ANNOTATIONS INCLUDE 171 N. C.

NORTH CAROLINA REPORTS

VOL. 145

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1907

BY

ROBERT C. STRONG,

STATE REPORTER

ANNOTATED BY

WALTER CLARK

(2D ANNO. ED.)

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CASES REPORTED IN THIS VOLUME

CASES CITED

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FALL TERM, 1907

P. G. ALSTON ET AL. v. THOMAS CONNELL.

(Filed 11 September, 1907.)

1. Options—Purchase Price—Interest Rate—Contract.

When a sale under mortgage securing a bond bearing 8 per cent interest is made under the power of sale, and the purchaser, who has taken the title, gave an option thereon, the basis of the present action, the purchase price stipulated for in the option bears only 6 per cent, the lawful rate of interest, in the absence of express agreement for a smaller sum.

2. Lands—Contract to Convey—Betterments—Innocent Purchasers.

Generally the successful claimant for permanent betterments put upon land of another holding superior title must be an innocent person who made the expenditures in good faith, believing at the time, and having reasonable ground to believe, that he was the true owner. When, under the contract between the parties, the defendant was to remain in possession for a stipulated time and expend a definite sum, and no more, for improvements, he cannot recover a sum expended therefor, after the time limited, in excess of the amount authorized by the contract, and with notice that the one holding the superior right intended to assert it. (*Gillis v. Martin*, 17 N. C., 470, cited and distinguished.)

3. Rule as to Allowance of Cost of Betterments.

In making an allowance for betterments, the general rule as to the amount is not their actual or reasonable cost, but the amount by which the value of the land was enhanced.

CLARK, C. J., not sitting.

EXCEPTIONS to report of referee, heard by *Lyon, J.*, at June Term, 1907, of WARREN. The court overruled the exceptions, confirmed the report, and defendant excepted and appealed.

(2) *T. Polk, B. G. Green, W. A. Montgomery, and T. T. Hicks for plaintiff.*

F. S. Spruill and T. W. Bickett for defendant.

HOKE, J. On a former appeal in this cause it was held that the plaintiff P. G. Alston had a valid and binding option on the land, the subject-matter of litigation, and known as "Tusculum," at the contract price of $3,502, subject to an accounting between the parties for use and occupation, etc., as indicated in the decree affirmed on the said appeal. *S. c.*, 140 N. C., 485. This decision having been certified down, in obedience thereto the referee, A. C. Zollicoffer, Esq., proceeded to take and state the account, and upon the evidence and findings of fact declared the true account and the rights of the parties to be as follows:

"Upon the foregoing facts, and feeling himself bound by the contract between the parties as to the option, and the opinion of the Supreme Court rendered in this action since his appointment, as he understands and construes the said opinion, the referee doth hold and conclude that the account between the plaintiff and defendant should be stated as follows:

To amount option price for 'Tusculum,' due 1 January, 1901		$3,502.00
To interest on same, 6 per cent, 1 January, 1901, to 11 February, 1907		1,284.05
By rent since 1 January, 1901	$1,500.00	
By interest on same, 6 per cent, to 11 February, 1907	235.00	
By hickory timber cut and sold from land	69.00	
By interest on same to 11 February, 1907	24.95	
By balance due 11 February, 1907	2,957.10	
	$4,786.05	$4,786.05
To balance due 11 February, 1907, brought down		$2,957.10

(3) "That the defendant is entitled to recover of the plaintiffs the sum of $2,957.10, with interest on same from 11 February, 1907, at the rate of 6 per cent per annum, until paid, and upon the payment thereof the plaintiffs are entitled to specific performance of the contract to convey the 'Tusculum' farm, as prayed for in the complaint herein."

Defendant excepted, and assigned for error, first, that the referee should have allowed interest at the rate of 8 per cent on $2,441.62, the amount of the original indebtedness, this being the rate stipulated for in the original note and the deed of trust on the property given to secure it. A reference to the former opinion is made for a more extended statement of the facts. The exception cannot be sustained, for the reason that the original contract of indebtedness and the deed of trust given to secure it are not the correct basis for the present accounting between

the parties. The evidence and findings of fact established that, under and by virtue of the power given in the deed of trust, a sale of the farm was held, at which defendant, Thomas Connell, became the purchaser and received the title. *Monroe v. Fuchtler,* 121 N. C., 104. And, holding this title, he executed to P. G. Alston the option declared on in this present action, and this option, and the material and relevant facts attending it, furnish the data, and the only data, for a correct and true accounting. The pleadings, testimony, issue and verdict set out in the former appeal all show that both plaintiffs and defendant desired and intended that this should be so, and the opinion states this position as follows: "This position, however, that of the right to redeem, is not open for the plaintiff in the present condition of the record, for the reason that the suit was originally instituted by P. G. Alston and complaint filed, seeking to enforce his rights under his written agreement of date 5 December, 1898, and under which Thomas Connell obligates himself to convey the property. The heirs at law of B. C. Alston make themselves parties plaintiff and seek the same relief, and, while (4) the pleadings set forth the entire facts, and some evidence is offered tending to sustain a claim in behalf of these heirs, the issues framed and passed upon are not decisive of those rights, but are addressed to the question of this written agreement and the facts especially bearing thereon, and are only determinative of the interest arising thereunder. The rights of the parties, therefore, are considered as they may arise upon this written paper and the issues determined in reference to the same."

This being true, and the option at $3,502 making no express stipulation for a lower rate, the referee properly allowed the lawful rate, 6 per cent, from the time the obligation matured.

Defendant makes further assignment of error, that the referee failed to allow the defendant the sum of $1,500 for permanent and valuable improvements put upon the land by Thomas Connell while he was in possession of same, and after he had given P. G. Alston the option declared on and established by the verdict and judgment in the cause. Even if this claim for improvements was valid, the proper allowance would not be for the amount of their cost, but the amount by which the value of the land was enhanced. But the claim is not valid. It is set up as a claim for betterments, an equitable defense now generally provided for by statute, and arising when one in the actual occupation of real estate under color of title believed by him to be good, and without notice of a superior title, makes permanent improvements on the land, by reason of which the value of same is enhanced. The doctrine is usually applicable in the case of claimants under adversary titles, and only in the rarest instances can it exist where the occupant is in posses-

sion under a contract which defines the rights of the parties and limits the length of the tenure. This doctrine of betterments, and the principle upon which it was originally made to rest, is very well stated by
(5) *Ashe, J.*, in *Wharton v. Moore*, 84 N. C., 482, as follows: "This right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity, and, while it has been adopted in many of the States, it is not recognized by others. But it may now be considered as an established principle of equity that whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person who has made improvements on land without notice of a superior title, believing himself to be the absolute owner, aid will be given him only upon the terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity." Here it will be noted that the claimant must be an innocent person, and in any correct statement of the principle will be found this or some equivalent requirement indicating that the occupant made the expenditures in good faith—that is, that he believed, and had reasonable ground to believe, at the time they were made, that he was the true owner. It would be difficult to suggest a case where an occupant could establish such a claim after he had received notice that the real owner intended to assert his rights; but certainly this should never be allowed when such occupant, having entered under a contract which expressly defined his rights, wrongfully remained in possession in violation of his contract, and made the improvements after notice that the true owner intended to insist upon and assert his claim. And so it is here. By the contract between the parties, as extended, the defendant was to remain in possession till 1 January, 1901; he was to expend for improvements during this time, by express stipulation, the sum of $250, and no more, and this was included in the contract price which has been charged against the plaintiff, the holder of the option. Any expenditures for improvements beyond this amount were not authorized by the contract, and any made after that time were made
(6) when defendant wrongfully withheld the possession, and after notice that plaintiff intended to assert his rights, and the same cannot therefore be allowed as a credit against plaintiff's demand.

We were referred by counsel to *Gillis v. Martin*, 17 N. C., 470, as authority to sustain their position, but we do not so understand this decision. There the defendant, on the evidence, was declared a mortgagee by the decree of the Court, and in taking the account was allowed for improvements put on the property while he was in possession. The Court stated the general rule to be that a mortgagee in possession is not allowed for improvements over and above necessary repairs, and made

the case then before it an exception on testimony which showed that the improvements were required for the enjoyment of the property; that they were made when the defendant believed, and had good reason to believe, he was the true owner, and at a time when the defendant had no notice or reason to believe that the claimant intended to assert any right or interest in the property. The decision, therefore, is not favorable to defendant; on the contrary, this and other authorities fully support the ruling of the referee in disallowing the claim, and there is no error in the judgment confirming the report. *Hallyburton v. Slagle,* 132 N. C., 957; *Southerland v. Merritt,* 120 N. C., 318; *Dunn v. Bagby,* 88 N. C., 91; *Cleland v. Clark,* 123 Mich., 179, reported also in 81 Am. St., with a full and learned note by the editor.

Affirmed.

CLARK, C. J., did not sit.

Cited: Faison v. Kelly, 149 N. C., 284.

C. C. ROGERSON v. COUNCIL LEGGETT.

(Filed 11 September, 1907.)

1. **Procedure—Abatement—Parties—Death Suggested—Process—Representatives.**

A judgment is necessary to abate an action, for the Court may, *ex mero motu,* enter judgment when it appears that plaintiff failed for a year to prosecute his action against the "representatives or successors in interest" of the original defendant, whose death has been suggested—Revisal, sec. 415 (1)—though the record, under Revisal, secs. 437-8, shows there had been no discontinuance of the action.

2. **Same—Action—Semidormant.**

Upon the suggestion of the death of defendant, it is the duty of the clerk to issue summons to the representatives or persons who succeed to the rights or liabilities of the deceased defendant; the law does not contemplate that plaintiff may keep his action in *semidormant* condition until it suits his pleasure or interest to call the heir at law into court, when by such conduct he has become disabled to make his defense.

3. **Deeds and Conveyances—Equitable Title—Principal and Agents—Registration—Notice—Knowledge—Possession.**

When an agent, having a power of attorney, makes a conveyance of land, inoperative for want of formal execution in the name of the principal, and the grantee claiming under the deed enters into and remains in the undisturbed possession thereof, the principal asserting no claim to the land and not repudiating the deed for a term of years, the deed, thus executed, will be enforced in equity as an agreement to convey.

4. Deeds and Conveyances—Equitable Title—Presumption—Abandonment—Release.

When the deceased, under whom defendant claims title, entered into and remained in the undisturbed possession of land in controversy for a term of years under a registered deed, inoperative for want of formal execution made by an agent authorized to make it, and stood upon his equitable rights, possessing and using the property as his own, no presumption of abandonment or release can arise from lapse of time against him.

5. Principal and Agent—Consideration, Its Application.

When, under a power of attorney, it appears that the agent was authorized to make a conveyance of the land of the principal, the grantee is not required to see to the application of the purchase money.

(8) ACTION tried before *W. R. Allen, J.*, and a jury, May Term, 1907, of BEAUFORT.

The title to the land in controversy was, on and prior to 12 August, 1856, in Patsy Dudley for life, remainder to J. C. Rogerson and W. O. Rogerson. On said day J. C. Rogerson executed to Hosea Dudley a power of attorney, under seal, authorizing him to sell and convey his interest in the land. Said power of attorney was duly registered. W. O. Rogerson, prior thereto, had conveyed to said Hosea his one-half interest. On the same day, towit, 12 August, 1856, the said Hosea Dudley, together with his wife, the life tenant, executed a deed, describing the said land, to Noah Leggett, which contained appropriate words of conveyance. The premises of said deed is as follows: "This indenture, made . . . by and between Hosea Dudley in his own right as assignee of W. O. Rogerson, of Hosea Dudley as attorney for Josephus Rogerson, and of Hosea Dudley and wife, Patsy, of the first part," etc. The said deed was signed and sealed by Hosea Dudley and his wife and by "Hosea Dudley, attorney for Josephus Rogerson," and duly proven and registered, 17 November, 1856, in the office of the register of deeds of Beaufort County. Noah Leggett, the grantee, entered immediately into possession of the land and remained therein until his death, during 1898, whereupon his son and heir at law, Council Leggett, entered and has at all times since remained in possession thereof.

Patsy Dudley, the life tenant, died 26 July, 1877. Josephus Rogerson died intestate during 1888. Summons was issued herein 6 July, 1897, and served upon Noah Leggett 13 July, 1897. At Fall Term, 1898, of the Superior Court the following docket entries appear: "Com-
(9) plaint filed 1 December, 1897. Death of defendant suggested, and notice ordered to issue to personal representative and heirs at law to come forward and defend suit. Continued." At Fall Term, 1899, the same entries appeared, together with the word "issued." The same entries appear at each term, with the exception of two terms,

1900-1901, until and including October Term, 1902. At October Term, 1905, an order was passed making Council Leggett and his wife, heirs at law of Noah Leggett, parties defendant, and directing *alias* summons to issue. Time was allowed plaintiffs to file amended complaint.

Summons was duly issued and served on them 17 November, 1905. At February Term, 1906, plaintiffs filed a complaint, setting forth the title to one-half undivided interest in Josephus Rogerson at the time of his death, and alleging ownership in themselves as heirs at law of said interest; that defendants were the owners of the other half and in possession of the whole tract, wrongfully withholding same from plaintiffs. Defendants answered, denying plaintiffs' title, pleading the statute of limitations and for further defense setting up the facts herein stated. They insist that if the paper-writing executed by Hosea Dudley, as attorney for Josephus Rogerson, did not operate to convey the legal title to said Rogerson's interest, it was a valid contract to convey, supported by a valuable executed consideration, and vested in their ancestor a perfect equity to call for the legal title.

His Honor instructed the jury, upon the entire evidence, that plaintiffs were not entitled to recover. Plaintiffs excepted. Verdict and judgment. Plaintiffs appealed.

Ward & Grimes and A. R. Dunning for plaintiff.
Small & McLean and Nicholson & Daniel for defendant.

CONNOR, J., after stating the case: In the view which we take (10) of this appeal, the failure on the part of the plaintiffs to cause notice to issue and be served upon defendant, Council Leggett, within one year after the death of his ancestor, becomes immaterial. We concur with the plaintiffs' counsel that, upon the record, there could be no discontinuance. This occurs only when the summons has not been served. Revisal, secs. 437 and 438, provides for such cases. This case is controlled by section 415 (1). While, as held in *Burnett v. Lyman,* 141 N. C., 500, the statute is not "automatic," and a judgment of the court is necessary to abate the action, it would seem that, unless the plaintiff, within a reasonable time, which the statute fixes at one year, proceeds to prosecute his action against the "representative or successor in interest" of the original defendant, the Court should *ex mero motu* enter judgment of abatement. It will be noted that by section 417 it is made the duty of the clerk, upon suggestion of the death of defendant, to issue summons to the representative or person who succeeds to the rights or liabilities of the deceased plaintiff or defendant. The wisdom of this requirement is illustrated by the record before us. Noah Leggett died within a few months after the action was brought, 6 July, 1897;

his death was called to the attention of the court at the next term. So far as the record informs us, his heir had no notice or knowledge that any action was pending involving the title to his land until 13 November, 1905. Certainly the law does not contemplate that the plaintiff may keep his action in a semidormant condition for seven years, and then, when it suits his pleasure or possibly his interest, call the heir at law into court, to find that by a legal fiction he has been deprived of his defenses and called to answer, when by the lapse of time he has become disabled to make good his defense, or that which his ancestor may have made. The liberal provisions of the statute permitting the continuation of the action after the death of the defendant should not be per-
(11) mitted to work out such results. Fortunately, under our reformed procedure, which permits the defendant to avail himself of equitable defenses, the Court is enabled to administer justice upon the facts as they appear in the record.

While it is true, as contended by the plaintiffs, "that where any one has authority as attorney to do any act he ought to do it in his name who gives the authority," it is also true that "where the attorney has the authority and, pursuant thereto, executes the instrument in his own name, as attorney, for his principal, and receives the consideration, though the deed be inoperative for want of formal execution in the name of the principal, it is binding in equity; hence, a deed executed by an agent, though defective and inoperative to convey the property, will be enforced as an agreement to convey in equity." 1 A. and E., 1034. This statement of the law is abundantly sustained upon principle and authority. It appearing that Hosea Dudley had a power of attorney, under seal, to convey the interest of Josephus Rogerson, and that he attempted to execute the power, and by his act intended to do so, a perfected equity was created in Noah Leggett to call for the legal title. He entered into possession under and pursuant to this right and remained therein until his death during the year 1898. Josephus Rogerson, with notice of the action of his attorney, by the registration of the deed 17 November, 1856, lived until 1888, asserting no claim to the land nor doing any act repudiating his deed. While it is true that until 26 July, 1877, the life estate of Patsy Dudley prevented him from demanding possession or maintaining a possessory action, this did not prevent him from disaffirming the act of his attorney. From 26 July, 1877, the time of the death of Patsy Dudley, until the death of Josephus Rogerson, in 1888, Noah Leggett was in possession of the land and subject to a possessory action. The possession of Leggett, pursuant to his equity, precludes the suggestion of abandonment of his right to call for the legal title. The status of the defendant, with its effect upon his rights, is well stated by
(12) *Dillard, J.*, in *Farmer v. Daniel,* 82 N. C., 152 (160): "The de-

fendant has now, and had at the institution of the action, the possession of the land, . . . consistent with the equitable title ever since it arose. . . . Under these circumstances, no presumption of abandonment, satisfaction, or release of the equity can arise against the purchaser or his assigns. No presumption of abandonment or release can arise from lapse of time against parties who all the time stand upon their equitable right and possess and use the property as their own."

The learned counsel contended that, to perfect his equity, the representatives of Noah Leggett should show that Rogerson received the purchase money. The power of attorney authorized Hosea Dudley to receive it; his deed acknowledges its receipt, which is at least *prima facie* evidence of the fact. It has never been held in this State that a party paying money to an agent or trustee was required to see to its application. *Hauser v. Shore,* 40 N. C., 357.

Much of the discussion before us was directed to the question of ouster and the operation of the statute of limitations between tenants in common. The defendant's title is not based upon an ouster perfected by adverse possession. The entry of Noah Leggett was under Josephus Rogerson in respect to his equity. As we have seen, the ancestor of the defendants was at all times since 17 November, 1856, until his death, in the rightful possession of the land. His equity passed to the defendants, and their possession is, therefore, in accordance with this equity. As all of the parties in interest were before the court, defendants would have been, if requested, entitled to a decree that plaintiffs convey to them the legal title, and that such decree operate to vest it in them pursuant to the provisions of the statute. Revisal, secs. 566-67. It would be a strange result if the defendant, whose ancestor paid for the land, took title from a duly empowered attorney, recorded his deed in 1856, remained in possession until his death, in 1898, should now be (13) ejected by reason of a technical defect in the execution of the deed by the attorney. We concur with his Honor, and the judgment must be

Affirmed.

Cited: Moore v. Moore, 151 N. C., 557; *Robinson v. Daughtry,* 171 N. C., 202.

CITY OF WASHINGTON v. EUREKA LUMBER COMPANY.

(Filed 11 September, 1907.)

Town Ordinances—Taxation—Separate Properties.

Under a town ordinance imposing a separate tax upon two distinctive classes of sawmill property connected by steam pipes, each is subject to its appropriate tax, though owned and operated by the same corporation.

ACTION for the collection of town tax on factories, etc., heard by *W. R. Allen, J.*, upon facts agreed, at May Term, 1907, of BEAUFORT. The facts sufficiently appear in the opinion of the Court.

Bragaw & Harding for plaintiff.
W. C. Rodman for defendant.

CLARK, C. J. The ordinances of the town of Washington, under authority of law, prescribed among the subjects of taxation "mills and factories of all kinds, including band-saw mills, $25 per year; circular-saw mills, $20; barrel, box, or roller factories, $25 per year." The defendant has two buildings, 160 feet apart, built and formerly owned by distinct companies, but now connected by steam pipes and operated by the same company. In one of these buildings, which is a band-saw mill, the finished product is lumber; in the other the product is boxes and rollers. This last mill uses logs, from which the product is made direct, only a very small percentage of its output being dressed lumber,
(14) which comes in the rough state from the other mill.

From the above agreed facts it is clear that there are two distinct businesses, taxed separately by the town ordinance. That both are conducted by the same company does not exempt one of them. *Arey v. Comrs.*, 138 N. C., 500, is exactly in point.

Affirmed.

J. R. BRISCOE v. HARDY W. PARKER.

(Filed 11 September, 1907.)

1. Surface Water—Drainage—Lower Proprietor—Damages.

Surface waters should be drained so as to be carried off in the due course of nature. The upper proprietor is liable in damages to the land of the lower proprietor caused by water diverted by his ditches and not carried to a natural waterway.

2. Same—Procedure—Election.

When the lands of the lower proprietor are damaged by the improper drainage of the upper proprietor, he may elect to bring an action for damages or proceed under Revisal, sec. 3983, *et seq.*

3. Evidence—Practice—Harmless Error—Instructions.

When a paper-writing offered in evidence was excluded by the court, but the matter was reopened upon the argument by plaintiff's attorney with the consent of the court, and its contents stated by him, this does not constitute reversible error when the court instructed the jury not to consider the contents of the paper nor the statement of counsel relative thereto.

ACTION tried by *W. R. Allen, J.,* and a jury, at Spring Term, 1907, of GATES.

This was an action by a lower proprietor against an upper for increasing the flow of water in such way as to obstruct and throw it on the plaintiff's land and water-sog it.

There was evidence offered by plaintiff tending to show that (15) defendant had collected water that fell on his own land, and by means of ditches had conveyed the water into a ditch called Hawtree Branch, on his own land, which ran across the land of one Mullen and was for the purpose of draining the land of the defendant, and which he was under obligation to keep in good order; that the lower end of said ditch ran up to the land of the plaintiff, and, if kept open and clear, would have caused the water which the defendant, by his ditches cut to drain his own land, had emptied into said Hawtree Branch ditch, to flow through the land of the plaintiff and into a certain canal; that defendant had failed and refused to keep open said Hawtree Branch ditch at its end close to the land of this plaintiff, and had allowed same to become clogged and dammed up, thereby causing the waters which his ditches had emptied into Hawtree Branch ditch to overflow the banks of said ditch and spread upon and submerge and drown the land of the plaintiff, thereby causing him injury and damage.

There was evidence introduced by the defendant to the contrary.

There was also evidence tending to show that Hawtree Branch was a natural water-course, and that defendant's ditches emptied into it at a place not on his own land.

The court, among other things, charged the jury: If defendant, the upper tenant, collects the surface water falling on his land in ditches and discharges the ditches on the land of the lower tenant, the plaintiff, otherwise than by natural water-courses on his own land, and thereby increases the flow of water on the land of the lower tenant, he is liable therefor; and if you so find by a greater weight of the evidence, answer the first issue "Yes," although the surface water of defendant's land would flow to land of the lower tenant. The defendant assigns that part of the charge as error.

There was evidence on both sides tending to show that there were several other landowners besides the defendant whose lands
(16) drained into Hawtree Branch, or Hawtree Branch ditch, as the plaintiff called it; and there was also evidence tending to show that the plaintiff had not attempted to cultivate or clear up the land which he claimed to be damaged, nor to drain the same since he went into the possession thereof, about eighteen years ago; and that those under whom he claimed had not attempted to cultivate it or to drain it, since the latter part of the Civil War, and that the plaintiff had sold and allowed timber trees on the land along the course of Hawtree Branch to be cut, and that the tops of the trees had fallen across the branch and had not been removed, and evidence to the contrary.

There was also evidence tending to show that Hawtree Branch was a natural water-course, and there was evidence on the part of the plaintiff tending to show that there had been many years ago a ditch along Hawtree Branch, and that it was a ditch, and evidence on the part of defendant tending to show that there had never been a ditch along its course, but that it had always been a natural water-course.

Plaintiff introduced evidence to show the injury to the land caused by the flooding of the land. The defendant moved to set aside the verdict and dismiss the action on the ground that the plaintiff had sought the wrong remedy, and that he ought to have applied the statutory remedy, and because of the manifest injustice done the defendant by reason of the fact (1) that the damages attempted to be proved were hypothetical and not actual; (2) that, according to all the evidence, if any damage was incurred by plaintiff, as alleged, several other parties besides the defendant contributed thereto, and, therefore, defendant ought not to bear all the burden, and for that reason the verdict should be set aside; and this contention was presented to the court as a matter of right and not as a matter of discretion. The court overruled the motion, and the defendant excepted. Verdict and judgment for plaintiff. Appeal by defendant.

(17) *H. S. Ward and W. M. Bond for plaintiff.*
L. L. Smith for defendant.

CLARK, C. J. The principle settled by our decisions is, that in the interest of health and good husbandry better drainage is to be encouraged. Hence, an upper proprietor can accelerate and even increase the flow of water from his land, but due regard for the rights of the lower proprietor forbids that the flow of water should be diverted to his detriment. *Hocutt v. R. R.*, 124 N. C., 214; *Mizell v. McGowan*, 125 N. C., 439; *s. c.*, 129 N. C., 93; *Lassiter v. R. R.*, 126 N. C., 509; *Rice v. R. R.*, 130 N. C., 376; *Mullen v. Canal Co., ibid.*, 502. There was here evidence

tending to show that the waters collected by plaintiff's ditches and carried by them through his own land and that of the next lower proprietor there ceased to be carried farther to a natural waterway, but were allowed to ooze through and water-sog the plaintiff's land, to his detriment. There was conflicting evidence, but the jury so found the fact. If so, the water put upon the plaintiff's land was not in the due and orderly course of nature from the increase and acceleration of the flow from the better drainage of his farm by the upper proprietor, but was, in fact, a diversion of the water upon the plaintiff's land, to its detriment. "The defendant had no right to collect surface water . . . into a ditch not adequate to receive it, and thus flood and injure the land of another." *Staton v. R. R.,* 109 N. C., 341; *Porter v. Durham,* 74 N. C., 767; *Jenkins v. R. R.,* 110 N. C., 444, 447. This is not the case of draining into a natural waterway, increasing its flow, which the defendant had a right to do. *Mizell v. McGowan,* 120 N. C., 134.

For such injury the plaintiff could bring this action at his election. *Mizell v. McGowan,* 120 N. C., 137. He is not restricted to the remedy prescribed by Revisal, sec. 3983, *et seq.* Indeed, that proceeding is one which the defendant, the upper tenant, might well have (18) resorted to.

The court excluded a paper offered in evidence by the plaintiff. The plaintiff's counsel, notwithstanding, upon permission of the court, reopened the argument, and in the course of it stated the contents of the paper. The court adhered to its ruling and told the jury not to consider the contents of the paper nor the statement of counsel in regard thereto. The jury must have understood so plain an instruction, and, furthermore, that the paper having been excluded as evidence and not testified to by any one, they could not consider it. If a jury is not possessed of this much intelligence, it is not a proper part of a trial in court.

No error.

Cited: Bedsole v. R. R., 151 N. C., 153; *Roberts v. Baldwin, ib.,* 408; *s. c.,* 155 N. C., 282; *Brown v. R. R.,* 165 N. C., 396; *Barcliff v. R. R.,* 168 N. C., 269.

P. A. NICHOLSON v. JOSEPH DOVER.

(Filed 11 September, 1907.)

Principal and Agent—Undisclosed Principal—Contracts—Specific Performance.

When an agent vested with authority to sell land to a designated person, who is buying for an undisclosed principal, contracts to do so, the undisclosed principal may claim all the rights of his agent not prejudicial to the seller, and enforce the specific performance of the contract. The seller cannot refuse to perform such contract when the personality of the purchaser is not the ground of the refusal, but that he could get a higher price.

CLARK, C. J., not sitting.

SPECIFIC PERFORMANCE of a contract to sell and convey a tract of land, tried before *W. R. Allen, J.*, and a jury, at May Term, 1907, of BEAUFORT. From judgment sustaining the motion to nonsuit and dismissing the action, plaintiff appealed.

Nicholson & Daniel for plaintiff.
Bragaw & Harding for defendant.

(19) BROWN, J. The defendant owned twenty-nine-thirtieths of the land described in the complaint, and B. B. Nicholson owned one-thirtieth. Each owner seemed desirous of owning the entire tract or of selling his interest therein. Negotiations were conducted with Dover, who was a resident of Pennsylvania, by B. B. Nicholson, through W. B. Rodman, who was Dover's agent and attorney. The negotiations are embodied in twenty-two letters passing between Dover and Rodman and B. B. Nicholson, all of which are set out in the record, and which it is unnecessary to do more than refer to. These letters comprise the basis of the plaintiff's action. The defendant contends that there is no sufficient contract, in writing or memorandum, or note thereof, within the requirements of the statute of frauds. Besides other letters, which it is unnecessary to refer to, we think there are two which plainly authorized Rodman to enter into a contract to sell the defendant's interest in the land. On 24 May, 1905, defendant wrote Rodman: "Now, I want to sell, if possible, and I want you and Mr. Nicholson to give me the very highest cent that he will pay me for the land in Chocowinity; then I will give you and him a definite answer, and we can settle all right." In the letter of 21 June, 1905, the authority to sell is confirmed. After further correspondence, Dover gives Rodman, in his letter of 1 July, 1905, express authority to sell the land to B. B. Nicholson upon a basis of $1,800 for the whole tract—that is to say, Dover was to have twenty-

nine-thirtieths of the $1,800 for his interest. This proposition was accepted by B. B. Nicholson in his letter of 30 July, 1905, to Rodman in behalf of his principal, P. A. Nicholson, the plaintiff. We think the letters set out in the record are a sufficient compliance with the requirements of the statute. It has always been held that letters addressed to a third party, stating and affirming a contract, may be used against the writer as a memorandum of it. Brown on Statute of Frauds, sec. 354a, and cases cited. Such writings are sufficient evidence of the contract to warrant the court in giving effect to it. *Mizell v. Burnett,* 49 N. C., 254. (20) The principal contention of the learned counsel for defendant is that, although Rodman might have been vested with ample power to sell, the authority was to sell to B. B. Nicholson and not to this plaintiff.

The correspondence, as well as the testimony of B. B. Nicholson and P. A. Nicholson, proves that the negotiations for the purchase of Dover's interest in the lands was conducted by B. B. Nicholson for the plaintiff, and that the offer of Dover, made through Rodman, was accepted by B. B. Nicholson for plaintiff. This was well known to Rodman, and the fact that he failed to disclose it to Dover will not avoid the contract of sale or relieve Dover from its performance. Assuming that, so far as Dover is concerned, the plaintiff is an undisclosed principal as to him, yet the plaintiff may enforce the contract made on his behalf by B. B. Nicholson, his agent. The right of a principal to maintain an action on a written contract made by his agent in his own name, without disclosing the name of the principal, is well settled. *Oelrichs v. Ford,* 21 Md., 489; *Towboat Co. v. Tel. Co.,* 52 S. E., 766 (Ga.); *Cowan v. Fairbrother,* 118 N. C., 406. If Dover had personally conducted this correspondence directly with B. B. Nicholson, who was acting for the plaintiff, an undisclosed principal, the latter could enforce the contract as against Dover. The fact that he conducted it through his agent will not alter the case. "It is a well established rule of law that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same position at the time of the disclosure of the real principal as if the agent had been the real contracting party." *Barnham v. Bell,* 112 N. C., 133; Ewell's Evans on Agency, 379; Story on Agency, 420; Wharton on Agency and Agents, 403. The defendant authorized Rodman to sell to B. B. Nicholson upon certain terms. The agent, not exceeding the authority conferred upon him, contracted to (21) sell to B. B. Nicholson according to the instructions given him. B. B. Nicholson was acting, so it turns out, as the agent of the plaintiff, whose interest was not disclosed to defendant. Under these condi-

tions the acts of the agent, Rodman, are equally binding upon the principal, Dover, as if the principal had done the act himself. In other words, so long as Rodman was obeying his instructions in selling to B. B. Nicholson, it made no difference whether the contract was made directly by Dover, the principal, or through Rodman, the agent; the effect would be the same. The principal is liable where the agent acts within the scope of his apparent authority, provided a liability would attach to the principal if he were in the place of the agent. *Navigation Co. v. Bank,* 47 U. S., 344; *Ford v. Williams,* 62 U. S., 287. The law is stated very clearly by the Supreme Court of Georgia, as follows: "When an agent makes a contract without disclosing the name of his principal, the principal may claim all his rights, with the single limitation that the other party shall not be injured thereby." *Woodruff v. McGehee,* 30 Ga., 158.

It follows that, if Rodman, acting for the defendant and within the scope of his powers, made a valid contract with B. B. Nicholson, and the latter at the time was acting for the plaintiff, the latter may enforce the contract against the defendant to the same extent that B. B. Nicholson could enforce it, although the defendant had no knowledge at the time of plaintiff's interest. The defendant has in no way been injured. Whatever equity or claim the defendant could set up against the agent he could set up against the principal when he was disclosed. In this case the defendant has no grievance against either. He simply declines to carry out his valid contract, made by an authorized agent, because, as he writes Rodman on 11 September, 1905, he had just received an offer of $2,000 cash for the land. The personality of the pur-
(22) chaser was not the ground of plaintiff's refusal, but the fact that he could get a higher price. Taking the evidence to be true, the plaintiff is entitled in the Superior Court to a decree for specific performance.

Reversed.

CLARK, C. J., did not sit.

Cited: Combes v. Adams, 150 N. C., 68; *Winslow v. Staton, ib.,* 267; *Peanut Co. v. R. R.,* 155 N. C., 151; *Archer v. McClure,* 166 N. C., 148; *Hardware Co. v. Banking Co.,* 169 N. C., 749; *Woodard v. Stieff,* 171 N. C., 82; *Springs v. Cole, ib.,* 419.

DORA S. ALEXANDER v. LULA MORRIS.

(Filed 11 September, 1907.)

1. **Lessor and Lessee—Parol Assignment—Statute of Frauds.**
A verbal assignment of an unexpired lease of land, to terminate more than three years from the date of the assignment, is void under the statute of frauds.

2. **Same—Evidence—Lease—Assignment—Indorsement.**
An indorsement upon the written assignment of a lease, "We hereby transfer all our right and title and interest in this lease," etc., means the original lease referred to and fully described therein.

ACTION to recover possession of a leasehold, tried before *W. R. Allen, J.*, and a jury, at Spring Term, 1907, of TYRRELL. The court adjudged, upon the facts agreed, that plaintiff was not entitled to recover. Plaintiff appealed.

J. E. Alexander and M. Majette for plaintiff.
W. M. Bond for defendant.

BROWN, J. The property in controversy was leased for eight years, beginning on 2 January, 1900, to Mrs. F. E. Cohoon, wife of E. P. Cohoon. On 30 July, 1903, F. E. Cohoon and husband duly assigned the lease to Abner Alexander, with a *proviso* that if Alexander should die before the expiration of the lease the property should (23) return to Mrs. Cohoon for the remainder of the lease. Alexander died 8 April, 1904, and on 30 August, 1904, Dora S. Alexander, the plaintiff, took from Mrs. Cohoon a verbal assignment of the unexpired term. On 23 July, 1906, F. E. Cohoon and her husband executed to the plaintiff a written assignment of the lease.

It appears, however, that on 21 May, 1906, F. E. Cohoon delivered to the defendant the written assignment of the lease which had been made to Abner Alexander on 30 July, 1903, with the following indorsement: "We hereby transfer all our right and title and interest in this lease to Lula Morris." This is dated 21 May, 1906, and is signed "F. E. Cohoon, per E. P. Cohoon, agent." It is admitted that the latter was the general agent for his wife, and that by virtue of such assignment defendant was in possession of the property.

The verbal assignment of the lease made to plaintiff was absolutely void, because, at the date thereof, 30 August, 1904, the lease had more than three years to run, and, therefore, such an interest in land could only have been assigned in writing. Revisal, sec. 976. At the time of the written conveyance, dated 23 July, 1906, made by Mrs. Cohoon and husband to plaintiff, they had, on 21 May, 1906, assigned the unexpired

term to defendant. As there was then only about nineteen months of the term remaining, it required no deed under seal or privy examination to effect a conveyance thereof. It could be assigned by parol. It is admitted that E. P. Cohoon was the general agent of his wife in the management of her property, and his authority to act for his wife is not contested. Under and by virtue of this assignment defendant has remained in possession of the leasehold estate up to this time.

We cannot agree that the assignment is invalid because not written on the original lease. The paper upon which it was written re-
(24) ferred to and fully described the lease and the property, and in using the words "this lease" in the assignment the assignors plainly meant the original lease executed to Mrs. Cohoon by Winston Sikes. Upon the facts agreed, we concur with his Honor that plaintiff is not entitled to recover.

Affirmed.

J. L. SAWYER v. ROANOKE RAILROAD AND LUMBER COMPANY.

(Filed 11 September, 1907.)

1. **Railroads—Logging Roads—Negligence—Proximate Cause—Damages.**

When the trains upon logging roads of defendant are operated by steam or other mechanical power, the employees engaged in operating its trains are required to keep a careful and continuous outlook along its track, and the defendant is responsible for injuries resulting as the proximate consequence of negligence in the performance of this duty, whether in remote or populous localities.

2. **Same—Contributory Negligence—Last Clear Chance—Proximate or Concurrent Cause.**

A negligent act of the plaintiff is not contributory unless the proximate cause; and, though plaintiff may have been negligent in going upon defendant's track, when he has become helpless and down thereon, the responsibility of defendant attaches when it negligently fails to avail itself of the last clear chance.

3. **Same—Last Clear Chance—Instructions—Issues—Discretion of Court.**

While the doctrine of the last clear chance is frequently submitted under a separate issue, and sometimes it is desirable to do so, it is not always necessary to so present it, and it is within the discretion of the trial judge to submit it upon the issue of contributory negligence under proper instructions.

4. **Evidence—Admission—Pleadings.**

It is competent for plaintiff to put in evidence as an admission of the defendant a section of the answer containing the allegation of a distinct and separate fact relevant to the inquiry, though it is only a part of an entire paragraph, without introducing qualifying or explanatory matter, inserted by way of defense, which does not modify or alter the fact alleged.

SAWYER *v.* R. R.

ACTION to recover damages for personal injury caused by the (25) alleged negligence of defendant company, tried before *W. R. Allen, J.*, and a jury, at February Term, 1907, of BEAUFORT.

There was evidence tending to show that in May, 1904, plaintiff was run over and seriously injured by a logging train of defendant company while he was in the employment of the defendant and engaged in cutting out its right of way; that defendant had constructed a railroad track of iron rails from Slatersville, a station on the Norfolk and Southern, to a tract of timber about 5 miles out, and at the time of the injury was engaged in operating a logging train, by which the logs, as they were cut and loaded, were hauled over the spur track to Slatersville and thence over the line of the Norfolk and Southern to Plymouth, where defendant's mill was situated; that the plaintiff was with a gang of hands engaged in cutting out a right of way through this timber, and as this was done another gang would lay the track, when the train, consisting on this day of a locomotive and several logging cars, would be moved backwards down the track, and the timber logs that had been cut from and on either side of the track were loaded onto the train; that this loading was done chiefly by a skidder, a machine which was placed on the rear car, being in front as the train was moving, a large machine, consisting of an engine, cable, etc., which was inclosed in a building or large box several feet wider than the car on which it was placed, and 8 or 10 feet high. This box, inclosing and protecting the machinery, had a door and perhaps a window at the rear, from which those who were engaged in operating the skidder could, when required, look down the track, and there were a door and steps for entrance at the front of the skidder; that several hands were required to operate the skidder when the loading was being done, and some were on (26) the car at the time of the injury; that when the track was laid the engine would back the train along the same, and the skidder would draw in and load the logs from either side of the track onto the logging cars; that some of the hands were engaged in the woods, some cutting the right of way, some were engaged with another machine at the end of the track, and plaintiff himself, with one Billie Boyd, was engaged in grinding plaintiff's axe, some 10 or 12 feet from the track, when a thunder and rain storm came up, and plaintiff and Boyd started along the track toward the skidder with the intention of going into the same for shelter. The train, with the skidder on the front car, was at this time being backed down the track toward plaintiff at the rate of about 2 miles an hour, and could have been stopped within a distance of 15 feet; that as plaintiff and Billie Boyd were so moving down the track to take protection in the skidder, they were struck by a bolt of lightning, Boyd being instantly killed and plaintiff knocked down and rendered

unconscious, remaining so until he was run over by the train. The place where the plaintiff fell and remained upon the track was 75 yards ahead of the moving train, on a straight track and in view of the hands and employees on the train, if any had been looking.

Three issues were submitted: (1) As to defendant's negligence. (2) Contributory negligence on the part of plaintiff. (3) Damages.

Under the charge of the court, there was a verdict for the plaintiff. Upon judgment thereon, defendant excepted and appealed.

Bragaw & Harding, Nicholson & Daniel, and Ward & Grimes for plaintiff.

Small & McLean for defendant.

(27) HOKE, J., after stating the case: The judge below imposed upon the defendant the duty of keeping an outlook along the track in the direction in which the train was moving, and in this connection charged the jury that if they found the facts to be that the defendant company was operating a railroad for the purpose of hauling logs, and operating an engine and cars, the law imposed upon it the duty to keep a lookout for the purpose of avoiding injury to persons on the track apparently unconscious; and if it failed in this duty it was negligent, and if such failure was the real and proximate cause of the plaintiff's injury they would answer the first issue "Yes," etc.

It is urged for error that, on account of the remote placing of this occurrence, with no one ahead along the track or likely to be there, except its own employees, whom they had every reason to believe were there, alive and in health and in proper possession of their faculties, the judge should have charged the jury that, upon the entire testimony, if believed, there was no negligence shown on the part of the company, and the jury should answer the first issue "No." But we are of opinion, and so hold, that the charge of the court correctly expresses the law applicable to the case, and that this assignment of error cannot be sustained. These logging roads, in various instances and in different decisions, have been described and treated as railroads and held to the same measure of responsibility and the same standard of duty. *Hemphill v. Lumber Co.*, 141 N. C., 487; *Simpson v. Lumber Co.*, 133 N. C., 96; *Craft v. Lumber Co.*, 132 N. C., 156. And it is well established that the employees of a railroad company engaged in operating its trains are required to keep a careful and continuous outlook along the track, and the company is responsible for injuries resulting as the proximate consequence of their negligence in the performance of this duty. *Bullock v. R. R.*, 105 N. C., 180; *Dean v. R. R.*, 107 N. C., 686; *Pickett v. R. R.*, 117 N. C., 616. This particular duty arises not so much from the

fact that railroad companies are common carriers or *quasi*-public (28) corporations as from the high degree of care imposed upon them on account of the dangerous agencies and implements employed and the great probability that serious and in many instances fatal injuries are almost certain to result in case of collision. As said by *Burwell, J.*, in *Haynes v. Gas Co.*, "The utmost degree of care, so far as skill and human foresight can go, is required, for the reason that a neglect of duty is likely to result in great bodily harm and sometimes death to those who are compelled to use that means of conveyance." And quoting from Ray on Negligence, page 53, "As a 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." These reasons apply with equal force to logging roads when their trains are operated by steam or other mechanical power, and are of such exigent nature as to impose this requirement of keeping an outlook as an arbitrary duty, whether in remote or more populous localities. Certainly, on the facts disclosed by this testimony, there should be no relaxation of the rule. Some of the employees were ahead, engaged in cutting out the way; others in laying down the track; yet others were at work at the end of the track, with another machine of the same kind. They were engaged in rough work, and not unlikely to be in and upon the track at different places, and at times and in different ways to be down and helpless upon it; and it was a negligent act to back a train in their direction without keeping an outlook. The duty is imposed because some injury, and serious injury, was likely to follow from its neglect; and when such injury does follow, it is no answer that the injured party was down and helpless from some unusual or unexpected cause. *Drum v. Miller,* 135 N. C., 204; *Hudson v. R. R.,* 142 N. C., 198; *Horne v. Power Co.,* 144 N. C., 375. As stated in *Hudson v. R. R.,* the correct doctrine is as follows: "In order that a party may be liable for negligence, it is not necessary that he could (29) have contemplated or even been able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act of omission, or that consequences of a generally injurious nature might have been expected."

Defendant further contends that, on the entire evidence, the plaintiff was guilty of contributory negligence, and objects to the following part of the charge on that question: "If you find from the evidence that defendant was backing its train down its track, that the plaintiff fell on the track in an apparently unconscious condition, that when he so fell he was far enough from the train for it to have been stopped in time

to have avoided the injury, that the defendant failed to keep a lookout, and that if a lookout had been kept the defendant, by the exercise of ordinary care, could have discovered that plaintiff was on the track in an apparently unconscious condition in time to stop its train and avoid the injury, then the plaintiff's negligence, if any, would not be contributory; and if you so find, you will answer the second issue 'No.'"

We think this position is also correct and clearly states the law applicable to the issue. A negligent act of the plaintiff does not become contributory unless the proximate cause of the injury; and although the plaintiff, in going on the track, may have been negligent, when he was struck down and rendered unconscious by a bolt of lightning his conduct as to what transpired after that time was no longer a factor in the occurrence, and as all the negligence imputed to defendant on the first issue arose after plaintiff was down and helpless, the responsibility of defendant attached because it negligently failed to avail itself of the last clear chance to avoid the injury; so its negligence became the sole proximate cause of the injury; and the act of the plaintiff in go-
(30) ing on the track, even though negligent in the first instance, became only the remote and not the proximate or concurrent cause. This responsibility of a defendant by reason of a negligent failure to avail itself of the last clear chance to avoid an injury is sometimes submitted to a jury under a separate issue; and while it is sometimes desirable, it is not always necessary so to present it, and the trial judge, in his discretion, as he did in this instance, may submit the proposition and have same determined by his charge on the issue as to contributory negligence. The same course was pursued by the trial judge and approved on appeal in *Pickett v. R. R.*, 117 N. C., 616. The defendant in the present case has been fixed with responsibility because of its negligent failure to avail itself of the last chance to avoid injury, and for that alone, and the judge below properly told the jury, in effect, that if this were true the act of the plaintiff in going on the track in the first instance, even if negligent, would not bar a recovery, because only the remote cause of the injury, and therefore not contributory.

The court below also correctly ruled that plaintiff could put in as an admission on the part of the defendant a section of the answer, as follows: "And said machine ran upon plaintiff, injuring his arm so that same had to be amputated." This is an admission of a distinct and separate fact relevant to the inquiry, and, though it was only a part of an entire paragraph, defendant was not required to put in qualifying or explanatory matter inserted by way of defense, and which in no way modified or altered the fact. *Hedrick v. R. R.*, 136 N. C., 510; *Lewis v. R. R.*, 132 N. C., 382. There is

No error.

Cited: Stewart v. Lumber Co., 146 N. C., 49; *Farris v. R. R.*, 151 N. C., 490; *Merrill v. R. R., ib.*, 526; *Bissell v. Lumber Co.*, 152 N. C., 125; *Snipes v. Mfg. Co., ib.*, 45; *Blackburn v. Lumber Co., ib.*, 363; *Hunter v. R. R., ib.*, 689; *Edge v. R. R.*, 153 N. C., 214, 215, 217; *Twiddy v. Lumber Co.*, 154 N. C., 240; *Guilford v. R. R., ib.*, 608; *Holman v. R. R.*, 159 N. C., 46; *Smith v. R. R.*, 162 N. C., 33; *Shepherd v. R. R.*, 163 N. C., 521, 522; *McNeill v. R. R.*, 167 N. C., 400; *Buchanan v. Lumber Co.*, 168 N. C., 43; *Hill v. R. R.*, 169 N. C., 741; *Horne v. R. R.*, 170 N. C., 661.

(31)

R. M. RIDDICK v. JOE DUNN.

(Filed 11 September, 1907.)

Carriers—Terminal Charges—Wharfage.

A general custom or usage in regard to terminal charges, in addition to the charges for carriage, is a part of the contract of carriage which the law reads into it. Therefore, in the absence of an express stipulation to the contrary, a wharfinger may recover of the consignee reasonable wharfage charges established by general custom or usage, and thus recognized and acquiesced in at the port of delivery.

CASE AGREED, heard by *W. R. Allen, J.*, at March Term, 1907, of GATES.

The plaintiff brought suit to recover the amount of wharfage charges upon goods shipped on a vessel of the Albemarle Steam Navigation Company from Franklin, Virginia, to Gatesville, in this State. He was lessee individually of a wharf at the latter town, which was the usual and only place for the delivery of goods from the boats of the said company, plaintiff being its agent at Gatesville. It was admitted that the charge for wharfage was the customary one, and also reasonable, and that such charges have always been made and paid by the owners of goods delivered from the company's steamers on the wharf. The defendant had received goods himself and paid the wharfage charges, but notified the plaintiff that he would not do so in the future, and not to receive any more of his goods on the wharf. The plaintiff insisted on their payment, and the defendant has since received goods from the wharf and paid the charges thereon, though at the time he refused to pay the charges now claimed, or any others thereafter. The goods on which the charges now sued for were made have been delivered to and received by him from the plaintiff's wharf. The published rates of the navigation company contained no reference to a charge for wharfage. Upon the case agreed the judge decided with the plaintiff, and from the judgment the defendant appealed. (32)

L. L. Smith for plaintiff.
W. M. Bond and A. Pilston Godwin for defendant.

WALKER, J., after stating the case: We do not see why the defendant is not liable for the sum demanded. The plaintiff was a wharfinger and dealt with his patrons according to a general custom or usage which had been recognized and acquiesced in by all of the consignees, including the defendant, at the port of Gatesville, whose goods were carried by the ships of the navigation company, namely, that the charges for wharfage should be paid to the plaintiff by them. The bill of lading was not made a part of the case agreed, and, as we are not permitted here to presume anything against the correctness of the court's ruling, it must be assumed that there is nothing therein inconsistent with the custom or usage as to the party liable for wharfage charges. Indeed, it is stated in the case that there is no reference to such charges in the company's tariff of rates, which would seem to imply that the latter were made with reference to the local custom at Gatesville, and that the rates of transportation were lower than they would have been if the company had undertaken to pay the terminal charges for wharfage. We cannot infer that carriers will voluntarily and gratuitously pay wharfage charges, which in some cases may be as much as the freight on the goods. That is not their custom, we believe, and as they are entitled to charge for the entire service rendered, including any expenditures for terminal facilities, provided they are reasonable, we must take it that the company did not intend that the freight charges should cover any amount to be paid to the plaintiff for wharfage, for there is no evidence that this is so; and the custom which is admitted to have existed at Gatesville would tend to show that
(33) it is not true, but that, on the contrary, the parties—consignor, consignee, and carrier—were all dealing with each other in view of the custom, and expected to be governed thereby. If the carrier agreed to pay the wharfage, or all terminal charges, either in the bill of lading or otherwise, it was easy to have inserted the fact in the case agreed, or to have proved it, if the parties could not have agreed in respect to it. In the absence of any more definite statement of the facts, we must hold that the parties contracted with reference to the custom, and are bound by it the same as if it had been expressly stated in their agreement. *Miller v. Tetherington,* 6 H. and N. (Exch.), 278. That case decides that when a custom is well known to exist, the parties must be considered to have contracted with reference to it, so as to import its terms into their agreement, or to require that the latter should be interpreted by it. *Brown v. Byrne,* 3 El. and B. (77 E. C. L.), 703, is perhaps more to the point, it bearing a closer resemblance to our case in its facts and the precise question presented. See, also, *Buckle v. Knoop,*

L. R., 2 Exch., 125; *Wigglesworth v. Dallison,* 2 Smith L. Cases (Ed. 1888), 842, and especially the notes at p. 853; and, as bearing somewhat on the question, *Vaughan v. R. R.,* 63 N. C., 11; *Norris v. Fowler,* 87 N. C., 9; 9 Cyc., 582.

Wharfage is a mere charge made by the owner of the soil or shore for the use of a portion of it, which charge he has a right to make. The price, perhaps, may be subject to municipal regulation, but the right to charge is undoubted. *O'Conley v. Natchez,* 9 Miss. (1 Sm. and M.), 31; *Cannon v. New Orleans,* 20 Wall., 577. Right to compensation for the use of a wharf may be claimed upon an express or implied contract, according to the circumstances. If the price has not been agreed upon, the proprietor recovers what is just and reasonable for the use of his property and the benefit conferred, as in other like cases. 1 Farnham on Waters, 570. A riparian owner had at common law a (34) qualified interest in the water frontage belonging by nature to his land, and, consequently, the right to construct thereon wharves, piers, or landings as far as deep water, subject, however, to certain restrictions in their construction and use imposed by statute (Rev., 1696), one of which is, that navigation must not be obstructed. *Bond v. Wool,* 107 N. C., 139. This originated the right to compensation for wharfage or for the use of the wharf, pier, or landing. *Lord Mansfield* said: "Everybody that pays has a benefit, for if they go to the wharf they have the benefit of it, and if they land their goods elsewhere within the manor, they land upon the plaintiff's property." *Colton v. Smith,* 1 Cowper, 47. In the case of *Fitzsimmons v. Milner,* 32 S. C. (2 Rich.), 370, it was held that, though it was shown to be customary for the factor to pay the wharfage charges for goods shipped to his consignee, yet the latter is also liable as owner, if the former failed to pay them, because of his right of property and the benefit received from the care of the goods and the use of the wharf. It is also said in that case: "That it is the rule of law, as well as the custom, for the consignee to pay the wharfinger, may, we think, be gathered from the cases." Whether that be so or not, we conclude that, upon the facts agreed, the plaintiff has derived a benefit, as far as appears, from the use of the wharf, and, upon a well-settled principle, should pay its reasonable value, which is admitted in the case to be the amount claimed, though the precise nature of the use is not disclosed. This Court has recognized the right of a wharfinger to charge the owner of goods for the use of his wharf. *Wooster v. Blossom,* 50 N. C., 244.

It does not appear distinctly whether the charge against the defendant was for dockage or berthage, strictly speaking, or for wharfage, using the former terms in the sense of a charge against a vessel for the privilege of mooring to a wharf or pier, which is one of the usual and customary port charges against the vessel, and the latter as denoting a

(35) charge against merchandise for the use of a wharf, which is said to be one of its meanings. 30 A. and E. (2 Ed.), 497; *People v. Roberts,* 92 Cal., 659; *The Wharf Case,* 3 Bland, 373; *Rodgers v. Stophel,* 32 Pa. St., 111. We infer from all the facts and circumstances that the charge in this case was of the latter kind.

We have not discussed the question as to the liability of the carrier, upon general principles, for wharfage charges, because we think the parties must be considered as having dealt with each other upon the basis of the established custom, and the freight rates may have been, and no doubt were, calculated and fixed with reference thereto. The defendant may not be paying more than he would be required to pay if the company had agreed to pay or should be held liable for all terminal charges, as it would in all probability increase its rates by the amount so expended for that purpose; and this, as we have said, it would have a right to do, if the rates for the whole service are reasonable, under all the circumstances, for they cannot exceed what is a fair return for the capital invested.

We have not overlooked the fact that the defendant never informed the navigation company of his intention not to be bound by the established custom at the port of Gatesville. The contract was between him and that company as the carrier, and the latter had every reason to suppose that the defendant was willing to abide by the custom in the carriage of the particular goods, for the care of which the charge was made by the plaintiff. This gave the carrier the right to unload the goods on the wharf, which was the usual place of deposit, instead of delivering them out of the ship or at its side.

The ruling of the court upon the facts was correct.

Affirmed.

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(36)

T. W. WHITE v. THOMAS ELEY.

(Filed 11 September, 1907.)

Jurisdiction—Torts—Contract—Wrongful Conversion—Election.

When the plaintiff can bring his action either in tort, for wrongful conversion, or upon contract, the courts, in favor of jurisdiction, will sustain the election of the plaintiff.

ACTION tried before *Lyon, J.,* and a jury, Spring Term, 1907, of BERTIE.

Winston & Matthews for plaintiff.
St. Leon Scull for defendant.

CLARK, C. J. The complaint alleges that plaintiff placed with the defendant a horse to sell for him; that the defendant received for the horse the sum of $149, which he has converted to his own use, and asks for recovery of the sum so converted, and for arrest and bail of defendant. The defendant demurred *ore tenus* that the Superior Court had no original jurisdiction because this is an action on contract. The court sustained the demurrer and dismissed the action.

There is error. "When the action can be fairly treated as based either on contract or in tort, the courts, in favor of jurisdiction, will sustain the election made by the plaintiff." *Brittain v. Payne,* 118 N. C., 989; *Schulhofer v. R. R., ibid.,* 1096. The plaintiff could sue either for the tort, the unlawful conversion, or on the contract. Bringing the action in one court, when he might have brought it in the other, is *prima facie* such election. *Sams v. Price,* 119 N. C., 574; *Parker v. Express Co.,* 132 N. C., 130.

In such cases the plaintiff may waive the tort and sue in contract. *Bullinger v. Marshall,* 70 N. C., 520; *McDonald v. Cannon,* 82 N. C., 245; *Wall v. Williams,* 91 N. C., 477; *Edwards v. Cowper,* 99 N. C., 421; *Timber Co. v. Brooks,* 109 N. C., 698.

Or he may elect to sue for the tort. *Bowers v. R. R.,* 107 (37) N. C., 721; *Purcell v. R. R.,* 108 N. C., 424; *Thompson v. Express Co.,* 144 N. C., 389. In *Frelich v. Express Co.,* 67 N. C., 1, it was held that the complaint showed that the plaintiff had elected to sue on the contract for a sum less than $200, notwithstanding the action had been brought in the Superior Court.

The judgment dismissing the action is

Reversed.

THE ALLEN-FLEMING COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 11 September, 1907.)

1. **Corporations—Jurisdiction—Justice of the Peace—Foreign Defendant—Process.**

   The provisions that no process shall be issued by a justice of the peace to another county unless there is one or more resident and one or more nonresident defendants (Revisal, sec. 1447) do not apply to foreign corporations. Under Revisal, sec. 1448, summons issued to a foreign corporation in another county where it has a process agent, properly certified under seal of the clerk of the Superior Court, served on such corporation or its agent more than twenty days before the return day, is valid.

2. **Penalty—Venue.**

   An action for a penalty can be brought against a foreign defendant before a justice of the peace in any county in which the defendant does business or has property, or where plaintiff resides. Revisal, sec. 423.

3. Same—Removal.

If an action is brought in the Superior Court in the wrong county to recover a penalty, it will not be dismissed, but removed to the proper county, if asked in apt time. Revisal, sec. 425.

4. Appeal and Error—Motion to Dismiss—Special Appearance.

In an action begun before a justice of the peace the defendant may enter a special appearance and move to dismiss; but, after judgment rendered, it may not enter a special appearance by appeal there, nor in the Superior Court, for the purpose of the motion.

(38) ACTION to recover penalty, heard by *Lyon, J.*, upon appeal from a justice of the peace, at June Term, 1907, of WARREN.

T. M. Pittman and J. H. Kerr for plaintiff.
F. H. Busbee & Son and W. B. Rodman for defendant.

CLARK, C. J. This was an action begun before a justice of the peace in Warren County against the Southern Railway Company and Seaboard Air Line Railway Company for the penalty for unreasonable delay in transportation of goods shipped 22 January, 1907, from High Point, N. C., on the line of the former road, and delivered to the consignee, the plaintiff, at Warrenton, a station on the last named road, 14 February, 1907. The summons was issued 9 March, 1907, returnable 8 April, 1907, and duly served in the manner required by law upon both companies. The summons, duly certified, as required by Revisal, sec. 1448, was served upon the agent of the Southern Railway Company at Henderson, in Vance County, 11 March, 1907. The Southern Railway Company made no appearance at the trial before the justice, though it did appear at the taking of a deposition, and entered a special appearance as to that. At the trial before the justice, 3 June, 1907, judgment was rendered in favor of the Seaboard Air Line Railway Company and against the Southern Railway Company. On 8 June the latter served notice of appeal, as follows: "The Southern Railway Company enters a special appearance and appeals from the judgment," on the ground, recited in the notice, that "the justice had no jurisdiction of the action, that the parties were improperly joined, and that the judgment was contrary to the law and the facts."

On the trial in the Superior Court a jury was waived and the judge found the facts: that the shipment was received by the Southern Railway, at High Point, 22 January, 1907; that it arrived at Durham, a station on that road, 25 January, 1907, but was not delivered to
(39) the Seaboard Air Line Railway Company at that point till 7 February, 1907, which the court held an unreasonable delay of nine days, and rendered judgment accordingly. The Southern Railway Com-

pany, the sole defendant in the Superior Court, moved to dismiss for want of jurisdiction, because the Seaboard Air Line Railway was not a resident of Warren County, the court having held that it had its principal office in Raleigh, Wake County, and that the Southern was a nonresident corporation, without any part of its track or any local agent in Warren County, and that the justice could not issue this summons to another county. It made a motion to dismiss on the above ground, and asked to enter a special appearance. The court refused the motion to dismiss, and entered judgment for $32.50.

The sole point presented is, that the justice did not acquire jurisdiction by service of summons upon the defendant, the Southern Railway Company, in another county.

The defendant relies upon Revisal, sec. 1447: "No process shall be issued by any justice of the peace to any county other than his own, unless one or more *bona fide* defendants shall reside in and also one or more *bona fide* defendants shall reside outside of his county." But this does not apply to foreign corporations. The next section (1448) is entitled "Service on Foreign Corporations," and provides: "Wherever any action of which a justice of the peace has jurisdiction shall be brought against a foreign corporation, which corporation is required to maintain a process agent in this State, the summons may be issued to the sheriff of the county in which such process agent resides, and, when certified under the seal of his office by the clerk of the Superior Court of the county in which the justice issuing such summons resides to be under the hand of such justice, the sheriff of the county to which such summons shall be issued shall serve the same, as in other cases, and make due return thereof"; and there is a further provision that in such cases the summons must be served twenty days before return day. (40)

This section governs this case. The justice had jurisdiction of the cause of action, the certificate was made by the clerk as required, service was made upon an agent of the Southern Railway Company, a foreign corporation, at Henderson, upon whom process against it could be served, and service was made more than twenty days before the return day of the summons. Section 1448 is specially provided for service of justices' summons upon a foreign corporation beyond the limits of the justice's county. Service of summons upon the Seaboard Air Line Railway Company was properly made on its local agent (Rev., sec. 440), and there is no provision for removal to another county in an action before a justice of the peace. Besides, it made no objection; neither does the venue of an action against it concern the Southern Railway Company.

In the Superior Court it is true that an action for a penalty must ordinarily be tried in a county where some part of the cause of action arose. Rev., sec. 420. But as to foreign corporations, the action can be

brought either in such county or in any county in which it does business or has property, or where plaintiff resides. Rev., sec. 423. The penalty, if an action is brought in the wrong county, is not dismissed, but removed to the proper county, if asked in apt time. Rev., sec. 425. And there is this express *proviso* in section 424: That "in all actions against railroads the action may be tried either in the county where the cause of action arose or in an adjoining county, or where plaintiff then resided."

Whether joining the Seaboard Air Line Railway Company made it merely a superfluous party, of which the Southern Railway Company could not complain, or was ground for a demurrer, requiring, if made, a division of the action, or was a proper joinder, making it a matter of proof as to which defendant was liable for the delay, is a matter
(41) not before us, as there was no demurrer, and, besides, the Seaboard Air Line Railway Company was eliminated from the action by the justice's judgment. Certainly, the Southern Railway being the initial railroad, the burden is upon it to show delivery without unreasonable delay to the next company. *Meredith v. R. R.*, 137 N. C., 478. As to the Southern Railway Company, a justice of the peace in Warren could issue summons against it in favor of a plaintiff in that county (it being a foreign corporation), to be served in another county, under the express terms of section 1448, whose requirements were strictly complied with.

The appellant could have appeared specially before the justice and have moved to dismiss, and, if that were denied, it could have preserved its point by an exception filed, and proceeded to trial. But after being duly served with process, it entered no special appearance in that court. Its special appearance before the commissioner in taking the deposition merely saved a point which it could have made, but did not, at the trial before the justice. It could not appeal by a special appearance. This has been fully discussed and distinctly held. *Clark v. Mfg. Co.*, 110 N. C., 111; *Finlayson v. Accident Assn.*, 109 N. C., 196; *Guilford v. Georgia, ibid.*, 310; *Plemmons v. Improvement Co.*, 108 N. C., 614, and, more recently, *Scott v. Life Assn.*, 137 N. C., 515. The defendant, not having taken the exception in the justice's court, could not, after judgment there, enter a special appearance by his appeal, nor in the Superior Court. In deference to the request of defendant's counsel, however, we have passed upon the exception to service of summons as if made in apt time.

Affirmed.

Cited: School v. Peirce, 163 N. C., 430.

LOUIS PATTERSON v. NORTH CAROLINA LUMBER COMPANY ET AL.

(Filed 11 September, 1907.)

1. **Negligence—Contributory Negligence—Employer and Employee—Defective Appliances—Assumption of Risks.**

The care required of the employer in keeping his machinery, etc., in a reasonably safe condition for the protection of those employed to perform a stated service does not extend, and no liability attaches to an act done by an employee of his own volition, outside of the scope of his employment, whereby he was injured by a defective machine, for therein the employee assumes all risk of injury.

2. **Same—Instructions.**

It is error in the court below, upon proper evidence, to refuse to instruct the jury that where an employee undertakes to do an act outside of the scope of his employment the master is not negligent, and if the jury find from the evidence that plaintiff was thus acting when injured, they will answer the issue as to negligence "No."

ACTION tried before *Lyon, J.*, and a jury, at March Term, 1907, (42) of HALIFAX.

The plaintiff was employed by the defendant to straighten boards in its planing mill. He alleged, and there was evidence tending to prove, that where any employee who operated a planing machine called upon him to take his place while he was absent, he had been ordered by the manager to do so; that McWynn, who had charge of one of the planers, left his place and requested the plaintiff to operate the machine while he was away. Plaintiff undertook to do so, and while feeding the machine his hand was cut and lacerated by a revolving cylinder, the machine being, as he alleged, in a defective condition; and to recover damages for the injury he brings this suit. There was evidence tending to show that the plaintiff had received no order to take McWynn's place, but that his duty was confined to straightening the boards. (43) Among the several instructions requested by the defendant was the following: "Where an employee undertakes to do something not his duty to do, the master is not negligent; and if the jury should find from the evidence that the plaintiff was acting outside the scope of his employment when he was injured, they will answer the first issue (as to negligence) 'No,' and the second issue (as to contributory negligence) 'Yes.'" This instruction was refused, and the defendant excepted.

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

George C. Green and Albion Dunn for plaintiff.
Day, Bell & Allen and F. H. Busbee & Son for defendant.

WALKER, J., after stating the case: We think the defendant was clearly entitled to the instruction which was refused. Where the employee steps

outside the line of his duty or goes beyond the scope of his employment and does something he is not required to do, he cannot recover from his master for any consequent injury, for in that particular he is not his servant, and his contract does not provide for the new risk which he thus assumes and to which he exposes himself. The result is the same where the servant, without the order or request of his employer, or his representative, or contrary to his orders, or at the request of another employee who has no authority from the master to make it, undertakes to do something not assigned to him. In such a case he assumes all the risk of injury. The master contracts to exercise ordinary care for the purpose of keeping his premises, his machinery, his tools and his appliances in a reasonable condition of safety for the protection of his servant employed to perform a stated service, and who is entitled to that protection while engaged in his work and so long as he continues therein and con-
(44) fines himself to what he is employed to do. The duty of the master to furnish safe and suitable implements and appliances, which due care for the protection of his servant would suggest, extends only to those employees who are required, permitted, or expected, in the course of the employment, to make use of the instrumentalities provided by him, or who, while in the performance of their work, may be injured by them if they are defective. Where the servant departs from the sphere of his assigned duty, the relation of master and servant is considered as temporarily suspended. The servant's position is, then, analogous to that of a trespasser, or, perhaps, of a bare licensee, and his master owes him no duty, nor is he under any legal obligation to anticipate his deviation from his instructions and the possible danger which may arise to him therefrom, and, consequently, to provide means for averting it. The servant becomes a volunteer as to the particular act which is outside the scope of his service and which he attempts to perform. He must, therefore, take things as he finds them and suffer the consequences of his own error. The master cannot be held liable therefor, as the law will not, on obvious grounds of justice, compel the master to answer in damages for any injury which the servant has brought on himself by undertaking to do that which he was not directed or required to do, and it refers his injury not to the fault of the master, but to his own unnecessary and gratuitous act. Where the servant leaves his own work to do something else for which he was not engaged, the duty of the master towards him reaches its vanishing point, as it has been said, at the moment of the transition, and his corresponding liability for a resulting injury disappears. There being no longer a contractual or legal relation imposing any duty on the master, for a breach of which he would be liable, it follows that there is nothing upon which to rest any claim for damages, because no cause of action arises from a failure to perform a mere act of

humanity, or for the violation simply of a moral obligation not (45) involving any legal duty. This principle is well established, if not elementary. It is grounded in wisdom and justice, it is perfectly fair to the master and to the servant, and, moreover, is supported by the highest authority. 4 Thompson on Negligence, secs. 4677, 4678; *Whitson v. Wrenn,* 134 N. C., 86. It has been crystallized into one of the leading maxims of the law, for in applying the same doctrine in the case last cited (page 90), we said: "The plaintiff in this case has simply done something which his master virtually told him not to do. He substituted his own will for that of his employer, and his case comes within the maxim, *volenti non fit injuria.*" There are other expressions in that case, illustrating the principle, which are directly applicable to the facts of this one. *Mallor v. Mfg. Co.,* 150 Mass., 362 (*s. c.,* 5 L. R. A., 792); *R. R. v. Hall,* 105 Ala., 599; *Allen v. Hixson,* 111 Ga., 460; *Parent v. Mfg. Co.,* 70 N. H., 1199; *Walker v. R. R.,* 104 Mich., 606. The recent case decided in this Court of *Martin v. Mfg. Co.,* 128 N. C., 264, is exactly in point. The identity of the two cases is striking.

Applying the principle we have stated to the facts of this case, we conclude that there was proof to sustain a finding for the defendant under the instruction, which was refused, namely, that the plaintiff had left the place of his work and, as a favor to McWynn, had undertaken to perform his duty in feeding the machine, when he was hurt, and the fact that there was evidence to the contrary cannot deprive the defendant of the right to have the disputed question submitted to the jury. It only made it the more necessary that such a course should have been taken. We have just held that if a special instruction is asked as to a particular phase of the case presented by the evidence, it should be given by the court in substantial conformity to the prayer. *Baker v. R. R.,* 144 N. C., 36. We so hold in this case, as the rule is manifestly a just and most reasonable one. *Horne v. Power Co.,* 141 N. C., 50, and cases cited. We have examined the general charge of the court with the greatest care, and can find therein no substantial or adequate (46) response to the rejected prayer, if there is any reference to it at all, and we think there is not. The charge, therefore, does not supply the omission to give the special instruction. The refusal to give the instruction which the defendant requested, was error, and entitles it to another trial. The questions involved in the other errors assigned may not again be presented, and for this reason we forbear to discuss them.

New trial.

Cited: Boney v. R. R., post, 251; *Burnett v. Mills Co.,* 152 N. C., 38; *Blackburn v. Lumber Co., ib.,* 364; *Boney v. R. R.,* 155 N. C., 112, 118; *Jackson v. Lumber Co.,* 158 N. C., 321; *Horne v. R. R.,* 170 N. C., 659.

JOHN DIXON v. MELISSA A. DIXON.

(Filed 17 September, 1907.)

Limitations—Trust—Husband and Wife.

When a trust is acknowledged, it becomes an express trust against which the statute of limitations will not run except from an adversary holding. Therefore, when the wife purchased lands with money given her by her husband, and wrongfully had title made to herself alone, which she agreed to have perfected in her husband, there being no evidence of any contest or friction about the title until a suit for divorce was commenced, the statute of limitation did not begin to run until the commencement of said action.

ACTION tried before *Neal, J.*, and a jury, February Term, 1907, of CRAVEN. The statement of facts sufficiently appears in the opinion of the Court.

Moore & Dunn for plaintiff.
W. A. Clark for defendant.

CLARK, C. J. This is an action by the husband to have his wife declared trustee for him of the property described in the complaint, which alleges that all said property was bought by the defendant with
(47) money furnished her by the plaintiff under instructions to take title in his name, but that instead she took the title in her own name. The jury found the facts to be as thus alleged.

The deeds to the wife for the property were dated 14 July, 1880; 24 October, 1889; 26 January, 1889, and 15 January, 1892. This action was begun 19 January, 1904. The defendant pleaded the ten-year statute of limitations. By consent, the facts as to this plea were found by the judge, which, in addition to what is above stated, are that while plaintiff and defendant were living together as man and wife, "knowing title had been taken in her, he, by and with her consent, took the deeds to a lawyer to have the title perfected in him, but was called off by a telegram, and the transfer was never made." It does not appear when this occurred, but the judge further finds that there was no evidence of any contest or friction about the title or possession of the property until the defendant instituted an action for divorce, 2 November, 1903.

It is, therefore, unnecessary to discuss the interesting question, whether the statute could run between husband and wife, for, the trust being acknowledged, it became an express trust, of which there was no disavowal or adversary holding until 2 November, 1903. Till then, the statute did not run, and the court properly held that the plaintiff's action is not barred by the statute of limitation.

Affirmed.

G. E. HAWK v. PINE LUMBER COMPANY.

(Filed 17 September, 1907.)

Pleadings—Procedure—Joinder of Action—Contract—Tort.

An action arising upon contract united in the same complaint with one arising in tort is not a misjoinder, and a demurrer thereto will not be sustained "where they arise out of the same transaction or are connected with the same subject of action." Revisal, sec. 467.

ACTION heard by *Neal, J.*, upon demurrer, at February Term, (48) 1907, of CRAVEN.

The plaintiff alleged in his complaint that the defendant owned a large tract of land in said county and employed him to log the same at $3 per 1,000 feet, there being 150,000,000 feet of timber on the land at the time. In order to cut and deliver the timber as required by the contract, it was necessary to lay a tramway, part of which was constructed by the plaintiff and the other part by the defendant, the plaintiff having agreed to furnish trucks and certain other equipment and supplies for carrying on the work, which he did, and the defendant having agreed to furnish other equipment and materials necessary for the said purpose, which it failed to do; that the defendant in other respects refused to perform its contract. While the plaintiff was engaged in the performance of his part of the contract, the defendant unlawfully seized and took possession of the tramway and converted to its own use certain property which the plaintiff had furnished and placed on the premises for the purpose of doing the work required of him by the contract, and thereby prevented him from performing the same. He prays judgment for $100,000 for the breach of the contract, for $3,470 for seizing the tramway, which was built by the plaintiff at his own expense, and for $2,174 for the conversion of the personal property, making in all $105,644. The defendant demurred for misjoinder, because the plaintiff had united a cause of action for unliquidated damages, (49) which arose out of a contract, with one for the conversion of personal property, which arose out of a tort. The demurrer was overruled, and the defendant appealed.

D. L. Ward and W. D. McIver for plaintiff.
W. W. Clark and Simmons, Ward & Allen for defendant.

WALKER, J., after stating the case: It is true, as argued by the learned counsel for the defendant, that at common law the causes of action stated in the complaint could not have been joined. 23 Cyc., 392; *Logan v. Wallis,* 76 N. C., 416; *Doughty v. R. R.,* 78 N. C., 22. But

this rule has been changed by the reformed procedure, and now any causes of action may be united "where they arise out of the same transaction or a transaction connected with the same subject of action." Whether they be for the breach of a contract and for a tort, or are legal or equitable, or both, will make no difference. Revisal, sec. 469. The courts have not attempted to state any general rule by which all cases may be tested under that statute, as it has been found impossible to do so. The language, no doubt, was chosen because of the very wide scope of its meaning, enabling the courts to construe it as will be found most convenient and best calculated to promote the ends of justice. 1 Enc. of Pl. and Pr., 185. Having no very definite principle to guide us, it is safer for courts to pass upon the question as each case is presented, except when it comes directly and clearly within some established precedent.

We think the causes of action were properly joined in this case, and that the court was right in overruling the demurrer and requiring the defendant to answer. In *Hamlin v. Tucker,* 72 N. C., 502, the Court held that the plaintiff had properly united causes of action for harboring his wife, for the conversion of personal property belonging to
(50) the plaintiff *jure mariti,* for inducing the wife to execute a deed for land to the defendant while so harbored, and for converting certain personal property, the subject of a marriage settlement. It would seem that the case just cited is more than a good precedent for the ruling of the court in this one. The causes of action are not so nearly related to or connected with each other as are those in this case, the only difference being that in *Hamlin v. Tucker* they were legal and equitable, while here they are in contract and in tort, but this is merely a nominal distinction. By clear analogy, many cases sustain the ruling of the court. *Young v. Young,* 81 N. C., 91; *King v. Farmer,* 88 N. C., 22; *Benton v. Collins,* 118 N. C., 196; *Cook v. Smith,* 119 N. C., 350; *Daniels v. Fowler,* 120 N. C., 14; *Fisher v. Trust Co.,* 138 N. C., 224; *Oyster v. Mining Co.,* 140 N. C., 135; *McGowan v. Ins. Co.,* 141 N. C., 367. The result of the decisions is, that if the causes of action be not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, the objection of multifariousness does not arise. *Young v. Young, supra; Bedsole v. Monroe,* 40 N. C., 313. But *Badger v. Benedict,* 1 Hilton (N. Y.), 414, seems to be directly in point. In that case there were separate causes of action arising out of the breach of a contract and injuries to property, the subject of the contract, which was in the possession of the plaintiff for the purpose of enabling her to perform it, and by the conversion of which she was prevented from doing so. The

Court held that they were properly united under a statute of that State identical in language with ours, as they arose out of one and the same transaction. That decision is not a binding precedent with us, but it must be regarded as very persuasive authority. If the causes of action stated in the plaintiff's complaint in this case did not arise out of the same transaction—and we think they did—they surely are (51) connected with the same subject of action. We do not see how the defendant can possibly be prejudiced in his defense by the joinder.

We conclude that the ruling of the court was right. The defendant will be allowed to answer.

Affirmed.

Cited: S. c., 149 N. C., 11; *Ricks v. Wilson,* 151 N. C., 50; *Worth v. Trust Co.,* 152 N. C., 244; *Lee v. Thornton,* 171 N. C., 214.

ANDREW DANIEL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 17 September, 1907.)

1. **Evidence—Negligence—Contributory Negligence—Nonsuit.**

A motion for judgment as of nonsuit will not be allowed when there is evidence tending to show that the plaintiff, an employee of defendant company, while in discharge of his duties, attempted to board a car, next to the engine, of defendant's slowly moving train; that the engineer saw him approach, and could have seen him in the act of boarding the car, and at that moment opened the throttle of the engine "and made a jerk," causing him to fall under the car and sustain the injury. Such evidence is sufficient to sustain a verdict that the defendant was negligent, and does not establish contributory negligence as a matter of law.

2. **Same—Withdrawn—Objections and Exceptions—Appeal and Error.**

Exceptions to evidence not taken on the trial at the time will not be considered on appeal; and likewise as to the language of the trial judge in withdrawing improper evidence from the jury.

3. **Evidence—Custom.**

Evidence of plaintiff as to the custom of defendant's servants to ride upon defendant's cars, as he was doing when injured, is competent, though he had only been employed by defendant one month.

4. **Measure of Damages—Appeal and Error.**

It is not reversible error, upon the measure of damages, for plaintiff to testify that defendant had promised him promotion.

ACTION tried before *Lyon, J.,* and a jury, at March Term, 1907, of HALIFAX. From a judgment for the plaintiff, defendant appealed.

(52) *E. L. Travis and George C. Green for plaintiff.*
Day, Bell & Dunn and Murray Allen for defendant.

CONNOR, J. Although the record contains forty-one exceptions, the merits of the controversy are presented upon defendant's motion for judgment of nonsuit, and involve but few facts. Plaintiff alleges and, in support of his allegations, testifies that he was employed by defendant company to work on and about its yards at Weldon, N. C.; that on the day of the accident he was directed by a fellow-servant to go to the coal-chute and deliver a message to one Reed, another employee, in regard to moving an engine and some coal cars; that in the discharge of the duty imposed upon him he met an engine to which two coal cars were attached. He thus describes the manner in which he sustained the injury for which he seeks to recover damages: "Mr. Owens was the engineer, and he was looking at me when I was meeting the engine. When the engine was passing, Mr. Owens was laying out of his window, watching, when I was meeting the engine, and was looking back at me after I passed the engine, and the second that I went to catch the car Mr. Owens opened the throttle and made a jerk, about the time I went to catch the car and had my foot on the stirrup, and that jerk threw me under the car, and the whole run over me and broke my leg all to pieces. The engineer could see me when I went to take hold of the car. I was going back down town on the car, about three-quarters of a mile. There were two cars attached to the engine. According to the best of my knowledge, the engine was moving at about the rate of 3 miles an hour. I could catch it in a fast walk. There was nothing between me and the engineer to prevent him from seeing me as I went to get on the train. I attempted to board the car next to the engine." He was cross-examined at much length, but the foregoing is the substance of his testimony regarding the manner in which he was injured. He further testified that he and other railroad employees were in the habit or
(53) that it was customary for them to get on and ride in the cars as they moved slowly along the track in the yard.

Plaintiff was contradicted in his account of the transaction, custom, etc. Defendant does not deny that the testimony, if believed, shows negligence on the part of its engineer. It contends that the same testimony which establishes negligence shows, as matter of law, contributory negligence on the part of the plaintiff, and upon that ground bases its motion for judgment of nonsuit.

Conceding the truth of plaintiff's testimony, as must be done in disposing of the motion, we do not perceive how his Honor could have rendered judgment of nonsuit. There is in it but slight, if any, evidence of contributory negligence. Plaintiff says that, while engaged in the

line of his duty, in accordance with the custom prevailing among defendant's employees, he attempted to board the car, under the circumstances narrated, and was, by the act of the engineer, injured. This testimony falls far short of establishing contributory negligence as a matter of law. The jury having found, under the instruction of the court, that the injury was sustained as testified to by plaintiff, the conduct of the engineer was manifestly negligent. It is but just to him to say that he denied the statement made by plaintiff, giving an entirely different account of the matter, and that his testimony was strongly corroborated by others who saw the accident, but was rejected by the jury. We are compelled to take the testimony as true, and from that point of view his Honor correctly denied the motion. His Honor instructed the jury, after stating the general contentions of the parties, as follows: "And (if) you further find that the engineer saw him (plaintiff) at the time he made the attempt to get on the car, or saw him immediately before he made the attempt, and that the engineer knew or had reason to believe that plaintiff would make the attempt to get on the car, or could, by the exercise of ordinary prudence, have seen that the plaintiff would attempt to get on the car; and if you further find by the weight of the evidence that when the plaintiff (54) attempted to and was in the act of getting on the car in the manner testified to, the engineer pulled the throttle, thereby causing the train to suddenly jerk forward, and that the sudden jerking of the train caused the plaintiff to lose his hold and fall under the wheels of the car, crushing one of his legs; and further find that a reasonably prudent man would ordinarily not have pulled the throttle at the time and under the circumstances as you may find them to be, then you will answer the issue 'Yes.' If you do not so find, you will answer the issue 'No.'" This instruction, to which defendant excepts, is clearly correct, and fairly presents the question of fact to the jury. They found against defendant, and, after doing so, logically found that the plaintiff was not guilty of contributory negligence. They could not, after finding the first issue, come to any other conclusion. His Honor correctly charged the jury in regard to the measure or standard of duty imposed upon the plaintiff in attempting to get on the car. We have examined the prayers for instruction submitted by defendant, and his Honor's ruling upon them. We find no error in this respect.

Defendant excepts to several rulings made by his Honor regarding the admissibility of testimony. The one most strongly urged upon us is thus presented upon the record: Plaintiff was asked, "Did he see you when you went to get on?" Answer: "Yes, sir." Defendant objected to his saying whether he could see him or not. The court: "Yes, I reckon that is a matter for the jury." Q. "Was there anything between

you and the engineer, when you went to get on the train, to prevent him seeing you?" A. "No." Defendant objected; overruled, and exception by defendant. Defendant insists that the court erred in permitting the answer to the first question. Without expressing an opinion upon the admissibility of the question and answer, the record shows that defendant was content with his Honor's action, and made no exception
(55) thereto. It is a fair construction of the language that his Honor excluded the answer, saying that whether the engineer saw plaintiff or not was an inference to be drawn by the jury from the evidence as to the position of the parties, etc. This is manifest from the form of the next question, which was clearly competent. His Honor would have made his language more explicit if defendant had indicated that it was not content. The witness had, without objection, testified that the engineer could see him. The difference is rather slight, in view of the condition of the record, to base a finding of reversible error.

The exception to the admission of plaintiff's testimony, that it was customary for defendant's servants to ride upon the cars as he was attempting to do, is without merit. It is true that plaintiff had been in defendant's employment but one month. He may, within that time, have become acquainted with the custom respecting his own employment and the discharge of his duties. He was cross-examined at much length, and the jury given ample opportunity to properly weigh and value his testimony. In the aspect of the case found by the jury, it was not material whether he attempted to get upon the car in accordance with a custom or not. If, after seeing plaintiff attempting to get on the car in the manner testified to by him, the engineer opened the throttle to his engine, thereby causing him to be thrown under the car and injured, the defendant would be liable for negligence, upon well settled principles and adjudged cases. *Deans v. R. R.*, 107 N. C., 686, and many other cases. Defendant excepts because plaintiff was permitted to say that he was promised promotion. His Honor admitted this evidence as tending to show his reasonable expectation of making wages. We do not find any reversible error in this. In view of the fact that the jury gave
(56) plaintiff, a young man, only $1,000 for the loss of his leg, we do not think it probable that his expectation of increased wages made much impression upon their minds. The cause was fairly submitted to the triers of the fact. We find no valid exceptions to his Honor's rulings. The judgment must be

Affirmed.

CRISSIE BOWSER AND JOHN SHANNON v. GEORGE T. WESCOTT.

(Filed 17 September, 1907.)

1. **Vacant Lands—Protestant—Title.**

When it appears that protestants to the entry upon State's lands are in possession of the *locus in quo*, but fail to connect their title with the former owners under whom they claim, it is not an admission of the absence of title, and the protest should not be dismissed as against the subsequent enterer.

2. **Same—Protestant—"Enterer"—Burden of Proof—Interpretation of Statutes.**

Proceedings of protest against the enterer on State's lands is not a civil action within the meaning of the statute, but is to determine the right of the enterer. Under The Code of 1883, now Revisal, sec. 2765, providing for the protest against an entry on the vacant and unimproved lands of the State, and in accordance with its provisions under reasonable interpretation, the burden of proof is upon the enterer to show, as against the protestant alone, that the *locus in quo* was vacant land, subject to his entry.

WALKER, J., dissenting, and HOKE, J., concurring in dissenting opinion.

THIS is a proceeding under the entry laws (Revisal, sec. 1709, *et seq.*), tried before *W. R. Allen, J.*, at Spring Term, 1907, of DARE. From the judgment rendered, the protestants, Bowser and Shannon, appealed.

D. M. Stringfield and Ward & Grimes for plaintiffs.
W. M. Bond for defendant.

BROWN, J. It is contended by the learned counsel for the enterer that there are admissions in the record that the protestants have no title to the land entered, and that, under the ruling in *Johnson* (57) *v. Wescott,* 139 N. C., 29, the protest should be dismissed and the enterer permitted to take out his grant. We fail to find any such admission in the record. It is admitted that the protestants on the trial failed to connect themselves by evidence with the possession of Ben Etheridge, Barbara Frost, or Ned Bowser, but that is far from being an admission of record that protestants have no title or possession of the land in controversy and that it is open to entry. The evidence tends to prove that protestants are in actual possession of the land, and were at the time the entry was made; that there was a field cultivated on it in 1871; that Barbara Frost cleared the land and was in actual possession of it for twenty-five years; that Ben Etheridge moved on the land thirty years ago, and that Ned Bowser had been cutting all over the land for the same length of time. There is other evidence which it is unnecessary to discuss, in the view we take of the case. Further reflection convinces us that we should adhere to our decision in *Walker v. Carpenter,*

144 N. C., 674, by which the burden of proof is placed upon the enterer to show, at least so far as the protestant is concerned, that the land is unappropriated and open to entry. The question had never been presented before, nor anything analogous to it that we can find. We, therefore, cannot "travel with ease along the highway of precedent," and must be guided by what we think is a proper construction of the statute and the evident intent of the General Assembly in enacting it. It is a source of satisfaction to feel that, if we are in error, that body will doubtless correct it in due season.

In the first place, let it be understood that we do not intend to reverse the ordinary rule of proof in an action to try title to land, as this is not a civil action within the meaning of the statute. It is a simple proceeding, under the entry laws, to ascertain if the enterer, so far as the protestant only is concerned, has a right to enter the land de-
(58) scribed in the entry. It is well to note the history of the protest section of the entry laws as indicating the purpose of the General Assembly to relieve what was possibly a hardship upon many landowners of the State, for it is fundamental that a statute should be so construed, if reasonably possible, as to give effect to the remedy intended. Prior to the amendment to the entry laws, when the protest proceedings were introduced, an entry could not be protested. The first enterer, by paying the small stipend required by the statute, after survey, secured his grant from the State and became the *prima facie* owner of the land. The person who contested his right had to bring suit to vacate and set aside the grant, or, if sued himself, after the grant had been put in evidence, had still to assume the burden of making out an indefeasible title. And this is the law now, where the grant has been issued and legal proceedings commenced. Thus it was in the power of land speculators to enter lands generally without the least investigation of the ownership, and, by paying a mere pittance for their grants, to put the apparent owners and possessors of the lands to proof of their title. If they failed upon some slight technicality, these enterprising land hunters acquired title. This condition of the law continued from the earliest times up to 1883, when for the first time the right to protest an entry was given and provision made for establishing in the Superior Court the rights of the enterer before grant issued. Section 2765 of The Code.

We are unable to find any trace of such proceeding in the legislation of the State prior to that time. When the State had large bodies of public lands open to entry, the old law worked no great hardship, for the location of those lands was well known. But now that the State owns practically no bodies of land that are open to entry, only timber hunters, and not the State, are benefited by adhering to it. By incurring

the trifling cost of an entry, and without incurring any expense (59) whatever of investigating titles, the enterer was enabled, not only to put the owner of land to the great expense and burden of demonstrating the title in court, but to avail himself of any defect which lapse of time, death of witnesses, or lost deeds and records might occasion. To remedy this great hardship must have been the purpose of the General Assembly in adopting the provisions of The Code of 1883. What else could have been the prompting motive for such legislation? If we still place upon the protestant the burden of making out his title in order to defeat a simple entry, it seems to us we defeat the only purpose of the act, for the protestant then is in no better position in contesting an entry than he would be in seeking to vacate and set aside a grant. A grant is the solemn deed of the State, under its great seal, and he who attacks it and seeks to vacate it should assume the burden of proof, for the presumption is that the sovereign owns the land she undertakes to convey. But, while it is presumed the State once owned the lands within its borders, there is no presumption that they remain vacant and are open to entry. Laying an entry is the act of the enterer, and not the act of the State, and there is no presumption that the lands he appropriates are open to entry. "So far as the State is concerned, it is a matter of indifference who appropriates the land, provided it be paid for." *Ashley v. Sumner,* 57 N. C., 123. "It is not material to the State what vacant land is granted; but such entries are not allowed to interfere with the rights of other citizens." *Pearson, C. J.,* in *McDiarmid v. McMillan,* 58 N. C., 31. We quote these extracts for the purpose of showing the State's indifference to entries of land, while on the contrary the interests of the citizen possibly gave him a very lively interest in them. It was, therefore, we think, in the interest of the citizens who own and occupy land that the act of 1883 was enacted, to the end that the right to make the entry may be established before a grant is issued. This act was repealed by the next General Assembly and the old law resorted. Chapter 132, Laws 1885. But we find that the General Assembly of 1891 repealed the repealing act, leaving the (60) law as enacted in The Code of 1883 and as it now appears in the Revisal of 1905.

We can see no reason for restoring the act of 1883 unless it was in some measure intended to protect a *bona fide* claimant and possessor of land against the hardships entailed by indiscriminate entries, and to compel careful investigation before making entries. If we still place the *onus probandi* on the protestant in his contest with the enterer, the act of 1883 might as well not have been restored.

It is contended that we are compelling the enterer to prove a negative—to produce proof exclusively within the knowledge of the protestant

and practically to perform an impossibility by showing that no one has any interest in the land entered.

The first proposition is discussed in *Walker v. Carpenter,* and we will not repeat here what is there said. In that case we attempted to analyze the statute and to show that by its terms the claimant must establish on the trial his right to enter the land. With due deference to the opinions of others, we think it would be to entirely destroy the beneficent purpose of the act to hold that this requirement can be fulfilled by putting in evidence a simple entry, the *ex parte* act of the one who offers it.

Neither are we compelling the enterer to produce proof exclusively within some one else's knowledge, or to perform an impossibility.

The notice required by the act is intended to inform the neighborhood that the enterer claims a right to enter a certain piece of land, the boundaries of which are given. If no one protests against such right, the grant issues as a matter of course, if the statute in other respects has been complied with. If a protest is filed, then the enterer must make good his right as against the protestant only, and not against all
(61) the world. If, in response to the notice, only one person protests, the law presumes that the enterer has infringed upon the rights of no one else. Under our present registration act, which bears the name of our learned brother, *Mr. Justice Connor,* it is as possible for the enterer to run out the adjoining boundary of the protestant and to investigate his title deeds as it is for the protestant to do it himself. Without the registration law of 1885 we would be compelled to admit the force of the contention. Since then the record of title to land is an open book, free to the examination of all, and we suspect this consideration had something to do with the passage of the act of 1891. We think there is a marked distinction between this case and the cases cited in behalf of the enterer. *McCormick v. Monroe,* 46 N. C., 13, and *Board of Education v. Makely,* 139 N. C., 31. The former was decided thirty years before the act we are construing was passed, and is entirely consistent with what is hereinbefore said in respect to the burden of proof when a grant is attacked. The case further holds that where there is an exception in a grant, the *onus* of proof lies upon the party who would take advantage of the exception, in which ruling we fully concur.

The *Makely case* was likewise an attack upon a grant issued by the State, and the decision is in full accord with what we have herein said in respect to grants. In our opinion, the *ex parte* act of an individual is not to be invested with that presumption of rightfulness which attends the act of the State, and there is nothing in either case which militates against this view, as we read them. We can say the same of *McNamee v. Alexander,* 109 N. C., 242, in which this Court refused to enjoin the Secretary of State from issuing a grant upon the ground that the plain-

tiff had a complete remedy given by section 2786 of The Code, now section 1748 of the Revisal. In conclusion, we will say that, in adhering to our former opinion, we are not laying down a rule of proof of our own invention, but are giving effect to legislation which has never (62) been construed before. The effect of the decision can only be to make those who undertake to enter land more particular in making a preliminary investigation of the title to the land they seek to appropriate.

New trial.

WALKER, J., dissenting: The case shows that the protestants, who are the nominal and, as I think, the real and substantial plaintiffs in the record, failed to show that they had any title to or interest in the land, or to prove any facts upon which they could base a claim thereto. The presiding judge ruled, first, that the protestants must show title or interest in order to get a standing in court, and, second, that they must take the burden of proving that the land was not the subject of entry. It is impossible for me to perceive why both rulings were not correct. The first is plainly in accordance with the very words and requirements of the statute, for it is expressly provided therein, as a condition precedent to the right to file and maintain a protest, that the protestants shall have or at least claim title to or interest in the land covered by the entry, and this requirement is introduced by strict words of condition: "If any person shall claim title to or an interest in the land covered by the entry, he shall file his protest in writing," Revisal, sec. 1709. The protestants have, therefore, failed to show themselves qualified to contest the right of the defendant under his entry. In their protest they assert that they are the owners of the land, but there was no evidence of this fact in the case, although they attempted to establish it. The claim of the protestant must, of course, be *bona fide,* and the evidence must in some way connect him with the title or interest. The case might well end here, I think, with an affirmance of the judgment, as, to my mind at least, nothing is clearer than that by the explicit language of the statute the protestant must have an interest in the controversy, and for a very good reason. The State is concerned only to pro- (63) tect those who have acquired vested rights or interest in her lands, and, where no such private interest exists, her policy is, and ever has been, to encourage the entry of lands, so that they may be cultivated, improved, and enhanced in value, and thereby increase its wealth and prosperity. It surely was not intended to promote a litigious or vexatious spirit among the people by permitting any interloper who may imagine that he has a grievance against his neighbor to attack the validity of his entry. The State does not seek to encourage litigation of that kind. Its well settled policy has been the reverse of it. *Interest reipublicæ, ut sit finis litium.*

The *onus* of proof was properly placed upon the protestants by the court. It has, perhaps, been truly said, in regard to the burden of proof, that there is no one rule, or set of harmonious rules, which furnishes a sure and universal test for the solution of any given case, and that there is not and cannot be any general solvent for all cases. But certain general principles have been recognized as affording sufficient aid for determining upon whom should rest the burden of proof, in view of the particular nature of the case under consideration. Some of the more important ones may be thus enumerated:

1. He who alleges an affirmative must take the burden of proving it. *Millsaps v. McCormick,* 71 N. C., 53; *Edmonston v. Shelton,* 46 N. C., 451; *Hinson v. King,* 50 N. C., 393; *Covington v. Leak,* 65 N. C., 594.

2. He who asserts the existence of a fact essential to his success must establish it, even though it may be alleged in a negative form. *Willett v. Rich,* 142 Mass., 356; *Nash v. Hall,* 4 Indiana, 444.

3. When a fact is peculiarly within the knowledge of a party, or the evidence which will show it is more available to him, or he has more means of knowledge concerning the fact to be established than the other party, he must assume the burden of proving it (*S. v. Privett,* 49 N. C., 103; *Cook v. Guirkin,* 119 N. C., 17, and cases cited); and this is
(64) said to be true even if the proposition involved be negative instead of affirmative. *Robinson v. Robinson,* 51 Ill. App., 317.

4. Where the burden of proof is may be determined by considering which of the parties would succeed if no evidence was offered, and by the effect of striking from the record the allegation to be proved. The *onus* is on the party who, under such a test, would fail. 16 Cyc., 932; *Porter v. Sill,* 63 Miss., 357; *Martin v. Macey,* 4 Ky. L., 625.

5. The burden of proof is on the party alleging a breach of duty or the commission of a wrong, even though it involves a negative, so it has been said. *Baird v. Brown,* 28 La. Ann., 842.

The foregoing rules are supported by Stephens' Digest of Evidence (May's Ed. of 1886), pp. 143, 144, 145, and 146, and notes. There are, of course, other rules to the same effect, which might also be considered, but those mentioned will suffice, it seems to me, in this case, to determine upon whom is the burden of proof.

The affirmation of an allegation is not always determined by its form. Here the protestants allege that the entry is void because the lands were not the subject of entry. The allegation would be precisely the same if they had said that the entry was not valid, and thus expressed the idea negatively. But this does not destroy its affirmative character, no more than the same kind of change in the form of an allegation that a deed or other instrument is void. The statute says that, when the protest is filed, a notice shall issue to the enterer to show cause, not why his entry

is valid, or why he should have a grant, as the court virtually construes it, but "why his entry shall not be declared inoperative and void." This language clearly implies that the law regards it as *prima facie* valid if the formalities required by the statute have been observed, as was the case here, because the law will never presume a wrong, and, upon the bare entry, without any proof whatever, adjudge that the enterer has violated the law by laying his entry on land not vacant, or (65) otherwise not subject to entry; nor will it "declare" an act which is apparently valid to be void without some proof of its invalidity. It proceeds upon proof, and not upon mere conjecture, and gratuitously imputes evil to no man. It presumes innocence of wrong until there is evidence to the contrary, and it will assume that an entry which has not the appearance of any wrong, but which, on the contrary, has been shown to have been made according to the prescribed forms of the law, is rightful, and for this and other sufficient reasons it requires, not that it shall be validated by proof from the enterer, but that he should show cause why it should not be invalidated by proof from the protestant. Is there any precedent in the books for a court to declare, or to decree (which is in effect the same thing), an act which is apparently valid to be void, without at least some proof of its invalidity? If there is, it reverses the very elementary principle of all judicial procedure.

I am unable to see any practical difference between this case and *McCormick v. Monroe,* 46 N. C., 13, and *Board of Education v. Makely,* 139 N. C., 31. In the last case, at p. 35, we said: "This is not an action to recover the realty, but is brought for the avowed purpose of removing a cloud from plaintiffs' alleged title, and for that purpose to have vacated and canceled the grant issued by the State to the defendant. Plaintiffs are, therefore, as we have said, the actors, and they allege the affirmative of the issue to be the truth of the matter." The opinion of *Pearson, J.,* in *McCormick v. Monroe* seems to have a direct bearing upon this important question. In that case the defendant, in attacking a grant, relied upon an exception in it, upon the ground that the land described in the exception had previously been entered and granted. The learned judge said: "The only question is, Upon whom does the *onus* lie? Clearly upon the defendant." And again: "This (66) is but an instance of the familiar rule that the affirmative must be proved." A reading of that opinion will show that practically the same question was involved as we have in this case. He further says: "Another view of the subject may be taken. Suppose no part of the land had been previously granted. If the *onus* be on the plaintiff (the enterer and grantee), he can never recover one acre of it; yet it is admitted that he is entitled to 250 acres of it. . . . It is settled that, where the land is the subject of entry, the grant is voidable (if attacked

directly for fraud, irregularity, etc.); where the land is not the subject of entry, the grant is void and may be so treated in ejectment or trespass." But the burden is always upon the party who attempts to assail it, as *Judge Pearson* demonstrates by applying one of the cardinal maxims of the law, and he attaches no importance to the fact that a grant had actually issued upon the entry. It is the fact upon which the attack is based, towit, a previous entry or grant, that must be established by him who affirms the invalidity of the subsequent grant, or who would except any part of the land from the operation of the grant or from its general description by reason of the existence of that fact. This opinion of *Judge Pearson* has been approved, *Gudger v. Hensley,* 82 N. C., 481; *King v. Wells,* 94 N. C., 344; *Dugger v. McKesson,* 100 N. C., 11; *Midgett v. Wharton,* 102 N. C., 14; *Mfg. Co. v. Frey,* 112 N. C., 161. Many other cases might be cited illustrating and enforcing the same rule, but those we have selected will suffice to show that when a party attacks an entry or grant because the land described in it has been previously entered or granted, or because it is for any other reason not the subject of entry, he must prove it or fail in his suit. There is no presumption that land has been previously entered or granted. If there is any presumption at all in such cases, it is precisely the other way,

(67) namely, that it has not been. It is for this reason, among others, that we unanimously decided, in *Board of Education v. Makely,* 139 N. C., 31, that where the plaintiff claimed that a grant was void and should be canceled because it conveyed swamp land which was not the subject of entry, the burden was upon him to show it; and that case was not ejectment, but the suit was brought by the board of education, acting for and representing the State in its sovereign capacity, to set aside the grant. The two cases may, perhaps, be distinguished, by reason of a slight difference in their facts, but the principles underlying them cannot be. It has always been understood that, where a grant is assailed because it was based upon an entry which in its turn was laid upon land not vacant, the burden is upon the party assailing the grant; and the decision in this case, it seems to me, shakes the foundation of all the law upon this question, which has heretofore been considered as settled. In *Whitney v. Morrow,* 50 Wis., 197, the right of the plaintiff to recover depended upon the question whether the land had been entered or occupied in 1828, and the Court said that, in the absence of proof, it could not be held that it had been so occupied, and, as the existence of that fact was essential to the plaintiff's success, he should have proved it, under the general rule "that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." That case seems to furnish a clear and striking analogy to the one we now have in hand.

The second of the principles above stated, that he who asserts the existence of a fact essential to his success must prove it, is clearly applicable to this case, as the pivotal fact asserted here is that the land was not vacant, and this rendered the entry void. The same may be said of all the above remaining rules. It must be remembered that the statute requires the protestant to show that he has a title or interest; and whether he has or has not is peculiarly and necessarily within his own knowledge, and the evidence to establish that fact is more available to him than to his adversary. The plaintiffs actually allege (68) in the protest that they are the owners of the land. As to the fourth of the rules enumerated, it may be said that, if no evidence is offered in the case, the protestant must fail, as, the entry being regular in form under the statute, there is no presumption against it, and, there being no proof of the fact that the land was not vacant, there is nothing upon which a judgment for the protestant can be based. Finally, the law never presumes a wrong, but its maxim is, that all acts are taken to have been rightly and regularly done (*Omnia præsumuntur rite esse acta*). Under this maxim, the formal requisites of the statute having been complied with, the enterer will not be presumed to have committed the wrong of having entered land which was not vacant. The entry of land under such circumstances would be not only a legal but a moral wrong, and the law never imputes wrong, and surely never convicts of it until some proof is forthcoming from the accuser. The enterer, therefore, has made out a *prima facie* case, which must stand until overthrown by proof coming from the protestants.

But the crucial test in this case is, that the law will not require an impossibility of any one. (*Lex non cogit ad impossibilia.*) It does not seek to compel a man to do that which it must know he cannot possibly perform. Broom's Legal Maxims (6 Am. Ed.), p. 184. How can the enterer show that the land was vacant or had not been entered? The protestant can easily show that he has acquired the title by entry and grant, or in some other way, or even that it had been entered by another than himself, if that were sufficient under the statute, but the enterer would be compelled to survey every entry and grant recorded in the county, and even then he would not have exhausted all the proof of this requisite fact, for the State's title to the land may have been acquired by another, or lost by it in some other manner. How can it be successfully denied that to do this is practically impossible? Again, if we compare the ability of the two litigants to adduce evidence in (69) the case, we find that the protestant's greatly exceeds that of the enterer. He is required to show only his own title to, or interest in, the land covered by the entry, and every man is conclusively presumed to be prepared with proof of that kind, because his interest is surely en-

listed on that side. The law, therefore, charges him with knowledge of his own title and of all the facts which would tend to establish it.

Every reason that can be suggested would seem to demonstrate that the protestant is the party who must assume the burden of proof in such a case as this one.

The provision of the statute, that the enterer shall set forth the lines or boundaries of adjoining tracts in his entry, should count for nothing, for the land may be so located as to be sufficiently described under the statute by natural boundaries, and, besides, the proximity of land already granted to the tract in question has no tendency in law to show that the latter was not vacant when entered. Nor can I attach any importance to the argument that the enterer is the actor, for the reason that he asserts his right to enter the land. The conclusive answer is, that he has already entered it, and the protestant seeks in this proceeding to have "the entry declared inoperative and void," to use the language of the statute. He is, therefore, the aggressor, or the one who affirms the invalidity of the entry, and he should, by every rule of law and justice, be required to prove it. In *McNamee v. Alexander,* 109 N. C., 246, this Court, in a similar suit to locate an entry, placed the burden of proof upon the plaintiff who attacked it.

It is, indeed, strange that we should disagree as to whether the enterer showed any title to or interest in the land in dispute. "It was admitted that the protestants could not connect themselves with the possession of Ben Etheridge, Barbara Frost, or Neal Benson, so far as it had been shown." Indeed, no possession was shown which operated to
(70) ripen a title in any one, whether protestants connected themselves with the possession or not. It must be borne in mind that here the only attempt was to show title by possession under color. How, then, can the Connor Act of legislation apply? Would an investigation of the books show who had been in possession? And right here let us inquire why the burden should be put upon the enterer, even if the books did disclose the title. Is it not much easier for the protestant to carry the burden, as he is perfectly familiar with his own title? And, again, the proof of title may be mixed, depending partly upon grants or deeds and partly upon possession, estoppel and other elements which go to make up a good title. When the enterer lays his entry, he acquires an equitable title to or at least an interest in or right to the land (*Plemmons v. Fore,* 37 N. C., 312), which is sometimes denominated an inchoate right or equity, and which may be assigned and is regarded as a valuable one, and protected by the law, as much so as any other vested right or estate (*Bryan v. Hodges,* 107 N. C., 492), and which, according to ordinary rules, can only be defeated by showing a better right in

another. Even a subsequent enterer and grantee must take the burden of showing a superior right as against a prior entry, even when no grant has issued thereon.

It is a great mistake to suppose that the title to all the public lands of the State has passed out of it by entry and grant, or in any other way. The reports of the Secretary of State, which are public documents, and of which we take judicial notice, will show the contrary. *S. v. R. R.*, 141 N. C., 846. The presumption, therefore, that any lands entered are vacant still prevails, and we can find no case in which it has even been intimated that this presumption has ceased to operate, and we know of no reason why it should not now have its full force.

I concurred in the able dissenting opinion of *Justice Hoke* in (71) *Walker v. Carpenter*, 144 N. C., 674; and, for the reasons therein so clearly and forcefully stated, as well as for those herein set forth by me, I am unable to agree with the majority of the Court. The great importance of the question involved, and the effect of the ruling in this case upon prior decisions of this Court, are my only reasons for having said anything about it. That the policy of the State, which has heretofore been enforced, will be defeated by this decision, and the entry of the public lands seriously embarrassed, if not prevented, seems to me clear.

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

Cited: Cain v. Downing, 161 N. C., 598; *Walker v. Parker*, 169 N. C., 153.

D. A. FISHEL v. E. B. BROWNING.

(Filed 17 September, 1907.)

1. **Deeds and Conveyances—Covenant—Dower—Outstanding Right.**

A widow, before allotment of her dower, has no title to or estate in her deceased husband's land. Hence, when one claiming under the husband conveys by deed with covenant of seizin, the outstanding right of dower in the widow does not work a breach of the covenant.

2. **Same—Quarantine—Mansion House—Magna Carta.**

In this case, it not appearing that the mansion house was situate on the land in controversy, or that the widow lived thereon at the time of her husband's death, it is not necessary to decide whether she is entitled to her quarantine as secured to her by *Magna Carta*.

3. **Same—Covenant—Dower—Outstanding Right—Warranty—Encumbrances.**

The right of dower outstanding in the widow before allotment is such an encumbrance on the land as will work a breach of covenant against encumbrancers.

4. Same—Dower, After Allotment—Covenant—Warranty—Encumbrances.

When the widow enters after allotment of dower and evicts the covenantee, such eviction works a breach of the covenant of quiet enjoyment or general warranty.

5. Same—Warranty—Eviction—Title Paramount.

A general warranty or covenant of quiet enjoyment "against the claims of all persons whatsoever" is broken only by an eviction by one having paramount title.

6. Measure of damages for breach of the several covenants in deeds, discussed by CONNOR, J.

(72) ACTION tried before *Lyon, J.*, upon demurrer to the complaint, at June Term, 1907, of WARREN.

The plaintiff alleges that the *feme* defendant, being the owner of the land described in the complaint, with the written assent of her husband, the male defendant, for a full and valuable consideration, conveyed said land to him by deed, bearing date 6 July, 1904. The said deed contains the following covenants: "And the said Howard Browning and wife covenant to and with the said D. A. Fishel, his heirs and assigns, that they are seized of said premises in fee, and have right to convey the same in fee simple as it was conveyed to them; that the same are free from all encumbrances, and that they will warrant and defend the said title to the same against the claims of all persons whatsoever." That upon the delivery of said deed to him, and in accordance with his contract with defendants, plaintiff undertook to enter upon the said land, when he was met by the widow and heirs of one Louis Baker, who were in possession and who forbade his entrance and disputed his right and title to the same, which fact was at once reported to defendants. The *feme* defendant acquired title to said land by virtue of a sale and deed pursuant thereto, made by the administrator of Louis Baker, deceased, for the purpose of making assets to pay debts. The heirs of said Baker resisted the recovery by plaintiff of said land in an action brought by him, and by independent proceeding, as well as by motion in the original cause, alleging that no process was served upon them. The widow resisted recovery, alleging that she was entitled to have dower allotted in said land. That the litigation for the recovery of the
(73) land continued two years, plaintiff being finally successful; that plaintiff expended on account of said litigation $287 in cost and counsel fees; that the interest on the purchase money during the said litigation was $102, no part of which defendants have paid, although requested to do so. Plaintiff further alleges that the bargain, contract, and covenant of the defendant E. P. Browning, set forth in said deed, to sell and deliver said lands to him, and to warrant and defend the title thereto, was broken by her failure to deliver possession thereof to

plaintiff; that thereby plaintiff suffered loss and was endamaged and forced and compelled to incur the expense and outlay above set out, and that the defendant E. P. Browning is liable to him therefor as the measure of his damages by reason of the breach of the said contract and covenant, in failing to deliver said lands to plaintiff and in failing to defend the title. He demands judgment for the sum of $389 and interest.

Defendants demurred to the complaint, and assigned as grounds therefor:

First. That said action is for alleged damages due by reason of a false covenant of warranty of title, and the plaintiff does not allege in said complaint, as a breach of contract, an ouster or eviction by paramount legal title.

Second. That the complaint, upon its face, discloses that the defendant's wife, E. P. Browning, had a good and sufficient title to the property, and that the plaintiff got such title in fee by the deed of the defendant, and that the plaintiff recovered possession of the property under their said deed.

Third. That the complaint shows that the plaintiff was entitled, under his deed from the defendant, to the possession of the property, the interest of the tenant in dower (the dower not having been allotted) being subordinate to that of the heirs.

Fourth. That the complaint shows that the dower had not been (74) allotted, and the tenant in dower, therefore, had no right to hold possession against the title of the purchaser, the plaintiff.

From a judgment sustaining the demurrer, plaintiff appealed.

T. T. Hicks and Tasker Polk for plaintiff.
Walter A. Montgomery and John H. Kerr for defendant.

CONNOR, J., after stating the case: The deed set forth in the complaint contains several covenants: (1) The covenant of seizin and right to convey. (2) Covenant against encumbrances. (3) General warranty, which is, under our decisions, a covenant for quiet enjoyment. It is not clear that the plaintiff intends to allege a breach of the covenant of seizin. Giving, however, the language of the complaint a liberal construction for the purpose of discovering such allegation, we are of the opinion that, for the purposes of this appeal, the *feme* defendant was seized of the land; that she had title thereto, with right of entry, subject to the encumbrance of the right of dower in the widow of Louis Baker. It is conceded that, with this exception, she had the title of Baker. Whatever controversy the heirs made in regard to the validity of the proceeding by the administrator and the sale made thereunder is

conceded to have been without foundation. It is further conceded that the widow was entitled to have her dower allotted in the land, and that no allotment was made. It has always been held by this Court that, until allotment, the widow has no right to retain possession of her deceased husband's lands against the heir or those claiming under him. In *Spencer v. Westcott,* 18 N. C., 213, *Daniel, J.,* said: "The widow has no right of dower until it has been assigned to her. . . . It is not until her dower has been duly assigned that a widow acquires a vested estate for life which will entitle her to maintain ejectment. On recovering at law, the sheriff delivers the demandant possession
(75) of her dower by metes and bounds." *Webb v. Boyle,* 63 N. C., 271. In *S. v. Thompson,* 130 N. C., 680, defendant was indicted for forcible entry and detainer. It appearing that the prosecutrix was in possession after the death of her husband, no dower having been assigned, *Furches, C. J.,* said: "She was not the owner of the land, from her own evidence, which tends to show, and we will assume did show, that the land she lived on belonged to her husband before his death and descended to his heirs, as no will is alleged or shown. She was entitled to dower, but this land had not been assigned or allotted to her. And the fact that she was his widow and entitled to dower gave her no right to any part of the land." Whether in this State, in the absence of any statute, she is entitled, under chapter 7, *Magna Carta,* to her *quarantine,* is not presented on this record, for the same reason assigned in *Spencer v. Westcott, supra,* that it does not appear that the mansion house was situate on the land in controversy. 10 A. and E., 148. We are of the opinion, therefore, that the possession of the heirs and widow of Baker was not a breach of the covenant of seizin or "the right to convey in fee simple as the same was conveyed to them." The covenant of seizin refers to the *title* and not the possession. Rawle on Covenants, 60, 61.

Passing, for the present, the next covenant, we find in the deed the usual covenant of warranty, which, as said by *Taylor, C. J.,* in *Herrin v. McEntyre,* 8 N. C., 410, is subject to the same construction as a covenant for quiet enjoyment. This is common learning with us. What, then, are the plaintiff's rights, treating the covenant as one for quiet enjoyment, sometimes called "the sweeping covenant"? *Howell v. Richards,* 11 East, 833. A breach of this covenant occurs when there is an eviction or disturbance of the possession by title paramount. Usually the action is based upon an eviction, either actual or constructive, of the covenantee after he has entered upon or been put into possession
(76) by his covenantor. Where title passed by deeds, operating by livery of seizin, the breach could not otherwise occur, because the transfer of actual possession was essential to perfecting the conveyance. After the enactment of the statute of uses, when title passed by virtue

of the declaration of the use and the transfer of the possession by operation of the statute, it frequently happened that transfers of title occurred when some person other than the bargainor was in the actual occupation of the land. We are not concerned, in this discussion, with the effect of the statutes against champerty, passed to prevent speculation in disputed titles. In such cases, where the bargainee, whose entry was barred by an adverse occupant, called upon his bargainor, who had given him a covenant of quiet enjoyment, to make good his covenant or pay damages for its breach, he was met with the answer that he had suffered no eviction, and therefore had no right of action. The law was so held by a number of courts. *Parker, C. J.*, said: "No entry having been made by the grantee under his deed, an eviction could not have taken place." *Chappell v. Ball,* 17 Mass., 220. Several other courts adopted this view. In *Grist v. Hodges,* 14 N. C., 198, the question for the first time came before this Court. *Ruffin, J.*, said: "The existence of an encumbrance, or the mere recovery in a possessory action under which the bargainee has not actually been disturbed, are held, for technical reasons, not to be breaches of a covenant for quiet possession, or, in other words, of our warranties. But that is a very different case from this, in which the bargainee never, in fact, was in possession, but was kept out by the possession of another under better title existing at the time of the sale and deed, and ever since. . . . The existence of a better title, with an actual possession, is of itself a breach of the covenant. It is manifestly just that it should be so considered, for otherwise the covenantee would have no redress but by making himself a trespasser by an actual entry, which the law requires of nobody." The learned justice (77) places his conclusion upon the ground that, as between the bargainor and bargainee, the statute of uses, immediately upon the execution of the deed, carries the possession to the bargainee. As between the parties, the bargainee is, on strict legal principles, in. If, however, there be in reality an adverse possession, he can be so only for an instant, because "the implication against the truth will be no further than is necessary to make the title effectual for its purposes." The bargainee will be taken to have been evicted *eo instanti* the possession by operation of the statute takes place. Thus, by a refinement, substantial justice is done. In *Shuttack v. Lamb,* 65 N. Y., 499, the question is ably discussed and the same conclusion reached by *Earl, C.* He reviews all of the cases. *Dwight, C.*, dissented, saying that many cases in the various States follow *Grist v. Hodges,* "in which the theory is stated with admirable force," quoting the language of Mr. Rawle. *Peters v. Bowman,* 98 U. S., 56. The defendants insist that, conceding the eviction upon the authority of *Grist v. Hodges, supra,* there was no superior or paramount title in the evictors; that the right to sue arises only upon an

eviction under paramount title. The plaintiff says that, conceding the general rule, his covenant is not confined to an eviction under paramount title, but extends to "the claims of all persons whatsoever," thus protecting him against damage by reason of an eviction by trespassers. This question appears to have been much mooted, and the early English authorities contradictory. The learned counsel for the plaintiff calls to our attention the form of the covenant of general warranty given by Mr. Washburn, which is confined to "all lawful claims and demands," etc.; whereas, he says, the covenant for quiet enjoyment includes indemnity against "the claims of any and all persons whatsoever." Mr. Rawle says: "There were several old authorities which held that a covenant thus absolutely expressed extended to all interruptions and dis-
(78) turbances whatsoever, whether lawful or tortious; and, although authority was not wanting in opposition to this doctrine, the law seems not to have been settled until *Hayes v. Bickerstaff,* 4 Vaughan, 118. That case decided that the covenant, however generally expressed, must be understood as applying merely to the acts of those claiming by title. In the first place, it would be unreasonable that a man should covenant against tortious acts of strangers which he could not see or prevent; secondly, the law gives a remedy against the wrongdoer; thirdly, the covenantee might thus have a double remedy and receive a double compensation; and, fourthly, it would enable him to injure the covenantor by colluding with a stranger to make a tortious entry." Rawle on Covenants, 147. Certain exceptions to the rule are stated, but, as none of them apply to this appeal, it is not necessary to discuss them. In Platt on Covenants, 3 Law Lib., 312, a form is given, said to be in general use, concluding, as in this record, "or any other person or persons whomsoever." The author says: "A general covenant for quiet enjoyment was, in earlier times, holden to extend to tortious evictions or interruptions, but this doctrine was never fully acquiesced in; and a different rule is now established, so that at present, when we speak of a covenant providing against the acts of all men, it is to be understood of all men claiming by title, for the law will not adjudge that the wrongful acts of strangers are covenanted against. Hence, if one who has no right ousts or disseizes a purchaser, he shall not have an action against the vendor; the reason being that the law has already furnished the means of redress by giving the injured party an action of trespass against the wrongdoer." So *Lord Ellenborough, C. J.,* in *Nash v. Palmer,* 1 Barn. and Cres., 29, says: "The rule has been correctly stated that, where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title." *Wotton v. Hele,* 2 Saund.,
Part II, 177. "The covenant for quiet enjoyment is the same as
(79) the covenant of warranty in all its practical effects. It is an as-

surance to the grantee that his enjoyment of the land conveyed shall not be disturbed by lawful means, but does not attempt to protect him against mere disturbances by trespassers." Hopkins Real Prop., 448; *Underwood v. Birchard,* 47 Vt., 305. While the precise question has not, so far as our investigations go, been before this Court, we find the general principle recognized, as in *Midgett v. Brooks,* 34 N. C., 145, *Nash, J.,* says: "The words in the deed we are considering, upon their face, import a promise or agreement on the part of the vendor that Midgett shall enjoy the premises free from disturbance from any one claiming by title paramount; and that is a covenant for quiet enjoyment."

We, therefore, conclude that, while there was an eviction within the terms of the covenant, the plaintiff's action upon the covenant fails, because it appears from the facts set forth in the complaint that the evictors had no title—they were mere trespassers. This is shown by the result of plaintiff's action brought to eject them. There is, however, in the deed a covenant against encumbrances. The learned counsel for defendants concede that the dower right of the widow, independent of her wrongful possession, was an encumbrance upon the title which constituted a breach of the covenant. It is well settled that the right of dower is such an encumbrance upon the land as works a breach of the covenant. *Gore v. Townsend,* 105 N. C., 228; 1 Jones Conveyances, sec. 867. The difficulty with which plaintiff is confronted in this action is, that he does not claim or show any damage sustained by reason of such encumbrance, but expressly excludes any such claim by alleging that his measure of damage is the amount paid by way of counsel fees and cost and the interest on the entire purchase money. This certainly cannot be correct. As said by Mr. Rawle, the rule which has been adopted as to the measure of damages for breach of this covenant is very simple. If the encumbrance is contingent in its character, and if nothing has been paid by the plaintiff towards removing or ex- (80) tinguishing it, and if it has inflicted no actual injury upon him, he can obtain but nominal damages, as he is not allowed to recover a certain compensation for running the risk of an uncertain injury. Rawle on Cov., 129; Hale on Dam., 369. Until dower was allotted, the widow had no right to interfere with plaintiff's possession. As she never had dower allotted, he sustained no damage by reason of the existence of her right to do so. It may be that, for the purpose of relieving his estate from the uncertain extent of the encumbrance, the plaintiff may have filed a petition against the widow for the allotment of her dower. The heir could do so after the expiration of three months from the death of her husband. Revisal, sec. 3088. Whether, without doing so, the plaintiff could sue upon the covenant, alleging that, by reason of the encumbrance, the market value of his title was depreciated in a sum either

certain or capable of being made so, is not presented upon this appeal, because there is no such allegation. The complaint is drawn upon the theory that counsel fees actually paid and interest on the entire purchase money constitute the measure of damages for the breach of covenant against an encumbrance which could, in no possible event, have affected more than one-third in value of the land during the life of the widow. Issue was joined upon the demurrer. His Honor was clearly correct in holding that plaintiff was not entitled to recover upon the complaint. It may be that, by an amendment of the complaint, he would have been entitled to at least nominal damages. His Honor would have permitted such amendment if so requested, but, as plaintiff elected to stand by his complaint as drawn, and as, for the reasons we have pointed out, he is not entitled to maintain his action, we can only affirm the judgment. It is well understood that, if the facts set forth in the complaint show a remediable legal wrong, the action shall not be dismissed because of the relief demanded. Here, however, while the plain-
(81) tiff shows that he held defendants' deed, containing a covenant against encumbrances, and that a contingent encumbrance was in existence, he further shows that, prior to the bringing of his action, the possibility of damage by reason of such encumbrance came to an end by the death of the widow. He says: "Plaintiff avers that the bargain, contract and covenant . . . was broken by her failure to deliver possession thereof to plaintiff"; and that "thereby plaintiff suffered loss and was endamaged and forced and compelled to incur the expense and outlay above set out, and that the defendant E. P. Browning is liable to him therefor as the measure of his damages by reason of the breach of the said contract and covenant in failing to deliver said lands to plaintiff and in failing to defend the title." This language, under the most liberal construction, does not aver any damage by reason of the breach of the covenant against encumbrance.

Upon a careful consideration of the complaint, we concur with his Honor in sustaining the demurrer.

Affirmed.

Cited: Bethell v. McKinney, 164 N. C., 75; *Taylor v. Meadows,* 169 N. C., 126.

M. R. TURNAGE v. JACOB JOYNER.

(Filed 17 September, 1907.)

Judgment—Estoppel—Lands.

A judgment by default final upon a complaint alleging that the plaintiff was the "owner in fee simple" of certain described lands, that they were withheld by the defendant, and asking to recover the possession, put the title to the lands in issue, and operates as an estoppel in a subsequent action by the same defendant against the same plaintiff in an action to recover lands.

ACTION tried before *Neal, J.*, at March Term, 1907, of PITT.

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

CLARK, C. J. W. G. Lang, mortgagee, sold the land now in (82) controversy under a power of sale in a mortgage executed to him by M. R. Turnage and wife, plaintiffs herein. It was duly advertised and sold. The regularity of the proceedings is not questioned. J. A. Lang was purchaser of the land at said sale, 8 February, 1897. Soon thereafter J. A. Lang brought an action against Turnage and wife to recover said land, and in his complaint alleged that he was "the owner in fee simple" of the land (describing it); that Turnage and wife held possession; asking judgment to recover it and damages for the detention. The defendant filed no answer, and judgment by default final was entered at March Term, 1897, of the Superior Court for that county, and the writ of possession issued under which J. A. Lang was put in possession 19 April, 1897. J. A. Lang conveyed to W. G. Lang 23 March, 1897, and the land has been in his possession, or in the defendant's, claiming under him, ever since.

This action was begun 28 January, 1905, the plaintiff averring that J. A. Lang bought at the mortgage sale as agent for his father, the mortgagee, claiming that hence the sale was void, and asking that the defendants be decreed trustees of the plaintiffs, and for an account of rents and profits. The answer denies that J. A. Lang bought as agent for his father, and sets up as further defense the judgment between J. A. Lang and the defendants at March Term, 1897, as an estoppel; that the claim is furthermore a stale claim, by reason of the delay for nearly eight years to assert it, and also pleaded the seven years statute of limitations. At the close of the evidence the court intimated an opinion that the plaintiffs were estopped and could not recover, whereupon they took a nonsuit and appealed.

In the former proceeding of ejectment the judgment determined only the possession, and did not prevent another action if it went against the

plaintiff, for it did not pass upon the title. Under the present system a judgment in an action for the recovery of land is conclusive of
(83) "all matters presented by the pleadings, or which may be properly predicated upon them." *Tyler v. Capehart,* 125 N. C., 64.

The complaint in the former action between these parties at March term of the Superior Court alleged that the plaintiff therein, J. A. Lang, was the "owner in fee simple" of the premises; that they were withheld by the defendant, and asked to recover possession. This put the title in issue. Certainly J. A. Lang was not seeking to recover possession as mortgagee, for he was not mortgagee, but was asserting his title as purchaser. The judgment by default final was as conclusive of his allegation of ownership in fee as if there had been an issue framed and the fact found by a jury thereon. It was held in *Johnson v. Pate,* 90 N. C., 334, that a "judgment rendered upon demurrer is as conclusive, by way of estoppel, as a verdict finding the facts confessed would have been." That case also holds that, in an action to recover realty, if title is averred, the judgment is as conclusive thereof as if it were an action for personal property. To the same purport are many other cases. *Davis v. Higgins,* 87 N. C., 298; *Cowles v. Ferguson,* 90 N. C., 313; *Bickett v. Nash,* 101 N. C., 583; *Allen v. Sallinger,* 103 N. C., 14; *Falls v. Gamble,* 66 N. C., 462. This last case holds that if, under the present system, the plaintiff does not wish the judgment to be conclusive of the title, he must restrict his allegations to a right to the possession. *Falls v. Gamble* is cited with approval in *Isler v. Harrison,* 71 N. C., 64; *Yates v. Yates,* 81 N. C., 401.

In *Tuttle v. Harrill,* 85 N. C., 461, *Ruffin, J.,* says, speaking of the estoppel by judgment there pleaded: "That was an action at law, it is true, being for the possession of the land upon the strict legal title of the then plaintiff (now defendant). Still, constituted as our courts now are, it was open to the defendant in the action to set up any equitable defenses he might have, and, if able to show a perfect equitable
(84) right in himself (such as he seeks to assert in his present action) to defeat a recovery upon the legal title of the plaintiff, it was his folly not to have asserted this claim, and he must be concluded by the judgment rendered in the cause." That case is exactly "on all-fours" with this. It has been cited and approved on this point. *Davis v. Higgins,* 87 N. C., 300; *Anderson v. Rainey,* 100 N. C., 337; *Mfg. Co. v. Moore,* 144 N. C., 527. In effect, it practically overrules what was said by the same learned judge in *Wittkowski v. Watkins,* 84 N. C., 456, but it is in accord, as above shown, with the other rulings of this Court, which are reaffirmed by us.

It is not necessary to pass upon the other two defenses set up, but we are inclined to think they are both valid. Even if the purchase had

been by J. A. Lang as agent for the mortgagee in point of fact, though nominally for himself, such purchase was not void, but merely voidable, and the conduct of plaintiffs in leaving the country, asserting no claim or right for eight years, until lands rose in value, would seem an abandonment of claim. There are certainly no surrounding circumstances, such as nonage, intimidation, oppression and the like, which should induce a court of equity to overlook the lapse of time. Nor are we prepared to say that the lapse of seven years after the ouster by judgment and an adversary holding thereunder, and under the subsequent deed of J. A. Lang to W. G. Lang, is not full protection. The decree and deed are both color of title, certainly, and the holding was adverse from the execution of the writ of possession in April, 1897. However, it is not necessary to pass upon either of these points, and we are not to be understood as doing so.

We hold that the judge properly decided that the former judgment between these parties was an estoppel as to the land in controversy in this action.

Affirmed.

Cited: Roberts v. Pratt, 152 N. C., 737; *White v. Tayloe,* 153 N. C., 35; *Roberts v. Pratt,* 158 N. C., 52; *Stelges v. Simmons,* 170 N. C., 45.

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(85)

G. E. MIDYETTE, ADMINISTRATOR, v. LUCY M. GRUBBS ET AL.

(Filed 25 September, 1907.)

1. **Standing Timber—Realty.**

Standing and growing timber is realty, and interests concerning it are governed by the laws applicable to that kind of property.

2. **Same—Heirs—Dower Interests.**

It appearing that the intestate, at the time of his death, was the owner of certain standing timber by virtue of three deeds made to him and his heirs and assigns, standing and growing upon certain lands, properly described and bounded, which would measure 10 inches across the stump at the time of cutting, with the right to enter on said lands and cut and remove said timber within certain periods, varying as to certain tracts from seven to ten years, and which period has not expired, the administrator, as such, is not entitled to the timber, for it devolved upon the heir, subject to the right of dower of the widow, both interests determinable as to all the timber not removed within the time specified in the deeds.

ACTION tried before *Lyon, J.,* at Spring Term, 1907, of NORTHAMPTON.

It appears that W. F. Grubbs died on or about June, 1907, intestate, and domiciled in said county of Northampton. The plaintiff is the duly qualified and acting administrator of his estate, and the defendants are his widow and child and only heir at law. That at the time of his death said W. F. Grubbs was the owner of certain standing timber in said county, under and by virtue of three deeds, bearing date in the year 1905, which conveyed to said intestate all the timber, except the oak, standing and growing upon certain lands, properly described and bounded, which would measure 10 inches across the stump at the time of cutting, etc., to him and his heirs and assigns, forever, with the right to enter on said lands, build tramroads, etc., and cut and remove said timber at any time, as to the first deed, within eight years from the date, with privilege of two more on certain specified conditions; and as to the second and
(86) third deeds, "at any time within five years from the date, with the privilege of five more on certain specified conditions." That the intestate having died holding the interest conveyed to him by said instruments, and before the time limited for the removal of the timber had expired, the plaintiff, his duly qualified administrator, brought this action against his widow and heir at law, claiming that the timber standing and growing on said land embraced in the deeds was personal property, and his claim was resisted by the widow and heir at law, claiming that same was realty and, as such, belonged to defendants.

The court, being of the opinion that, under and by virtue of the terms of the three deeds, the timber then standing and growing upon the lands therein described was personalty, gave judgment for plaintiff, and defendants excepted and appealed.

Peebles & Harris and W. C. Bowen for plaintiff.
Winborne & Lawrence and S. J. Calvert for defendants.

HOKE, J., after stating the case: There are courts which hold that in deeds and contracts for the sale of standing timber which evidently contemplate an immediate severance of the timber, or severance within a reasonable time, but conferring no beneficial interest in the soil for the purpose of further growth, such timber shall be considered as personalty, and the validity and effect of contracts concerning it shall be construed and treated in most respects as affecting that kind of property. 2 Page on Contracts, p. 992; Ewell on Fixtures (2 Ed.), 45, note 12; *McClintock's Appeal,* 71 Pa., 365; *Huff v. McCauley,* 53 Pa., 206; *Marshall v. Green,* I. C. P. Div., 39. In 2 Page on Contracts, 991, 992, the author, after saying that growing trees, other than trees in a nursery, are held in most jurisdictions to be realty, and that a contract for the sale of growing timber, as such, to be removed by the vendee, is within the

clause of the statute of frauds requiring contracts concerning (87) land to be in writing, states the doctrine maintained by the courts, above referred to, as follows: "Some American courts follow the rule which, after much vacillation, was finally adopted by the English courts, that if the parties in contracting contemplate the sale of growing trees solely as chattels, and do not intend that they shall remain attached to the realty for an indefinite or unreasonable time, and do not intend that they shall derive a benefit from allowing them to remain attached to the realty, the contract is not within this clause of the statute. Some jurisdictions hold that if the contract for the sale of growing trees contemplates an immediate severance of them from the soil, they are to be treated as personalty, and hence not within this clause of the statute; while, if they are to be removed at the discretion of the vendee, they are realty and within the statute." And the English rule to which reference is made is thus stated by *Lord Coleridge* in the case of *Marshall v. Green, supra,* p. 39, and quoting from Sergeant Williams in Saunders' Reports the case of *Duppa v. Mayo:* "The principle of these decisions appears to be this: that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods." Some of the decisions have gone so far as to hold that, although the time limited for the removal of the timber may have expired, if the vendee afterwards enters and cuts and removes the timber, the vendor might sue him and recover damages for breaking the close, by action in the nature of trespass *quare clausum fregit,* but he could not recover the value of the timber. The views announced in these decisions have not prevailed with us. (88) On the contrary, this Court has uniformly held that standing or growing timber is realty, and that deeds and contracts concerning it are governed by the laws applicable to that kind of property. *Brittain v. McKay,* 23 N. C., 265; *Whitted v. Smith,* 47 N. C., 39; *Ward v. Gay,* 137 N. C., 397. In some of our former decisions there was intimation given that, in contracts of this kind, where the growing timber was absolutely conveyed and the time of removal was limited to a definite number of years, the effect of such a contract was to create a lease; but in *Bunch v. Lumber Co.,* 134 N. C., 116, decided intimation was given that such a construction of the contract was not the correct one; and in *Hawkins v. Lumber Co.,* 139 N. C., 160, the Court decided that such an instrument was not a lease, but "conveyed a present estate of absolute ownership

in the timber defeasible as to all timber not removed within the time required by the terms of the deed." *Hawkins v. Lumber Co.*, 139 N. C., 162. This case has been approved in several recent decisions of the Court. *Mining Co. v. Cotton Mills*, 143 N. C., 307; *Ives v. R. R.*, 142 N. C., 131; *Lumber Co. v. Corey*, 140 N. C., 466. As said by *Walker, J.*, in *Ives' case*, "It may now be taken as settled that growing trees are a part of the realty, and a contract to sell and convey them, or any interest in or concerning them, must be reduced to writing." These authorities also clearly establish that, on the expiration of the time stated in such a contract within which the timber may be removed, all right in the vendee shall cease and determine, and the estate in so much of the standing timber as has not by that time been severed shall revert to the vendor; and both positions are upheld in numerous and well considered cases in other jurisdictions. *McCumber v. R. R.*, 108 Mich., 491; *Williams v. Flood*, 63 Mich., 493; *Lumber Co. v. Hines*, 93 Minn., 505; *Shasson v. Montgomery*, 32 Wis., 52. Our decisions, then, having established the principle that standing timber is realty, "as much a
(89) part of the realty as the soil itself" (*Douglas, J.*, in *Lumber Co. v. Hines, supra*); second, that deeds and contracts concerning it must be construed as affecting realty; and, further, that in instruments conveying the growing timber to be removed within a definite time the title to all timber not severed within the time shall revert to the vendor—we hold that the deeds now under consideration, which conveyed to the intestate, to him and his heirs and assigns, all the standing timber on certain described tracts of land which should measure 10 inches when cut, and to be removed within ten years, created an estate in such timber in fee, not pure and simple, but qualified and debased by the provision that, in case the trees should not be severed within the time, the title to same should revert, and rendered the estate a qualified or base or determinable fee. Some anomaly may be suggested as a result of this position, more apparent, however, than real, and arising chiefly from the fact that the property changed its nature by the act of final and complete appropriation. But these difficulties are inherent from the nature of the property, and would exist in any construction that would be placed on such a contract, and we think that the instrument should be construed as of the time when it takes effect and the interest is created, and in reference to the property in its then condition; and so construing these deeds, they convey a determinable fee in realty. It is objected that the estate could in no event be a fee, in that it lacks one of the essential requirements of such estates, that it might by possibility endure forever, whereas this estate must at any event terminate within ten years. Such a possibility is generally held to be an essential feature of an estate in fee, and, if applied in strictness to these instruments, the requirement

might be met by the fact that the interest conveyed includes the right of absolute appropriation by severance. But such a requirement, by authority, has not been universally held to be essential. Thus, *my Lord Coke,* in *Liford's case,* 2 Coke, 91, says: "A man may (90) have an estate in lands as long as a tree shall grow, because a man may have an inheritance in the tree itself." Dr. Minor, speaking of this and like estates, makes this comment: "By parity of reason, leaving authority out of view, it would seem that an estate limited to A. and his heirs until Z. should return from abroad was of like character with that just described, and that both might be properly denominated descendible freeholds; the estate in the case last stated passing to the heirs of A. if he dies before Z. returns, and, upon Z.'s death without returning, ceasing altogether. So, in like manner, a limitation to A. and his heirs, as long as a tree shall grow, would seem to be not properly an estate of inheritance, not even a base fee (since it cannot by possibility continue forever), but only a descendible freehold, inuring after A.'s death to his heirs by the effect of the special limitation until the tree falls, and then coming to its appointed end. Adverse authorities, however, are too numerous and strong to admit of this construction, and both the cases supposed are to be deemed estates of inheritance—that is, according to the more rigorous analysis of Plowden and Preston, determinable fees. *Walsingham's case,* 2 Plowd., 557; 1 Prest. Est., 432, 441." 2 Minor's Institutes, 98, 99. The estates then conveyed by these deeds, being in the nature of determinable fee in realty, are subject to the laws of devolution and transfer applicable to such estates, and on the death of the intestate it follows that the estate passed to his heirs, subject to the dower interest of his widow; the dower, however, partaking of the same infirmity which attaches to the estate from which it is derived. Pearson's Lectures, p. 130; 2 Minor's Institutes, 87-129; Hopkins on Real Property, 88. In reference to such estates, this last author says: "Dower attaches to determinable estates, but is defeated by the happenings of the event which terminates the estate. If this occurs before the husband's death, dower never becomes consummate; if after his death, the enjoyment of the land assigned as dower is (91) cut off." This statement of the doctrine must be taken with the limitation in this State that it only applies when the estate of the first taker is determined by an event entirely collateral, and does not apply to a fee determinable on the death of the first taker and passing a substitute estate by way of executory devise. 4 Kent Com., 49, where the author says: "So dower will be defeated by the operation of collateral limitations, as in the case of an estate to a man and his heirs so long as a tree shall stand, and, in case of a grant of land to A. and his heirs, till the building of St. Paul's Church is finished, and the contingency

happens. Whether dower will be defeated by a collateral limitation by way of shifting use or executory devise is hitherto an unsettled and vexed question, largely discussed in the books." The *quære* here suggested by the learned author has been resolved with us in favor of the widow's dower in a decision of much learning by *Ashe, J.*, in *Pollard v. Slaughter,* 92 N. C., 72, and other courts of the highest authority have taken the same view. *Northcott v. Whipp,* 51 Ky., 65-73.

We are referred to Ewell on Fixtures (2 Ed.), p. 45, note 12, where a large number of cases are cited as tending to show that these deeds present a case of constructive severance, and the interest created should be considered as personalty. The author here classes growing trees with fixtures, and lays down the doctrine as claimed. A reference to these authorities, however, will show that they refer chiefly to fixtures proper, or to growing crops, about which there has been great diversity in the decisions, arising in many instances from different statutory regulations; or they were cases in jurisdictions which hold, as those referred to in the outset, that contracts for sale of standing timber, when an immediate severance is contemplated, create an interest in personalty, a principle which we have endeavored to show has not obtained with us.
(92) Even in jurisdictions where this doctrine prevails it is held not to obtain when a beneficial interest in the soil is conferred for the purpose of future growth; and in the present case the contract passes the trees to be taken off in ten years and measuring 10 inches when cut, thus passing a beneficial use of the soil for the purposes of growth; so that in any event the estate created by these deeds would be held to be realty.

We are of opinion, therefore, and so hold, that on the death of the intestate the estate created by the deeds devolved upon his heir, subject to the right of dower in his widow, both interests determinable as to all timber not removed within the time specified in the deeds. There is error.

Judgment reversed.

Cited: Bateman v. Lumber Co., 154 N. C., 251; *Williams v. Parsons,* 167 N. C., 531; *Fowle v. McLean,* 168 N. C., 540; *Timber Co. v. Wells,* 171 N. C., 264.

D. C. STRICKLAND ET AL. v. T. M. PERKINS & CO.

(Filed 25 September, 1907.)

Principal and Agent—Vendor and Vendee—Change of Agent—Contract—Question for Jury.

When the plaintiff has bought for cash of the defendant, through his broker, certain goods for prompt delivery, of which only a part were actually delivered, and suit is brought for the balance, and the defense is that, subsequent to the sale, the plaintiff made a separate arrangement with the broker, as his agent, for the delivery of the goods, the question raised is one of fact, and under conflicting evidence the verdict thereon will not be disturbed.

ACTION tried before *Cooke, J.*, and a jury, at October Term, 1906, of FRANKLIN.

From judgment for the plaintiffs, defendants excepted and appealed.

W. H. Yarborough, Jr., and T. W. Bickett for plaintiffs.

W. H. Ruffin, F. S. Spruill, and Armistead Jones & Son for defendants.

WALKER, J. The only question in this case, it seems to us, (93) after a most careful examination of the record, is substantially and essentially one of fact. The learned judge who presided at the trial presented the questions at issue fairly to the jury, giving to each party the full benefit of every principle of law applicable to his contention upon the evidence. Let us see if this is not true. The defendants, who are pork packers, contracted to sell, by and through their agent and broker, W. B. Green, and to deliver to the plaintiffs 10,000 pounds of dried salt ribs, at the price of $8.20 per 100 pounds, and in the execution of this contract defendants actually delivered only 4,013 pounds, at or about the time of the purchase. The plaintiffs paid, at the time of the purchase, the full price of the goods, which was $820, for the entire quantity agreed to be delivered, and brought this suit to recover the price of the salt ribs which were not delivered and for which they had paid. The defendants allege, and there was evidence tending to show, that they delivered the lot of ribs of 10,000 pounds to their broker, W. B. Green, and that it was thereafter agreed between him and the plaintiffs that the ribs should be delivered to them at such times and in such quantities as called for, and for this purpose they were stored by the broker in the warehouse. There was also evidence to the contrary, the plaintiffs contending and introducing evidence to show that the sale and delivery were to take effect as a completed transaction presently or at the time of the purchase, and that they never received the goods according to the stipulations of the contract; and in order to establish their contention they relied partly upon the testimony of the defendants' witnesses.

The court was fair, at least to the defendants, in submitting the case to the jury, giving them the benefit of every conceivable ground upon which they could defeat the plaintiffs' claim or recovery upon the evidence, and presenting the case to the jury in its every phase.

It appears to us, upon a close scrutiny of the testimony, that even the evidence introduced by the defendants was sufficient to sustain the
(94) verdict of the jury as we have discovered some expressions which fell from their witnesses and which give countenance to the plaintiffs' theory. It is a familiar rule in an appellate court that, where there is any evidence to go to the jury, and no error in law appears in the conduct of the case, there is nothing to do but affirm the judgment below, so far as the application of the law to the case is concerned. We have not been able to see any departure from the principles applicable to cases of this kind, although we have diligently searched for the same, as counsel were earnest and zealous in arguing that error had been committed. The matter resolves itself into this: that the defendants have, upon the evidence, and with a charge which presented their contention to the jury in the most favorable aspect for them, failed to convince the triers of the fact that their view of the case was the correct one, and that is all.

There is no question of subsequent approval or ratification of an agent's acts in this case, and no serious question is presented as to the extent or limitation of the powers of a special agent within the rules laid down in *Brittain v. Westhall,* 135 N. C., 496, and 137 N. C., 34, and *Biggs v. Ins. Co.,* 88 N. C., 143, which cases were cited by the defendants at the bar. Those cases and *Williams v. Whiting,* 92 N. C., 691, which was also relied on, have no application, as the jury were against the defendants upon the bald question of fact as to whether the sale of the ribs was made directly and immediately to the plaintiffs through the broker, or whether, after the defendants had sold them to the plaintiffs, there was a new agreement between the broker and themselves as to the delivery.

No good purpose would be served by examining the various objections to evidence in detail. When they are properly analyzed and considered with reference to the material matters at issue in the case and the main question involved, they will be found to be clearly without merit.
(95) And, indeed, we think they are in themselves untenable, when viewed separate and apart from the real issue.

The case was ably and ingeniously argued by the counsel for the defendants, and they presented many plausible reasons for their contentions; but when the case is stripped of all superfluous matter it will be found that there is no real ground upon which they can succeed.

No error.

JAMES DAVIS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 25 September, 1907.)

Evidence, Corroborative — Employer—Jumping from Engine—Self-preservation—Extent of Injury—Damages.

In an action against defendant railroad company to recover damages for injuries alleged to have been sustained by plaintiff, its fireman on its engine, on account of being compelled, for self-preservation, to jump therefrom immediately preceding a collision with another train on defendant's track, wherein the defendant denied the necessity for plaintiff's jumping and the extent of the injuries alleged, evidence of the speed of the engine and the conditions of the wrecked engine and cars is competent upon the questions of the necessity for plaintiff's jumping and of the extent of the injury, being corroborative of the plaintiff's evidence thereon.

ACTION to recover damages for personal injury, tried before *Lyon, J.*, at March Term, 1907, of HALIFAX.

From the judgment rendered, defendant appealed.

Daniel, Travis & Kitchin for plaintiff.
Day, Bell & Dunn and Murray Allen for defendant.

BROWN, J. The defendant admitted the negligence and its lia- (96) bility for damages, and excepted to the introduction of certain evidence admitted by the court upon that issue.

It appears that the plaintiff was a fireman on defendant's engine, and sustained personal injuries, claimed to be of a severe character, in being compelled to jump from his engine immediately preceding a collision with another train on defendant's track. The court permitted plaintiff to prove the speed at which the engine was running when the plaintiff jumped, to which defendant excepted. We can see no error in this, as it tends to prove that the plaintiff was compelled to jump under circumstances calculated to cause injury. It tended to corroborate the testimony of the plaintiff that he had in reality suffered an injury, and was not feigning one.

The defendant offered evidence of two physicians to the effect that they had examined the plaintiff, and that, in their opinion, he had sustained no substantial injury, and was feigning. The exact question was decided in New York by the City Court of Brooklyn, before *Clement, C. J.*, and *Osborne, J.*, in 1891. *Gillespie v. R. R.*, 16 N. Y. Supp., 850. The Court says: "We think that the plaintiff had the right to prove the speed of the car. Such proof would have a tendency to show the violence of the fall of the plaintiff."

His Honor permitted evidence to be given over defendant's objection as to the effect of and circumstances attending the collision. It is con-

tended by defendant's counsel that, as this happened after plaintiff jumped and after his alleged injury was sustained, the evidence should have been rejected as immaterial and as calculated to unduly excite and prejudice the jury against the defendant. It is unnecessary for us to attempt to lay down here any rule governing trial judges as to how far it is proper to go into the circumstances attending an injury, when the issue of damage is solely before the court. We agree with the learned counsel for the defendant that it would be highly improper to admit immaterial and unnecessary evidence, which can throw no possible
(97) light upon the issue before the jury, and which is calculated only to prejudice and inflame their minds.

We find no evidence in the record, and none has been pointed out to us in brief or argument, calculated to prejudice a jury or to make them swerve from the path of impartial duty. No one was killed, maimed, or hurt, so far as we can discover, except the plaintiff. The objectionable evidence offered related solely to the condition of the engine from which plaintiff had jumped, after the collision had taken place, and also tended to prove that seventeen cars were derailed and that one box car was on top of the engine as it lay in the ditch. The collision occurred because the plaintiff's engine ran into and telescoped a freight train which was preceding it on the track. The conditions given in evidence were such as any one would be likely to suppose would naturally result from such a collision, and had no tendency to unduly inflame the jury or divert their minds from the only issue they were called upon to decide. In this particular case the badly wrecked engine tended to prove that it was running at a rapid speed, and, as we have said before, that tended to corroborate the plaintiff as to the *bona fides* of his injury by proving that he was compelled, in order to save his life, to jump, under circumstances calculated to produce great bodily harm.

As the exceptions to the charge are not presented in the brief, and were not pressed on the argument, we will not discuss them, except to say that they cannot be sustained.

No error.

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(98)

M. B. SMITH v. NORFOLK AND SOUTHERN RAILROAD COMPANY.

(Filed 25 September, 1907.)

1. Maritime Law—State Courts—Negligence—Practice.

In an action for damages in the State courts for injuries received by one vessel in collision with another, alleged to have been caused by the negligence of the other, the rules obtaining in courts of admiralty in such cases do not apply.

2. Same—Negligence—Evidence—Only Cause—Nonsuit.

When it appears that the vessel of plaintiff company altered its course in a fog in a manner not to have been anticipated or foreseen by the officers in charge of defendant's vessel, so as to unexpectedly bring the vessel of the former across the bow of the latter, each hearing the fog signal of the other, and the officers on the defendant's vessel reasonably believing therefrom that plaintiff's vessel would pass in ample water for the purpose, and, upon the first opportunity to see the danger, did all that was possible to avoid it, the unexpected change of course by plaintiff's vessel is the proximate cause of the injury, and a motion as of nonsuit, upon the evidence, should have been allowed.

3. Same — Negligence — Only Cause — Contributory Negligence — Last Clear Chance.

When defendant's vessel, in a fog, was exceeding the speed prescribed for such conditions, but the unexpected and unforeseen change of course of plaintiff's vessel was the direct cause of the injury, the issue upon "the last clear chance" does not arise, there being no element of negligence or "continuing negligence on the part of the plaintiff."

ACTION tried before *Neal, J.*, and a jury, at February Term, 1907, of CRAVEN, for injury caused by alleged negligence of the defendant in a collision between two boats on Neuse River.

Eliminating nautical terms and irrelevant matter, the plaintiff's evidence makes the following case: The steamer "Neuse," belonging to and controlled by the defendant company, on the morning of 25 August, 1905, while making her regular run up the Neuse River to New Bern, encountered a fog near Otter Creek buoy. Her course was north-northwest; she was in shoal water. Her regular speed was from (99) 12 to 13 miles an hour. Shoal-water speed, at which she was running at the time she entered the fog, was 8 miles an hour. She was properly equipped and in charge of a competent officer, who had been her first officer fourteen years. When the steamer entered the fog he was and at all times remained in his proper position, in charge of the watch in the pilot house, at the window on the port side of the wheel, blowing fog signals; began blowing before he entered the fog.

The steamer "Blanche," belonging to plaintiff, on the same morning, at about 6:10 o'clock, left New Bern, going down the Neuse River to points on Bay River. Her course was south-southeast ½. She was properly equipped and in charge of a competent officer. She encountered the fog and began to blow her fog signal. Her regular speed was 7 miles an hour, which she maintained after entering the fog until she reached Johnson's Point, when she took a southeast course. The officers in charge of the two steamers each heard the fog signals of the other. The officer of the "Blanche" says that his usual course is to pass Johnson's Point and keep on down to Hampton Shoal buoy, the course being south-southeast ½. On the day of the collision, before passing John-

son's Point, he "starboarded and went to the port"; thought it would put her out of the way of the "Neuse" and get off shoal water. The change had the effect to put the "Blanche" across the course of the "Neuse." The plaintiff introduced the officer of the "Neuse," who testified that he heard the fog signals of the "Blanche" on his port bow; that he was going north-northwest; that the signals of the "Blanche" were always on the port bow. "The first glimpse of her I could not understand; her position ranged across our bow, and I blew four short whistles and struck four bells to back, blowing the whistles with the right and striking the bells with the left hand."

(100) Q. "Up to the time she appeared her whistles always sounded on your port bow?" A. "Yes, sir."

Q. "If she had been proceeding on a proper course down the channel, what would that course have been?" A. "Going down the main channel about south-southeast." There was plenty of water and plenty of room "for the 'Blanche' to have proceeded, port to port."

Q. "If the 'Blanche' had fulfilled her duty, will you state whether or not there would have been a collision?" A. "I don't think there would. There was room for her to have passed on her starboard side. The boat which has the other on her own starboard hand shall keep out of the way, and it was the duty of the other vessel to navigate with caution, if necessary, if she thought there was danger of collision."

Q. "State whether, up to the time you saw the 'Blanche' appearing out of the fog and crossing your bow, there was anything in the situation which showed that she was going to attempt to cross your bow?" A. "No; the whistle sounded on the port bow all the time."

Q. "Up to the time the 'Blanche' appeared in the fog, will you state whether or not there was anything, from the sound of the whistle or the location, which would indicate that there would be any danger in passing if each vessel was properly navigated?" A. "No, sir."

Q. "When was it you first ascertained that there was danger of collision?" A. "When I sighted her."

Q. "Was there anything at that time which you could have done to avoid the collision?" A. "Nothing, in my judgment, more than I did."

After testifying that he was running at 8 miles an hour, being shoal-water speed, he was asked, "Had you reduced the speed at all on account of fog?" A. "No, sir; we never reduce speed. It is done from the engine room." He says that he could not rightly tell how fast he was moving when he struck the "Blanche"; that he should judge about 3 or 3½ miles; reduced speed by backing.

Q. "Suppose you had been going up at 3 miles an hour and had backed, your boat would have been stopped without sinking the

(101) 'Blanche,' wouldn't it?" A. "It is a mathematical calculation."

It was in evidence that when the officer of the "Neuse" first saw the "Blanche" she was about 50 yards distant from him—about the length of his boat. The defendant introduced no evidence, but moved for judgment of nonsuit. Motion denied, and defendant excepted.

The following issues were submitted to the jury:

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

2. If so, did plaintiff, by his own negligence, contribute to the injury?

3. Notwithstanding the plaintiff's contributory negligence, could the defendant, by the exercise of the rule of the prudent person, have avoided the injury?

The defendant excepted to the third issue.

The jury, under the instructions of the court, answered the first issue "Yes." By consent, the second issue was answered "Yes." The jury answered the third issue "Yes." There was judgment upon the verdict for $2,000. Defendant excepted and appealed.

W. W. Clark for plaintiff.

Simmons, Ward & Allen and H. H. Little for defendant.

CONNOR, J., after stating the case: As, in our opinion, the defendant was entitled to judgment of nonsuit upon the motion made at the close of the testimony, it is unnecessary to discuss or pass upon the exceptions to the instructions given, and the refusal to give others requested by defendant. The action being prosecuted in the State courts for alleged negligence, the rules obtaining in courts of admiralty in such cases do not apply. The rights and liabilities of the parties are to be ascertained by resorting to the principles which control in actions for alleged negligence wherein contributory negligence is set up as a defense. *Fuller, C. J.*, in *Belden v. Chase*, 150 U. S., 674, says: "At common law the general rule is, that if both vessels are culpable in respect of (102) faults operating directly and immediately to produce the collision, neither can recover damages so caused. In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury; or, in other words, he could not recover, though defendant was negligent, if it appeared that his own negligence directly contributed to the result complained of." 25 A. and E., 1025.

The motion for judgment of nonsuit involved two propositions: First. That there was no evidence of negligence on the part of the "Neuse." Second. That if there was negligence, the admitted contributory negligence on the part of the "Blanche" intervened and became the proximate cause of the injury, thus preventing a recovery. This is undoubt-

edly true, unless the plaintiff can maintain a third proposition: That defendant, having knowledge of plaintiff's negligence, failed to use ordinary care to prevent the injury. Barrows on Neg., 35. "It is sometimes said to be the rule that a plaintiff may recover, notwithstanding the fact that his own negligence exposed him to the risk of injury, if the defendant, having knowledge of plaintiff's negligence, failed to use ordinary care to avoid injuring him." Beach Cont. Neg., sec. 54. It being established that defendant was negligent—that is, guilty of a breach of duty—and that plaintiff was also negligent, the law fixed the liability upon the one whose negligence was the proximate cause of the injury. If fixed upon the defendant, it is because of his negligence and the absence of any intervening negligence on the part of plaintiff contributing to the injury. Where the injury is the result of a sequence of negligent acts or omissions, the rule is thus stated by *Judge Cooley:* "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission of another, the injury shall be imputed to the last wrong as the proximate cause, and not to that
(103) which was remote." Cooley on Torts, 70, cited with approval in *Clark v. R. R.,* 109 N. C., 430; *Pickett v. R. R.,* 117 N. C., 616.

In *Farmer v. R. R.,* 88 N. C., 564, it is said: "Where an injury results from negligence, and the act of the plaintiff is directly connected and concurrent with that of the defendant, the plaintiff's negligence is the proximate cause of the injury, and will bar his recovery in an action for damages; but where the negligent act of the plaintiff precedes that of the defendant, it is the remote cause, and the defendant will be liable if the injury could have been avoided by the exercise of reasonable care." These and other decisions holding this doctrine are based upon *Davies v. Mann,* 10 M. and W. (Exch.), 546. In all of the cases the liability is put upon the party whose negligence is the proximate cause of the injury.

Upon the undisputed evidence in this case, we think it very doubtful whether there is any evidence of negligence on the part of the officer of the "Neuse"; but, passing that question, it is clear that the admitted negligence of the "Blanche" was last in order of sequence, and, as the learned counsel properly conceded, *contributed* to the injury.

The answer to the second issue put an end to the controversy. The officer of the "Neuse," introduced by plaintiff, says that before entering into the fog he blew fog signals, and continued to do so until he saw the "Blanche"; that he was on the watch in the pilot house; that his course was north-northwest; that he heard the fog signals of the "Blanche"; that they were always on the port bow, clearly showing her position; that nothing occurred to indicate that she would change her course or her position, her course being south-southeast ½; that she had plenty

of room to pass, and that the first intimation he had of danger was when, 50 yards distant, he saw her across his course; that he immediately blew the proper signals, rang the bells, reversed his engine, backed his boat; that he did everything in his power to avoid the collision. Conceding that at the moment he saw the "Blanche" he (104) was going faster than the rules allowed, is it not apparent that, but for the erratic course of the "Blanche," he could and would have proceeded with perfect safety to both boats? The case comes clearly within the principle of *Pickett's case* and numerous other authorities.

But the learned counsel for plaintiff calls attention to the rules established by Congress to prevent collisions: "Every vessel shall, in a fog, go at a moderate speed, having careful regard to the existing circumstances and conditions." He insists that the term "moderate speed" has been defined to be such a speed as will enable the boat to stop within a distance at which he could see another boat. In the *Umbria,* 166 U. S., 404, *Judge Brown,* after a very exhaustive discussion of the authorities on the subject, says: "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precaution as will enable her to stop in time to avoid a collision after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." In other words, the steamer should so reduce her speed when in a fog that steamers which are free from blame or negligence may not be injured. The learned justice proceeds to say that, in a dense fog, this rule might require both vessels to come to a standstill. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerage way; the true principle being that they must use due diligence, the standard of which, in the light of the rules, being measured by "existing circumstances and conditions." The distinction between the measure of duty to avoid injury imposed upon a locomotive engineer passing a public crossing and running on the track where there is no such crossing, is pointed out by *Smith, C. J.,* in *Parker v. R. R.,* 86 N. C., 221. In the former the public have an equal right with the train; the engineer must anticipate that persons will be using the crossing, and lower his speed so that he may have his engine under such control that he can stop (105) before coming in contact with a person on the crossing. Persons using the crossing must, however, use ordinary care to avoid injury. This speed, in towns, is usually fixed by ordinance, and in many cases its violation is declared to be, as matter of law, the proximate cause of the injury. It is unnecessary to discuss the distinction made in that class of cases and the one before us. There was nothing in the conditions by which the "Blanche" was surrounded to cause her to change her course. The undisputed evidence is that "she had plenty of room and

water" to pass the "Neuse" in safety. Her officer elected to change the course, the effect of which change was to throw her across the course of the "Neuse" at a point which rendered it impossible to prevent collision. The "Neuse," with a regular speed of 12 miles, was running at the shoal-water speed of 8 miles. There is nothing in the evidence showing that her surroundings required any further reduction to prevent injury to a steamer herself free from negligence, or to indicate that the only steamer of whose presence in the river she had any notice was off her course until too late to prevent the injury. Whatever may have been said by this Court in regard to "continuing negligence," the facts in this record do not come within the doctrine of any case wherein that expression is used. Measured by the well settled principles of the common law, we find no evidence upon which to base the third issue. We are of the opinion that, by a shorter route, the same result would have been reached by granting the motion for judgment of nonsuit. In refusing the motion there was error. Let this be certified to the Superior Court of Craven, to the end that judgment be entered dismissing the action.

Error.

(106)

AGNES H. KINSEY v. CITY OF KINSTON ET AL.

(Filed 2 October, 1907.)

1. **Negligence—Sidewalks—Ditches—Warning Signals.**

It is the positive duty of municipal authorities to keep the public streets in a reasonably safe condition for the use of pedestrians. The city is liable in damages to the plaintiff, who, being accustomed to use its sidewalk in going to and from her work, passed in the morning, and, repassing in the evening about 8 o'clock, was injured by falling into a ditch which had been dug across the sidewalk in the intervening time by a contractor for private person, with notice to and permission of the city, and left without lights, warning signals, or signs at, near, or upon the ditch.

2. **Same — Sidewalks — Ditches — Permit — Warning Signals — Liability of Owner.**

While a private person is liable to pedestrians for his negligence in permitting a ditch dug across the public sidewalk of the city to remain after nightfall without lights or other warnings, the city is also liable for negligence when, after granting the permit, it fails to exercise proper supervision and inspection.

3. **Same — Permit — Notice — Questions for Court — Knowledge, Expressed, Implied—Character of Work.**

While the question of knowledge upon the part of municipal authorities is usually one to be determined by the jury, when there is no conflict of

evidence it is proper in certain cases for the judge to hold as a question of law that notice was given. When it is admitted that defendant city issued its permit authorizing a private person to dig a ditch across its public sidewalks, its authorities are expressly charged with the knowledge of the character of the work and its possible dangers to those of the citizens who should use the street, especially after nightfall.

ACTION tried at October, 1906, Special Term of LENOIR, before *Webb, J.*, and a jury. The plaintiff sued to recover damages received from falling in a ditch at night, which ditch had been dug during the day of 4 May, 1905, across defendant's street. The usual issues as to negligence, contributory negligence, and damages were submitted. The jury found for the plaintiff on all issues. The court refused the motion for a new trial and rendered judgment for plaintiff, and (107) defendant appealed.

E. R. Wooten and George V. Cowper for plaintiff.
Loftin & Varser for defendant.

BROWN, J. We have considered the fifteen exceptions presented in the record in this case, and are of opinion that all of them are without merit. At the close of the evidence the defendant moved to nonsuit, and excepted to the ruling of the court denying the motion. Plaintiff's evidence tends to prove that about 8 o'clock at night, on 4 May, 1905, the plaintiff was returning from her work, on her way home, and was walking on the sidewalk on King Street, in the city of Kinston, when she suddenly fell headforemost into an open ditch 4½ feet deep and 2½ feet wide, extending from the middle of the street across the said sidewalk, from which she was rendered unconscious; that there were no lights, warnings, signals or signs at or near or upon the ditch. This was the usual way which plaintiff returned from her work at night, going home. That she passed the place of injury the morning before she was hurt on the night of 4 May, and there was no ditch or excavation there. The ditch was dug in order to make a sewer connection from the city's main sewer to certain residences on King Street. A permit was granted and issued on 4 May, 1905, to cut the ditch across King Street for that purpose. The work was performed by S. H. Isler, a contractor, who finished digging the ditch and making the connection by 4 p. m. of the same day, and at once, before closing the ditch, verbally notified City Inspector Brown to inspect the connections with the city sewer. No written notice was given the inspector, who at the time of the verbal notice was temporarily ill. The inspector did not inspect the ditch that day, and it was left open all night, without lights or other protection.

We do not deem it necessary to notice any matters embraced in the exceptions other than the ruling of his Honor denying the (108)

motion to nonsuit, and the seventh exception to that portion of his Honor's charge, as follows: "That the grant of a permit to Isler to make the ditch is notice to the city that the work is in progress, and that thereafter it would be liable for the injuries arising from the negligence of the person doing the work, which is dangerous in itself."

1. The contention of the defendant that it is not liable because the excavation was made across its public street by a contractor who was doing the work for a citizen in order to establish water connection with the city sewer, and that, therefore, the motion to nonsuit should have been allowed, is wholly untenable. To allow such contention would be to relieve the city authorities of one of their most important duties. It is the positive duty of municipal authorities to keep the public streets in a reasonably safe condition, so that the people may pass along them with comparative safety. This duty is not suspended because a private contractor is permitted to open the streets in order to establish water connections with the public sewers. The fact that the contractor may be liable for negligence will not relieve the authorities of the municipality if they are, in law, fixed with knowledge of such negligence.

This is plainly deducible from our own decisions. *Bunch v. Edenton,* 90 N. C., 431; *Russell v. Monroe,* 116 N. C., 720; *Fitzgerald v. Concord,* 140 N. C., 113. In other jurisdictions it has been expressly held that the city is liable for damages to pedestrians for the negligent performance of work in a city for private purposes, under special *permission of the city council,* where there is ordinarily a certain city officer to supervise it, and the city has knowledge that it is in progress on the day in question. *Augusta v. Cone,* 91 Ga., 714; 17 S. E., 1005; *Wendell v. Troy,* 39 Barb., 329. The city is not relieved even if the work is
(109) in the hands of an independent contractor. *South Bend v. Turner,* 54 L. R. A., 396; 16 A. and E. (2 Ed.), 197, "cases cited."

We think, therefore, upon the facts in evidence, that the court committed no error in overruling the motion to nonsuit.

2. It is further contended that in the part of the charge hereinbefore recited his Honor substantially instructed the jury, as matter of law, that the defendant was fixed with notice of the obstruction or excavation which caused the defendant's injury, and that such instruction is erroneous. We concur with appellant in the construction placed upon the charge excepted to, but we cannot concur in regarding it as erroneous. The question of knowledge upon the part of municipal authorities of defects in the public streets is usually one to be determined by the jury, upon the principles so clearly stated by *Mr. Justice Hoke* in *Fitzgerald v. Concord, supra.* But in the case at bar there was nothing in dispute respecting notice for the jury to determine. It is admitted that on the day the excavation was made the defendant issued its permit author-

izing it to be done. The defendant's authorities were, therefore, expressly charged with knowledge of the character of the work and its possible dangers to those of the citizens who should use the street, especially after nightfall, as the plaintiff happened to do. A ditch cut across a much used street in a city is necessarily dangerous, and it is the duty of the person doing the work to protect it against accident to those using the street. The duty of a private person is very much the same as that of the city itself *when it is prosecuting an improvement.* If a private individual fails to protect an excavation in the street, then it is the duty of the city authorities to see that it is protected, and they are held responsible that he should do so, for they were *notified* that he is going on with the work *when he obtains the permit.* The city is liable for negligence in failing to exercise supervision and inspection, if injury results by such excavation made by an individual under such permit or license issued by it. *South Bend v. Turner,* 54 L. R. A., 396; *District of Columbia v. Woodberry,* 136 U. S., 450; 34 L. Ed., 477; *Bauer* (110) *v. Rochester,* 59 Hun, 616; *Hoyer v. North Tamawanda,* 79 Hun, 39; 29 N. Y. Supp., 650; *Baltimore v. O'Donnell,* 53 Md., 110; *Chicago v. Johnson,* 53 Ill., 91; *Denver v. Aaron,* 6 Colo. App., 232; *Bowen v. Huntington,* 135 W. Va., 682.

Upon a review of the whole record we find

No error.

Cited: Johnson v. Raleigh, 156 N. C., 271; *Bailey v. Winston,* 157 N. C., 259; *Hines v. Rocky Mount,* 162 N. C., 416; *Seagraves v. Winston,* 170 N. C., 620.

TEMPERANCE SMITHWICK v. W. C. MOORE.

(Filed 2 October, 1907.)

Wills—Deeds—Devise—Construction.

When the evidence establishes that the testator and his first wife made a deed to defendant of certain lands, and at the same time the testator delivered to defendant a will devising the same lands and other property, who held both until after the death of the testator, and offered the will for probate, which was refused, owing to notice of a later will devising to testator's second wife "all of his property, real and personal," whereupon defendant had his deed registered, it was error in the court below to refuse to instruct the jury that, upon the evidence, they should find that the defendant was the owner of the land described in the deed.

EJECTMENT tried before *Long, J.,* and a jury, September Term, 1906, of MARTIN. The pertinent facts sufficiently appear in the opinion of the Court.

Francis D. Winston and A. O. Gaylord for plaintiff.
H. W. Stubbs and Gilliam & Gilliam for defendant.

CLARK, C. J. Edward Smithwick (colored), by his will, dated 2 April, 1894, and probated 23 October, 1901, devised "all his property, real and personal," to the plaintiff, who was his second wife. By (111) deed of gift, signed by him and his first wife, dated 21 March, 1891, probated 14 October, 1891, and registered 14 October, 1901, he conveyed to defendant 50 acres, cut off from his home tract, which this action is brought to recover. At some time it seems that Smithwick gave to the defendant a will, as well as the deed. It is in evidence that the defendant deposited both deed and will with one Wallace, and after Smithwick's death he got them from Wallace and carried them to the office of the clerk of the Superior Court, who, not probating the will (doubtless because he had notice of the later will in favor of plaintiff), the defendant thereupon registered his deed. There was evidence that Smithwick had stated that he had made a deed of gift of the land in controversy to the defendant. In his will he does not purport to devise this land to his wife, but simply devises "all his property, real and personal," but without describing any.

The court erred in refusing to charge the jury that, upon the evidence, they should answer the issue "No." The court properly charged the jury that the registration of the deed raised a presumption of delivery, but left the bare fact that the defendant had both a will and a deed, and registered the latter only after first offering the will for probate, to the jury as evidence from which they could be satisfied that the presumption of delivery of the deed was rebutted. It appears, inferentially, from terms of defendant's application to probate it, that the will gave the defendant more property than the deed, and hence, naturally, he offered that for probate first. The fact that he was unable to probate the will because of the later will held by the plaintiff was no evidence that the deed had not been delivered to him.

Error.

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(112)

ŻANEY BALTHROP v. JAMES H. TODD AND WIFE.

(Filed 2 October, 1907.)

1. Deeds and Conveyances—Fraud—Burden of Proof—Nonsuit.

In an action to set aside a deed for fraud, it was error in the court below to sustain a motion as of nonsuit at the close of plaintiff's evidence, tending to show that the male defendant procured the deed to be made to his wife, the sister of the plaintiff; that the defendants had made their

home with the plaintiff for fourteen years and possessed her trust and confidence, the *feme* defendant being her sister and the male defendant her brother-in-law; that the plaintiff was a feeble old woman, in bad health, a widow, childless, could not read or write; that there was no consideration for the deed, though such was therein recited; that as an inducement for making the deed the male defendant promised to take care of the plaintiff for life, with the purpose of getting the deed and then "dropping her."

2. Same—Presumptions—Evidence—Jury.

When the evidence disclosed that the act complained of was induced by those in friendly relations and from one in a position of dependence or habitual reliance for advice, a presumption of fraud is raised as a matter of fact, and is alone sufficient to go to the jury.

ACTION tried at April Term, 1907, of NASH, before *Biggs, J.*, and a jury. The action was brought to set aside three deeds executed 1 March, 1900, by plaintiff to Sarah J. Todd, the *feme* defendant. At the close of the evidence defendants' motion to nonsuit was sustained, and plaintiff excepted and appealed.

Jacob Battle for plaintiff.
F. S. Spruill for defendants.

BROWN, J. It is in evidence that on 1 March, 1900, the plaintiff, a feeble old woman, approaching 70 years, conveyed her entire landed estate consisting of three tracts, to her sister, Sarah J. Todd, with whom and her husband, James H. Todd, the plaintiff had made her home for some fourteen years. No money was paid or promised, and at the time the defendants did not claim that plaintiff owed them a (113) penny. Plaintiff had no other property whatever, except $108, to support herself. In her advanced age and enfeebled condition she leaned upon her brother-in-law and sister and reposed trust and confidence in them. Plaintiff was a widow, childless, could not read and write, and was in bad health. Shortly before the deeds were executed Todd told a neighbor that the plaintiff had some money and land; that he was going to promise to take care of her during her life, and thus get her property, and after he got it he was going to drop her. He told the plaintiff that her brother intended to have a guardian appointed for her, and then she could no longer control her own property. She doubtless thought that it was necessary to do as her brother-in-law told her to do in order to retain control of her property. She asked him if she could not make a will. He said: "Make a deed; it will be best, as a will can be destroyed." James H. Todd then procured the deeds to be written and executed at his house, reciting a money consideration, although not a dollar was paid or promised, and no claim made that plaintiff owed him anything.

Clearly his Honor erred in not submitting the case to the jury upon appropriate issues and under proper instructions. It is true that the evidence does not bring the case within either of the four definite fiduciary relations mentioned by *Judge Pearson* in *Lee v. Pearce,* 68 N. C., 87, when the court can instruct the jury that fraud is presumed as matter of law. But the evidence discloses plainly such "confidential relation" or "position of dependence" that, if the jury find the facts to be as testified to by plaintiff, the burden of proof shifts, and to sustain the validity of the deeds the defendants must satisfy the jury of the *bona fides* and legality of the transaction. The evidence brings it within that class mentioned by *Lord Hardwick* in *Chesterfield v. Jansen,* where fraud arises from the circumstances and condition of the immediate parties to the transaction. 2 Pom. Eq., secs. 922, 923. It comes
(114) within the fourth class of those *quasi* relations of confidence mentioned in *Lee v. Pearce,* viz.: "When the relation is that of friendly intercourse and habitual reliance for advice," which, *Judge Pearson* says, "raises a presumption of fraud *as matter of fact,* to pass before the jury for what it may be worth." See, also, *Buffalo v. Buffalo,* 22 N. C., 241; *Smith v. Moore,* 142 N. C., 296; *Timmons v. Westmoreland,* 72 N. C., 587; Bigelow on Fraud (1890), p. 295; 2 Pom. Eq., secs. 928 (2) and 956.

New trial.

EAST CAROLINA RAILWAY COMPANY v. MARYLAND CASUALTY COMPANY.

(Filed 2 October, 1907.)

Insurance—Contracts—Interpretation.

While in a contract of insurance reasonably susceptible of two constructions the construction most favorable to the insured will be adopted, the Court, in the absence of any equitable principle, must take the contract as it finds it, and so construe it as to preserve the intent of the parties, when clearly expressed, so that their rights can with certainty be ascertained from the language used. When, under a contract, the plaintiff was to be indemnified by defendant from loss occasioned to one of its servants by the negligent act of a fellow-servant on the pay-roll of the plaintiff, or within the list of estimated wages, there can be no recovery when such fellow-servant is not shown to be within the terms of the said description.

ACTION tried before *Biggs, J.,* and a jury, at April Term, 1907, of EDGECOMBE.

This action was brought by the plaintiff to recover $1,999, alleged to be due on a contract to indemnify it against liability to its employees,

which was the amount theretofore adjudged to one J. G. (115) Andrews, an employee of the plaintiff, on account of injuries received by the negligence of Henry Clark Bridgers, another of its employees, in a suit brought by him against the plaintiff. The policy of the defendant indemnifies "against loss from common-law or statutory liability; for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any employee or employees of the assured, while on duty at the places and in the occupations mentioned in this application, in and during the continuance of the work described in this application." But the liability is limited by the following clause: "This policy does not cover loss for liability for injuries, as aforesaid, to or caused by any person unless his wages are included in the estimated wages named in the schedule and he is on duty at the time of the accident, in an occupation hereinafter described, at the place or places mentioned in the schedule." It appears that Andrews' compensation as an employee of the plaintiff was included in the estimated wages named in the schedule, which is a part of the policy, while Bridgers' was not so included.

Issues were submitted to the jury and answered, by consent, as follows:

1. Was J. G. Andrews, at the time of the injuries for which he obtained the judgment in controversy, an employee of the plaintiff, and was he on the pay-roll and his wages included in the estimated wages named in the schedule? "Yes."

2. Were the injuries to J. G. Andrews for which the judgment was obtained, caused by an employee of the plaintiff, and if so, who? "Yes; Henry Clark Bridges, who was at the time running as engineman, and who held the office of president and general manager."

3. Were the wages of such employee included in the estimated wages named in the schedule? "No."

The court, upon the verdict, was of the opinion that the defendant was not liable to the plaintiff upon the contract, and so adjudged. The plaintiff thereupon appealed.

John L. Bridgers for plaintiff.
Jacob Battle for defendant.

WALKER, J., after stating the case: The policy upon which (116) this suit was brought is most clearly restricted to cases where the injury results to an employee of the insured from the negligence of some other employee whose wages were on the pay-roll of the company and included or considered in the estimate upon which the premium was computed. Parties who are *sui juris* must be permitted to make contracts

for themselves, and the Court, in the absence of any equitable element invoking its protection in favor of one or the other of the parties, must take the contract as it finds it and so construe it. It is true that, in passing upon contracts of insurance or indemnity like the one now in hand, the courts have adopted certain canons of interpretation, one of which is, that the contract will be liberally construed in favor of the assured, so as not to defeat, without a clear necessity, his claim for indemnity. When doubt arises by reason of the language employed to express the agreement, so that it admits of two interpretations, the courts, as a general rule, adopt that one which, without any violence to the words selected by the parties, will sanction the claim and cover the loss. *Goodwin v. Assurance Society,* 97 Iowa, 226; *Kendrick v. Ins. Co.,* 124 N. C., 315. The leading idea which controls in such cases was well stated by *Judge Douglas* in *Grabbs v. Ins. Co.,* 125 N. C., 399: "The extraordinary development of insurance, and its necessary adaptation to the varying and complicated business relations of a progressive age, tax the utmost ability of the courts. But, while different conditions may require the application of different rules, one great principle must always be kept in view, and that is, the ultimate object of all insurance. While we should protect the companies against all unjust claims and enforce all reasonable regulations necessary for their protection, we must not forget that the primary object of all insurance *is to insure.* We cannot permit insurance companies, by unreasonable stipulations, to evade the payment of such indemnity when justly due, and thus defeat (117) the very object of their existence." And so in *Bank v. Fidelity Co.,* 128 N. C., 371, the same learned judge tersely restated the rule: "The object of an indemnifying bond is to indemnify; and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as an actual security, and misleading as a pretended one."

The Supreme Court of the United States is equally explicit: "If, looking at its provisions, the bond is fairly and reasonably susceptible of two constructions—one favorable to the bank and the other favorable to the surety company—the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the Court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well-established rule in the law of insurance." *Surety Co. v. Pauly,* 170 U. S., 144.

In *Bray v. Ins. Co.,* 139 N. C., 393, in considering the same principle of construction, where the meaning of any provision or of the entire policy is uncertain, we held that the interpretation should be such as to favor the plaintiff, or party insured or indemnified, assigning as one all-

sufficient reason for this view of the matter, "that the company has had the time and the opportunity, with a view to its own interest, to make clear its meaning by selecting with care and precision language fit to convey it, and if it has failed to do so, the consequences of failure should *not even be shared by the assured,* so as to deprive him of the benefit of the contract as one of indemnity for his loss."

Probably the most important general rule guiding courts in the construction of insurance policies is, that all doubt or uncertainty as to the meaning of the contract shall be resolved in favor of the insured. Vance on Insurance, p. 592. The latter author also says: "This rule, it is well settled, applies in full force to those contracts of special insurance which, unfortunately for both insurers and insured, are often filled with numerous conditions, the legal significance and eco- (118) nomic purpose of which are alike uncertain." *Jones v. Casualty Co.,* 140 N. C., 264; *Bank v. Ins. Co.,* 5 Otto, 673; *Lumber Co. v. Fidelity Co.,* 30 L. R. A., 691; *Fenton v. Fidelity Co.,* 48 L. R. A., 770.

This Court has distinctly declared that, if a contract of insurance is reasonably susceptible of two constructions, the uniform rule in all courts is to adopt that which is most favorable to the insured. *Rayburn v. Casualty Co.,* 138 N. C., 382; *Bank v. Ins. Co.,* 95 U. S., 673; *Jones v. Casualty Co.,* 140 N. C., 265. But, while this salutary rule is well established, it is never enforced except in those cases to which it is strictly applicable and which come within its reason and purpose; and while we generally favor the insured when the company, by the language of its own selection, has created a doubt as to what was meant, the rule will never be carried so far as to make a contract for the parties different from what they have made for themselves, and it is not applicable when the intent of the parties has been clearly expressed and their rights can with certainty be ascertained from the language as used. *Bray v. Ins. Co.,* 139 N. C., 393; *Durand v. Ins. Co.,* 63 Vt., 437 (25 Am. St., 773); Vance on Insurance, p. 593.

In this case it is perfectly clear what the parties meant. Indeed, there cannot well be two opinions about it. They have plainly contracted that the plaintiff should not be indemnified for any loss arising to one of its servants who is injured and who is either not on the pay-roll or within the list of estimated wages, or who was injured by a fellow-servant not within the same category. If the employee injured is not on the pay-roll, or if the employee who injured him by his negligence is not, there is no liability. The exception is inclusive of both classes of servants, although expressed alternatively, or, as counsel said, disjunctively. Stated differently, the plaintiff, in order to recover, must have shown that both of the servants, the injurer and the injured, were on the pay-roll and not within the descriptive words of the exception from

(119) liability. This is not an unreasonable view of the matter, as the basis of calculating the premium to be paid is just this very stipulation and requirement. If we should hold the plaintiff entitled to recover, he would clearly receive a benefit and indemnity for which he had never paid the defendant; and when it asserts the defendant's liability to it, the latter may well reply *non hæc in fedeра veni.*

The able and learned brief of Judge Battle is conclusive upon the question, and we do not hesitate to follow it, although confronted by a very able and ingenious one by Mr. Bridgers.

We do not understand why plaintiffs sue generally for $1,999, when a sum demanded not exceeding $2,000, exclusive of interest and costs, takes the case out of the jurisdiction of the Federal courts. 4 Anno. Fed. Stat., 265 and 312; *Coffin v. R. R.*, 118 Fed., 688.

The judgment of the court upon the verdict was correct.

Affirmed.

Cited: Crowell v. Ins. Co., 169 N. C., 37; *Stagg v. Land Co.*, 171 N. C., 591.

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(120)

CHARLES M. WHITLOCK v. AUBURN LUMBER COMPANY.

(Filed 2 October, 1907.)

Contract—Negotiable Instruments—Vendor and Vendee—Conditional Sale—Purchaser for Value.

A party to a contract will not be permitted to plead his own act or fault, which has prevented the performance thereof by the other party, in order to defeat the latter's recovery. When the vendee of goods gives to the vendor an unconditional promise to pay therefor in the form of a negotiable note, and executes an agreement, in effect a conditional sale, to secure the payment of the note, the vendor, at the request of the vendee, retaining possession of the goods, which were afterwards destroyed by fire while in his possession, without fault on the part of the vendor, the goods are constructively in the possession of the vendee under and during the term of the conditional sale, and he cannot offset his note in the hands of an innocent purchaser with the value of the goods thus destroyed.

ACTION heard by *Long, J.*, upon exceptions to report of referee, at April Term, 1907, of NEW HANOVER.

The Acme Machine Works sold to the Auburn Lumber Company certain machinery and personal property for $2,770, of which sum $1,000 was paid in cash, and the balance of the purchase money was secured by two notes, due, respectively, 23 February and 24 April, 1903. On

these notes payments were made which reduced the balance due on 15 December, 1906, including interest, to $973.36. In the contract of sale it was stipulated that if the Auburn Lumber Company should fail to pay the notes, or either of them, at maturity, the entire debt should become due, and the Acme Machine Works might take possession of the property; but if the notes were paid at maturity, then the title, which, until the payment, should remain in the Acme Machine Works, should vest in the Auburn Lumber Company. The notes contained an absolute promise to pay the amount of money therein specified, with a stipulation as follows: "For the retention of title until payment of the amount due on the notes, together with all reasonable attorneys' (121) fees for collecting and necessary expense incurred, if not paid at maturity, at which time the said machinery shall be at the disposal of the Acme Machine Works, or order, and for the deficit we hold ourselves equally responsible until paid in full." All the property was to be delivered to the lumber company on the cars at Goldsboro, N. C., *at the same time,* and the Acme Machine Works did so deliver all of it, except a dry-kiln, which it offered to deliver with the other property, but was requested by the Auburn Lumber Company not to deliver the kiln until called for by the lumber company, and it was accordingly held by the Acme Machine Works, at the special request of the lumber company, until the summer of 1903, when it was burned, without negligence or fault of the Acme Machine Works. Its value was $750. The purchase notes above described were indorsed for value to the Bank of Wayne, before their maturity and without notice of any infirmity in them, except such, if any at all, as appears on the face of the notes. This action was brought, under the statute, by the plaintiff (Whitlock), as a creditor of the lumber company, for the purpose of winding up its affairs, upon an allegation of insolvency and for the further purpose of having its assets applied to the payment of its debts. Cameron F. MacRae was appointed receiver in said proceeding. The Acme Machine Works, after the indorsement of the notes to the Bank of Wayne, assigned all of its assets to I. F. Dortch for the payment of its debts. The Bank of Wayne and Mr. Dortch thereupon filed a petition in this case, setting forth the facts, and praying judgment for the amount of the balance due on the said purchase notes by the lumber company to the bank as assignee of the Acme Machine Works. The receiver, Mr. MacRae, petitioned the court to be allowed to sell all of the property of the lumber company free of encumbrances, and asked that the lien of the Bank of Wayne for its alleged claim be transferred to the general fund in (122) court (or the proceeds of the sale), the latter to be held subject thereto, as the dry-kiln would have been if it had not been sold. The court so ordered. Mr. J. O. Carr was appointed referee to pass upon

the validity of the claim and lien of the Bank of Wayne. He reported substantially the above stated facts, and found as a conclusion of law that the bank had a lien for the balance of the notes held by it on the dry-kiln, and consequently on the fund in court. The court, upon exceptions by the receiver, confirmed the report, and gave judgment for the amount due on the notes, and the receiver appealed.

Aycock & Daniels for petitioners.
Meares & Ruark for defendant.

WALKER, J., after stating the case: It cannot be well denied that, under the prior decisions of this Court, the transaction between the Acme Machine Works and the Auburn Lumber Company constitutes a conditional sale of the property described in their contract. The agreement was that the former should sell and the latter should buy the machinery and other property, to be delivered at once for the stipulated price. A part of the purchase money was paid in cash, and for the remainder the lumber company executed its notes, by which it absolutely and unconditionally promised to pay the sums therein specified. All of the property named would have been delivered immediately to the lumber company but for the request that the dry-kiln be retained by the Acme Company until the lumber company should be ready to receive it. The receiver of the latter company contends, upon the facts found by the referee, that he is entitled to a credit of $750, which was the value of the dry-kiln, upon the notes given for the purchase money of the property bought by the lumber company from the Acme Company, and which are now owned and held by the Bank of Wayne. We do not perceive upon what ground, legal or equitable, any such
(123) claim can be successfully maintained. The lumber company has made an absolute promise to pay a certain sum of money, the consideration of which was the purchase of the property described in the contract. Why, then, should it not be compelled to perform its promise? It is a mistake to suppose that its liability depends upon whether the title did or did not pass unconditionally to it from the Acme Company. Its obligation arises out of the fact that it has promised to pay the money upon a sufficient consideration, and the said obligation is in no way affected by the state of the title to the property as between the parties—that is, whether vested conditionally or unconditionally.

The case is not distinguishable from that of *Tufts v. Griffin,* 107 N. C., 47; in which is stated by *Judge Shepherd,* in his usual clear and vigorous style, the principle governing such cases. Quoting from *Tufts v. Burnley,* 66 Miss., 49 (in which will be found an able and well considered opinion adopted by this Court as a clear exposition of the law

which obtains with us), he says: "The transaction was something more than an executory conditional sale. The seller had done all he was to do, except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promise to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether, by the contract, he has made his promise absolute or conditional. The contract was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation the Court must make a new agreement for the parties instead of enforcing the one made, which it cannot do. As is said in the foregoing extract, the vendor has done all that he was required to do, and the transaction amounted to a conditional sale, to be defeated upon the nonperformance of the condition. The vendee had an interest in the property which he could convey, and which was attachable by his creditors, and which (124) would be *ripened* into an absolute title by the performance of the condition," citing 1 Wharton on Contracts, 617; *Vincent v. Cornell,* 13 Mass., 296; *Newhall v. Kingsbury,* 131 Mass., 445.

We regard it as too late, at this time, to deny that the contract between these two companies was, in contemplation of law, a conditional sale. *Ellison v. Jones,* 26 N. C., 48; *Ballew v. Sudderth,* 32 N. C., 176; *Parris v. Roberts,* 34 N. C., 268. The same is the law in other jurisdictions. *Ridgeway v. Kennedy,* 52 Mo., 24; *Harnway v. Wallace,* 18 Ill., 377; *Dunbar v. Rawles,* 28 Ind., 225; *White v. Garden,* 10 C. B., 919; *Coghill v. R. R.,* 5 Gray (Mass.), 545. The subject is discussed and the later authorities cited in the recent case of *Hamilton v. Highlands,* 144 N. C., 279.

It was not necessary, to effectuate the intention and purpose of the parties in making the contract, that there should have been an actual delivery of the dry-kiln, as there was of the other property. The kiln was held by the Acme Company, subject to the order of the lumber company, and was, therefore, constructively in its possession. *Alman v. Davis,* 24 N. C., 12; *Morgan v. Perkins,* 46 N. C., 171; *Cohen v. Stewart,* 98 N. C., 97; *Lumber Co. v. Wilcox,* 105 N. C., 34, and especially *Winberry v. Koonce,* 83 N. C., 351. The parties stood towards each other, in regard to their relative interests in the dry-kiln and in respect to any risk of its destruction by fire or other accidental cause, precisely as they would have stood if the kiln had actually been delivered.

It is familiar learning, and such an elementary and just principle as to have become axiomatic, that one party will not be permitted to plead his own act or fault, which has prevented the performance of a contract by the other party, in order to defeat the latter's recovery thereon. It

is just a simple application of the maxim that no man will be allowed to take advantage of his own wrong, and the doctrine has been strikingly illustrated in its application to cases analogous to this one. *Buff-*
(125) *kin v. Baird,* 73 N. C., 283; *Harris v. Wright,* 118 N. C., 422; *Harwood v. Shoe,* 141 N. C., 161. *Judge Pearson* said: "One who prevents the performance of a condition, or makes it impossible by his own act, shall not take advantage of the nonperformance." *Navigation Co. v. Wilcox,* 52 N. C., 481. So, in *Harwood v. Shoe, supra,* it was said: "It would be against good morals, as well as law, to allow plaintiffs to profit by their wrongful acts, although they were not parties to the contract." (*Nemo ex suo delicto meliorem suam conditionem facere potest.*) Here it appears that the lumber company, by its own request, prevented the delivery of the kiln. Will it now be heard to say that the resulting loss should fall upon the Acme Company, which was ready and willing at all times, even up to the very moment of the fire, to deliver it, when, if the delivery had been made, as originally contemplated and agreed, no loss would have occurred? Such a proposition cannot be entertained for a moment. It would be grossly inequitable if we should so hold. The lumber company must abide by the consequences of its deliberate act, which has entailed loss upon it, and not be permitted to shift the responsibility for the loss to the Acme Company, which was absolutely without any fault. The correct principle is stated and elucidated in 1 Parsons on Contracts (9 Ed.), p. 581, as follows: "If the contract be to deliver the thing ordered at the residence or place of business of the buyer, the seller is liable, although such delivery becomes impossible, unless it becomes so through the act of the buyer. If the seller refuses to deliver it at a time and place agreed on, and it perish afterwards without his fault, he is liable for it; but if he be ready, and the vendee wrongfully refuse or neglect to receive it, the seller is not liable, unless the thing perish through his gross and wanton negligence." As we have shown, there was no neglect or fault on the part of the Acme Company.

(126) This being the situation with reference to the title of the kiln, the principle of *Tufts v. Griffin, supra,* most clearly applies. That case is cited with approval in *Tufts v. Wynne,* 45 Mo. App., 42, in which the same question we have here was presented, and an analogy is there drawn between a conditional sale of personal property and a contract to sell land, it having been held by many courts, in accordance with a well settled principle of equity, that in the latter case the loss, if any of the property is destroyed or diminished in value by accidental causes, falls upon the vendee, citing *Snyder v. Murdock,* 51 Mo., 175; *Walker v. Owen,* 79 Mo., 509; *Martin v. Carver,* 1 S. W., 199. We have lately announced and applied the same principle, as to land, in *Sutton v.*

Davis, 143 N. C., 474, where the leading authorities will be found carefully collected and lucidly considered by *Justice Hoke,* at page 484.

The general principle of liability on notes given for the purchase money of personal property, where title is retained as a security for payment, is clearly stated in *Barrows v. Anderson,* 3 Cent. Law Journal, 413, as follows: "But the question here is, At whose risk was the property, and who must bear the loss? The purchaser, by his note, obligated himself to pay the price at a given time; there is no condition or contingency expressed in the note upon which he can avoid payment, and the question is whether the law will supply such a condition. There is no doubt but that the title and right of property, by the terms of the note, remained in the seller, while the possession and right of possession were with the defendant and the seller could not assert any claim to it until the buyer made default. The seller held the naked title subject to the interest of the buyer, *i. e.,* the contingent right to a title which would vest absolutely on payment of the price, without any further act on the part of the seller. The right to the use of the machine for two years, with the contingent right to a perfect title upon the payment of the price, constituted the consideration of the note."

The real and substantial nature of the transaction, for the pur- (127) pose of determining who should bear the loss, is that of mortgagor and mortgagee, or lienor and lienee. The contract, it is true, creates technically a conditional sale, but the vendor, in fact, only retains the legal title as a security in equity, and the title otherwise passes to the vendee with a lien for the purpose named. *Hamilton v. Highlands,* 144 N. C., 279. The intention of the law, as embodied in the recent statutes of registration, but emphasizes this view of the relation of the parties (*Brem v. Lockhart,* 93 N. C., 191), when we come to determine their legal and equitable rights. It is not our purpose to diminish in the least degree the rights of either party in the property as fixed by the former decisions of this Court, but only to look at the transaction, as regards the question before us, according to its true and essential character, and to administer justice under the fundamental maxims of the law.

If we should decide that the Acme Company was holding the kiln for the lumber company as its bailee, our conclusion would not be affected or changed, as, even in that case, there being no negligence shown on the part of the former company, but it being found that it was without any fault whatever, it could not be adjudged liable for the loss.

Some of the cases cited by the learned counsel for the receiver, in their well prepared brief, can easily be distinguished from the one at bar; and the other authorities they rely on, which apparently support their position, are in direct conflict with our decisions and the best considered cases on the subject decided in other courts. They are, in our

opinion, contrary to both reason and a proper conception of what should, in accordance with good conscience and sound morality, be considered as the relative rights of the parties. The equity of the case is clearly with the Acme Company, and the law, we believe, is in harmony with the right.

(128) There may be another ground upon which the bank can succeed, as suggested by its counsel, but we need not and do not consider it, as the point already decided is sufficient to dispose of the case in its favor.

The learned referee, who so intelligently tried the case, and who has stated his findings of fact, and the law arising thereon, with such remarkable clearness, was right in his conclusion, as was the able presiding judge, who confirmed his report and gave judgment accordingly.

We find no error in the record.

Affirmed.

H. G. WILLIAMS, ADMINISTRATOR, v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

(Filed 2 October, 1907.)

1. **Insurance—Contract—Lex Loci Contractus—Agreement.**

In the absence of a statute fixing the *lex loci contractus*, a foreign insurance company and the insured may fix, by agreement, the place of the contract as being that of the residence of the former party.

2. **Same—Summons—Service—Company Withdrawing from State—Foreign Parties.**

Revisal, sec. 2806 (act of 1893, ch. 299, sec. 8), providing that "All contracts of insurance, application for which is taken within this State, shall be deemed to have been made within the State and subject to the laws thereof," was designed for the protection of citizens of this State, and does not apply to a policy issued prior to its passage to a citizen of this State and subsequently assigned by the insured to a citizen of another State, so as to make a summons served upon the insurance company here in an action by the citizens of such other State a sufficient service, when the defendant has previously thereto withdrawn from the State and canceled its power of attorney to the commissioner.

ACTION heard on motion, by special appearance, before *Long, J.*, at June Term, 1906, of MARTIN, made to set aside and vacate service of summons on the Insurance Commissioner.

(129) On 19 April, 1884, defendant, a New York corporation, issued to A. W. Satterthwaite, of Yatesville, Beaufort County, in this State, a policy of insurance upon his life for $6,000, payable to insured

or his legal representatives. The policy contained the usual stipulations in regard to payment of assessments. There is nothing in the policy to indicate at what place the application was made or where the policy was delivered, other than the statement of insured's residence. The policy was signed in New York. The tenth clause is as follows: "The entire contract contained in this certificate and said application, taken together, shall be governed by, subject to, and construed only according to the constitution, by-laws, and regulations of said association and the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York." On 27 November, 1895, the said A. W. Satterthwaite, having paid the assessments to that date, assigned the policy to the plaintiff, a citizen and resident of the State of Virginia, who thereafter paid such assessments as were made on said policy until 1 June, 1901, when the defendant company declared the contract of insurance forfeited on account of plaintiff's refusal to pay increased assessments demanded of him. The assessments paid by plaintiff amount to some $4,000. Plaintiff, on 7 June, 1906, instituted this action in the Superior Court of Martin County for the purpose of recovering the assessments paid by him, remitting and forgiving all sums in excess of $1,999.99, etc. Summons was served on James R. Young, Esq., Commissioner of Insurance for the State of North Carolina. Defendant, by its counsel, at June Term, 1906, of said court, made a special appearance and lodged a motion to set aside and vacate the service of summons on the Commissioner of Insurance. The court, upon this motion, found the following facts: On 19 May, 1899, defendant company revoked the power of attorney theretofore made to the Commissioner of Insurance. At (130) the date of the policy, at the date of the assignment, and at all times since, the plaintiff was and is now a citizen and resident of the State of Virginia. Defendant is a corporation, chartered, organized and having its principal place of business in New York City. The court denied the motion, and defendant duly excepted. Defendant thereupon demurred to the complaint. Demurrer was overruled. Defendant excepted and appealed.

R. O. Everett for plaintiff.
J. W. Hinsdale and Gilliam & Gilliam for defendant.

CONNOR, J., after stating the facts: The record presents a number of interesting questions, some of which are difficult of solution. In the view which we take of the appeal, it is unnecessary to discuss or decide them. The appeal must be disposed of upon the defendant's exception to the refusal of *Judge Ward* to set aside the service of summons on the

Insurance Commissioner and dismiss the action. It will be noted that, prior to the act of 1893 (ch. 299, sec. 8; Rev., sec. 4806), there was no statute in this State preventing a foreign insurance company and the insured from fixing by agreement the place of the contract. By that statute it is provided that "All contracts of insurance, application for which is taken within this State, shall be deemed to have been made within this State and subject to the laws thereof." That, in the absence of such a statute, the parties may agree upon the place of the contract, is well settled. 22 A. and E., 1325. Therefore, the policy, by its express terms, is made a New York contract.

This brings us to the consideration of the effect upon the plaintiff's right to bring the defendant into court by serving summons on the Commissioner of Insurance after the revocation of the power of attorney. Laws 1899, ch. 147 (Rev., sec. 4747), subsec. 3, requires every foreign insurance company, before it shall be admitted to do business in
(131) this State, to file in the office of the Insurance Commissioner "an instrument appointing him and his successor its true and lawful attorney, upon whom all lawful process in any action against it may be served," and further providing that "the authority thereof shall continue in force irrevocable as long as any liability of the company remains outstanding in this State."

The defendant, conceding the full force of this provision in the statute, as construed by this Court in *Biggs v. Ins. Co.*, 128 N. C., 5, and *Moore v. Ins. Co.*, 129 N. C., 33, insists that, as against the plaintiff, a resident and citizen of the State of Virginia, suing upon a New York contract, the limitation upon the power of the company to revoke the power of attorney does not apply. The point has been ruled in accordance with defendant's contention in *Hunter v. Ins. Co.*, 184 N. Y., 136. *Mr. Justice Hiscock*, discussing the language of our statute, says: "Statutes requiring the execution of some such agreement by foreign corporations as is invoked against the defendant here have always been regarded as primarily designed for the protection of the citizens of the State enacting the legislation and who might acquire rights under contracts executed with them, or for their benefit, while they were such citizens." The learned justice, speaking of citizens of other States, says: "They are not of the class for whose protection it was originally executed. They have not acquired any rights upon the faith of it." The contract of insurance being a New York contract, the plaintiff a resident of Virginia, we do not think that he, or his cause of action, comes within either the language or spirit of the portion of the statute which limits the power of the company to revoke its power of attorney. This view is not in conflict with the right secured to every citizen of any of the States to sue in the courts of this State upon any cause of action he may have against

defendant, whether a resident of this State or not, provided he finds the defendant in the State and has valid service of process. The Legislature of this State has the undoubted power to prescribe (132) the terms upon which foreign corporations may come into the State, and to pass statutes for the protection of its own citizens doing business with it. This is no discrimination against residents of other States. It is a question of procedure, always subject to legislative control, provided it does not violate any constitutional rights of the citizen. Except for the purpose stated in the statute, the defendant had a right at any time to withdraw from the State and cancel its power of attorney to the commissioner. Plaintiff is not within the restrictive language of the statute in that respect. The court erred in refusing the motion. This will be certified to the Superior Court of Martin, to the end that the defendant may have judgment in accordance with its motion and the action be dismissed.

Reversed.

W. R. HORTON v. SEABOARD AIR LINE RAILWAY.

(Filed 10 October, 1907.)

1. **Railroads—Negligence—Duty of Employer—Competent Assistance—Ordinary Care.**

It was the duty of the defendant railroad company to furnish the plaintiff, its engineer, a competent person to assist him in fixing his locomotive, the engineer acting under the instruction of the defendant, and such assistance being necessary from the character of the work being done; and the defendant is liable in damages when the assistant fails to exercise reasonable or ordinary care to prevent an injury, such failure being the proximate cause of the injury.

2. **Same—Instructions.**

While a party to the litigation is entitled to have correct propositions of law applicable to phases of the testimony given as instructions to the jury, when aptly tendered, it is not reversible error when the court, in its general instructions or in response to special prayers, has stated the proposition in a form equally as favorable to the contention of the appellant.

3. **Same—Fellow-servants—Evidence—Burden of Proof.**

When it appears from the evidence that plaintiff was injured, while in the course of his employment, by reason of the slipping or dropping of an end of a rod by his fellow-servant, upon the other end of which he was at work, such is sufficient evidence to be considered by the jury upon the question of negligence, and, if unexplained, justifies the inference of negligence or the failure to exercise due care, when the consequences of such act could readily have been perceived. Revisal, sec. 2646.

(133) ACTION tried before *Biggs, J.*, and a jury, at February Term, 1907, of VANCE.

Action for personal injury sustained by plaintiff while in the employment of defendant.

Plaintiff testified that he was, at the time of, and had been for many years before, the injury complained of, in the employment of defendant as yard locomotive engineer at Henderson, N. C.; that on 10 December, 1903, Mr. Clark, the traveling engineer of defendant, who had charge of its engines and the duty of looking after them, came to Henderson and told him that the front end of the engine was in bad condition and must be fixed at once. Plaintiff told Clark that the brass was worn out, and that he could not fix it. Clark said that it must be done—that plaintiff must fix it at once. Plaintiff told him that he would do the best he could with it; that he had no tools. He said that it must be done that night. It snowed and the wind blew "as hard as you ever saw it." When plaintiff quit work, he backed down to a yard and bought some wood. Seagrave was fireman on the engine. Plaintiff says: "We were working on the main rod. Seagrave had never seen a rod taken down before, and didn't look like he knew anything about it. I was trying to enter the rod into the back end of the strap, when his end slipped out of his hand and jerked my hand down on the rod. He dropped his end of the rod. I had hold of the other end of the rod; it mashed my arm.

(134) It was 8 or 10 feet long. It was about half-past 10 or 11 o'clock at night when I got through fixing the engine." He testified that certain tools were necessary to do the work; that he purchased a file himself, and that it was necessary to have one man to help him. The foregoing is all of the evidence in regard to the time, place, manner, etc., of the injury. There was evidence in regard to the condition of the engine and of the work to be done on it, the character and extent of the injury, none of which is necessary to set out in detail for the purpose of passing upon the exceptions referred to and relied upon in the defendant's brief. Defendant moved for judgment of nonsuit. Motion denied. Defendant excepted. The usual issues were submitted to the jury.

His Honor, after stating the contentions of the parties, among other instructions not excepted to, charged the jury: "As between master and servant, the mere fact of the servant being injured while in his employ is not *prima facie* evidence of negligence, and the burden is upon the servant to prove the injury was caused by the master, and he must show that the injury was the result of his negligence. It is not sufficient to show that he was injured; he must go further and show the cause of the injury, and that it was the result of negligence of some agent of the master, and that it was this negligence that was the proximate cause of the

injury. So much for the questions of law which I shall give you to guide you and control your actions in determining the first issue. Now, applying these rules to the facts in the case, you must determine whether Mr. Horton was injured by the negligence of the defendant's fireman, Mr. Seagrave, and whether that negligence was the cause of the injury, if you find that Mr. Horton sustained an injury. Did the defendant railroad, through its agent, fail to exercise proper care, as I have explained to you, in handling this rod, and was such negligence the proximate cause of the plaintiff's injury, if you find he was injured, as claimed by him, on or about 10 December, 1903? That is the question which you must determine with reference to the first issue." His Honor explained the evidence and directed the attention of the (135) jury to the several issues and phases of the case. To this there is no exception.

Defendant requested his Honor to give the following special instructions:

"As between master and servant, the mere fact that the servant is injured while in his employ is not *prima facie* negligence and is no evidence of negligence." This prayer was given, the court adding: "But the burden of proof is upon the servant to prove that his injury is caused by the negligence of the master."

"Upon the whole evidence, if the jury believe it, they will answer the first issue 'No.'" Refused, and the defendant excepts.

"The mere fact that plaintiff's arm was injured while in the employment of the defendant is no presumption of negligence." The court gave this instruction.

"The mere fact that Joseph Seagrave dropped the rod is no presumption of negligence." The court gave this instruction.

"The general rule is, that the mere fact and proof of injury, unsupported by other evidence of negligence or any attending circumstances whereby the jury can reasonably infer negligence, is not a presumption of negligence; and if the jury should find from the facts in this case there are no attending circumstances from which they can reasonably infer negligence, other than the bare fact of the unexplained falling of the rod upon the plaintiff's arm, they will answer the first issue 'No.'" His Honor gave the first part of the instruction, but omitted to give the latter part, towit, "and if the jury should find from the facts in this case that there are no attending circumstances from which they can reasonably infer negligence, other than the bare fact of the unexplained falling of the rod upon the plaintiff's arm, they will answer the first issue 'No.'" Defendant excepted.

There was judgment upon the verdict. Defendant appealed. (136)

T. M. Pittman and J. C. Kittrell for plaintiff.
Day, Bell & Allen for defendant.

CONNOR, J., after stating the case: Defendant, in the well prepared brief and the oral argument of counsel, alleges as the first ground for a reversal of the judgment the refusal of his Honor to direct judgment of nonsuit. This contention involves the proposition that there was no evidence of negligence fit for the consideration of the jury. It is conceded that plaintiff was in the line of his duty, acting by direction of an employee of the company having the power to give the order, and that Seagrave, whose alleged negligence in dropping the rod from his hand, was a fellow-servant, for whose negligence defendant is liable under the fellow-servant law. Rev., sec. 2646. Is there any evidence that Seagrave "dropped his end of the rod?" The plaintiff swears to it, and he is not contradicted. Seagrave is not introduced by either party. It is true that plaintiff also used the expression, "the rod slipped from his hand." It was for the jury to say which was the correct statement. If he dropped the end of the rod while plaintiff's arm was in a position to be injured thereby, it certainly constituted some evidence from which the jury may have inferred negligence. It was his duty to hold the rod—to use such physical power as was at his command to prevent it from dropping. The dropping of the rod was not conclusive, nor, as his Honor charged the jury, did it raise a presumption of negligence, but it was certainly some evidence thereof. In this connection his Honor said to the jury: "In determining the question as to whether the agent of the defendant was or was not negligent in dropping or letting the rod slip, if you find he dropped or let it slip, the question of whether he acted as a reasonably prudent man would have acted under similar circumstances must be considered, the burden being upon the plain-
(137) tiff to satisfy you by greater weight of evidence that the agent did not exercise proper care. If you are satisfied by the greater weight of evidence that the agent did not exercise proper care, that he was negligent, and that this negligence was the proximate cause of the plaintiff's injury, then, as I have explained, it is your duty to answer the first issue 'Yes.' If you are not satisfied by the greater weight of evidence that he was negligent, or that it was the proximate cause of plaintiff's injuries, you will answer that issue 'No.'"

His Honor carefully explained to the jury that the burden of proof was upon the plaintiff, not only to show that Seagrave let—that is, permitted—the rod to slip or drop from his hand, but that he failed to exercise the care of a prudent man to prevent its doing so. There is no suggestion that the rod slipped or dropped because of its weight, or that Seagrave did not have physical strength sufficient to hold it—that it was

too heavy for one man to hold. It is true that plaintiff says: "I should say that it weighed 400 or 500 pounds; I never weighed one." Defendant's witnesses say that it did not weigh to exceed 75 pounds. It was the duty of defendant, when, by its agent, it ordered plaintiff to fix the engine, to furnish a competent man to assist him, who would exercise reasonable—that is, ordinary—care in holding the rod. If it failed to do so, there was negligence; and if such negligence was the proximate cause of the injury, it was actionable. We have examined the cases relied upon by defendant: *Bryan v. R. R.*, 128 N. C., 387, and *Alexander's case*, 132 N. C., 428. We do not think them conclusive of the question presented by this record. Certainly, if one whose duty it is to hold an iron rod while another person is in a position with reference to it that dropping it will injure him, the duty is imposed upon the person holding to use ordinary care to prevent it from dropping. In the absence of any explanation why he "dropped" it, is it not a reasonable inference that he failed to exercise ordinary care? The prin- (138) ciple governing cases of this kind has been so fully and so recently discussed by us that we deem it only necessary to cite the last one, in which *Mr. Justice Hoke* reviews all of them—*Fitzgerald v. R. R.*, 141 N. C., 530. We are all of the opinion that his Honor correctly denied the motion for judgment of nonsuit or to direct a verdict upon the first issue. There is no exception to the charge, as given, argued in the brief, and we find no error therein. Defendant, however, earnestly contends that his Honor committed prejudicial error in refusing to give the last part of the instruction asked.

While it is settled by a number of cases decided by this Court that a party is entitled to formulate a correct proposition of law applicable to phases of the testimony, and have it submitted to the jury, it is equally well settled that, if the court, either in its general instruction or in response to special prayers, has stated the same proposition in a form equally favorable to the contention of appellant, the failure to give such prayer is not reversible error. His Honor had clearly instructed the jury in respect to the law applicable to the testimony. He had, also, in response to defendant's prayer for special instruction, told the jury that the mere fact that plaintiff was injured while in the employment of defendant was "no evidence of negligence"; that the "mere fact that Joseph Seagrave dropped the rod is no presumption of negligence," and again, that "the mere fact and proof of injury, unsupported by other evidence of negligence or any attending circumstances whereby the jury can reasonably infer negligence, is not a presumption of negligence." We are unable to see how much more strongly his Honor could have put defendant's contention, unless he had instructed them that there was no evidence of negligence. Having submitted the question of negligence to

the jury upon the theory that if they found that Seagrave dropped the rod, we do not perceive how he could have said to them that if
(139) they found no attending circumstances, they must find that there was no negligence.

Plaintiff's contention was that, in the absence of "attending circumstances" explaining why he dropped the rod, the jury should infer that he did so negligently—that he was not exercising due care. To have given the instruction asked would have been to reason in a circle and withdraw from the jury, indirectly, the very question which he had submitted to them. It was the unexplained dropping the rod which plaintiff relied upon to maintain his contention. It will be further noted that the instruction assumes that the evidence showed an "unexplained falling of the rod." This assumption has no support. All of the evidence is that Seagrave "dropped the rod," or that it "slipped" from his hand. It has been frequently held that, where the duty is imposed of securely fastening an object, the falling of which endangers life or limb of one to whom the person owes the duty of fastening the object, the falling of it unexplained justifies the inference that it was not securely fastened. *Windleman v. Calloday,* 88 Md., 98; *Gulock v. Eldermeyer,* 88 N. Y., 645; *Kearney v. R. R.,* 5 L. R. (Q. B.), 411, and other cases cited in *Womble v. Grocery Co.,* 135 N. C., 474. Here Seagrave was an intelligent human being, knew the conditions and the duty which he owed plaintiff and almost certain injury to him if he dropped the rod. If there were "attending circumstances" explaining why he did so, as if his hands were benumbed by cold, or he was taken suddenly sick, or for any reason he was suddenly disabled, it was open to defendant to show such conditions. The instruction asked is not perfectly clear, but, as we interpret the language, his Honor correctly declined to give it. The case has been, so far as an examination of the record discloses, fairly tried, and every phase of the testimony submitted to the jury, with correct instructions in respect to the law.

The judgment must be

Affirmed.

Cited: Board of Education v. Lumber Co., 158 N. C., 317; *Moore v. R. R.,* 165 N. C., 441.

(140)

Y. T. ORMOND, EXECUTOR, v. THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(Filed 10 October, 1907.)

1. **Issues, Form of.**

No particular form is prescribed by law for issues, and when those submitted by the court substantially and clearly present the issues raised by the pleadings they are not open to objection.

2. **Parties—Beneficiaries of Litigated Fund.**

The joinder of unnecessary parties, either plaintiff or defendant, is immaterial, save only as it may affect the matter of costs; and when, upon application of the defendant, parties defendant are made who are beneficiaries of a fund in litigation, it is best, for the due administration of justice, that they should be before the court when the title to the fund is settled.

3. **Same—Assignment of Interest—Insurance—Policies.**

To effect an assignment of a policy of insurance, no particular form of words is essential, and such results when there is substantially a transfer, actual or constructive, with the clear intent at the time to part with all interest in the thing transferred with a full knowledge by the transferrer of his rights.

4. **Same—Declarations—Assignment of Policy—Cancellation—Paid-up Policy—Evidence.**

Declarations of plaintiff's testator indicating that he did not care to pay premiums on a policy of insurance on his life any longer, and that he "turned over" the written policy and interest thereon to his four children named, who agreed to and did pay the premiums thereafter, are competent evidence against the executor. And letters written by the insured to the insurance company, practically directing the company to cancel the policy and to issue a separate paid-up policy to said children, naming them, are clear proof of an assignment or surrender of all the testator's interest therein, when the testimony is not conflicting.

ACTION tried at May Term, 1907, of LENOIR, before *Long, J.*, and a jury.

Plaintiff sues to recover one-fifth of a policy of insurance on the life of his testator, issued by defendant. The court submitted the following issues:

"1. Did the plaintiff's testator, . . . after the death of his wife, relinquish any rights and interest he might have had in the policy from his wife and surrender said policy to his children, to be kept (141) alive for their benefit, as alleged in the answer?" A. "Yes."

"2. Did the defendants Hyatt, Luce and E. L. Miller, agreeably to such an understanding with A. R. Miller, keep alive the said policy and pay the premiums accruing thereon from year to year and until the death of A. R. Miller (plaintiff's intestate), as alleged in the answer?" A. "Yes."

From the judgment rendered, plaintiff appealed.

Y. T. Ormond and George V. Cowper for plaintiff.
W. S. O'B. Robinson and F. H. Busbee & Son for defendant.

BROWN, J. The evidence in this case tends to prove that, in 1868, plaintiff's testator, A. R. Miller, insured his life in the defendant company in the sum of $10,000 for the benefit of his wife, Delia M. Miller, and their four children, Sybil Hyatt, E. L. Miller, Maude Luce, and W. R. Miller. In 1884 Mrs. Delia M. Miller died intestate, leaving her husband, A. R. Miller, and the four children above named. No administration was granted upon her estate. In 1903 W. R. Miller assigned his interest in the policy to Mrs. Sybil Hyatt, and soon thereafter died, before the death of A. R. Miller. In June, 1905, A. R. Miller died, leaving a will, in which Mrs. Luce was named as residuary legatee. The policy was presented to the insurance company for payment by the three children and by Mrs. Hyatt as assignee of W. R. Miller, and the amounts due were paid by the company, as appears by the receipts and releases of the beneficiaries. The rights and interest of A. R. Miller having been relinquished and surrendered, as claimed, to the four children, the company paid to them as beneficiaries the amount of the policy in full, without deduction. The plaintiff brings this action, as executor of A. R. Miller, to recover one-fifth of the amount of the policy, alleging that the interest of Mrs. Delia M. Miller in the policy had not been relinquished or surrendered to the other beneficiaries by Dr. Mil-
(142) ler, the insured, who, it is admitted, acquired such interest upon the death of his wife, in 1884.

1. The objection made by the plaintiff to the form of the issues submitted by the court to the jury is without merit. No particular form is prescribed by law, and if the issues submitted substantially present the issues as raised by the pleadings they are not open to objection. *Mace v. Insurance Co.*, 101 N. C., 122. The issues submitted in this case are so formulated that they clearly express the controverted facts alleged on the one side and denied on the other.

2. Upon application of the defendant company, the court, some time before the trial, entered an order making the beneficiaries, to whom the insurance company had paid the policy in full, parties defendant, to which plaintiff excepted. The beneficiaries themselves take no exception to the order of the court making them parties. It possibly may be, as contended by the plaintiff, that they are not, strictly speaking, necessary parties. They certainly are not improper parties, and it is doubtless best for the due administration of justice that they should be present before the court when the title to the fund is settled. Under our practice, the failure to join a necessary party is an error, to which exception may be properly taken. But the joinder of unnecessary parties,

either as plaintiffs or defendants, is immaterial, save only as it may affect the matter of costs. *Rowland v. Gardner,* 69 N. C., 53.

3. It is contended by appellant that the evidence, in any view of it, fails to establish an assignment of A. R. Miller's interest in the policy to his four children, to whom the company paid the full amount of the policy. No particular form of words is essential to effect an assignment or surrender of a policy of insurance. An assignment is substantially a *transfer,* actual or constructive, with the clear intent at the time to part with all interest in the thing transferred and with a full knowledge of the rights so transferred. May on Ins., secs. 388, 390; (143) *Winberry v. Koonce,* 83 N. C., 351.

The declarations of plaintiff's testator, which are clearly competent against his executor, indicate that he did not care to pay the premiums any longer, and that he "turned over" the written policy and his interest in it to his four children, hereinafter named, who agreed to pay the premiums thereon, and that after that the testator paid no further premiums. We think the two letters signed by the testator, dated 30 November, 1890, and 13 April, 1893, written to the insurance company and received by it in due course of mail, are clear proof of an assignment or surrender of all of the testator's interest which he then had in the policy to his four children. In the letter of 13 April, 1893, the testator practically directs the company to cancel the policy and to issue "a separate paid-up policy, the amount being divided into four equal parts and made payable to the following individuals: Mrs. Sybil Hyatt, Kinston, N. C.; Mrs. Maude Luce, Galesville, Wis.; E. L. Miller, Leanna, Kan., and W. R. Miller, Kinston, N. C. You can send them here, to my care, or to the above addresses, as you think best."

The evidence shows that the written policy was delivered to Dr. Hyatt, the husband of Mrs. Sybil Hyatt, one of the children, for the benefit of testator's four children, and there is no evidence that, up to his death, he exercised any control over it or claimed any interest in it. We think there is abundant evidence to be submitted to the jury that the two letters to the company were written by the testator or by his direction and authority, and that the plaintiff's exception on that ground is untenable. Upon a review of the whole record, we are of opinion that the case has been fairly tried, and that there is

No error.

Cited: Baggett v. Jackson, 160 N. C., 29.

(144)

W. E. SWINDELL v. J. E. LATHAM.

(Filed 10 October, 1907.)

1. **Principal and Agent—Borrowed Money by Agent—Ratification.**

A person dealing with an agent of limited powers must generally inquire as to the extent of his authority. When the principal authorizes his agent, who conducts a mercantile business for him in a different town, to buy goods only for cash, and furnishes the means therefor, he is not responsible for the full amount of moneys borrowed on a note made in his name by his agent for the purposes of the business.

2. **Same—Ratification—Knowledge.**

When an agent conducting a mercantile business for his principal, with authority only to buy for cash, the means being furnished therefor, exceeds this authority and borrows money on a note made by him in the name of his principal for that purpose, it is not alone sufficient that the principal receives the use and benefit in the business of the money thus borrowed to amount to a ratification of the full amount of the debt, but it must be further shown that the principal knew that the agent had thus violated his instructions. *Quære*, whether the creditor can recover the reasonable value of the benefit derived from the loan.

3. **Same—Principal's Credit—Speculation.**

An agent, without the knowledge of the principal, cannot use the credit of his principal in buying flour on their joint account for the purpose of speculation.

4. **Same—Evidence—Circumstance.**

When an agent, with limited power to buy goods for cash for his principal, who furnishes the means therefor, exceeds his authority by buying upon a credit, his borrowing money upon a usurious rate of interest is, at least, a circumstance to be considered by the jury upon the question of knowledge upon the part of the one thus lending the money.

ACTION tried before *W. R. Allen, J.*, and a jury, at February Term, 1907, of BEAUFORT.

This action was brought to recover the sum of $3,906.25, which the plaintiff alleges is due to him from the defendant by reason of the fact that the latter, who lived in New Bern, was conducting a mer-
(145) cantile business in Washington, Beaufort County, N. C., by and through his agent, A. B. Smith, and that Smith was authorized to purchase such goods, wares, and merchandise as were necessary to be used in the conduct of the said business, either for cash or on credit, and that, in the usual and necessary conduct of the affairs of his principal, A. B. Smith borrowed from the plaintiff the said sum, which was used in the said business and of which the defendant derived the use and benefit. The defendant denied all of this, and averred that his agent was authorized to buy only for cash, which was to be furnished by him or procured through the bank.

The court charged the jury as follows:

1. The plaintiff brings this action to recover money which he alleges was borrowed by the defendant's agent, A. B. Smith, for use in defendant's business of buying and selling cotton and merchandise in Washington, and that the agent, when he received the loan of the money, was acting within the scope of his authority, and that the defendant received the benefit of the money so borrowed in the prosecution of his business in Washington.

2. The defendant admits that he was doing business in Washington, by his agent, A. B. Smith, but he denies that Smith, as his agent, had any authority to borrow money, but, on the contrary, he was instructed to buy only for cash and to draw checks on the bank for the purchases so made by him, both of cotton and merchandise, and that sufficient arrangements had been made with the bank to honor all checks so drawn; and he avers that he is not liable to the plaintiff for any money borrowed by Smith from him.

3. A principal is not bound by the act of his agent unless the act is within the authority of the agent. This authority may be expressly given, but there is no evidence of such authority in this case. It may also be implied. If the principal acts in such manner and permits his agent to so conduct his business as to lead one of ordinary prudence to believe he has authority to do a particular act, and a third party deals with the agent, relying upon this apparent authority, the (146) principal is liable.

4. If an agent has no authority to borrow money in order to pay for goods, but is directed to buy for cash with money advanced by the principal, and the latter fails to furnish the cash, and the agent, for the purpose of promoting the business, borrows money and uses it to pay for goods for his principal, and the goods are used in said business for the benefit of the principal, then the principal is liable for the money so borrowed.

5. The court here stated the contentions of the parties, and recited the testimony, showing its bearing upon the issues in the case.

6. If you find by the greater weight of the evidence that the defendant held Smith out as his agent, and, with his knowledge and consent, permitted the business to be so conducted by Smith as to lead a man of ordinary prudence to believe that he had authority to borrow money, and the plaintiff, while acting upon this belief, loaned money to said agent, which was used in buying goods for the defendant, you will answer the first issue "Yes." If you find by the greater weight of the evidence that the defendant failed to furnish his agent with sufficient funds to pay for goods, that he knew goods were to be bought for cash, that his agent borrowed money from the plaintiff and used the same to pay for goods,

and that these goods went into the business of the defendant and were disposed of for his benefit, you will answer the first issue "Yes"; otherwise, "No."

7. If you believe the evidence in this case, the plaintiff loaned to Smith $1,548.75 in October, 1903; $857.50 on 16 February, 1904, and $1,500 on 16 December, 1904. If you further believe the evidence, the first two of these transactions are usurious, and the plaintiff would not be entitled to recover any interest thereon, and all payments made would be deducted from the principal sum. The third transaction is dependent upon the intention of the parties. If it was made for the purpose of securing a greater rate than 6 per cent, it was usurious, (147) but if otherwise, it was not.

8. If you answer the first issue "Yes," you will answer the second issue, if you believe the evidence, "$1,356.25 on the first transaction, $778.75 on the second, $1,500 on the third" if you find it was usurious, or "$1,500 and interest from 16 December, 1904," if it was not usurious.

9. If you answer the first issue "No," do not consider the first and second loans any further, but you will still consider the third; and if you find from the evidence that Smith borrowed the $1,500 from the plaintiff on 16 December, 1904, and used it to buy goods for the defendant; that these goods were received by the defendant and used by him with a knowledge of these facts, then the defendant is liable therefor; and if you so find, answer the second issue "$1,500," if usurious, or "$1,500 and interest," if not usurious. If you do not so find, and you answer the first issue "No," then you will answer the second issue "Nothing." If you believe the evidence, and answer the first issue "Yes," you will answer the second issue "$300, less $92, leaving $207.12, with interest from 7 January, 1905."

The following issues were submitted to the jury:

1. Was A. B. Smith, prior to 13 December, 1904, authorized by the defendant to enter into the contracts with the plaintiff sued on in this case, and to charge defendant with the payment of the money received thereby? Ans. "Yes."

2. Is the defendant indebted to the plaintiff; and if so, in what amount? Ans. "$3,635."

There was a verdict, under the evidence and the charge of the court, for the plaintiff, as appears in the record, and judgment was entered thereon, from which the defendant, having duly excepted to the alleged errors of the court in the trial of the case, appealed to this Court.

Harry McMullan and Ward & Grimes for plaintiff.

W. C. Rodman for defendant.

WALKER, J., after stating the case: It seems to us that the pre- (148) siding judge went too far, under the facts and circumstances of this case, in the fourth instruction given the jury, which was as follows: "If an agent has no authority to borrow money in order to pay for goods, but is directed to buy for cash with money advanced by the principal, and the latter fails to furnish the cash, and the agent, for the purpose of promoting the business, borrows money and uses it to pay for goods for his principal, and the goods are used in said business for the benefit of the principal, then the principal is liable for the money so borrowed." We presume that his Honor, in giving this instruction, was attempting to follow the principle which he thought had been declared in *Brittain v. Westhall,* 135 N. C., 492, and 137 N. C., 30; but he did not confine himself to the limit which, in that case, is prescribed to an agent in buying goods for his principal, and for this reason he erred in the instruction given to the jury, because it broadened the scope of the agent's authority as there defined. There is undoubtedly one expression in that case, as reported in 135 N. C., 492, which, when considered by *itself,* might, perhaps, have led the judge into this error; but what is said in a judicial opinion must be read with reference to the facts of the particular case then under investigation, and also in connection with the context.

In *Brittain v. Westhall,* as reported in 135 N. C., 492, and again in 137 N. C., 30, there were two questions involved: (1) Whether Westhall had furnished Townsend, his agent, with funds to buy the goods; and (2) whether, if he had done so, and his agent, instead of using the funds for that purpose, bought the goods on the credit of his principal, and the latter afterwards received and appropriated them, *knowing* that Townsend, his agent, had violated his instructions to buy only for cash with money supplied to him, and had bought on credit. With reference to these questions, we stated several legal propositions:

1. That an agent can only contract for his principal within the (149) limit of his authority, and persons dealing with an agent having limited powers must generally inquire as to the extent of his authority. *Brittain v. Westhall,* 135 N. C., 495. See, also, *Bank v. Hay,* 143 N. C., 326.

2. When the authority to buy or to sell is given in general terms, it is clear, in the absence of any restriction to the contrary, that the agent has the power to buy for cash or on credit, as he may deem best, and to sell in the same way. *Ruffin v. Mebane,* 41 N. C., 507. Or, if express authority to buy on credit is not given to an agent, but he is authorized to make the purchase, and no funds are advanced to him to enable him to buy for cash, he is, by implication, clearly authorized to purchase on the credit of his principal, because, when an agent is authorized to do

an act for his principal, all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted. *Sprague v. Gillett,* 50 Mass., 91; *Brittain v. Westhall,* 137 N. C., p. 32; *Komorowski v. Krumdick,* 56 Wis., 23.

3. On the face of the contract it appeared that Townsend was directed to buy only for cash, and, this being so, he could not, of course, buy on credit, contrary to the instruction of his principal. Whether the defendant subsequently ratified what he did, and is therefore liable to the plaintiff, is quite another and different question. *Brittain v. Westhall,* 137 N. C., p. 33. This was said by us in regard to a prayer of the defendant, as follows: "The written contract introduced in evidence constituted Townsend the agent of Westhall, with limited authority only. As such agent, Townsend had authority to buy lumber for cash, with money furnished him by Westhall, but he did not have authority under said written contract to buy lumber on Westhall's credit."

4. The contract expressly required Townsend to buy for cash, and the only possible ground of defendant's liability is, that he received and appropriated the lumber to his own use, knowing that his agent
(150) had bought it on his credit, or that he had not provided his agent with the cash to buy lumber, in which case the latter had implied authority to buy on credit, and that fact would also be some evidence of notice to defendant that his agent had so bought. 1 A. and E. Enc., 1021, and notes; *Brittain v. Westhall,* 137 N. C., p. 34. This language was used by us when commenting upon a prayer of the defendant, as follows: "Although the identical lumber in controversy came into the possession of defendant and was appropriated by him, he would not be liable to plaintiff for its value unless he had authorized Townsend to buy on his credit, or accepted and appropriated the lumber with *notice* of the fact that Townsend had bought it on his (defendant's) credit." We also stated that, if the agent is instructed to buy only for cash, to be furnished by the principal, and violates his instructions by buying on credit, and the principal thereafter receives and uses the goods, knowing that he has not furnished the cash with which to buy them, he is liable at least for the value of the goods to the seller, as he must have known that they were bought on credit; but if it appears that he did furnish the cash, and the agent nevertheless purchased on credit, he is not liable for the price, even though he afterwards received and used the goods, if it *appears* that he did so, without notice of his agent's default.

It follows from this statement of the law, as declared by the two decisions in that case, that the instruction of the judge below was erroneous, because the defendant's liability, as principal of A. B. Smith, to the plaintiff was made to turn only upon whether the borrowed money had

been applied to the payment for goods which were used in the defendant's business, in which event the jury were told that the defendant would be liable, not merely for the value of the goods so used by his agent in his business, or for the value of any benefit he may have derived therefrom, but for the full amount of the *borrowed money*. The defendant lived in New Bern; the business was carried on by his agent, Smith, in Washington. It may be that, under the real (151) facts and circumstances of this case, the defendant did not know that his agent had violated his instruction, and his liability to the plaintiff for the amount of the *borrowed money* depended upon such knowledge. This was the ultimate fact to be established, and the jury should have been so instructed. Whether the defendant would be liable for the value of the goods actually used in his business, or for the value of any benefit derived therefrom, even if he had no notice that his agent had disobeyed his instructions, is a question which is not now before us. We simply decide that there was error in the instruction of the court to the jury.

There are some expressions in the receipts given by A. B. Smith, the agent, to the plaintiff for the borrowed money which might indicate that they were buying flour on joint account for the purpose of speculation, using the credit of the defendant for that purpose. We may not correctly understand these receipts, and their meaning and significance may be far otherwise than would appear on their face, but it is not permissible for an agent thus to use his principal's credit, if we are right in our interpretation of these receipts. An agent cannot, in law, represent himself and his principal where their interests conflict, and without the knowledge of the latter. An agent cannot thus well serve in two capacities—for himself and his principal—because the latter's interests *may* be prejudiced even by an unconscious and unintentional desire to advance his own. *Sumner v. R. R.*, 78 N. C., 289; *Lamb v. Baxter*, 130 N. C., 67; *Mining Co. v. Fox*, 39 N. C., 61; *Atkinson v. Pack*, 114 N. C., 597. We have only referred to this matter that the intention of the parties may be made clearer at the next trial. It may be, and likely is, that the transaction is entirely free from any objectionable feature.

If the transactions between the plaintiff and the agent, A. B. (152) Smith, were usurious, in so far as they affected the defendant, we do not see why this is not at least a circumstance to be considered by the jury upon the question as to whether the plaintiff did not know that the agent was exceeding his authority and acting contrary to his principal's instructions.

New trial.

Cited: Bank v. Drug Co., 152 N. C., 146; *Wynn v. Grant*, 166 N. C., 47; *Powell v. Lumber Co.*, 168 N. C., 637, 638; *Robinson v. Brotherhood*, 170 N. C., 549.

C. E. MANGUM v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 10 October, 1907.)

Railroads—Negligence—Duty to Passengers—Platforms—Ingress and Egress.

A railroad company owes a duty to its passengers to keep its depot platforms used by them as a means of egress and ingress free from obstructions and dangerous instrumentalities, especially at a time when its passengers are hurrying to and from its cars. And it is responsible for the actionable negligence of a newspaper porter in carrying a truck of newspapers to the train, when it customarily permitted such to be done if the papers were sent to the train too late for its own employees to reasonably handle them, not being compelled to receive them under such circumstances.

ACTION tried at February Term, 1907, of WAKE, before *Jones, J.*, and a jury.

These issues were submitted:

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

2. Did plaintiff, by his own negligence, contribute to the injury complained of? Ans. "No."

3. What damage, if any, is plaintiff entitled to recover? Ans. "$7,500."

From the judgment rendered defendant appealed.

Charles U. Harris for plaintiff.

F. H. Busbee and A. B. Andrews, Jr., for defendant.

BROWN, J. The evidence tends to prove that the plaintiff, on the night of 4 July, 1903, was a passenger on defendant's train, *en*
(153) *route* from Raleigh to Danville, Va. He passed through the gates of the defendant's station at Raleigh, and as he was walking along the platform used by passengers to reach the cars he was run into and seriously injured by a truck loaded with newspapers. It was in evidence that the man in charge of the truck was not employed by the railroad, but was employed by a newspaper, and it was his business to handle the newspaper mail. When the newspaper mail reaches the station in time it is the custom for the railroad truck hands to take the mail from the gate down to the train. When the newspapers arrive too late to be taken at the gate by the truck hands, the man who brings the newspapers down from the office takes them down to the cars and delivers them to the mail agents at the mail car. Witness R. E. Lumsden testified that the newspaper mail was handled by the railroad porters when it got to the gate before the transfer clerk and the porters went down with the regular mail. If it arrived in time, the railroad porters took the mail down to

the mail car; but if the newspaper mail got to the gate after the porters had gone down with the mail, the person who brought the newspaper mail took it down to the mail car and unloaded it. "When we went down with the mail on the night of 4 July, 1903, the newspaper mail had not come. A colored boy, named Lunsford Davis, handled the newspaper mail to the depot for the newspaper at that time." The witness heard of the accident either that night or the next day.

The only question presented for our consideration is the liability of defendant to plaintiff for the negligence of the newspaper porter, upon the above facts. It seems now to be almost elementary that one of the recognized duties of a railway company that undertakes to carry passengers is to keep its station premises in a reasonably safe condition, so that those who patronize it may pass safely to and from the cars. *Pineus v. R. R.*, 140 N. C., 450; Wood on Railways, 310, 1341, 1349. This duty extends not only to the condition of the platform itself, whereon passengers walk to and from the trains, but also to the manner in (154) which that platform is allowed by the common carrier to be used. *Western v. R. R.*, 73 N. Y., 595; Wood, *supra*. The defendant owed a duty to plaintiff, and to all other passengers, to keep its depot platforms used by them as means of ingress and egress free from obstructions and dangerous instrumentalities, especially at a time when its passengers are hurrying to and from its cars. *Pineus v. R. R., supra; R. R. v. Johnson*, 36 Kan., 769.

The fact that the injury to plaintiff was inflicted by the negligence of the newspaper porter, who, with defendant's consent, was on his way from the gates to the mail car with the truck loaded with papers, does not relieve the defendant from its contractual obligation to plaintiff, and we find no authority which sustains the contention that it does. The liability does not arise because defendant might reasonably have anticipated just what happened, but grows out of its duty to plaintiff to furnish him reasonably safe passage to the train. The defendant is not bound to accept newspapers and deliver them to the mail car unless the newspaper company delivers its papers at the gates in *reasonable* time for the defendant, through its own agents and employees, to take them at the gates and transport them to the mail car. If the defendant customarily permitted the newspaper porter, when late in his delivery, to push the truck along the platform inside the gates when passengers are hurrying to and fro, the defendant must be liable for the porter's negligent conduct while using the station platform, upon the principle that it has temporarily accepted him as its servant. *R. R. v. Gustafson*, 21 Col., 393; *Kimball v. Cushman*, 103 Mass., 194; *Hill v. Morey*, 26 Vt., 178; *Oil Creek v. Kreighton*, 74 Pa., 316; *Demmitt v. R. R.*, 40 Mo. Appeals, 654.

(155) The fact that the newspaper company may also be liable for the negligence of its servant as a tort does not relieve the defendant from its contract obligations to furnish plaintiff a safe passage to its train. The case of *Fritz v. R. R.*, 132 N. C., 829, pressed upon our attention, has no relation, we think, to the case at bar. In that case the plaintiff, while alighting from the train, was injured by another passenger, who was attempting to make his way into the car and accidentally struck plaintiff on the knee with his valise. The Court held in that case that such conduct on the part of the passenger could not reasonably have been anticipated by the company's agents. For the same reason, *Muster v. R. R.*, 61 Wis., 325, cited by defendant, is no authority, in our opinion, to sustain its contention. In that case a postal clerk negligently threw out a mail bag at an unusual place, where he had never before thrown it. The Court held that the company could not anticipate such conduct, and, therefore, was not called upon to take precautionary measures to prevent injury. On the contrary, it is held in *Snow v. R. R.*, 136 Mass., 552, that a passenger, waiting on a platform at the railroad station for a train, and injured by a mail bag being thrown from a passing train, such throwing being *customary* and well known to the company, may recover of the railroad company therefor. The decision is put upon the ground that, although the postal clerk is not the agent of the railroad company, but is the agent of the National Government exclusively, the custom being known to the company, it must take precautions to protect its passengers from injurious consequences.

It is true, as contended by counsel, that there is no proof whatever that defendant is under any contractual obligations, or duty, to receive the mail intended for the mail car at the station gates when the newspaper is late in reaching the train. But if, nevertheless, they do receive the papers on such occasions, and customarily permit the newspaper porter to discharge the duty their hired employees otherwise dis-
(156) charge, they must be held liable to passengers if they are injured by such porter's negligence while on the platform.

The only exception to the evidence was abandoned by appellant upon the argument. We have examined the charge carefully, and find it fair, free from error, and in line with the views expressed in this opinion.

No error.

Cited: Roberts v. R. R., 155 N. C., 84; *Fulghum v. R. R.*, 158 N. C., 561; *Leggett v. R. R.*, 168 N. C., 367; *Brown v. Power Co.*, 171 N. C., 557.

CHARLES WILLIAMS, GUARDIAN OF JULIA F. PARROTT, FORMERLY JULIA BIZZELL; GEORGE F. PARROTT, ET AL. v. THE ADMINISTRATOR AND HEIRS AT LAW OF DUNCAN McFADYEN, DECEASED.

(Filed 10 October, 1907.)

1. **Vendor and Vendee—Lands—Vendor's Lien—Judgment, Interlocutory—Limitation of Actions—In Personam.**

In an action to enforce a vendor's lien, where a definite indebtedness is declared and judgment therefor entered and foreclosure by sale decreed, such judgment is final between the parties as to the amount of indebtedness so adjudicated; but, as to all subsequent questions arising as incident to the sale, the occupation and possession of the property by the parties, the collection and distribution of the proceeds, and the like, the decree, from its very nature, is interlocutory, and the cause is still pending, and the ten-year statute of limitations, as to judgments (Revisal, sec. 391), has application. But, in proper instances, on plea of the statute properly entered, the judgment could no longer be enforced *in personam*.

2. **Same—Procedure—Motion in the Cause—Independent Action.**

While an independent action instituted and prosecuted as such, will not be treated as a motion in the cause, yet when the pleadings are called complaints and answers, but are, in fact, in the nature of affidavits in an action where it is evident, from the perusal of the record and papers, that all notices issued and affidavits were in the pending cause, and properly treated by the parties as a proceeding in that cause, and no new action was entered, the proceedings will be regarded as a motion in the cause pending.

MOTION in the cause, heard and determined before *Long, J.*, at (157) May Term, 1907, of SAMPSON.

It appears from facts found by his Honor at the hearing below that, in September, 1894, the original summons was issued in the name of Charles Williams, guardian of Julia Bizzell (now Parrott), against Duncan McFadyen, to collect the purchase money for a tract of land and enforce a vendor's lien therefor against said McFadyen, who held the same under a bond for title, and was in possession, claiming the interest in land existent by reason of said bond. At a subsequent term, said Charles Williams, individually, and his wife, Sarah J. Williams, mother of Julia F. Bizzell, were allowed to join and file a supplemental complaint as claimants of a part of said purchase money. At October Term, 1905, judgment was had in favor of plaintiffs for the amount of the purchase money and "condemning the land to be sold" for the payment of the debt, interest, and cost, allowing plaintiffs to bid at the sale, and appointing John D. Kerr, attorney of plaintiffs, as "commissioner to make the sale pursuant to the order of the court, make report of his proceedings, and retaining the cause on the docket for further orders and decrees." No sale was ever had under this decree, nor was any

action taken by the commissioner, and the cause was continued from term to term, until February Term, 1905, when the original defendant, Duncan McFadyen, having died, it was ordered that his administrator and heirs at law be made parties defendant, which was done by service of summons issued and returnable at a subsequent term. Later, at May Term, 1906, it was ordered that Julia F. Parrott, formerly Julia Bizzell, and her husband, George F. Parrott, be made parties plaintiff, and these parties thereupon filed another complaint, setting out their interest in the purchase money and giving a history of the cause to date, styling their affidavit a complaint. Defendants filed an affidavit, styled
(158) an answer, setting forth their statement of the matter, and pleading various statutes of limitations, more especially setting up the ten-year statute, in bar of plaintiff's right to relief. The cause then came on for hearing before his Honor, *Judge B. F. Long,* as stated, who found the facts and gave judgment for plaintiffs, directing sale by a substituted commissioner, as shown by his decree.

Defendants excepted and appealed.

Rouse & Land for plaintiffs.

L. V. Grady and Stevens, Beasley & Weeks for defendants.

HOKE, J., after stating the case: We are unable to perceive in what way or by what statute of limitations the plaintiffs are barred of their right to enforce the collection of their debt by a sale of the property. The defendants more particularly insist that the demand is barred by the ten-year statute of limitations, applicable to judgments (Rev., 391), and that this position finds support in a direct adjudication of this Court. *McCaskill v. McKinnon,* 121 N. C., 194. But we do not think their position is well taken, or that they have correctly interpreted the authority cited as applied to the facts of the present case. Our statute of limitations applies to final judgments, or to judgments or decrees which partake of that nature, and was never intended to affect interlocutory judgments, and in a cause still pending. The action to enforce a vendor's lien for unpaid purchase money, where the vendee, defendant, is in possession under the bond of title, is in many of its aspects like a proceeding of foreclosure and sale to collect a debt secured by mortgage. Where a definite indebtedness is declared, and judgment therefor entered and foreclosure by sale decreed, such judgment is final as to the amount of indebtedness so adjudicated, and it is final also for purposes of appeal as to all debated and litigated questions between the parties preceding such a decree; but, as to all subsequent questions arising as incident to the sale, the occupation and possession of the property by
(159) the parties of record, the collection and distribution of the pro-

ceeds, and the like, the decree is interlocutory and the cause is still pending. *Knight v. Houghtalling,* 94 N. C., 408; *Clement v. Ireland,* 138 N. C., 136; *Null v. Cumming,* 155 N. Y., 309; *Morgan v. Casey,* 73 Ala., 222. This is true in all jurisdictions where the cause in express terms is retained for further orders and decrees, and it is true with us from the force and effect of such a decree, and whether such a feature formally appears or not, for our decisions are to the effect that a decree for absolute sale, without requiring a report to be submitted for further consideration by the court, is irregular and improper and will be set aside on motion. *Foushee v. Durham,* 84 N. C., 56; *Mebane v. Mebane,* 80 N. C., 34. The double aspect of this class of decrees, being final in some respects and in others interlocutory, is recognized in the authority relied upon by defendant, *McCaskill v. Graham, supra,* where it is said by *Furches, J.*: "The judgment of $754.93 was a personal judgment, and was final. The judgment foreclosing the mortgage was the exercise of the equitable jurisdiction of the court, and was not what would have been a final decree in equity, and was not so in this case." And so it is here. The judgment as to the debt is final, and, on plea of statute properly entered, could no longer be enforced as a judgment *in personam* and against other assets of deceased; but, as a proceeding *in rem,* the cause is still pending for the purpose of carrying out the provisions of the decree directing a sale of the property and an application of the proceeds to the satisfaction of the plaintiff's debt.

We have it, then, that, as to the questions involved in this motion, the cause is still pending. Plaintiffs are here representing the same interests and asserting the same right claimed and established by the unexecuted and interlocutory decree; and defendants, as successors and heirs at law of Duncan McFadyen, deceased, are parties of record, (160) bound by the terms of the decree, subject to the orders of the court made in the cause, and when nothing has occurred to put them in a hostile attitude, so as to cause the statute to operate for their protection. The judge below was correct, therefore, in ruling that plaintiff's right to proceed was not barred by the statute of limitations.

Inasmuch as some of the affidavits offered and used on the hearing are styled complaints, and some of the notices issued are called summons, we deem it well to note that the relief sought by plaintiff on this hearing, the cause not having terminated by final judgment, is only to be had by motion in the cause; and that, according to our present decisions, an independent action instituted and prosecuted as such will not longer be treated as a motion in a pending cause. *Long v. Jarratt,* 94 N. C., 443; *Faison v. McIlwaine,* 72 N. C., 312. It is evident here, however, from a perusal of the record and papers, that all the notices issued and the affi-

davits filed were in the pending cause, and that the parties have properly treated them as a proceeding in that cause, and no new action was entered or contemplated.

There is no error, and the judgment is

Affirmed.

Cited: Bradburn v. Roberts, 148 N. C., 216; *Davis v. Pierce,* 167 N. C., 136; *Johnson v. Robinson,* 171 N. C., 196.

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(161)

RALEIGH REAL ESTATE AND TRUST COMPANY v. M. J. ADAMS AND J. F. CUTHRELL.

(Filed 10 October, 1907.)

1. **Principal and Agent—Broker—Employment at Will—Termination.**

When there is no definite time fixed for the employment to sell land upon a commission, either party has a right to terminate the agreement at will, subject to the requirement of good faith under the agreement and a sale made in pursuance of its terms.

2. **Same—Employment at Will—Contract—Terms—Commissions.**

When a real estate broker undertakes to sell the land of his principal under the agreement that such sale should be for cash, to entitle him to his stipulated compensation he must find a purchaser able, ready, and willing to complete the purchase upon the specified terms before the principal elects to terminate the agreement, no specified time having been provided therein.

3. **Same—Good Faith.**

When a real estate agent or broker who undertakes to sell the land of his principal for cash, the time therefor not being fixed, has found a purchaser able, ready, and willing to comply with the terms of instruction to sell, it is the duty of the agent or broker to report such facts to his principal and act in good faith with respect to his agency. Therefore, when the broker or agent endeavors to get better terms of payment from his principal, fails to do so, and the land is withdrawn from sale, he is not afterwards entitled to insist upon the sale, or to have his commissions, upon subsequently informing the principal that the sale was effected in accordance with the terms of his instructions.

ACTION tried before *Jones, J.,* and a jury, at April Term, 1907, of WAKE.

This action was brought by the plaintiff to recover the sum of $250, alleged to be due by the defendants, as commissions for the sale of two lots in the city of Raleigh. The plaintiff's version of the facts was, that the property was placed with it for sale by the defendants at 5 per cent

commissions for services rendered in making the sale; that it sold the lots to Mr. Corpening and Mr. Tennille for $5,000, the price named by the defendants as vendors. Mr. Ellington, who conducted the transaction for the plaintiff, went to the house of the defendant Adams on 1 December, 1905, to take his acknowledgment and his wife's (162) privy examination to the deed for the lots, telling him at the time that he had sold the property for $1,000 in cash and the balance on time, and, if the defendants did not want to take the $1,000 and give time on the balance, he could raise the cash for the whole amount. The defendants declined to sell the property on those terms. Mr. Ellington testified that he had made an arrangement with the Raleigh Savings Bank to get the balance of $4,000. He demanded the commissions for making the sale on 2 December, and the defendants refused to pay the same. The defendants' testimony tended to show, on the contrary, that they had placed the lots for sale in the hands of several real estate dealers, with the understanding that the one who first sold them, according to the stipulated terms—that is, $5,000 in cash—should be preferred and receive the commissions; that Ellington had met Adams on the street and stated to him that he held the lots at too high a price. He afterwards—on or about Thanksgiving Day, 1905—told the defendants that he had a proposition to make to them, and that he would pay $1,000 down and the balance in one and two years, to which the defendants replied that they would not accept it; that the sale must be for cash, as before agreed upon; that they did not care to sell on time, and had decided to take the property off the market. Ellington did not say that he could give the cash, but merely made a proposal to buy, as above indicated. There was but one offer—of part in cash and the balance on time. The defendants, when this offer was made by Ellington and refused by them, withdrew the property from the market. There was other evidence, and facts bearing more or less upon the controversy, but the foregoing is a sufficient statement to present the point decided in this Court. No question was made about the actual ability of Corpening and Tennille to pay the $5,000.

The issues submitted to the jury, and the answers thereto, were (163) as follows:

1. Did the defendants withdraw the property from sale in good faith before the plaintiff found a purchaser, ready, willing, and able to pay (for the property)? Ans. "Yes."

2. In what amount, if any, are the defendants indebted to the plaintiff? (Not answered, as the response to the first issue disposed of the case.)

The plaintiff requested the court to instruct the jury as follows: "If they found from the evidence that the plaintiff procured a purchaser,

able, ready, and willing to pay $5,000 in cash, before they withdrew the property from sale, they should answer the first issue "No," although the plaintiff did not tell the defendants that the purchaser would pay cash." This instruction was refused, and exception taken.

The court then charged the jury as follows: "The burden of proof, upon the issue submitted, is on the defendants. Among other things, the jury are instructed that, if they find from the evidence that Mr. Ellington, the plaintiff's agent, as claimed by him, told the defendants, at the interview between them, that he had found a purchaser who desired to pay $1,000 cash and the balance on time, but if it was not satisfactory, he would raise all the purchase price in cash and pay the same, and the defendants then declined to sell, and withdrew the property from sale, then the jury will answer the first issue 'No.' But, if you find from the evidence that the defendants went to the office of the plaintiff, as they were requested to do, and Mr. Ellington told them he had a proposition to make them, which was that they take $1,000 cash for the property and the balance, $4,000, in one and two years, and he did not tell the defendants that they could get the purchase price, $5,000, cash, at the time, and they withdrew the property from sale in good faith, and Ellington did not tell them they could get the cash for the property until the next day, or afterwards, as testified to by them, then the jury will answer the first issue 'Yes.'" The plaintiff duly excepted to the charge, and now
(164) assigns as error the refusal to give its special prayer, and the two instructions given by the court.

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

Womack, Hayes & Pace for plaintiff.
W. N. Jones and W. H. Lyon, Jr., for defendant.

WALKER, J., after stating the case: The defendants, having specified no definite time for the duration of the plaintiff's employment as their broker when they appointed and authorized it to sell the lots, had the right to terminate it at will, before any contract was effected with a purchaser, subject, however, only to the ordinary requirement of good faith. *Abbott v. Hunt,* 129 N. C., 403; *Sibbald v. Iron Co.,* 83 N. Y., 378; *Coffin v. Landis,* 46 Pa. St., 426; *Young v. Trainor,* 158 Ill., 428; *Bailey v. Smith,* 103 Ala., 641; *Hartley's Appeal,* 53 Pa. St., 212; *Hunt v. Rousmanier,* 8 Wheaton, 174; *Ins. Co. v. Williams,* 91 N. C., 69; *Brookshire v. Voncannon,* 28 N. C., 231; *Wilcox v. Ewing,* 141 U. S., 627. The cases which we have so copiously cited will show the different circumstances under which this rule of law has been applied, and demonstrate the wisdom of it.

There is another principle equally as well settled. A broker who negotiates the sale of property is not entitled to his commissions unless he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed upon between him and his principal, the vendor. *Mallonee v. Young,* 119 N. C., 549; 2 A. and E. Enc., 584; *McGavock v. Woodlief,* 20 How. (U. S.), 221.

Can it be that a real estate broker will be permitted by the law to recover his commissions when he has reported to his principals a sale upon terms materially different from those which the latter had stated in their proposal to sell, the offer being thereupon rejected and the property withdrawn from sale? No authority has been cited to us which sustains such a proposition as an affirmative answer to the (165) question would establish.

It was clearly the duty of the broker, in this case, to communicate to his principals the real facts and the true situation, as no doctrine is better settled in the law of agency than that the agent must give to his principal notice of all facts, relative to the business intrusted to him, which have come to his knowledge and which may materially affect the principal's interests. Tiffany on Agency, p. 415, sec. 107; *Humphrey v. Robinson,* 134 N. C., 432. The relation between the agent and the principal being of a fiduciary nature, it results that there must always be the exercise of good faith by the former towards the latter. The principal reposes confidence in his agent and is entitled to receive in return perfect loyalty to himself and unselfish attention to his business. There should be no conflict between their interests, as the agent must always be free and untrammeled in order to serve his employer with undivided devotion and fidelity to his trust and an unremitting endeavor to promote the success of the matters committed to his charge. Reinhardt on Agency, secs. 239 to 246. An agent must also obey instructions and observe the terms of the agency; otherwise he does not perform, in the eye of the law, his full duty towards his principal, and is not entitled to receive the compensation for his services promised to him in the contract of agency.

We held, substantially, in *Humphreys v. Robinson, supra,* following the general principles thus stated, that a real estate broker who fails to communicate to his employer any facts known to him and material to the transaction he had in charge was not entitled to damages for the failure of his principal to comply with the contract made by the broker in his name and on his account with a third person. So here the plaintiff, as agent, failed to disclose to the defendants, who employed it to sell the lots, the facts as it now claims they actually existed. Its agent reported to them a contract with Corpening and Tennille entirely different from the one he was authorized to make, and the defend-

(166) ants had the right then and there to reject the proposition and terminate the agency, which they did, according to the findings of the jury. We cannot imagine upon what principle of equity, even broadly considered, and certainly we have failed to discover any principle of law—under which the plaintiff is entitled to a commission as upon a sale made by it, for surely none has been justly earned. It is now the established doctrine of the courts that, in the absence of any usage, or contract, express or implied, to the contrary, or conduct of the seller preventing a completion of the bargain by the broker, an action by the latter for his commissions will not lie until it is shown that he has procured and effected a sale of the property upon the terms fixed by the vendor. It is not enough that the broker has devoted his time, labor, or money to advance the interests of his employer. Unsuccessful efforts, however meritorious, afford no ground of action. Where his acts bring about no agreement or contract between his employer and the purchaser, by reason of his failure in the premises, the loss of expended and unremunerated effort must be all his own. He loses the labor and skill used by him which he staked upon success. If there has been no contract, and the seller is not in default, then there can be no reward. His commissions are based upon the contract of sale. Rapalje on Real Estate Brokers, sec. 75, and cases cited in the note; *Sibbald v. Iron Co.*, 83 N. Y., 378. The broker must also act strictly, or at least substantially, according to the authority conferred upon him, in order to entitle himself to the stipulated compensation. Rapalje on Real Estate Brokers, secs. 59 and 60. In one of the cases cited on the argument by the plaintiff—*McDonald v. Smith*, 108 N. W. Rep. (Minn.), 292—it is said: "A real estate broker, in order to earn a commission for finding a purchaser, must either obtain a contract from a proposed purchaser, able to buy, whereby he is legally bound to buy on the authorized terms, or he must produce to his principal a proposed purchaser who is able, will-
(167) ing, and ready to buy upon the terms authorized. It is not necessary that the principal and the purchaser actually be brought face to face, but the principal must be notified that such purchaser has been found and afforded a full opportunity to make a binding contract for the sale of the land on the authorized terms."

If the plaintiff has lost the benefit of its commissions upon a sale that it could easily have made, the fault was its own, and no blame can attach to the defendants. The mistake it made was in trying to obtain little better terms from its principal in respect to the time for the payment of the purchase money. It tried to make a sale, contrary to the instructions of the principal, in which payment of the larger part of the purchase money was to be deferred, when, in fact, as it now claims, the purchaser was ready to pay all in cash. It is plain that a cash sale is what the

defendants desired, and it was no doubt more advantageous to them. They had at least a right to consider it so when they made the bargain with the plaintiff. The latter was, therefore, by every consideration of good faith, bound to communicate to the defendants the important fact that they could get cash for the property. Instead of doing so, the plaintiff withheld this information until the defendants had exercised their undoubted right to put an end to the agency.

The jury have found against the plaintiff upon the facts, adopting the defendant's version of them. The instruction requested was properly refused, under the circumstances, and the charge of the court, which was concise and clear-cut, presented the case to the jury in its proper light.

No error.

Cited: Clark v. Lumber Co., 158 N. C., 144; *Trust Co. v. Goode,* 164 N. C., 23; *Crowell v. Parker,* 171 N. C., 396.

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J. T. BLAND ET AL. v. L. A. BEASLEY ET AL.

(Filed 10 October, 1907.)

1. **Ejectment—Deeds and Conveyances—Title Passed.**

When, in an action of ejectment, it is shown that the plaintiff has acquired title by deed while defendants are in possession of the land in dispute, the plaintiff may maintain his action under The Code, sec. 177, now Revisal, sec. 400.

2. **Same—Adverse Possession—Legal Title—Seizin.**

While Revisal, sec. 384, debars plaintiffs from maintaining an action for recovery of realty, unless it appear that they, or those under whom they claim, were "seized or possessed of the premises" in question within twenty continuous years next before the commencement of the action, it does not apply when the plaintiffs have shown legal title and it appears that the defendants' possession has not been for twenty continuous years.

3. **Same—Adverse Possession—Legal Title—Color—Presumption.**

There is no presumption that the possession of one under and in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to show such possession to have been continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership.

ACTION tried before *Long, J.,* and a jury, at January Term, 1907, of PENDER.

From a judgment for plaintiff, defendant excepted and appealed. The facts sufficiently appear in the opinion of the Court.

J. D. Kerr, James O. Carr, Simmons, Ward & Allen, E. K. Bryan, and C. E. McCullen for plaintiffs.

L. A. Beasley, H. L. Stevens, C. D. Weeks, and Shepherd & Shepherd for defendants.

CLARK, C. J. Action to recover land. The defendants excepted because the court refused to charge the jury, as prayed, that the plaintiffs having failed to show actual possession in themselves, or in those under whom they claim, within twenty years before this action was begun, they cannot recover. The plaintiffs acquired their title within said
(169) period, the defendants being then in possession. An action of ejectment could not have been maintained under the Statute 32, Henry VIII., The Code, sec. 1333, which made a conveyance under such circumstances void; but that rule was modified by The Code, sec. 177, now Rev., 400, which provides that "An action may be maintained by a grantee of real estate in his own name, whenever he or any grantor, or other person through whom he may derive title, might maintain such action, notwithstanding the grant of such grantor, or other conveyance be void by reason of the actual possession of a person claiming under a title adverse to that of such grantor or other person at the time of the delivery of such grant or other conveyance." *Johnson v. Prairie,* 94 N. C., 773; *Osborne v. Anderson,* 89 N. C., 261. Indeed, section 1333 of The Code has been later totally repealed by chapter 42, Laws 1899, and hence does not appear in the Revisal at all.

It will be noted that this defense is not under Revisal, sec. 384, for the defendants did not prove "twenty years' adverse possession." It is true that Revisal, sec. 383, debars the plaintiffs from maintaining an action for recovery of realty, unless it appear that they, or those under whom they claim, were "seized or possessed of the premises" in question within twenty years before beginning the action. But the defendants have not shown twenty years' possession, and, the plaintiffs having shown the legal title, the law carries the seizin to the party having the legal title, when neither is in possession.

His Honor was correct in charging the jury that "The possession for seven years under color of title must be continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership, to bar the entry of one shown to be or to have been the real owner; and when the title is claimed by adverse possession, the burden is on him who relies upon such claim to show continuous possession. There is no pre-
(170) sumption that the possession of real estate is adverse." *Monk v. Wilmington,* 137 N. C., 322. Revisal, sec. 386, provides that possession by another shall be deemed "to have been under and in subordination to the legal title," unless such possession is shown to have been

adverse. There was evidence sufficient to go to the jury to locate the grants and conveyances under which the plaintiffs claimed. The other exceptions need no discussion. The case was largely one for the jury on the evidence as to the location of the land in dispute, and, upon a thorough consideration of the exceptions, we find no error of which the defendants have cause to complain.

No error.

Cited: Stewart v. McCormick, 161 N. C., 626, 627; *Fowle v. Whitley,* 166 N. C., 447; *Land Co. v. Floyd,* 167 N. C., 687; S.c., 171 N. C., 545.

J. R. COLLIE v. COMMISSIONERS OF FRANKLIN COUNTY.

(Filed 10 October, 1907.)

Taxation—Constitutional Law—Construction—Public Schools—Constitutional Limitations.

The Constitution must be construed as a whole to give effect to each part, and not to prevent one article from giving effect to another article thereof, equally peremptory and important. While Article V of the Constitution is a limitation upon the taxing power of the General Assembly, Article I thereof commands that one or more public schools shall be maintained at least four months in every year in each school district in each county of the State, and should be enforced. Hence, Revisal, sec. 4112, providing that, if the tax levied by the State for the support of the public schools is insufficient to enable the commissioners of each county to comply with that section, requiring four months school, they shall levy annually a special tax to supply the deficiency, is constitutional and valid, though exceeding the limitation of Article V. Anything beyond would be void. *Barksdale v. Commissioners,* 93 N. C., 473, overruled.

WALKER, J., and CLARK, C. J., concurring.

CIVIL ACTION, brought to August Term, 1907, of FRANKLIN Superior Court by the plaintiff and in behalf of other taxpayers of Franklin County against the board of commissioners of said county, to (171) restrain said board from collection of a tax levied at the meeting of June, 1907, of 1 cent on the $100 worth of property and 3 cents on each taxable poll, for the support and maintenance of the public schools of the county, in addition to and beyond the limit of 66⅔ cents on the $100 worth of property and $2 on each taxable poll, levied for general State and county purposes in said county in said year.

Plaintiff obtained from Hon. C. M. Cooke, judge resident of the Fourth Judicial District, a temporary restraining order, returnable before himself. Upon the hearing his Honor dissolved the restraining order, and plaintiff appealed.

William H. Ruffin for plaintiff.
F. S. Spruill, Charles B. Aycock, and R. B. White for defendant.

BROWN, J. It is admitted that the questions presented by this appeal have been passed upon adversely to the contention of the defendant in two cases—*Barksdale v. Comrs.*, 93 N. C., 473, and *Board of Education v. Comrs. of Bladen*, 111 N. C., 578. We are now asked to review those cases and disregard them as precedents in the decision of this case. As those cases involve a construction of certain sections of the Constitution relating to a question of taxation, and involve no right affecting the life, liberty, or property of the citizen, we can see no reason why they should continue to guide us if time and reflection have convinced us that they are not correct interpretations of the letter and spirit of our organic law. We are not lacking in respect for the opinion of the eminent judges who decided those cases, because we happen to differ from them in our efforts to gather from that instrument the true intent and purpose of its framers. The doctrine of *stare decisis* is worthy of all respect, and should be accorded due weight in the consideration of all cases, but
(172) the doctrine, where it does not involve the rights of the citizen, should not be carried to that extreme where it becomes an obstruction to the carrying out of other provisions of the Constitution intended to promote the progress, prosperity, and welfare of the people. Again, it must be remembered that the cases cited are somewhat weakened as authoritative precedents by dissenting opinions in each of acknowledged power and force of reason. Section 1, Article V, of the Constitution directs the levying of a capitation tax by the General Assembly "which shall be equal on each to the tax on property valued at $300 in cash." . . . "And the State and county capitation tax combined shall never exceed $2 on the head." Section 6 of the same article enacts that "The taxes levied by the commissioners of the several counties for county purposes shall be levied in the like manner with State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly." Article IX of the Constitution, after declaring that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education should be forever encouraged," commands, in section 3 thereof, that one or more public schools shall be maintained at least four months in every year in each school district in each county of the State; and further provides that, "if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment." At every session the General Assembly has endeavored to give effect to this section of the Constitution by providing that, if the tax levied by the State for

the support of the public schools is insufficient to enable the commissioners of each county to comply with that section, they shall levy annually a special tax to supply the deficiency, to the end that the public schools may be kept open for four months, as enjoined by the Constitution. Revisal, sec. 4112. It is admitted that, in the *Barksdale case,* this Court held that the sections quoted from Article V are (173) a limitation upon the taxing power of the Legislature, and control Article IX; so that, if the taxes levied in accordance with that limitation and equation are insufficient to support the public schools for four months, the commissioners cannot be compelled to levy more, and that the act of the General Assembly requiring it is void. The *Barksdale case* was approved and followed in the *Bladen case,* and the matter so exhaustively discussed in the opinions of the Court and of the dissenting judges in both cases that it is difficult to add anything new to the controversy, and it is unnecessary to repeat the argument set forth in their opinions. We agree with the Court in those cases, that Article V is a limitation, generally, upon the taxing power of the General Assembly. Nor are we called upon to hold that the tax to supplement the school fund in each county, directed by the statute to be levied in case of need, may be upheld as a "necessary county expense" or as a "special tax" for a special purpose. It is unnecessary in the construction we give to the Constitution, to place our decision upon any such grounds. We hold, with *Mr. Justice Merrimon* in the *Barksdale case,* that, while this limitation upon the taxing power of the General Assembly prevails generally, it does not always prevail, and that it should not be allowed to prevent the giving effect to another article of the same instrument equally peremptory and important. We must not interpret the Constitution literally, but rather construe it as a whole, for it was adopted as a whole; and we should, if possible, give effect to each part of it. The whole is to be examined with a view to ascertaining the true intention of each part, and to giving effect to the whole instrument and to the intention of the people who adopted it. Coke Lit., 381a; Cooley Const. Lim. (7 Ed.), p. 91.

Of the two constructions which have been given it in the cases cited, we prefer to adopt that which, while properly limiting the power of taxation as to matters not embraced in the Constitution, leaves it within the power of the Legislature to give effect to one of its (174) most important and peremptory commands. While the General Assembly must regard such limitation upon its power to tax, as defined in many decisions of this Court, when providing for the carrying out of objects of its own creation and the ordinary and current expenses of the State Government, yet, when it comes to providing for those expenses especially directed by the Constitution itself, we do not think the limita-

tion was intended to apply. Although the Legislature must observe the ratio of taxation between property and the poll provided in Article V, section 1, it is not required to obey the limitation upon the poll and the property tax, if thereby they are prevented from giving effect to the provisions of Article IX. It is better, we think, to hold that such limitation applies to legislative creations, rather than let it hinder constitutional commands. The purpose of our people to establish by taxation a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State, and that such schools should be open every year for at least four months, is so plainly manifest in Article IX of the Constitution that we cannot think it possible they ever intended to thwart their clearly expressed purpose by so limiting taxation as to make it impossible to give effect to their directions. The reasons which induced the people to adopt Article IX are set forth in its first section, and they are so exalted and forcible in their nature that we must assume that there is no article in our organic law which the people regarded as more important to their welfare and prosperity. This conviction is greatly strengthened when we find that the only criminal offense defined and made indictable by the instrument is one created especially to enforce obedience to its specific commands in respect to the establishment of four-months schools. In commenting upon this *Mr. Justice Avery* well says: "It is difficult to understand why this wide departure from the usual course was made, unless we interpret it as
(175) emphasizing the intent of the framers of the Constitution that the officers held subject to this unusual liability should have power coextensive with their accountability." *Board v. Comrs.*, 111 N. C., 585.

"Schools and the means of education shall forever be encouraged," says the Constitution. Why? Because they foster religion and morality, which, with knowledge, are necessary to good government. The people expressed their willingness to incur such expense because of the great good resulting therefrom. It is hardly probable they intended by a previous enactment in the same instrument to render it impossible to carry out purposes expressed in such earnest and unmistakable language. Our people regarded the subject of education as of the highest and most essential importance, and there is no provision in our Constitution which is clearer, more direct or commanding in its terms than Article IX. As said by *Judge Merrimon,* "Its framers, whatever else may be said of their work, seem to have been especially anxious to establish and secure beyond peradventure a system of free popular education." *Barksdale v. Comrs.*, 93 N. C., 483. This sentiment has grown greatly in the hearts and minds of our people since that section of the Constitution was adopted. So great has been its growth that they have in recent years adopted an educational qualification as a prerequisite to exercising the

electoral franchise. Const., Art. VI, sec. 4. This places an additional obligation upon us to provide full educational facilities for the youth of the State, who otherwise may grow up in ignorance and be disqualified to take their just part in the administration of our Government.

The construction placed upon the Constitution by the *Barksdale* decision has been found to be an especial handicap upon the country schools. In the cities and towns, generally, special taxes are levied by a vote of the people, graded schools established, and the requirements of the Constitution more than complied with. Very many country schools cannot continue open for four months unless the tax pre- (176) scribed by the act is levied. The country school is the nursery of the larger part of the bone and sinew of this land. It carries a greater responsibility than the city schools in proportion to its advantages, for, as is well said by a recent writer, "It is charged not only with its own country problems, but with the training of many persons who swell the population of cities. The country school is within the sphere of a very definite series of life occupations."

Thus it is seen that Article V vitally affects all the leading purposes of the Constitution. It, therefore, becomes more imperative than ever that, if it reasonably can be done, we should give the instrument that construction which will effectuate and carry out its wise and beneficent provisions. We think we do this when we hold that the limitation contained in Article V was not intended to restrain and trammel the General Assembly in providing the means whereby the boards of commissioners of the different counties are enabled to perform the duties enjoined by the Constitution and give to the people public schools for at least four months in each year. Instead of prescribing the rate of tax to be levied for the purpose of a four-months school, the General Assembly properly and wisely left the amount to be levied to be determined by the county authorities of each county. In some counties it may not be necessary to levy any tax, while in others some tax, differing in amount, will have to be levied and collected in order to carry out the directions of the law. In levying the tax the boards of commissioners must observe the equation between property and poll fixed in the Constitution. In estimating the tax necessary beyond the limit of 66⅔ cents on property and $2 on the poll to give a four-months term, no longer period may be considered. When the four-months requirement is fulfilled, the limit of taxation fixed in Article V necessarily takes effect, and anything beyond that would be void. The taxes levied and collected in (177) pursuance of the act constitute a special fund, supplemental to the general school fund, and must be devoted exclusively to procuring four-months terms of the public schools in those counties or districts only where, for lack of funds, they are kept open for a shorter period.

After careful consideration of the matter, we are of opinion that the judgment of the Superior Court dissolving the restraining order should be

Affirmed.

WALKER, J., concurring: The provisions of the Constitution having any special bearing upon the question presented in this case are as follows:

"The General Assembly shall levy a capitation tax on every male inhabitant of the State over 21 and under 50 years of age, which shall be equal on each to the tax on property valued at $300 in cash." Art. V, sec. 1.

"The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than 25 per cent thereof be appropriated to the latter purpose." Art. V, sec. 2.

"The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly." Art. V, sec. 6.

"Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. IX, sec. 1.

"The General Assembly, at its first session under this Constitution, shall provide, by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to
(178) all the children of the State between the ages of 6 and 21 years." Art. IX, Sec. 2.

"Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least four months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section they shall be liable to indictment." Art. IX, sec. 3.

"All moneys, stocks, bonds, and other property belonging to a county school fund, also the net proceeds from the sale of estrays, also the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal or military laws of the State, and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State: *Provided,* that the amount collected in each county shall be annually

reported to the Superintendent of Public Instruction. Article IX, section 5.

"No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." Art. VII, sec. 7.

It is a well recognized rule in the interpretation of constitutions—and the same principle extends to statutes and contracts—that, in case of any ambiguity, the whole instrument must be examined and considered, in order to determine the meaning and legal effect of any part of it; and the construction should be such as to give effect to the entire instrument, and not raise any conflict between its several provisions, if this can possibly be avoided. Black Const. Law, p. 67, sec. 41. There is one case in our Reports which has been cited frequently as establishing the doctrine that the provisions of the Constitution are all man- (179) datory—*S. v. Patterson,* 98 N. C., 660. I have never been able to give the full assent of my mind unreservedly to this proposition, broadly stated as it is in that case and as it has been construed by this Court to be. A large part of our present Constitution was not the voluntary expression of the will of our people, for many of the most intelligent of them were, at the time it was adopted, under the ban of proscription and were not permitted to take any part in framing it. But, notwithstanding this deplorable fact, it contains many commendable features, and among them those which I have already quoted, and which, in my opinion, are of such an important and essential nature as to be mandatory upon us. When the people have clearly ordained what shall be done, we, as judges, have nothing to do but to obey and to execute their will. Whether the particular provisions in question are wise or unwise is not for us to determine. We must give proper effect to each part, and to the whole, so as to fully execute the general purpose, if possible, with harmonious precision. After a most careful reading again of the entire Constitution of our State, and a study of its general scope, and the specific purpose of its framers, as shown in its several provisions concerning public schools and taxation, I am constrained to believe that the duty of educating the people, as enjoined by the Constitution, is one of its leading and controlling ideas, and was so intended to be, and the plan devised for providing the necessary means of discharging this duty was considered in the general scheme of taxation to be of paramount importance. In Article IX the very first declaration is, that religion, morality, and knowledge lie at the very foundation of all good government. And who can doubt the correctness of this proposition? They are the essential prerequisites, if I may so speak. With-

(180) out intelligence, properly cultivated and directed, good government would be almost impossible, especially where the particular form of State policy depends so largely upon the will of the people as it does in a representative democracy. I may go further, and assert that this principle is applicable generally to all forms of society and lies at the foundation of all human institutions. Good government begins at the fireside, is nourished in the schoolhouse, and gradually developed in the council chamber and legislative halls, on the hustings and in the forum, and refined, purified, and ennobled by the holy precepts of religion and morality as taught and inculcated in the sanctuaries of the people. What the State needs to make her great and prosperous are good minds and good men. She is apt always to have the beneficent influence of good women in her homes. Education, religion, and morality must be the cornerstones of all successful government.

I have made these general observations for the purpose of showing that the provisions of the Constitution as to the education of the masses being of supreme importance, it must of necessity be held to be something apart from others not relating to that subject, and to be highly mandatory. It cannot be subject to any limitation of taxation, for the very terms by which the duty to educate the people is enjoined are altogether independent of the provision establishing a limitation of the taxing power, and are just as imperative.

It was necessary to support the Government, and, therefore, to provide it with the means of defraying its expenses by taxation, the only method by which this could be done. It was well to prescribe an equation or ratio of taxation, and consequently a limit beyond which the taxing power should not be permitted to impose burdens upon the people, as is done in the Constitution; but it is a grave mistake, I think, to suppose for a moment that this limitation, which, of course, is finally determined by the proportion of taxation and the maximum of the poll tax, was intended to have any necessary connection with the other provisions in regard to the duty to educate the people. The two
(181) articles are, and were manifestly intended to be, separate and distinct. The public schools *must be* kept open for the required time, and at the same time the Government, both State and local, must likewise be maintained. One is just as mandatory as the other.

The prohibition of the Constitution against doubling the State tax for county expenses, except for a special purpose, and then only with the special approval of the General Assembly (Art. V, sec. 6), has no essential relation to the educational article of the Constitution, as, by the express language of Article V, section 6, it is restricted to taxation for county purposes, strictly speaking—that is, those which arise in the ordinary administration of county affairs; nor can it be successfully

asserted that the education of the people is a "special purpose," within the meaning of that section. It is emphatically a general one, and of the first importance, and is so clearly defined to be in Article IX. It may well be conceded that the just and equitable principle involved in the equation of taxation may be beneficially applied to all forms of taxation and for all purposes, as this Court held should be done in the case of taxation by cities and other public or municipal corporations, under Article VII, section 9 (which, by examination, will be found to bear a close resemblance to the provisions of Article V, section 3, requiring uniformity in the taxation of property at its true value, or, as it is sometimes expressed, *ad valorem*)—*Redmond v. Comrs.*, 106 N. C., 122; *Young v. Henderson*, 76 N. C., 420; *French v. Wilmington*, 75 N. C., 477—although, by the same authorities, it was adjudged that the rule in regard to the limitation of taxation did not apply to such corporations.

In passing, I may remark that I do not take the view of Article V, section 6, which seems to be indicated in several opinions of this Court, namely, that the doubling of the State tax for county purposes has any necessary connection with either the equation or limitation of taxation. This prohibition against counties exceeding the double of (182) the State tax may, in practice, well come into play before the limit of taxation—that is, 66⅔ cents on the $100 worth of property—is ever reached. For illustration: The State tax may be as low as 10 cents on the $100 of property at its true value, in which case the county might double, or levy a tax of 20 cents, making a total of State and county taxation equal to 30 cents on the $100 in value of property. The rate would be still short of the limit by 36⅔ cents. The extreme limit of taxation prescribed to the counties, and the largest levy that could be made by them under this provision (Article V, section 6), would be reached only where the State should levy a property tax of 22⅔ cents on the $100 of value, when the counties could levy 44⅔ cents without the special approval of the General Assembly or for a special purpose. The limit prescribed to the counties would, of course, be decreased in the proportion that the rate should be increased for State purposes. Even where the general limit of taxation is not reached by the counties in doubling the State tax, they would have no power under Article V, section 6, to increase their rate, except for the purpose therein specified, and with the special approval of the General Assembly. If the rate for State purposes is 20 cents, that of the counties must not be over 40, unless an increased rate is constitutionally authorized by the General Assembly.

The general limit of taxation is fixed, of course, at 66⅔ cents on the $100 in value of property, as I have already indicated, by the provision

in regard to the equation, and the maximum of the poll tax, which is $2 on the $300 of property at its true value in cash. Const., Art. V, sec. 1. All the above provisions were evidently intended to apply to taxes laid for general State and county purposes, and could not by any admissible rule of interpretation apply to the taxes required for the support of the schools. It was regarded of such momentous importance to educate the people that a separate and distinct provision was made
(183) for that purpose and an entire article of the Constitution devoted to the subject, the only restriction imposed upon the power to tax for the education of the people being the provision which requires that one or more public schools shall be kept open at least four months in every year in each school district. Article IX, section 3 (2 Revisal, p. 618). This requirement was considered as so vital to the welfare of the State that it was made indictable if the officers who were charged with this supreme duty failed to comply with this plain mandate of the Constitution. When a duty is prescribed, or when a power is conferred by the Constitution, or even by statute, every means and every other power necessary to execute the primary purpose is also considered as granted. It is distinctly enjoined by the Constitution that the people shall be educated, and for this purpose it is ordained that there shall be a "general and uniform system of public schools," with free tuition to all children between the ages of 6 and 21 years; and it is further commanded that the General Assembly shall, even at its first session, provide, by *taxation and otherwise,* for the execution of that provision. Can we escape the conclusion that the framers of the Constitution of 1868, as amended in 1875, intended that commissioners of the counties should do a certain thing, with a heavy penalty imposed in case of their default, and yet be deprived of the power of performing their duty? What an imperfect syllogism and what an impotent conclusion! When we concede the duty as a correct premise, the opposite result is inevitable, if we reason logically. The chief purpose of the framers of the organic law was, that the people should be educated, without regard to the raising of the necessary expenses of government for other purposes; but, according to the only true principle of democracy (using that word as describing a particular form of government and not in any partisan sense), that no more of the people's earnings should be exacted of them than is necessary for the support of their Government, economic-
(184) ally administered, which should really be the true principle of taxation in all government, whatever may be its form.

It is true, the people have agreed to support their Government in all its branches by the method of taxation, consisting in reasonable impositions laid down upon persons and property, by a standard which they deemed fair and just to all; but their leading desire was that their chil-

dren should receive the advantages of education, so that not only should the Government proceed in the exercise of its ordinary functions for their benefit and advantage, but that the people of the State should be elevated in the scale of intelligence and prepared to enjoy the true blessings of liberty and prosperity for which the compact of government was formed, and, moreover, to further advance their welfare and happiness. This was of the first consideration.

I am now brought to my second proposition—whether the education of the people is so far required by the organic law as to have become a necessary expense of the Government, within the meaning of Article VII, section 7, of the Constitution. It is not for me to say, in construing that instrument, whether its provisions make for the best interest of the people. I must ascertain the will of the people from what they have said, and not from what I think they should have said—not meaning at all to imply that they have not spoken wisely, and truly expressed their intention. If there is a deliberately conceived and carefully stated principle in their Constitution, and one which it is perfectly evident they desired to be clearly understood and rigidly enforced, it is that embraced in sections 1, 2, and 3 of Article IX, in regard to the schooling of the children of the State. They intended that the State should no longer be debased or retarded in its progress by the ignorance of its people. It is plain that those who wrote these sections knew, as any intelligent citizen knows, that the surest way to obtain good government, and to enjoy it, is to know how to appreciate its blessings and to be able (185) to perpetuate it by a proper and intelligent use of it. When it was, therefore, declared that the people *must* be educated, it was just as binding an injunction that the means to that end must be supplied by taxation as it was that the counties or even the State Government should be supported. Why not? It became, therefore, by the very terms of the command, a public necessity, because the people, in their Constitution, have so declared, and logically, therefore, a necessary expense.

Why is one essential mandate of the Constitution any more binding, or obedience to it any more obligatory, than another? What the framers of the Constitution meant was this: That the State and county governments should be maintained by taxation (with certain qualifications), which should be laid upon a principle of equation or due proportion between property and taxes, and within a certain limit; but that, in addition to this sovereign power and corresponding duty, so necessary to the vigorous life of the Government, there should be another, which is equally vital to its continuance under just and wise laws, and that is the separate and independent right to educate the people, by taxation also, to the extent that it might be necessary to keep open to all the children

between certain ages the public schools of the State for *"at least* four months in every year." Const., Art. IX, sec. 3.

To my mind, at least, it is perfectly clear that this power of taxation, in order to educate and enlighten the people, is not in any way subject to the provision as to the limit of taxation fixed by other articles and sections of the Constitution, but what is known as the equation may be just and not necessarily inconsistent with Article IX, and perhaps should be observed. It is not required now that I should express any binding opinion as to this matter. When the Constitution prescribes only one limit to taxation for school purposes, as I have shown
(186) has been done by the clearest implication, we, as a court, have no right to substitute another.

It is provided by Article V, section 2, that a specified part of the proceeds of the State and county capitation tax shall be applied to the purposes of education, and by Article IX, sections 4 and 5, that certain property therein enumerated shall also be applied to the same purpose; but if this is not sufficient to keep the schools open as required to be done by Article IX, section 3, then it is the paramount duty of the Legislature to provide by taxation for a strict compliance with the latter section, without regard to any restriction on taxation, except in the respect herein already indicated.

It may be a question worthy of serious reflection whether, by the recent amendments to the Constitution, which relate to suffrage and which were adopted for the purpose of securing an intelligent electorate, and prescribing an educational test for the voter, it has not become the duty of the State to educate her people, and, by reason thereof, such education has become a necessary expense, to be met by appropriate taxation, imposed as in like cases, as I have already substantially argued. Those amendments to our organic law were, in my opinion, at least, as now advised, lawfully passed and ratified, and were a rightful and sagacious exercise of the power of the people of this State, under the Federal Constitution, to protect themselves at the ballot box against the untold consequences of ignorance, illiteracy, and vice. What is more essential to good government and the peace and good order of society than that the voter should be able to intelligently decide *for himself* upon all public questions which concern the general welfare, and to select honest and capable men to represent him in the offices and councils of the State? And wherein is there any departure from constitutional principles if each man is given a fair chance by the law to qualify himself to exercise this important right and principle, when the people rule and declare what this law shall be? That is all these amendments seek to secure; and if there is anything to be found in the Con-
(187) stitution of the State or of the United States that will prevent a

consummation so devoutly to be wished, it would be strange, indeed, and every canon of construction should exclude such a meaning of its provisions unless it has been most plainly and clearly expressed. There must be no loose implication in favor of it. But these amendments have imposed the duty upon the State to prepare its people to enjoy the rights and advantages that will accrue from self-government by qualifying them to exercise the elective franchise, and in order to do this it perhaps became a public necessity that the schools be kept open, as required by the Constitution, so that the benefits of education can be accessible to all.

CLARK, C. J., concurring: The requirement of the Constitution (Art. IX, sec. 3) that the "public schools shall be maintained at least four months in every year" (besides making the county commissioners in any county failing to do this indictable), and the prohibition in the Constitution (Art. V, sec. 1) that the State and county taxation shall not exceed 66⅔ cents upon the $100, are both imperative. There should have been at no time any difficulty in enforcing both. The trouble has been to find between the amount levied for State taxes, when added to that required for four-months schools, and the 66⅔ cents limitation, a margin of taxation large enough to defray the necessary expenses of the county. In thirty-eight counties such margin is large enough to provide for necessary county expenses, but in fifty-nine counties it is not.

The error has been in assuming that in such case the necessary expenses of the county came first. Such is not the mandate of the Constitution. The maintenance of schools for four months in each county is imperatively commanded. If the margin left is not sufficient to raise enough money to defray the necessary expenses of the county, taxes for that purpose can be levied, without a vote of the peo- (188) ple, by approval of the General Assembly. Const., Art. V, sec. 6, and Art. X, sec. 7; *Vaughan v. Comrs.*, 117 N. C., 429. That permission has been practically, though perhaps not very explicitly, given by the statutes authorizing and requiring county commissioners to provide for the county purposes named in the laws concerning them.

Cited: R. R. v. Comrs., 148 N. C., 238; *Hollowell v. Borden, ib.*, 257; *Board of Education v. Comrs.*, 150 N. C., 121.

GEORGE B. WEBB ET AL. V. P. R. BORDEN ET AL.

(Filed 10 October, 1907.)

1. Deeds and Conveyances—Fraud or Mistake—Pleadings—Evidence.

When plaintiff claims under a deed, the terms and provisions of which are set forth in the complaint, in the absence of any averment of mistake, they will not be permitted to introduce testimony for the purpose of showing a mistake of the draftsman. The same principle applies when the original deed is lost and a substituted one is set out in the complaint.

2. Same — Mistake — Correction — Chain of Title — Pleadings — Questions for Jury.

A plaintiff in an action for the recovery of land may, upon proper averment and proof of mistake, have a deed in his chain of title corrected. The facts upon which the equity for correction is based must be alleged, to the end that, if denied, an issue may be submitted to the jury.

3. Same—Trusts and Trustees—Ouster—Action.

When the trustees holding lands impressed with an active trust in favor of J. B. for life, remainder to themselves, permit J. B. to be ousted by a stranger, such ouster puts the trustees to their action, and the statute of limitations began to run against them from the ouster.

4. Same—Trusts and Trustees—Ouster—Limitations of Actions.

Under Revisal, sec. 1580, trustees are seized as joint tenants and not as tenants in common; where there is an ouster of J. B., the *cestui que trust*, under a deed made by one of them, acting as commissioner under a judicial proceeding, to a third party, such deed is color of title. The seven years statute of limitations will bar the right of entry of all the trustees and their *cestuis que trustent*.

5. Same—Trusts and Trustees—Fraud or Mistake—Equity.

Land was granted to several children in trust to pay over the rents and profits to their father, and provide a home thereon for him and his family for life, remainder to the children, trustees. In proceedings for partition before the clerk, one of the children was appointed commissioner to sell, and did sell, and, by deed, for a valuable consideration, convey the land to one under whom defendant claims title. The children, trustees and remaindermen, seek to set aside the deed of the commissioner for fraud participated in by him and the clerk of the court, since dead, upon the parol testimony of the commissioner: *Held*, after the lapse of twenty-seven years courts of equity will not interfere.

WALKER, J., dissenting.

(189) ACTION tried before *Webb, J.*, and a jury, at October Term, 1906, of LENOIR, for the recovery of a lot in the city of Kinston.

The facts material to an understanding of the appeal, as shown by admission in the pleadings and the uncontradicted evidence, are: The title to the land in controversy was, prior to 1 March, 1869, in James B. Webb, father of plaintiff, George B. Webb, and those under whom the

feme plaintiff, Emma P. Webb, claim. On 1 March, 1869, the land was sold by the sheriff of Lenoir County, under executions issued upon judgments against said James B. Webb, and conveyed to Mary M. Webb, his daughter, who intermarried with Robert S. Hay. Plaintiffs allege that, subsequently, in 1869, the said Mary M. Webb conveyed said lot of land by deed in fee simple, as tenants in common, to Benjamin T. Webb, George B. Webb, N. H. Webb (now the wife of H. G. West), J. W. Webb, Carrie J. Webb (now the wife of D. R. Midyette), Emma Webb (now the wife of T. W. Noland), and Martha J. Webb, subsequently the wife of one Lewis Meyer, and who has since died, leaving as her only heirs at law Lily and Daisy Meyer surviving her. That (190) in said deed mentioned in the fourth paragraph of this complaint the said James B. Webb was given and granted an estate in said lot of land for his own life, the grantees named in said fourth paragraph to have and to take their interest in the same after the death of the said James B. Webb. That the said deed was recorded in the register's office of Lenoir County and said State, in book No. 42, page 295, the records of which have been destroyed by the fire of 1878 or 1880, except the index thereto, and the said deed itself is lost or destroyed and cannot be found, after a thorough search therefor. That the said Mary M. Webb, who, on 28 June, 1881, was Mary M. Hay, wife of Robert S. Hay, did, together with her said husband, execute, on said 28 June, 1881, another deed in place of said lost or destroyed deed, conveying said lot of land in the same way and manner as did the said lost or destroyed deed, except as to Martha J. Webb, who intermarried with one Lewis Meyer, and she having died prior to said 28 June, 1881, her share in said lot of land is in the substituted deed conveyed to her only heirs at law, Lily and Daisy Meyer. (See said deed, recorded in said county and State, in the register's office, in book No. 6, pages 558, 559, 560, as part of this complaint.)

The deed of 1 June, 1881, referred to, was put in evidence, and contained the following language: "That whereas, on or about the first day of March, A. D. 1869, the said Mary M. Hay, then Mary M. Webb, for and in consideration of natural love and affection, did sell and convey to the said Benjamin T. Webb, George B. Webb, N. M. Webb (now N. M. West), J. W. Webb, Carrie J. Webb, Emma Webb, and Martha J. Webb (mother of the said Lily and Daisy Meyer), and their heirs, certain tracts or lots of land in the county of Lenoir, in and near the corporate limits of the town of Kinston, . . . adjoining the lots of John Ennis and John D. Long; and whereas the said lots of land were by the said Mary M. Hay, then Mary M. Webb, conveyed and assigned to the said B. T. Webb and others, and their heirs, by a certain deed of absolute conveyance, duly executed, but with (191)

the special trust and confidence that they, the said B. T. Webb and others, pay over and deliver to their father, James B. Webb, the rents and profits of said lands during his natural life, and that the said J. B. Webb be allowed to occupy the said premises as a home for himself and family during his natural life; and whereas the said deed of conveyance is now supposed to be lost: Now, therefore, this identure witnesseth, that for and in consideration of the foregoing premises, together with the further consideration of the love and affection to them, the said B. T. Webb and others, borne by the said Mary M. Hay and husband, Robert S. Hay, have given, granted, released, confirmed, and quitted claim, and by these presents do give, grant, release, confirm, and quitclaim unto the said B. T. Webb and others, their heirs and assigns, all their right, claim, interest, and property in and to the aforesaid parcels of land, to have and to hold to them, the said B. T. Webb and others, and their heirs in fee simple, forever. But with this special trust: that they pay over annually and deliver to James B. Webb the rents and profits of said lands for and during his natural life, and they permit the said James B. Webb to occupy and use said premises as a home for himself and family during the term of his natural life."

On 17 December, 1874, B. T. Webb, one of the sons of James B. Webb, executed a deed, describing said lots, to R. W. King, in which are set forth the following recitals:

"Whereas, Benjamin T. Webb, commissioner appointed by the court to sell a certain lot of land mentioned in the petition of B. T. Webb, Lewis Meyer and wife (Martha Jane), George B. Webb, Nannie Webb, Caroline J. Webb, Emma Webb, and James B. Webb and wife, Margaret; and whereas, in pursuance to the order of said court, I, Benjamin T. Webb, commissioner as aforesaid, having advertised said lot
(192) of land, agreeably to law and agreeably to the order of said court, for more than thirty days, did expose the same at public sale at the courthouse door in the town of Kinston, Lenoir County, on 14 December, 1874, when and where Richard W. King became the purchaser, he being the last and highest bidder," etc.

R. W. King conveyed the lot to one Anthony Blount, and, by a connected chain of conveyances, such title as King acquired vested in the defendants Peter R. Borden and E. W. Borden during the years 1885 and 1886, at which time they entered into possession, and have continued therein, claiming under said deed, until the institution of this action, 1 April, 1902. The deeds from King and others in the chain of defendants' title, including those to themselves, are duly recorded. Plaintiffs allege that the deed of B. T. Webb, commissioner, to King was void and conveyed no title, by reason of fraud, misrepresentation, etc., in respect to the alleged proceedings under which it purports to

have been made, etc. It is unnecessary to set forth in detail plaintiffs' contentions in this respect. James B. Webb died 3 August, 1901. Plaintiff George B. Webb was of full age 8 July, 1876. The youngest child, a daughter, was of full age 17 February, 1888. All of the daughters married before reaching their full age. The children of James B. Webb, except plaintiff George B. Webb, executed deed for such interest as they had in the lot to plaintiff Emma P. Webb, wife of George B. Webb, after the death of their father.

Plaintiffs demand judgment for possession of the land, and damages for withholding, etc.

Defendants, conceding that James B. Webb owned the lot, and that his title vested in his daughter, Mary, allege that, by virtue of the deed of B. T. Webb, commissioner, and the *mesne* conveyances, they are the owners thereof. They also rely upon the several statutes of limitation, etc.

His Honor was of the opinion, first, that the deed executed by (193) Mary Hay 28 June, 1881, referred to in paragraph seven of the complaint, did not vest a life estate in James B. Webb; second, that parol evidence was not admissible to contradict the averments in allegation seventh of the complaint. He expressed the opinion that plaintiffs were not entitled to recover, whereupon they excepted, submitted to judgment of nonsuit, and appealed.

Loftin & Varser and Wooten & Wooten for plaintiff.
Rouse & Land, Y. T. Ormond, and W. D. Pollock for defendant.

CONNOR, J., after stating the case: Plaintiffs proposed to show by B. T. Webb that the deed of 1 March, 1869, made by Mary M. Webb, who intermarried with Robert S. Hay, conveyed the lot in controversy to James B. Webb and his wife for their joint lives and the life of the survivor, remainder to their children. It was admitted that the courthouse "in which the deed was recorded was destroyed by fire during 1880, and that the original deed was lost." The court, upon defendants' objection, excluded the testimony, and plaintiffs excepted. The purpose of the proposed testimony was to avoid the effect of the substituted deed of 28 June, 1881, by showing that the recital therein and the *habendum* were incorrect. It will be observed that, in the seventh paragraph of the complaint, plaintiffs, referring to the deed of 1 March, 1869, and its destruction, say that the said Mary Hay executed the deed of 28 June, 1881, "conveying said lot in the same way and manner as the said lost or destroyed deed" (except that the names of the children of a deceased daughter were inserted). The substituted deed of 28 June, 1881, is made a part of the complaint. It is true that in a preceding paragraph they

say that the lost deed, of 1 March, 1869, conveyed to James B. Webb a life estate. The deed of 28 June, 1881, which "conveyed the
(194) land in the same way and manner," when made a part of the complaint and put in evidence, became the basis upon which the court must, by its construction, ascertain what estate is conveyed. The plaintiffs, having elected to claim under this deed, cannot show, in the absence of any allegation of mistake in the maker or draftsman, that the deed of 1 March, 1869, conveyed a different estate from that described in the deed. This would be not only to contradict their own allegation, but the deed under which they claim. While, under The Code system of procedure, it is settled by many decisions of this Court that, in an action for the recovery of land, the plaintiff may, by proper averments, invoke the equitable power of the court to reform a deed in his chain of title, he must make the essential averments, so that the defendant may either admit or deny them, and an issue may be framed presenting the controversy in that respect. He cannot set up a deed as the foundation of his title, and, without amendment of his complaint, when he finds that it does not serve his purpose, attack it by parol evidence. The law is well stated by *Mr. Justice Walker* in *Buchanan v. Harrington,* 141 N. C., 39. Referring to an attempt to introduce testimony of this character, he says: "But the pleadings do not raise any issue to which it was pertinent. If the petitioners desired to have the deed reformed, relying upon their right to the equity of correction, this matter should have been set up by proper averment and a corresponding issue submitted to the jury. . . . If a party demands equitable relief, he must specially allege the facts upon which he seeks the aid of the court in the exercise of its equitable jurisdiction." The wisdom of the law in this respect is illustrated by this record. The parties went to trial upon the allegations in the verified complaint; the deed was made a part thereof, and introduced in evidence. To permit the plaintiffs, without any notice to defendants, to introduce parol evidence of an interested witness, based upon
(195) his recollection of the contents of a deed which, it seems, he saw but once, and then more than thirty years ago, to contradict the solemn declarations by way of recital in another deed made in substitution of the first, more than twenty years ago, would be to place the security of defendants' title upon the slippery memory of the witness, without any opportunity to apply the usual tests or contradict him. It appears from this record that the deed of 21 September, 1881, was drawn by an intelligent and careful attorney, by whose testimony plaintiffs now propose to contradict it. This witness, plaintiffs charge, fraudulently executed another deed for this same property. His Honor's ruling was manifestly correct. To have admitted the testimony would have violated all of those rules of evidence which experience has shown to be essential to the security of titles.

We are thus brought to the consideration of the deed of 28 June, 1881, for the purpose of ascertaining what estate was vested in James B. Webb. Whatever he acquired by that deed he also had by the deed of 1 March, 1869, because his daughter conveyed by the latter deed "in the same way and manner" as in the first. Plaintiffs insist that the trust declared was passive, and that, by operation of the statute of uses, James B. Webb took an estate for his life in the land. From this position they conclude that the children had no title to or estate in the lots, other than a vested remainder, until the death of James B. Webb, 3 August, 1901, and that, therefore, the statute of limitations began to run against them at that time.

Defendants, on the contrary, insist that the trust impressed upon the legal title was active, imposing upon the grantees and trustees duties in respect to the property which made it necessary for them to hold the legal title; that James B. Webb took no estate in the land; that the case comes within one of the well-recognized classes not affected by the statute of uses. From this position they conclude that the ouster, under the deed of B. T. Webb, 17 December, 1874, put the statute of limitations into operation against the trustees, and that, being under (196) color, it ripened into a perfect title at the end of seven years. The solution of this controversy depends upon the character of the trust created by the deed. The lot is conveyed to B. T. Webb and others in trust "that they pay over annually and deliver to James B. Webb the rents and profits of said lands for and during his natural life, and they permit the said James B. Webb to occupy and use said premises as a home for himself and family for and during his natural life." It is well settled that "The duty to collect or receive the rents, profits, and income of the estate, and pay over the same to the persons entitled thereto, is generally inseparable from the personal control and supervision of the estate by the trustee, and requires that legal title to the *corpus* upon which the rents and profits accrue shall be in the trustee." 28 A. and E., 926. We had occasion to consider the question in *Perkins v. Brinkley,* 133 N. C., 154, where we quoted, with approval, the language of Mr. Tiedeman: "Where a special duty is to be performed by the trustee in respect to the estate, such as to collect the rents and profits, to sell the estate, etc., the trust is called active." Real Prop., sec. 494. Whereas, as said by Mr. Lewin, "If the trust be simply to permit A. to receive the rents, the legal estate is executed in A., this being a mere passive trust." Trusts, sec. 18. In *Hicks v. Bullock,* 96 N. C., 164, it is held that, "Where, by a will, land is devised to a trustee to rent and pay the rents over to a person during his life, the *cestui que trust* takes no estate in the land, but only the right to have the rents paid to him." In *McKenzie v. Sumner,*

114 N. C., 425, *Shepherd, C. J.*, emphasizes the fact that the trustee is charged with no specific duties in respect to the property.

Here the holders of the legal title are required to "pay over annually and deliver the rents and profits" to James B. Webb during his life.

How can they pay over and deliver unless they "rent and collect"?

(197) It seems clear that to execute the trust, to discharge the duty imposed, they must of necessity hold the legal title, control and manage the property. They are further to permit him to occupy the premises "as a home for himself and family," thus showing the intention of the maker of the deed, that, as to the portion of the property suited for that purpose, the father is to "occupy" for the restricted purpose named, and, as to the other part, they are to rent it out and receive the rents and pay them over to him annually. We think it apparent, in view of the fact that the property had, just preceding the execution of the deed, been sold under executions against him, that it was the purpose of his children to take the title and impress upon it a charge, or trust, for the benefit of their father—to remove it beyond his control or power to dispose of it—in other words, to create an active trust for his benefit. The deed is carefully drawn to effectuate that purpose, and apt language is used to that end. This being settled, it follows, upon the well-settled doctrine of this Court, that the ouster of James B. Webb was the ouster of his trustees, and put them to their action. This principle was clearly announced by *Smith, C. J.*, in *Clayton v. Rose,* 87 N. C., 106, and followed in a well considered opinion by *Shepherd, J.*, in *King v. Rhew,* 108 N. C., 696; *Kirkman v. Holland,* 139 N. C., 185; *Cameron v. Hicks,* 141 N. C., 21 (7 L. R. A., N. S., 407). The result of this rule is, that if the trustees are barred, the *cestui que trust* is likewise barred. If this is true when the trustee is a stranger to the remainderman, the same process of reasoning would seem to lead to the conclusion, with even greater force, that when the trustees were entitled as remaindermen they would be barred after permitting the statutory period to expire. It was the duty of the trustees to bring an action against the disseisor within seven years; they would have recovered the possession to enable them to execute the trust and protect the remainder. If their failure to do so for the statutory period barred their entry for one purpose or in

(198) one right, it must do so for all purposes. It was not only the interest of James B. Webb, which the disseisor acquired by seven years adverse possession under color of title, but the title as against all who had a right of entry, and, therefore, a cause of action. It would seem that, under our statute (Revisal, sec. 1580), trustees are seized as joint tenants, and not as tenants in common, resulting in the conclusion that, if one is barred of his entry, his cotrustees are also barred. *Cameron v. Hicks, supra.* B. T. Webb was 24 years of age in 1874, and

plaintiff George B. Webb was 19 years of age at that time. They are clearly barred, and by the decision of this Court it is settled that their cotrustees are equally so. It is immaterial, for this purpose, whether the ouster be fixed at the date of the deed of B. T. Webb, commissioner, to King, 17 December, 1874, or at the date of defendants' deed, 1885. From either date the same result follows. What we have said is upon the assumption that the deed of B. T. Webb, commissioner, is absolutely void and the entry under it wrongful.

There is, however, another view of the case equally decisive of plaintiffs' contention. The deed from B. T. Webb, commissioner, reciting that proceedings were had in the Superior Court upon the petition of himself and the other owners of the lot, resulting in his appointment as commissioner, sale of the property, payment of the purchase money, etc., was recorded immediately after its execution, and, upon the destruction of the courthouse, recorded a second time, in 1881. There is evidence in the record showing conclusively that the purchasers under that deed took possession, and those claiming under them have continued therein; that the defendants have put valuable improvements upon the property; that plaintiff George B. Webb has made conveyances of adjoining lots calling for the lines of the one in controversy as the property of the purchasers; that all of these facts have been known to him since 1874. It is also apparent that James B. Webb and other persons having knowledge of these facts are dead. It also appears that B. T. (199) Webb, the person who made the deed and received the purchase money in 1874, being $118, has, since the death of his father, executed a deed to George B. Webb, conveying his undivided one-fifth interest, for $500, to the wife of George B. Webb; that the other children have likewise conveyed to her for a recited consideration of $500 for each share. The deed made by B. T. Webb, commissioner, is not, upon plaintiffs' averments, void, but, if they be true, may be in equity set aside for fraud practiced by said B. T. Webb, either alone or, as charged by plaintiffs, in conspiracy with others. In view of these facts, and the lapse of twenty-eight years of unexplained silence, it would seem that a court of equity would refuse to interfere by setting aside the deed. In *Harrison v. Hargrove,* 109 N. C., 346, the time elapsing since the proceeding was only seventeen years; there was an outstanding life estate, and the fact was found that no service was made of the summons on the petitioners. This Court, by *Shepherd, J.*, held that the petitioners were guilty of laches, and relief was refused. His language is peculiarly applicable to this record: "Indeed, if there is anything in the rule which requires long delay to be explained and knowledge of a decree to be negatived, we can conceive of no stronger case than the present one." No one can read this record without being deeply impressed with the remarkable com-

bination of facts and circumstances surrounding plaintiffs' alleged claim. Although it was the imperative duty of the plaintiff George B. Webb and the other children of James B. Webb to protect the interest of their father and secure to him the annual reception of the rents and profits and a home for himself and family, they permit him to be ousted, and remain so for twenty-seven years, by the alleged fraud of their brother; they took no steps to recover the property for his use, and, after his death and the death of the clerk of the court, seek to have the deed declared fraudulent upon the testimony of their brother, whom
(200) they charge with active participation in the fraud, and to whom they have paid, as shown by his deed, $500 for his alleged interest in the property which he sold in 1874 and for which he received the purchase money. It is significant that the clerk, who is charged with aiding him in perpetrating the fraud, is dead. In any aspect of the case, his Honor correctly directed judgment of nonsuit.

Affirmed.

WALKER, J., dissenting: I do not understand the facts of this case as do my associates. It seems to me that there was sufficient allegation in the complaint of an intention and agreement on the part of Mary M. Webb (afterwards Mrs. Robert S. Hay) to convey to James B. Webb an estate for life in the land, and whether legal or equitable can make no difference, in the view I take of the law of the case. If, therefore, the substituted deed of 28 June, 1881, did not convey such an estate as the parties intended should pass to James B. Webb, and, as they distinctly allege, did pass by the original deed, why were not the plaintiffs entitled to establish the mistake, if they could do so by the requisite proof? If the deed of 28 June, 1881, while intended to take the place of the one of 1869, which gave James B. Webb a life estate, failed, by reason of the mistake of the draftsman, to convey a life estate to him, and there was a mutual mistake, as, I think, is sufficiently alleged in the complaint, though not very formally or with that precision so much to be desired in pleadings, it would seem that his Honor erred in excluding the evidence offered for the purpose of proving the fact. Can the mere circumstance that the plaintiffs have placed a wrong construction upon the deed of 1881, as the majority think they have, preclude their right to have it conformed to what was really the purpose in making it? The substance of the allegation, when properly considered, is—and that is what the plaintiffs really meant—that the deed of 1881 did convey a life estate to James B. Webb; but if it did not, then that it should be cor-
(201) rected so as to carry out the agreement of the parties in respect to that contemplated effect of the deed. Pleadings should not be construed too strictly, for narrow and technical interpretations often defeat

justice. "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties." Revisal, sec. 495. The plaintiffs also allege that all of the successive purchasers had full notice of their equity. The defendants plead that they have had twenty years adverse possession of the land and seven years adverse possession under color of title; but there is no plea of the statute especially addressed to plaintiffs' equity for a correction of the deed—and if there were, I doubt if, under the facts and circumstances of this case, as they now appear, it should be allowed to avail the defendants.

I gave my concurrence to the decisions in *Kirkman v. Holland,* 139 N. C., 185, and *Cameron v. Hicks,* 141 N. C., 21, most reluctantly, and only in deference to the prior decisions in *King v. Rhew,* 108 N. C., 696, and *Clayton v. Rose,* 87 N. C., 106, and the greater learning and wisdom of my brethren, because I believe the principle underlying those decisions is essentially wrong, and will work, if it has not already wrought, great injustice. I do not think that when a life tenant is ousted, even though he has only an equitable estate, the legal title being in a trustee for him, and the disseisin continues long enough to bar his trustee, that persons entitled in remainder should be prejudiced by the inaction of the trustee, and there is eminent authority for this position. The bar should operate only against the estate of the life tenant, just as an estoppel is not permitted to extend beyond the estate of the person bound by it. James B. Webb died in August, 1901, and the life estate then fell in. This action was commenced in April, 1902, by the remaindermen, in full time for the assertion of their rights by the plaintiffs.

I am also of the opinion that there was evidence tending to (202) show that the proceedings for the sale of the land, which are attacked for fraud, irregularity, and upon other grounds, were of such a character as not to obstruct the plaintiffs' right to equitable relief. But his Honor ruled out important and material evidence that plaintiffs proposed to introduce on the other branch of the case, and peremptorily decided that they could not recover. They were deprived *in limine* of the benefit of proof essential to their success, and finally denied the right to recover in any aspect of the case. This, in my judgment, was error. It would, perhaps, have been better to submit the case to the jury upon proper issues, so that the facts might have been found. The jury may have found against the plaintiffs, but they should, at least, have had an opportunity to prove their case or to develop it. No issues were framed, but the case was most manifestly tried upon the understanding that proper issues would be submitted when the evidence had all been introduced. It does not seem to me, upon a review of the entire record, that the plaintiffs have had the full benefit of their legal rights, and, being

of this opinion, I must dissent from the opinion of the majority, which I always do with extreme regret. My inclination always is to concur with them, not only because of their great learning and ability, but also because I well know with what anxious care and patient investigation they consider and decide cases coming before them. The principle herein applied goes beyond what has heretofore been decided, it seems to me.

I would enter more fully into the discussion of the principle involved in *King v. Rhew, Kirkman v. Holland,* and *Cameron v. Hicks* if it would not extend this opinion to an unreasonable length. I may undertake to express my views at length on that subject at some future and more opportune time.

I agree with my brethren that this case bears no resemblance to *Joyner v. Futrill,* 136 N. C., 301, or *Perry v. Hackney,* 142 N. C., 368, and for that reason they were not cited. In the former of those two (203) cases the trust was a passive one, and was executed by the statute of uses, plainly and unmistakably, and, besides, it was clearly confined to the life estate. The remainder was devised, freed and discharged of the trust. In *Perry v. Hackney* the devise was made directly to Nancy Richardson of the "use, benefit, and profit" of the property in controversy. There was no intervention of a trustee upon whom duties were conferred that created an active trust. She got the whole estate, because the language was capable of no other construction; and the rule in *Shelley's case* was held to apply, as the limitation then was "to the lawful heirs of her body" after her death. The statute of uses had no application, nor did the question presented in this case arise.

Cited: Windley v. Swain, 150 N. C., 361.

A. S. BRICK v. ATLANTIC COAST LINE RAILROAD.

(Filed 16 October, 1907.)

1. **Judgment—Estoppel—Jurisdiction.**

The plaintiff is not estopped to bring another action in the Superior Court against the same defendant upon the same subject-matter, by reason of a judgment by a justice of the peace dismissing a former action for lack of jurisdiction.

2. **Railroads—Baggage—Sale, Purpose of—Negligence, Gross or Willful.**

Articles carried in the trunk of a passenger for the purpose of sale are not baggage for which the railroad is chargeable, except only in tort as a gratuitous bailee, for gross negligence or willfulness.

3. Same—Baggage—User of Ticket—Bailee, Gratuitous—Negligence, Gross or Willful.

The carriage of personal baggage is incident and personal to the user of the ticket. Generally, where the user was not the owner of the baggage, and the owner was not traveling with him, the carrier, without knowledge and acceptance of the conditions, is not liable to the latter, except as a gratuitous bailee, for gross negligence or willful injury.

4. Same—Parties.

The owner can maintain an action against the carrier for gross negligence or willful injury, causing the loss of articles in the trunk of the user of the ticket.

5. Evidence—Instructions—Harmless Error.

It is harmless error in the court below to instruct the jury that in no event could the plaintiff recover when the recovery could only have been for gross negligence, of which there was no evidence.

APPEAL from a justice of the peace, tried before *Council, J.,* (204) and a jury, at September Term, 1906, of ROBESON.

The plaintiff sued to recover the value of the contents of a trunk by him delivered to the defendant. It was in evidence that the plaintiff, who was a merchant, packed the trunk with certain wearing apparel, and also placed therein certain jewelry. The plaintiff purchased a ticket and checked the baggage, and delivered the ticket to his brother, who was a clerk in the employ of plaintiff, and who was going to Chadbourn for the purpose of clerking in the plaintiff's store. Plaintiff's brother used the ticket. The jewelry was to be sold in plaintiff's store at Chadbourn. Demand was made upon the defendant for the baggage, and it has failed to produce same or account for its nonproduction. It is admitted that the defendant had no knowledge of the contents of the trunk. The value of the wearing apparel was $46.75, and the jewelry $207.83. On the trial of a former action before the justice, plaintiff remitted all of his claim in excess of $200. The justice rendered judgment for plaintiff, and defendant appealed. Upon the trial in the Superior Court his Honor charged the jury that in no event could the plaintiff recover the value of the jewelry. Thereupon a verdict was rendered for $46.75, the value of the wearing apparel, and plaintiff appealed to the Supreme Court. This Court affirmed the judgment below, declaring that the justice had no jurisdiction of the cause of action for the value of the jewelry, inasmuch as this demand was in tort and in excess of (205) $50. 142 N. C., 359. Thereupon the plaintiff instituted this new action in the Superior Court, founded in tort, asking for the recovery of the value of the jewelry. A jury trial was waived, and thereupon the court found the facts to be as testified to by the plaintiff on the former trial.

His Honor further found the value of the jewelry to be $207.83. Upon the uncontroverted facts, his Honor, being of opinion that the plaintiff could not recover, nonsuited the plaintiff, and he appealed.

McIntyre & Lawrence for plaintiff.
McLean, McLean & McCormick for defendant.

CLARK, C. J., after stating the case: The plaintiff is not estopped by the former judgment, *Brick v. R. R.*, 142 N. C., 359, because it was held therein that the court of the justice of the peace (in which that action began) had no jurisdiction as to the tort for nondelivery of the jewelry. The subject-matter of this action was not passed upon, and could not have been, in that action. *Harrington v. Hatton,* 130 N. C., 89; *Smith v. Garris,* 131 N. C., 34.

The common carrier is "insurer of the personal baggage of the passenger, and this includes jewelry carried for the personal use of the passenger to a reasonable extent, but not when it is carried for the purpose of sale or for the use of some one else." 3 A. and E. Enc. (2 Ed.), 534; *Humphreys v. Perry,* 148 U. S., 627. This last case, citing many others (p. 642), holds that in such case the carrier is chargeable merely with the duty of a gratuitous bailee, and liable, not in contract, but in tort, and hence only for gross negligence or willfulness. "Articles carried for sale are not baggage, whatever the articles may be." 2 Fetter Carriers of Passengers, sec. 587, p. 1440, and cases cited. Nor is the carrier insurer of merchandise delivered to the carrier by a passenger as personal baggage, without notice of the contents. *Ib.*, sec. 602,
(206) p. 1459; 6 Cyc., 668; 3 A. and E. Enc. (2 Ed.), 539; 3 Thomp. Neg., sec. 3417, and cases cited.

Even when it is personal baggage, its carriage is incident to the ticket purchased, and is personal to the user of the ticket. There are exceptions, as where several members of a family, or husband and wife, are traveling together, and articles belonging to both are in a trunk. 3 Thomp. Neg., 3424. The user of the ticket in this case was not the owner of the trunk and contents, nor were he and the owner traveling together. He could not recover for the baggage of another. 3 A. and E. Enc., 533; 2 Fetter Carriers, sec. 600, p. 1455. This action is properly brought by the party in interest, the owner of the property.

Where the baggage is not personal baggage, or, if such, when it is not the personal baggage of the passenger, it is a fraud on the carrier, unless that fact is made known and the baggage is, notwithstanding, accepted for carriage. Unless this is done, there is no contract, and the liability of the carrier is that of a gratuitous bailee, responsible only for gross negligence or willful injury. 1 Fetter Carriers of Passengers, sec. 607,

p. 1470; 3 A. and E. Enc., 533. In such cases negligence must be clearly shown, and cannot be presumed by the mere fact of loss or injury (as in the ordinary case of loss of or injury to the personal baggage of a passenger). 3 A. and E. Enc. (2 Ed.), 542; *Young v. R. R.*, 116 N. C., 936. It would be otherwise if the carrier received the trunk with knowledge of its contents. *Trouser Co. v. R. R.*, 139 N. C., 382, where the subject is fully discussed by *Walker, J.*

The plaintiff here can maintain the action, though he was not the passenger using the ticket, but only by showing gross negligence or willful misconduct. The court erred in holding that in no event could the plaintiff recover, but, as there was no evidence of gross negligence, this was harmless error, and the judgment is

Affirmed.

Cited: Kindley v. R. R., 151 N. C., 213; *Perry v. R. R.*, 171 N. C., 164.

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(207)

DAVIS & HOOKS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 16 October, 1907.)

1. Railroads—Penalty—Statutes—Transport—Time Computed.

Under Revisal, sec. 2632, the time in which railroads shall transport freight shall be computed by excluding the first day and including the last, except when the last day falls on Sunday.

2. Same.

Though Revisal, sec. 3844, prohibits freight trains from running on Sunday within certain hours, Revisal, sec. 2632, does not exclude Sundays from the reasonable time in which railroads are given to transport freight, except when Sunday is the last day in computing the time. Revisal, sec. 887. (The time allowed, under Revisal, sec. 2632, when not necessarily taken for the specified purposes, discussed.)

3. Same—Intermediate Points.

An "intermediate point" for which time is allowed under Revisal, sec. 2632, in transporting freight is only where the freight is transferred to another road.

ACTION for recovery of a penalty, under Revisal, sec. 2632, heard by *Jones, J.*, at Spring Term, 1907, of WAYNE.

From a judgment for plaintiff defendant appealed.

The facts are sufficiently stated in the opinion of the Court.

M. T. Dickinson for plaintiffs.

Aycock & Daniels for defendant.

CLARK, C. J. This is an action for penalty, under Revisal, sec. 2632, begun before a justice of the peace. On appeal to the Superior Court, by consent, the court found the facts, from which it appears that, on 5 May, 1906, a firm of merchants in Wilmington, N. C., shipped over defendant's road to plaintiffs at Fremont, N. C., a quantity of corn, less than a car-load; that Fremont is a station, 96 miles from Wilmington, on defendant's line from Wilmington to Rocky Mount; that Goldsboro, between Wilmington and Fremont, is the terminus of two other
(208) railroads; that in the car in which this corn was shipped was other merchandise, which was unloaded at Goldsboro, to be transferred to said other railroads at that point; that this car arrived at Fremont 16 May; that the shipment was in possession of the defendant for twelve days, including the day of its receipt and the day of its arrival at Fremont; that two of the intermediate days (*i. e.*, 6 and 13 May) were Sundays, and that the schedule or ordinary time for the movement of freight by local train between Wilmington and Fremont is one day.

The court below allowed the defendant to deduct five days, *i. e.*, the day of receipt of the goods for shipment, the next day (Sunday, 6th), then two more days (Monday and Tuesday) to get ready to start, and one day as the actual "ordinary schedule time" for transporting freight between Wilmington and Fremont, and gave judgment for seven days delay, *i. e.*, one day at $12.50 and six at $2.50 each—total, $27.50.

The defendant excepted because the court did not further deduct Sunday, 13 May; also two days (forty-eight hours) at Goldsboro, as an intermediate point; also the day of arrival at Fremont. These four days, if allowed, added to the five already allowed, would make a total of nine days for transportation of freight from Wilmington to Fremont, 96 miles, whose ordinary schedule is one day, as found by the court. Ninety-six miles in nine days is more than twice the time it would take an ox cart to make the same trip. Indeed, as railroad trains, unlike ox carts, ordinarily travel by night as well as by day, 96 miles in nine days is less than one-half mile per hour. At 20 miles an hour, the ordinary speed of a freight train, it would have taken less than five hours, instead of the twelve days actually taken, to transport this freight from Wilmington to Fremont, which was at the actual average speed of 1 mile for each three hours, or 8 miles for each twenty-four hours.

In *Hinkle v. R. R.*, 126 N. C., 939, it was held that "transportation of live stock at an average rate of less than 5 miles an hour cannot
(209) be considered reasonable diligence, in the total absence of explanation."

The statute was passed in response to a wide public demand and a grave recognized necessity of compelling railroads to deliver freight in

a reasonable time. A construction of the act that would hold that this modern, splendidly equipped, up-to-date railroad, with its line between Wilmington and Fremont almost without curves and level as a plank floor, is not chargeable with unreasonable delay if it shall take in transportation between those points more than twice as long as it would take an ox cart to make the transit, challenges attention. If the remedial statute accomplishes no more than requiring of a railroad less than half the speed of an ox cart, why was it passed? What does it remedy?

The statute (Revisal, sec. 2632) is as follows: "It shall be unlawful for any railroad company, steamboat company, express company or other transportation companies doing business in this State to omit or neglect to transport within a reasonable time any goods, merchandise or articles of value received by it for shipment and billed to or from any place in the State of North Carolina, unless otherwise agreed upon between the company and the shipper, or unless same be burned, stolen or otherwise destroyed, or unless otherwise provided by the North Carolina Corporation Commission. Each and every company violating any of the provisions of this section shall forfeit to the party aggrieved the sum of $25 for the first day and $5 for each succeeding day of such unlawful detention or neglect, where such shipment is made in car-load lots, and in less quantities there shall be a forfeiture in like manner of $12.50 for the first day and $2.50 for each succeeding day: *Provided,* the forfeiture shall not be collected for a period exceeding thirty days. 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 (210) time required for transporting such articles of freight between the receiving and shipping stations; and a delay of two days at initial point and forty-eight hours at one intermediate point for each hundred miles of distance, or fraction 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."

The statute for computing time (Revisal, sec. 887) is as follows: "The time in which an act is to be done, as provided by law, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded."

The Legislature makes the law. The function of the court is to apply it. An examination of these two statutes will show:

1. That the last day, the arrival at Fremont, is not to be deducted unless it had been Sunday.

2. We are of opinion that Goldsboro is not an intermediate point on the line between Wilmington and Fremont, on the same railroad. It would be an "intermediate" point only as to freight transferred to another railroad at that place. Merely taking other goods out of the car, *en route,* at Goldsboro could not justify a delay of forty-eight hours there, for, this being a "local freight" train, goods are taken out or put in the car at any station, requiring for that purpose only a few moments, and not delaying the train nor the transportation of this particular freight, as may be the case as to freight transferred to another line of road to be forwarded in another car.

3. The Legislature has not written the words "Sundays excluded" into the statute, and the court has no authority to do so. The Revisal, sec. 887, by providing that, in computing time, if the last day be
(211) Sunday it shall be excluded, shows that, except when Sunday is the last day, it shall be counted in the time "provided by law."

The defendant contends that, inasmuch as railroads are prohibited (Revisal, sec. 3844) from running freight trains on Sundays, between sunrise and sunset, the court ought to interpolate the words "Sundays excepted," in section 2632. The Legislature might have written those words in the statute, but it did not do so. The courts have no power to do so. The Legislature evidently thought it had made full allowance for freight trains not running between sunrise and sunset on Sunday by the liberal allowance it has made to the railroads over and above "the ordinary time required for transporting such articles of freight between the receiving and shipping stations," which in this case is found to be *one* day.

The exact point has already been twice passed upon by this Court. In *Keeter v. R. R.,* 86 N. C., 346, *Ashe, J.,* says that the defendant set up the defense that Sunday should not be counted, because the statute (chapters 197 and 203, Laws 1879) forbade freight trains to run on that day, and holds that Sunday is to be counted—not excluded—in making up the time which the railroad is allowed for transportation. Said chapters 197 and 203, Laws 1897, referred to by *Judge Ashe,* are now Revisal, sec. 3844, again brought forward as a defense by defendant. The same ruling that Sunday (unless the last day) is to be counted was made in *Branch v. R. R.,* 77 N. C., 347.

In *Drake v. Fletcher,* 50 N. C., 411, in construing the statute which allowed twenty days in which a *ca. sa.* must be executed, the Court held that Sundays must be counted, though the statute forbade service of such process on Sunday, the Court saying that when Sundays are to be excluded "the Legislature so declares in express terms." In *Barcroft v. Roberts,* 92 N. C., 249, the Court held, as to the twenty days allowed in which a petition to rehear could be filed, that the first day is to

be excluded from the count, and the last day is to be counted, (212) unless Sunday, and counted all other Sundays in the twenty days.

We have numerous statutes fixing the time within which certain acts are to be done, and, though process and notices are forbidden to be served on Sunday (Revisal, sec. 2837), no court has ever written into the statute specifying the time in which process shall be served (under a penalty to the officer for failure to serve in the prescribed time) the words "Sundays not to be counted."

We also have statutes prescribing that if roads or bridges shall remain out of repair ten days the overseer is liable to a fine and an action for damages (Revisal, sec. 2724), but this has not been construed as "exclusive of Sundays," though the overseer is forbidden to do any work on Sunday (Revisal, sec. 2836), and would not have ten working days, exclusive of Sundays. There are similar penalties in Revisal, secs. 2722, 2723. Appeals must be taken in ten days, cases on appeal served in ten days, counter-cases in five days, under penalty of loss, yet the court has not extended the time by writing in the statute "Sundays not counted," though lawyers are no more to be expected to work on Sundays than freight trains.

There is a severe penalty on any officer not serving process, if delivered to him twenty days before court or ten days before return day, of a justice of the peace's warrant (Revisal, sec. 2817); but, though he cannot serve such process on Sundays, they have never been excluded from the count. If a register fails to record a license in ten days he incurs a penalty. Revisal, sec. 2098. But, though he cannot legally record it on Sundays (Revisal, sec. 2836), any more than a freight train can legally run between sunrise and sunset on that day, Sundays are not excluded.

There is a penalty on clerks for not issuing executions in six weeks. Revisal, sec. 618. They cannot legally issue executions on Sunday, but it has never been held that another week was to be added to the six weeks because of the six Sundays. (213)

Many other instances might be given, but this Court has said, if the Legislature intends that Sundays shall not be counted, it always "so declares in express terms." *Drake v. Fletcher,* 50 N. C., 411. This is a remedial statute in response to a public demand that *quasi*-public corporations shall transport freight in a reasonable time. There is no indication that Sundays shall be excluded from the reasonable time prescribed in which railroads shall transport freight, since Sundays are counted in the time in which clerks, sheriffs, lawyers, road overseers and all others are respectively required to perform certain acts, under a penalty if they fail to do so within the time prescribed.

In the cognate matter of demurrage, as *Judge Ruffin* notes in *Branch v. R. R.*, 77 N. C., 354, Sundays are counted in the time prescribed. To the same effect is *Car Co. v. R. R.*, 121 Fed., 609; *The Oluf*, 19 Fed., 459; *Baldwin v. R. R.*, 142 N. Y., 279.

It follows, not only that none of the defendant's exceptions can be sustained, but that the judge erred in allowing the defendant four days at the initial point, for the statute expressly allows only "a delay of two days at the initial point." Sunday, 6 May, was properly deducted, not as Sunday, but as one of the two initial days of nonaction. There was no authority to deduct two more days. This last error follows our ruling that Sundays are not excluded by the statute; but we cannot correct this error, as the plaintiff does not appeal. For the same reason, we cannot pass upon the contention, earnestly and ably made by the plaintiff, that, under the terms of the statute, "if there is a delay of two days at the initial point," or of "forty-eight hours at an intermediate point," it shall be held *"prima facie* reasonable," but that this does not mean that if there is not, in fact, such delays at those points, that length of time shall be deducted out of unreasonable delays elsewhere.

The question is an interesting one, but we are not called on to de-
(214) cide a point not raised by any exception, the plaintiff not appealing.

In *Meredith v. R. R.*, 137 N. C., 481, this Court held that the "forty-eight hours at intermediate points" was, as the statute says, only *"prima facie* reasonable delay," and not to be allowed unless it was a necessary delay.

The statute allows the carrier "the ordinary time for transporting such articles of freight between the receiving and shipping stations," and, in addition to that, "a delay of two days at the initial point" (instead of the day of receipt, under Revisal, sec. 887), and "forty-eight hours at one intermediate point for each hundred miles of distance, or fraction thereof, . . . shall be held *prima facie* reasonable." This is the plain language of the body authorized to make laws, and this Court has no desire or power to read or construe it except as it is written. If the time allowed is too liberal, or too restricted, it is for the Legislature to change it.

Affirmed.

Cited: Watson v. R. R., post, 241; *Jenkins v. R. R.*, 146 N. C., 184; *Ice Co. v. R. R.*, 147 N. C., 61, 68; *Wall v. R. R., ib.*, 410; *Mfg. Co. v. R. R.*, 152 N. C., 669.

(215)

WILLIAM ALLEN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 16 October, 1907.)

1. Railroads—Damages—Issues—Last Clear Chance.

In an action for damages on account of the alleged negligence of the defendant, when the evidence shows that the plaintiff was an experienced brakeman, and, while helping a fellow-servant to place some cars on a siding, attempted to get upon the cars in an unusual and unforeseen manner, and fell between the cars and was injured, it was proper for the court below to refuse an issue as to "the last clear chance."

2. Railroads—Running Switch—Negligence per se.

Making a running switch is not negligence *per se* on the part of the employer having the employee to make it, when the detached moving car has a brakeman on it and is under control.

3. Railroads—Contributory Negligence—Questions for Court.

When it was the duty of the brakeman to be on top of the cars as they were being "shunted" or "kicked" from the track onto the switch where they were to be placed, and he jumped from the ground to a moving coal car, next to a shanty, for the purpose of ascending the ladder of the shanty, and saw the switchman in the act of "cutting loose" the shanty, as ordered, and endeavored to leap upon the shanty as it was "cut loose," and fell and was injured, this is contributory negligence, and will bar recovery in a suit by him against the railroad company.

ACTION to recover damages for personal injuries, tried at November Term, 1906, of LENOIR, before *Jones, J.*, and a jury.

The court submitted the following issues:

1. Was the plaintiff, William Allen, injured by the negligence of the defendant?

2. Did the plaintiff, William Allen, contribute to his injury by his own negligence?

3. What amount, if any, has plaintiff been damaged?

The jury answered the first issue "Yes," and the second issue "Yes."

From the judgment that the defendant go without day, the plaintiff appealed.

Loftin & Varser, G. V. Cowper, and M. H. Allen for plaintiff.
Rouse & Land for defendant.

BROWN, J. Upon the trial the plaintiff tendered the issues submitted, and also another issue, as follows: "If the plaintiff contributed to his own injury, could the defendant have avoided the injury by due care?" The refusal of the court to submit this issue is strongly pressed by plaintiff as error. The contention of a plaintiff that, although he may be guilty of negligence, yet the defendant had the last opportunity to pre-

v nt injury, can be presented under the issue of contributory negligence, as negligence, to bar recovery, must be shown to be the proximate cause. *Baker v. R. R.*, 118 N. C., 1021; *Ramsbottom v. R. R.*, 138 N. C., (216) 38. We find nothing in this case which warrants the application of the so-called doctrine of the last clear chance. The only person who, it is claimed, could have intervened and saved the plaintiff from injury was the brakeman, Outlaw, and we see nothing in the evidence to sustain the contention that he could have done it. It appears by plaintiff's own testimony that he had been employed on a freight train of defendant, and was an experienced brakeman; that he was ordered by the conductor to help Elias Outlaw place some shanty cars on the siding; that, instead of going to the side of the shanty cars where the ladders were, he let the shanties pass, and jumped on a coal car, which was the first car after the shanties passed. In respect to this contention the plaintiff's evidence is as follows: "As soon as I caught the coal car, which was the first car that reached me after the shanties passed, I got upon the platform of the coal car and at once started to step from it to a ladder on the shanty car, which I was going to place on the side-track. Just as I was stepping to this ladder on the shanty car the switchman cut off the cars and dropped me from the center of the track down to ground." This testimony makes the acts of plaintiff and the switchman, Outlaw, practically simultaneous. Upon the plaintiff's statement, then, there was no intervening time between his step and the act of Outlaw in disconnecting the cars to have enabled any agency to have been brought to bear upon the occurrence which could have averted the injury. Therefore, there is no possible deduction in the testimony which would have permitted the submission of this issue. Again, there is no evidence in the record that Outlaw saw the plaintiff as he started to climb from the moving coal car onto the shanty, or that Outlaw had any reason to expect the plaintiff to take that way of going on top of the shanty instead of the usual method of climbing from the ground by the ladders. There was no "last clear chance" left to Outlaw to avoid the injury, and no evi-
dence that he neglected any duty he, as a fellow-servant, owed the (217) plaintiff. The evidence, therefore, does not support the issue tendered, and for the same reason, we think, his Honor properly declined to give plaintiff's prayer for instruction embodying such contention. *Ellerbe v. R. R.*, 118 N. C., 1026; *Taylor v. R. R.*, 109 N. C., 236.

1. The only exception to the evidence and most of the prayers for instruction relate to the first issue; and as the jury answered that issue in favor of the plaintiff, it is unnecessary to consider them.

2. The contention of plaintiff, as presented in prayers for instruction upon the second issue, that "kicking" cars is negligence *per se*, and the proximate cause of the plaintiff's injury, seems to be founded upon

a misapprehension of the decisions. The word "kicking" seems to be used, in railroad parlance, as synonymous with making a "flying switch." This Court has never held such operations to be *per se* negligence in respect of the employees performing them. It is "the attempt to make a running switch" when the detached car has no brakeman on it and is under no control that is declared to be negligence, because highly dangerous. *Wilson v. R. R.*, 142 N. C., 336, and cases there cited.

3. The plaintiff further requested the court to charge that there is no evidence of contributory negligence. We think his Honor properly denied his prayer. There is ample evidence in the record to go to the jury upon that issue. In fact, his Honor might well have instructed the jury that the plaintiff, upon his own showing, was guilty of contributory negligence, and by his careless conduct caused his injury. Plaintiff was ordered to assist the switchman, Elias Outlaw, in side-tracking the "shanties." Being a brakeman, he knew his place was on top of the shanties and at the brakes, so he could control the cars as they were "shunted" or "kicked" from the track onto the switch. He jumped from the ground to the moving coal car, next to the shanty, for the purpose of ascending the ladder. When he mounted the coal car he saw the switchman at the crank and knew he was in (218) the act of "cutting loose" the shanties, as ordered. The plaintiff never called to Outlaw, but took his chances and endeavored to leap onto the shanty car just as the switchman "cut it loose." The plaintiff probably believed that he could successfully make the leap, or doubtless he would not have attempted it. He made a mistake, as other unfortunate men have done before, and fell to the ground between the moving cars and was injured.

The majority of the Court is of opinion that there is

No error.

Cited: Boney v. R. R., post, 250; *Johnson v. R. R.,* 163 N. C., 445; *Bordeaux v. R. R.,* 150 N. C., 532; *Vaden v. R. R., ib.,* 702; *Farris v. R. R.,* 151 N. C., 487; *Johnson v. R. R.,* 163 N. C., 445; *Kenney v. R. R.,* 165 N. C., 103.

C. S. MODLIN v. ROANOKE RAILROAD AND NAVIGATION COMPANY.

(Filed 16 October, 1907.)

1. **Deeds and Conveyances—Timber, Standing—Description, Specific, General—Construction.**

When a deed conveying standing timber contains a general description, followed by a specific one, the latter will control the former only to the extent required to reconcile the two, and in subordination to the principle that all clauses of the deed should be given effect so far as they can be harmonized by a fair and reasonable interpretation.

2. **Same.**

When the general description in a deed of standing timber conveys "all the pine, oak, ash, cypress, and poplar of specified dimensions within the boundaries of the entire Harmon-Modlin 42-acre tract," specifically excepting "as to that portion lying on the south of Cooper Swamp," whereon only the pine, poplar, and cypress were passed, the specific description relates only to the locality named, and controls the general description to that extent only.

3. **Deeds and Conveyances—Description—Fraud—Options.**

When it is properly established by the verdict of the jury, in an action to set aside a deed of standing timber, that fraud or deceit was practiced upon plaintiff, an ignorant man, unable to read or write, induced by false and fraudulent representations of defendant as to its contents, making plaintiff believe that it was in accordance with an option thereof theretofore obtained from him, but was, in fact, a conveyance to defendant of a much larger amount of timber, the evidence of fraud and deceit is sufficient, and the judgment will not be disturbed.

4. **Same—Remedies.**

One who has been induced to convey his property by fraud or deceit has an election of remedies, either to bring an action to set aside the conveyance, unless the property has passed into ownership of a purchaser for value without notice, or, allowing the conveyance to stand, he may sue to recover damages for the pecuniary injury inflicted upon him by the fraud. Retaining the purchase price is not, in the latter case, a ratification of the deed.

5. **Same—Evidence, Extrinsic.**

When the deed, which is alleged to have been fraudulently obtained as not being in accordance with an option theretofore given, stands alone as embodying the contract of conveyance between the parties, without referring to the option, the last-named paper is competent evidence in proper instances upon the question of fraud, and to show whether the deed complied with the option, but is incompetent in aid of the description in the deed.

6. **Same—Knowledge, False Representations as to.**

When the agent of defendant, charged with the duty of obtaining a deed from plaintiff in accordance with an option theretofore obtained, positively asserted that he knew the contents of the option, and that the

deed was in conformity therewith, and when he does not know whether his assertion is true or false, he is as culpable, in case another is thereby misled or injured, as if he made an assertion knowing it to be untrue.

7. Same—Timber, Standing—Removal.

When it is established that the defendant obtained from the plaintiff a deed of timber by fraud or deceit, and conveyed the timber to a third person, the cause of action is not dependent upon the question of the removal of the timber in an action for damages.

8. Same—Registration—Limitation of Actions—Discovery of Fraud.

In an action for damages for obtaining by fraud or deceit a deed from plaintiff conveying a larger amount of timber than was intended to be conveyed, the statute of limitations applicable is Revisal, sec. 395, subsec. 9, and begins to run only when the injured party first discovered the facts, or could have discovered them by the exercise of proper effort and reasonable care. Registration of the deed is not in itself sufficient notice of such facts.

CONNOR, J., dissenting.

ACTION to recover damages for fraud and deceit, tried before (220) *Biggs, J.*, and a jury, at March Term, 1907, of MARTIN.

There was evidence tending to show that, on 15 November, 1899, plaintiff contracted to sell to defendant company that portion of the pine, cypress, and poplar timber on a tract of land belonging to plaintiff and known as the Harmon-Modlin land, which was situated on the south side of Cooper Swamp, "as far back as the muck and mire comes," for the sum of $60; that plaintiff was an ignorant man, being unable to read or write, and that, on 18 November following, the defendant company, by false and fraudulent representations as to its contents, and making plaintiff believe that it was in compliance with the contract, induced plaintiff to execute a deed conveying to defendant company a much larger amount of the timber on the said tract than was included in the terms of the contract; that defendant afterwards sold the timber to the Dennis Simmons Lumber Company, and conveyed same to that company by deed, in the exact terms of the said deed to defendant, and, by reason of the fraud and deceit so practiced on plaintiff, he was damaged to the amount of $1,000.

The action to recover damages for said wrong was commenced on 3 April, 1906, and the fraud practiced on plaintiff by defendant and the sale to the Dennis Simmons Lumber Company were not discovered until December, 1905. The deed to defendant company was registered 9 January, 1900, and that to the Dennis Simmons Company was registered 24 February, 1902, and no timber has yet been cut by either company. Defendant company denied the fraud, claimed that the deed, in effect, only conveyed the timber embraced under the terms of the contract, and

(221) that no injury had been wrought to plaintiff, and pleaded the statute of limitations. The jury rendered a verdict as follows:

"1. Did defendant procure the execution of the deed of date 18 November, 1899, by false and fraudulent representation, as alleged in the complaint?" Ans. "Yes."

"2. What damage, if any, has the plaintiff sustained in respect to the highland timber?" Ans. "Two hundred and fifty dollars, with interest from 18 November, 1899."

"3. What damages, if any, has the plaintiff sustained in respect to the swamp and ravine timber?" Ans. "Forty dollars, with interest from 18 November, 1899."

"4. Is the plaintiff's cause of action barred by the statute of limitations?" Ans. "No."

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

Winston & Everett and B. A. Critcher for plaintiff.
A. O. Gaylord for defendant.

HOKE, J., after stating the case: The verdict, when considered in connection with the allegations and the admissions and testimony, establishes the proposition that, under a contract to convey the pine, poplar, and cypress timber on the tract which was situated on the south side of Cooper Swamp, as far as the muck and mire comes, the plaintiff has been induced by fraud and deceit to convey to defendant company the timber described in the deed, as follows: "All the pine, oak, ash, cypress, and poplar timber, of and above the size of 12 inches in diameter on the stump when cut, in and upon the following described tracts of land, situated in Jamesville Township, in the aforesaid county of Martin, adjoining the lands of S. L. Wallace, H. M. Modlin, and others, and known as the Harmon-Modlin tract, containing 42 acres, more or less; all the pine, poplar, and cypress timber on said land on the southern side of Cooper Swamp and in said swamp and ravines," and the damage fixed at $290.

(222) Defendant objected to the validity of this recovery, for the reason, chiefly, that by correct interpretation the deed only conveys to the defendant the timber specified in the contract, and on the principle that the latter part of the description, "all the pine, poplar, and cypress timber on said land, on the southern side of Cooper Swamp," being more specific, will control the former and more general description, "all the pine, oak, ash, cypress, and poplar timber on said tract," and so restrict the timber conveyed to that which was actually embraced within the terms of the contract, citing *Peebles v. Graham,* 128 N. C., 220.

The principle contended for by the defendant is well recognized, but we do not think its correct application to the terms of the deed will sustain the position of defendant. Conceding that the latter part of the description is more specific, it would only control the former to the extent required to reconcile the two, and in subordination to the principle that all the clauses of the deed should be given effect as far as they can be harmonized by fair and reasonable interpretation. *Jones v. Casualty Co.*, 140 N. C., 265. To apply, therefore, both of these rules of construction, we think it clear that in the instrument now before us the former and more general clause conveyed the grantee all the pine, oak, ash, cypress, and poplar, of the dimensions specified, within the boundaries of the entire Harmon-Modlin 32-acre tract, except as to that portion of said timber lying on the south side of Cooper Swamp, and as to that, only the pine, poplar, and cypress timber was passed, allowing the latter and more specific description to limit the kind of timber conveyed on the portion of the tract south of the swamp, leaving out the oak and ash. This being the true significance of the deed, the plaintiff has been wrongfully deprived of all his timber in excess of that described in the original contract, which was only the "pine, cypress, and poplar within that portion of the tract on the south side of Cooper Swamp, as far as the muck and mire ran." It is right, therefore, on the issue as to defendant's responsibility, that the verdict be sustained, for it is well established that one who has been induced to convey (223) his property by fraud and deceit has an election of remedies, and may either bring an action to set aside the conveyance, unless the property has passed into ownership of a purchaser for value and without notice (*Summers v. Mfg. Co.*, 143 N. C., 102), or he may allow the conveyance to stand, and sue to recover damages for the pecuniary injury inflicted upon him by the fraud. *May v. Loomis*, 140 N. C., 350. And it is further held that retaining the purchase price is not such a ratification of the contract as prevents the injured party from maintaining his action for damages to recover for the injury over and above the amount already received under the contract. 20 Cyc., 91; *Andrews v. Jackson*, 168 Mass., 266; *Shimabarger v. Shelton*, 41 Mo. App., 147. As said in Cyc., *supra*, "As indicated above, a return, or an offer to return, what plaintiff has received under the contract, induced by the fraud, is not a condition precedent to his maintaining an action for deceit, since he is entitled to the benefit of his contract, plus the damage caused by the fraud," and the general principles sustaining plaintiff's right to recover are well stated in the cases of *Sprinkle v. Wellborn*, 140 N. C., 163; *Griffin v. Lumber Co.*, 140 N. C., 514.

An effort is made to support the interpretation of the deed insisted on by defendant by construing the deed and option together, using the

option in aid of the description contained in the deed. It is familiar learning, however, that user of the option for such purpose is not permissible. The deed now stands alone as embodying the contract between the parties. It makes no reference to the option for description, or for any other purpose, and, while this last paper is competent evidence on the question of fraud, and to show whether or not the deed complies with the option, the authorities are clear that the paper is not relevant in aid of the description in the deed, and any attempt to use
(224) it for such purpose would, therefore, be improper. *Farthing v. Rochelle,* 131 N. C., 563. Again, it is contended that a great wrong has been done defendant in this trial, and a verdict has been rendered fixing it with a gross fraud, without any sufficient evidence to support it; but we find nothing either in the record or the testimony to justify this position. It appears that plaintiff gave an option at the price of $60 to sell to the defendant company the pine, cypress, and poplar timber in the swamp and ravine, "as far as the muck and mire comes," on a tract of land consisting of about 7 acres of the land known as the Harmon-Modlin tract, on the eastern side of the Washington and Jamesville Road and the southern side of Cooper Swamp, and agreed that the company should have five years in which to cut and remove the same. By the representations of the defendant's agent, plaintiff was induced to sign and deliver a deed conveying to the defendant all the pine, oak, ash, cypress, and poplar timber upon the entire tract of land known as the Harmon-Modlin tract, containing 42 acres, more or less; all the pine, poplar, and cypress timber on such land on the southern side of Cooper Swamp and in said swamp and ravines, being the land conveyed to said Modlin, as per record in Martin County, by deed dated 18 February, 1898, giving ten years in which to remove it.

Speaking of the transaction by which this result was effected, the plaintiff testified as follows:

"The highland part of the Harmon-Modlin tract is covered with pine, oak, and poplar timber. It is good timber. There is pine, ash, poplar, and cypress timber in the swamp. None of the timber has ever been cut. Mr. Arthur Hardison came to my house to buy my timber for the company. I gave him an option on the swamp timber as far up as the muck and mire goes. I did not sell him any of the highland timber. He was to cut timber down to 12 inches in diameter at the stump in the swamp and ravines. I signed the option—my wife and I. Hardison gave it to Mr. Jordan. I have seen it since. Mr. Jordan read it to me, at his home in Beaufort County, some weeks before the suit was
(225) brought. In 1905 was the last time I saw the option, just before I brought this suit. It was a thirty-day option. Mr. Jordan came with a deed at the end of the thirty days. Mr. Jordan said the

deed was exactly like the option—that it was written, word for word, like the option. I asked him to read the deed over to me. He said: 'It is no use reading the deed; it is exactly like the option, and is all right.' I cannot read, and Mr. Jordan knew that I could not read or write. I sold the timber for five years in the option, and Mr. Jordan said the deed was exactly like the option in every respect. On this statement, and relying on it, I signed the deed—my wife and I signed it—and Mr. Jordan took private examination and paid me $59 in check on the company. One dollar had been paid by Hardison when the option was taken." It is admitted that the defendant paid $60. Mr. Jordan acted for the defendant.

Thus it will be seen that plaintiff, as we interpret the deed, who had given an option at the price of $60 to convey the pine, cypress, and poplar timber on 7 acres of the Judson Harmon land, lying south of the Cooper Swamp, and "as far as the muck and mire runs," has, by the false representations of the defendant's agent, been induced to convey all the pine, cypress, poplar, oak, and ash on the entire tract, except that part lying south of Cooper Swamp, and all the pine, cypress, and poplar south of Cooper Swamp, without limiting this amount by the restriction "as far as the muck and mire runs," the timber so conveyed amounting in value to $350, being $290, the amount of damage found by the verdict, plus $60, amount paid under the contract. On the moral aspects of the question there is here, in our opinion, ample evidence to establish willful misrepresentation on the part of defendant's agent, and to justify the verdict as rendered. If it be suggested that there is no evidence that the agent, Jordan, was aware of the contents of the option, the answer is, that he positively asserted that he knew the contents, and that the deed was in exact compliance with the same; and it is well (226) established that one who intentionally and positively asserts a fact to be true of his own knowledge, when he does not know whether it be true or false, is as culpable, in case another is thereby misled or injured, as one who makes an assertion which he knows to be untrue.

It is further urged, in objection to this recovery, that no timber has yet been cut, and may never be, but the law must deal with facts, and not with possibilities, which rest only in suggestion; and, unfortunately for the defendant, it has so dealt with this contract that its mental attitude toward it has ceased to be of importance. It has conveyed the timber bought by it to the Dennis Simmons Lumber Company by deed containing a description exactly similar to its own. This last company is not a party to this record, and we are not informed of its purpose. Certain it is, however, that, if our interpretation of this deed be correct, it has a right to enter upon the plaintiff's land and cut and appropriate all the timber of the kind and dimensions specified on the entire Judson

Harmon tract, to the value of $350, when the plaintiff had only agreed to sell $60 worth of timber on 7 acres of the property.

This being true, and the result indicated having been brought about by the fraudulent misrepresentations on the part of defendant's agent, the plaintiff's right to recover on the main issue comes clearly within the principle so well stated in *Griffin v. Lumber Co.*, 140 N. C., 514: "Where the parties made a contract for the sale of certain timber, reserving a well-defined class of trees, and defendant undertook to reduce the contract to writing, in accordance with its terms, but knowingly included the reserved timber, and falsely represented to plaintiff that said timber was reserved in the deed, and, by means of this false representation, procured the execution of the deed, the plaintiff has a cause of action for deceit; and this is not dependent upon the removal of (227) the timber."

Defendant assigns for error, further, that on the issue as to the statute of limitations the judge below declined to charge, as requested, that the registration of defendant's deed was in itself such a notice of the alleged fraud as would put the statute in motion for the defendant's protection and in bar of plaintiff's claim; but the point has been resolved against the defendant. The statute applicable (Revisal, sec. 395, subsec. 9) provides that actions of the present kind are barred in three years after the discovery by the aggrieved party of the facts constituting the fraud, and, construing this subsection, the Court has decided that the statute commenced to run when the aggrieved party first discovered the facts, or could have discovered them by the exercise of proper effort and reasonable care, and that the registration of the deed, or knowledge of its existence, by which the fraud was accomplished was not of itself sufficient notice of such facts. *Peacock v. Barnes,* 142 N. C., 215; *Stubbs v. Motz,* 113 N. C., 458.

There is no error, and the judgment of the lower court is

Affirmed.

CONNOR, J., dissenting: I am unable to concur in the conclusion reached by the Court in this case. If nothing more was involved than a small sum of money, I would be content to note my dissent and say no more; but, as I interpret the record, a gross moral fraud is by the verdict of the jury fixed upon the defendant—a corporation, it is true, but corporations commit frauds only by their agents and servants. It is impossible to disassociate them. I, of course, accept as true the allegation in the complaint, and every statement made by plaintiff and his witness, in regard to the terms of the option, and the contract upon which it is founded. I also accept as true his testimony in regard to the declarations and conduct of defendant's agent when he presented the deed

for plaintiff's signature. I am, however, of the opinion that (228) instead of speaking a willful, deliberate falsehood in regard to the timber conveyed in the deed, he spoke the exact truth—that the deed, properly construed in the light of the option, conveys no other and no more timber than is included in the option. I freely concede that, if I am in error in this, and if the agent, who, it seems, did not take the option or draw the deed, knew that it included more and other timber than the option called for, he was guilty of a gross fraud upon the plaintiff. It is so easy to charge men with fraud, and, unfortunately, we are so prone to take the accusation for the proof, that courts should be cautious to see that conduct capable of more than one construction should not be hastily or upon insufficient evidence branded as fraudulent when it may be consistent with an honest mistake. The complaint sets out the terms of the option, and in that respect it is fully sustained by the testimony. The option was for "the pine, cypress, and poplar timber in the swamp and ravines, up as far as muck and mire comes, consisting of about 7 acres, on the land known as the Harmon-Modlin land, on the eastern side of the Washington Jamesville Road and the south side of Cooper Swamp." The charge is that defendant "willfully and wickedly contrived to defraud plaintiff," and "fraudulently and purposely" inserted in the deed other timber, towit, "oak and ash," on the swamp and ravine, and "pine, oak, ash, cypress, and poplar" on the highland, etc.

Plaintiff introduces Mr. Hardison, who says: "I took an option on the swamp and ravine timber . . . The plaintiff had other timber than swamp and ravine. I did not buy the timber on the highland." Plaintiff testifies: "I gave him (Mr. Hardison) an option on the swamp timber, as far up as the muck and mire goes. I did not sell him any highland timber. He was to cut timber down to 12 inches in diameter at the stump on the swamp and ravine." The deed contains the following description: "All the pine, oak, ash, cypress, and poplar timber, of and above the size of 12 inches in diameter on the (229) stump when cut, in and upon the following described tracts of land, situated in Jamesville Township, in the aforesaid county of Martin, adjoining the lands of S. L. Wallace, H. M. Modlin, and others, and known as the Harmon-Modlin tract, containing 42 acres, more or less; all the pine, poplar, cypress timber on said land, on the southern side of Cooper Swamp and in said swamp and ravines; being the land conveyed to said Modlin, as per record of Martin County, by deed dated 18 February, 1898." It bears date 18 November, 1899, and is recorded 19 December, 1899. No timber has been cut, and defendant has never claimed, but expressly disclaims, any other timber than that included in the option. Its contention is thus stated in the record: "The defendant contends that the deed to it did not convey any timber except that in the

swamp and ravines." Thus the issue is sharply presented. Plaintiff charges that defendant fraudulently included all of his timber in the deed, whereas defendant disclaims ever taking, owning, or acquiring the timber on the highland. The controversy, so far as the quantity of timber is concerned, depends upon the construction of the deed. It will be noted that, although the plaintiff alleges that defendant fraudulently inserted in the deed "oak and ash" in "the swamp and ravine," the deed conveys only "pine, poplar, and cypress," the exact language of the option. The controversy is, therefore, narrowed to the question whether, reading the deed in the light of the option, any other timber is conveyed than that on the "southern side of Cooper Swamp and in said swamp and ravines." His Honor construed the deed to convey all of the timber on Harmon-Modlin land, thus giving no effect to the last restrictive words in the description. I take it as settled that courts, in such cases, will, for the purpose of ascertaining the intention of the parties, "endeavor to place themselves in the position of the parties at the time of the conveyance." *Cox v. McGowan,* 116 N. C., 131. We should read
(230) this deed as if the description referred to the option. The question which the Court is to ask in such cases is thus clearly stated by *Judge Walker,* in *Gudger v. White,* 141 N. C., 507: "After all, the simple question is, What does the whole description show was actually intended to be conveyed? When reading the deed and looking at the facts and circumstances as they appear, what impression is left on the mind as to the purpose of the parties? "When a general description is joined with a particular one, it is a rule of construction that the latter prevails over the former. A general description may be limited, restrained or controlled by a particular description, but, as a rule, a particular description is not limited, restrained or controlled by a general description. The real intent of the parties should, when possible, be gathered from the whole description." Jones on Conv., sec. 410. It is sometimes said that the first description will control a later one. This rule is, however, applied only when the question as to which conveys the intention is so exactly balanced that it is necessary to invoke it "to tip the nodding beam." "But, whether a specific description comes before or after a general description, it must prevail, upon the underlying principle that the law will always demand the production of the highest evidence, and, as between two descriptions, will prefer that which is most certain." *Cox v. McGowan, supra.* In *Carter v. White,* 101 N. C., 30, the grant described the land as "a tract containing 67½ acres, lying and being in the county of Currituck, known by the name of Walker's Island, beginning," etc. Those words were followed by a specific description, which did not include the whole of Walker's Island. *Smith, C. J.,* said: "While the words recited, unconnected with others, will embrace

a water-bound tract as an island, yet, upon every well-settled rule of interpretation, subsequent restrictive words giving and defining its boundaries must have the effect of qualifying the preceding general designation. The island determines, as does the mention of (231) the county, the locality of the land granted; the particular description, what portion is intended; and thus the general and true intent is reached and an apparent repugnancy avoided and the deed rendered self-consistent." The learned *Chief Justice* says that the proposition is so manifest that he refrains from citing authority for its support. In *Peebles v. Graham,* 128 N. C., 218, the testator, under whom both parties claimed, gave plaintiff "all the lands included under the name of the Arnold, the Geer and the Jones lands—all east of the Raleigh and Roxboro Road." *Furches, C. J.,* said: "If the description had closed with all the lands included, . . . and the dispute had been whether the 64½ acres were a part of the 'Arnold' land, it would have been proper for the court to submit that question to the jury. But the description did not stop here; it added 'all east of the Raleigh and Roxboro Road.' This qualification must mean something. It would not have been added if it did not. The description, without this qualifying clause, would undoubtedly have given the plaintiff all the Arnold tract. . . . As (to) this language, according to all rules of interpretation, the only meaning it can have is to restrict the gift to the east side of the road." *Proctor v. Pool,* 15 N. C., 371. In these cases the Court had no facts and circumstances *aliunde* the deed to aid it; whereas we have the option pursuant to which the deed was drawn. The option includes "pine, cypress, and poplar timber"; the specific description in the deed is confined to "pine, cypress, and poplar timber." The option calls for the timber "in the swamp and ravines"—the exact words of the deed. The option confines the timber sold to the "Harmon-Modlin land on the eastern side of the Washington and Jamesville Road, on the south side of Cooper Swamp." The deed confines the grant to the timber on the "south side of Cooper Swamp." No point is made of the omission to insert the road. But it is said that the words "up as far as the muck and mire comes" are omitted. No reference is made in the complaint to (232) this omission. The only complaint made of the description as to the land on the "south side of Cooper Swamp, in the swamp and ravines," is that the deed includes "oak and ash," where the option includes only "pine, cypress, and poplar"; and when the deed is read it appears that "oak and ash" are not in it. I fail, after careful inspection, to find any evidence suggesting that plaintiff was claiming any damage for fraud as to the swamp and ravine timber. His action is for the value of the timber on the highland. It is conceded that no timber has been cut. There is no suggestion that defendant, or its grantee, has

ever claimed to own the highland timber; on the contrary, defendant expressly disclaims such ownership. I think that his Honor was in error when he held, as a matter of law, that the deed conveyed all of the timber on the Modlin land. There is not the slightest evidence that Jordan, or any one else, ever made any such claim. While it is conceded that defendant did not request his Honor to submit the question of the intention of the parties to the jury, it did except to his instruction that, as a matter of law, the language of the deed included all of the timber. If the question was for the jury, I think the exception extends to all errors in the charge in that respect. If the description was ambiguous and obscure, it would seem clear that the question as to what was included in the deed, in the light of the "facts and circumstances," should have been submitted to the jury. *Ward v. Gay,* 137 N. C., 397. It is said that defendant conveyed the timber to the Dennis Simmons Lumber Company by deed, containing the same description as is found in the deed from plaintiff. There is no suggestion that the lumber company has ever claimed that the highland timber passed, although eight years have elapsed since plaintiff's deed was made. I confess to some difficulty in comprehending how a person, either natural or corporate, can be fixed with actual intentional fraud in respect to property which it does not claim to own, has never asserted any right
(233) to, and when, after eight years from the date of the alleged fraud, it is first notified that any such construction is put upon the deed, promptly disclaims title to the property. The defendant is made to buy property, at plaintiff's price, which it does not want, has never purchased or claimed to own, and, for the purpose of compelling the purchase, is fixed with a gross, wicked fraud. It is made to pay interest for eight years. The deed was recorded immediately. It will be further observed that, although the defendant's grantee, by the judgment, is compelled to take the timber, it is given only two years within which to remove it. If it be not removed within that time, the plaintiff receives $290, with interest for eight years, and retains his timber. *Bunch v. Lumber Co.,* 134 N. C., 116, and other cases in which we have held that, at the expiration of the time fixed for removal, the estate of the purchaser revests in the vendor. Assuming that ten years was inserted instead of five for removal, the difference in the price is fixed by the testimony. This amount, easy of calculation, plaintiff would recover. It may not be improper to say that, upon the argument, the attorney who wrote the deed—a man utterly incapable of committing a fraud—had the original deed, showing that a portion of the description was printed, thus explaining how the ambiguity occurred—the written words constitute the specific description. I think that, in any aspect of the case, there should be a new trial, to the end that the rights of all parties may be adjudged and protected.

Cited: Lamb v. Major, 146 N. C., 533; *Whitehurst v. Ins. Co.,* 149 N. C., 276; *Machine Co. v. Feezer,* 152 N. C., 520; *Unitype Co. v. Ashcraft,* 155 N. C., 67; *Tarault v. Seip,* 158 N. C., 377; *Pate v. Blades,* 163 N. C., 272.

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CHARLIE FLOWERS v. LEWIS KING.

(Filed 16 October, 1907.)

1. **Process—Service—Wrong Party—Judgment by Default—Remedy—Practice.**

The defendant was ejected from a piece of land by virtue of final process issued on a judgment by default, the original process having been served on a different man of the same name; the real defendant never entered an appearance, and had no knowledge of the pending action until the service of the writ of possession upon him: *Held,* (1) the judgment is absolutely void, (2) and may be set aside, on motion of defendant, or treated as a nullity.

2. **Same—Merits.**

When it is made to appear that the judgment against defendant is void by reason of an entire lack of jurisdiction of the party, he is entitled to have it set aside without proof or suggestion of merit.

MOTION to set aside judgment, heard before *Jones, J.,* and a jury, at April Term, 1907, of WAYNE.

The judgment was set aside and order made restoring defendant to possession of the real estate from which he had been ousted, and plaintiff excepted and appealed.

Aycock & Daniels and Isaac F. Dortch for plaintiff.
Stevens, Beasley & Weeks for defendant.

HOKE, J., after stating the case: It appears from the facts found by the judge on the hearing that defendant has been ejected from a piece of land by virtue of final process of the court, issued on a judgment by default in the present cause, the original process having been served on a different man of the same name as the defendant. In regard to service on defendant, the court finds the facts to be as follows: "The court finds that the summons in this action had never been served upon the real defendant, Lewis King, a negro, and the said Lewis King has never entered an appearance in said suit, either in person or by attor- (235) ney, and had no knowledge of the pending action until the writ of possession was served upon him." On these facts it is well established

with us that the judgment against the defendant is absolutely void, and may be set aside on motion of defendant, or treated as a nullity when and wherever the entire lack of jurisdiction is made to appear. *Card v. Finch,* 142 N. C., 140; *Carter v. Rountree,* 109 N. C., 29; *Doyle v. Brown,* 72 N. C., 393; *Cooper Co. v. Martin,* 70 N. C., 300; Black on Judgments, sec. 307. It is urged that the judgment should not be set aside, because the affidavits have failed to disclose any facts which would enable the defendant to make a valid defense against the plaintiff's demand. This is usually required before a court will disturb an irregular judgment. As said in *Becton v. Dunn,* 137 N. C., 559-562, speaking of irregular judgments: "The authorities are all to the effect that an irregular judgment may be set aside at a subsequent term, independent of section 274 of The Code. *Wolfe v. Davis,* 74 N. C., 597. This is not done as a matter of absolute right in the party litigant, but rests in the sound legal discretion of the court. It is always required that a party claiming to be injured should show that some substantial right has been prejudiced, and he must proceed with proper diligence and within a reasonable time." But no such requirement exists when the judgment is void by reason of an entire lack of jurisdiction of the party. In that case the judgment is a nullity, and the party affected is entitled to have same set aside whenever such fact is made to appear, and without proof or suggestion of merits. Black on Judgments, sec. 348, citing *Dobbin v. McNamara,* 113 Ind., 54; *Roberts v. Pawley,* 50 S. C., 913.

The doctrine of the text is fully supported by the authorities cited, and is in accord with the principles established by our own decisions.

There is no error, and the judgment of the court below is

Affirmed.

Cited: Simmons v. Box Co., 148 N. C., 346; *McKeithen v. Blue,* 149 N. C., 99; *Massie v. Hainey,* 165 N. C., 178, 179; *Cox v. Boyden,* 167 N. C., 321; *Estes v. Rash,* 170 N. C., 342; *Johnson v. Whilden,* 171 N. C., 154.

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(236)

T. W. WATSON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 16 October, 1907.)

1. **Railroads—Transport—Evidence—Burden of Proof—Instructions — Questions for Court.**

When it is admitted that certain articles were received by defendant, to be transported and delivered to plaintiff, the party aggrieved, both points being in the State, the distance separating them 58 miles, with but one intermediate point between the place of shipment and destination, and

that they were not delivered to plaintiff within twenty-one days, without explanation, the court should instruct the jury, as a matter of law, that the delay was unreasonable.

2. Same.

When the initial carrier delivers goods to its connecting carrier, necessary for them to be by it further transported to their destination, and an unreasonable delay occurs, without evidence as to which carrier was responsible for the delay, the defendant, the initial carrier, is liable for the entire delay, the burden of proof being upon it as the party having the evidence peculiarly within its own knowledge or possession.

3. Railroads—Penalty Statutes—Transport—Construction.

Under Revisal, sec. 2632, the two days at the initial point are allowed for the purpose of giving a reasonable time to begin the transportation; the forty-eight hours at each intermediate point are allowed for the necessary change of cars or unloading and loading; and it is not a reasonable construction of the statute to deduct the day of the receipt and the day of delivery from the time thus fixed.

4. Same—Sundays.

The time for the transportation of goods shipped by the defendant carrier, as fixed by Revisal, sec. 2632, is not affected by section 2613, prohibiting freight trains to run on Sundays, etc., and the intervening Sundays should be counted, especially in a shipment where the entire distance is not over 58 miles, and five days free time is allowed.

ACTION for the recovery of penalty before a justice of the peace, (237) and heard on appeal at Spring Term, 1907, of BERTIE, before *Lyon, J.*, and a jury.

The following evidence was submitted:

Bill of lading, duly signed by defendant company, for car-load of lumber to be shipped by plaintiff, T. W. Watson, at Cedar Landing, Bertie County, N. C.

1. That on 1 October, 1906, the Rocky Mount Sash and Blind Company, at Rocky Mount, delivered to the Atlantic Coast Line Railroad Company, for T. W. Watson, at Cedar Landing, N. C., the owner and party in interest, a car-load of lumber and window frames, to be shipped and delivered at Cedar Landing to said Watson.

2. That the distance from Rocky Mount to Cedar Landing is 58 miles, and there is in that distance one intermediate point, towit, Williamston, N. C., where the defendant connects with the Norfolk and Southern Railroad Company by boat for Cedar Landing.

3. That said shipment was delivered to the plaintiff at Cedar Landing on 21 October, 1906.

4. That the entire route of the shipment and both terminal points are in North Carolina.

5. The defendant delivered to the plaintiff the bill of lading named, above referred to.

The court instructed the jury, if they believed the evidence, to answer the first issue "Yes" and the second issue "$100." To this charge defendant excepted. Thereupon the court rendered judgment. Defendant excepted to the judgment, and appealed.

Winston & Matthews for plaintiff.
J. H. Pou, G. B. Elliott, and Pruden & Pruden for defendant.

HOKE, J., after stating the case: In support of its exception to the charge of his Honor on the first issue, the defendant insists that
(238) the only obligation assumed by the contract of carriage, evidenced by the bill of lading, was to transport within a reasonable time the articles to the point of destination, if on its line, and if not, to transport and deliver to the next connecting carrier on the route to the final destination. In the absence of any evidence of a joint obligation, this is unquestionably true. It is further true that, if the consignee seeks to fix the carrier with liability, either by way of damages or for statutory penalty, the burden of proof is upon him to show that the goods were not transported, according to the contract, within a reasonable time. *Walker v. R. R.*, 137 N. C., 163. In this case it is conceded that the articles were received by defendant at Rocky Mount, 1 October, 1906, to be transported and delivered to plaintiff at Cedar Landing, both points being in this State, and the distance separating them 58 miles; that they were delivered to plaintiff 22 October, 1906; that there was but one intermediate point between the place of shipment and destination. When the facts are admitted and but one reasonable inference can be drawn from them, the court should instruct the jury as a matter of law—this is elementary. In the absence of explanation, it would not seem open to debate that the time between the receipt and delivery of the articles was unreasonable. We do not understand counsel to controvert this proposition. Defendant insists that, conceding this to be true, it also appears that Williamston is, for the purpose of this shipment, the terminus of defendant's line, and that at that point the articles were delivered to and transported by the Norfolk and Southern Railroad Company to their final destination. It is clear that if within a reasonable time the defendant delivered the articles to the Norfolk and Southern Company, and the delay occurred upon that line, the defendant was exonerated and the liability was transferred to that company.

The question therefore, is, Where does the burden of proof rest as to such transportation and delivery? We had occasion to discuss
(239) this question in *Meredith v. R. R.*, 137 N. C., 478, in an action for damages for a failure to transport goods in a reasonable time and deliver them in good condition. After a careful consideration of the

authorities, we held that the means of proof being within the control of the contracting company, upon the well-settled exception to the general rule, the burden was upon it to account for the damaged condition of the goods. In *Harper v. Express Co.,* 144 N. C., 639, we held that the same principle would apply where the action was for wrongful delay, and that presumption of responsibility would arise against any one of the connecting carriers shown to have possession and control of goods after the delay occurred. We can perceive no good reason why the same principle should not control in an action for the statutory penalty for delay in transporting goods. As we said in *Stone v. R. R.,* 144 N. C., 220, the only purpose and effect of the statute is to enforce the common-law duty and penalize its breach. The defendant keeps a record of all shipments over its line by means of waybills, showing the date of receipt, date of arrival at the destination, together with all other data enabling its agents to keep trace of the shipment. It also takes a receipt from the connecting carrier to which shipments are delivered for transportation to the point of destination. This record is always made by and under the control of defendant's agents. The shipper or consignee only knows from his bill of lading when the goods are shipped and when delivered. It is manifest, upon every principle of fair dealing, that when he shows an unreasonable delay in the transportation, all matters in exoneration or defense should come from the defendant. To hold otherwise would be to render the legislation enacted for the enforcement of the duty of the carrier and protection of the "party aggrieved" of no effect—to keep the promise to the ear and break it to the sense. If, as in this case, the carrier may permit articles—lumber and window frames —doubtless shipped to meet an immediate necessity, to be delayed from 1 October to 22 October, a distance of 58 miles, and with- (240) out any explanation or information as to the cause or place of such delay, call upon the defendant to summon its agents, with its own records, to show when, where and how the delay occurred, the statute would be of little value as a remedy for the wrong done him. His Honor was, therefore, clearly correct in his instructions to the jury upon the first issue.

The defendant excepts to the instruction upon the second issue. His Honor assumed that the entire delay occurred on the defendant's road. In the absence of any explanation, we are unable to perceive how any other rule can be applied. For the same reasons which fixed the burden of proof regarding the place or cause of the delay, we are constrained to hold that the defendant must be held liable for the entire delay. If, having the evidence in its possession to show the contrary, the defendant withholds it from the court, it has no just cause of complaint. In the absence, therefore, of any evidence showing when the article was

delivered to the connecting carrier, the initial or contracting carrier will be charged with the entire time during which the unreasonable delay occurred. If it has discharged its full duty, or has partially done so, the evidence thereof is within its possession and not known to plaintiff.

His Honor directed the jury to answer the second issue "$100." This is upon the theory that there was a delay of twenty-one days, two being allowed at the shipping point and two days at the intermediate point, leaving seventeen days. The judgment of $100 is based upon a charge of $25 for the first day and $5 per day for fifteen days. It is stated in the brief that 21 October was Sunday. We presume that his Honor deducted that day. The defendant's counsel insist that the day of receipt and the day of delivery should be deducted, and from the time thus fixed the four days should be deducted. We do not think this a reasonable construction of the statute. The two days at the initial point

(241) are allowed for the purpose of giving a reasonable time to begin the transportation. The forty-eight hours at each intermediate point are allowed for change of cars—if necessary, unloading and reloading. The defendant insists that, in view of the statute (Revisal, sec. 2613) prohibiting freight trains to run on Sundays, between sunrise and sunset, the Sundays intervening between the day of shipment and delivery should not be counted. This suggestion might be made effective on appeal to the Legislature, but the Court is not at liberty to adopt it, when the statute which imposes the penalty (Revisal, sec. 2632) contains no such provision. We should not read into the statute an exception which the Legislature has not seen proper to make. *Davis v. R. R., ante,* 207. It will be noticed that the carrier is only prohibited from running its train for a part of Sunday, between sunrise and sunset, and certainly in the present case there has been no hardship imposed in the matter of time. In a shipment where the entire distance was not over 58 miles there has been an allowance of five days as free time, and this was as favorable as the defendant could reasonably ask.

There has been no error of which the defendant can complain, and the judgment below is

Affirmed.

Cited: Collection Agency v. R. R., 147 N. C., 594.

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EDWARD SMITH v. R. L. GODWIN ET AL.

(Filed 16 October, 1907.)

1. **Negotiable Instruments—Past Due—Indorsement—Securities—Title.**

Y. held the note of H., secured by mortgage on land. H. subsequently conveyed the land to Y. by an absolute deed, and obtained a receipt in full. Y. retained possession of the note and mortgage, the latter remaining uncanceled of record. On the same day Y. conveyed the land to V. by deed, reciting a consideration, followed by a provision that all thereof which had not been paid should constitute a lien on the land. Thereafter Y., for a valuable consideration, executed a promissory note to plaintiff, and indorsed as security therefor the note, then past due, he held of H., secured by the mortgage: *Held*, in an action to recover of the defendant V. the balance due on the purchase price of the land described in the H. mortgage, that, in equity, the indorsement of Y. to the plaintiff of the note of H. passed the title to the note, with the right to the mortgage security as an incident.

2. **Bankruptcy—Trustee—Assets, Rights in.**

A trustee in bankruptcy, in the absence of fraud, takes the assets of the bankrupt subject to rights, liens, and equities existing against them in the hands of the bankrupt.

3. **Bankruptcy—Securities—Sale—Demand.**

A creditor of the bankrupt estate, holding several kinds of securities for the debt, can, in the absence of demand, realize on them in the order he prefers.

4. **Power of Court—Verdict, Set Aside—Issues, Irrelevant.**

It is not error in the court below to set aside a verdict on an issue irrelevant to the inquiry.

ACTION tried before *Peebles, J.*, and a jury, at November Term, 1907, of HARNETT.

The facts, as shown by the pleadings, admissions, and verdict, are: E. F. Young held a note against one B. F. Hamilton, secured by a mortgage on land in Harnett County, for $1,256, dated 7 March, 1896, subject to certain indorsed credits. On 7 January, 1902, the note being past due, Hamilton, for the purpose of paying the note and discharging the mortgage, executed an absolute deed for the land to Young, who (243) gave him a receipt in full, but retained possession of the note and mortgage. On the same day, 7 January, 1902, Young executed a deed for the land to defendant W. R. Vann. The consideration recited in the deed was $3,100, followed by the following provision: "It is distinctly understood and agreed between the parties hereto that only the sum of $1,692.05 of the consideration of $3,100, above written, has been paid, and that this deed shall become operative as a fee-simple deed of convey-

ance only from and after the payment of said balance in full, with interest." On 1 March, 1904, Vann paid Young on account of the balance due $1,014.24, leaving due at the time of the trial $746.76. The deeds from Hamilton to Young, and from Young to Vann, were recorded subsequent to 3 February, 1903, as was the cancellation of record of the mortgage from Hamilton to Young. On 2 February, 1902, Young executed to plaintiff for a valuable consideration his promissory note for $1,000, due 1 November, 1902, no part whereof has been paid. On 3 February, 1903, Young indorsed to plaintiff as collateral security for said note the Hamilton note, and transferred the mortgage executed to secure the same. There was apparently due on said note at that time $1,053.96. On 4 June, 1904, Young was duly adjudged a bankrupt, and defendant Godwin and others appointed his trustees. Plaintiff has not proven his debt against Young. At the time of the transfer of the Hamilton note and mortgage, Young, for the same purpose, transferred to plaintiff certain shares of stock in incorporated companies. Plaintiff in this action seeks to recover of defendant Vann the balance due on the purchase price of the land described in the Hamilton mortgage conveyed to him by Young. He avers that by the transfer of the note he acquired an equitable lien on the debt. Defendant Vann is ready to pay the amount as the court may adjudge. Defendants, trustees, insist:
(244) first, that plaintiff took the note after maturity and subject to all infirmities and defenses attaching thereto in the hands of Young; second, that they took the debt, as trustees, free from any liens or equities attaching to Young's title; third, that in any event plaintiff cannot recover the debt until he accounts for the value or the amount which he ought by due diligence to have realized from a sale of the stocks. His Honor, being of the opinion that there was no evidence that Young, or his trustees, had notified plaintiff to dispose of the stocks, he could not compel him to account for their value before realizing on the Vann debt; that they could at any time demand the return of the stocks by paying the note; he therefore declined to submit an issue in regard to the sum which Young could have realized by a sale of the stocks. Defendants duly excepted to these rulings. From the judgment rendered the trustees appealed.

J. C. Clifford and Rose & Rose for plaintiff.
Godwin & Townsend and R. L. Godwin for defendants.

CONNOR, J., after stating the case: It is conceded, as contended by defendants, that, as against Hamilton, the plaintiff took the note by indorsement from Young, subject to defenses accruing to him by reason of the execution of the deed of 7 January, 1902, and the receipt by

Young. He could not have maintained an action on the note against Hamilton. This question, however, is not involved here. When Young indorsed the note, although past due, to plaintiff, he warranted that it was genuine—that he had a good title to it; that he had no knowledge of any fact which would impair its validity or render it valueless, and that on presentment it would be paid. Revisal, secs. 2214, 2215. Hence, his title to the note and his right to demand all securities which Young held are clear. While the record presents a peculiar state of facts, we can see no good reason why the same equitable principles which carry to the purchaser of a note all securities held by the assignor for its payment may not be invoked by plaintiff. Certainly, in good conscience and equity, Young should be treated as holding such (245) security for the benefit of his assignee. The principal having passed, the incident goes with it. This is elementary. Hamilton was entitled to demand of Young the surrender of his note and cancellation of the mortgage. He permitted him, however, to retain the one and leave the other open upon the record. When Young sold to Vann he expressly retained a lien upon the land to secure the unpaid balance of the purchase money. This represented, in Young's hands, the note and mortgage which he held against Hamilton. A court of equity, which always disregards mere form, so that substantial justice will be done, finds no difficulty in treating Young as a trustee for plaintiff in respect to the amount due by Vann. Defendants insist that, however this may be as against Young, they take under the bankrupt law title to the debt, free from such equity, or, to state their contention in the language of their well-considered brief, "When they were appointed trustees of Young's estate, and were by operation of law vested with the title to Young's property, they took that title which Young could, prior to his adjudication in bankruptcy, have transferred to an innocent purchaser for value." In considering this question, the fact that Hamilton's note was overdue and open to defense by him is immaterial. Plaintiff, as against Young, acquired a perfect *title* to the note. This being true, we are unable to see how his subsequent bankruptcy in any manner affected plaintiff's title, either to the note or any securities which Young held for its payment. We do not think plaintiff's right grows out of an estoppel; but equity, regarding that as done which ought to have been done, treats the Vann debt as having been transferred to plaintiff as incident to the transfer of the note, or, which amounts to the same thing, considers Young as trustee for the plaintiff. Whether if Young had, for value and without notice of such trust, transferred the Vann debt to a purchaser, plaintiff would have been without remedy, is not presented here. While there is some apparent confusion in the decisions of the Federal District and Circuit Courts upon the question, we find (246)

that the Supreme Court of the United States has held that the trustees in bankruptcy take the assets of the bankrupt subject to rights, liens and equities exising against them in the hands of the bankrupt. In *Thompson v. Fairchild,* 195 U. S., 516, it is said: "Under the present bankrupt act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all equities impressed upon it in the hands of the bankrupt." *Mfg. Co. v. Cassell,* 201 U. S., 344. The result of the decisions is thus stated in 5 Cyc., 341: "The trustee becomes vested with the same kind of a title as though he were a purchaser, but such title is subject to all the rights and equities existing in favor of third persons against the bankrupt." *Bank v. Iron Co.,* 102 Fed., 755. The same principle has been recognized by this Court in regard to assignees of property to secure the payment of existing debts. In *Potts v. Blackwell,* 56 N. C., 449, *Pearson, J.,* speaking of the title acquired by such assignees, says: "It would seem that they take subject to any equity that attached to the property in the hands of the debtor, and cannot discharge themselves from it on the ground of being purchasers without notice." This cause was reheard, and, after most exhaustive argument by counsel of marked learning, affirmed. It has been uniformly followed in this Court, and is sustained by reason. *Potts v. Blackwell,* 57 N. C., 59. While there are some apparently conflicting rulings in the bankrupt courts, we think that they are more apparent than real, being controlled frequently by local statutes regarding registration of deeds and mortgages. No question of that kind is presented in this case. Plaintiff did not acquire any interest in the land sold to Vann, but became entitled to the debt for the purchase money. It will be observed that, at the date of the assignment to plaintiff, the mortgage from Hamilton had not been canceled nor the deeds from Hamilton to
(247) Young, or Young to Vann, recorded. So far as plaintiff's knowledge or information extended, the Hamilton note and mortgage were intact. This fact shows the strength of his equity against Young, and equally so against his trustees.

The next exception made by defendant involves the right of plaintiff to recover in this action before disposing of the stocks transferred to him. We can perceive no reason, in the absence of a demand upon him to do so, why he may not realize on either of his securities in the order which he prefers. It is conceded that the amount recovered by him in this action is insufficient to discharge his note. The trustees of Young are entitled, if so advised, to have an accounting of the fund in plaintiff's hands, to the end that they may either have the stocks sold, and the balance, after paying plaintiff's note, paid to them; or, we presume, by an order of the bankrupt court, they may

redeem the stocks and dispose of them for the benefit of the estate. Discussing the duty of a pledgee of stocks to secure debts, *Mr. Justice Blatchford* in *Culver v. Wilkinson,* 145 U. S., 205, says: "A sale, in the absence of a request to sell, or the commencement of a suit, was not compulsory, but was at the discretion of the pledgee." We concur in the opinion of his Honor (*Lake v. Trust Co.,* 3 L. R. A. (N. S.), 1199), that "Young had a right to pay plaintiff's note and take back his collateral, or he could have instructed plaintiff to sell them." This right passed to his trustees. Neither he nor they did so. There is no suggestion of any other breach of duty on the part of plaintiff in respect to the stocks. Upon a careful examination of the record, with the aid of the well-prepared briefs and arguments of counsel, we find no error. It was in the sound discretion of his Honor to set aside the verdict on the eleventh issue; and, as we have seen, in the absence of any notice to sell, the issue was unnecessary.

The judgment must be

Affirmed.

Cited: Godwin v. Bank, 145 N. C., 326.

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H. F. BONEY v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

(Filed 16 October, 1907.)

1. Nonsuit—Evidence—Safe Appliance—Fellow-servant Act.

A refusal to nonsuit upon evidence that plaintiff was injured in consequence of using a defective hand car which he had theretofore repeatedly reported to his employer as defective, and had been promised another, is proper by reason of the fellow-servant act (Revisal, sec. 2646), and independently thereof.

2. Contributory Negligence—Causal Connection—Instructions.

When there is no causal connection between the act relied upon as constituting contributory negligence and the act which caused the injury, a prayer for special instruction based upon the former was properly refused.

3. Same—Instructions—Proximate Cause.

A prayer for special instructions as to contributory negligence which omits the doctrine of proximate cause is insufficient.

4. Same.

Plaintiff was in charge of a hand car of the defendant railroad company in the course of his employment, standing up and helping his men to run it. The car, while plaintiff was looking back at an approaching

train 6 miles away, flew the track, owing to a defect in its running gear, previously reported by him, and caused the injury. It does not clearly appear whether or not the car was taken from the track twenty minutes before the train passed, as required by defendant's rules: *Held*, that defendant's prayer for instruction, that, upon these facts, eliminating the question of proximate cause, there was contributory negligence, was properly refused.

5. Power of Court—Discretion—Excessive Damages—Appeal and Error.

It is discretionary with the trial judge to set aside a verdict for excessive damages, and his acts thereupon are not reviewable on appeal. *Wallace v. R. R.*, 104 N. C., 452; *Ruffin v. R. R.*, 142 N. C., 129, cited and approved as to a charge to the jury upon the question of damages.

WALKER, J., dissenting.

ACTION tried before *Long, J.*, and a jury, at May Term, 1907, of LENOIR, to recover damages arising out of a personal injury re-
(249) ceived by plaintiff, alleged to have been caused by defendant's negligence.

From a judgment for plaintiff, defendant appealed.

The facts sufficiently appear in the opinion of the Court.

G. V. Cowper and Loftin & Varser for plaintiff.
Rouse & Land and L. I. Moore for defendant.

CLARK, C. J. The plaintiff was injured in consequence of using a defective hand car, whose defects he had repeatedly reported to his superior, who promised to furnish another hand car, but had failed to do so. The nonsuit was properly refused, both because of the fellow-servant law (Revisal, sec. 2646), which denies the defense of assumption of risk when an employee is injured "by any defect in the machinery, ways and appliances of the company" (*Coley v. R. R.*, 128 N. C., 534), and even independently of that statute, because the plaintiff had reported the defective hand car to his superior and had been promised another one. Labatt Master and Servant, p. 86 (b), and sec. 423, p. 1193.

The defendant relied on the defense of contributory negligence, but that issue was found in favor of the plaintiff. The acts complained of were that the plaintiff, in charge of the hand car, was standing up, helping his men work the lever up and down, running the car, and, looking back, saw the train, 6 miles off, and about this time the hand car flew the track, solely from the defect, previously reported, in its running gear. The rules of the company required the hand car to be taken off twenty minutes before the train passed. It is not clear whether the accident occurred twenty minutes before the train passed or not, but there was no causal connection between the passage of the

train and the injury, and the jury so found. It may be that the court might well have instructed the jury, if they believed the evidence, to find the issue of contributory negligence in the negative. Certainly the defendant has no cause of complaint, for the court gave the instructions asked by the defendant, with the proper modifi- (250) cation, that if the conduct of the plaintiff should be found as stated in the defendant's prayers, and was the proximate cause of the injury, to answer the issue of contributory negligence "Yes"; otherwise, "No." Negligence, to bar a recovery, must be shown to be the proximate cause of the injury. *Baker v. R. R.*, 118 N. C., 1021; *Ramsbottom v. R. R.*, 138 N. C., 38, cited and approved; *Allen v. R. R., ante*, 214.

The charge as to *quantum* of damages follows that approved in *Wallace v. R. R.*, 104 N. C., 452, and recently in *Ruffin v. R. R.*, 142 N. C., 129.

The amount of damages was a matter of fact of which the jury were the judges. If their finding was excessive, his Honor, who heard the evidence, had the corrective power to set it aside. His refusal to do so is not reviewable by us. This is well settled by numerous decisions of this Court. *Norton v. R. R.*, 122 N. C., 937, and cases there cited. There are States under the wording of whose Constitutions the appellate court can review the question of excessive damages, and it may not be improper to say that in those courts verdicts for damages for wrongful death and for personal injuries sustained by employees and others by reason of negligence in operating railroads, much greater in amount than those ordinarily returned by juries in cases coming up to this Court, have been sustained as not excessive.

No error.

WALKER, J., dissenting: I wish that I could fully concur with my associates in the decision of this case, because I regard the neglect of the defendant to repair the hand car, if the evidence is to be believed, as not only gross, but cruel. It is one of the first duties of the master to care for the safety of his employees, and, in the discharge of that duty, to use reasonable care in furnishing him with such tools and implements to perform his work as will not unnecessarily ex- (251) pose him to danger. *Marks v. Cotton Mills*, 135 N. C., 287; *Witsell v. R. R.*, 120 N. C., 557; *Hicks v. Mfg. Co.*, 138 N. C., 319. That duty was not performed in this case, as the jury evidently found; and if this were all, I would not hesitate to give my assent to the conclusion of the Court. But it is not, by any manner of means. It appears here that the servant knowingly and deliberately violated the defendant's orders to remove the hand car from the track at least twenty minutes before the passage of a train—freight or passenger.

The plaintiff actually saw a train approaching, and knew that it was on its schedule time. If he had complied with the rule and the instruction of his employer, the accident would not have occurred; and the master's default, while gross and inexcusable, was not the proximate cause of his injury, as it must be to entitle him to a verdict, but his own neglect in disobeying orders. Besides, it is perfectly apparent, from the nature of the accident and the manner in which it occurred, that it was not the result of the particular defect in the hand car complained of, but was produced by the effort of the plaintiff to reach a point beyond that where he should have removed the hand car from the track. If he had complied with explicit orders he would not have been hurt. This Court has held repeatedly that, where an injury is caused by a departure from the employer's instructions to his servant, the latter is not entitled to recover, because he is considered as the author of his own injury, *volunti non fit injuria,* and it is not within the terms of the contract of employment that the master should protect him from such an injury. *Whitson v. Wrenn,* 134 N. C., 86; *Stewart v. Carpet Co.,* 138 N. C., 60; and, as being more directly in point, *Hicks v. Mfg. Co.,* 138 N. C., 319, where the principle is clearly and definitely stated by *Justice Hoke* for this Court. We have also laid down the same doctrine in *Patterson v. Lumber Co., ante,* 42. While the plaintiff has my sympathy in his misfortune, decisions of this Court cannot be
(252) based upon sympathy, but must be founded upon the law, as was said in *Crenshaw v. Street Railway,* 144 N. C., 314.

There was just as much causal connection between the plaintiff's negligent act and the injury in this case as there was in any of those cases we have cited, wherein the servant was denied the right of recovery, and there are many more decisions which might be cited to the same effect.

Cited: Harvey v. R. R., 153 N. C., 574; *Kearney v. R. R.,* 158 N. C., 548; *Cook v. Hospital,* 168 N. C., 256.

J. C. McCASKILL v. SARAH E. WALKER.

(Filed 16 October, 1907.)

Title—Adverse Possession—Evidence—Questions for Court.

Evidence of title by adverse possession to woodland is not sufficiently definite, certain, and exclusive to justify a court in holding, as a matter of law, that such title is established by both the plaintiff's and defendant's getting wood and straw therefrom for twenty years.

McCASKILL *v.* WALKER.

ACTION to recover possession of land, tried before *Webb, J.*, and a jury, at April Term, 1907, of ROBESON.

At the conclusion of plaintiff's evidence, upon motion of defendant, his Honor nonsuited the plaintiff, who appealed.

McIntyre & Lawrence and J. D. Proctor for plaintiff.

R. H. Battle & Son and McLean, McLean & McCormick for defendant.

BROWN, J. It is admitted that John Walker, Jr., was seized and possessed of the lands in controversy. The evidence shows that he conveyed the land by deed dated 2 June, 1869, to Hector J. MacLean, under whom plaintiffs claim. The record evidence tends to prove that plaintiff McCaskill claims three-fourths of the land by purchase from the heirs of Hector J. MacLean, and the other fourth is claimed (253) by plaintiff Lola Wright, the remaining heir at law of said MacLean. The defendants pleaded adverse possession and that Hector J. MacLean obtained the deed to the land from John Walker, Jr., by fraud, and that defendants are the heirs at law of Walker and claim the land as such.

The ground of the nonsuit, as we understand the record, is that the evidence offered by the plaintiffs proves title in the defendants by adverse possession, and that, therefore, the plaintiffs, upon their own showing, are not entitled to recover.

We do not think that the evidence as set out in the record is sufficient to sustain his Honor's ruling.

The evidence tends to show that there were two tracts of land owned by John Walker, a 40-acre tract, which is the one in controversy, and a 32-acre tract, whereon John Walker lived, and died in 1872, and where, according to the evidence of one witness, the widow and children of John Walker have lived ever since. The evidence, taken in its most favorable view for plaintiff, as is the rule upon a motion to nonsuit, tends to prove that the 40-acre tract is woodland and was used for getting firewood and straw, very generally from 1888 to 1901, by those claiming under Hector J. MacLean. There is some evidence also of a like use by defendants during the same period, but it is not sufficiently definite, certain and exclusive to justify a court in holding as matter of law that it establishes adverse possession for twenty years.

His Honor erred in sustaining the motion.

New trial.

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W. P. OLDHAM v. SARAH M. RIEGER.

(Filed 16 October, 1907.)

1. **Executors and Administrators—Judgment Against Intestate — Independent Action—Procedure.**

When it appears that plaintiff had obtained judgment against the defendant's intestate, it was not necessary for plaintiff to establish his claim against the defendants in an independent action in the nature of a creditor's bill.

2. **Same—Judgment Against Intestate—Accounting—Clerk—Jurisdiction.**

In a proceeding brought by plaintiff before the clerk to have an accounting of the defendants, as administrators, and to compel payment of plaintiff's judgment theretofore obtained against defendant's intestate, the clerk has jurisdiction of the action, and it is proper for him, upon issues raised, to transfer the cause to the Superior Court for trial.

3. **Same—Judgment Against Intestate—Accounting—Clerk—Superior Court—Jurisdiction.**

When an action against administrators, brought for the purpose of enforcing a judgment theretofore obtained by plaintiff against their intestate, and demanding an accounting, is transferred by the clerk to the Superior Court for trial upon issues joined, it is proper for the Superior Court, in the economical and speedy administration of justice, to proceed to hear and determine all matters in controversy, or to remand the cause to the clerk, in its discretion. Revisal, secs. 129, 614.

4. **Limitation of Actions—Statute—Answer—Demurrer—Motion to Dismiss.**

Under Revisal 1905, sec. 360, declaring that the objection that an action was not commenced within the time limited can only be taken by answer, the bar of limitations cannot be raised by demurrer or motion to dismiss.

5. **Same—Answer—Admissions—Questions of Law—Apparently Barred—Defenses.**

Where the complaint sets out a cause of action which is barred, and the facts are admitted by answer, and the statutory bar is pleaded, the court may decide the question as a matter of law; but where the complaint states a cause of action apparently barred, and the answer denies the facts and sets up the bar, the court cannot dismiss on a motion for nonsuit, since, under Revisal 1905, sec. 485, a plea of the statute does not require a reply; and further, since, under section 248, the fact that the action is not barred on the ground of infancy, etc., may be shown by evidence.

6. **Same—Limitations of Actions—Entire Cause—Accounting.**

In an action against administrators for an accounting and settlement, when there is a plea of the statute of limitations going to the entire cause of action, the issue raised upon the statute should be determined before an accounting is ordered.

ACTION, heard before *Webb, J.*, upon the pleadings and state-
(255) ment of counsel, at March Term, 1907, of BRUNSWICK.

The court was of the opinion that the plaintiff was not entitled to recover, and dismissed the action. Plaintiff appealed.

The plaintiff alleges in his complaint that he recovered judgment against A. W. Rieger on 14 December, 1895, for $126.31, in New Hanover County, before a justice of the peace, and that the judgment was duly docketed on the same day in the Superior Court, under the statute; that the said Rieger died in Brunswick County, the place of his domicile, on 3 December, 1903, and that the defendants Sarah M. Rieger and M. B. Mintz qualified as administrators of his estate in said county of Brunswick on 8 December, 1903; that the plaintiff duly demanded payment of the judgment from the defendants, as administrators, which was refused. They further allege that more than two years have elapsed since the defendants qualified as administrators, and that the judgment still remains unpaid. The defendants answer the complaint and admit the death of A. W. Rieger and administration on his estate, as alleged in the complaint, but they deny all the other allegations of the complaint, except the one that two years have elapsed since letters of administration were taken out by them. They then plead the statute of limitations, denying the material allegations of the plaintiff's complaint, except as hereinafter stated, and averring that, even if they be true, the plaintiff's cause of action, upon the facts stated in (256) the complaint and the additional facts averred in their plea of the statute, is barred. The full administration of the estate is alleged, with the usual allegations as to legal notice to creditors, and so forth.

The plaintiff brought this action (or proceeding) before the clerk of the Superior Court of Brunswick County, where administration was granted, to have an accounting of the defendants, as administrators of the estate of A. W. Rieger, and to compel the payment of their judgment, the suit being in the nature of a creditor's bill, under the statute. The clerk ruled that the case was cognizable by him, and issued the necessary notices. Upon the issues joined between the parties, he then transferred the case to the Superior Court at term for trial. The plaintiff moved to remand the case, and the judge was of the opinion, as we infer from the briefs, though not necessarily from the record, that it was the duty of the plaintiff to have prosecuted an independent action upon his judgment before proceeding to call the defendants to an account of their administration of the estate of their intestate. He thereupon rendered judgment dismissing the action, but coupled it with an order, made in open court, directing the clerk "to require the defendants to file accounts and make a proper settlement of the estate according to the law in such cases made and provided; the said account and settlements to be filed at once, after the citation to the proper parties." The plaintiff duly excepted and appealed.

S. M. Empie for plaintiff.
E. K. Bryan for defendant.

WALKER, J., after stating the case: It is stated in the plaintiff's brief—and the argument which is so ably presented in the defendant's brief seems to admit—that the learned judge who presided at the trial of this case ruled as he did because he was of the opinion that the plaintiff should have sued upon the judgment independently, and established his claim against the estate before bringing this proceeding. In (257) this ruling, if it is correctly stated in the briefs—though it does not clearly so appear in the record—we do not concur. There was a special plea in bar, namely, the statute of limitations, and we think this plea should have been determined before ordering an account, or a reference to ascertain the exact condition of the estate. It was not necessary to establish the claim of the plaintiff by a new adjudication upon his judgment. *Bank v. Harris,* 84 N. C., 206; *McLendon v. Comrs.,* 71 N. C., 38; *Glenn v. Bank,* 72 N. C., 626. The debt had already been established by a judgment against A. W. Rieger in his lifetime. The court should have submitted to the jury, unless the parties could agree upon the facts, the issue raised by the pleadings, towit, whether the plaintiff's claim was barred; and if it was found that the statute was not in the way of the plaintiff's recovery, then the court should have proceeded to order an account and settlement. Revisal, sec. 104, *et seq.* The Superior Court had full possession of the case by the transfer, and, therefore, jurisdiction, under the statute (Revisal, sec. 129) and the decisions of this Court, to finally determine all matters of controversy between the parties. This has been the law in cases of administration since the act of 1876-77, ch. 241 (Code, sec. 1511), as construed in *Haywood v. Haywood,* 79 N. C., 42, and *Pegram v. Armstrong,* 82 N. C., 327; *Bratton v. Davidson,* 79 N. C., 423; Clark's Code (3 Ed.), pp. 263, 264; Revisal, sec. 614; *Capps v. Capps,* 85 N. C., 408; *McMillan v. Reeves,* 102 N. C., 550; *Roseman v. Roseman,* 127 N. C., 494; *Ledbetter v. Pinner,* 120 N. C., 455; *Faison v. Williams,* 121 N. C., 152; *Fisher v. Trust Co.,* 138 N. C., 90. Indeed, the act of 1887, ch. 276 (Code, sec. 255; Revisal, sec. 614), as above cited, provided that whenever a cause which was originally brought before the clerk is constituted in the Superior Court at term, by transfer, appeal or in any other way, that court shall proceed to hear (258) and determine all matters in controversy, with power to remand, in its sound discretion, if by that method justice can be more speedily and cheaply administered. *In re Anderson,* 132 N. C., 243.

Not having had the benefit of an oral argument from the learned counsel who represented the respective parties, which is always desirable, we were somewhat troubled to decide upon the reasons assigned in one of the briefs whether the proceedings should not be dismissed in this Court, because it appeared, *prima facie* at least, upon the complaint that the cause of action is barred by the statute of limitations, which is pleaded in the answer. But slight consideration of that question and a cursory examination of the authorities convinced us that the point was entirely without merit. The bar of the statute of limitations could not be raised by demurrer or motion to dismiss. Under the former system it could have been done in equity. *Robinson v. Lewis,* 45 N. C., 58; *Whitfield v. Hill,* 58 N. C., 316; *Smith v. Morehead,* 59 N. C., 360. But it cannot be under the new procedure, for the law provides that "an objection that the action was not commenced within the time limited can be taken *only* by answer." Clark's Code (3 Ed.), sec. 168, and notes (Revisal, sec. 360). The change, under the reformed procedure, is noted and fully discussed by *Shepherd, J.,* in *Guthrie v. Bacon,* 107 N. C., 337, and *Randolph v. Randolph,* 107 N. C., 506. See, also, *Freeman v. Sprague,* 82 N. C., 366. When the complaint sets out a cause of action which is clearly barred and the facts *are admitted* by the answer, and, in addition to the admission, the statute is pleaded or relied on, then the court may decide the question as a matter of law. This was the case, as will appear by reference to the statement of the facts, in *Shackleford v. Staton,* 117 N. C., 73, and *Cherry v. Canal Co.,* 140 N. C., at p. 426, in the last of which cases *Justice Hoke* says: "The facts are uncontroverted." But when the complaint states a cause of action apparently barred, and the answer properly denies the facts or the cause of action, and (259) then sets up the bar of the statute, the Court cannot dismiss upon a demurrer *ore tenus* or a motion to nonsuit, for when such a motion is made it must be decided upon the pleading of the plaintiff or of the adversary of the party who makes the motion, and the Court has no right to look at the pleading of the opposing party, except to see if the facts are admitted, so as to present merely a question of law. No defendant can, therefore, in the science of pleading or practice, demur to the cause of action of the plaintiff and call in aid the averments of his own pleading, unless they amount to an admission of what is alleged in the complaint. This would be in the nature of a "speaking demurrer," and would be no more permissible than if a defendant, after all the evidence had been introduced, should move to nonsuit the plaintiff or to dismiss his action upon the evidence introduced by himself. There is excellent reason for this rule, in the case of pleadings, when the statute of limitations is set up as a bar, and it

is this: when the plaintiff alleges the facts constituting his cause of action, and the defendant denies the material allegations and then pleads the statute of limitations as a bar, the Court evidently has no facts before it upon which it can declare the law as to the statutory bar, because here are no facts admitted or found by a jury; and for one other reason at least, if not for still others just as sound and conclusive, namely, that the plaintiff has the right, without any special or written reply—Clark's Code (3 Ed.), sec. 248 (Revisal, sec. 485)—to show in evidence that his cause of action is not barred, although apparently so, as, for instance, that he was an infant, or imprisoned, or insane, or, if a *feme,* that she was *covert* at the time the cause of action accrued, or any other good and sufficient disability which would exempt his or her cause of action from the operation of the statute. This being so, how could the judge dismiss and thereby exclude the plaintiff from his right to repel the plea of the statute by proof? It must be re-
(260) membered that the plea of the statute does not, like a counterclaim, require any special written reply, but a reply is always deemed to have been made, as upon a direct denial or avoidance, as the nature of the case may require. Clark's Code (3 Ed.), sec. 248, and notes; Revisal, sec. 485; *Askew v. Koonce,* 118 N. C., 526.

We have discussed this question somewhat fully, because it does not seem to be very clearly understood.

The court erred in not first submitting to the jury the plea of the statute instead of ordering an *immediate* accounting *in limine.* The plea in bar should have been disposed of, because, if found in favor of the defendant, no reference or accounting would have been necessary. *Royster v. Wright,* 118 N. C., 152; and cases cited; *Smith v. Barringer,* 74 N. C., 665; *Clements v. Rogers,* 95 N. C., 248; *Kerr v. Hicks,* 129 N. C., 141; *Bank v. Fidelity Co.,* 126 N. C., 320; *Austin v. Stuart,* 126 N. C., 525; *Jones v. Wooten,* 137 N. C., 421. The court could hardly have proceeded under Revisal, sec. 100, which requires the clerk of the Superior Court to compel the filing of accounts within twenty days by executors or administrators who have neglected to comply with their statutory duty.

There was error in the ruling of the court.

Error.

Cited: Batts v. Pridgen, 147 N. C., 135; *Roberts v. Baldwin,* 155 N. C., 280; *Earnhardt v. Comrs.,* 157 N. C., 236; *Coltrane v. Laughlin, ib.,* 288; *Campbell v. R. R.,* 159 N. C., 588; *York v. McCall,* 160 N. C., 279; *Jordan v. Simmons,* 169 N. C., 142; *Ewbank v. Lyman,* 170 N. C., 506, 507; *Alley v. Rogers, ib.,* 539; *Moody v. Wike, ib.,* 544.

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PAUL WIERSE v. BETTIE S. THOMAS, TRADING AS THOMAS & CO., AND THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 23 October, 1907.)

1. **Attachment in Personam—Parties—Residence—Earnings—Exemptions.**

The defendant partnership attached, in another State, the earnings of the plaintiff due by defendant railroad company, and defendants were, at the time of the attachment, citizens and residents of this State, and the defendant was a railroad company with its principal place of business in this State and operating in Virginia, North Carolina, South Carolina, and Georgia. The sum attached was due by the defendant railroad company to plaintiff for personal services, rendered as an employee, within sixty days prior to the levy, and was for the necessary support of plaintiff and his family, supported by him. Plaintiff obtained an order in the courts of this State restraining the defendant *in personam* from prosecuting the proceedings in attachment: *Held*, (1) that the plaintiff's earnings at the time this action was commenced were exempted, both by the personal property exemptions provided by the Constitution of this State and by the provisions of The Code, sec. 493; Revisal, sec. 678; (2) that the restraining order should be continued to the hearing.

2. **Courts — Jurisdiction — Injunction — Resident Creditor—Equity—Exemptions—Evasion—Suitors.**

A court of equity has jurisdiction to enjoin a resident creditor from instituting or prosecuting an action or proceeding in another State for the purpose of evading the exemption laws of this State, and of collecting his claim by subjecting to its satisfaction property or credits which the debtor could claim as exempt if the action or proceeding were brought within the State.

3. **Same—Jurisdiction—Resident Creditor — Injunctions—Attachment—Constitutional Law.**

The courts of the resident creditor have power in proper cases to issue an injunction, not in restraint of the action of the court of another State, but operating *in personam* on the creditor and compelling him to obey the laws of his own Commonwealth. Such is not in violation of Article IV, section 1, of the Federal Constitution, providing that in each State full faith and credit shall be given to the judicial proceedings of every other State, providing that citizens of each State shall be entitled to all the privileges or immunities of the several States.

4. **Same — Jurisdiction — Resident Parties—Attachment—Evasion—Constitutional Law—Presumptions.**

When it appears that the plaintiff and his creditor were resident and domiciled in the same city of this State, at which the defendant railroad company had its office and principal place of business, and where the local courts were open and accessible, and that the defendants, T. & Co., caused an attachment in another State to be issued against an indebtedness due to plaintiff by defendant railroad company, protected by our own Constitution and laws from the payment of the debt, the intention from such facts and circumstances of the creditor to evade the exemption laws of his own State will be presumed.

5. Same — Resident Parties — Exemptions — Attachment—Evasion—Disobedience—Remedy.

When an attachment is issued in another State by a resident of this State against another resident for the purpose of avoiding the exemption laws, the *situs* of the debt may be in such other State, but it is also in this State, where the defendant railroad also has its residence and principal place of business, and where the debt due to the plaintiff, its employee, is subject to our general exemption laws and the statute passed for the special protection of a laborer's wages; and upon the disobedience of a restraining order upon the creditor *in personam*, the creditor will be made to restore the amount wrongfully collected.

6. Exemptions—Cessation of Residence.

The general exemption laws of this State, under our Constitution and statutes, will not operate when it is made to appear that plaintiff ceased to be a resident and citizen of this State at any time before the property is applicable to the creditor's claim.

ACTION heard on return to restraining order, before *Jones, J.*, at October Term, 1906, of NEW HANOVER.

The court found the facts to be as follows: "That the plaintiff, at the date of the institution of these proceedings, was a resident of North Carolina, the defendant, Thomas & Co., residents of North Carolina, and the codefendants, a corporation, having its principal place of business at Wilmington, N. C., operating a railroad in Virginia, North Carolina, South Carolina, and Georgia. Plaintiff and other defendant reside in Wilmington, N. C. That at said date plaintiff was (263) a resident, having a family residing in Wilmington, where plaintiff worked as an employee of defendant company. That on ____ May, 1906, defendants Thomas & Co. sent an account against plaintiff for collection to Atlanta, Ga., where an attachment was issued against plaintiff in a justice's court, levying upon the indebtedness of the Atlantic Coast Line Railroad Company to plaintiff, such action not being prosecuted further by reason of the restraining order issued in this cause. That the amount of indebtedness due by the defendant company to plaintiff was $70, being for his personal services, rendered within sixty days prior to said levy, and said sum is necessary for the support of said debtor and his family, supported by him. That the debt claimed by Thomas & Co. against plaintiff is just and correct, and was then due." And thereupon adjudged that the restraining order be continued to the hearing, and defendants Thomas & Co. excepted and appealed.

John D. Bellamy for plaintiff.
R. G. Grady for defendants.

HOKE, J. At the time this action was commenced and the Georgia attachment was levied, the property attached was protected, both by the personal property exemption provided for by the Constitution and the general exemption laws of the State, and also by section 493 of The Code (section 678 of the present Revisal), prohibiting wages due for personal services of the debtor rendered within sixty days prior to the levy, and necessary for the use of the family which was supported by his labor, from being subjected and applied to the laborer's indebtedness; and, this being true, on the facts established, the judge correctly ruled that the restraining order be continued to the hearing.

As stated in 12 A. and E. Enc., 256: "It may be regarded as settled that a court of equity has jurisdiction to enjoin a resident creditor from instituting or prosecuting an action or proceeding in another State for the purpose of evading the exemption laws of his State, (264) and of collecting his claim by subjecting to its satisfaction property or credits which the debtor could claim as exempt if the action or proceeding were brought within the State. And in such a case an injunction should generally be granted." And the doctrine so stated is grounded in right reason and fully sustained by authority. *Dehon v. Foster,* 86 Mas., 545; *Teager v. Langley,* 69 Iowa, 726; *Engle v. Schenerman,* 40 Ga., 206; *Keyser v. Rice,* 47 Md., 203; *Snook v. Snetzer,* 25 Ohio, 516; Waples on Homestead Exemptions, pp. 888, 889.

It is objected chiefly that an injunction on the facts before us is in violation of Article IV, section 1, of the Federal Constitution, providing that in each State full faith and credit shall be given to the judicial proceedings of every other State, etc., and section 2, same article, providing that citizens of each State shall be entitled to all the privileges and immunities of the several States. This view is fully discussed in the authorities cited, and rejected as unsound; and the correct doctrine is held to be that the courts of the resident creditor have power in proper cases to issue an injunction, not in restraint of the action of the court of another State, but operating *in personam* on the creditor and compelling him to obey the laws of his own Commonwealth. Thus, in *Dehon's case, supra, Chief Justice Bigelow,* speaking to this question, says: "The authority of this Court, as a court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits, either in the courts of this State or of other States or foreign countries, is clear and indisputable. In the exercise of this power courts of equity proceed, not upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly presented

for their determination, but the jurisdiction is founded on the clear authority vested in courts of equity over persons within the (265) limits of their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and are, therefore, contrary to equity and good conscience. As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign State or country. If the case stated in the bill is such as to render it the duty of the court to restrain a party from instituting or carrying on proceedings in a court in this State, it is bound in like manner to enjoin him from prosecuting a suit in a foreign court. 2 Story on Eq., pp. 889-900; *Mackintosh v. Ogilvie,* 3 Swanst., 365n, and 4 T. R., 193n; *Carron Iron Co. v. Maclaren,* 5 H. L. Cas., 416, 445; *Maclaren v. Stainton,* 16 Beav., 286." And in *Snook v. Snetzer,* 25 Ohio, 519, *Rex, J.,* delivering the opinion, says: "In exercising this authority, courts proceed, not upon any claim of right to control or stay proceedings in the courts of another State or country, but upon the ground that the person on whom the restraining order is made resides within the jurisdiction and in the power of the court issuing it. The order operates upon the person of the party and directs him to proceed no further in the action, and not upon the court of the foreign State or country in which the action is pending." On this subject *Mr. Justice Story,* Eq. Jur., sec. 899, says: "Although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or con- (266) trol the foreign court, but, without regard to the situation of the subject-matter in dispute, they consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees *in personam.*" And in *Keyser v. Rice,* 47 Md., *Bowie, J.,* for the Court, said: "The power of the State to compel its citizens to respect and obey its laws, even beyond its own territorial limits, is supported, we think, by the great preponderance of precedent and authority." And again: "All these instances imply that the citizen going from one State to another shall be entitled to the privileges and immunities of a citizen of the State to which he goes, but they do not absolve him from the duties and obligations of a citizen to the State

to which he belongs and from which he went. As long as a citizen belongs to a State, he owes it obedience; and, as between States, that State in which he is domiciled has jurisdiction over his person and his personal relations to other citizens of the State."

And the question was directly presented to the Supreme Court of the United States, the final arbiter on such matters, in *Cole v. Cunningham,* 133 U. S., 107, in which *Chief Justice Fuller,* in a learned and elaborate opinion, established the proposition that the Constitution of the United States, in proper case, permits equity courts of one State to control persons within their jurisdiction from prosecuting suits in another State, and applied the principle to a case not unlike the one now before us. The same opinion, too, cites with approval several cases where the same principle is applied on facts almost identical with those existent here, and making the cases an apt authority in support of our present decision. True, it is not found as a fact in express terms that the purpose of the creditor in resorting to the Georgia courts was to evade the exemption laws of his own State, but, as both plaintiff and his creditor were then resident and domiciled in the same city, where the railroad company had its office and principal place of business, and where the local courts were open and accessible, no other reason could be well con- (267) ceived or suggested, and the existence of such a purpose is an inference well-nigh conclusive from the facts which are declared. As said in the *Keyser case, supra:* "We think the intention to evade is necessarily presumed. Rational creatures must be presumed to intend the necessary and inevitable consequences of their deliberate acts."

There is nothing in our present decision which is intended to militate against the position, undoubtedly correct, that our exemption laws have no extraterritorial vigor; nor do we question in any way the doctrine declared by the United States Supreme Court in several recent decisions, that, for the purpose of attachment and jurisdiction to the extent that it may be so acquired, the *situs* of the debt is at the debtor's residence, or wherever he may be personally served with process. *R. R. v. Deer,* 200 U. S., 176; *Harris v. Balk,* 198 U. S., 214; *R. R. v. Sturm,* 174 U. S., 710. While the debt may have a *situs* in the State of Georgia, it has its *situs,* too, in the State of North Carolina, where the railroad also has its residence and principal place of business, and where the debt due to plaintiff, its employee, is subject to our general exemption laws and the statute passed for the especial protection of a laborer's wages; and, though the Georgia court has jurisdiction for the purpose, and to the extent indicated, and if it should proceed, its judgment applying the property on the claim would be allowed full force and effect, so as to protect the railroad company from a second payment, this does not impair the right of the court of the creditor's residence, acting *in personam,* to com-

pel obedience to its own laws, to the extent permitted by the proper application of the constitutional principle; and if such creditor, in defiance of an injunction duly served in an action properly constituted, should proceed in the Georgia courts, he would be subject, perhaps, to punishment for disobeying the restraining order, and could certainly be
(268) made here to restore the amount wrongfully collected from the debtor. *Teager v. Langley, supra.*

In *Sturm's case, supra,* which was strongly urged upon our attention in behalf of defendants, it does not appear in any report of the case to which we have access that the attaching creditor was a resident of the State whose exemption laws were alleged to have been violated, and the right of the court of the resident creditor to compel obedience to its own laws does not seem to have been presented. It was certainly not considered or passed upon. The Court only applied the recognized principle that, the court where the attachment issued having acquired jurisdiction, its judgment condemning the debt would protect the garnishee from a second payment. The same doctrine was applied here in a recent case—*Wright v. R. R.,* 141 N. C., 164—and neither decision is in conflict with our present opinion, nor the principle upon which it is made to rest.

We note an affidavit sent up with the record to the effect that, since this suit was instituted, the plaintiff has removed from the State and become a resident of South Carolina. This is not adverted to by the court in its findings of fact; and, while the findings are not conclusive upon this Court in a case of this kind (*Mayo v. Comrs.,* 122 N. C., 5), as the evidence on the matter may not all have been sent up, we make no comment, except to say that, if it should be made to appear that plaintiff has ceased to be a resident and citizen of this State at any time before the property is applicable to the creditor's claim, the general exemption laws of our State would not operate in his favor. The authorities, however, seem to have decided that the statute passed to protect a laborer's wages (Revisal, sec. 678) would, in any event, be effective for his protection. *Goodwin v. Claytor,* 137 N. C., 224-236.

There is no error, and the judgment of the lower court is
Affirmed.

Cited: Carpenter v. Hanes, 162 N. C., 49.

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LOUISE B. SMITH v. SUSAN E. MOORE, EXECUTRIX.

(Filed 23 October, 1907.)

1. Issues—Fraud—Verdict, Contradictory—Judgment.

When the issue is one of plain and gross moral fraud in procuring the deed under which defendant claims title, and is answered by the jury in the affirmative, followed by a further finding that such answer was in deference to the instruction of the court as to what constituted fraud, but that they were compelled upon the evidence to find there was no intentional or moral fraud, no judgment can be based upon the verdict, it being contradictory.

2. Lessor and Lessee—Lease for Life—Pepper-corn.

It was error in the trial judge not to instruct the jury, in answer to their question, that, under a lease for life, in consideration of a peppercorn rent, made by defendant's testator to plaintiff at the time of the execution of the deed to the lands in controversy, the plaintiff would be entitled to the rents of the property during its continuance if the lease were found by the jury to be valid.

ACTION tried before *Long, J.*, and a jury, at April Term, 1907, of NEW HANOVER.

From judgment for plaintiff, defendant appealed.

The facts sufficiently appear in the opinion of the Court.

E. K. Bryan and J. D. Bellamy & Son for plaintiff.

Bellamy & Bellamy, H. McClammy, and Rountree & Carr for defendant.

CLARK, C. J. This case was before us (*Smith v. Moore,* 142 N. C., 277), when a new trial was granted. It is not necessary again to set out the facts in full.

The cause of action alleged in the complaint is, that on or about March, 1885, Roger Moore, the testator of the defendant, Susan E. Moore, and ancestor of the other defendants, being the confidential friend and adviser of the plaintiff and her mother, Mary E. Smith, induced and persuaded the said Mary E. Smith and this plaintiff (270) to execute and deliver to him a certain deed, conveying to him a lot of land and premises in fee simple, in the city of Wilmington; and at the time he procured the execution of the said deed he procured the same by falsely and fraudulently representing to this plaintiff and her mother, the said Mary E. Smith, that the said deed was a will, whereby they would leave the said property to him after their death; and thereupon the plaintiff and her mother, relying upon the said representation, and verily believing the said instrument to be a will, executed the

same; that the plaintiff did not discover or know that the said instrument was not a will, but a deed, until some time after the death of Roger Moore, when the defendants demanded possession of the said premises from the plaintiff, telling her that she had conveyed the same to the said Roger Moore and threatening to have this plaintiff ejected from the same if she did not surrender the possession thereof. These allegations were denied by the defendants.

On the new trial, from which this appeal is taken, the following issue was submitted to the jury: Was the deed of 3 March, 1885, by Mary E. Smith and Louise B. Smith to Roger Moore procured by fraud? To which the jury replied "Yes."

At the time the issue above was answered, as above set out, the jury attached to the same a separate piece of paper and asked the court to consider the same in connection with their verdict thus rendered, whereon was written the following words: "In answering the issue in this case 'Yes,' we distinctly exonerate Col. Roger Moore of any intentional fraud, it being agreed that the finding is made necessary under the charge of the court as to the law, and that the guilt is legal and not moral. We think the evidence shows conclusively that it was the wish and purpose of both Mrs. M. E. Smith and Louise B. Smith that the property in question should go to Roger Moore and his heirs after the death of both of them." Which entry was made on the records by order of the (271) judge.

The only fraud alleged in the procurement of deed of 3 March, 1885, was that the deed was substituted for the will by the fraudulent practices of Colonel Moore, aided by Mr. Cutlar, the counsel for plaintiff and her mother. This appears throughout plaintiff's evidence and in the argument of plaintiff's counsel to the jury, as stated by the court in the charge, when arraying the contentions of the parties.

This is a charge of the plainest and grossest moral fraud. It was not a case of legal as distinguished from moral fraud. The verdict of the jury, in effect, says that, yielding to the instructions of the court as to the law, they are compelled to find that the deed was procured by fraud, but that they are compelled, upon the evidence, to find that there was no intentional or moral fraud on the part of Colonel Moore, and that it was the wish and purpose of both Mrs. M. E. Smith and Louise B. Smith that the property in question should go to Roger Moore and his heirs after the death of both of them—a purpose which is effectuated by the deed and lease called in question by this action.

The issue was tried as one of moral, intentional fraud. The verdict answers "Yes," and then contradicts this finding by recording, as a part of the verdict, that Colonel Moore was not guilty of intentional fraud.

The finding is palpably contradictory, and no judgment can be based

upon it. It is impossible that a lawyer could have "unintentionally" drawn a deed for a will, especially when he conveyed a life estate back to the grantors by executing a lease reserving a pepper-corn rent.

One of the jurors, before the jury withdrew, asked the court the following question: "If the lease written 15 March, 1885, is found by the jury to be valid, would the life tenants under that lease be entitled to the rents of this property?"

The court erred in not answering the question "Yes," instead (272) of the charge given, which was not only not responsive, but probably had the effect, we think, to lead the jury to think the court was of the contrary opinion.

There are other exceptions, but, as a new trial is necessary, and they may not arise again, it is unnecessary to discuss them.

Error.

Cited: *S. c.*, 149 N. C., 200.

FESTUS BEASLEY v. ABERDEEN AND ROCKFISH RAILROAD COMPANY.

(Filed 23 October, 1907.)

1. **Railroads—Deeds and Conveyances—Easement—Fee.**

A deed to a railroad company conveying "a free and perpetual right of entry, right of way and easement," etc., to and upon lands conveys the easement only, and not the fee.

2. **Same—Easement—Consideration—Tramways, the Consideration for.**

A deed of an easement over lands for the purpose of constructing a tramway is not adequate, as a matter of law, for its use as a railroad dedicated to the public, under the law of public highways.

3. **Same—Corporations—Charter Powers—Railroads—Tramways.**

A corporation formed under the general corporation law (Code, ch. 49, sec. 677) has no power to acquire, maintain, and operate a "railroad" dedicated to public use under the general law regulating highways, and its deed to a corporation having such power of a "tram or railroad" owned by it, and provided for in its charter, can only convey a tramroad and the right to maintain and operate it as such.

4. **Same—Measure of Damages.**

A railroad company, having acquired the right of way of a tramway and using it as a railroad, is liable to the owner of the fee for a fair compensation for the injury done his land by entering upon and constructing and operating the railroad.

ACTION tried before *Webb, J.*, and a jury, at April Term, 1907, of CUMBERLAND.

(273) On 29 May, 1890, the Enterprise Land and Improvement Company was incorporated, pursuant to the general law of the State. The business proposed to be conducted by the company is stated in the articles of incorporation: "To transport and carry, for tolls, timber, lumber, and produce of all kinds, naval stores and all kinds of produce and merchandise of every nature and description; and, for this purpose, may build and operate, if necessary, tramways or other roads, not meaning to include railways, and may generally do all such kinds of work and business," etc. On 9 June, 1890, Malcolm McInnis, under whom plaintiff claims title to the land described in the complaint, executed a deed to the said corporation in consideration of $1 and "benefits to be derived," etc.; "a free and perpetual right of entry, right of way and easements at any and all times, for the purpose of surveying, locating, building, etc., the said road, its depots, station houses, and bridges, in, through, and over a strip of land 130 feet wide—that is to say, measuring 65 feet on each side of said road." Thereafter the said corporation executed a mortgage on all of its property, right of way, etc., to the Lima Machine Works. The mortgage was foreclosed and the same property conveyed to Henry M. Sherrin and two others. Such title as they acquired passed to the defendant, Aberdeen and Rockfish Railroad Company. Malcolm McInnis, on 14 September, 1897, conveyed to John Beasley the tract of land over which the right of way was granted, who, on 25 January, 1898, conveyed to the plaintiff. The evidence on the part of defendant tended to show that the Enterprise Land and Improvement Company built a tramroad, of wooden rails, across the land. No cuts or fills were made. The testimony on the part of plaintiff tended to show that the tramroad was operated two years; that it was discontinued five or six years; the timber rotted and burned. In 1897-98 it

(274) was rebuilt, and operated about two years; this was by Sherrin and Campbell. It was not operated when plaintiff bought the land. After the Enterprise Land and Improvement Company quit operating, it was destroyed by every one who owned the land on it. Other persons had conveyed rights of way. In two or three years after Sherrin and Campbell ceased operating, defendant entered and built a railway, standard gauge, on the right of way, and is now operating it, hauling freight and passengers. Defendant has been operating a railroad for about three years. This action is brought to recover damages for the entry upon and appropriation of the roadbed by defendant. His Honor being of the opinion that plaintiff was not entitled to recover, so instructed the jury. Plaintiff excepted. Judgment for defendant. Appeal by plaintiff.

Sinclair & Dye and J. S. Newton for plaintiff.
Robinson & Shaw for defendant.

CONNOR, J., after stating the facts: It is conceded that the deed from Malcolm McInnis to John Beasley, under which plaintiff claims, covers the tract of land described in the complaint, over which defendant has constructed its track and is now operating the business of a common carrier. The right of the plaintiff, therefore, to maintain this action depends upon the answer to the second issue, "Is the plaintiff the owner of the strip of land mentioned and referred to in the complaint?" His Honor instructed the jury to answer the issue "No." In any aspect of the case this was error—doubtless inadvertent on the part of the court and counsel. The utmost which defendant could claim under the deed from McInnis to the improvement company, through which it deraigns its title, is an easement to use so much of the strip of 130 feet as is necessary to construct and operate its road. *Olive v. R. R.*, 142 N. C., 257, and cases cited. No land is conveyed, but a "right of way" and easement. The title to the land, subject to such easement, remained in McInnis and passed to plaintiff. The real questions, (275) however, presented in the record and argued before us are (1) the extent and character of the easement, and (2) whether it has been lost by abandonment. Plaintiff seeks in this action to recover damages, or, speaking more accurately, compensation for the entry upon his land and subjecting it to the burden of defendant's railroad track. He concedes that the land may be subjected to the burden by defendant, in the exercise of the right of eminent domain, by proper proceeding. He alleges, however, that its entry was a trespass. Defendant, on the other hand, insists that by the deed from McInnis to the improvement company a perpetual easement passed, entitling the grantee and its successors to build, maintain, and operate a railroad of standard gauge and used for the purpose of carrying freight and passengers. The solution of this question depends upon the construction of the deed. It will be observed that the charter of the improvement company was obtained under the provisions of the general law then in force (Code 1883, sec. 677), and not under statute providing for incorporating railroad companies. Chapter 49, section 677, expressly excepts from the corporate powers granted building railroads. The charter empowers the company "to build and operate, if necessary, tramways or other roads, not meaning railways."

The deed from McInnis contains the following recital: "Whereas the party of the second part contemplates building a tram or rail road," etc. The words of the grant are: "a free right of entry, right of way, etc., for the purpose of locating said road, its depots, station houses, bridges, etc., necessary and convenient for the use, operating, and business of said

road." Pursuant to this grant, made in 1890, the improvement company constructed a wooden tramway over the land. After using it some time, having mortgaged its property and easements, they passed into the hands of natural persons, who used it for about two years, and "quit
(276) operating it about 1900." Thereafter the defendant corporation, conceded to have power to build and operate a railroad, as a common carrier, acquired such right as passed to the improvement company, and proceeded to build and operate a railroad over the land owned by plaintiff. Before defendant acquired the easement the wooden tramway had practically disappeared—been burned or had rotted. It is manifest that the improvement company had no power to build or operate a railroad, and, therefore, no capacity to take and use an easement for that purpose. If it had attempted to do so, its acts would have been *ultra vires,* and, at the suit of the State, its charter forfeited. The deed, if construed to grant such power, would have been in such suit declared void, and as the consideration was contemplated "benefits" from the road, the easement would have been at an end. It is settled by the decisions of this Court, although held otherwise by the Supreme Court of the United States and other State courts, that the right to avoid the deed is confined to the State. Womack Private Corporations, sec. 132, *et seq.,* where the authorities are collected and commented upon. We are of the opinion, however, that by a proper construction of the deed no easement passed other than the company was authorized to take and use. The words "tram or rail road" should not be so construed as to invalidate the grant. It may well be that they were used as synonymous. The word "railroad," while in general use understood to signify a road constructed of cross-ties, upon which iron rails are placed, and dedicated to public use, under the general law regulating public highways, may well be construed, as used in the deed, as a private road, such as the improvement company was authorized to construct, with iron rails. So understood, it would be but a tramway, built of iron instead of wooden rails. This construction conforms to the charter and the evident intention of the parties, as manifested by their conduct. It is an elementary rule of construction that parties will be presumed to have used language
(277) effectuating a lawful purpose rather than one which is unlawful. We must assume that the owners of the Enterprise Land and Improvement Company intended to preserve the powers conferred by their charter rather than to expose their corporation to a suit by the State for acting *ultra vires.* We have construed such grants of easements to railroads as conveying no more than may be reasonably within the contemplation of the parties. *Hodges v. Tel. Co.,* 133 N. C., 225. Illustrating the principle, *Redfield, C. J.,* in *Hill v. R. R.,* 32 Vermont, 68, says: "A contract to convey land for a particular use, or to a party having capac-

ity to acquire a certain estate in land for a particular use, must of necessity carry the implication of such limitation upon the estate to be conveyed." The grant of such easement as is necessary or convenient for the operation of "said road" should be confined to such "tram or rail road" as the charter authorized the grantee to construct and operate. As said by *Battle, J.*, in *R. R. v. Garrison,* 85 S. W., 81 (Ark.): "The right of way for a tramway does not imply the right to construct and operate a railroad. The owner of the land might be willing to waive compensation for the first, when he would not for the latter." It is a matter of common observation that tramways or, as sometimes called, railroads constructed by lumber companies for a temporary purpose, destroying but little timber, requiring no cuts or fills, are of little damage to lands. Many persons, either for some benefit accruing, or to aid and encourage improvement, give such right of way, who would be surprised to find that they had thereby imposed a permanent burden upon their lands, with much larger powers and much greater injury incident to the building and operation of a railroad than they contemplated. In this case it is in evidence that at the time plaintiff purchased the land the tramway had disappeared—there was nothing more than a "wagon road" where the tramway had been. We think that it would be doing violence to the language of the charter of the improvement company, the language of the deed, and the intention of the parties to hold that (278) a permanent easement for the construction and operation of a railroad was granted. By construing the language of the deed as granting a right of way for a tramway we avoid these difficulties and relieve the land of a burden which the company had no right to impose and which we do not think the grantor intended to create. This view of the case renders it unnecessary to discuss a number of interesting questions raised upon the record. The plaintiff is entitled to recover of defendant a fair compensation for the injury done his land by entering upon it and constructing the railroad. When this is fixed and paid, the defendant will acquire the easement to use the land in the same manner, for the same purpose, and to the same extent as if it had acquired the easement by condemnation. *Brown v. Power Co.,* 140 N. C., 333.

We think that there was evidence proper to be submitted to the jury upon the question of abandonment of the easement, but, as the view which we take of the record entitles the plaintiff to recover, it is unnecessary to discuss that question. There must be a

New trial.

Cited: S. c., 147 N. C., 363; *Staton v. R. R.,* ib., 443; *Porter v. R. R.,* 148 N. C., 565; *Land Co. v. Traction Co.,* 162 N. C., 504; *McMahan v. R. R.,* 170 N. C., 458.

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T. R. TOMLINSON v. D. N. BENNETT.

(Filed 23 October, 1907.)

1. **Contracts, Executory—Part Payment—Nonperformance—Consideration—Recovery.**

Plaintiff and defendant entered into an executory contract. Plaintiff paid defendant a certain sum of money and delivered a horse in part payment thereunder. Without fault on plaintiff's part, the contract was never executed, and there was an entire failure of performance by the defendant: *Held*, in an action to recover for money had and received to plaintiff's use, the plaintiff is entitled to recover, upon an implied promise to pay, the amount of money he had so paid, and the value of the horse, yet unsold, as for conversion.

2. **Statute of Limitations—Nonsuit—Counterclaim in Former Action.**

The bar of the statute of limitations is not repelled by reason of a former suit brought by the defendant against the plaintiff, in which, after a long lapse of time, the then plaintiff took a nonsuit without filing complaint, upon the assumption of the present plaintiff, then the defendant, that he could therein have set out as a counterclaim the subject-matter of the present action.

3. **Same—Pleadings, Parol Evidence of—Nonsuit—Statute of Limitations.**

Parol evidence is incompetent to prove that a complaint in a former action between the same parties which was never filed, and in which action judgment of nonsuit was taken, would have alleged subject-matter to which the present plaintiff, then defendant, could have set up as a counterclaim the subject-matter of the present action, and thereby repel the bar of the statute of limitations.

APPEAL from *Council, J.*, at February Term, 1907, of ANSON.

Action to recover money paid and the value of a horse delivered by plaintiff to defendant.

The uncontroverted facts, as they appear upon the pleadings, are: On 1 December, 1887, plaintiff and defendant entered into a contract, whereby defendant agreed to convey to plaintiff a good and indefeasible title to a tract of land represented to be of the value of $1,825. Plaintiff, in consideration of the conveyance of said land, agreed to

(280) convey to defendant title to a lot in the town of Wadesboro, of the value of $1,500, to pay $175 in money and deliver to him one horse, valued at $150. Plaintiff paid the money and delivered the horse at the time the contract was made. For reasons not necessary to be set out, the contract in regard to the conveyance of the real estate was never executed. At a term of the Superior Court of Anson County in 1888 defendant instituted an action against plaintiff, in which summons was duly issued and served. The case remained on the docket of said court—no complaint having been filed—until March Term, 1906, when the

plaintiff in said action took a nonsuit. Plaintiff in this action objected thereto. Plaintiff herein, at April Term, 1906, of said court, instituted this action, alleging that he was induced to enter into said contract by representations in regard to the value, condition, etc., of said land, which were untrue; that the title was defective. He also alleged the payment of the money and delivery of the horse and value thereof, demanding judgment therefor. Defendant answered at length, admitting that the contract had not been executed, stating reasons therefor, and pleading the several statutes of limitation. Plaintiff alleged that he was prevented from setting up the matters constituting his present cause of action by way of counterclaim in said action by reason of defendant's failure to file a complaint and taking a nonsuit therein. The complaint does not state the cause of action upon which the first suit was brought. The answer states that it was to compel the present plaintiff, defendant therein, to carry out his contract. He admits that the nonsuit was taken, alleging that, after the institution of the action, a building on the lot contracted to be conveyed was destroyed by fire, rendering it impracticable for plaintiff to comply with his contract, etc. Defendant herein moved for judgment upon the facts alleged and admitted in the pleadings, for that, first, the complaint did not set out facts sufficient to constitute a cause of action; and, second, that the alleged cause of action was barred by the statute of limitations. His Honor granted the motion. Plaintiff excepted and appealed. (281)

H. H. McLendon and J. W. Gulledge for plaintiff.
Robinson & Caudle for defendant.

CONNOR, J., after stating the facts: The only cause of action stated in the complaint is for money had and received to plaintiff's use. If the plaintiff, in part performance of an executory contract, paid the money and delivered the horse, and, for any reason for which he was not responsible, the contract was not executed, he would be entitled to recover the money upon an implied promise to repay it, and the value of the horse as for a conversion. The law will imply a promise to repay money received, when there is a total failure of the consideration upon which it was paid. It would be against good conscience and equity to retain it; this is the principle upon which the action is based. As plaintiff does not allege that the horse was sold and the money actually received, the action in that respect must be for the value of the horse. This, however, is not the point in the case. Treating the action as for money had and received, it is barred at the end of three years from the time the action accrued—that is, the contract was broken, and not from the receipt of the money; this was in 1888. Plaintiff, however, says

that he was prevented from suing by reason of defendant's conduct in bringing an action in 1888, permitting it to remain on the docket until 1906, and disposing of it by a nonsuit. It is settled that if plaintiff was prevented from bringing his action during the statutory period by such conduct on the part of the defendant as makes it inequitable for him to plead the statute, or by reason of any agreement not to do so, he will not be permitted to defeat plaintiff's action by interposing the plea. *Daniel v. Comrs.*, 74 N. C., 494; *Haymore v. Comrs.*, 85 N. C., 268;
(282) *Whitehurst v. Dey*, 90 N. C., 542. These and other cases sustain this proposition.

We are unable to see in the mere failure of the defendant to file his complaint in the former action, in the absence of any agreement calculated to cause the plaintiff to sleep upon his rights, any fraud or wrong on his part. Assuming, for the purpose of the argument, that plaintiff in that action would, in his complaint, have set out a cause of action to which the defendant's present cause of action could have been pleaded as a counterclaim, he was not compelled to plead it; he may at any time have brought an independent action. *Woody v. Jordan*, 69 N. C., 189. Plaintiff encounters another difficulty: How is the Court to know what the defendant, the plaintiff in that action, would have alleged therein as his cause of action? We do not think parol evidence would be competent to show what a plaintiff would have alleged in a complaint which was never filed. The language of *Ashe, J.*, in *Bryan v. Malloy*, 90 N. C., 508, discussing a different question, but involving the same principle, is pertinent: "The only record is a summons; no complaint; no answer; no issue, and no verdict—only a judgment of nonsuit, which in that case means a *nolle prosequi.*" Concluding the discussion, and referring to the class of cases in which parol evidence is admissible to make more specific the issues decided in a former action, he says: "It is only admissible in aid of the record—this, whenever the record of the first trial fails to disclose the precise point on which it was decided, it is competent for the party pleading it as an estoppel to aver the identity of the point or question on which the decision was had, and to support it by proof. But there must be a record to be aided. When there is no record, as in this case, there is no foundation for the proof." The learned justice used the word "record" as synonymous with "pleading." The plaintiff could, at any term of the court between 1888 and 1906, have compelled the defendant, plaintiff in the first action, to file his com-
(283) plaint, or dismiss his action, or he could have brought his action for the recovery of the money paid and the value of the horse. There was nothing in the record to prevent him from doing so. By permitting the action to remain on the docket during the intervening years,

and failing to sue, he is barred. There must be an end to litigation. Private right and public interest demand it, and vindicate the wisdom of statutes of limitation. The judgment must be

Affirmed.

Cited: Brown v. R. R., 147 N. C., 219.

A. G. GILMORE ET AL. v. W. R. SELLARS ET AL.

(Filed 23 October, 1907.)

Wills — Devise — Estates for Life — Dower — Remainder — Rule in Shelley's Case.

A devise to J. P. of lands, etc., for the sole use and benefit of E. R. and his family, and the whole of the property at the death of E. R. "to belong to his lawful heirs, share and share alike," conveys only a life estate in the lands to the first taker, with no right of dower in his widow, and with the remainder to the heirs, *per capita*, as purchasers under the will.

APPEAL from *Council, J.*, at February Term, 1907, of ANSON.

This is a special proceeding, instituted in the Superior Court of Anson County, wherein the petitioner, L. H. Gilmore, seeks to have dower allotted to her in the lands described in the petition. Defendants answered, and the cause came on for hearing before the clerk, and, by appeal, to the judge presiding.

The material facts appearing upon the petition and answer are: Elijah Ratliff, by his last will and testament, devised the land in controversy and several negro slaves to John P. Ratliff, upon the following trusts, towit: "For the sole use and benefit of my son, Eli Ratliff, and his family; said property to be entirely under the control of my son- (284) in-law, John P. Ratliff, in such manner as not to be subject to any of his debts, contracts, liabilities, or encumbrances whatever, and the whole of the above-mentioned property, with all of its increase, at the death of my son, Eli Ratliff, to belong to his lawful heirs, share and share alike." Eli Ratliff intermarried with *feme* petitioner, and died during the year 1884, leaving surviving the defendants, his children and heirs at law, who took possession of the lands, and, together with those of the defendants, who are grantees of some of the children, have been in possession since that time. Partition was had in 1890. Petitioner, after the death of Eli, intermarried with A. G. Gilmore.

His Honor, being of the opinion that petitioner was not entitled to dower, affirmed the judgment of the clerk. Petitioner appealed.

No counsel for plaintiffs.
H. H. McLendon for defendants.

CONNOR, J., after stating the facts: It is immaterial whether the trust declared in the will was, during the life of Eli Ratliff, active and not executed by the statute, or whether it was passive, in which case, by the operation of the statute, the legal title vested in Eli. The right of the petitioner to dower depends upon the estate which her husband took under the will. It is clear that, if the words "share and share alike" had not followed the words "to belong to his lawful heirs," he would, under the rule in *Shelley's case,* have taken a fee simple. While there are no words expressly limiting his interest to a life estate, that it was the intention of the testator to do so is manifested by the use of the words "after the decease of my son, Eli Ratliff, to belong to," etc. The exact question was decided by this Court in a well-sustained opinion by *Judge Ashe* in *Mills v. Thorne,* 95 N. C., 362. There the limitation to the heirs of the devisee was followed by the words "to share and
(285) share equally." The learned justice, after reviewing the adjudged cases, says: "The consideration we have given the question leads us to the conclusion that the rule in *Shelley's case* does not apply in this case; that the words 'to share and share equally' indicate an intention on the part of the testator to give the property to his sister and her heirs, . . . to be divided between them as tenants in common, . . . to be distributed *per capita* between such persons as may bring themselves under that description when the life estate terminated." The "lawful heirs" of Eli Ratliff take *per capita* as purchasers under the will of their grandfather, thus limiting his interest to a life estate, to which, of course, no right to dower attached.

His Honor's judgment was correct, and must be
Affirmed.

Cited: Haar v. Schloss, 169 N. C., 229.

DREWRY-HUGHES COMPANY v. B. & S. MCDOUGALL ET AL.

(Filed 23 October, 1907.)

Partnership—Statement—Credit Given—Notice of Nonliability.

When defendant, in response to an inquiry from a mercantile agency, writes it that he was a member of a certain firm, it is error in the court below, in an action against defendant as a partner, for goods sold and delivered to the firm, to exclude evidence that he afterwards gave notice

to the authorized agent of such agency, and three months before plaintiff advanced credit upon the strength of the letter, that it was a mistake, that he was not a member of the firm and would not be responsible for credit given it.

ACTION tried before *Council, J.*, and a jury, at March Term, 1907, of ROBESON.

From a judgment for plaintiff, defendant Monroe appealed.

The facts sufficiently appear in the opinion of the Court.

McLean, McLean & McCormick for plaintiff. (286)
M. L. John for defendants.

CLARK, C. J. The defendant Monroe wrote, on 8 October, 1902, a letter to the mercantile agency of R. G. Dun & Co., in response to their inquiry, in which he stated that he, with others named, was a member of the firm of B. & S. McDougall. The defendant Monroe offered to prove that, in January, 1903, some three months prior to the time when the plaintiff sold this bill of goods to B. & S. McDougall, he, the said Monroe, saw the duly authorized agent of R. G. Dun & Co. at his town, and had a conversation with him, in which Monroe informed such agent that the letter to said R. G. Dun & Co. on 8 October was an error; that neither he nor the others named in that letter had become members of said McDougall firm, and that none of them would be responsible for the debts of that firm, and at the same time gave the agent an oral statement of the financial condition of said firm, which the agent wrote down. It was error to exclude this testimony. Information of the letter of 8 October, 1902, was conveyed to plaintiff by said R. G. Dun & Co., and the testimony is that the plaintiff sold the goods on such information. Monroe had a right to dissolve his contemplated connection with the McDougalls, and it was competent to show that, some three months before the plaintiff sold to said firm, and, therefore, in full time to correct its previous information, Monroe informed the agent of said R. G. Dun & Co., in his town, that he was no longer a member of the McDougall firm nor responsible for its debts. The plaintiff had not, up to that time, become a creditor of the McDougalls, and did not for nearly three months later. Monroe could not, therefore, give the plaintiff notice. He did all he could when he gave notice to the traveling agent of said R. G. Dun & Co., then in his town.

In *Cowan v. Roberts,* 133 N. C., 629, it was held that it was not sufficient to give notice of the retirement of a partner to an employee or bookeeper at the home office of the seller, but the notice must (287) be given to the sellers themselves or their credit man. Here the defendant offered to show that notice was given to the traveling agent of

R. G. Dun & Co. (to which agency the original advice had been given) that Monroe was no longer connected with the McDougall firm. It was the plaintiff's own fault that it sold this bill, some three months later, without ascertaining whether there had been any change in the partnership or not.

If, before the withdrawal of Monroe, the plaintiff had had dealings with the McDougall firm, then, of course, notice of Monroe's withdrawal from the firm must have been given to the plaintiff. It would be entitled to rely upon the status remaining unchanged until notified to the contrary. But here the first sale was made to the McDougalls long subsequent to Monroe's withdrawal. He could not anticipate that the plaintiff would become a creditor, and he should have been allowed to show, as he offered, that in January, 1903, he notified R. G. Dun & Co., withdrawing the statement made to them in his letter of 8 October, 1902.

Error.

Cited: Rheinstein v. McDougall, 149 N. C., 253.

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STEPHEN McINTYRE ET AL., EXECUTOR OF E. K. PROCTOR, JR., v. LIZZIE PROCTOR ET AL.

(Filed 23 October, 1907.)

1. Executors and Administrators—Resignation—Causes.

At common law an administrator or executor who had duly qualified and entered on the performance of his duties had no right, at his own desire and for his own convenience, to resign his office, and such cannot be now done, except for causes specified in the statute (Revisal, secs. 31, 34, 35, 37, 38), or for equivalent causes.

2. Same—Parties Interested—Resignation Desired.

The power of the clerk of the court to revoke letters testamentary after the executor has qualified and entered upon the performance of his duties exists for the good of the estate and its proper administration, and should only be exercised by reason of some unfitness or unfaithfulness on the part of the trustee, and never simply because the parties interested desire it.

3. Same—Saving Expense—Benefit of Estate.

When it only appears from the petition of the executor, asking to be relieved from the duties of his office, that the affairs of the testator had been administered upon, except collecting the rents and profits from the real estate, the dividends from moneys invested, and paying such portions thereof as may be necessary for the support, maintenance, and education of the family of the intestate, according to the directions contained in the

will and the duties thereby imposed, it is not within the power of the clerk of the court to grant the prayer of the petition, though it was made to appear that a son of the testator has become of age since the testator's decease, is a practicing attorney, competent and willing to administer, and that some expense would be thereby saved in the further administration of the estate.

PETITION by executors that they be allowed to resign, heard on appeal from the clerk, before *Jones, J.*, at August Term, 1907, of ROBESON.

The petitioners, having qualified as executors of the last will and testament of E. K. Proctor, deceased, proceeded to collect the assets and pay the debts of their testator, and, having in their possession quite an amount of property, real and personal, to be managed and applied under the provisions of the will, filed their petition before the clerk of the court that they be allowed to resign their office in favor of a (289) son of the testator, now grown, who is ready and willing to act as their successor, and is capable of discharging the duties of the office. The widow and children and heirs at law of the testator were made parties defendant, and a guardian *ad litem* for the infants duly appointed. On the hearing, the clerk, having found the allegations of the petition to be true, held as follows: "Upon the foregoing facts the court is of opinion that, as a matter of law, it has no power to permit the petitioners to resign as executors and trustees of the estate of E. K. Proctor, Jr., and that the court has no power to appoint James D. Proctor as administrator *de bonis non*," etc.; and thereupon adjudged that the prayer of the petitioners be refused.

On appeal, the judge reversed the ruling of the clerk and directed that the clerk proceed in accordance with such ruling, and defendants excepted and appealed.

Stephen McIntyre and McIntyre & Lawrence for plaintiffs.
No counsel contra.

HOKE, J., after stating the case: The allegations of the petition relevant to the inquiry admitted by the answer, and found to be true on the hearing, are as follows: "(3) That your petitioners have collected all the assets belonging to said estate, and have paid all debts due by the said estate, and have in all respects complied with the terms and provisions of the said last will and testament, and have made all investments as therein provided, and have satisfied all legacies to be satisfied, all of which will more fully appear from the annual accounts filed by your petitioners, as executors, in the office of the clerk of the Superior Court of Robeson County, to which said reports reference is hereby made. (4) That your petitioners have so far administered the said trust that nothing now remains to be done except to collect the rents and profits from the real estate owned, and the dividends from the (290)

moneys invested and to expend such portions thereof as may be necessary for the support, maintenance, and education of the family of said E. K. Proctor, Jr., as by the said will provided. (5) That your petitioners are informed and believe that, under the terms and provisions of the said will, the said trust cannot be finally closed and settled until the youngest child of the said E. K. Proctor, Jr., attains his majority, and, inasmuch as said youngest child, Robert W. Proctor, is now of the age of about 8 years, it will be some thirteen years before said trust can be finally closed and settled. (6) That the administration of the said period of thirteen years will be very expensive to the said estate and a heavy charge upon the said children and devisees of the said E. K. Proctor, Jr., the same to be the more considered on account of the fact that the utmost economy must be used in order that there may be property sufficient to provide a support, maintenance, and education for all of the said children until they attain their majority. (7) That the widow and all the children of the said E. K. Proctor, Jr., reside in the town of Lumberton, N. C., and no general or testamentary guardian has been appointed for the minor children. That all of the said children, except James D. Proctor, are infants and reside with their mother. (8) That James D. Proctor, eldest son of E. K. Proctor, Jr., has attained his majority and is now engaged in the practice of law in the town of Lumberton, N. C., and the widow and children of said E. K. Proctor, Jr., reside with him, under his care and protection. (9) That your petitioners believe, and so allege, that it would be to the best interests of the widow and children of the said E. K. Proctor, Jr., if the management of the said estate and the care and control thereof could be turned over to James D. Proctor, for the reason that the said James D. Proctor, residing as he does with the others of the family, is in a better position to know their actual necessities and so exercise greater economy in
(291) their support and maintenance than can the present executors, and for the further reason that no commissions would be charged by him for his services in closing up the said trust and estate. (10) That your petitioners have consulted Mrs. Lizzie G. Proctor, widow of E. K. Proctor, Jr., and the children who are capable of understanding, and they agree with your petitioners and are desirous that your petitioners be allowed to resign as executors and trustees of the estate of E. K. Proctor, Jr., and that the said James D. Proctor be appointed in their place and stead. (11) That your petitioners have consulted the said James D. Proctor, and he is willing to assume the duties which would be imposed upon him in case of his appointment as substituted trustee of the said estate, and he is prepared to give such bond as the court may require of him as a condition precedent to this appointment. (12) That your petitioners are desirous of filing their last annual account, and of resign-

ing their executorship and trusteeship in favor of the said James D. Proctor; and there are many reasons, business and sentimental, incapable of being set forth here, why it will be to the benefit of the widow and heirs at law of the said E. K. Proctor, Jr., that such change be made." And on these facts we think the clerk correctly ruled that he had no power to accept the proposed resignation and appoint a successor. At common law, using the term in its broadest sense, an administrator and executor who had duly qualified and entered on the performance of his duties had no right, at his own desire and for his own convenience, to resign his office, and so put aside responsibility for the further performance of his duties. This has been directly held with us in *Washington v. Blount,* 43 N. C., 253; and, without statutory authority, a clerk, for a like purpose, has no right to permit such resignation. Our statutes, in various sections (Revisal, secs. 31, 34, 35, 37, 38), confer on the clerks the power to revoke the letters of administration for certain reasons therein specified; section 38, containing the more general pro- (292) visions on the subject, being as follows: "If it is made to appear that the person to whom the letters have been issued is legally incompetent or has been guilty of default or misconduct in the execution of his office, or that the letters have been obtained by false and fraudulent misrepresentations"; and, no doubt, for causes specified in the statute, or equivalent causes, as indicated by way of suggestion only, in *Tulburt v. Hollar,* 102 N. C., 406, the clerk could permit the officer to resign and revoke the letters on such resignation. But the power exists for the good of the estate and its proper administration, and should only be exercised by reason of some unfitness or unfaithfulness on the part of the trustee, and never simply for his convenience or because the parties interested may desire it. While the principle is well established, both as to administrators and executors, it is more especially appropriate to the case of executors who are selected by the testator himself, usually because of his knowledge of their business capacity and his confidence in their integrity, or both; and, though they have in the first instance a right to decline the office, after they have accepted and are qualified they are not afterwards permitted to resign and voluntarily put aside its responsibilities. This case presents a good illustration of the doctrine and its proper application. A perusal of the will and the facts submitted in connection with the administration indicate that there is a good amount of property to be invested and managed, and that the duties incident to the trust will continue for some length of time. The testator has selected two of his friends to administer his estate and carry out his wishes, on account of their capacity and approved faithfulness, and they will no doubt continue to justify his confidence. There is no reason alleged or shown why they should be displaced, and the judgment of the clerk should have been affirmed.

Reversed.

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UNIVERSAL METAL COMPANY v. DURHAM AND CHARLOTTE RAILROAD COMPANY.

(Filed 23 October, 1907.)

1. **Power of Court—Verdict, Set Aside—Record—Reason Sufficient.**

When the court below sets aside the verdict of the jury for an insufficient reason, it is immaterial upon appeal when the record discloses another and valid reason therefor.

2. **Evidence—Principal and Agent—Misrepresentations—Question for Jury—Fraud—Opinion Expressed.**

Upon evidence that plaintiff's agent induced the agent of defendant by false and fraudulent misrepresentations to buy certain metal or steel, called "metalose," as being preferable to metal or steel used by defendant in a limited way; that defendant's agent was one of limited authority, and ignorantly purchased a greater quantity than defendant's business and his authority as such agent would justify, of which plaintiff's agent had notice: *Held*, (1) it was error in the court below to direct a verdict against the defendant upon an appropriate issue of fraud; (2) such direction was an expression of opinion by the court, prohibited by Revisal, sec. 535.

3. **Principal and Agent—Limited Authority—Questions for Jury—Instructions Construed.**

Defendant's prayer for special instructions as to the authority of its agent should have definitely required the jury to find what was the extent of the agent's authority—that is, whether limited or unlimited; and if the former, whether under the circumstances of this case the plaintiff was notified thereof; but if by reasonable construction it embraces these features, it will be regarded as sufficient.

4. **Instructions—Charge in Writing, Request for—Apt Time.**

The request of the judge below to put his charge to the jury in writing is in time when made at the close of the evidence and before the beginning of the argument to the jury.

5. **Same—New Trial—Costs of Appeal.**

Where a new trial is granted in the Supreme Court, the awarding of the costs is discretionary.

ACTION tried before *Peebles, J.*, and a jury, at May Term, 1907, of MOORE.

(294) This action was brought by the plaintiff to recover of the defendant $898.95 upon an alleged contract, by which the plaintiff agreed to sell to the defendant a certain quantity of steel in bars at the aforesaid price. The defendant denied the contract, and especially alleged that it did agree to purchase from the plaintiff, a firm of Mulhouse, France, to be shipped and delivered to it at Gulf, in this State, a certain quantity of metal or steel, which was at the time falsely and

fraudulently represented to the defendant to be "metalose," a new discovery, which was much lighter than and preferable to the steel in ordinary commercial use; that the said false representation was made to induce the defendant to buy a much larger quantity than, as the plaintiff well knew, the defendant intended or desired to buy; that when the "metalose" arrived it was discovered not to be as represented by the plaintiff, and the defendant refused to receive the same.

The court submitted issues to the jury, which, with the answers thereto, are as follows: "(1) Did the defendant contract with the plaintiff as alleged in the complaint? Answer: Yes. (2) Was the defendant induced by fraud and misrepresentation to enter into the alleged contract with the plaintiff? Answer: No. (3) Is the defendant indebted to the plaintiff on account of the alleged contract? If so, in what amount? Answer: $898.95. (4) Were Paul Bloch and Octave Bloch, at the time mentioned in the complaint, trading and doing business under the firm name of Universal Metal Company? Answer: Yes."

There was evidence tending to show that Frank D. Jones, superintendent of the defendant company, who represented it in the negotiations, told Alfred Jacob, the agent of the plaintiff, at the time the alleged contract was made, and with whom, as such agent, it was made, that he had received orders not to buy more than $100 worth of supplies at any one time without the approval of the president of the company, and that such order had in fact been given. Jacob replied (295) to Jones that the order would not exceed in amount $100. There was further evidence that the shops of the defendant company were not large, and only a small quantity of steel was needed, and Jacob was, at the time the alleged contract was made, notified of this fact, and that the order was given only to test the new metal. There was evidence introduced tending, as we think, to show the alleged fraud practiced upon the defendant. Requests for instructions were submitted by the defendant upon the questions of fraud and the authority of Jones to make the contract, and refused by the court. When the evidence was closed, and the court had discharged the jurors until after the noon recess, and directed them to leave the courtroom, the judge asked the defendant's counsel what evidence there was upon the question of fraud, and the matter was argued by the respective counsel for a short time, whereupon the judge remarked that the court would take a recess and give counsel an opportunity to examine and present any authorities they could find upon the question when the court convened after the noon recess. When the court reconvened, and before anything else had been done, the defendant's counsel requested the court to give a written charge. This was refused, upon the ground, as stated at the time by the judge,

that the request was made too late. He then charged the jury orally, and instructed them, upon the second issue, that there was no evidence of fraud, and that they should answer the issue "No."

A verdict was rendered for the plaintiff, as above indicated, whereupon the presiding judge set it aside and directed the following order to be entered: "The court being of opinion that the order for goods upon which this action is based was not binding upon defendant, and for that reason he erred in his charge to the jury on the first issue, not as a matter of discretion, but as a matter of right on the part of the de-
(296) fendant, the court sets aside the verdict and awards a new trial." The plaintiff excepted and appealed.

George H. Humber for plaintiff.
Guthrie & Guthrie for defendant.

WALKER, J., after stating the case: It was stated on the argument that the court thought the order for the goods was not binding upon the defendant because signed simply "Frank D. Jones, superintendent," without indicating for what company he was superintendent. The reason of the judge for setting aside the verdict, if insufficient, is immaterial, so that there appears a good and valid reason in the record for sustaining his ruling, and we are all of the opinion that such a reason does exist. There was evidence that Jones was an agent of limited authority, and there was also evidence, we think, that a fraud was practiced upon the defendant by plaintiff's agent in his dealings with Jones, and yet the court instructed the jury that, if they found Jones made the order for the metal on 19 September, 1905, they should answer the first issue "Yes," and that the evidence in the case was not sufficient to sustain an affirmative finding upon the second issue, and they should answer it "No." The defendant's counsel had asked instructions as to both of these issues. Their third prayer, as to the authority of Jones, was not very explicit, it is true, as it referred more to the fact that Jones had informed Jacob of his restricted authority as agent of the defendant than it did to the nature or extent of the authority itself; but if a liberal construction is given to it, we find it sufficient to embrace that feature of the case. It should have more definitely required the jury to find, first, what was the nature of Jones' authority, whether limited or unlimited, and, if they found that it was limited, whether, in the second place, the plaintiff, through Jacob, was notified of the fact. If Jones had only the restricted authority, as testified by him, he could not, of course, exceed the limit of his power when he made the contract.

Brittain v. Westhall, 135 N. C., 492; *ib.,* 137 N. C., 30; *Bank v.*
(297) *Hay,* 143 N. C., 326.

Whether the evidence introduced to establish the fraud was sufficient for that purpose was a question for the jury, and the judge could express no opinion as to its weight. Revisal, sec. 535; *Withers v. Lane,* 144 N. C., 184; *S. v. Simmons,* 143 N. C., 613. Whether there is *any* evidence upon which the jury could conclude as to the truth of the matter submitted to them for inquiry and decision, we have often said, is a question of law to be decided by the judge (*Byrd v. Express Co.,* 139 N. C., 273; *Campbell v. Everhardt,* 139 N. C., 503; *Lewis v. Steamship Co.,* 132 N. C., 904); but, there being some evidence which is more than conjectural or speculative to establish the fact in issue, and which the law adjudges to be fit for the consideration of a jury, whether it sufficiently proves the fact or not is a question for the jury. The cases already cited also establish this proposition, which is but the counterpart of the other. The able and learned judge who presided at the trial may have intended by the expression which he used to say that there was no evidence of the fraud, but even if this was his purpose, there was error, as, in the view we take of the evidence, without setting it out at length, we think there was at least some which the jury should have been permitted to pass upon.

We also are of the opinion that the judge erred in not reducing his charge to writing, as he was asked to do by the defendant's counsel. The request was made in apt time. It is impossible to distinguish this case from *Craddock v. Barnes,* 142 N. C., 89. The principle established in that case is clearly applicable to this one. The mere intervention of an argument by counsel, at the judge's invitation, upon the question as to whether there was any evidence of a particular fact, when the jury had retired from the courtroom for the recess, and as preliminary to the discussion before them after the recess, should not have the effect to except this case from the principle of that one. The argument (298) to the jury had not commenced when the request to the court was made. We do not see anything in the record to indicate that the judge did not have adequate time to write out his charge after he was asked to do so. *Sawyer v. Lumber Co.,* 142 N. C., 162, would also seem to be direct authority against the ruling of the court that the request had come too late. In that case the present *Chief Justice* said: "The defendant, at the close of the evidence, and before the argument began, requested the court to put its charge in writing." This means, of course, "at the close of the evidence, and before the argument (to the jury) began." We then held that the judge committed an error when he failed to comply with the request.

There must be a new trial, for the errors indicated in the plaintiff's appeal.

New trial.

DEFENDANT'S APPEAL IN SAME CASE.

WALKER, J. These two appeals have been so prepared for this Court that it has been found impossible to reach the true merits of the questions intended to be presented without considering them together and as if they had been consolidated into one. We doubt if it was necessary for the defendant to have formally taken an appeal, as the exceptions noted in its case might well have been considered in the plaintiff's appeal. It is stated by the judge, in the plaintiff's appeal, the case having been settled and signed by him, that all the evidence was sent up at the request of the appellant, whereas it appears by reference to the defendant's appeal that all the evidence, by some accidental omission, of course, was not, in fact, stated in the plaintiff's appeal, for there is much evidence to be found in the case as stated in the defendant's appeal which is not in the case as stated in the plaintiff's appeal. It was intended, no doubt, and we think the cases clearly show it to be
(299) so, that all the evidence should have been set out in the plaintiff's appeal. We have for this reason, and for others of equal or greater weight, found it absolutely necessary, for the purpose of doing justice by intelligently considering this case, to unite the two cases, as it were, into one appeal, and in this way we have been enabled to reach what we consider to be the right conclusion upon the whole matter. In view of the confusion in the record, as above indicated, we think the costs of this Court, except the costs of printing the records and briefs, should be divided between the parties. The plaintiff is adjudged to pay one-half thereof, and the defendant the other half. The plaintiff will pay the costs of printing the record and briefs in its appeal, and the defendant the costs of printing the record and brief in its appeal. Where a new trial is granted, the awarding of costs is discretionary. Revisal, sec. 1279; *Williams v. Hughes,* 139 N. C., 18.

Regular practice and procedure would require us, under ordinary circumstances, to dismiss the defendant's appeal, as it was taken only to save its rights in case our opinion should have been adverse to it in the plaintiff's appeal, and, as we have decided the other way, a consideration of the defendant's appeal separately becomes unnecessary. We conclude, though, that an apparent departure from the strict practice in such cases is justified, under the peculiar circumstances, and the real intention of the parties will be effectuated by considering the two cases as we have done, and dividing the costs. If this course were not taken, and the plaintiff's position is the correct one, we would, perhaps, have to affirm in its appeal and award a new trial to the defendant's appeal, and thereby produce confusion and incongruity in the result. It would be vain and useless to issue a *certiorari* or any other process to perfect the case, when all the facts are before us in the two cases.

Sometimes it may be proper and legitimate practice for a party in whose favor a case has been decided to note his exceptions and preserve them by an appeal in case the ruling of the court is re- (300) versed here, but the instances where this practice can be justified are exceedingly rare, and it is not to be encouraged. We do not decide that the defendant's appeal was improvidently taken in this case, though we are inclined to think the defendant's exceptions could have been presented in the plaintiff's appeal. Let the two cases be considered as one, and the costs be divided and paid as herein directed.

New trial, as ordered in plaintiff's appeal.

Cited: S. v. Ownby, 146 N. C., 678; *Drewry v. Davis,* 151 N. C., 299; *Bank v. Drug Co.,* 152 N. C., 146.

JOHN A. DEW ET AL. V. W. H. PYKE ET AL.

(Filed 30 October, 1907.)

State's Lands—Entry—Registration—Enabling Act—Grants.

The registration of a grant of land from the State is not necessary to give it validity for the purpose of title. Chapter 40, Laws of 1893, provided that grants which had theretofore been issued, but not registered within the time required by law, might at any time be registered within two years after 1 January, 1894, "notwithstanding the fact that such specified time had already expired; and all such grants heretofore registered after the expiration of such specified time shall be taken as if they had been registered within such specified time"; therefore, a grant issued prior to the said enactment, but registered at a time when there was no provision therefor, is made valid by the provisions of said act as against a subsequent grant duly registered, the latter having been issued and registered at a time when the grant first issued could have been registered under the law.

ACTION heard before *Webb, J.,* and a jury, at March Term, 1907, of BRUNSWICK.

C. Ed. Taylor and Lewis & Schulken for plaintiffs.
E. K. Bryan and Cranmer & Davis for defendants.

WALKER, J. This is an action for the possession of land. The court intimated an opinion against the plaintiffs. They thereupon submitted to a nonsuit and appealed.

The State granted the land to Lewis Jones 25 October, 1852. This grant was not registered until 1888, at a time when there (301)

was no law permitting the registration of it. On 17 December, 1880, a grant for the same land was issued to Alexander Cox, and legally registered 28 January, 1881. The plaintiffs assert title to the land under the grant to Cox, and the defendants under the Jones-Alexander grant; so that the question is, Which of these two grants should prevail? By Laws 1893, ch. 40, it was provided that grants which had theretofore been issued, but had not been registered within the time required by law, might be registered at any time within two years after 1 January, 1894, "notwithstanding the fact that such specified time had already expired, and all such grants heretofore registered after the expiration of such specified time shall be taken as if they had been registered within such specified time: *Provided,* that nothing herein contained shall be held or have the effect to divest any rights, titles, or equities in or to the land covered by such grants, or any of them, required by any person or persons from the State of North Carolina, by or through any entry or entries, grant or grants, made or issued since such grants were respectively issued, or of those claiming through or under such subsequent entry or entries, grant or grants." This case is governed by *Janney v. Blackwell,* 138 N. C., 437. In both cases the junior grants were registered within the prescribed time, for, while in the *Janney case* the junior grant was registered more than two years after it was issued, the act of 1876-77, ch. 23, extended the time of registration, and it was registered within the extended period. In this case the junior grant was registered within two years from the date it was issued. There is, though, this one difference between the two cases, which is, that the senior grant in the *Janney case* was registered at a time when its registration was authorized—that is, by the act of 1893 to which we have already referred, it having been registered 5 April, 1895—while in this case the senior
(302) grant, which was issued to Jones, was registered in 1888, or at a time when there was no law authorizing its registration, the Legislature having failed from 1885 to 1893 to pass any act extending the time for the registration of grants. But that very act of 1893 validated the registration of all grants which had been registered after the time for registration had expired, except as to "rights, titles, or equities" acquired in the land from the State since the issuing of the senior grant, or, in other words, any intervening "rights, titles, or equities." While the two cases, therefore, differ in the respect indicated, they do not differ in principle, because it is clearly and distinctly held in *Janney v. Blackwell* that the junior grantee had acquired no such "right, title, or equity" as was intended by the act of 1893 to have the effect of defeating the title of the senior grantee, and, indeed, no "right, title, or equity" at all, as at the time the junior grant was issued the land was not the subject of entry, the State having by the senior grant parted with all the title she had

originally in the land. The language of the Court in that case, as used by *Justice Connor* in this connection, is significant, and completely overthrows the plaintiff's contention in the case at bar. "It is not to be doubted," says he for the Court, "that the Legislature had the power to impose upon the persons registering their grants after the time provided therefor had expired the condition that they should do so, subject to junior grants which had been registered. The registration of a grant is not necessary to give it validity for the purpose of passing title," citing 24 A. and E. Enc. (2 Ed.), 116, which fully sustains the proposition, if it required any authority to sustain it. The distinction between deeds and grants, in this respect, is obvious, when we carefully read the statutes applying to them, respectively. In the case of a deed it is provided that it shall not be valid unless registered, as against creditors or purchasers for a valuable consideration from the bargainor, and then only from the registration thereof (Laws 1885, ch. 147; Code, sec. 1245; Revisal, sec. 980), while in the case of a grant it is simply (303) required that the grantee shall cause it to be registered in the proper county within two years after it is issued. Rev. Code, ch. 42, sec. 22; Code, sec. 2779; Revisal, sec. 1739. Why this radical difference in the phraseology of the two statutes, if it was intended that there should be no distinction between the two kinds of instruments with reference to the effect of registration upon their validity? It is perfectly evident that the two enactments were expressed in different words designedly, and with the purpose that they should have separate and distinct meanings and receive different constructions. If it was the purpose to provide that grants should be void if not registered within two years after they are issued, why not declare that intention in unmistakable language, as was done in the case of deeds? We also find that in the case of contracts to convey land, and leases of land for more than three years (Revisal, sec. 980), mortgages and deeds of trust (Revisal, sec. 982), marriage settlements (Revisal, sec. 985), and some other instruments, the intention that they shall be void if not duly registered is clearly expressed; and in the case of deeds of gift the difference is striking, and demonstrates to a certainty, we think, what was meant by the different phraseology. It is provided that a deed of gift shall be proved and registered within two years after its execution. So far, the statute is like that in the case of grants. But the Legislature did not think this language sufficient to invalidate the deed of gift if the provision as to registration was not complied with by the donee, so it took the precaution to add that if the deed is not registered within two years it shall be void, "and shall be good against creditors, and purchasers for value, only from the time of registration." If the requirement that the deed of gift should be registered within two years after its execution was intended as

a condition, noncompliance with which should invalidate it, why superadd the words "or otherwise (it) shall be void"? Revisal, sec. 986.
(304) This may be considered as a legislative construction of the words "shall be registered within two years after its execution," to the effect that if the instrument is not so registered it shall not be evidence, unless the time for registration is extended and a new authority to register it is thereby given. The English Statute of Enrollments (27 Hen. VIII., ch. 16) provided that no manors, lands, etc., shall pass from one to another, whereby an estate of inheritance or freehold shall be made to take effect, unless the deed of bargain and sale be enrolled within six months after the date of the writing indented. It was resolved that no estate passed until the enrollment of the deed. *Dymnock's case,* Cro. Jac., 408; *Iseham v. Morrice,* Cro. Car., 110; *Flower v. Baldwin,* Cro. Car., 217. But it will be observed that the enrollment is annexed as a condition to the passing of the title, as in the case under our statutes of mortgages, deeds of gift, and the other instruments above enumerated. This is all very significant, and plainly evinces, what we have confidently asserted to have been the intention, that the material difference in language should produce a marked unlikeness in meaning, and what difference could there be in the sense of the two statutes other than that, in the one case a failure to register the instrument within the specified time should invalidate it, and in the other it should not? This reasoning is supported by the view of the law manifestly entertained by *Judge Ruffin* (afterwards Chief Justice) in *Jones v. Sasser,* 14 N. C., 378, for he recognizes the existence of the very distinction we have made between the act which there declared that gifts of slaves should not be good and available unless registered within one year after their execution, and the general statute merely requiring registration within a given time of other instruments.

Passing to another view of the case, it is a mistake to suppose that no legal title passes from the State to its grantee by virtue of a grant until it is registered. The entry gives an equity or inchoate right to call for a grant, which may be divested by a subsequent entry laid
(305) and grant issued thereon before the grant based on the first entry is taken out, if the senior grantee had no notice of the first entry. *Gilchrist v. Middleton,* 107 N. C., 678; *Kimsey v. Munday,* 112 N. C., 816. But when the grant issues upon the first entry, the title passes out of the State, and the land is no longer subject to entry. *Hoover v. Thomas,* 61 N. C., 184; *Gilchrist v. Middleton,* 108 N. C., 705; *Rowe v. Lumber Co.,* 129 N. C., 97; *Stewart v. Keener,* 131 N. C., 486; *Berry v. Lumber Co.,* 141 N. C., 386; *Janney v. Blackwell, supra.* It was contended in *Ray v. Wilcoxson,* 107 N. C., 523, that an unrecorded deed confers no estate, and that it is no more than a mere executory con-

tract. With reference to this contention, *Shepherd, J.,* for the Court, said in reply, and with great force, following former decisions of this Court, that it was a misconception of the law, for it is well established that such a deed is "a legal conveyance," and, although it cannot be given in evidence until it be registered, and, therefore, it does not pass a present legal title, it has, as a deed, an operation from its delivery. It may be set up in equity, whether voluntary or for value, and by it such an estate is conferred as may be sold under execution, and this even before the act of 1812. Its owner is a tenant of the freehold, and a recovery under a *precipe* against him would be good, and his widow may be endowed in the same. Such a grantee is also deemed in equity to be seized of an equitable freehold. *Price v. Sykes,* 8 N. C., 87; *Morris v. Ford,* 17 N. C., 412; *Walker v. Coltraine,* 41 N. C., 79; *Phifer v. Barnhart,* 88 N. C., 333; *Austin v. King,* 91 N. C., 286; *Arrington v. Arrington,* 114 N. C., 151. A grant bears a close resemblance, in some of the respects above indicated, to a deed, and certainly to the extent, as said in *Janney v. Blackwell,* of not requiring registration to give it validity. Registration is, indeed, necessary to make it evidence of the title which the State has granted, but does not constitute an essential part of the title itself.

There is still another view of this case which is fatal to the (306) plaintiff's contention. At the time the Cox grant was issued, and also at the time it was registered, on 28 January, 1881, and for some time afterwards, extending acts had been passed, under which the senior grant issued to Lewis Jones in 1852 could have been registered. Laws 1876-77, ch. 23; Laws 1879, ch. 220; Laws 1881, ch. 313. Why was the grant to Jones not valid at the time the Cox entry was made and the grant issued thereon was registered? Surely, at that time—that is, in 1880 and 1881—the land was not the subject of entry, and the Cox grant was therefore void, the State having already parted with its title. In *Berry v. Lumber Co.,* 141 N. C., 393, we said: "The Houck and Berry grants were both ineffectual to pass title to any land covered by the Cathcart grant, as, the latter being of older date, the State had no title to that land at the time the junior grants were issued, and the lands were therefore not subject to entry and grant. The State could not grant that which it did not itself have, and, therefore, where there are two or more conflicting titles derived from the State, the elder shall be preferred, upon the familiar maxim that he who is prior in time shall be prior in right, and shall be adjudged to have the better title." See, also, *Janney v. Blackwell, supra.*

We are not at all disposed to overrule *Janney v. Blackwell,* or even to modify the ruling of the Court therein, for, upon a careful reëxamination of the question presented in that case, we are now convinced (in

view of past and of existing legislation upon the subject, showing what the true policy of the State is) that *Janney v. Blackwell* was correctly decided. Nor need we attempt to show that there is no essential difference between that case and this one, arising out of the fact that in *Janney v. Blackwell* the senior grant was registered at a time when its registration was authorized, while the grant to Jones was registered when there was no law authorizing its registration, and must, therefore, depend for its validity upon the restropective clause in the act of 1893, mak-
(307) ing good all prior unauthorized registrations of grants, for that is, upon the facts of this case, clearly a distinction without a difference, the crucial question being whether Cox acquired a good title by his grant, and *Janney v. Blackwell* decides that he did not, and if he did not, there was no one to be injured by the validating provision of the act of 1893, so far as appears in this case. There was no vested right or title to be affected by the retroactive legislation, even if it was not in itself valid. The fallacy of the plaintiffs' argument consists in the fact that their premise is incorrect, namely, that registration of a grant is required to vest the title.

We need not discuss the interesting question raised in the learned and exceedingly well-prepared brief of Mr. Taylor as to the intervention of an equity or right in the plaintiffs, arising from the issuing and registration of the Cox grant before the Jones grant was recorded, under *Scales v. Fewell,* 10 N. C., 18; *Isler v. Foy,* 66 N. C., 547, and that class of cases, as we have shown that he had no such right or equity.

The plaintiffs having admitted that they cannot succeed in this case upon the facts, unless the Cox grant is valid as against the Jones grant, it follows from what we have said that there is no error in the ruling of the court, and the nonsuit must stand.

Affirmed.

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(308)

NASH SIBBERT v. SCOTLAND COTTON MILLS.

(Filed 30 October, 1907.)

Negligence—Safety Appliances—Evidence—Nonsuit.

The master is responsible for damages for allowing a safety appliance used in connection with dangerous machinery to remain in such condition as to be ineffectual, when he had actual or constructive knowledge thereof. It was error in the court below to sustain a motion for judgment as of nonsuit upon evidence tending to show that plaintiff was injured by his sleeve catching in cogwheels or grooves of a machine, which could have been prevented if the "shifter" used for stopping the running machinery had been in proper condition; that the "boss" or manager of the machinery room had been several times notified thereof; that the plaintiff continued to work with knowledge of the defect.

SIBBERT *v.* COTTON MILLS.

ACTION for recovery of damages for injury sustained by plaintiff while at work in defendant's mill, heard before *Council, J.*, and a jury, at March Term, 1907, of SCOTLAND.

The testimony of plaintiff tended to show that he was, at the time of the injury, 19 years of age, employed by one Terry, head boss of the night force; that he was instructed by Terry how to do the work to which he was assigned—"oiling and tying on bands" on twenty-four frames at night. He says: "All frames have shifters to throw belt which runs the frame from the tight to the loose pulleys. The shifter is a rod extending from the pulley at the end of the frame, looping over the belt, to the other end of the frame. This rod runs underneath top of frame and is connected with two levers coming out on top. The levers shift the belt from the tight to the loose pulley. Levers have cross-arms coming down to the edge of the frame. In working the shifter, you pull either lever and the frame is started; push the lever and the frame is stopped. While standing by the frame, there is no other way to stop or start it." Plaintiff further says that, when he first entered defendant's employment, the shifter was in good condition. Got "out of fix" about two weeks before he was injured; that he did not know how to fix it; did not have much experience when he was injured. (309) He was doing his work like Terry told him; never told him anything about the cogs under the frame. Plaintiff described the manner in which he was injured: "The band that ran one of the spindles had broken. I went to tie it on. As I reached in to do this, my shirt sleeve, just above the wrist, caught in the cogs of the travis gear under the frame. This drew my arm down and against the cogs and produced the injury. . . . When I was caught in the cogs, my shirt sleeve was buttoned around my wrist. There are two of these cogs, called travis cogs, and they work together. At night there is no light under the frames—just shadows. When I say my sleeve caught, I called for help. Cora Norris first came to help me. She came when my sleeve was first caught, and took hold of the lever of the shifter to stop the frame. Then she tried the other lever. Neither would work. She then tried to throw off the belt at the end of the frame, but was not able." He says: "If the shifter had been in fix at the time my sleeve was caught, I could have reached the lever and stopped the frame." There was no other way except to pull the end of the shifter over or throw the belt off.

Cora Sibbert, a sister of plaintiff, testified that both levers to the shifter were "out of fix"—had been so for three or four weeks before plaintiff was injured; that she asked the boss of the day force to fix them —asked him nearly every day.

There was other evidence tending to show that the levers were "out of fix" at the time of the injury.

At the close of plaintiff's evidence, his Honor, upon defendant's motion, directed a judgment of nonsuit. Plaintiff appealed.

Cox & Dunn for plaintiff.
Morrison & Whitlock for defendant.

CONNOR, J., after stating the facts: It may be conceded that the frames at which plaintiff was put to work were of proper con-
(310) struction and in good condition; that there was no evidence on the part of defendant, either in respect to the frames or the travis gear; that defendant was guilty of no negligence in failing to instruct plaintiff in his work. It may be further conceded that his sleeve getting caught in the travis gear was an accident for which defendant was not responsible, or that plaintiff did not exercise due care to avoid the danger of getting caught in the cogs. The question arises, whether there was negligence in permitting the levers of the shifters, provided for the purpose of starting and stopping the frames, to be "out of fix," and whether such negligence was the proximate cause of the injury. It appears that the wheels, upon which were the cogs of the travis gear, move slowly, and that, if the shifters had been in good repair and had performed the office for which they were intended, the frames could easily have been stopped by pushing the lever, throwing the belt from the tight to the loose pulley, and plaintiff would not have sustained any injury further than tearing his shirt sleeve. The plaintiff, assuming, as we must do, the truth of his testimony, was pursuing instructions—working as directed by the "head boss." There is always more or less danger that employees working in mills, even when the machinery is in proper repair, will become entangled in the wheels, cogs, etc. This is one of the dangers incident to the employment. Where there is no negligence in respect to the construction, repair of the machinery, or in failing to give instruction as to the manner of operating the machine, an injury sustained by the employee is attributed either to accident or the negligence of the employee. The risk of such injury is assumed. Recognizing the danger of such accidents, employers use such safety appliances as are in general use, either to avert the danger or to stop the machine in the event that an injury is imminent. Defendant had attached to the frames, upon which plaintiff was employed, shifters controlled by levers, easily operated, by which in an emergency the frames could be
(311) stopped. It was the duty of defendant to use reasonable care, by proper construction and frequent inspection, to have and keep them in working order. If it failed to do so, there was a breach of duty to plaintiff. He says that, after his sleeve was caught in the cogs, there was ample time to have stopped the frame, if the shifter had not been

"out of fix." This is evident from the fact that plaintiff's sleeve was caught near to his wrist, while the injury sustained was at his armpit, showing clearly that, if the shifter had worked, the injury would have been avoided. It seems that he and those who came to his relief did all in their power to stop the frame, but failed to do so because of the defective condition of the shifter or the lever to it. If the jury find that the injury, notwithstanding preceding conditions, would not have been sustained but for the defective condition of the shifter, such defective condition would be the proximate cause of the injury—the last, real cause. This question, in the light of the evidence, should have been submitted to the jury. We concur with his Honor's ruling upon the questions of evidence presented upon the record. The fact that at one other mill the wheels of the travis gear were boxed does not tend to show that it was usual or customary to do so. *Marks v. Cotton Mills,* 135 N. C., 287. Nor do we think that the proposed evidence of the condition of the lever after the injury was competent. The only questions presented by this record are whether the shifter was a safety appliance, and whether it was in proper repair and condition, and if not, whether the defective condition was known or ought by proper inspection to have been known to defendant's servants whose duty it was to inspect it, and whether such defective condition, if found by the jury, was the proximate cause of the injury. These were all questions for the jury. We do not perceive any evidence in the case, as now presented, of contributory negligence. If the shifters got in defective condition after plaintiff began work, he was not required to abandon his employment—he did not assume the risk incident to danger by reason of such negligence. *Sims v.* (312) *Lindsay,* 122 N. C., 678; *Lloyd v. Hanes,* 126 N. C., 359; *Marks v. Cotton Mills,* 138 N. C., 406.

In directing judgment of nonsuit there was error, for which there must be a new trial.

Reversed.

D. R. DUNLAP v. RUFUS HILL ET AL.

(Filed 30 October, 1907.)

1. **Deeds and Conveyances — Trusts and Trustees — Marriage Settlement — Joinder of Trustee.**

When, under a marriage settlement, a trustee is named "who shall have the right, by and with the consent of the *feme covert,* to sell and convey" the real and personal property, a conveyance of real property by such *feme covert* and her husband, without the joinder of the trustee, is void.

2. Same—Marriage Settlement—Construction of Deed.

A marriage settlement may include the disposition and control of future acquired real and personal property; but, in order to restrict the wife's power to convey real property acquired by purchase, and to control it, especially since the Constitution of 1868, the language of the instrument should be plain and the intent unequivocal.

3. Same.

When by placing the descriptive words of conveyance of realty used in a marriage settlement in their proper relation to each other, they appear to embrace all the real estate that the *feme covert* may hereafter be entitled by "right, devise, or bequest," the words "entitled by right" are used in connection with "devise or bequest," and their meaning is restricted to lands descending by operation of law or right of inheritance, and they do not include land acquired by purchase.

4. Same—Expressio Unius.

When the devolutions by which realty must be acquired in order to come within the terms of the marriage settlement are expressed in the deed, as by operation of law or by inheritance, it excludes realty acquired by purchase.

(313) ACTION to foreclose a mortgage deed, dated 17 March, 1903, executed by John C. Hill and wife, Caroline, to plaintiff, conveying two tracts of land, one containing 87 acres and the other 105 acres, heard before *Justice, J.*, at October Term, 1906, of ANSON.

From the judgment dismissing the action plaintiff appealed.

John T. Bennett for plaintiff.
Robinson & Caudle and J. A. Lockhart for defendants.

BROWN, J. It appears from the record that in 1861 Carolina Coley entered into a marriage settlement with John C. Hill, who immediately thereafter became her husband. The wife is dead, and the husband survives. The tract of land containing 87 acres is conveyed in the deed of settlement. The other tract was conveyed by deed directly to Caroline Hill some years after her marriage. She and her husband duly executed the mortgage sued on to plaintiff, conveying both tracts, to secure the debts described in the complaint. The trustee in the deed of settlement did not join in the execution of the mortgage.

It is contended by defendant that the mortgage is void.

1. As to the 87-acre tract, we concur with his Honor below that the mortgage is void for lack of power in the mortgagors to make a valid conveyance. In the deed of settlement the only method provided for a conveyance of any part of the estate of the *feme covert* is as follows: "G. A. Smith (the trustee) shall have the right, by and with the consent of the said Caroline Coley, to sell and convey away any of the real

or personal estate that he may hereafter hold for the said Caroline Coley." It is further provided that said trustee shall have the right to reinvest moneys received from the conveyance of real or personal estate for the use of said Caroline Coley. It seems to be settled in this State that where a *feme sole* has made a deed of marriage settlement of her separate estate, whether real or personal, to a trustee, for her sole and separate use, her power of disposition over the same during (314) marriage is limited to the mode and manner prescribed by that instrument. If she and her husband join in a mortgage conveying her estate, without the knowledge or consent of the trustee, and outside of the powers conferred, said deed is invalid. *Hardy v. Holly,* 84 N. C., 661; *Kirby v. Boyette,* 116 N. C., 165; *Shannon v. Lamb,* 126 N. C., 38.

The matter is so fully discussed in the cases cited, and others in our reports, that it is useless to do more than cite them. It is plain that, according to our authorities, Caroline Hill, although with the consent of her husband, could not convey the 87-acre tract without the joinder of the trustee.

2. The plaintiff contends that the 105-acre tract is unaffected by the marriage settlement, and as to that the mortgage is valid.

We note the fact that the deed of settlement not only conveys real and personal property by specific description, but purports to convey, subject to the trusts declared, such property as said Caroline should acquire in the future, the language of the instrument being as follows:

"Have bargained, sold and conveyed, and by these presents doth bargain, sell and convey, unto the said G. A. Smith all the estate, both real and personal, and all the choses in action that the said Caroline Coley may be possessed of or entitled to receive from any and all sources whatsoever, *and all the estate, either real or personal, or choses in action, that the above-named Caroline Coley may hereafter receive or be entitled by right, devise, or bequest.*"

As to the personal estate acquired by said Caroline during her coverture, it is unnecessary to determine whethr that cam under the dominion of the trustee by virtue of the deed or not. No question of that sort is presented in the record.

As to the tract of land conveyed by deed to said Caroline during her coverture, we are of opinion that it does not come within the terms of the marriage settlement, and that consequently the mort- (315) gage is valid and the plaintiff is entitled to a decree of foreclosure as to that.

We do not controvert the proposition contended for by the learned counsel for the defendants, that marriage settlements may include the disposition and control of future acquired property, both real and personal. 19 A. and E., 1239.

But, in order to restrict the wife's power to acquire property by purchase, and to control it when so acquired, especially since the Constitution of 1868, the language of the instrument should be plain, and the intent to do so unequivocal.

In respect to the real property, we think the instrument is justly susceptible of a different construction from that contended for. The words of the deed relating to the future acquisitions of real estate are so mixed with those properly relating to personalty that, in order to construe the former, it is well to eliminate them and place them in a sentence by themselves, reading as follows:

"And all the real estate that the above-named Caroline Coley may hereafter be entitled to, by right, devise or bequest."

The other words in that part of the deed quoted plainly refer to personalty. The word "receive" is entirely appropriate when used to denote an acquisition of choses in action and other personal property, but entirely unusual and inappropriate in describing an acquisition of land by purchase.

We may say "a man receives his inheritance," but we do not use that word in describing a purchase of land. While we have been unable to find, after diligent search, "a case in point," we have no difficulty in concluding that the words "by right, devise or bequest," taken in connection with each other, indicate by their association a purpose to bring within the scope of the instrument only such lands as Caroline Coley should receive by right of inheritance, devise or bequest. If the purpose was to embrace all lands, however acquired, why use the words "right,
(316) devise or bequest" at all? If such was the purpose, those words were unnecessary and inappropriate.

The words "be entitled by right" are used in connection with "devise or bequest," and evidently refer to land descending upon Caroline Coley by operation of law, by right of inheritance, and not to land acquired by purchase. *Noscitur a sociis.*

The methods of devolution by which the realty must be acquired in order to come within the terms of the settlement, being expressed in the deed, the maxim of the law will exclude from its operation land acquired in other ways. *Expressio unius est exclusio alterius.*

The cause is remanded, with direction to enter a decree of foreclosure in accordance with this opinion.

(317)

CITIZENS NATIONAL BANK OF DURHAM v. MOLLIE F. BURCH, ADMINISTRATRIX, ET AL.

(Filed 30 October, 1907.)

Negotiable Instruments—Principal and Surety—Indorser Without Knowledge.

A. and B. signed a negotiable note apparently as joint principals, when, in fact, the latter was surety for the former. Appellant signed the note by writing his name across the back, with the word "surety" underneath: *Held*, in the absence of any evidence that appellant knew of the relation between the makers, he was surety for the two, and that surety B. could not compel contribution.

ACTION tried before *Justice, J.*, and a jury, at March Term, 1907, of DURHAM, and appealed by the defendant J. W. Smith.

On 16 July, 1906, Joab Burch and L. R. Burch executed a note, of which the following is a copy:

$1,000. DURHAM, N. C., 16 July, 1906.

One hundred and twenty days after date we promise to pay to the order of The Citizens National Bank of Durham, at Durham, N. C., one thousand and 00-100 dollars. Negotiable and payable at The Citizens National Bank of Durham, at Durham, N. C., for value received, etc.

JOAB BURCH,
L. R. BURCH.

Across the back of this note is written the words "J. W. Smith, surety."

The court submitted these issues:

1. Are the defendants, Mollie F. Burch, administratrix of Joab Burch, L. R. Burch, and J. W. Smith, indebted to the plaintiff in the sum of $1,000 and interest, as alleged in the complaint? Answer: Yes.

2. Is the estate of Joab Burch insolvent? Answer: Yes.

3. Is L. R. Burch a surety on the note sued upon? Answer: Yes.

4. Did defendant J. W. Smith know, at the time he indorsed the note, that L. R. Burch was surety? Answer: No.

From the judgment rendered, declaring him a cosurety with L. R. Burch, the defendant Smith appealed.

Winston & Bryant for plaintiff.
Giles & Sykes for defendant.

BROWN, J. According to the facts as found by the jury at the time the note was presented to appellant for indorsement as surety, it contained the names of Joab Burch and L. R. Burch as principals, and Smith indorsed the same on its back as surety for them as principals,

having no knowledge that Joab Burch and L. R. Burch were other than principals, or that the defendant L. R. Burch bore any relation to the note other than as a coprincipal with Joab Burch. The form (318) of the note justified Smith in supposing that the two Burches were borrowing the money jointly, and were jointly liable for it as coprincipals, and that he was contracting as surety for the two, and not for the one. One who signs in form and appearance as a principal and maker of a note is bound as such to all persons who subsequently deal with the paper without knowledge of his true relationship to it. It is entirely competent for one person to become surety for other sureties, or to limit the extent of his liability with respect to other sureties. The test of liability is the intent of the parties as indicated by their agreement. There is no finding as to any agreement here which warranted the court in holding Smith other than as he is bound by the face of the instrument he signed, and, according to that, he is bound as surety for the two apparent principals.

A person dealing with a negotiable instrument has a right to act upon it as it appears upon the face of it. Daniel Negotiable Instruments, 311. This is also the doctrine laid down in *Cragin v. Lovell,* 109 U. S., 194. In order to constitute the appellant Smith a cosurety with the defendant L. R. Burch, there must have been a mutual understanding between the parties to that effect. *Smith v. Smith,* 16 N. C., 173; *Cowan v. Baird,* 77 N. C., 201; *Bulkeley v. House,* 62 Conn., 459; *Thompson v. Sanders,* 20 N. C., 541; *Dawson v. Petway,* 20 N. C., 531; *Sayles v. Sims,* 73 N. Y., 552; *Sherman v. Black,* 49 Vt., 198; 1 Brandt on Suretyship (2 Ed.), sec. 260. According to these authorities, it is plain that his Honor erred in holding the appellant as a cosurety with L. R. Burch.

The cause is remanded, with directions to modify the judgment rendered in accordance with this opinion.

The costs of this Court will be taxed against L. R. Burch, the appellee.

Modified.

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(319)

SINGER MANUFACTURING COMPANY v. CITY NATIONAL BANK ET AL.

(Filed 30 October, 1907.)

Purchaser for Value—Consideration—Immorality or Illegality.

The jury having found that defendant Fuller was a purchaser in good faith, for a valuable consideration, without notice, of a cashier's check, procured from defendant bank by plaintiff's agent in depositing plaintiff's money to his individual credit, the verdict will not be disturbed when the evidence of the consideration supports the finding, and when there is insufficient evidence of immorality or illegality.

GODWIN *v.* BANK.

APPEAL from *Ward, J.*, at February Term, 1907, of GUILFORD.

This is an action brought by the plaintiff to recover a sum of money belonging to plaintiff and deposited by its agent, Summers, to his individual credit, in defendant bank. Summers procured a cashier's check, drawn by the cashier of defendant bank in Summers' favor, and indorsed it to the defendant Fuller. Plaintiff enjoined the payment of the check to Fuller. Upon the pleadings *Ward, J.*, submitted the following issue to the jury: "Was the defendant Fuller a purchaser of the check in good faith, for valuable consideration and without notice of any infirmity in the instrument or defect in the title of Summers? Answer: Yes."

King & Kimball and Thomas S. Beall for plaintiff.

John A. Barringer, W. P. Bynum, Jr., and T. H. Calvert for defendants.

PER CURIAM: A careful examination of the record in this case has led us to conclude that no formal opinion is necessary. The issue involved purely a question of fact, and that has been decided against the plaintiff under a clear charge, free from error. The contention so earnestly pressed, that the testimony of the defendant Fuller shows that a small part of the consideration for the assignment to him of the cashier's check was an immoral and illegal consideration, (320) is not supported by the record. The fact that Fuller admitted that he received $150 from Summers for the purpose of making a trip to Georgia and securing witnesses for Summers in his pending divorce suit against his wife does not justify the conclusion, in the absence of other evidence, that Fuller was to secure false and suborned testimony or to do any other act for Summers that was corrupt and against the policy of the law.

The judgment of the Superior Court is

Affirmed.

GODWIN ET AL. V. MURCHISON NATIONAL BANK ET AL.

(Filed 30 October, 1907.)

1. Bankruptcy—Title of Trustee—Claim Against Bankrupt.

A trustee in bankruptcy is, in general, vested with no better title to the property than the bankrupt had; so that, in the absence of some express provision of the Bankruptcy Act, a claim against certain of the bankrupt's assets, valid as against him, will be upheld against the trustee, unless in contravention of public policy or some established legal principle.

2. Same—Assignments by Bankrupt—Validity—What Law Governs.

Unless the Bankruptcy Act otherwise provides, the validity of an assignment of a bankrupt's property must be determined according to the principles of local law.

3. Assignment—Validity—Possession of Res.

Where a person having a contract by which he was to receive bonds in payment for real estate contracted to assign the bonds to a bank in consideration for present loan, it was no objection to such contract that at the time it was made he had not possession or control of the bonds.

4. Bankruptcy—Equitable Assignment—Executed Contract.

A debtor, having sold certain real estate in exchange for bonds which he was to receive on the purchaser's acceptance of the title, more than four months before he became a bankrupt, agreed verbally to transfer the bonds to defendant bank if the bank would then loan him $10,000, which was done. The bonds not having been delivered promptly, a written contract was made within the four-months period, assigning to the bank all the bankrupt's right to the price of the land, and shortly after this the bonds were actually delivered to and assigned in writing to the bank: *Held*, that the words "agreed to transfer," in the oral contract, imported an agreement to "deliver," so that that agreement constituted an equitable assignment of the bonds, to be delivered on their receipt by the bankrupt.

5. Words and Phrases—"Transfer."

Under the Bankruptcy Act, 1 July, 1898, ch. 541, p. 1, 30 Stat., 544 (U. S. Comp. St. 1901, 3418), providing that the term "transfer" shall include a sale and every other mode of disposing of or parting with property, or the possession thereof, as a payment, pledge, mortgage, gift, or security, an agreement to "transfer" property may be construed as an agreement to "deliver."

6. Same—Assignment—Validity.

A bankrupt, more than four months before bankruptcy, contracted to deliver certain bonds to defendant bank, which he was to receive under a land contract in consideration of the bank's agreement to make a present loan to him. The bankrupt, within the four-months period, assigned in writing the proceeds of the real estate, and later, on receiving the bonds, assigned and delivered them to the bank: *Held*, that on such delivery the bank's title vested as of the date of the original equitable assignment, and was, therefore, valid under the rule that a contract, to create a positive lien, attaches in equity as soon as the assignor acquires title, both as against him and all persons claiming under him, either voluntary or with notice or in bankruptcy.

7. Same—Bona Fide Purchaser—Notice—Registration.

Where a bankrupt made a present equitable assignment, for a cash consideration, of certain bonds which he was to receive in payment for land, the bonds to be delivered or transferred to defendant when they came into the bankrupt's possession, and to be then appropriated to the bankrupt's indebtedness as far as they would pay the same, the sale of the land having been completed according to the contract, the bank's right to the bonds as the proceeds of the sale was not affected by the registration laws concerning sales of realty.

GODWIN *v.* BANK.

ACTION tried before *Jones, J.*, and a jury, at February Term, 1907, of HARNETT.

The action was brought by the trustees in the matter of E. F. (322) Young, bankrupt, to recover the interest of the bankrupt's estate in $4,500 of Norfolk city bonds, said interest amounting to $3,150, as shown by the verdict, and under claim and allegation on the part of the trustees that the said bonds were transferred to defendant bank under circumstances which made such transfer a voidable preference under the Bankruptcy Act, by reason of same having been made within four months prior to the filing of petition in bankruptcy, etc. Defendant bank, admitting that a written assignment of the bonds and actual delivery of same had been made within the four months, as alleged, claimed that such action was not a voidable preference, by reason of the fact that same was in pursuance .of a valid and binding agreement entered into prior to the four months, and which gave to defendant an unimpeachable title to the property. It was shown that proceedings of involuntary bankruptcy (*in re E. F. Young*), followed by adjudication, were instituted on 4 June, 1904; that the written assignment was made on 9 February, 1904, delivery of bonds being made shortly thereafter, and within the four months, as stated, and the alleged agreement was entered into on 9 December, 1903, prior to four months. At that time the bonds in question had not been obtained or received by the bankrupt, but were to be turned over to him in payment of some real estate which the bankrupt had theretofore sold to Charles W. Priddy (Incorporated), of Norfolk, Va.

On the trial, issues were submitted, and responded to by the jury, and judgment had thereon, as follows:

"1. In what amount, if any, was E. F. Young indebted to defendant bank, 9 February, 1904, by reason of indorsement or otherwise? Answer: $34,000.

"2. Did E. F. Young, within the period of four months immediately preceding 4 June, 1904, transfer, by writing, to the defendant bank the $4,500 Norfolk city bonds, and if so, what was the (323) cash value of same? Answer: Yes; $4,400.

"3. Was the said E. F. Young insolvent on 9 February, 1904, and did he so continue up to and including 4 June, 1904? Answer: Yes.

"4. Did the defendant or its agents, at time of the transfer of the $4,500 Norfolk city bonds, as alleged in the complaint, have reasonable cause to believe that such transfer was intended as a preference to the defendant bank by said E. F. Young? Answer: Yes.

"5. Did the defendant E. F. Young, in December, 1903, agree verbally with the defendant to transfer to said bank the Norfolk city bonds of $4,500 if said defendant bank would loan the said E. F. Young for

Merchants and Farmers Bank $10,000 and the South Dunn Manufacturing Company $10,000, and did the defendant bank make said loan as agreed? Answer: Yes.

"6. Did E. F. Young, in furtherance of the agreement of December, 1903, execute the paper-writing of 9 February, 1904? Answer: Yes.

"7. Did the transfer of the $4,500 Norfolk city bonds to defendant bank enable the defendant bank to obtain a greater percentage of its debt against E. F. Young than other creditors in the same class as the bank obtained? Answer: Yes.

"8. What interest did E. F. Young have in the $4,400 received by the defendant bank from a sale of the Norfolk city bonds? Answer: $3,150, with interest from 1 March, 1904, at 6 per cent.

"It having been admitted of record that petition in bankruptcy was duly filed against said E. F. Young on 4 June, 1904, and that subsequently he was duly adjudged a bankrupt, and that the plaintiffs are the duly chosen, qualified, and now acting trustees of said Young in bankruptcy, and that the defendant is a duly chartered, organized, and existing banking institution under the laws of the United States,

(324) now, upon motion of the counsel for plaintiffs, it is considered, ordered, and adjudged that the plaintiffs, in this action, R. L. Godwin, J. D. Barnes, and J. M. Hodges, trustees, do recover of the defendant in this action, the Murchison National Bank, the sum of $3,150 and interest on that sum from 1 March, 1904, and the cost of this action, to be taxed by the clerk of this court. E. B. JONES,

"Judge Presiding."

Thereupon defendant bank excepted and appealed.

Godwin & Davis, D. H. McLean, and R. L. Godwin for plaintiffs.
E. K. Bryan and Shepherd & Shepherd for defendants.

HOKE, J., after stating the case: The verdict of the jury on the fifth and sixth issues was as follows:

"5. Did the defendant E. F. Young, in December, 1903, agree verbally with the defendant bank to transfer to said bank the Norfolk city bonds of $4,500 if said defendant bank would loan the said E. F. Young for Merchants and Farmers Bank $10,000 and the South Dunn Manufacturing Company $10,000, and did the defendant bank make said loans as agreed? Answer: Yes.

"6. Did E. F. Young, in furtherance of the agreement of December, 1903, execute the paper-writing of 9 February, 1904? Answer: Yes."

And the paper-writing referred to and established by the sixth issue, and the response thereto, contains the following recital as to the agreement between the defendant bank and E. F. Young, of date December,

1903, and more than four months prior to the institution of the proceedings in bankruptcy: "Witnesseth, that whereas the Merchants and Farmers Bank of Dunn, N. C., is indebted to the Murchison National Bank of Wilmington, N. C., in a large sum of money which was loaned to the Merchants and Farmers Bank and the South Dunn Manufacturing Company at the request of the party of the first part; and whereas, at the time of said loans, the party of the first part (325) agreed with the said Murchison National Bank that if it would make said loans that the party of the first part had sold three brick stores in the town of Dunn, N. C., to one Charles W. Priddy (Incorporated), of Norfolk, Va., and that the deed of said stores was to be made when the abstracts of title for said stores had been approved by said Priddy (Incorporated), and the purchase money was paid, and it was agreed by the said parties hereto that if the said Murchison Bank would make said loans, the party of the first part would pay over the money derived from said sale, towit, the sum of $4,500, to the party of the second part, on account of the indebtedness then created to the said party of the second part; and whereas there has been more delay in consummating said sale than was anticipated, and the said party of the first part is desirous of carrying out said agreement: Now, therefore, in consideration of the premises, the said party of the first part doth hereby transfer and assign, sell and convey to the said party of the second part all his right, title, interest and estate in the three stores bargained to Priddy Company (*Limited*), and the purchase price thereof, when same is received on the consummation of the sale." There is no allegation of fraud in the transaction between these parties in December, nor that the same was had with any intent to evade the general policy or express provisions of the Bankruptcy Act. This being true, on the facts established by these two findings, the Court is of opinion that, for a present cash consideration then passing, a claim was created in favor of defendant to these bonds, the purchase price of the property referred to in the agreement, which attached as soon as they passed in consideration for the sale, good against the bankrupt himself, and enforcible in equity against the plaintiffs holding the estate as trustees under the bankruptcy proceedings, and there is nothing in the verdict on the other issues which destroys or impairs the force and effect of this position—the word "transfer," in the fourth issue, evidently hav- (326) ing the same significance as in the fifth.

It is accepted doctrine that, as a general proposition, the trustee in bankruptcy is vested with no better right or title to the property than the bankrupt had when the trustee's title accrued. And unless in contravention of some established principle of law or public policy, or some express provision of the Bankruptcy Act, a claim valid against the

bankrupt will be upheld against his trustee. *Mfg. Co. v. Cassell,* 201 U. S., 334-352; *Hewitt v. Berlin Machine Works,* 194 U. S., 296; *Smith v. Godwin, ante,* 242; Loveland on Bankruptcy (2 Ed.), 368. As said in this last citation (Loveland, *supra*): "The trustee takes the title of the bankrupt subject to all equities, liens, or encumbrances, whether created by operation of law or by the act of the bankrupt, which existed against the property of the bankrupt, except in cases of levies, judgments, attachments, or other judicial liens created against the property within four months preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared to be fraudulent and void." It is also established that, unless the Bankruptcy Act otherwise provides, the validity of an assignment or claim is to be determined in accordance with the principles of local law. *Thompson v. Fairbanks,* 196 U. S., 516; *Humphrey v. Tatman,* 198 U. S., 91.

And it will be observed that, under our law, no valid objection can be urged against the defendant's claim by reason of the fact that the bonds, the subject-matter of the contract, and which represented the purchase price of the property, were not in the possession or control of the bankrupt when the agreement of December was entered into. On the contrary, unless inhibited by some principle of public policy, our decisions expressly uphold and enforce such contracts, both as to tangible property and choses in action, to vested as well as contingent interests. *Brown v. Dail,* 117 N. C., 41; *Williams v. Chapman,*
(327) 118 N. C., 943; *Chemical Co. v. McNair,* 139 N. C., 326; *Nelson v. Edwards,* 40 Barbour, 283.

Applying these principles, we are of the opinion that the force and effect of the verdict is to establish, for a cash consideration, towit, the loan, an equitable assignment of these bonds, the purchase price of the property in December, 1903, the date when the contract was made, to be consummated by delivery of the bonds whenever and as soon as they came into the control of E. F. Young pursuant to the sale which was then being conducted. While the language of the issue, "verbally agreed to transfer," might be construed as constituting an executory agreement, when taken in connection with the pleadings and evidence, and especially in reference to the more explicit ascertainment of the terms of the December trade, made a part of the verdict on the sixth issue, we think that a present equitable assignment was thereby created, and the words "agree to transfer" clearly referred to an agreement to "deliver" the bonds whenever the same came to hand. This meaning of the term "transfer" is recognized in the definition of the word given by the Bankruptcy Act, 30 U. S. Stat. at Large, ch. 541, sec. 1, has been applied in various decisions rendered in administration of the law (8

Words and Phrases, 7066), and is so clearly the significance contemplated by the parties in the transaction, as established by the verdict, that we have no hesitation in holding, as stated, that the contract amounted to a present equitable assignment in December, more than four months prior to the institution of the bankruptcy proceedings, and the right of defendants to the bankrupt's interest in these bonds is supported by well-established principles of equity and by the great weight of authority. *Walker v. Brown,* 165 U. S., 655; *Hauseet v. Harrison,* 105 U. S., 401; *Union Trust Co. v. Bulkely,* 150 Fed., 510; *In re J. F. Grandy,* 146 Fed., 318; *Wilder v. Watts,* 138 Fed., 436; *Sabin v. Camp,* 98 Fed., 974; *Smith v. Godwin, supra; Brem v. Coving-* (328) *ton,* 104 N. C., 589; *Lawson v. Pringle,* 98 N. C., 450. See, also, a very full and learned note by the editor to case of *Moody v. Wright,* reported in 46 Am. Dec., 706-717 (the case being from 13 Met., 17). In this last reference, on page 717, it is said: "The grounds of these decisions are that the mortgage, though inoperative as a conveyance, is operative as an executory contract, which attaches to the property when acquired, and, in equity, transfers the beneficial interest to the mortgagee, the mortgagor being held as trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done: per *Durfee, C. J.,* in *Williams v. Briggs,* 11 R. I., 478. *Mitchell v. Winslow,* 2 Story, 630, is a leading American case upon this subject. A mortgage was given in that case by two manufacturers of cutlery upon all the tools and machinery in their manufactory and upon all the tools and machinery which they might purchase within four years, and all stock that they might manufacture during the same time. It was held to create a good, equitable lien, and was protected as such under the Bankruptcy Act. At page 644, *Story, J.,* said: 'It seems to me a clear result of all the authorities that, wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then *esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntary or with notice, or in bankruptcy.' " And in *Walker v. Brown* the general doctrine is stated thus, citing with approval 3 Pomeroy Equity, 1235: "Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identi- (329) fied, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is en-

forcible against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers, or encumbrancers with notice."

By the contract of December, 1903, when these bonds came into his possession and control, E. F. Young had no right to deal with them, except to deliver them to the defendant bank, as required by its terms. On the equitable principle which considers that done which the parties are under a binding agreement to do, said Young had no right to make any other disposition of this specific property. This is the principal test by which an equitable assignment may be distinguished from an executory agreement to assign, and a case is presented where the claimant has a right to the specific property against the bankrupt himself, and where, in the absence of some interfering State regulation or of some adverse provision of the Bankruptcy Law itself, the defendants' right is enforcible against the trustee. It is this creation of a present interest in the bonds themselves, amounting to an equitable assignment thereof, which differentiates the present case from many of those cited and relied upon by the plaintiff trustees. Some of these were cases where, from the very general terms of the agreement, no right in any specific property was acquired at all. In others, from the nature of the interest, or by reason of some interfering principle of positive law or public policy, no right in any specific property was created, except within the period when it was avoided by express provisions of the Bankruptcy Law itself. Thus, in *Sheridan's case,* 98 Fed., 406, there was an executory agreement to pledge property made prior to the four months, and the property was actually delivered within such period.

By the very nature of a pledge, no interest passes until delivery, (330) and this was on that ground avoided as a prohibited preference.

In several other decisions an executory agreement to give a chattel mortgage made prior to the four months was not allowed to validate the mortgages executed or registered within the prohibited period. *In re Mfg. Co.,* 152 Fed., 123; *Loeser v. Bank,* 148 Fed., 975; *In re Dismal Swamp Co.,* 135 Fed., 415. These and other like cases, as we apprehend them, were decided either because of some State law which avoided such mortgages against creditors, except from registration, or by reason of the amendment to the Bankruptcy Act made in February, 1903. 32 Statutes at Large (Part I), ch. 487, to the effect that, "Where a preference consists in a transfer, such period of four months shall not expire until four months after the recording and registering of the transfer, if by law such recording and registering is required." And this requirement of registration distinguishes a decision of our own Court. *Lance v. Tainter,* 137 N. C., 249.

Without going into a careful analysis of these decisions, which could s rve no good purpose and would unduly lengthen our opinion, we deem it sufficient to say that they do not apply here. This case presents no executory agreement to make a pledge of personal property as security for a past indebtedness, nor is it an executory agreement to give a chattel mortgage or other lien which requires registration, either by State law or the Bankruptcy Act and its amendments. But, as we have endeavored to show, it is a present equitable assignment for a cash consideration of the bonds, to be delivered or "transferred" to the defendant bank whenever they come into possession of the bankrupt, and to be then appropriated to the indebtedness as far as they would pay the same.

Since the opinion was prepared, it has been earnestly contended that, inasmuch as the contract under which the defendants claim the bonds applies also in terms to realty, the case of *Lance v. Tainter, supra,* is direct authority against the defendants' claim. This position (331) might avail the plaintiffs if the sale of the land had not been carried out and the defendants were seeking to establish their claim against the land itself. The sale, however, was completed according to the contract with the Norfolk company, and this litigation is over the proceeds. Our registration laws concerning realty have, therefore, no application to the cause, on the principle established in the decisions of *Bourne v. Sherrill,* 143 N. C., 381, and the authorities therein cited.

We are of opinion, therefore, and so hold, that there was error in the judgment as rendered, and that, as a conclusion of law on the verdict as it now stands, there should be judgment entered that defendants go without day. Let this be certified and judgment entered accordingly.

Reversed.

BROWN, J., did not sit.

Cited: Garrison v. Vermont Mills, 154 N. C., 8; *Carriage Co. v. Dowd,* 155 N. C., 316; *Wooten v. Taylor,* 159 N. C., 611; *Corporation Commission v. Bank,* 164 N. C., 207.

R. Q. BROWN AND WIFE v. R. B. SOUTHERLAND AND WIFE.

(Filed 30 October, 1907.)

1. Deeds and Conveyances—Mistake of Draftsman—Construction—"All Our Interests"—Warranty, Breach of.

A conveyance of "all interest in the land of H. C. Smith, deceased, as divided by committee," conveys only such interest as the grantors had

therein, as so divided, and a suit for breach of covenant or warranty therein contained as to other lands of said Smith embraced by the draftsman by mistake, described by metes and bounds, concerning which the grantors neither had nor claimed title, will not lie.

2. Same—Instructions—Interpretation.

Plaintiffs are not entitled to have the question submitted to the jury as to fraud in a deed, without having requested such by proper instructions, and when there is no error by the court below in interpreting the deed as a question of law, in the light of admissions.

(332) ACTION tried before *Jones, J.*, and a jury, at January Term, 1907, of WAYNE.

From judgment for defendants the plaintiffs appealed.

The pleadings and admissions disclose this case: Spiars Smith died seized of a tract of land which descended to his five children, one of whom is the *feme* defendant, and another H. C. Smith. The land was partitioned and a lot of 70 acres, described by metes and bounds, allotted to *feme* defendant. The share of H. C. Smith was allotted in two tracts—one of 47 acres lying south of the *feme* defendant's tract, and one of 15½ acres lying north thereof. Thereafter, said H. C. Smith died intestate, whereupon his share was partitioned among his surviving brothers and sisters, 20 acres of the 47-acre lot being allotted to *feme* defendant. On 6 July, 1900, *feme* defendant and her husband contracted to sell the share allotted her in the Spiars Smith and in the H. C. Smith land to the plaintiffs, and, pursuant thereto, gave to Mr. Hill the plat showing the first partition by which to draw the deed. He described the 70-acre tract by metes and bounds, and proceeded to describe the interest in the H. C. Smith lands as follows: "Second Tract: All interest in the land of H. C. Smith, deceased, as divided by committee, first on the north side of the first tract, said to contain about 5½ acres. Third Tract: All interest in the land of H. C. Smith, deceased, south of the first tract of 70 acres and said to contain about 20 acres, more or less, or being the interest of section No. 1, as platted by John M. Caldwell in November, 1887."

Mr. Hill did not have before him the plat showing partition of H. C. Smith land. There is no tract of 5½ acres. This action is brought to recover damages for breach of the covenant of seizin and warranty contained in the deed from defendants to plaintiffs. It is conceded that plaintiffs got, under the description in the deed, all of the interest of defendants in the Spiars Smith and the H. C. Smith land. His Honor, upon the pleadings and admissions, was of the opinion that the deed, construed in connection with the admitted facts and the

(333) evidence of plaintiffs, did not purport to convey anything but the

interest of the defendants in the Spiars Smith and H. C. Smith land. He rendered judgment for defendants. Plaintiffs excepted and appealed.

W. C. Munroe for plaintiffs.
F. R. Cooper for defendants.

CONNOR, J., after stating the facts: The case seems to have been tried upon the pleadings and admissions. Neither party tendered any issues, and, of course, no prayers for instructions. It is manifest that the defendants only intended to convey, and plaintiffs to buy, the interest of the defendants in the Smith land. It is equally clear how the draftsman fell into the error of supposing, in the absence of any plat showing partition of the H. C. Smith land, that such interest extended to both the 47-acre and the 15½-acre tracts; whereas the defendants had no interest in the last-named tract. It is equally clear that the controlling thought of the grantors was the conveyance of their interest in the H. C. Smith land "as divided by the committee." If there had been no division, the deed would have conveyed only the undivided interest, and not any specified number of acres; hence, the mention of the number of acres only indicated the extent of the interest. If the number of acres is controlling, the plaintiffs got more than they were entitled to in the 47-acre tract. If this was the basis upon which the contract price was fixed, plaintiffs have 90 acres, whereas they would have had but 86 acres. If it was "an undivided interest" which they were buying, they got "the interest" of the grantors in the land of H. C. Smith as divided by the committee, which is all that the deed purported to convey. Hence they show no breach of the warranty.

We think that his Honor's view was correct, and that, reading the entire description in the light of the admissions, the deed conveys all that the parties intended to grant or plaintiffs were entitled to (334) receive. Plaintiffs suggest that they were entitled to have the question whether there was a mistake in the deed submitted to the jury. It does not appear that any request was made to his Honor to do so. We are of the opinion that his Honor correctly interpreted the deed. The judgment should be

Affirmed.

CHARLES D. NELSON v. PRISCILLA HUNTER, ADMINISTRATRIX, ET AL.

(Filed 30 October, 1907.)

1. Rehearing—Second Rehearing, When Permissible—Practice.

A second rehearing in the Supreme Court is only permissible when, on the first rehearing, the Court has reversed or materially changed the original opinion that was sought to be reheard.

2. Same—Motion to Correct Opinion.

It appearing to the Supreme Court that what purported to be a petition for rehearing was in effect a motion to correct and modify its former judgment, the Court ordered that time be given to both parties for oral argument and filing printed briefs at a specified time, with notice of the order.

CLARK, C. J. This is, in form, an application for a rehearing, but as such it cannot be entertained, as there was a rehearing at last term, which reaffirmed the opinion at the previous term. A second rehearing is permissible only when on the first rehearing we have reversed or materially changed the opinion that was sought to be reheard, as in *Elmore v. R. R.*, 132 N. C., 865.

But on examining the petition we find that, notwithstanding its prayer, it does not call in question the rulings of law in the opinion, but, taking them as conclusive, asks that the judgment based thereon be modified. It is ordered, therefore, that it be treated as a motion to correct and modify the judgment, and set down to be heard at the morning (335) hour Tuesday, 1 October, at the beginning of the call of the Sixth District, to which it belongs; that notice of this order be given to both parties, who will file printed briefs, and that ten minutes will be allowed each side for oral argument.

Cited: Hunter v. Nelson, 151 N. C., 184.

CHARLES D. NELSON v. PRISCILLA HUNTER, ADMINISTRATRIX, ET AL.

(Filed 30 October, 1907.)

Appeal and Error—Motion to Correct Opinion—Res Judicata.

When matters on appeal from the Superior Court have been passed upon by the Supreme Court, this Court, upon motion to reëxamine the entire record and modify the decree, has no power to amend or modify the final decree after its opinion has been certified down.

MOTION in this cause heard in the Supreme Court.

W. J. Peele for defendants.
No appearance made in opposition to the motion.

BROWN, J. The defendants move the Court to reëxamine the record in the above-entitled action and determine if they are not entitled to share with the plaintiff in the distribution of their intestate's estate. This cause first came before this Court at Spring Term, 1906, upon appeal from the judgment of the Superior Court. The entire record was reviewed, all the exceptions of defendants were passed upon, and the judgment of the lower court affirmed. *Nelson v. Hunter,* 140 N. C., 599. At the succeeding term, in apt time, the defendants filed a petition to rehear, and, the petition having been favorably acted upon, according to our rules, the appeal was again heard; and after due consideration the original judgment was again affirmed, in an opinion filed 26 February, 1907, *S. c.,* 144 N. C., 763.

In the original opinion it is said: "The plaintiff claims the (336) property as the only legitimate child of Jackie Nelson. The defendants claim to share with plaintiff as the illegitimate children of Jackie."

It would seem, from reading the original record in this case, that the question at issue was the right of the plaintiff to the entire estate of Jackie Nelson in the hands of the administratrix, to the exclusion of the defendants. The judgment of the Superior Court awarded it to plaintiff in the following language: "It is therefore ordered and adjudged that the said Charles D. Nelson is the only legitimate child of Jackie Nelson, and as such is entitled to the entire estate of his mother, Jackie Nelson, after the payment of the debts thereof and the costs of administration." This judgment, after due consideration of the several exceptions presented in the record, has been twice affirmed by this Court.

"It is, upon the hearing of this motion for the first time, contended" (quoting from the brief of the defendant) "that, in the case of real estate, the bastard can never inherit from the mother if she have legitimate issue, for the statute says: 'When there shall be no legitimate issue,' etc. But these words do not appear in The Code, sec. 1486 (Revisal, sec. 136), and it would, therefore, seem that the legitimate and illegitimate children would all share alike in the distribution of the personal estate of the mother. I do not find that this has been passed upon by the Court; therefore, it must be taken *cum grano salis.* Mordecai's Law Lectures, pp. 1187, 1188."

We regret that we are debarred from considering this interesting question, so ably presented in the argument of Mr. Peele; but the case passed out of this Court at the last term, when the petition to rehear was

dismissed and the judgment of the Superior Court affirmed. We have now no jurisdiction over it, and no power to change or modify the final judgment of that court. This Court has said that "the Court has no power to amend or modify the final decree, entered at last term, upon an application like this. After final judgment, the Court cannot (337) disturb it, unless upon an application to rehear, or for fraud, accident, or mistake alleged in an independent action." Again: "The practical effect of granting the prayer of the petitioners would be to give them the benefit of a rehearing upon a summary application to change the final decree at a term of the Court subsequent to that at which it was granted. We are not aware of any rule of procedure or practice that warrants such action." *Ruffin v. Harrison,* 91 N. C., 398.

To same effect are *Cook v. Moore,* 100 N. C., 294; *Moore v. Hinnant,* 90 N. C., 163.

Motion denied.

MAGGIE STREATOR ET AL. V. W. B. STREATOR.

(Filed 30 October, 1907.)

1. **Pleadings—Personal Knowledge of Defendant—Answer Insufficient—Judgment.**

When matters are alleged in the complaint to be in the personal knowledge of the defendant, an averment in the answer thereto that he "has no knowledge or information sufficient to form a belief as to the truthfulness thereof, and, therefore, denies the same," is insufficient, and judgment can be rendered for want of an answer if such allegation goes to the cause of action.

2. **Same—Amendment.**

The refusal of the trial judge to permit an amendment to a defective answer is not reviewable upon appeal.

3. **Same—Issues.**

Issues not raised by the pleadings are properly refused.

4. **Same—Additional Issues—Discretion of Court.**

Additional issues, proper for the full elucidation of the case, may be submitted in the discretion of the court, and, when framed late and counsel given full opportunity to discuss them, there is no reversible error.

ACTION tried before *Peebles, J.,* and a jury, at May Term, 1907, of ANSON.

(338) From judgment for plaintiffs defendant excepted and appealed.

H. H. McLendon for plaintiffs.
No counsel contra.

CLARK, C. J. The complaint alleges that the defendant procured the lands to be conveyed to himself in pursuance of a parol agreement that he would hold the same in trust for the benefit of his mother, himself and the other heirs at law of his father, and that the deed was executed to him upon that parol trust and condition. To this averment the answer sets up that the defendant "has no knowledge or information sufficient to form a belief as to the truthfulness thereof; therefore, denies the same." This is an insufficient denial of matters alleged to be in the personal knowledge of the defendant, and the court properly rendered judgment on that allegation for want of a denial. *Machine Co. v. Mfg. Co.*, 91 N. C., 74; *Avery v. Stewart*, 134 N. C., 299. The point is so fully discussed and clearly stated by *Walker, J.*, in *Avery v. Stewart*, 136 N. C., 432, as to render repetition here entirely unnecessary. The answer being insufficient, and, in law and in fact, no answer on this point, judgment on this point for want of an answer was the right of the plaintiff (*Phifer v. Ins. Co.*, 123 N. C., 410; *Carroll v. McMillan*, 133 N. C., 140), unless the court, in its discretion, had allowed an amendment. Its refusal to do so is not reviewable. *Avery v. Stewart*, 134 N. C., 299. The learned judge in this case acted carefully and intelligently, and refused to allow an amendment only after full inquiry and investigation.

The issues tendered by the defendant were not raised by the pleadings, and were properly refused. The exceptions for exclusion of evidence are without merit and need no discussion. The additional issues were proper for the full elucidation of the case. Their submission after the argument to the jury on the other issues was in the discretion of the court. Though made late, counsel were given full (339) opportunity to discuss them before the jury, and we can see no prejudice to defendant. If his counsel declined to discuss them, it was doubtless because they had already discussed the evidence fully in all its aspects.

The exception to the charge of the court "for errors therein contained," without specifying the errors, is a "broadside exception," and cannot be considered. *Pierce v. R. R.*, 124 N. C., 99, and cases there cited.

No error.

GREENLEAF-JOHNSON LUMBER COMPANY v. W. P. LEONARD AND WIFE.

(Filed 6 November, 1907.)

1. **Deeds and Conveyances—Contracts to Convey Lands—Married Woman—Privy Examination—Signing Under Mistake—Probate with Knowledge.**

When it is admitted that a married woman, at the time of signing a contract to convey land, believed it conveyed the timber thereon only, but had been correctly informed thereof before her proper acknowledgment and privy examination was taken before a justice of the peace, such acknowledgment would relate back to the signing of the deed, and would be as effectual as if she had known at the time of the signing that it was a contract to convey the land.

2. **Same—Contracts to Convey—Evidence—Signing Under Mistake—Proof—Burden of Proof.**

When the judicial act of the justice of the peace in taking the acknowledgment, or privy examination, of a married woman to a contract to convey land was being inquired into, and the *feme* defendant, the married woman, had been permitted to testify that, at the time of her signing, she thought it related to the timber only, it was competent in contradiction of this testimony to show by the justice that if she had made any such statement to him subsequently, or at the time he took her acknowledgment, he would not have probated the instrument.

3. **Same—Married Woman—Examination—Certificate—Fraud.**

When the certificate of examination of a married woman to a contract to convey is made by a justice of the peace in due form, and supported by evidence, it can only be attacked by clear, strong, cogent, and convincing proof. It is error for the court below to charge the jury "the burden of proof is upon the defendant to show her contentions by the greater weight of the evidence."

4. **Same—Married Woman—Probate—Certificate—Fraud—Evidence—Proof.**

The certificate of the proper officer who took the privy examination of a married woman shuts off all inquiry as to fraud, duress, or undue influence in signing a deed or conveyance, unless participated in by the grantee or his agent, and also precludes all inquiry into fraud or falsehood in the *factum* of the privy examination, unless it appears by clear, cogent, and convincing proof that no examination was had, or that her voluntary consent was refused, and so expressed to the officer at the time.

CLARK, C. J., and HOKE, J., concurring; WALKER and CONNOR, JJ., dissenting.

ACTION for specific performance of a contract and agreement for the sale and purchase of a tract of land in Franklin County, fully described in said contract, against defendants, W. P. Leonard and wife, M. F. Leonard, heard before *Cooke, J.*, and a jury, at October Term, 1906, of FRANKLIN.

The pleadings are set out in the record, and in its complaint plaintiff alleged the execution of the contract for conveyance of the land,

tender of deed within the time prescribed by the contract, drawn in accordance with its terms, and tender also of the contract price. The *feme* defendant alone answered, and admitted all the allegations of the complaint except the binding execution of the contract, alleging that she signed the contract believing it to be for sale of timber instead of the fee to the land, and denying that she acknowledged its execution, as required by law. Plaintiff, tendering the deed and purchase money into court, renewed its demand for the specific performance of the contract.

From judgment denying the prayer for specific performance the plaintiff appealed.

W. H. Ruffin and F. S. Spruill for plaintiff. (341)
W. M. Person and W. H. Yarborough, Jr., for defendants.

BROWN, J. We think there should be a new trial of this case.

1. The plaintiff, in apt time, handed up the following prayer for instruction, viz.: "That although the *feme* defendant, M. F. Leonard, did, at the time she signed the contract to convey, believe and suppose that it was only a contract to convey the standing timber, yet, as she, after having ascertained that it was a contract to convey the land, subsequently acknowledged to the justice of the peace, separate and apart from her husband, that she signed the same freely and voluntarily, without fear or compulsion of her husband or any other person, and that she still voluntarily assents thereto, such acknowledgment would relate back to the signing of the contract, and would be as effectual against her as if she had known at the time of the signing that it was a contract to convey the land that she was signing; and if the jury should so find, they will answer the first issue 'No.'"

We think it was prejudicial error in the court to refuse to give this instruction. It deprived the plaintiff of its strongest position before the jury. It admitted that Mrs. Leonard signed the deed a week before the justice of the peace came to her house to take her privy examination. She testifies herself that when she signed the deed she believed it to be a conveyance of the timber only, but that she learned from her husband that it was a deed for the land on the evening of the same day on which she signed it. She admits she knew its true purport a week before the official called to take her examination.

Stokes, the justice of the peace, testifies as follows:

"Q. You are an acting justice of Franklin County, and were such acting justice on 25 September, 1905? A. Yes.

"Q. Examine that paper [exhibiting option], and see if it is your probate. Yes, sir.

(342) "Q. When you took that probate, what did you ask Mrs. Leonard? A. I asked her if she signed 'this paper of her own free will and accord, if she was forced by her husband or any other person, and—'

"Q. How did she answer? A. She said she did. I asked her if she was forced by her husband or any other person. She said: 'No.' I says: 'You still assent, then, freely and voluntarily, on your part? She says: 'Yes.' I asked her: 'Then you still say it is freely and voluntarily, of your own free will and accord?'

"By the court: Did you ask her if she still voluntarily assented? A. I asked her them three questions.

"Q. Did she still voluntarily assent to it? A. She answered them 'Yes.'

"Q. You asked her that, and she answered 'Yes'? A. Yes, sir.

"Q. At that time did she say anything about having misunderstood the purport of the paper? A. She said, while I was there—I don't know whether to me or to Captain Phil—says: 'When I signed that contract I thought it was for timber only, instead of for the land and timber.'

"Q. Was that after you asked her those questions? A. I think it was."

That testimony is plainly susceptible of the construction placed upon it by plaintiff, viz., that, although Mrs. Leonard did not know the option contract covered the land at the time she signed it, yet she was informed of it the same day by her husband, and that she acquiesced, and when the justice came the following week she duly acknowledged and voluntarily assented to the paper, although she stated, after her privy examination was taken, either to "Captain Phil" or the justice, that, had she known the true nature of the paper in the beginning, she would not have signed it. This is the justice's account of the matter, and it is entitled to great weight. The prayer for instruction was intended to present that phase of the testimony to the jury, and it is supported by Stokes'
(343) evidence. It seems to me erroneous to refuse it. The plaintiff had a right to have that phase of the evidence presented to the jury.

2. The following questions were asked witness Stokes, for the evident purpose of corroborating and strengthening his testimony:

"Q. Would you have probated that paper, as you have, had she said to you at the time that she signed it thinking it was a timber deed?" Defendant objected to the question.

"Q. Would you have probated the paper at the time if you had understood her to say at the time that she thought she was signing a timber deed?"

These questions were excluded by the court, and plaintiff excepted. We think this ruling was erroneous and prejudicial. The evidence was

competent, upon the ground that the judicial act of the officer was being inquired into, and the evidence tended strongly to support and corroborate his evidence and to affirm his good faith and integrity. The *feme* defendant having been permitted, over plaintiff's objection, to state that she told the officer at the time he took her acknowledgment that she thought she was signing a timber contract instead of a land contract, it was competent in contradiction of this testimony to show that, if she had made any such statement to him, the paper would not have been probated by him. We cannot imagine any statement that could be more strongly corroborative of the accuracy of the justice's recollection than the one which the excluded questions sought to bring out.

3. The court erred in charging the jury that "The burden of proof is upon the defendant in respect of the contentions, and the finding of either one of the issues in her favor must be by the greater weight of the testimony." The certificate of the justice is in due form, and is also supported by abundant evidence. It can only be attacked by clear, strong, cogent and convincing proof. *Benedict v. Jones,* 129 N. C., 472. The court should instruct the jury with the greatest care (344) in cases of this character, and explain to them that the solemn act of a judicial officer is not to be lightly set aside, and certainly not upon a mere preponderance of evidence, but only upon very clear, strong, and cogent proof, which should fully convince the minds of the jury. Unless in their opinion the proof comes fully up to this standard, we think the judges of the Superior Court should not hesitate to exercise their discretion and set aside a verdict which destroys the legal effect of such an important judicial act, and one which is so essential to the security of titles.

4. Much may be said in favor of the contention that, "if the private examination of the wife *shall have been certified* in the manner prescribed by law," by the purport of section 956 it is not open to attack at all, except upon the ground that "its execution was procured by fraud, duress, or other undue influence," to which the grantee must be shown to be a party. In other words, it is contended that, if the officer certifies in due form the wife's voluntary assent, when in fact she refused to give it, it is a fraud perpetrated against the wife and the purchaser both, but one to which the grantee or his agent must be proven to be a party, in order to invalidate the certificate. However that may be, we are of opinion that the certificate of the officer of privy examination of a married woman shuts off all inquiry as to fraud, duress, or undue influence in the treaty, unless participated in by the grantee or his agent. It also precludes all inquiry into fraud or falsehood in the *factum* of the privy examination itself, unless the *feme covert* can make it appear, by clear, cogent, and convincing proof, either that no such examination was had

at all or that on such examination she refused to give her voluntary assent to the execution of the instrument, and so expressed herself to the officer at the time he undertook to examine her. In the case at bar there is no such evidence offered in contradiction of the official certificate, the truthfulness of which has the additional support of the
(345) clear and unequivocal testimony of the officer who made it. On the contrary, the evidence shows that her entire objections and statements, made when Stokes was at her residence, related, not to the privy examination at all, nor to what she understood at that time, but to her act and mental attitude in respect to the execution of the instrument at the time she signed it, several days before, when Stokes, the justice, was not present.

For the reasons given, we think that there should be a new trial.

CLARK, C. J., concurs on the ground that the court erred in refusing plaintiff's prayer, and also in instructing the jury that the certificate of the privy examination could be set aside by "the preponderance of the evidence." In *Benedict v. Jones,* 129 N. C., 470, it is held that the presumption of the correctness of such certificate must be overcome "by clear, strong, and convincing evidence." It would shake the security of titles if it could be done on a mere preponderance, which a jury might, in their gallantry to the sex, give to the testimony of a young and pretty woman over the bare certificate of the justice, who may be dead, and when the holder of the property, at a third or fourth conveyance, perhaps, may not, and probably would not, be able to get corroborating testimony to support the certificate of the officer. Here the officer was living, but the rule as to the amount of evidence to overcome his certificate is the same.

In the adjoining States to this—Virginia, South Carolina, Tennessee, as well as in many others—privy examination has long ago been abolished as a useless formality, and the execution of a deed by a married woman is binding on her to the same extent, and can be set aside only upon the same proof, as if she were a single woman. It is hardly reasonable to suppose that a woman, upon becoming married, *ipso facto,* reverts into the helplessness of *non sui juris,* a class whose only other members are "infants, idiots, lunatics, and convicts." The sole
(346) ground for such suggestion is the assumed possibility of "undue control or duress" by the husband. But in this case there is no allegation nor proof of such undue influence by the husband, and it is noteworthy that if there had been it would not vitiate the deed unless it had been participated in by the grantee, or he had notice thereof before receipt of the deed. Revisal, sec. 956. This section makes the execution of a deed by a married woman, when there is a certificate of privy

examination, unimpeachable, except for "fraud, duress, or undue influence," participated in or known by the grantee, and absolutely unimpeachable in the hands of an innocent purchaser, though from a grantee who participated in or had knowledge of such fraud, duress, or undue influence.

Originally, the privy examination was by the court, and the certificate was equivalent to a judgment of fine and recovery, and hence unimpeachable, except as any other judgment would be. *Woodbourne v. Gorrell,* 66 N. C., 82. When the certificate was transferred to a single justice of the peace out of court, the courts were compelled to hold that the certificate was subject to inquiry and impeachment. *Jones v. Cohen,* 82 N. C., 75. This making titles insecure, the statute (Revisal, sec. 956) intervened and allowed impeachment of the deed of a married woman, notwithstanding the privy examination, but only when there is duress, fraud, or undue influence, participated in or known to the grantee, thus putting her deed now practically on the same footing as would be the case if the privy examination were abolished.

CONNOR, J., dissenting: The exception to his Honor's refusal to submit the issue tendered by plaintiff is based upon a misconception of defendant's answer. In the first answer filed the *feme* defendant alleged that she was induced to sign the contract by the false and fraudulent representations of plaintiff's agent. This answer, by permission of the court, was amended and the charge of fraud expressly withdrawn. This was, in the light of the evidence, proper. I do not find any (347) evidence of fraud on the part of any one connected with the transaction. I have no doubt that the contract was made by the husband to sell the land, and that it was fairly and correctly read, in the manner and under the circumstances testified to. It is entirely natural that the *feme* defendant did not hear it, or at least did not do so understandingly; that, knowing her husband was selling to a lumber company, she supposed the sale was of the timber only, and that "she did not feel deeply interested about it." It is but common justice to so interpret the conduct of all parties. His Honor correctly interpreted the answer, wherein the *feme* defendant says "that she never legally consented to the conveyance of the land itself, nor acknowledged the execution of said option, as required by law. She further insists that, in equity, she ought not and cannot be compelled to specifically perform a contract for the conveyance of land which she signed with the belief that it was a contract for the conveyance of timber on the land alone, which she repudiated as soon as informed that it did purport to concern the land, and which she never acknowledged, as required by the law governing the contracts and conveyances of married women."

Her defense is substantially a plea of *non est factum.* It may be conceded that if she were *sui juris* her failure to read the deed, or give proper attention to its contents when read in her presence, coupled with the fact that there was no mistake on the part of the plaintiff, would bar her of any equitable relief for rescission or reformation. If *sui juris,* signing and delivery, in the absence of fraud or mutual mistake, would have made a completed contract valid at law, and, for the reasons stated, beyond the power of a court of equity to rescind or reform. She contends, however, that before the last and essential act was done which bound her she gave notice of her dissent, and the reasons therefor. The question thus presented is, in an important respect, different from the cases cited in the opinion, wherein a married woman, with knowl-
(348) edge of the act and its legal effect upon her property rights, acknowledges the execution of the deed, free from the control or undue influence of her husband and all other persons, and thereafter seeks to avoid it by averring that her acknowledgment was not true; that, notwithstanding her solemn statement to the contrary, she was coerced, etc. In such cases she attacks the certificate for fraud alleged to have been practiced upon her by her husband or some other person. It was formerly held that she was estopped by the certificate, and could have relief only in equity. *Woodbourne v. Gorrell,* 66 N. C., 82. The statute in this respect has been changed, as pointed out in *Jones v. Cohen,* 82 N. C., 75, and other cases. The ease with which this charge could be made, the difficulty of successfully meeting it, and the frequency with which it was made endangered titles to land in the hands of *bona fide* grantees and purchasers for value, without notice of such alleged fraud. To meet the evil the General Assembly wisely enacted, at its session of 1889, a statute (now section 956 of the Revisal) protecting innocent grantees and purchasers. While the answer to the first issue is in accordance with the weight of the testimony, it is not decisive of the case, but followed by the answer to the second issue, sustains the defendant's contention in regard to the manner in which the acknowledgment was taken. The principal question for decision, therefore, is presented by the plaintiff's exception to the charge. His Honor, upon the second issue, told the jury, if they found, the burden of proof being upon the defendant, that "at the time of taking her acknowledgment she did say that she signed the contract thinking it was only for the sale of timber, they will answer the second issue 'No.'" It is too elementary to require the citation of authority that a married woman can convey her real estate or interest therein only in the manner and by complying with the essential requisites prescribed by law. Unless she does so, her signature and delivery of a deed or contract concern-
(349) ing her land is absolutely void, both at law and in equity. *Scott*

v. Battle, 85 N. C., 184, and numerous other cases in our reports. Acknowledgment and private examination by some one of the officers named in the statutes, and in the manner pointed out, is necessary to the valid execution of a deed or contract to convey. Until the last act in the proceeding has been done, and the matter has passed beyond the control of the officer, the contract is incomplete, and she may retract her signature; hence it is that she must not only acknowledge that she signed it freely, voluntarily, etc., but, what is equally essential, she must declare that "she still assents thereto." So long as it is the policy of the Legislature to restrict the power of married women to dispose of their real estate and place around them the protective provisions found in our statutes, it is our duty to enforce the law in accordance with its spirit. The Legislature, to meet new conditions, has enlarged the number of officers having jurisdiction to take these examinations, and removed many of the strict requirements which were formerly found in the statute. The law still requires that she acknowledge the due execution of the deed, etc. There is great wisdom in the observations of *Judge Ruffin* in regard to the manner in which this duty should be performed. In *Burgess v. Wilson,* 13 N. C., 306, he says: "After confession in open court, she is then to be examined, where, in privacy and with self-collection, which a timid female in the presence of a crowd and overawed by the authority of her husband might not be able to command in public, that she may have an opportunity of retracting her deed after her interests have been weighed by her and her rights explained by an intelligent and upright judicial officer." While the law has in some respects been changed, it would be well for clerks and other officers having probate jurisdiction, to read and observe the language of this great and wise judge. To permit the wife to be bound by a contract to release her dower, when she, in the presence of the plaintiff's agent, the witness to the deed, and the officer taking the probate, coupled (350) her statement that she *signed* the paper freely, etc., with the declaration that when she did so she thought it was a contract for the sale of the timber, it seems to us, would be trifling with the statutory protection thrown around her by the Legislature. There is no substantial difference in the testimony. Plaintiff's witness, Harper, and the justice corroborate Mrs. Leonard. There is, as we have said, no fraud charged or proven on the part of any one. She simply did not execute the contract as the law requires. If notice to the plaintiff of what occurred was necessary, it is shown by the evidence that Captain Alston, the agent of plaintiff, was present, heard and saw what occurred—in fact, took part in the conversation. The case does not come within the language or the spirit of section 956 of the Revisal. While it may be that the officer taking an acknowledgment of a married woman is not

required to understand and explain to her all of the provisions of the deed, if, before he has completed the examination and affixed his certificate, he has good reason to think that she does not fully understand its contents and its legal effect upon her rights, common prudence and fairness to her suggest, if they do not demand, that he withhold his certificate. In *McCaskill v. McKinnon,* 121 N. C., 214, the judge instructed the jury that it was the duty of the officer taking the examination to explain the deed to her, etc. This instruction was approved by this Court. It must be conceded that language is found in the opinion in *Benedict v. Jones,* 129 N. C., 470, difficult to reconcile with what is said in *McCaskill v. McKinnon, supra.* In *Benedict v. Jones* the wife simply said that she signed it freely, etc., but "she did not know what the paper was."

Without calling into question the correctness of the decision in that case, I think the language of the wife here was much more positive and free from ambiguity. While it is true that the exact language (351) of the statute may not be required, it is equally true that, if, notwithstanding the formal use of its exact language, it is apparent to the officer taking the examination that the mind of the wife does not assent to the act, or that she does not understand it, he should not "stick in the bark" by contenting himself with formal answers to questions, but look to the substance of the judicial procedure in which he is engaged, and refuse to proceed until satisfied that the *feme covert* understands what she is doing. The verdict was in accordance with the evidence. Counsel for defendants earnestly insist that, if the admitted facts were insufficient to sustain the plea of *non est factum,* they disclose a case in which the Court will refuse specific performance, and leave the plaintiff to work out its remedy by an action for damages. There is much force in the position, and, in view of the fact that the plaintiff is not out of pocket any money, nor has otherwise changed its position by reason of the conduct of the *feme* defendant, and the contract was unilateral, plaintiff assuming no liability whatever, I should hesitate to decree specific performance compelling the wife to release her inchoate dower. While much has been said by writers on equity jurisprudence and by chancellors regarding the rules by which courts are governed in decreeing specific performance, I have not found any statement of the doctrine more satisfactory than that in *Leigh v. Crump,* 36 N. C., 299: "Even though the contract of which specific performance is sought be valid at law, and, if it had been executed by the parties, could not be set aside because of any vice in its nature, yet, if its strict performance be, under the circumstances, harsh and inequitable, a court of equity will not decree such performance, but leave the party claiming it to his legal remedy." *Pendleton v. Dalton,* 92 N. C., 185. The con-

tract should be fair, just, certain and understood by and between the parties. *Tillery v. Land,* 136 N. C., 546.

WALKER, J., dissenting: I agree fully in all that *Mr. Justice* (352) *Connor* has said in his opinion. Whether the requirement of the statute that there should be privy examination be wise or expedient is not a question with which this Court has anything to do. We do not belong to the legislative department of the Government and have no right to change the statute. We must construe the law as we find it. It has been wisely provided that there should be three divisions of government—one to make the law, another to expound, and still another to execute it. The people have the right, through their chosen representatives, to say what the law shall be, and this Court has no right or power to say otherwise. When we attempt to do so we trench on the prerogative of the legislative department. The sooner we clearly understand the relation between the different coördinate departments of our State Government the more surely will we confine ourselves within the defined limits of our jurisdiction as prescribed to us by the people under their Constitution. I am not, of course, opposed to any such change of the married woman's law as the Legislature may think will accord more nearly with what we may suppose to be the enlightened spirit of the age. I believe that honorable body has proceeded so far cautiously, and that it has had due regard to the delicate relation always subsisting between husband and wife, not wishing to compel by legislation any course of action which *may* imperil the unity and harmony and the happiness of the home, for "surely in the homes of the people lodge at last the strength and responsibility of this Government, the hope and the promise of this republic."

I must respectfully protest against the suggestion that the law so classified married women, in respect to their right of contracting, as to place them in the same category with idiots, lunatics, persons *non compos mentis* and *convicts,* for the purpose of degrading them in the estimation of society, as I well know that there was no such intention. It must occur to any one who will consider and apply candidly (353) and frankly the reason of the law by which married women are required to be privily examined that such was not the purpose. It is not because they are insane, idiotic or *non compos,* nor even because they may be incapable of judiciously managing their own affairs, that the law was enacted. It is perfectly apparent that such is not the reason which actuated the Legislature. It is simply because of the delicate and confidential relation subsisting between husband and wife, and the fact that even a woman with perhaps more sense and wisdom than her husband has—and this is not infrequently the case—will sometimes yield to

his wishes, or to his undue persuasion or influence, to prevent family jars or friction and preserve peace in the household. It is the highest tribute the law could pay to woman that recognizes her refined sense of propriety and her unselfish desire to do whatever may promote conjugal felicity and her delicate sensibility in such cases. It is just for this reason that it provides against the abuse of those excellent virtues by a thriftless or perhaps brutal husband. And again, it is to protect the weak and confiding wife, however sound of mind she may be, against the machinations of a designing and mercenary husband. It was never the purpose of the law to rank her, in the scale of intelligence or morality, with weaklings or convicts. I believe that many a good woman, endowed with mental faculties and capacity at least equal to those of her husband, has been saved by this beneficent and wholesome law from destitution and poverty. If we regard privy examination as an idle ceremony, to be performed by the judicial officer in a merely perfunctory manner and without due regard to the real protection of the married woman—a mere form and not a serious procedure, as it is and was designed to be—it will be of little or no avail. But we must assume
(354) that officers will discharge their duty in the same spirit which prompted the Legislature in imposing it upon them, and in an efficient and not merely a formal way. The law, if I may be permitted to say so, is a wise and salutary one, when properly enforced, and, since the enactment of the recent statute mentioned in the opinion of *Justice Connor,* the rights of innocent purchasers are sufficiently safeguarded.

Cited: Odum v. Clark, 146 N. C., 549; *Butler v. Butler,* 169 N. C., 591; *Glenn v. Glenn, ib.,* 730.

G. H. BROCKENBROUGH v. MUTUAL RESERVE LIFE INSURANCE COMPANY.

(Filed 6 November, 1907.)

Insurance—Mutual Life Companies—Stockholder—Statute of Limitations—Estoppel.

While the statute of limitations does not run against the nonresident defendant, a mutual life insurance company, the plaintiff, who was a policyholder therein, is estopped, after a lapse of nearly seven years without having paid his premiums thereon, from recovering the principal and interest paid on said policy.

WALKER and CONNOR, JJ., dissenting.

ACTION tried before *Peebles, J.*, and a jury, at October Term, 1906, of MECKLENBURG.

Plaintiff moved for judgment upon the facts alleged in the complaint and admitted in the answer. Motion overruled, and plaintiff appealed.

Chase Brenizer for plaintiff.
John W. Hinsdale for defendant.

CLARK, C. J. On 15 December, 1897, the defendant adopted a resolution under which it would assess the plaintiff according to the table for "attained age" indorsed on his policy. He paid the first assessment made upon that basis under protest, and thereafter paid them without objection till an assessment was levied 1 February, 1899, when he quietly and silently dropped out, making no complaint or demand (355) till the summons was issued in this action, 18 January, 1906.

In *Green v. Ins. Co.*, 139 N. C., 312, it is said that "the plaintiff voluntarily ceased payment and abandoned his policy. He cannot be heard to ask damages for its cancellation. *Ins. Co. v. Phinney*, 178 U. S., 327; *Ins. Co. v. Sears, ib.*, 347; *Ryan v. Ins. Co.*, 96 Fed., 796. In every case where damages have been allowed for the cancellation of a policy of insurance it was alleged and proved that the cancellation was wrongful. *Braswell v. Ins. Co.*, 75 N. C., 8; *Lovick v. Life Assn.*, 110 N. C., 93; *Burrus v. Ins. Co.*, 124 N. C., 9; *Hollowell v. Ins. Co.*, 126 N. C., 398; *Strauss v. Life Assn., ib.*, 971; *Simmons v. Life Assn.*, 128 N. C., 469. . . . His motive, or the method of reasoning by which he arrived at his conclusion to abandon his policy, was irrelevant."

It is true that the statute of limitation does not run in favor of the nonresident defendant (*Green v. Ins. Co., supra*), but the plaintiff, having abandoned his policy and stopped payment thereon in February or March, 1899, cannot be heard to assert any rights thereunder in this action, nearly seven years thereafter. He is estopped by his abandonment and delay. 2 Pom. Eq., sec. 818, says upon this head: "This species of estoppel, as well as other kinds which consist of affirmative acts or representations, applies to corporations in their dealings with third persons and with their own stockholders. Conversely, stockholders may be estopped by their acquiescence from objecting to the acts of the corporations which are not illegal or *mala prohibita*, but *ultra vires*. When the rights of innocent third parties have intervened, express assent is not necessary to estop the stockholders. When they neglect to promptly and to actively condemn the unauthorized act and to seek judicial relief after knowledge of its being done, they will be deemed to have acquiesced and will be estopped as against innocent third persons." To same purport many other authorities can be cited.

(356) An insurance company exists by means of the payments it receives. These must be regular, that it may meet its liabilities. A member cannot drop out, disregard his duties and make no payments for nearly seven years, and then assert by action a claim that the other members be assessed to pay him what possibly he might have recovered if he had asserted his claim in apt time. Many thousands of new members have come in, who ought not to have the fund, created almost if not entirely of payments made since the plaintiff dropped out, subjected to payment of claims of which they had no notice and which may be thousands in number and aggregate hundreds of thousands of dollars in amount. If seven years' acquiescence and nonpayment of assessments do not estop the plaintiff, then there is no limit of time or of nonpayment that will bar. No one would be safe in becoming a member of a mutual life insurance company under such circumstances. *Leges subveniunt vigilantibus non dormientibus.* The court properly sustained the demurrer to the evidence.

No error.

WALKER, J., dissenting: The defendant contracted to insure the life of the plaintiff for the benefit of his wife, on 10 March, 1888, for the sum of $5,000, in consideration of an admission fee, annual dues and death-fund assessments to be levied from time to time and called mortuary premiums, which were payable at stated intervals, the amount of the premium varying according to the number of death losses, and depending upon the "sum which the executive committee may deem sufficient to meet the existing claims by death" for the period immediately preceding the date of the assessment, but the rate of assessment was fixed at $1.20 per $1,000 of insurance, that being the rate fixed by the schedule as of his then attained age, 34 years, the maximum amount to be collected annually being $11.77 on each $1,000 of insurance.

(357) This was to be the permanent rate. The plaintiff paid the admission fee, the annual dues and the assessments regularly for more than seventeen years, when the defendant, without his consent and, as will appear hereafter, against his protest, which was made when he was apprised of the fact, changed the rate of assessment by increasing it in June, 1895; and again, in January, 1898, not content with having once grossly and arbitrarily violated its contract with the plaintiff, the terms of which had been clearly and irrevocably settled by itself in the contract, the defendant again raised the rate of assessment considerably and much higher in proportion than the increased rate of 1895. The plaintiff then protested against the increase of his rate, which the company had solemnly agreed should remain at the figure stated in the schedule for his age of entrance as a member of the company, telling

the defendant at the time that he considered the increase as illegal. The company notified him that if he did not pay what was clearly an extortionate amount, his policy would be forfeited, and, under the compulsion of this unwarranted and inexcusable threat, and under his protest, he continued to pay the unlawful assessments for the short period of the year 1898 between March and December, when he refused to pay any longer. He testified that he thought the assessment was illegal, but he paid under protest, because the company threatened, in its notice to him, that if he did not pay the assessments, his policy would be forfeited, and that he believed his protest against the illegality of the increase was sufficient to protect him. He was corroborated by the agent of the company to whom he paid the assessments. And yet it is decided that the plaintiff is equitably estopped to recover damages for this arbitrary conduct of the company and its willful breach of the contract, because, having paid the increased premium for a few months under protest, he refused in January to be longer imposed upon by the defendant through its illegal exactions, or to be intimidated by its threats, and failed, after January, 1899, for a few years, or until this action was brought, to pay the unlawful assessments. It is said (358) that these premiums are necessary to the continued existence of the company. Surely it cannot be meant that the law regards illegal assessments in this light. But there is one thing that is essential to the maintenance of insurance companies of every kind, and of every other legitimate enterprise, and this is honesty and integrity in the administration of its affairs, and recent events have convinced us more and more, if we needed any such proof, of the truth of the assertion. And I may say that it applies with peculiar force to insurance companies, as the contract on the company's part is to be performed at a time when the member or policyholder may not be present to vindicate his rights, or those of the beneficiary or object of his bounty, under the contract. He must rely very largely upon the good faith of the company, and unless by a careful regard for their obligations, a strict compliance with their engagements, and a faithful fulfillment of their promises, the confidence of those whose patronage they seek is secured, they will in very truth find their career eventually cut short for the lack of premiums to pay expenses, much less profits.

With profound respect for my brethren, from whom I greatly differ, the doctrine of equitable estoppel has nothing whatever to do with the facts of this case, when properly considered. To apply it will produce the very wrong which was sought to be avoided when it was first adopted. It is founded, in part, upon the maxim of the law that no man shall be permitted to take advantage of his own wrong; and yet, if it is to control the decision in this case, the defendant will be permitted

to do that very thing. In *Ins. Co. v. Knight,* 162 Ill., 470, decided by a court whose opinions are entitled to the greatest weight, it was said: "The evidence introduced on the trial tends to prove that the managers of the insurance company, for several years, in making assess-
(359) ments, did not adhere to the statute, and that in a number of cases more money was raised than was at the time required to meet losses. But these violations of the statute did not ripen into a right; nor are we aware of any principle which would preclude a policy-holder of the insurance company from calling in question the validity of an assessment, although he may have previously paid assessments which did not conform to law. We do not think the doctrine of estoppel applies to such a case." Our case is even stronger than that one, because here the managers did not merely raise more than was necessary to pay losses, but actually made a radical change in the contract—in other words, repudiated the contract with the plaintiff and attempted by threats and compulsion to substitute one of their own.

But I now cite a case which seems to be exactly in point. The Court said, in *Mutual Life Assn. v. Tuttle,* 87 Ill. App., at p. 328: "In 1895 another change was made in the manner of assessing. The group plan was abolished and each member was assessed according to the estimated cost of his insurance at the time he entered the society, and he was also assessed, not only to pay death losses, but for the purpose of creating a permanent fund. Rather than take the possible chances of having his certificate forfeited and losing his insurance, Tuttle paid these assessments. Now this is the extent of his supposed wrongdoing, upon which is predicated the right of invoking the doctrine of estoppel against appellee. Can it be that, because appellant violated its contract on former occasions by making illegal assessments, and Tuttle did not take the chance of having his certificate forfeited by refusing to pay them, he or his beneficiary is estopped from denying the legality of assessment No. 149, which was for an amount so largely in excess of any previous assessment? We think not. He might have been content to pay a small increase on his original contract rate. And because he did so, shall it be said he was therefore bound to pay an amount ten times as great?
(360) We think to so hold would be unreasonable and would be permitting the wrongdoer to invoke the doctrine of estoppel against the party injured. This, we think, ought not to be done. The doctrine of estoppel, when properly applied, is founded upon the highest principles of morality, and recommends itself to the common sense and justice of every one. Herman on Estoppel, p. 291, sec. 272. Equitable estoppels, or estoppels *in pais,* only arise when the conduct of the party estopped is fraudulent in its purpose or unjust in its results (Herman, p. 335, sec. 321); or, as the rule is otherwise stated, 'Where one, by his words or

conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' (Bigelow on Estoppel, 433, 434). It certainly cannot be said that Tuttle, in paying previous illegal assessments, acted fraudulently, or that he willfully did anything calculated to mislead others to their injury. When he paid illegal assessments, he did so under a moral compulsion, and the threat, implied at least, that if he did not pay his certificate would be forfeited and the provision made for his wife in the event of his death be thereby lost. Did this conduct on his part warrant appellant in increasing Tuttle's assessments tenfold? In other words, can appellant thus be permitted to take advantage of its own wrong? Would this commend itself to the common sense and justice of any one, or be in accordance with the highest principles of morality, upon which the doctrine of estoppel is said to have its foundation? We certainly think not."

I must be indulged for quoting so fully from that case, because it appears to be so much like ours, and the principles stated certainly fit the facts in this record. Besides, it is a clear, strong, convincing statement of the law, and, I may add, is based upon an eminently just principle. The morality of this case is all with the plaintiff; the (361) equity surely is, and I believe the law also is. Why multiply authorities to sustain a proposition which, to my mind at least, is self-evident?

But it is suggested that he should be estopped *in equity,* mind you, because, after paying unjust and unlawful premiums under protest for a short time after March, 1898, when the second increase of the rate of assessment was made, and after being threatened with a loss of a policy upon which he had paid the defendant premiums for many years, he refused to be longer intimidated and ceased paying until this suit was commenced. 3 Cooley Insurance, 234, says: "As a member of a fraternal association is not liable for an assessment unless the same is valid and made in accordance with the rules of the association and the provisions of his certificate, it naturally follows that a member's rights under his certificate are not subject to forfeiture for a failure to pay an invalid assessment. This being the rule, the burden is on an association, relying on a forfeiture of a certificate for nonpayment of assessments, to prove a duly authorized and valid assessment." He cites many authorities to sustain the principle, and, strange to say, they all regard it as a proposition that should be taken for granted. *Margesson v. Benefit* Assn., 165 Mass., 262; *Langdon v. Benevolent Assn.,* 166 Mass., 316; *Roswell v. Equitable Aid Union,* 13 Fed. Rep., 840; *American Mutual Aid Society v. Helburn,* 81 Ky., 1; *Stewart v. Grand Lodge,* 100 Tenn.,

267; *Miles v. Life Assn.*, 108 Wis., 421; *Shea v. Massachusetts Benevolent Assn.*, 160 Mass., 289; *Coyle v. Benefit Society*, 2 S. W., 676. In Illinois the matters involved in this case have been frequently before the courts, and invariably have they decided against the contention now made by the defendant. *Assessment Co. v. Erlenkoetter*, 90 Ill. (362) App., 99; *Life Society v. Wilson*, 91 Ill. App., 667; *Tourville v. Brotherhood*, 54 Ill. App., 71; *Order of Chosen Friends v. Austerlitz*, 75 Ill. App., 74; *Union v. Warezak*, 82 Ill. App., 351. See, also, *Murphy v. Life Assn.*, 114 Fed., 404. These authorities, and many others to the same effect which could be cited, variously state the governing principle, as follows: A member of a beneficiary association is not bound by an illegal assessment, and no forfeiture can be insisted upon because of its nonpayment. 91 Ill. App., 667. The corporate rights of a member of an insurance company may be subject to the control of the corporation, but his rights as a party insured rest on the contract (*Bragaw v. Supreme Lodge*, 128 N. C., 354); and when the party is not bound by an assessment, because made in violation of his contract, he does not forfeit his insurance by not paying it. Such a forfeiture can rest only upon strict legal right, and it must abide inflexibly the terms of the contract. 90 Ill. App., 99; 100 Tenn., 267. A benefit association has no right to cancel insurance for failure to pay an illegal assessment; and the fact that earlier calls under the same assessment have been made and paid does not enlarge the contract or justify the association in declaring a forfeiture, nor does it constitute any defense by way of estoppel or otherwise. 165 Mass., 262, and 166 Mass., 316. A benefit association claiming that a membership certificate has been forfeited by failure to pay an assessment must show affirmatively that the assessment was imposed in exact accordance with the insurance contract; otherwise its defense must fail. 106 Wis., 421, and 13 Fed., 840. A legal assessment and proper call are treated by the law as conditions precedent to the right to declare a forfeiture upon a subsequent refusal by the member to pay. 160 Mass., 289; 114 Fed., 404; 100 Tenn., 267. So strict is this rule that the association is not even allowed to show that its new plan of assessments is more equitable than the old, because it is bound by the contract of insurance as ascertained from its charter and the (363) agreement with the member. 85 Ky., 1. An offer to pay the illegal assessment constitutes no more than a waiver of notice that it has been made, and is no waiver of matters affecting its regularity or validity, and it is no estoppel. 100 Tenn., 267. Until a member is in default, he cannot be suspended or his rights forfeited. It is incumbent upon the association to prove that unpaid assessments were legally made and due, and there is no default by reason of nonpayment of them, or

any of them, until this appears. The company must act first and take the burden of proof, and not the member. 82 Ill. App., 351. Forfeitures are not favored by the law, and an association insisting upon one must make clear proof and show that it has acted regularly and legally before it can call upon the member to prove anything. If there has been an illegal assessment, there can be no forfeiture when the member has simply ceased to pay. 75 Ill. App., 74. The association will not even be permitted to allege a forfeiture for failure to pay an assessment unless it appears affirmatively at the same time by proper averment that it has proceeded legally in levying, and in the absence of such allegation and proof, a tender of the amount of the assessment is, of course, unnecessary. 54 Ill. App., 72. Lastly and convincingly, in a contract of mutual benefit insurance the member acts for himself, and not as a part of the society; his rights rest upon his contract of insurance, and not upon his contract of membership in the society. A corporator in a mutual benefit society, like a stranger, may enter into a contract of insurance with it, and his rights under the contract will be as fully protected as those of a stranger. A member of such a society, in paying previous illegal assessments, cannot be said to have acted fraudulently, or willfully to have done anything calculated to mislead others to their injury, so as to equitably estop himself from questioning subsequent illegal assessments and refusing to pay the same. 87 Ill. App., 309. It is well settled that no forfeiture can be established except for a violation of the precise terms and conditions laid down in the laws of the society and in the contract; and if an assessment be levied (364) illegally, the member is under no obligation to pay it, nor are his rights in the least affected by its nonpayment. Bacon on Benefit Societies (3 Ed.), sec. 377. This last statement of the law is supported by the citation of numerous cases in the notes to section 377. I might cite authorities indefinitely stating this proposition one way or another, but they all come to this: that a wrongdoer cannot take advantage of his own wrong and avail himself of so just a doctrine as that of equitable estoppel to enable him to do so. That principle was introduced into equity jurisprudence to prevent wrong, and not to encourage or promote it; and, further, it does not apply in favor of a benefit association seeking to forfeit the insurance of one of its members for nonpayment of assessments when the latter have not been imposed according to his contract or the law.

It is not necessary for me to argue that the defendant has violated its contract of insurance with the plaintiff. It has made such a fundamental change in it as to relieve him from paying any assessment until it restores him to his rightful position as a member of the company under his contract. *Strauss v. Life Assn.*, 126 N. C., 971; *same case,*

128 N. C., 465. It had no power to violate the contract or to injuriously affect vested rights. *Bragaw v. Supreme Lodge,* 128 N. C., 354; *Makely v. Legion of Honor,* 133 N. C., 367; *Sherrod v. Ins. Co.,* 139 N. C., 167.

It seems to me that the decision in this case is in conflict with two well-considered precedents in this Court. Upon the question of estoppel, or waiver, it sets aside the principle stated and applied in *Makely v. Legion of Honor,* 133 N. C., 367. It was there said that no proof had been offered of an intentional waiver, and "He (plaintiff) received nothing from defendant in consideration of any implied waiver." The plaintiff had paid, and continued to pay, according to the change made by
(365) society. As to the question of estoppel, it was decided in *Strauss v. Life Assn.,* 126 N. C., 971, that when the defendant broke the contract of insurance the plaintiff had the right to cease paying the illegal assessments, and could recover his damages for the breach, which, in that case, it was said, should be measured by the amount of premiums and dues paid by him. Whether this is, in principle, the correct rule for assessing the damages, it is not necessary for me now to say. It is the right of the plaintiff to recover, and not the *quantum* of his damages, that I am discussing.

The decision in *Green v. Ins. Co.,* 139 N. C., 312, so much relied on by the majority, has no bearing upon the question. It was decided upon a principle which has nothing whatever to do with the facts of our case. I admit that when a party "voluntarily" and wrongfully abandons his policy, as the plaintiff did in *Green v. Ins. Co., supra,* he cannot recover. Nobody will gainsay that proposition. In that case the decision is put expressly upon the ground that it did not appear that the insurance company had violated its contract. It was simply a case where the defendant lawfully laid assessments, and the plaintiff, without any legal excuse, refused to pay them. And the other cases which are cited in the opinion of the Court with *Green's case* are to the same effect. It is not denied, and cannot be, that there was a clear and willful breach of the contract in our case.

It does not appear that anybody has, in fact, been prejudiced by the action of the plaintiff, if that is a relevant inquiry. The case was tried on the plaintiff's proof alone, and he was nonsuited. We are confined to that proof, and it is to be taken as true. The plaintiff protested against the increase of the assessment, and his subsequent payments were, of course, covered by the protest. He was not protesting against payments, but against the illegal action of the society in raising the assessment so as to increase his payments. His payments, therefore, did not estop him, upon any principle of the law, and certainly not upon the authorities. He had the right to stop paying at any
(366) time under an illegal assessment, and to continue to refuse to

pay, as he did, until a proper assessment was made. He was not bound to make any tender, for two reasons—first, because the assessment was excessive and illegal; and, second, because he could not know the amount until there was a lawful assessment.

It does not lie in the mouth of the defendant to say that it did not know why Mr. Brockenbrough had refused, after December, 1898, to pay the assessments. He distinctly and positively protested against the increase of the rate, the gross violation of its contract with him, and its arbitrary conduct, and paid for a short time under this protest and the constant threat that he would lose the benefit of the insurance if he failed to pay when called upon by the society for the money. This was done, as he says, by reason of the threat, and, perhaps, also, in the hope that upon reflection, the defendant would see the error of its way and repent of the grievous wrong it had done. His refusal to submit to its illegal exactions any longer is the same as if he had resisted the unlawful action of the society in the beginning, and continued to do so; and we have seen that, by the highest authority, he is not to be prejudiced, either by the payment under protest or by the failure to pay that which he did not owe.

It is strange that, upon the facts appearing in the record, the defendant, which has been from the beginning of the transaction to the end in the wrong, can successfully resist the plaintiff's recovery. My conclusion is that the nonsuit should be set aside and the plaintiff be allowed to recover the amount of his damages, to be fixed by the jury, under the principles of law applicable to that phase of the case.

CONNOR, J., concurs in dissenting opinion of WALKER, J.

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BLACKWELL'S DURHAM TOBACCO COMPANY v. THE AMERICAN TOBACCO COMPANY ET. AL.

(Filed 6 November, 1907.)

1. **Foreign Corporations—Comity—Prohibited, or Terms Prescribed for Doing Business.**

   Foreign corporation may, by comity, exercise in this State the general powers under its charter granted by another State, subject to the power of this State, within the limitations of the Federal Constitution, to prescribe the terms and conditions or to prohibit it altogether.

2. **Corporations—Same or Similar Names—Injunctions—Pleadings.**

   While it is unnecessary to allege actual fraud, a corporation cannot successfully seek injunctive relief against another corporation of the same

or similar name for alleged irremediable injury arising from the use of the name by the latter company, in the absence of allegation that its corporate rights, for which it invokes protection, were in existence, or that it carried on business in accordance therewith, before the defendant committed the wrongs complained of, by carrying on business in this State under such name.

3. Same—Pleadings—Domesticating Act—Collateral Action—Suit by State.

The plaintiff corporation cannot successfully seek aid by injunction against the defendant, a foreign corporation doing business in this State under the same or similar corporate name, under the allegation that defendant has not complied with the statute by filing its charter and becoming a domestic corporation, as such is collateral to the action and determined only by the State in a direct proceeding.

4. Practice—Demurrer Ore Tenus—Supreme Court.

A demurrer *ore tenus* that, upon the allegations of the complaint, the plaintiff is not entitled to the relief sought, may be originally made before the Supreme Court.

CLARK, C. J., dissenting.

APPEAL by plaintiff from an order entered by *Biggs,* resident judge, at chambers, in DURHAM, on 6 July, 1907, quashing an order, or subpœna, made by *Justice, J.,* at chambers, in Greensboro, requiring the defendants and the president and secretary of the corporations defendant to testify and produce documents before a commission named (368) in the order.

This action is brought by plaintiff against defendants, American Tobacco Company, Blackwell's Durham Tobacco Company (of New Jersey), C. W. Toms, W. W. Flowers, George W. Watts, and D. W. Andrews. So much of the complaint as is material to the decision of the appeal is in the following language:

"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 manfacture of smoking tobacco under said alleged corporate 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 Com- (369) pany (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 provided, 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 within 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 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 (370)

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 rights in the premises, and to plaintiff's irreparable injury and damage.

"That the other defendants are residents of this State and are officers, agents, etc., of both defendant corporations. Whereupon, plaintiff demands judgment:

"(1) For a perpetual injunction against each and all of the defendants and their officers, agents, employees, servants and assigns, to perpetually enjoin and restrain them from using plaintiff's corporate name of 'Blackwell's Durham Tobacco Company,' or any other name so similar thereto as to lead to uncertainty or confusion in business, at Durham, N. C., or within the State of North Carolina.

"(2) For such other and further relief as plaintiff may be entitled to, together with the costs of this action."

Plaintiff obtained from the judge presiding in the Ninth Judicial District an order for the examination of the officers, etc., of the defendant corporations before a commissioner appointed for that purpose, and for the inspection of the books of said corporations. Defendants moved the judge to set aside and vacate the order, for the reasons set out in the motion and the notice thereof. Upon hearing, the motion was granted, and plaintiff appealed to this Court. When the case was called here for argument defendants demurred *ore tenus* and moved the Court to dismiss the action, for that:

"(1) There are no facts alleged in said complaint impugning the right of defendant, Blackwell's Durham Tobacco Company, to use its trade name of 'Blackwell's Durham Tobacco Company,' except that it is alleged that said defendant 'has never complied with the corporation laws of the State of North Carolina in that behalf made and provided, nor become domesticated as a North Carolina corporation, and it is not, therefore, authorized, but is expressly forbidden by the laws
(371) of the State of North Carolina, to do the business aforesaid, or any other business, at Durham, in the county of Durham, or elsewhere within the State of North Carolina, under the aforesaid corporate name of 'Blackwell's Durham Tobacco Company.' Failure to comply with the corporation laws of said State, and to become domesticated, cannot be complained of by any one except the Attorney-General in an action prosecuted by him in the name of the State to recover the penalty provided by the statute.

"(2) It is not alleged in said complaint that plaintiff corporation has ever engaged in business in the State of North Carolina, or elsewhere, and it is only by engaging in business that a corporation becomes entitled to a trade name, so as to complain of the use of that name by any one else."

Guthrie & Guthrie for plaintiff.
Fuller & Fuller and Junius Parker for defendants.

CONNOR, J., after stating the case: Plaintiff's right to equitable relief by way of injunction depends upon the maintenance of several propositions. The learned counsel, in his argument before us, insists that, by its charter and organization "for the purpose of buying, manufacturing and selling smoking tobacco in its various forms, at Durham, within the county of Durham," plaintiff acquired a property right in the corporate name, "Blackwell's Durham Tobacco Company"; that defendant company, of the same corporate name, chartered and organized in the State of New Jersey, by "engaging in the manufacture of smoking tobacco at Durham, in the same county," has so injured and damaged this property right, and threatens to continue to do so, that plaintiff is entitled to invoke the injunctive power of a court of equity for its protection; that the continued manufacture and sale of smoking tobacco at Durham by defendant will work irreparable injury to plaintiff.

For the purpose of discussing this phase of the controversy (372) the domicile of origin of defendant corporation is immaterial.
In the absence of any prohibitory statute, a corporation having its domicile of origin, or, as is sometimes said, of creation, in one State, has, as a matter of comity, the right to carry on its corporate business, perform its corporate functions, in any other State. *Range Co. v. Carver,* 118 N. C., 329. "In harmony with the general law of comity obtaining among the States comprising the Union, the presumption should be indulged that the corporation of a State not forbidden by the law of its being may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from doing so either in the direct enactments of the latter State or by its public policy, deduced from the general course of legislation, or from the settled adjudication of its highest court." *Union v. Yount,* 101 U. S., 356; *Bank v. Earle,* 38 U. S., 519; Womack Pr. Corp., sec. 640. This right is, of course, subject to the power of the State to prohibit altogether, or to prescribe the terms and conditions within the limitations of the Federal Constitution upon which a foreign corporation may come into its borders and exercise its corporate powers. We are, therefore, for this purpose, to regard the plaintiff and defendant corporations as exercising in a lawful manner, so far as the State is concerned, the powers conferred by their charters. It does not appear from the complaint—and upon this motion we may not find it elsewhere—which of the two corporations first acquired its charter, or whether the plaintiff acquired its charter before the defendant entered the State and engaged in the manu-

facture of smoking tobacco. It would seem that it was incumbent upon the plaintiff to allege that such corporate rights as it possesses, and of which it invokes protection, were in existence before the defendant committed the wrongs of which it complains. It is not easy to see how a corporation can successfully invoke the interference of a court of equity without alleging its corporate creation prior to the al-
(373) leged wrongful act of its adversary. If, for instance, the defendant had, before the creation of the plaintiff corporation, obtained its charter under its corporate name, acquired its corporate powers, organized and commenced to exercise them in this State and in the town of Durham, it would seem that it was the folly of the incorporators of plaintiff to take the same corporate name as that of the defendant, and that if any annoyance, inconvenience or injury was occasioned by reason of the similarity of names, no relief could be had in a court of equity.

In *Grand Lodge v. Graham,* 31 L. R. A., 133 (Iowa), it is said: "We do not think that a corporation can, under the statutes of this State, select a name which is then in use by some other person or persons, and, after recording its articles, insist that this person or (those) persons must abandon the use of the name they have previously selected and under which they are operating. If any damage results to a corporation which selects its name in this manner, it is due to its own folly and indiscretion in selecting a name which is already in existence and which is used by another body upon which the name was originally conferred." So, in *Ottoman Cahey Co. v. Dane,* 95 Ill., 203, it is said: "The fact that a corporation was organized under the laws of this State subsequent in date to the time defendant commenced business, which assumed the same name under which defendants were carrying on their business, could confer no right upon complainant to invoke the aid of a court of equity to restrain the defendants from the use of the name."

As it does not otherwise appear from the complaint, and as the demurrer admits all allegations and reasonable inferences to be drawn therefrom, we will, for the purpose of this discussion, assume that defendant either acquired its corporate name or that it began to engage in the business of manufacturing smoking tobacco in the city of Durham subsequent to the corporate birth of the plaintiff. The question
(374) is thus presented, whether the plaintiff has acquired by its incorporation the exclusive right to the use of its corporate name, and to exercise its corporate power in such name in the city of Durham, and whether it has so alleged in its complaint. That such right may be acquired, and that, when acquired, its use will be protected by the injunctive power of the court, is well settled. *Brown Chemical Co. v. Meyer,* 139 U. S., 540; *Elgin Watch Co. v. Illinois Watch Co.,* 179 U.

S., 665. "The law having authorized the selection of a name, and having declared the name so selected to be the name of the corporation, we see no reason why the law should not protect the corporation in the use of that name, upon the same principle and to the same extent that individuals are protected in the use of trade-marks. Hence it necessarily follows that corporations, in the exercise of discretionary powers conferred by the statute, must so exercise them as not to infringe upon the established legal rights of others." *Holmes v. Holmes,* 37 Conn., 278.

"It is well settled that an exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another who assumes it for the purpose of deceptions, or even when innocently used without right, to the detriment of another; and this right, which is in the nature of a right to a trade-mark, may be sold or assigned. . . . In respect to corporate names, the same rule applies as to the names of firms and individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation, which tends to create confusion and to enable the latter corporation to obtain, by reason of the similarity of names, the business of the prior one." *Higgins v. Soap Co.,* 144 N. Y., 462. The property right in the name of a corporation, as in a trade-mark, is acquired, not simply by adoption, but by using it. The interference of courts is based upon the principle that the use of the (375) name, or a trade-mark, already acquired and used by another is a fraud upon the person or corporation whose property it has become. *Lee v. Haley,* L. R., 5 Ch. App., 155. "A trade-mark can be acquired only by actual user of the mark in the market. A mere intent to use particular terms or marks as a trade-mark, however clearly manifested, is insufficient in the absence of actual user." 28 Am. and Eng. Enc., 393. That incorporation does not confer such right is clearly stated and illustrated in the opinion of the present *Chief Justice* in *Bingham School v. Gray,* 122 N. C., 699 (707), in which he says: "That the plaintiff is incorporated as the 'Bingham School' does not give it the exclusive right to that name. Another corporation might be created by and operated under the same title, when not in the same locality, in the absence of proof of an intent to injure the first-named corporation or to avail itself fraudulently of the other's good name and reputation. . . . The incorporation of the Bingham School, at Asheville, has only the usual effect of a charter—that is, to confer the corporate right of perpetual succession. . . . It did not have the effect of creating a trade-mark of the Bingham name, and of conferring the exclusive right to use it in connection with school purposes upon that corporation, nor is it a prohibition upon all others named Bingham, whether of that

family or any others of the same name, using it in connection with any school they might establish." This is manifestly true, upon the reason of the thing. It cannot be the law that three or more persons may, either under our general corporation law or by special act of the Legislature, become incorporated by any name which they may select for the purpose of engaging in some branch of trade or manufacture, and thereby, without engaging in the business of buying, selling or manufacturing the article or product named in its charter, acquire a perpetual monopoly in the corporate name. This would be to create a
(376) monopoly in a corporate name, without ever using it, by legislative enactment, and in violation of our fundamental law and the well-settled policy of the State. The law has been settled against plaintiff's contention in many cases. In *Lawson v. Bank,* 86 E. C. L., 84, *Jervis, C. P.,* said: "All that appears is, that the plaintiff was the promoter of a certain bank, called the Bank of London, which he proposed to establish in the city of London; that he had incurred expense in putting up the name on a brass plate and in publishing prospectuses, and that some one else has beaten him in the race and established a bank under the same name by virtue of letters patent. It does not appear that the plaintiff has ever carried on the business of banking, or that he had a single customer, or that he was in a position to be damnified by the acts of the defendants. I therefore think, without entering into the question how far a corporation established for trading purposes might render itself liable to a charge such as that now sought to be fixed upon these defendants, enough is not alleged in the declaration to show that the plaintiff has sustained any injury, and consequently the action will not lie." The language of *Cresswell, J.,* is very pertinent: "The plaintiff, in his declaration, cautiously abstains from averring that he has carried on the business of a banker and has sustained damage in that business through the fraudulent acts of the defendant."

When this cause was before us at the last term, on a motion for removal, we intimated that the complaint was defective, calling attention to the decision in the *Bingham School case.* We are quite sure that the learned counsel for plaintiff would have amended his complaint in this respect, as he had ample right and opportunity to do, if the facts had justified him in doing so. In *Maxwell v. Hogg,* L. R., 2 Ch. App. (1866-67), 305, the plaintiffs sought to enjoin defendants from publishing a magazine, the name of which they claimed to have acquired. They alleged that they had advertised it and made expenditures
(377) in its preparation. *Turner, L. J.,* said: "The first principle which applies, not only to this case, but to every case in this Court, is, that the plaintiff must show some property right or interest

in the subject-matter of his complaint. The question, then, in that point of view, is whether the expenditure made by Mr. Maxwell upon his intended work of 'Belgravia,' and the advertisements issued by him from July to October, have created any such right of property in him as to entitle him to an injunction restraining another person from using the same title." His conclusion that no such right is acquired is stated so strongly that we quote his language: "If it is to be considered as doing so, the consequence will be that, without having made any new publication at all, he might come to this Court, saying: 'I have advertised my intention to publish, in October, a given work under a given title, and nobody else shall publish a work under that title until I have had an opportunity of bringing my work before the public.' He does not, by his advertisements, come under any obligations to the public to publish the work, and, therefore, the effect of holding the advertisements to give him a title would be that, without having given any undertaking or done anything in favor of the public, he would be acquiring a right against every member of the public to prevent their doing that which he himself is under no obligation to do and may never do." *Lord Cairns* says: "The question, then, reduces itself to this: Can property of that character which is had in a trade-mark be acquired in a name before the vendible articles bearing the name have actually been put upon the market for the purpose of sale?" The learned justice concludes by saying that "All the definitions which have been given in this Court of the nature of the right to protection in the case of trade-marks seem to me to be opposed to the idea that protection can be given where there has been no sale or offering for sale of the article to which the name is to be attached." The bill was dismissed. So, in *Civil Ser. Sup. Assn. v. Dean,* 13 L. R., Ch. Div., 512, *Malins, V. C.,* said: "An intimation by the association that they in- (378) tended to open a shop for a particular purpose can give them no right to restrain anything which any other person may think fit to do." The same principle has been announced and enforced by the courts in this country. *Kaffer Fab. v. Med. Co.,* 82 Fed., 321; *Jæger's San. Co. v. Le Boutillier,* 47 Hun, 521. In *Caswell v. Hazard,* 121 N. Y., 484, in an exhaustive opinion upon the subject, *Ruger, C. J.,* says: "The right to a trade-mark is derived from its appropriation and continual user, and becomes the property of those who first employ it and give it a name and reputation." *Kohler Co. v. Beeshore,* 59 Fed., 572. The authorities cited by plaintiff fully sustain its contention that "A man's name is his own property, and he has the same right to its use and enjoyment as he has to any other species of property." *Brown Chemical Co. v. Meyer,* 139 U. S., 540, and other cases. It is also true, as contended, that to enjoin the unlawful use of a man's name or his

trade-mark it is not necessary to allege or show actual fraud. So far as the corporate name taken by plaintiff is concerned, it is too well settled to admit of controversy that, as said by this Court in the *Bingham School case, supra,* the mere incorporation does not confer an exclusive right to the name. While it is true that, under the provisions of our general incorporation law (Revisal, sec. 1137), no corporation will be chartered by the name of another corporation existing in this State, if the Legislature sees fit there is no reason why it may not charter more than one corporation of the same name. This is not a matter in which the State is concerned; and if it does so, the rights and liabilities of each corporation in respect to the use of its name will depend upon well-settled principles of law. If plaintiff, as it must do, relies upon the right to its name, as assimilated to that of a trade-mark, we have seen there must be an allegation that the name has been used to such an extent and in such a manner as to confer a property right to it.
(379) Courts of equity only interfere by injunction to protect property rights when there is some substantial injury done or threatened. They will not do so when the alleged right is uncertain, speculative and may never become otherwise. In the absence of any allegation that plaintiff has used its corporate name or exercised its corporate powers in the manufacture, purchase or sale of smoking tobacco, at Durham, or elsewhere, we find no ground upon which it may successfully invoke the power of a court of equity to prevent defendant from continuing to do so. We have so far discussed the complaint upon the theory that there was an allegation of plaintiff's prior corporate origin to that of the defendant. To prevent misconception, it is proper to say that there is no such averment. When a plaintiff comes into court asking injunctive relief, it is a well-settled rule that there should be a full, fair, frank statement of the essential facts upon which its right is based, so that the court may see, upon demurrer, that it has a cause of action. It would have been easy for plaintiff to have stated the date of its incorporation and organization, and the date upon which defendant began the manufacture of smoking tobacco in Durham, or, at least, that it was subsequent to the date of plaintiff's charter.

Plaintiff insists that, however this may be, the defendant should be enjoined, because, being a New Jersey corporation, it has never complied with the corporation laws of this State nor become domesticated as a North Carolina corporation, as required by law, and is not, therefore, authorized, but is expressly forbidden, to carry on business in Durham or elsewhere in this State. The demurrer admits this to be true, but defendant insists that by such failure to comply with the statutes of this State a penalty is imposed, to be sued for by the Attorney-General, and that plaintiff has no power to interfere with it by means of a civil

action. *Judge Thompson,* in this connection, says: "When the facts do not otherwise entitle the complaining party to relief, the fact that the defendant may, under a name similar to that of the (380) plaintiff, be engaged in an unlawful undertaking—such a carrying on the business of life insurance in violation of the State law—will not entitle the plaintiff to have the defendant enjoined from using the plaintiff's name in such business, since the question whether the defendant is engaged in an unlawful business is collateral to the particular action, being a question more properly determined in a proceeding by the State against the offending body." 7 Corporations, sec. 8195. Every foreign corporation, before being permitted to do business in this State, is required to comply with the provisions of section 1194 of the Revisal, and for failing to do so it shall forfeit $500 to the State, etc. Similar statutes are found in many, if not all, of the States. The right of private persons or corporations to enforce these provisions, either by invalidating contracts made by such foreign corporations subject to the penalty, or by enjoining them, has been uniformly denied by the courts. The right of foreign corporations to do business in the State in violation of the statute "cannot be raised collaterally by private persons unless there be something in the statute, expressly or by necessary implication, authorizing them to do so." *Fritts v. Palmer,* 132 U. S., 282; *Columbus Insurance v. Walsh,* 18 Mo., 229. In *Wright v. Lee,* 4 S. D., 237, we find the principle universally adopted well stated. Referring to the status of a foreign corporation doing business in the State in violation of the statute, it is said: "The statute was designed to place foreign corporations, in respect to a knowledge of their powers, the object of their incorporation and the jurisdiction of our courts within the State over them, in the same position as domestic corporations. In the case either of domestic or foreign corporations the State names the conditions upon which they may do business. It does it in its sovereign capacity as the conservator of the rights and best interests of its citizens. The State, which alone can name the conditions, can enforce their observance. . . . The wrong done in disre- (381) garding the law is against the State, and not against the individual. Transacting business in the State without compliance with the statutory conditions is a usurpation of power by the corporation, but with the State rests the right to elect whether it will acquiesce in such usurpation or dispute or prevent it." In *McGinnis v. B. & M. C. C. & S. M. Co.,* 29 Mont., 428 (at page 446), it is said: "Much argument in the appellant's brief is also devoted to the question whether or not the Amalgamated Company is engaged in doing business in this State in violation of the law, and whether it is a monopoly. . . . The plaintiff sues as a private citizen. He is not, as such, authorized

to present through the medium of a civil action and try the issue whether the defendant Amalgamated Company is doing business in this State in violation of the law. A determination of this issue as an independent ground of relief must be had, if at all, by the State and in its own behalf, through the Attorney-General." *Mill Co. v. Bartlett,* 3 N. D., 138; *Tol. T. & L. Co. v. Thomas,* 33 W. Va., 566; 2 Morawitz Pr. Corp., sec. 665. The authorities are uniform to this effect. While the question has not heretofore been before this Court, the general principle has been recognized. *Newberry v. R. R.,* 133 N. C., 45; Womack Pr. Corp., 68, where the cases are collected. The wisdom of this rule is manifest. If, in the absence of express power to do so, private citizens, or corporations, were permitted to enforce penalties and forfeitures which the State has reserved to itself, confusion would result. The plaintiff insists that the statute shows that it is the policy of the State to prohibit foreign corporations coming into her borders without first complying with her laws. This is undoubtedly true, but the same statute shows that the State has prescribed the penalty for doing so, and reserved to herself its enforcement, and this excludes any other mode of doing so. It is not the policy of the State, so far as expressed by
(382) her legislation, to prohibit foreign corporations from doing business here, but to prescribe the conditions upon which they may do so. If the Legislature shall in its wisdom prohibit this defendant or any other corporation from doing business in the State, it will be the duty of the courts to enforce obedience to the law when called upon in the manner prescribed by the statute. So long as it permits them to be here, either by compliance with the laws or as a matter of comity, they are entitled to have the law of the land administered so that they have equal protection and equal justice done them. We cannot make the law of "none effect" for even so desirable an object as fostering domestic corporations. Their safety, as well as the safety of the individual citizen, is dependent upon the due and orderly administration of the law as it is written. We have given to this record our anxious consideration, and the conclusion to which we have arrived is, as we intimated when the cause was first before us, that the complaint states no cause of action. Following the course pursued by this Court in *Harper v. Pinkston,* 112 N. C., 293, the action must be dismissed. We have not considered or discussed the exceptions regarding the proceeding before *Judge Biggs,* because, in the view which we take of the case, they are immaterial. The right to examine witnesses is based upon the statement in the complaint of a cause of action, or an application based upon affidavits to have such examination for the purpose of enabling the plaintiff to file its complaint. No such question is presented here. The motion of defendant is allowed and the action

Dismissed.

CLARK, C. J., dissenting: The defendant, a foreign corporation, was doing business in this State in violation of our laws. It is true that the $500 penalty prescribed for such violation (Revisal, sec. 1194) cannot be sued for by the plaintiff, and that a *quo warranto* could be brought only by the Attorney-General or by his permission. If it further be conceded that the plaintiff had only recently been (383) incorporated and had done no business when this action was brought, still it avers that it is prepared to do business and that the defendant is illegally doing business here, and, by using the same name with the plaintiff, will interfere with and injure its business. Under these circumstances it would seem clear that the legal corporation is entitled to the injunctive process of the court to protect it from interference by another corporation doing business here under the same name in violation of our laws.

ANNIE D. TAYLOR v. SECURITY LIFE AND ANNUITY COMPANY.

(Filed 6 November, 1907.)

1. **Insurance—Temperate Habits—Evidence—"Opinion Evidence"—Witnesses—Testimony as to Temperance.**

   It is competent evidence, upon the question of false representation of the deceased in having answered a question in his application for life insurance upon which his policy had been issued, to the effect that he had never been intemperate in the use of malt or spirituous liquors, for a witness to testify to the conditions under which he had known deceased, saw him every day for several months, and that, from his knowledge and observation of him and his habits, the insured was temperate in the use of such liquors. This is not "opinion evidence," it being such as the mind acquires knowledge of by the simultaneous action of several of the senses, the impression upon the mind not traceable to any one fact produced by a single sense, but being a statement which is, nevertheless, a fact. (Expert evidence discussed and distinguished.)

2. **Burden of Proof—More Than One Conclusion—Questions for Jury—Directing Verdict.**

   When the burden of proof is upon defendant, the court cannot direct a verdict in its favor as a matter of law, when more than one conclusion can be reached upon the evidence by fair-minded men.

   WALKER, J., concurring, cited with "approval" *In re Peterson*, 136 N. C., 28, and distinguished "opinion evidence" from the character of the evidence in this case.

ACTION tried before *Justice, J.*, and a jury, at April Term, (384) 1907, of GRANVILLE.

This is an action for the recovery of the amount of a policy of insurance on the life of Frank L. Taylor, issued by defendant company, payable to plaintiff.

Defendant admitted that the policy issued, that plaintiff was the beneficiary named therein, the death of insured, the insurable interest of plaintiff in his life, and that proof of death had been duly filed. It alleged, by way of defense, that the insured had made false answers in his application to the following questions:

"14. Have you ever been intemperate in the use of malt or spirituous liquors? No. If so, when and how often? Never.

"15. Do you use malt or spirituous liquors now? No. If so, definitely, how much and how often? X

"16. Do you now or have you ever used, habitually, opium, chloral, cocaine, or any other drug? No."

The following issues were submitted to the jury:

"Did the insured, Frank L. Taylor, represent in the contract of insurance sued on that he had never been intemperate in the use of malt or spirituous liquors? Answer: Yes.

"2. If so, was such representation false? Answer: No.

"3. If so, was such representation material? Answer: Yes.

"4. What sum, if any, is the plaintiff entitled to recover of the defendant? Answer: $5,056.12, with interest thereon from 15 October, 1906."

Plaintiff consented that the jury should answer the first and third issues in the affirmative. Defendant took the burden of establishing the second issue, and introduced the evidence of persons who were acquainted with insured for several years prior to the date of the application—knew his habits, etc. They testified in regard to his habit in (385) the use of spirituous liquors, based upon their own knowledge.

Several of defendant's witnesses were asked by plaintiff, on cross-examination, "How frequently did you see Frank Taylor while he lived in Wilson?" "Practically every day." Q. "From your knowledge of him and your observation of him from day to day, would you say that he was a man of intemperate habits in the use of alcoholic liquors?" Defendant objected and excepted to admission of question. Answer: "No." Defendant excepted. It was in evidence that insured lived in Wilson from 1901-1904.

Plaintiff introduced a number of witnesses, among them Col. W. H. Osborne, who testified that he lived in Greensboro and had lived there since 1892; that he was born and reared in Oxford; that he knew the insured in Greensboro, when, in 1904, he clerked in the drug store of J. D. Helms; that insured lived in Greensboro several months, and that witness saw him nearly every day. Witness was asked by plaintiff's

counsel, "if, from his knowledge of insured and his observation of him and his habits, he knew whether insured was temperate or intemperate in the use of malt or spirituous liquors." Witness answered that he thought he did, and that insured was temperate. On cross-examination, witness testified that, at the time referred to, he was mayor of Greensboro; that he was at Helms' drug store very often at night, but rarely, if ever, late at night; that he made the drug store his headquarters, and that insured was on duty when he was there.

J. D. Helms testified that he lived in Greensboro; conducted a drug store there; that insured was prescription clerk in his store from June 20 to October 20, 1904, and that he (witness) had personal supervision of his store. Witness was asked by plaintiff's counsel: "From your knowledge of insured and your observation of him and his habits, would you say that he was intemperate in the use of spir- (386) ituous or malt liquors?" Witness replied: "The insured was temperate." On cross-examination, witness said that if insured ever drank, he had not heard of it.

T. M. Washington testified that he left Granville County in the year 1891 and went to Wilson County, where he had lived ever since; that he knew the insured intimately while he lived in Wilson; that witness saw insured every day and sometimes several times a day when witness was in town. Witness was then asked by plaintiff's counsel: "From your intimate acquaintance with insured, your opportunities for observing him and his habits, was he temperate or intemperate in the use of malt or spirituous liquors?" Answer: "I consider him temperate. I think I know."

To each and every one of the questions and answers defendant duly excepted. Defendant's testimony tended to show that insured was under the influence of liquor several times in Wilson, Oxford, Morehead City, Greensboro, and once in Richmond.

Defendant, in apt time, requested his Honor to instruct the jury as set out in the opinion, and to his refusal duly excepted.

His Honor, in response to defendant's prayer, among other things, instructed the jury as follows:

"The court charges the jury that the word 'intemperate,' as used in this application, is defined by the law to mean as follows: 'Intemperance is the use of anything beyond moderation, and it does not necessarily imply drunkenness. An occasional use of alcoholic liquors is not to be deemed intemperance, but there must be indulgence to such an extent as would be considered an excess.'

"The court charges you that an insurance company in North Carolina has a right to prescribe, as a condition precedent to the issuing of a life policy, that the applicant shall state in writing whether or not he

(387) has ever been intemperate in the use of spirituous or malt liquor, and that the answer to same is a material fact in said application.

"Intemperance does not necessarily mean habitual drunkenness. Habitual drunkenness is, of course, intemperance, but there may be intemperance in the absence of habitual drunkenness. Therefore, if the jury should find from the evidence that during the several years preceding the time when the insured, Frank L. Taylor, signed the application for the policy sued on in this case he was often under the influence of some intoxicating liquor and was from time to time what is commonly called drunk, and you should further find that he represented, when applying for said policy, that he had never been intemperate in the use of malt or spirituous liquors, then and in that event the court charges you, gentlemen, that his answer to the question, 'Have you ever been intemperate in the use of malt or spirituous liquors?' was false, and you should answer the second issue 'Yes.'

"If the jury should find from the evidence that the insured's representation that he had never been intemperate in the use of malt or spirituous liquors was false, and that said representation was material, you would then have a plain duty to perform; and the court charges you that this duty ought not to be influenced and cannot be changed by any consideration of the manner in which the interests of the parties to this cause may be affected.

"While the policy in question, under all the circumstances of this case, might not be avoided by proof of an occasional use of malt or spirituous liquors, yet such occasional use does not mean occasional sprees of drunkenness; and if the jury should find from the evidence that, prior to the date of the application in question, the insured occasionally and from time to time, with intervals of perfect sobriety of greater or less duration between, got on what are called sprees and became intoxicated, the court charges you that such sprees, although

(388) occasional and although occurring with varying intervals of sobriety, would constitute an intemperate use of malt or spirituous liquors; and if you should so find, it would be your duty to answer the second issue 'Yes'; and the court further charges you, if you so find, to answer the second issue 'Yes.'"

In addition to the special instructions given by request of defendant, his Honor charged the jury as follows upon the third issue:

"On the second issue the question for you to ascertain is whether the insured, Frank L. Taylor, was ever intemperate in the use of malt or spirituous liquors. Although you should find that the insured used malt or spirituous liquors in moderation, or that he even occasionally felt their effects, not to intoxication or immoderation, this would not be suffi-

cient to enable you to answer the third issue 'Yes.' In order to enable you to answer this third issue 'Yes,' it is necessary for the defendant to satisfy you by the greater weight of the evidence that the insured, Frank L. Taylor, had, prior to the application, been intemperate in the use of malt or spirituous liquors.

"Intemperate means excessive—immoderate. So the question in another form is this: 'Had the insured ever used malt or spirituous liquors intemperately, excessively, immoderately?' If you find from the testimony, by the greater weight of the evidence, that he had so used it prior to the date of his application, you will answer the second issue 'Yes.' If the defendant has failed to so satisfy you, you will answer the second issue 'No.'

"You will consider all the testimony offered by the defendant and by the plaintiff bearing on the question as to whether the insured has been intemperate in the use of malt or spirituous liquors."

The exceptions to his Honor's refusal to give special instructions are noted in the opinion. There was judgment upon the verdict. Defendant excepted and appealed.

Graham & Devin and B. S. Royster for plaintiff. (389)
Brooks & Thompson, F. P. Hobgood, Jr., and A. A. Hicks for defendant.

CONNOR, J., after stating the facts: The learned counsel for defendant pressed the exceptions to the admission of the statement of witnesses, based upon personal knowledge and observation, that insured, at the time of his application, was not intemperate in the use of spirituous liquors. The argument assumes that the testimony comes within the definition of "opinion evidence." Plaintiff insists that, properly interpreted, it is the statement by the witness of a fact, and not the expression of an opinion. It has been said that, "if the witness had opportunity to know relevant facts himself, and did observe and note them," his evidence, although expressed in the form of an opinion, is really the statement of a fact. *Gilliland v. Board of Education,* 141 N. C., 482, citing Greenleaf Ev. (16 Ed.), 441. It is very difficult to draw the line between testimony in which the witness states a fact—ascertained from observation, sensation or other *media*—and that in which he gives expression to an opinion by observing a number of facts from which, by a mental operation, he comes to a conclusion. Judges have felt themselves embarrassed by the general rule that, except within certain limitations, only facts, as distinguished from conclusions or opinions, were competent to be given in evidence. It is not improbable that too much refinement has found its way into judicial opinions, and

that the practical side of the subject has suffered at the expense of substantial truth and justice. The effort to relieve the law from what has been termed pedantry, and to place it upon a basis suited to the practical affairs of life, in this respect, is both interesting and instructive. Probably in our jurisprudence the most successful and well-sustained effort in this respect is found in the opinion of *Gaston, J.*, in *Clary v. Clary,* 24 N. C., 78, referred to by *Judge Redfield* as being done "with great ability and abundant success." Redfield on Wills, 143,
(390) note 16. Professor Wigmore thus refers to this opinion and that of *Justice Doe,* of New Hampshire. After referring to the controversy regarding the admissibility of the class of testimony presented in this appeal, he says: "Generally, the view favoring admission prevailed; the great lawmaking and argument-furnishing precedent for the earlier rulings being the opinion of *Mr. Justice Gaston* in *Clary v. Clary, supra,* in North Carolina, in 1841, and for the more recent rulings being the opinions of *Mr. Justice Doe,* dissenting in *Boardman v. Woodman,* 47 N. H., 144, and *Mr. Justice Foster,* in *Hardy v. Merrell,* 59 N. H., 250, in the same court, in 1875. The opinion of *Mr. Justice Doe* succeeded in bringing about a change of heart in his own court and in the arsenal of arguments to whose supplies it is chiefly due that the courts of the country are today so unanimous in accepting the common-sense view of the subject." After defining the "opinion rule," as applied to cases in which "expert evidence" was admissible, *Judge Gaston* says: "But judgment founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features or handwriting of others is more than mere opinion. It approaches to knowledge, and *is knowledge,* so far as the imperfection of human nature will permit knowledge of these things to be acquired; and the result thus acquired should be communicated to the jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observation of others." The record in this case illustrates the truth of the observation of the learned judge. The question asked the insured is whether he has ever been intemperate in the use of liquors. This question is addressed, not to the *opinion* of the applicant, but to the *fact,* based upon the assumption that he has *knowledge* of the fact in regard to which he is asked. For the purpose of showing that the answer is not true, defendant introduces several witnesses and asks them
(391) whether they have seen him "under the influence of alcoholic stimulants." They are not confined to the inquiry whether they have seen him drink liquor; if so, how much, and at what intervals of time; and then asked what he said, did, etc., so that the jury could draw their conclusions. The course of examination pursued was clearly ad-

missible, because it is uniformly held competent to ask a witness whether a person was intoxicated—under the influence of liquor—that being a *fact* known to the witness from observation of conduct, other facts, etc. Why may not the witness, after stating the basis of his knowledge, be asked with equal reason whether the applicant was intemperate? It is not easy to see why one class of testimony is to be regarded as fact, while the other is opinion. If the question asked the insured had been, "Have you been under the influence of liquor within one year?" it would have been competent to ask a witness the direct question, "Have you seen the insured under the influence of liquor within one year?" Wherein is the distinction in principle between the two questions? To answer the first requires large data, knowledge or observation, extending over a longer period, but is none the less a conclusion of fact drawn from personal knowledge and observation. That a witness may, having first stated knowledge of the essential facts, be asked whether a person was well or sick, angry or otherwise, and a multitude of other questions of like character, is settled beyond controversy. For a collection of the cases illustrating the extent to which the courts of this country have gone in extending the principle upon which this class of testimony is admitted, see Greenleaf Evidence (16 Ed.), 441; 3 Wigmore Evidence, sec. 1938, note 2. Greenleaf says: "There is, therefore, no rule admitting opinions or inferences when made by one class of persons—experts—and excluding them when made by another class—laymen; but there is a rule excluding them whenever they are superfluous and admitting them whenever they are not." After stating the rule, as applied to persons having special skill or knowledge, he says: (392) "Secondly, from persons who have no special skill, but have personally observed the matter in issue, and cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness's place and enable them equally well to draw the inference. The absurdities which disfigure the application of the rule come chiefly from a too illiberal interpretation of the latter notion—that is, it is frequently ruled that a personal observant can sufficiently state the observed data without adding his inference, although a just view of the situation would recognize that too much credit has been given to the witness's power of narration, and that, in truth, it is impossible for the data to be stated." The rule, with its limitations, underwent a most able and exhaustive discussion in the Supreme Court of New Hampshire, beginning with the dissenting opinion of *Mr. Justice Doe* in *Boardman v. Woodman* and *S. v. Pike,* 49 N. H., 397, and the adoption of his opinion by *Foster, C. J.,* in *Hardy v. Merrell,* as stated by Professor Wigmore. It is interesting to note, as said by Greenleaf (441), that "A more liberal tendency in this respect seems to be making its way in

recent times." All of the writers on the law of evidence agree "that the reports are overloaded with decisions of the sort that ought never to have been called for." While it may be difficult to reconcile all of the cases in our reports, we think that, upon a careful examination of the peculiar facts in each case, there will be found a recognition of the principle announced in *Clary v. Clary, supra.* In *McRae v. Malloy,* 93 N. C., at page 154, *Smith, C. J.,* says of this class of testimony: "The opinion is but a condensed and summary method of stating the result of personal observation and communications with the party." In *Ins. Co. v. Foley,* 105 U. S., 350, the question and answer appear to have been admitted without objection. *Field, J.,* in the opinion, says of the witnesses: "All of them testified from their observation of the conduct of the deceased, and the jury would properly give weight to the testimony, not according to the positiveness of the averments of the wit-
(393) nesses as to their knowledge, but, other considerations being equal, according to their opportunities of observation of the deceased's conduct, and the manner in which those opportunities had been improved." He further says: "The question was as to the habits of the insured. His occasional use of intoxicating liquor did not render him a man of intemperate habits, nor would one exceptional case of excess justify the application of this character to him," concluding, "And the testimony of witnesses who had been intimate with him for years and knew his general habits may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate." Mr. McKelvey, after stating the general rule excluding opinion evidence, notes the exceptions to the rule, or, speaking more accurately, testimony which is sometimes erroneously supposed to come within it: "The matters referred to are those of which the mind acquires knowledge by the simultaneous action of several of the senses, so that an impression is produced on the mind which cannot be traced to any one fact produced by a single sense, but a statement of which is, nevertheless, a fact. A witness may say that a man appeared intoxicated, or angry, or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense and within the meaning of the phrase 'matter of fact,' as used in the law of evidence, it is not an opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain and as much a matter of fact as if he testified, from evidence presented to his eyes, to the color of a person's hair or any other physical fact of like nature." Evidence, 174; *Ins. Co. v. Lathrop,*

111 U. S., 612. It would serve no good purpose to review the (394) decisions made by this Court in the cases cited in defendant's brief. We have examined them. Several may be distinguished, while it may be that in some the Court has fallen into the error of overmuch nicety of refinement. As said by Professor Thayer, in his admirable treatise, "The law of evidence is the creature of experience rather than logic." See, also, Holmes Com. Law, 156.

It may be well to keep in view that this class of testimony is not to be confused with "expert evidence." There the opinion of the witness is admitted, not because he has knowledge of the matter or condition in regard to which he testifies, but, upon an assumed state of facts, sustained by evidence, he, by reason of his skill or learning, is competent to form opinions. The distinction is clearly stated in McKelvey Evidence, 176, *et seq.* The defendant complains that a large number of witnesses, many of them of great weight in the community, were permitted to testify. The obvious answer to this objection is, that if insured was known to a large number of persons—his habits, conduct, demeanor, etc.—and they all concur in the conclusion, formed from knowledge, that he was temperate, the question is thereby removed from the plane of conjecture—opinion—and placed upon "hard facts." We are of the opinion, both upon reason and authority, that the testimony to which exception was taken was properly admitted.

The court could not have directed the jury to answer the issue as a matter of law. The affirmative was upon the defendant, and certainly it could not be said that there was not ample room for more than one conclusion by fair-minded men. In the brief the first, second, fifth, and ninth assignments of error are conceded to involve this contention. The sixth and seventh assignments raise the much discussed question regarding the weight to be attached to positive and negative testimony. We do not think that the rule for which defendant contends applies in this case. The question was not whether any (395) witness had seen the insured under the influence of liquor, but, conceding that he was so seen, as testified, he was not thereby shown to be intemperate. While this Court has approved the instruction as given in *S. v. Murray,* 139 N. C., 540—and we do not question the wisdom of giving it when the testimony presents the contention, for the purpose of aiding the jury—we should hesitate to find reversible error in the failure to give it when the other instructions, as in this case, point out the manner in which the testimony should be considered. An examination of the testimony fails to disclose any substantial contradictory statements by the several witnesses. The real question was whether, conceding the truth of defendant's testimony, the insured had

ever been intemperate in the use of alcoholic liquor. This was fairly submitted to the jury, and they found against the contention of defendant.

We find no reversible error. The judgment must be

Affirmed.

WALKER, J., concurring: The opinion of the Court in this case does not conflict, as I understand it, with the rule of evidence that a witness cannot give his opinion in answer to a question which involves a matter of law as one of its ingredients, as, for example, whether a certain person had or had not sufficient mental capacity to execute a deed or will, or to make a contract; what is mental capacity and the standard by which it is to be gauged, being questions of law. I adhere to what I said in the case of *In re Peterson,* 136 N. C., 28, and concur in the decision of the Court in this case, because I do not think the questions which are now ruled to be competent fall within the principle discussed by me in that case. There is a wide difference between mental condition or soundness and mental capacity, and if this difference is carefully regarded, most of the cases in our reports can easily be reconciled. *Crowell v. Kirk,* 14 N. C., 356; *Clary v. Clary,* (396) 24 N. C., 78; *Smith v. Smith,* 117 N. C., 326; Lawson on Exp. and Op. Ev. (2 Ed.), p. 155; *Fairchild v. Bascom,* 35 Vt., 416; Reg. Richards, Fos. and Fin., 87; *Walker v. Walker,* 34 Ala., 470; *In re Arnold,* 14 Hun, 525. *Whitaker v. Hamilton,* 126 N. C., 465, was, in my opinion, erroneously decided, and should be overruled. A witness is no more competent to express an opinion as to the mental capacity of a testator to make his will than he would be to state that an act was negligently done, both involving questions of law. The latter kind of testimony this Court has steadily and consistently held to be incompetent. *Tillett v. R. R.,* 118 N. C., 1031. Nor can he state that another has acted *bona fide. Wolfe v. Arthur,* 112 N. C., 691. In *Tillett v. R. R.,* at p. 1042, *Justice Avery* said: "When, therefore, the witness was asked to state whether a car was coupled in a negligent manner, the question was calculated to elicit an opinion upon one of the very questions which the jury were impaneled to decide, and the objection to its competency, being made in apt time, was properly sustained." *Smith v. Smith, supra.* Mental state may be proved by a witness's opinion, as in *McRae v. Malloy,* 93 N. C., 154, cited in the opinion of the Court. See, also, *Sherrill v. Tel. Co.,* 117 N. C., 353. It is also competent for a witness to give his opinion as to whether a person is a negro or not (*Hopkins v. Bowers,* 111 N. C., 175), or that his appearance indicates the presence of negro blood in his veins, as in *Gilliland v. Board of Education,* 141 N. C., 482. But in all the cases just noted,

and in those cited in the opinion of the Court, as well as in the principal case, the inquiry referred to a state or condition not complicated with a question of law. A witness cannot give his opinion as to what the law is, either directly or indirectly, unless that is the very issue involved or the subject of inquiry, as when it relates to the law of some other jurisdiction and he is called as a professional expert to prove it. That a nonexpert should not be asked a question requiring him to express his opinion upon a question of law would seem (397) to be a proposition so plain as not to require any argument to demonstrate its correctness. He could just as well be asked if a will or deed had been properly executed. It is not the nature of the particular question of law involved, but the fact that it involves a question of law, which renders the witness incompetent to answer such a question.

Although concurring with the Court, I have discussed this matter in a separate opinion because it is considered by me as very important to preserve the true and proper distinction which separates competent from incompetent evidence; otherwise, great injustice may be done in the trial of causes.

Cited: Wade v. Telephone Co., 147 N. C., 225; *Davenport v. R. R.*, 148 N. C., 295; *Wilkinson v. Dunbar*, 149 N. C., 28; *Lumber Co. v. R. R.*, 151 N. C., 220; *Harper v. Lenoir*, 152 N. C., 731; *Boney v. R. R.*, 155 N. C., 105; *Daniel v. Dixon*, 161 N. C., 380; *Renn v. R. R.*, 170 N. C., 141.

T. J. McDUFFIE v. SEABOARD AIR LINE RAILWAY.

(Filed 6 November, 1907.)

Railroads—Penalty—Failure to Furnish Cars—North Carolina Corporation Commission Rules.

The defendant railway company is not liable for the penalty for failure to furnish cars to those who apply in writing or make the deposit under Rule 9 of the North Carolina Corporation Commission, when the company is not allowed the four days therein specified within which to furnish them, notwithstanding the railway company did not furnish them for twenty-three days.

ACTION to recover penalty for failure to furnish cars as provided by Rule 9 of the Corporation Commission, tried before *Webb, J.*, and a jury, at August Term, 1907, of CHATHAM.

The court submitted these issues:

"Did the plaintiff apply in writing for the car, as alleged?" Answer: "Yes."

"Did the defendant fail to furnish the car, as alleged?" Answer: "Yes; twenty-three days."

(398) "What amount is plaintiff entitled to recover?" Answer: "Twenty-three dollars, including Sundays."

From the judgment rendered the defendant appealed.

Day, Bell & Allen and Womack, Hayes & Bynum for defendant.
Plaintiff not represented in this Court.

BROWN, J. The provision made by the Corporation Commission to compel carriers of freight to furnish cars within four days, as embodied in Rule 9 of the Commission, has been superseded by the act of Assembly of 1907, ch. 217, sec. 3, which went into effect 1 July, 1907, after plaintiff's alleged cause of action accrued.

The learned counsel for the defendant contends, in an argument of much force: (1) That the regulation is unreasonable, in that it fixes an arbitrary time within which the cars are to be furnished, allows no excuse or exception, and fixes no limit to the penalties that may be incurred. (2) That the Commission had no power to make it. (3) That the shipper himself did not comply with it.

It is true, as contended, that the Supreme Court of the United States did hold a statute of Texas unconstitutional and void which required railroad companies to furnish cars within six days in unlimited numbers, within a time arbitrarily fixed by the statute and without regard to the circumstances or facilities of the company. *R. R. v. Mayes,* 201 U. S., 329. In commenting upon the unreasonableness of the statute, the Court says: "It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy

(399) weather. In that case the Court held it to be an unreasonable regulation of interstate commerce. In this case the car was not to be used in such commerce, but wholly within the State, viz., for transporting logs from Colon, N. C., to Raleigh, N. C.

Whether we will follow the persuasive force of that authority in passing upon a matter of intrastate commerce, we need not and do not now determine. Nor need we pass upon the power of the Commission to make such a rule, as we are with the defendant upon its third proposition.

In this case it appears that the plaintiff applied in writing on 3 January, for a car to be furnished "by 5 January, 1907." The rule

allows the carrier four days in which to furnish cars to those who apply in writing and make the deposit. This application required the car to be furnished within two days. The defendant was not, therefore, required to fill it, and incurred no penalty for its failure to do so.

The plaintiff is not entitled to recover, and the defendant's motion should have been granted.

Action dismissed.

Cited: S. c., post, 400.

T. J. McDUFFIE AND C. D. WOMACK v. SEABOARD AIR LINE RAILWAY.

(Filed 6 November, 1907.)

ACTION to recover a penalty, under Rule 9 of the Corporation Commission, for failure to furnish a car, tried before *Webb, J.*, at August Term, 1907, of CHATHAM.

From the judgment rendered, the defendant appealed.

Day, Bell & Allen and Womack, Hayes & Bynum for defendant.
Plaintiff not represented in this Court.

BROWN, J. The record discloses that the order for the car is (400) dated 8 December, 1906, and requires that the empty car be furnished by 10 December, 1906. For the reasons given in *McDuffie v. Railway, ante,* 397, the plaintiff is not entitled to recover, and defendant's motion should have been granted.

Action dismissed.

L. C. TAYLOR ET AL. v. THE SEABOARD AIR LINE RAILWAY.

(Filed 6 November, 1907.)

1. **Railroads—Trustees of Church—Nuisance—Permanent Damages.**

An action by the trustees of a church for permanent damages against a railroad company, caused by the propinquity of its terminal and depot to the church, and the manner of its use, will not lie, whether the railway company acquired the property by purchase or condemnation proceedings.

2. **Same—Damages—Lawful Exercise of Rights—Nuisance—Specific Allegations—Demurrer.**

Personal interests and comfort must yield to public necessity or convenience, and the lawful operation of a railway, with reasonable care, is

not an actionable nuisance. Therefore, a demurrer will be sustained to a complaint which does not point out in a specific manner the particulars wherein the defendant has exceeded its legal or chartered rights.

3. Same.

A demurrer will be sustained to a complaint in a suit brought by the trustees of a church against a railroad company alleging that the defendant, in the use and operation of its railroad at its terminal, wantonly and negligently created and maintained its terminal and premises contiguous to plaintiff's lot on the opposite side of the street therefrom, so as to greatly endamage the church and manse and to render them less valuable as a place of worship and residence, without specifying any act which the railroad did not have the lawful authority to do, or that it needlessly and heedlessly caused the acts complained of.

4. Same—Nuisance—Damages—Trustees of Church—Damages to Pastor, etc.

In suit by the trustees of a church against a railroad company for the improper use of its terminal or depot at or near the manse of the church, no recovery can be had for any physical suffering upon the part of their pastor, his family, or the individuals composing the congregation.

(401) ACTION heard by *Council, J.*, at July Term, 1907, of GRANVILLE, upon complaint and demurrer.

From the judgment overruling the demurrer defendant appealed.

B. S. Royster and T. Lanier for plaintiffs.
Day, Bell & Allen and Graham & Devin for defendant.

BROWN, J. It appears from the complaint that plaintiffs are the trustees of the Oxford Presbyterian Church, situated, with the manse for the use of the pastor, on the east side of Gilliam Street, and that the congregation for which they are trustees have been using the property for religious purposes since 1833. The complaint alleges that defendant operates a line of railway to the town of Oxford, and that the terminus of the said line of railroad is within the corporate limits of the said town and very near the center thereof; that the freight depot and passenger station of the said railroad, which are used, operated, and controlled by the defendant, are on the west side of said Gilliam Street and nearly opposite to the said church building and dwelling, and the tracks of the said railroad leading to the said freight depot and passenger station cross said Gilliam Street very near said church and dwelling. Plaintiffs further aver that, in the use and operation of the said railroad, freight depot, passenger station, and tracks thereon, the defendant has wantonly and negligently created, maintained, and permitted on its terminal premises contiguous to the plaintiffs' lot, and on the opposite side of the street therefrom, such nuisances as to greatly endamage the church and manse and to render them less valuable as a place of worship

and residence. The pleader then sets out specifically the particular acts constituting the alleged nuisances:

1. By the ringing of bells, sounding of whistles, blowing off of (402) steam, and the loud puffing of engines, and by smoke, cinders, soot, dust, and foul, noxious, and offensive odors from defendant's engines being operated on its tracks.

2. By odors from cars of fertilizer being moved about and left remaining on the terminal tracks.

3. By the maintenance and use of a freight and passenger depot so near the plaintiffs' property that the smoke, odors, noise, and vibrations from its engines and trains are annoying to the congregation and occupants of the parsonage.

4. By blocking Gilliam Street with trains very near the church and dwelling, and obstructing the passage of the members of the congregation desiring to attend church and the children going to Sunday-school.

5. By loading and unloading circuses on defendant's tracks near the plaintiffs' property.

6. By running trains and shifting cars on Sunday near the plaintiffs' church and at the time of their regular services.

The complaint further alleges that, by reason of the nuisances aforesaid, the said church and dwelling have been greatly and most seriously damaged as a place of worship and for a residence, towit, damaged in the sum of $5,000.

The plaintiffs do not seek to enjoin defendant from the use of its terminal station, but to recover permanent damage, once for all, for the diminution in the value of their property, caused by the propinquity of the terminal and the manner of its use. It is alleged that the defendant acquired its terminal property by purchase, and not by condemnation. It is immaterial, so far as it affects the rights and liability of a railway corporation, how it acquired its property, whether by purchase or under the exercise of the delegated power of eminent domain. It holds the same rights, is subject to the same governmental regulation, and incurs the same liabilities to the public in either case.

The principal legal propositions presented on this appeal were (403) very fully and recently considered by this Court in *Thomason v. R. R.*, 142 N. C., 322, and the law of nuisance, as applicable to railroads, is there elaborately discussed by *Mr. Justice Connor.*

Applying the principles of law, as there laid down, to the facts as stated in the complaint, we are of opinion his Honor erred in overruling the demurrer.

The several alleged acts charged against the defendant are well within its chartered powers, provided they are performed with reasonable care.

It is out of the question, in this advanced age, to apply to railways, our great arteries of commerce, the doctrines of the common law in relation to nuisances. As an eminent judge has recently said, "A rigid enforcement of rules and definitions announced in an age that knew nothing of locomotives and blast furnaces would have stopped the wheels of commerce, put out the fires of furnaces, and silenced the rattle of manufactories." *Simmons, C. J., Austin v. Terminal Co.,* 108 Ga., 687.

We live in an age of progress, which requires the modification of old rules and their judicious application to changed conditions. Personal interests and comforts must yield to public necessity or convenience. To deny to the defendant the use of its road and terminal would be to exclude all railroads from our cities and towns. The extension of such a ruling would stop all machinery driven by steam, and restrain the use of coal because of its annoying smoke.

There are thousands of manufacturing plants, mills, and other kindred establishments in the cities and towns of this country, about which no complaint has been made in the courts, which would have been adjudged actionable nuisances according to the old view of such structures. We cannot afford to silence the hum of industry or destroy the city that has grown up around the loom. In the elevated railroad cases (404) abutting property owners recovered permanent damages arising from smoke and noise, but upon the sole ground that the elevated structures invaded the owner's easement of light and air and greatly interfered with means of access to his property. Speaking of those cases, the Supreme Court of Georgia says: "But in no case has the owner of property on a cross street or a parallel street, no matter how close to the elevated road, been held entitled to recover, so far as we have found. And yet it is almost certain, on a business proposition, that persons owning property abutting on cross streets have found their property depreciated in value as a result of the construction and operation of the elevated roads." *Austin v. Terminal Co., supra.* In this complaint there is no allegation of any physical interference with plaintiffs' property by defendant from which damage may flow, as in the elevated cases. It is, therefore, manifest, from an unbroken line of precedents, that the mere establishment and proper use of a freight and passenger station across the street from plaintiffs' property does not constitute an actionable nuisance. Having been established by authority of law, all damage that flows from its reasonable and proper use is *damnum absque injuria.* 2 Elliott on Railroads, 718; 2 Wood on Nuisance, sec. 753; *R. R. v. Maddox,* 116 Ga., 64; 19 A. and E. (1 Ed.), 923 and 924, and cases there collected.

And it further follows that injuries and inconveniences to those who reside near this terminal, from noises of locomotives, shifting of cars,

loading and unloading freight, smoke, and the like, which result from the necessary and therefore proper use and conduct of the terminal, are not actionable nuisances, but are the necessary concomitants of defendant's franchise. Wood Railroads, p. 722; *Beseman v. R. R.*, 50 N. J. Law, 235; *R. R. v. Speer*, 56 Pa., 325.

While we hold that a railway lawfully operated with reasonable care, however disagreeable it may be to the residents of the neighborhood, is not an actionable nuisance, we are far from holding that (405) it cannot be so operated and conducted as to become one.

The *Baptist Church case*, 108 U. S., 317, is a weighty and often cited authority illustrative of the lawful and unlawful use of railroad property. The railroad had located an engine-house away from its business terminal, close under the eaves of the church windows, and had erected sixteen smokestacks, lower than the church windows, almost up against them and so constructed that the volume of smoke from each stack poured directly into the body of the church. The Supreme Court of the United States applied the law of nuisance, wholly independent of reasons of public policy and business convenience, for no such considerations required the construction of a roundhouse immediately under the eaves of a church. But in that case the Court holds that, for all usual and necessary noises and inconveniences occasioned by the operation of the railway, as such, in the discharge of its public duty, a property owner cannot recover. When railroads so conduct their operations that they needlessly and heedlessly cause suffering and inconvenience, their statutory authority will not protect them. Such grant of power does not give railway corporations an unbridled license to use their own property as they please without consideration for the rights and property of others. If it did, then, instead of being the servants of the public, they would be its masters. Railroad companies have been held liable for creating an actionable nuisance in using defective engines which scatter great and unnecessary quantities of sparks, cinders and smoke; for continued and unnecessary noises and disturbance from shrieking whistles and hissing steam; for maintaining their stations, depots and cattle yards in a filthy condition; for maintaining coal chutes and roundhouses at improper places and operating them so carelessly and noisily as to create a nuisance. In such and other like contingencies their charters afford them no protection.

Speaking of a railway terminal becoming a nuisance, the Su- (406) preme Court of Georgia says: "Although properly constructed, its negligent and improper operation might produce noises, smoke, cinders, etc., largely in excess of what would result from its proper operation, and thus create specific nuisances which the plaintiff might enjoin." *R. R. v. Maddox, supra.* In their complaint these plaintiffs

have specified as actionable nuisances those general things which the defendant, under its charter, has the right to do, without stating in any particular wherein the defendant has done them injury in an unnecessary, improper, and unlawful manner, thereby exceeding its chartered powers. The defendant may do these lawful acts in an unlawful manner; and if so, it may commit an actionable nuisance; but if it performs them in a proper manner, the act is lawful and not actionable, although disagreeable. The complaint should have pointed out in a specific manner the particulars wherein the defendant has exceeded its legal authority.

"A complaint which alleges negligence in a general way, without setting forth with some reasonable degree of particularity the things done, or omitted to be done, by which the court can see that there has been a breach of duty, is defective and open to demurrer.

"While pleadings are to be liberally construed, they are to be so construed as to give the defendant an opportunity to know the grounds upon which it is charged with liability." *Thomason v. R. R., supra.*

For instance, the complaint charges as a nuisance the running of trains and shifting of cars on Sunday, at the time of the regular church services. As set out in the complaint, these acts do not, *per se,* constitute an actionable wrong, for the statute expressly confers upon railway companies the right to operate their passenger, express and mail service on Sundays, as well as freight trains run for the purpose of transporting fruits, vegetables, live stock, and perishable freight. And when
(407) there are not sufficient cars of live stock or other perishable freights to make a complete train or section of a train, the company may add cars loaded with other freight to complete it. Revisal, sec. 2613.

The loading and unloading of freight trains on Sunday is expressly prohibited, and consequently the shifting and moving of freight cars on that day would be unnecessary, unless they should be in the way of a passenger train, and this should be anticipated and guarded against as much as possible. The complaint should specify wherein the defendant is violating the statute, and wherein it is creating an unnecessary and unjustifiable noise and disturbance on the Sabbath Day.

In our view of the law the plaintiffs cannot in any event recover permanent damage for the depreciation of their property by reason of the establishment of the railway terminal on Gilliam Street, opposite it. If they can allege and prove unlawful and unwarranted acts and conduct by defendant in the management of its terminal which amount to a nuisance, they may enjoin the further commission of such acts, as well as recover such temporary damage as their property has sustained thereby. As trustees they could not recover for any physical suf-

fering upon the part of their pastor, his family or the individuals composing the congregation.

As the case is to be remanded, we will direct that plaintiffs have leave to replead and file another complaint, if so advised, and if not advised, the case will be dismissed.

Reversed.

Cited: Staton v. R. R., 147 N. C., 444; *s. c.*, 153 N. C., 434; *R. R. v. Goldsboro*, 155 N. C., 370; *Rhodes v. Durham*, 165 N. C., 686.

(408)

STATE v. JOSHUA HARRISON.

(Filed 17 September, 1907.)

1. Removal of Causes—Counties—Duty of Court—Objections and Exceptions.

When a cause is ordered removed from one county to another, the law imposes upon the court the duty of selecting the county to which the cause shall be removed. When the court states that the counsel for the prosecution could name any county in the district except a certain one, which they do, and the defendant interposes no objection or does not except thereto, he is deemed to have acquiesced. If excepted to in apt time, whether reversible error had been committed, and a new trial ordered, *Quære.*

2. Evidence—Maps.

A map may be used by a witness to explain his testimony and enable the jury to understand it, though it may not be admitted in evidence; and a witness may show thereby the location of his residence when such is material and relevant.

3. Indictment—Kidnapping—Evidence—Circumstantial Evidence.

When the State relies on circumstantial evidence in an indictment against defendant for kidnapping a boy, it is competent to show by a witness that the defendant was a neighbor of the boy's parents, and, knowing thereof, took no part in the general search instituted by the neighbors, in which several hundred persons participated, such being a circumstance, though slight, in the chain of evidence.

4. Same—Kidnapping—Evidence—Circumstantial Evidence—Exclusion.

In an indictment for kidnapping a child, the State must establish the fact that the child had been actually carried away, as well as that the defendant did it; and, circumstantial evidence being relied on, the force of evidence of this character, though slight in any one circumstance, is materially strengthened by the total absence or vestige of any other agency. Hence, evidence is competent tending to prove that the child could not have been lost in a sound not far from his residence, "for that it is a harbor for boats," and that "there are usually plenty of fishermen

and gunners on the sound and fishermen near the wharf"; also, "that the woods for miles around had been scoured in vain by hundreds of searchers," if such evidence, taken in connection with the other evidence of time, place, motive, opportunity, and conduct, concur in pointing out the accused as perpetrator of the act.

5. Same—Evidence—Newspaper Articles—Declarations.

After a conversation between witness, the father of the lost child, and the defendant, brought out without objection on direct examination, concerning an article published in a newspaper, in which the defendant said the kidnapping idea was absurd, and requested witness to contradict it, and, upon cross-examination, witness was handed a newspaper containing an article headed "Kidnapped," and requested to say if it was the article referred to, to which he replied it was, it was not error to exclude the further question on cross-examination, whether the paper did not contradict it the next day. The direct examination was evidence of the declaration of the defendant, and the subject of the newspaper article, introduced by defendant himself, and his statements, are competent evidence against him.

6. Appeal and Error—Attorneys—Improper Remarks—Objections and Exceptions.

The Supreme Court will not correct the errors of the trial judge, or the conduct of the attorneys during the trial, or their use of improper or offensive language, unless proper exceptions were made upon the trial at the time.

7. Same.

The Supreme Court will not correct the errors of the trial judge unless duly excepted to, nor the improper or offensive language used by attorneys during argument upon the trial, unless called to the attention of the court below and he fails to correct it. Objections and exceptions to the conduct of the counsel taken for the first time on appeal are too late.

8. Appeal and Error—Jurors—Outside Influence—Applause of Crowd—Correction.

Sharp retorts and repartee of counsel in the argument of the case, which bring applause from a large part of the crowd in the courtroom, lasting several minutes, will not be taken as sufficient ground for a new trial, when such is strongly reprimanded by the judge and there is no finding that there was a preconceived design and intention to prejudice the jury against the defendant, and no sufficient evidence to support any such allegation, if made.

9. Indictment—Kidnapping—Proof.

Under an indictment for kidnapping, it is only necessary to prove the taking and carrying away of a person forcibly or fraudulently.

10. Indictment, Bill of—Sufficiency.

A bill of indictment is not defective which conforms to a statute making the particular act an offense, and sufficiently describes it by terms having definite and specific meaning, without specifying the means of doing the act. Such is sufficient if it charges the act itself, without its attendant circumstances.

STATE *v.* HARRISON.

CRIMINAL ACTION, tried at March Term, 1907, of PASQUOTANK, (410) before *W. R. Allen, J.*, and a jury.

The incident charged the felonious kidnapping, on 13 February, 1905, of one Kenneth Beasley, a boy child 8 years of age. The jury rendered a verdict of guilty. From the judgment of the Superior Court, the defendant appealed.

Assistant Attorney-General Clement and H. S. Ward and W. M. Bond for the State.

Aycock & Daniels, Aydlett & Ehringhaus, and I. M. Meekins for defendant.

BROWN, J. The indictment was returned in Currituck County, where the offense is charged to have been committed. The court granted the defendant's motion to remove the case for trial to another county. The counsel for defendant made no objection to any county except Camden. The court then stated that counsel for the State could name any county in the district except Camden. Pasquotank County was then named by counsel for the State and adopted by the court. No objection was made by counsel for defendant, and no exception taken at the time. As the defendant took no exception, he acquiesced in the action of the court, and cannot now be heard to complain. Had the defendant objected at the time, his Honor doubtless would have corrected the error and selected the county himself. The practice of allowing either party to select the county when a cause is removed for trial is not to be commended, and, if excepted to at the time, might possibly be regarded as reversible error, necessitating a new trial. The law imposes upon the court the duty of selecting the county, and this duty cannot be delegated to others.

There are eight exceptions in the record to the rulings of the court upon evidence offered, all of which we have examined with that care which the importance of this case demands. We find no (411) error pointed out by the exceptions of such a character as would justify us in awarding a new trial, and all of the exceptions need not be commented upon in this opinion.

The witness Beasley was permitted to take up a map and show the location of his residence. The court permitted the witness to use the map to explain his evidence. The defendant's exception thereto cannot be sustained. The map was not admitted in evidence, but it was competent for the purpose of enabling the witness to explain his testimony and enable the jury to understand it. Diagrams, plats, and the like are of frequent use for this purpose in the trial of causes, and for such purpose the use of the map was admissible. *Dobson v. Whisenhant*, 101

N. C., 645; *Riddle v. Germantown,* 117 N. C., 387; *S. v. Whiteacre,* 98 N. C., 753; *S. v. Wilcox,* 132 N. C., 1135.

It was in evidence that defendant was a neighbor of the boy's parents, and defendant excepts because a witness was permitted to state that defendant took no part in the general search instituted by the neighborhood, in which several hundred persons participated. We see no objection to this, and his Honor's ruling is supported by *S. v. Wilcox,* 132 N. C., 1128. It is only a very slight circumstance, it is true, but facts which are but slight evidence standing alone should be admitted when the State relies upon circumstantial evidence, if they, with the other facts proved, bear upon the offense charged. *S. v. Rhodes,* 111 N. C., 647.

Exceptions 4, 5, 6, and 7 relate to the introduction of evidence tending to prove that the boy could not have been lost in the sound, not far from his residence; that "many people frequent the sound"; that "it is a harbor for boats"; "there are usually plenty of fishermen and gunners on the sound, and fishermen usually fish near the wharf."

(412) The State was endeavoring to prove by circumstances that the boy had been carried away. To that end evidence was offered that the woods for miles around had been scoured in vain by hundreds of searchers. The State then undertook to demonstrate the great improbability that the boy was lost in the near-by water. We see no objection to this proof. Its value was for the jury. It was a circumstance, slight though it may be, tending, with other evidence, to establish the contention that the boy had not been lost in the woods or drowned along the shore of the sound. It was incumbent upon the State to establish the fact that the boy had been actually carried away, as well as to prove that the defendant did it. In this connection the language of *Mr. Justice Connor* in *S. v. Wilcox,* 132 N. C., 1143, is very pertinent: "In a criminal case, where all the circumstances of time, place, motive, means, opportunity, and conduct concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of any other agent."

Upon the examination of S. M. Beasley, a State's witness and father of Kenneth Beasley, the following conversation with defendant was received in evidence on behalf of the State, without objection: "Harrison asked me if I had seen the article in *The News and Observer,* and what I thought of it. I said, 'I don't know what to think of it.' He said, 'Don't you think it is a batch of lies?' I said, 'I don't know whether it is or not.' Then he asked me if I would not write an article to *The News and Observer* and criticise this article referred to as untrue. I told him I was very particular as to what I said, especially what I

wrote for the public, as I wanted to get my boy back if possible. He said, 'It is perfectly absurd to entertain the kidnapping idea.' I said, 'It does not seem to me absurd to entertain any idea, in view of the fact that we have had so diligent a search for two weeks and have failed to find any trace of him whatever.' He said, 'If your son was kidnapped, some of your neighbors did it.' I said, 'I don't know (413) who did it, but I would like to get him back if possible, and I would not write anything to *The News and Observer.*' Then he drove on. I presume he was referring to the article in *The News and Observer* which suspected him as being the party who took the child. Such an article was published some time, I think, during the week before this conversation. I did not go back to Raleigh. I did not publish the article, and do not know who did." Upon cross-examination by defendant's counsel, the witness was handed a newspaper containing an article headed "Kidnapped," and requested to say if it was the article referred to. Witness answered that it was; and defendant's counsel then asked, "Did the paper next day contradict it?" The State objected to the last question, and it was excluded. We see no error in this ruling. The evidence in chief to which this was intended as a response was not only not objected to by defendant, but consisted almost entirely of the declarations of the defendant in a conversation with Beasley. The subject of the newspaper article was introduced during that conversation by the defendant himself, and his statements are competent evidence against him. The State did not offer the declarations of *The News and Observer,* but the declarations of the defendant. These were competent evidence, and it was plainly incompetent to undertake to reply to them by the subsequent declarations of the newspaper. Whatever value the general public may or may not set upon the statements of *The News and Observer,* we know of no law as yet which constitutes them evidence of a fact on the trial of an indictment in a court of justice.

The defendant took several exceptions to the conduct of the argument upon the part of counsel for the State. During the argument the solicitor asserted that the defendant was a bad man, as shown by the evidence, and said the indictment was found in Currituck County and he was being tried in Pasquotank. The court, without objection by defendant, stopped him and stated that it was not proper to (414) comment on the removal of the cause, and that the jury could not consider it. The solicitor made no further reference to the removal. In view of the very prompt action of the court in correcting the error of the solicitor, we see no ground for complaint, so far as the court is concerned. The same can be said as to the exception to comments of counsel that defendant failed to testify. The court corrected this error

of counsel in a very effective and impressive manner. We undertake to correct the errors of the judge, and not those committed by attorneys. Their errors are to be corrected by the trial judge, and when he fails in his duty it becomes a ground of exception. The other exceptions to the conduct of the argument must likewise be overruled, for the reason that counsel for defendant failed to call the court's attention to the alleged objectionable language, and failed to note an exception thereto. It is too late after the trial is over to note such objections and exceptions for the first time in the case on appeal. It is but fair to the judge, and in the interest of the proper administration of justice, that he should have the opportunity to admonish counsel if they depart in the argument from the proper measure of an advocate's duty. *S. v. Suggs,* 89 N. C., 527; *S. v. Brown,* 100 N. C., 519; *S. v. Tyson,* 133 N. C., 695.

The defendant excepts because, during the argument of the solicitor, the defendant's counsel interrupted him to correct a statement. The solicitor made a sharp retort, whereupon a large part of the crowd in the courtroom broke into applause, which lasted several minutes. We find that the court reproved the audience in strong terms for the misconduct, required the solicitor to suspend his speech until it could be investigated, and called the officers before the court and inquired of them as to who engaged in the applause. One man was arrested and sentenced to five days in jail. We do not think this demonstration warrants us in granting a new trial. It is far from being such a (415) public manifestation of hostility to the defendant as occurred upon the trial of Wilcox (131 N. C., 707). In that case a new trial was ordered, because it appeared that about one hundred people left the courtroom in a body and rang a fire-bell, with the fixed intention to destroy the force of the remarks of the defendant's counsel and distract the attention of the jury; but that case differed from the one at bar, inasmuch as the judge there found as a fact that the demonstrations were made for the purpose of breaking the force of counsel's argument and to prejudice the defendant's case. In this case there is no finding that there was a preconceived design and intention to prejudice the jury against defendant, and no sufficient evidence to support any such allegation. The applause seems to have been evoked by the tilt between counsel. It is sometimes the case that in hotly contested cases the sharp repartee and cross-firing of counsel bring laughter or applause from the audience, which is, of course, promptly checked by the judge. It is not always evidence of deep-seated hostility to either one party or the other. It has been held in other States that, where a disturbance is made in a courtroom for the purpose of prejudicing the jury, and where the presiding judge pays no attention to the interruption, a new trial will generally be granted. *Cartwright v.*

State, 16 Texas App., 473; *Raines v. State,* 81 Miss., 489. The new trial was granted in those cases, not solely because of the disturbance, but because the trial judge failed to do his duty in correcting its effect. In this case, however, the court rebuked the audience in strong terms for their misconduct, and imprisoned one man, and, in addition thereto, in his charge to the jury used these words: "You would be unworthy to sit in the jury box if you permitted the applause of the crowd or any sentiment of the audience to sway you the breadth of a hair from the path of duty." We have no doubt that these impressive words from an upright and fearless judge, preceded as they were by summary punishment upon an offender, had far more influence upon the minds of the jury than the impulsive conduct of some of the audience. (416)

The defendant handed up a number of prayers for instruction, many of which were practically given by the court, and those which were refused the defendant was not entitled to. The defendant requested the court to instruct the jury that there is no sufficient evidence to justify a conviction. The State relies upon a chain of circumstances proven by different witnesses, no one of which, standing alone, would be sufficient to convict, but when taken together, the State contends, they point strongly to the defendant's guilt. It must be admitted that the circumstances in evidence point to the guilt of the defendant, and that there is not a circumstance which points to any other person. To set them out would be of no value as a precedent, and would unduly lengthen this opinion. It is not for us to say that the defendant should or should not have been convicted upon this evidence, as the jurors are the triers of the fact, and not the court. They have rendered their verdict of guilty, and, measured by the standard prescribed by law, his Honor committed no error in not withdrawing the case from their consideration. This evidence is not so slight and inconclusive as that in no reasonable view of it ought the jury to convict. *S. v. Atkinson,* 93 N. C., 519. The evidence, as a whole, raises much more than a mere conjecture or suspicion, and the case comes within the general rule that, if there be any evidence tending to prove the guilt of the accused, the weight of it must be left to the jury. *S. v. Vinson,* 63 N. C., 335; *S. v. Rhodes,* 111 N. C., 650; *S. v. Wilcox, supra.* Defendant excepts to the refusal of the court to give the following instruction: "The word 'kidnap' has a technical meaning. It is derived from the common law and must be interpreted according to its technical meaning at common law, and its meaning at the common law and under our statute is, to take and carry away any person, forcibly or fraudulently, beyond the boundaries of the State." The court in- (417) structed the jury that, "By kidnapping is meant the taking and carrying away of a person, forcibly or fraudulently." The character-

istics and limits of this offense are somewhat differently drawn by legal writers. Blackstone and some other English authorities define kidnapping to be the "forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another." In 1 East Pleas of the Crown, 429, it is described as "the most aggravated species of false imprisonment," and defined to be "the stealing and carrying away or secreting of any person." "The Supreme Court of New Hampshire," says Bishop, "more reasonably, and apparently not in conflict with actual decisions, held that transportation to a foreign country is not a necessary part of this offense." 2 Bish. New Crim. Law, sec. 750. The case referred to is *S. v. Rollins,* 8 N. H., 550, and sustains the author's text. Bishop states the better definition of kidnapping to be "false imprisonment aggravated by conveying the imprisoned person to some other place." *Ibid.* See, also, *Eberling v. State,* 136 Ind., 117; *S. v. Leuth,* 128 Iowa, 189; *Haddon v. People,* 25 N. Y., 373; 5 Words and Phrases, p. 3928, and cases cited. We think that the exception cannot be sustained.

It is further objected that the bill is defective in that it fails to set out "facts and circumstances stating the offense." The bill need not set out the circumstances attending the commission of the offense. It is sufficient if its allegations pursue the language of the statute creating the offense and prescribing its essential elements. *S. v. George,* 93 N. C., 567. In *S. v. Stanton,* 23 N. C., 424, *Chief Justice Ruffin* says: "When a statute makes a particular act an offense, and sufficiently describes it by terms having a definite and specific meaning, without specifying the means of doing the act, it is sufficient to charge the act itself, without its attendant circumstances." A careful
(418) review of the whole record convinces us that no reversible error has been committed.

No error.

Cited: S. v. Leeper, 146 N. C., 658, 661; *S. v. Whedbee,* 152 N. C., 781; *S. v. Nowell,* 156 N. C., 651; *S. v. Corbin,* 157 N. C., 620; *S. v. Arlington, ib.,* 646; *S. v. Hinton,* 158 N. C., 627; *S. v. Vann,* 162 N. C., 540; *S. v. Rogers,* 168 N. C., 114; *S. v. White,* 171 N. C., 786.

STATE v. SOL. HERRING.

(Filed 10 October, 1907.)

1. **Spirituous Liquors—Place of Delivery the Place of Sale—Statutes—Interpretation.**

Chapter 350, Laws 1901, prohibits the sale of spirituous liquors in Pender County. Chapter 498, Laws 1903, makes the place of delivery the place of sale. Revisal, sec. 2080, extending the provisions of the last-named statute to forty-seven counties, not including Pender County, does not repeal the local law relative to Pender County, as by express provisions of Revisal, sec. 5458, the Revisal shall not repeal any act prohibiting or regulating the sale of liquors in any particular section of the State.

2. **Same—Legislative Power—Constitutional Law.**

The liberty of contract yields readily to any of the acknowledged purposes of the police power. The Legislature has the authority, and it is not unconstitutional, to make the place of delivery the place of sale in a county where the sale of spirituous liquor is prohibited.

3. **Same—Instructions.**

It was not error in the court below to refuse to instruct the jury that, if they believed the testimony, the defendant was not guilty under an indictment for selling spirituous liquor in prohibited territory, when the testimony showed that there was a sale of such liquor to defendant and others, a delivery thereof made to him in prohibited territory, and that he aided and abetted such unlawful sale to others in taking orders for the whiskey and having same delivered to the other purchasers.

INDICTMENT for unlawful sale of spirituous liquors in Pender County, same being prohibition territory, tried by *Long, J.*, and a jury, at March Term, 1907, of PENDER.

Solicitor Jones, the alleged vendee of the liquor, testified for (419) the State as follows: "On Wednesday or Thursday I gave defendant 50 cents to send for some liquor, and 4 cents to pay express. I gave him the 54 cents the morning he sent off the order. I got the liquor on Saturday following. I went to the stables and got the liquor. Sol. was there, and I got my liquor; I got a quart of gin. The arrangement we made with defendant about sending for the liquor was on Wednesday or Thursday. Jim Johnson, Ellis Taylor, and Amos Grady were present when we made the arrangement to send for the liquor. Defendant was going to order some for himself, so we all gave him the money—50 cents each, and 4 cents express from Wilmington. Defendant was to send for the liquor. The liquor came on Saturday morning following, in the daytime. The box was open when I got to the stable. Defendant and Amos Grady were there when I got there. When I got there Sol. said: 'It has come, and you all know what you ordered.' I picked mine up out of the box and took it and went

home. Jim Johnson, Ellis Taylor, and Amos Grady were present when I gave defendant the money. The others gave defendant same amount at the same time, in this town. When I saw the liquor it was at Johnson's stables; it was in a box; I got it out. All the bottles had the names of the owners upon them, and I did not see any bottles unmarked. My bottle was wrapped in a paper and name on bottle. Ellis Taylor got his at the same time that I got mine."

There was further testimony, as follows:

William Hand (cross-examination): "I saw a negro carrying a box to the stables; cannot say who the man was carrying the box; he was 250 yards away from me. Four bottles had been taken away when I got there; seven remained in the basket, covered with a bag. Solicitor Jones and the three other witnesses each had liquor. I examined the box when it came in, and it had express tags on it from Wilmington, N. C. Defendant told me he had not made a cent on the whiskey, and ordered it to come in his box, but each bottle was labeled in the (420) name of the person to whom it belonged; that he sent the order to Sternberger Bros., Wilmington, N. C., and they packed and shipped the whiskey, as above stated, to him at Burgaw. Sternberger Bros. are licensed barkeepers in the city of Wilmington, N. C."

Defendant requested the court to charge the jury that, if they believed the testimony, they would render a verdict of not guilty, which was refused, and defendant excepted. Verdict of guilty, and from the judgment on the verdict defendant appealed.

Assistant Attorney-General Clement for the State.
Stevens, Beasley & Weeks for defendant.

HOKE, J., after stating the case: Chapter 350, Laws 1901, prohibits the manufacture or sale of spirituous liquors in the county of Pender, and chapter 498, Laws 1903, makes the place of delivery of such whiskey in said county the place of sale. Section 2080, Revisal of 1905, which extends and applies this last regulation to forty-seven counties in the State, and to certain townships in some additional counties, does not include the county of Pender, and might probably have the effect of repealing the local law just referred to but for the express provision elsewhere found in the Revisal itself (section 5458), to the effect that the Revisal shall not repeal any act prohibiting or regulating the sale of liquors in any particular section of the State, etc.

We have it, then, that the sale of liquors is unlawful within the county of Pender, and the further statutory regulation that the place of delivery of whiskey within said county shall be the place of sale. The validity of this regulation, popularly known as the "Anti-jug Law," has

been upheld with us by direct adjudication (*S. v. Patterson,* 134 N. C., 612), and the decision on this question, we think, is well considered. We see no reason, as a general proposition, why the Legislature cannot make the place of delivery the place of sale as to all con- (421) tracts entered into after the enactment of such a law; and certainly a statute of this kind is valid to the extent required for the proper exercise of the police power, as here. Page on Contracts, sec. 1778; Freund on Police Power, sec. 499; *S. v. Goss,* 59 Vt., 266. In Page on Contracts it is said: "The power to regulate contracts is at least as wide as the police power, and has been assumed to be the same thing." And in Freund, sec 499: "The liberty of contracts yields readily to any of the acknowledged purposes of the police power." This, then, being a valid regulation, we think the evidence, if believed, shows a clear case of guilt on the part of the defendant; and the court was right in refusing to give the defendant's prayer for instruction. The testimony tended to establish that there was a sale of whiskey by Sternberger Bros., of Wilmington, N. C., to Solicitor Jones, the person named in the bill of indictment, completed by delivery at and in Pender County, and that defendant aided and abetted such unlawful sale, in taking the orders, procuring the whiskey, and having same delivered to the purchaser, as charged in the bill of indictment. *S. v. Johnston,* 139 N. C., 640. There is

No error.

Cited: Vinegar Co. v. Hawn, 149 N. C., 356; *S. v. Burchfield, ib.,* 541; *S. v. Allen,* 161 N. C., 234; *S. v. Wilkerson,* 164 N. C., 449; *S. v. Cardwell,* 166 N. C., 316; *S. v. Bailey,* 168 N. C., 171, 172.

(422)

STATE v. NATHAN TISDALE.

(Filed 10 October, 1907.)

Indictment—Spirituous Liquor—Sale—License—Evidence.

An indictment for the sale of spirituous liquor in prohibited territory must charge a sale to some person by name or to some person unknown to the jurors. When the bill is faulty in this respect, Revisal, sec. 2060, providing that the possession of a license, or issuance to any person of a license to sell, etc., by the Department of Internal Revenue, shall be *prima facie* evidence that such person is guilty of doing the act permitted by the license, is insufficient, such charge being too general, and it being necessary that the facts constituting the offense be set forth.

WALKER, J., concurring; CLARK, C. J., dissenting.

STATE *v.* TISDALE.

INDICTMENT for the sale of spirituous liquor in prohibited territory, tried before *Neal, J.*, and a jury, at June Term, 1907, of CRAVEN. There was a verdict of guilty. From the judgment rendered, defendant appealed.

Assistant Attorney-General Clement, D. L. Ward, and L. I. Moore for the State.

W. D. McIver and R. A. Nunn for defendant.

BROWN, J. It is unnecessary to consider any of the exceptions taken by the defendant on the trial, as his exception to the bill of indictment is well taken, and the motion to arrest the judgment must be allowed. The first count charges the unlawful sale of liquor, without a license, to some person to the jurors unknown, in violation of the general law. The second count charges the unlawful sale to some person to the jurors unknown, within territory wherein the sale of liquor is wholly prohibited by law. The third count is as follows: "The jurors aforesaid, upon their oaths aforesaid, do further present: That the said Nathan Tisdale, late of the county of Craven, on 20 September, 1906, unlawfully and willfully did engage in and carry on the business of retail liquor dealer, by selling spirituous and malt liquors to divers
(423) persons in the city of New Bern, said city of New Bern being an incorporated town, where the sale of spirituous and malt liquors is forbidden by law, and where the majority of the qualified voters of said city had voted against the sale of spirituous, vinous, and malt liquors in said city and for prohibition, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State." The State entered a *nol. pros.* as to the first and second counts. The court below overruled defendant's motion as to the insufficiency of the third count, and the defendant was tried and convicted upon that count alone.

This count does not charge the defendant with a sale of liquor to any specific person by name, nor does it charge a sale to any person whose name is unknown to the jurors. It charges that the defendant did engage in and carry on the general business of a retail liquor dealer in the city of New Bern, where the sale of liquor is prohibited by law.

The learned counsel for the State rely upon section 2060 of the Revisal to sustain the bill. This section provides that the possession or issuance to any person of a license to manufacture, rectify, or sell, at wholesale or retail, spirituous or malt liquors by the United States Government or any officer thereof in any county, city, or town, where the manufacture, sale, or rectification of spirituous or malt liquors is forbidden by the laws of the State, shall be *prima facie* evidence that

the person having such license, or to whom the same was issued, is guilty of doing the act permitted by the said license, in violation of the laws of this State. There is nothing in it, or any other statute to which our attention has been called, or which we have been able to find, which supports the contention of the State. It is evidence the General Assembly never thought it necessary to create any such specific offense as carrying on the general business of retailing liquor in territory where its sale is entirely forbidden. In such territory liquor is a (424) contraband, and the sale of it is a secret transaction. The bill of indictment may charge a sale to some person by name, or to some person unknown to the jurors. It must charge one or the other. *S. v. Stamey,* 71 N. C., 202. In an indictment for the unlawful sale of liquor it is not sufficient to charge the defendant generally with the offense of illegal selling. The facts constituting the offense must be set forth. *S. v. Faucett,* 20 N. C., 239. "Every necessary ingredient in the offense must be set forth," says *Judge Daniel* for the Court, in that case, and he then proceeds to state the exceptions to the rule, viz., indictments against a common barrator, a common scold, for keeping a common gambling house or bawdy-house.

In *S. v. Stamey* the identical point is decided, as it was in *S. v. Faucett,* both being indictments for selling liquor. In *S. v. Blythe,* decided in 1835, the question seems to have been first presented to this Court. It is there held, in an opinion by *Chief Justice Ruffin,* that the indictment was defective because the names of the slaves to whom the liquor was sold were not set out in the bill. The learned *Chief Justice* says: "Every indictment ought to have convenient certainty as to time, place, and persons, and give to the accused reasonable notice of the specific facts charged on him, so that he may have an opportunity of defending himself. Here the indictment conveys no information of that sort."

The same principle of criminal pleading is set forth in *S. v. Ritchie,* 19 N. C., 29. The *Stamey case* is cited with approval in *S. v. Pickens,* 79 N. C., 654; *S. v. Miller,* 93 N. C., 516; *S. v. Foy,* 98 N. C., 746; *S. v. Hazell,* 100 N. C., 474; *S. v. Dalton,* 101 N. C., 683; *S. v. Farmer,* 104 N. C., 889; *S. v. Gibson,* 121 N. C., 681. This rule of criminal pleading is recognized by the common law, and is founded upon a just regard for the rights of persons charged with crime. Archb. Crim. Prac., 41, 42. It is not a technical refinement of the law. Had it been, it would have long since been discarded and would never (425) have survived up to 1897, when the last opinion citing *Stamey's case* was written by the present *Chief Justice.*

The reason for setting forth the name of the person to whom the liquor is sold is because each sale constitutes a distinct offense, for which the offender may be punished. When the name of the vendee of the

liquor is given, the particular transaction on which the indictment is founded is identified. The accused then has notice of the specific charge, and may have the benefit of the first acquittal or conviction if accused a second time of the same offense.

Judgment arrested.

WALKER, J., concurring: It seems to me that the distinction between the sale of liquor under a general prohibitory statute, of the character of that upon which this indictment was drawn, and the like offense when the act is prohibited—for instance, near a church or other place—is simply this: That in the former there may be repeated indictments for different offenses, while in the latter the crime consists in doing the proscribed act in or near a certain place, or within a given distance of a certain locality. Where there may be numerous indictments arising out of different offenses, as where a man sells liquor in violation of the general statute, the name of the person to whom the liquor is sold should be given, by every elementary rule of criminal pleading which has been adopted, to protect the defendant from double punishment and to enable him to make his defense and to successfully plead his former conviction or acquittal, for there may be many offenses committed by the violation of the same law on different occasions. Not so, perhaps, where the offense consists in selling in a prohibited place. It makes no difference to whom the defendant sold, so that it appears that he had sold within the prohibited distance of the church or other place intended to be protected. Selling in the prohibited place is the offense. The writer (426) of this opinion is not willing, at present and without further reflection, to assent to the doctrine that, even in the latter case, the name of the purchaser should not be given, if known, because we should always be careful to safeguard the defendant against a second prosecution for the same offense, as it is abhorrent to us, living as we do under a system of laws and a Constitution which forbids double punishment, to impose two penalties for the same crime. It is contrary to the fundamental principles of the common law, to *Magna Carta* and to the Bill of Rights. Const., Art. I; *Com. v. Blood,* 4 Gray (Mass.), 31; *Capritz v. State,* 1 Md., 569; *Dorman v. State,* 34 Ala., 216. We should be careful, therefore, to see that, in administering the criminal law, whether in pleading, evidence, or practice, we do not depart from this manifestly just and well-established principle. The people of this State, who are really and substantially the prosecutors in all criminal proceedings, do not ask that any man be punished, or even be exposed to punishment, twice for the same criminal act.

Justice Bynum, who always stated a principle of law with conciseness and vigor, in *S. v. Stamey,* 71 N. C., 203, says: "The purpose of setting

forth the name of the person on whom the offense has been committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have notice of the specific charge and have the benefit of an acquittal or conviction if accused a second time." See, also, *S. v. Blythe,* 18 N. C., 199; *S. v. Ritchie,* 19 N. C., 29; *S. v. Faucett,* 20 N. C., 239, and, in the reports of other States, *S. v. Allen,* 32 Iowa, 491; *S. v. Steedman,* 8 Rich. (S. C.), 312; *Dorman v. State, supra; Capritz v. State, supra; Com. v. Blood, supra.* Mr. Bishop, in his work on Statutory Crimes (Ed. 1873), sec. 1037, classifies the courts in respect to their decisions upon this subject, and places this Court with those who have held that it is essential to a valid indictment to state the name of the person to whom the liquor was sold. He also recognizes the distinction between the cases which I have attempted to point out in this opinion. *S. v. Steedman,* (427) *supra.*

No one, of course, in this particular prosecution, is seeking to punish the defendant twice for the same offense. That is palpably not the question. It is the liability to be punished hereafter upon a second prosecution and for the same act, by reason of a material defect in the bill. The distinction between the two cases is too plain for argument. And again, shall a citizen be tried hereafter by "indictment, presentment, or impeachment," as required by Article I, sections 12 and 17, of the Constitution, or merely by a bill of particulars? Unhesitatingly I declare in favor of the former method, under which the freemen of England and this country have heretofore been safe against untrue and unjust accusation against them. We may soon imperil the liberty of the citizen by impairing and thereby gradually abolishing the forms of law intended for his protection. Trials are not conducted now as they were in the days of Sir Walter Raleigh. We live not under a king or a potentate, but in a democracy—the best form, we think, of all government, where every man has an equal chance, or should have, before the law, and the right, "in all criminal prosecutions, to be *informed of the accusation against him,* and to confront his accuser and witnesses with other witnesses, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees or (even) necessary witness fees of the defense, unless found guilty." Constitution of N. C., Art. I, sec. 11. If this had been the law of England, as it should have been, when Raleigh was called to the bar to answer the charge against him, he would, perhaps, have escaped the ignominy of the block. Even the ancient forms and the old lore should not be neglected or disregarded, as we cannot well know what the law is except by what it has been, and how it has gradually developed by degrees into a perfect and more liberal system. But however, in our (428)

rapid progress towards a more sensible administration of justice, we may have regarded mere forms of procedure, we should not, by a too liberal construction, jeopardize the liberty of the citizen, and especially should we not deliberately violate his constitutional right and privilege.

CLARK, C. J., dissenting: In Black on Intoxicating Liquors, sec. 464, where the precedents are collected, the overwhelming weight of authority is that in indictments for the illegal sale of liquor it is not necessary to name the persons to whom it was sold. In this State, in *S. v. Faucett,* 20 N. C., 239, it was held that the name of the purchaser must be charged, because, said *Daniel, J.,* the words of the statute (1 R. S., ch. 34, sec. 81) prescribed a penalty for "each and every offense." This case has been followed only by *S. v. Stamey,* 71 N. C., 202. These two cases have never been cited in any other case on *this point.* They have been cited on other points.

On the other hand, in *S. v. Muse,* 20 N. C., 463 (in same volume with *S. v. Faucett, supra*), it was held that, in indictments for selling liquor near a church, it was not necessary to name the vendee, because, says *Ruffin, C. J.,* the statute does not give a penalty for each and every offense. This last case is exactly in point, for our present statute is like the wording of the statute in this last case, and differs from that in *S. v. Faucett* in the same particular which *Chief Justice Ruffin* there pointed out. The statute under which the defendant is indicted is Revisal, sec. 2062: "No person shall sell or otherwise dispose of, for gain, any spirituous, vinous, or malt liquors, or intoxicating bitters, without first obtaining, as provided by law, a license so to do."

This case, therefore, falls exactly under *S. v. Muse,* and not under *S. v. Faucett.* The words "for each and every offense" are not in
(429) the statute now, which is the distinction both *Judge Daniel* and *Chief Justice Ruffin* made in those cases.

The only other reason given in *S. v. Faucett, supra,* is that the defendant may be able to use the judgment as an estoppel when again indicted. Yet the same case (*S. v. Faucett*) holds that, if the sale is charged to have been made "to persons to the jurors unknown," the indictment is valid. So, if the sale is charged, as in this case, merely "to divers persons," the indictment is now held invalid; but if the sale is charged to have been made to "divers persons to the jurors unknown," the indictment is conceded to be good. It is impossible that one of these forms should be more informing to the defendant, or to the court, than the other.

Revisal, sec. 3254, forbids an indictment to be quashed, or judgment stayed thereon, "by reason of any informality or refinement, if in the bill sufficient matter appears to enable the court to proceed to judg-

ment." It is clear that, if there is sufficient matter to enable the court to proceed to judgment in one case, there is in the other. The mere adding after "divers persons" the words "to jurors unknown" cannot give the trial court any additional light when proceeding to judgment. The difference is a "refinement" which the statute requires to be disregarded, and there is no better time to do so than now and in this case.

S. v. Faucett, 20 N. C., 239, was decided far back, when such refinements still lingered occasionally in the administration of the original law, and in *S. v. Stamey,* 71 N. C., 202, was so held merely to follow the other case. It would be better not to lengthen the line by adding the present case to the other two. It is like the expressions "with force and arms," "against the form of the statute," "against the peace and dignity of the State," and the like, which at one time were considered sacred and indispensable, and in some undefinable way connected with the maintenance of our liberties, and whose omission from an indictment vitiated a verdict against the guiltiest criminal. *S. v. Har-* (430) *ris,* 106 N. C., 687, 689. The growing enlightenment of the age has given a clearer conception, both to the Legislature and to the courts, that a trial for crime should proceed solely upon the merits of the case, disregarding all informalities and refinements. In former days, in an indictment for homicide, the nature and size of the wound had to be charged, the manner in which it was inflicted, the value of the weapon, and if a firearm was used it was gravely charged that it was loaded with powder and shot, and that, by the ignition of the powder, "the leaden bullets aforesaid were propelled in and against the left side of A." aforesaid, and many similar details, including "being moved and instigated by the devil," taking up two to four pages of foolscap. Now, three or four lines state the charge in a clear, businesslike way, and no prisoner has ever suffered injustice thereby. If details are required by the prisoner for information, he can have a bill of particulars. There is no reason why the "refinement" of quashing a bill for selling liquor should be allowed for not adding to "divers persons" the further words "to jurors unknown," when the latter allegation is not required to be proven; still less ought the judgment to be arrested, as here, when objection for the omission to use those words was not made till after trial and verdict.

As was said in *S. v. Harris,* 106 N. C., 689, "To sustain obsolete technicalities in indictments will be to waste the time of the courts, needlessly increase their expense to the public, multiply trials, and in some instances would permit defendants to evade punishment who could not escape upon a trial on the merits. If it has not the last-mentioned result, it is no advantage to defendants to resort to technicalities, and if it has such effect the courts should repress, as they do, a reliance upon them."

Here, upon the evidence, the defendant was guilty, beyond question. The jury have so found. The judge states that, in defiance of (431) law, the defendant continued to sell after indictment and even after verdict. He feared the Federal courts enough to pay the United States tax on his business. Why should the State courts reward his contempt of State process by turning him loose, unwhipped of justice, because of the mere omission of the words "unknown to the jurors," which could have been of no aid to the court in proceeding to judgment, nor could their omission be any possible detriment to the just rights of the defendant?

Instead of following an ancient decision, based on a differing statute, and which is contrary to the overwhelming weight of authority in other jurisdictions, it seems to me, we should obey the statute (Revisal, sec. 3254), which was passed to prevent just such miscarriages of justice, and to follow the present statute (Revisal, sec. 2062), which is like that upon which the Court, in *S. v. Muse, supra,* sustained an indictment which, like this, did not charge the names of the vendees.

The courts should keep up with legislation. The law should express the best sentiment of the age. It should move, because all the world beside is moving, for, as Galileo said, *"E pur si muove."* We should move up abreast of our age, and not take our seats by the abandoned camp-fires of a generation that has gone before.

No one is seeking to punish this defendant twice. No such question is before us. The difficulty is to punish him once for an offense of which he has been duly convicted, upon a trial in which there was no valid objection taken. He is seeking to escape judgment upon the attenuated technical ground that the indictment charged the sales to have been made by him to "divers persons" instead of to "divers persons unknown." He might have had this information if he had asked at the trial for a bill of particulars as to the names of the vendees. He made no objection on that score at the trial. He does not show that he has received any detriment. Revisal, sec. 3254, provides that no bill shall be quashed nor judgment stayed by reason of any informality or (432) refinement. It was passed for just such cases as this. Neither *Magna Carta,* the English Bill of Rights, nor the common law can have any effect to prohibit or restrict the legislative power of the people of North Carolina, except in so far as they have been expressly placed by our people in the words of our Constitution. In indictments for false pretense (Revisal, sec. 3432) and in some other offenses the statute provides that the ownership of the property need not be charged; and certainly the Legislature could provide, and has intended, that when there is a mere technical omission (as here, of the word "unknown") in an indictment, not objected to at the trial, and which is not shown to

have worked any detriment, the trial, verdict and judgment shall not be vitiated by such omission.

Cited: *S. v. Dowdy, post,* 434; *S. v. Allen,* 161 N. C., 235. NOTE—Laws 1913, ch. 44, sec. 6, provides that the indictment need not "allege a sale to a particular person." *S. v. Brown,* 170 N. C., 714; *S. v. Little,* 171 N. C., 806.

STATE v. D. W. DOWDY.

(Filed 10 October, 1907.)

1. **Indictment—Sufficiency—Sale of Liquor—Person and Persons Unknown—Prohibited Territory—General Verdict.**

While, under an indictment for unlawfully selling spirituous liquor in prohibited territory, the name of the person to whom the sale was made should have been given, to the end that the defendant should have had reasonable opportunity to prepare his defense and, on conviction, may be protected from a second prosecution for the same conduct, yet when two counts on the bill of indictment allege "an unlawful sale to person or persons to jurors unknown," it is sufficient to support the general verdict of guilty, though coupled with a third count which may be defective.

2. **Same—Evidence—Certificate an Official Record—Revisal, secs. 1616, 1617.**

Upon the trial under an indictment for unlawfully selling spirituous liquor in prohibited territory, it is competent as evidence to introduce a writing, under the hand and seal of the collector of internal revenue, showing the current list of taxpayers for such sale covering the time in question, including the name of the defendant as a "retail malt liquor dealer," the date of payment of tax and issue of certificate, in accordance with the amendment of the Revised Statutes of the United States, sec. 3240, ch. 3, making the matter thus certified an official record; and, as such, it is competent evidence by express provisions of Revisal, secs. 1616, 1617.

3. **Same—Trial for Crime—Certificate of Public Records—Confront Accusers—Constitutional Rights.**

While the Constitution gives to the accused the right to confront his accusers, such does not apply when the facts, from their very nature, can only be proved by a duly authenticated copy of a record. When the entries constitute official records, and a copy and its admission as evidence are expressly provided by statute, the rules of the Department of Internal Revenue making it impossible that oral testimony speaking to the facts recited should be obtained, the copies thus provided for are competent as evidence and are exceptions to the constitutional provisions.

4. **Same—Rules of Evidence—Legislature—Constitutional Powers.**

Revisal, sec. 2060, making the possession of or issuance to any person a license to sell spirituous liquors, etc., *prima facie* evidence of guilt, is a constitutional and valid exercise of the power of the Legislature to change

the rule of evidence and make certain facts *prima facie* evidence of guilt, when the same are relevant to the inquiry and tend to prove the fact in issue.

5. Same—Excessive Punishment.

A sentence of two years imprisonment in the county jail is not excessive when the defendant has, in deliberate violation of law and with the evident purpose to persist in it, sold spirituous liquors in prohibited territory.

INDICTMENT for unlawfully selling spirituous liquors, tried before *Neal, J.*, and a jury, at February Term, 1907, of CRAVEN.

Defendant was convicted and sentenced to two years imprisonment in the county jail, and thereupon excepted and appealed.

Assistant Attorney-General Clement and D. L. Ward for the State.
Henry R. Bryan and W. D. McIver for defendant.

(434) HOKE, J. The various questions raised by the exceptions have been heretofore resolved against the defendant, and we find no error which entitles him to a new trial. Objection is made that the bill of indictment is not sufficiently definite and specific, in that it does not give the name of the person or persons to whom the alleged unlawful sale was made.

There are three counts in the bill—the first two charging an unlawful sale to a person or persons to jurors unknown, and the third charging that defendant was unlawfully carrying on the business of selling spirituous liquors in prohibited territory. It may be that, under section 3529 of The Code, the third count could be sustained for some of the unlawful conduct forbidden by that section; but, without passing upon that question, we think the first two counts are undoubtedly good, alleging an unlawful sale to person or persons to jurors unknown. This kind of allegation should only be resorted to from necessity and when the facts justify such a method of statement; and it seems from the authorities that when the charge is made in this way it should be proved as laid. *S. v. Trice*, 88 N. C., 630; Archbold's Criminal Practice and Pleading, p. 124. It is important always, and required when possible, that, in cases where each forbidden act constitutes a separate offense, the name of the person to whom the sale is made should be given, to the end that the defendant should have reasonable opportunity to prepare such defense as he may have, and that the bill, on conviction, may protect him from a second prosecution for the same conduct. *S. v. Faucett*, 20 N. C., 239; *S. v. Stamey*, 71 N. C., 202; *S. v. Tisdale, ante*, 422. As a matter of form, however, the first two counts in the present bill are sufficient and have been frequently upheld. *S. v. Faucett, supra;* 1 Chitty Criminal Law, marginal notes, pp. 212, 213. The two first counts, then,

in the present bill being good, and there being evidence tending to sustain them, on general verdict of guilty the conviction would be upheld on the good counts, even though the third should be defective. *S. v. Sheppard,* 142 N. C., 586; *S. v. Toole,* 106 N. C., 736. (435)

The defendant further excepts because the court admitted on the trial as incriminating evidence a written paper, under the hand and official seal of E. C. Duncan, collector of internal revenue, in terms as follows:

Current List of Special Taxpayers in Craven County, N. C., as of Record November 7, 1906.—Lee & Dowdy, retail malt liquor dealers, New Bern, from September 1, 1906. Tax, $20.83. Date of payment and issue of certificate, September 30, 1906. Serial number stamp, 222. 104 Queen Street. The firm consisting of N. G. Lee and D. W. Dowdy. Witness my hand and official seal, etc.

E. C. DUNCAN, *Collector.* [SEAL]

The objection being, first, that it does not certify that a license was issued to sell spirituous liquors. Second, was it such a copy or extract from the record of any public office as should be received in evidence under the law? It is held with us that the term "spirituous liquors" includes malt liquors as well. *S. v. Giersch,* 98 N. C., 720. And, while the paper does not state in exact words that a license issued, we think that such a statement is, by fair intendment, the necessary import of the words used, and as such making a copy receivable in evidence under the law. The Federal statute addressed to this question provides as follows: "That chapter 3 of the Revised Statutes of the United States be and hereby is amended in section 3240 so as to read: 'Sec. 3240. Each collector of internal revenue shall, under regulations of the commissioner of internal revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place and business for which such special taxes have been paid; and upon application of any prosecuting officer of any State, county or municipality, he shall furnish a certified (436) copy thereof, as of a public record, for which a fee of $1 for each one hundred words, or fraction thereof, in the copy or copies so requested may be charged. Approved 21 June, 1906.'" This statute makes the matter certified to an official record of the office, for the purpose of the certificate, and as such the copy, properly certified, is made competent evidence by the express provisions of our own statutes on the subject. Revisal, secs. 1616, 1617.

It is strongly urged, however, that the admission of this paper violates the constitutional right of the defendant, that on a trial for

crime he should have opportunity to confront his accusers and the witnesses offered to sustain the charge. This right, of such supreme importance to the citizen, so essential to any proper and impartial administration of justice, should appeal most impressively to the courts of this State, for North Carolina declined to adopt the Federal Constitution until the amendment by which it was guaranteed had been formulated by the Federal Congress and its adoption practically assured. It has, too, a prominent place in our own Bill of Rights, and this Court would never uphold or countenance any legislation or procedure by which it was destroyed or substantially impaired. The right, however, does not mean that never under any circumstances shall a criminal charge be prosecuted except by the presence of living witnesses. At the time of the adoption of our Constitution the principle was subject to several well-recognized exceptions, as the testimony of a witness examined at a former trial and since deceased, dying declarations under certain circumstances, official certificates and the like. Says 1 Greenleaf Ev., 163: "The constitutional clause purported merely to adopt the general principle of the hearsay rule, that there must be confrontation, but it did not purport to enumerate all the exceptions and limitations to that principle. There were then a number of well-established exceptions, and there might be others in the future. The Constitution indorsed
(437) the general principle, subject to these exceptions, merely naming and describing it sufficiently to indicate the principle intended." And, in approval of these exceptions as to official records, *Mr. Justice Avery,* in *S. v. Behrman,* 114 N. C., 804, says: "When facts, from their very nature, can only be proved by a record, or a duly authenticated copy of a record, proof of them does not fall within the constitutional inhibition, since the genuineness of the original was determined by inspection, and of the copies by an examination of the certificates; and the right to confront accusers was intended to be secured to the accused, not under all circumstances, but only where it would bring with it the benefit of testing the truth of testimony by meeting a prosecuting witness face to face and subjecting him to cross-examination." And to like effect is *Reives v. State,* 47 Tenn., 96. The case before us comes, we think, clearly within the principle established by this exception. It was shown that the Department of Internal Revenue has prohibited its officers from giving oral testimony of the contents of public records in its office. This was no doubt found necessary for the proper and efficient administration of the business of the department, and in any event the Executive Department is made the conclusive judge of whether the order should be made, and it has been directly upheld and approved as a valid and binding regulation by the United States Supreme Court in *Boske v. Comingore,* 177 U. S., 459, the doctrine being there laid down as follows:

"The regulation adopted by the Secretary of the Treasury was authorized by section 161 of the Revised Statutes, and that section was consistent with the Constitution of the United States. To invest the Secretary with authority to prescribe regulations not inconsistent with law for the conduct of the business of his department, and to provide for the custody, use and preservation of records, papers and property appertaining to it, was a means appropriate and plainly adapted to the successful administration of the affairs of his department; and (438) it was competent for him to forbid his subordinates to allow the use of official papers in their custody, except for the purpose of aiding the collection of the revenues of the United States." It was, no doubt, on account of this ruling, and in recognition of its fitness, that Congress enacted the statute above referred to, providing that copies of the records might be furnished prosecuting officers.

The entries, then, having been constituted official records, and a copy and its admission as evidence expressly provided for by the statute, and the rules of the department making it impossible that oral testimony, speaking directly to the facts recited, should be obtained, the case, we think, comes clearly within the principle established by the recognized exceptions to the constitutional provision, and the copy was properly received in evidence.

It is further assigned for error that the court charged the jury as follows: "The court charges the jury that the possession of or issuance to any person of a license to manufacture, rectify or sell, at wholesale or retail, spirituous liquors by the United States Government or any officer thereof in any county, city or town where the manufacture, sale or rectification of spirituous or malt liquors is forbidden by the laws of this State, constitutes *prima facie* evidence that the person having such license, and issued as before stated, was guilty of doing the act permitted by the said license, in violation of the laws of the State; and if you find from the evidence, beyond a reasonable doubt, that the defendant had license to carry on the business of retail liquor dealer in the city of New Bern, it being admitted that said city is incorporated, where the sale of liquor is prohibited by law, this would be *prima facie* evidence of his guilt; but unless you find from all the evidence that he is guilty beyond a reasonable doubt, then you ought to acquit him." Defendant admits that the charge is in accord with our statute on the subject (Revisal, sec. 2060), but contends that (439) the statute is unconstitutional. We have so recently discussed and decided this question, in *S. v. Barrett,* 138 N. C., 630, that we do not feel it necessary to do more than refer to that decision. In *Barrett's case* we held that the Legislature had the constitutional power to change the rules of evidence, and to declare that certain facts and conditions,

when shown, shall constitute *prima facie* evidence of guilt, the limitation being that the facts and conditions should be relevant to the inquiry and tend to prove the fact in issue; and the case, we think, comes clearly within the principle, and the objection must be overruled.

Again, it is contended that the judgment should be set aside because the punishment is excessive; but we do not assent to the position. And here, too, the authorities are against the defendant. *S. v. Farrington,* 141 N. C., 844; *S. v. Miller,* 94 N. C., 904. Without expressing an opinion on the question of prohibition, the people of New Bern have adopted this as the law by which they are to be governed, and they are entitled to have the law enforced. This is not an exceptional instance of lawbreaking which can be dealt with in leniency or by an ordinary sentence; but the evidence tends to establish a willful and deliberate violation of law on the part of the defendant, with an evident purpose to persist in it, and presents a case where a light or even an ordinary sentence would be inefficient and entirely out of place.

There is no error, and the judgment below is affirmed.

No error.

Cited: S. v. Toler, post, 440; *S. v. Williams,* 146 N. C., 626; *Vinegar Co. v. Hawn,* 149 N. C., 356; *S. v. McDonald,* 152 N. C., 805; *S. v. Boynton,* 155 N. C., 460; *S. v. Dunn,* 158 N. C., 654; *S. v. Avery,* 159 N. C., 495, 496; *S. v. Fisher,* 162 N. C., 567; *S. v. Watkins,* 164 N. C., 427, 429; *S. v. Wilkerson, ib.,* 442, 445, 446; *Hinton v. Canal Co.,* 166 N. C., 487; *S. v. Little,* 171 N. C., 806.

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(440)

STATE v. THOMAS J. TOLER.

(Filed 10 October, 1907.)

INDICTMENT for unlawfully selling spirituous liquors, heard before *Neal, J.,* at February Term, 1907, of CRAVEN.

Defendant was convicted and sentenced, and appealed to the Supreme Court.

Assistant Attorney-General Clement and D. L. Ward for the State.

R. A. Nunn for defendant.

HOKE, J. The exceptions presented by this appeal are in all respects similar to those decided in the next preceding case of *S. v. Dowdy, ante,* 432. For the reasons stated in that opinion, the exceptions of the defendant are overruled and the judgment against him affirmed.

(441)

STATE v. JACOB WOLF.

(Filed 16 October, 1907.)

1. **Indians—Compulsory Attendance at Government Indian School—Constitutional Law.**

The Cherokee Indians are citizens of this State, and chapter 213, Laws 1905, compelling, under certain conditions, the attendance of their children at the Government Indian School, is not repugnant to Article I, section 15, of the Constitution of North Carolina.

2. **Indians—School Districts—Particular Localities—Constitutional Law.**

The Legislature can meet the needs of one county, district, or locality without making the same act apply to the whole State. And chapter 213, Laws 1905, constituting "all within the boundary known as the 'Qualla boundary' of the Cherokee Indian lands" a special school district, is not repugnant to Article I, sec. 15, of the Constitution of North Carolina.

3. **Indians—Class Legislation—Discrimination—Constitutional Law.**

Chapter 213, Laws 1905, is not discriminative against the Indians, applying alike to all Indians in the special school district. (Article IX, sec. 2, Constitution of North Carolina.)

4. **Same.**

Chapter 213, Laws 1905, compelling the Indians within the "Qualla boundary," especially created a school district, to send their children, between the ages of 7 and 17, to the Government Indian School at Cherokee, for nine months, under certain conditions, providing that the act shall not apply to children within said boundary attending other schools for a like period of time, is constitutional and valid. (Article IX, sec. 2, Constitution of North Carolina.)

HOKE, J., concurs in result. CONNOR, J., dissenting. WALKER, J., concurs in dissenting opinion.

INDICTMENT for the unlawful failure of the defendant, having more than one-eighth Indian blood in his veins, and residing in the "Qualla boundary," a special school district, to send his child to the Government Indian School therein, tried before *O. H. Allen, J.*, and a jury, at March Term, 1907, of SWAIN.

From a judgment upon a special verdict of not guilty the State appealed.

The facts are sufficiently stated in the opinion of the Court.

Assistant Attorney-General Clement for the State.
W. T. Crawford for defendant.

CLARK, C. J. Chapter 213, Laws 1905, reads as follows:

"SECTION 1. That all within the boundary known as the 'Qualla boundary' of the Cherokee Indian lands, in Jackson and Swain counties,

in which is located the Government Indian School, at Cherokee, N. C., be and the same is hereby constituted a special school district.

"SEC. 2. That all children within said boundary are hereby compelled to attend school at least nine months in each calendar year, between the ages of 7 and 17 years: *Provided,* the Government of the (442) United States shall furnish such school with all proper facilities, together with board, clothing, books, medicine, medical attendance, and other necessary expenses: *Provided further,* that nothing in this act shall compel any sick or otherwise disabled child, or any child who is sole person or necessary for the care or waiting on of any sick parent, or for other legal or lawful excuse, to attend said school: *Provided further,* that nothing in this act shall prevent the proper school authorities from excusing any child from the provisions of this act when in their judgment they deem it necessary: *Provided further,* that this act shall not apply to children in said boundary attending some other school for a like time and period.

"SEC. 3. That it shall be unlawful for any parent or guardian to withhold any child from school, and upon conviction shall be fined or imprisoned, at the discretion of the court.

"Sec. 4. That the proper authorities of said schools shall have authority to take charge of any of said children of said district wherever found, and place and keep them in said schools for the period above expressed: *Provided,* that nothing in this act shall allow any person to mistreat or abuse said child or children, or use any more force than is necessary to carry this act into force and effect.

"SEC. 5. That nothing in this act shall apply to any child, parent, or guardian with less than one-eighth Indian blood."

The defendant was indicted for violation of this act, and the jury returned the following special verdict:

"We find that, at the commencement of this action and for a year prior thereto, there was a school maintained by the Government of the United States within the Qualla boundary, furnished with all the proper facilities, together with board, clothing, books, medicine, medical attendance, and other necessary expenses. That the defendant was the father of a child between the ages of 7 and 17. That he did not (443) send said child to the said school for nine months during the last school year. That said child is more than one-eighth Indian blood. That said child was not sick, disabled, or necessary for the care or waiting upon of any sick parent. That said child was not in attendance on any other school for a period of nine months during said school year, nor was said child excused from attendance by the proper school authorities. That said defendant resided within the Qualla boundary. That the said school is under the entire control of the United States, and

the said school is in no way under the control or management of the board of education or school committee, or taught by any teacher under employment of the State. If, upon this special verdict, the court be of the opinion that the defendant is guilty, then we, the jury, find him guilty; but if the court be of the opinion that he be not guilty, then we find him not guilty."

The defense seems to rest its case upon three propositions: 1. The defendant is not a citizen of the State, and hence the act is beyond the power of the State Legislature. 2. That the act applies only to Indians, and hence is class legislation and unconstitutional. 3. It is unconstitutional to select out one school district or locality and make education compulsory therein, without applying the same regulation to the rest of the State.

The Constitution (Art. IX, sec. 15) provides: "The General Assembly is hereby empowered to enact that every child of sufficient mental and physical ability shall attend the public schools during the period between the ages of 6 and 18 years, for a term of not less than sixteen months, unless educated by other means." The authority is as to "every child" between the ages of 6 and 18, and embraces Indians, as well as whites and blacks. We have long had legislation for separate schools for the Croatans in Robeson. In *S. v. Ta-cha-na-tah,* 64 N. C., 614, it was held that the Cherokee Indians resident in this State are subject to our criminal law, the Court saying: *"Prima facie,* all persons within the State are subject to its criminal law and (444) within the jurisdiction of this Court. If any exception exists, it must be shown. Upon examination of the treaty of New Echotah, Georgia, on 29 December, 1835, between the United States and the Cherokee Indians, we find that, by Article XII, it was provided that individuals and families who were averse to moving west of the Mississippi River might remain and become citizens of the States where they resided. . . . Unless expressly excepted, our laws apply equally to all persons, irrespective of race."

In *Cherokee Nation v. Georgia,* 5 Pet., 1, and *Worcester v. Georgia,* 6 Pet., 515, it is held: "It is the universal doctrine of the public law that the Indians are the domestic subjects of the particular European or American State in which they may happen to be." There are bands of Indians still surviving in New York, Georgia, Wisconsin, and in many other States, and the decisions on this point are summed up and reviewed in *S. v. Doxtater,* 47 Wis., 278. These decisions show that Indians are subject to the general laws of the State, unless specially excepted, and that they are usually excepted in laws as to taxation and game laws, but not in this State. In this case the General Assembly did not exempt Indians, but specially provided for the application of

this law to them in this district. *In re Cherokee Trust Funds,* 117 U. S., 309 (bottom of page), it is said of the Cherokees in North Carolina: "They are citizens of that State and bound by its laws."

The second objection, that this is class legislation and unconstitutional, is equally untenable, as is also the third objection, that it applies to only one locality or district. The Constitution does provide (Art. IX, sec. 2): "The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of or to the prejudice of either." The white and colored races compose the bulk of the people of this
(445) State, and the object of this provision is plain, but it is clear that this special act in regard to the Indians of the Qualla School District is "no discrimination in favor of or to the prejudice of either" the white or colored race. And it is also well settled that the Legislature can meet the needs of one county, district, or locality without making the same apply to the whole State. This was held as to the sale of intoxicating liquor (*S. v. Joyner,* 81 N. C., 534; *S. v. Stovall,* 103 N. C., 416; *S. v. Barringer,* 110 N. C., 525; *S. v. Snow,* 117 N. C., 774); restricting sale of seed cotton in certain localities (*S. v. Moore,* 104 N. C., 714); as to no-fence laws (*Broadfoot v. Fayetteville,* 121 N. C., 418); as to mode of working public roads (*Tate v. Comrs.,* 122 N. C., 812); and there are other instances (*Intendant v. Sorrell,* 46 N. C., 49, and many cases cited; *S. v. Sharp,* 125 N. C., 632, 633). That the Legislature may provide special regulations for a particular school district, as where, for instance, the district furnishes by its own action funds in addition to the public school funds, is held in *McCormac* v. Comrs., 90 N. C., 441. And the same must be true if the funds come from private donation or the General Government, if the State accepts such maintenance for "a public school district."

The act is not discriminative, because it applies alike to all Indians in that school district. It could not apply to other races, which go to their own race schools. It is not objected (indeed, could not be by this defendant) that other races are unduly taxed for the benefit of one race, as in *Lowery v. School Trustees,* 140 N. C., 33, for the school is supported, not by taxation, but by donations from the General Government.

It has been suggested that, the school being supported and maintained by the Federal Government, the State could not compel the defendant to send his child there. The point does not arise, for the act, while creating the district a "special school district," as is also the case with
(446) graded schools supported in whole or part by other than State and county funds, the requiring the Indians within that district to send their children between 7 and 17 to school, provided the United States Government furnishes "all proper facilities, together with board,

clothing, books, medicine, medical attendance, and other necessary expenses," does not require them, specifically, to send the children to the Government School, but specifically says that they may send their children to any "other school for a like time and period." There are exemptions of sick or disabled children, or those waiting on sick parents or having other lawful excuse, or whom the school authorities may see fit to excuse. The law compels attendance on some school, but not on this school, leaving the defendant full choice.

The purview of the act is clear, reasonable and within the scope of the lawmaking power of the State. The Federal Government has established a school for the Indians in the "Qualla boundary," and defrays *all* expenses, including not only education, but books, board, clothing, medicine, medical attendance and other necessary expenses. The United States Government cannot compel the attendance of the children. The State Legislature makes the "Qualla boundary" a special school district, and, reciting the above facilities afforded by a school established therein, requires (section 2) the Indian children in that boundary "to attend school at least nine months" in each year, without designating this school, and, to avoid such conclusion, provides that the children may comply with the act by attending some other school. The defendant did not send his child to any school.

Upon the special verdict the judge should have held the defendant guilty. The judgment is reversed. The case is remanded for proper judgment to be entered on the verdict and that the sentence of the court may be imposed.

Reversed.

HOKE, J., concurs in result.

CONNOR, J., dissenting: I do not question that, pursuant to (447) the provisions of Article IX, section 15, of the Constitution, the General Assembly is authorized to enact statutes "requiring every child of sufficient age, mental and physical ability to attend the public schools" established and maintained as a part of the public school system of the State. I do not question the power of the General Assembly to extend this legislation to the children of Cherokee Indians residing in the State. I dissent from the conclusion that the General Assembly has the power to compel such attendance upon a school for nine months in each year, "under the entire control of the Government of the United States and no way under the control or management of the board of education or school committee, or taught by any teacher under employment of the State." While this statute is confined to a small number of Indian children living in the mountains of Swain County, and doubtless, in its operation would do but little wrong, the principle involved is, to

my mind, very important to the preservation of our system of public education. The Constitution (Art. IX, sec. 3) commands the General Assembly to provide for the division of each county into a convenient number of districts, in which one or more public schools shall be maintained at least four months in every year. We have decided at the present term that this constitutional requirement is paramount, and that any other provision apparently conflicting with it must give way. We have sustained every act of the General Assembly enacted for the purpose of making the public school system elastic and adjustable to local conditions and needs. We have, however, kept always in view the constitutional provision for a system of public schools, uniform in essential respects, holding that every public school established and maintained by public taxation constitutes a part of the system, and subject to the control either of committees appointed by the county boards of education or in such manner as the special statutes provide. It has never, I am sure, been supposed that by simply declaring that
(448) certain territory shall constitute a school district, a school entirely controlled by other than State or local officers could be engrafted into the State's system. In *Lowery v. Comrs.*, 140 N. C., 33 (page 46), we said: "There can be no possible room for doubt or controversy in respect to the two principles underlying and always controlling the establishment and maintenance of the public school system of this State. The system includes all public schools or schools receiving for their support public taxes, either general or local." The question was discussed and the authorities reviewed by *Mr. Justice Hoke* in *Smith v. School Trustees,* 141 N. C., 143. The education of the children in the public schools is peculiarly, and in a large measure exclusively, a function of the State—a trust which she cannot delegate to any other agency. The absolute separation of the races and the exclusion of any political or sectarian influence or control are essential to the fundamental and fixed policy of the State. These can only be secured with absolute assurance by holding strictly to the constitutional provision commanding the Legislature to provide for a uniform system of public schools. This uniformity, in essentials, must be preserved. Such variety in matters of administration not affecting the cardinal points regarding race, sectarian issue, etc., is preserved by keeping the public school under the direct control of the people, through their representatives and other officers elected by them for that purpose. Any departure from this principle will eventually destroy uniformity in the system, introduce novel, disturbing and dangerous expedients, with disaster to the cause of public education, so essential to the welfare of the State. If this act, with its loose, uncertain provisions, conferring upon the "authorities" of this Government school almost arbitrary powers, can be sustained, it is

difficult to see where a limit would be fixed beyond which legislative discretion may not go. I disclaim any right, as a judge, to declare an act of the Legislature violative of the Constitution because I may not deem it wise; but there is no more dangerous fallacy than (449) that which teaches that, for some real or supposed temporary advantage, either department of the Government may disregard the supreme law of the State—the people's will formulated and crystallized into the organic law. The people of this State command, in unmistakable terms, their Legislature to provide a system of public schools, and empower it to require compulsory attendance; but certainly they never conferred power to compel attendance upon schools wherein their appointed officers and teachers could not, as a matter of right and duty, enter, supervise and, in all proper manner as prescribed by the law, control. In the public schools, nurseries of the State's citizenship, she cannot safely delegate to any other authority the duty of selecting the teachers, prescribing the books, excluding all teaching and training not in harmony with her ideas and ideals. Doubtless the introduction and passage of this law was prompted by good motives and for the purpose of promoting education among the children of the Cherokee Indians, but the best and permanent good to the State is preserved only by keeping all legislation within the limitations fixed by the supreme law. Any experimental expedients not within these limitations are subversive of liberty regulated by law.

We have avoided many of the disturbing questions encountered by other communities. Our population has been divided by well-defined racial distinctions, for which provision is made. Political, sectarian, and other lines of separation have been excluded from our public school system. We may avoid them by adhering strictly to the constitutional requirement that in these essential matters we maintain a uniform system of public schools under the control of the people of the State, in accordance with local needs and conditions. I think that the judgment of his Honor should be affirmed.

WALKER, J., concurs in dissenting opinion.

Cited: Frazier v. Cherokee Indians, 146 N. C., 482.

(450)

STATE v. B. F. HOLT ET AL.

(Filed 23 October, 1907.)

Principal and Surety—Appearance Bond—Failure to Produce—Principal—Excuse.

The liability of a surety upon an appearance bond is a continuing one until discharged by renewal of bond or production and surrender of principal. He is not released by the principal being drunk and under arrest when his case was called in court and continued, and by the principal having since become a fugitive from justice under charge of a different offense.

ACTION against the surety upon an appearance bond, heard before *Council, J.*, at March Term, 1907, of ANSON.

From judgment rendered against him, the defendant appealed.

The facts sufficiently appear in the opinion of the Court.

Assistant Attorney-General Clement for the State.
H. H. McLendon for defendants.

CLARK, C. J. *Sci. fa.* against Holt, principal, and Ballard, surety, on appearance bond. The defendant was called on Wednesday of April term, and judgment *nisi* and *capias* ordered. It was issued 10 July and served on surety, the principal not found, having become a fugitive from justice on another charge. On motion for judgment absolute, the surety, Ballard, answered that Holt did not appear in court on Wednesday when called, because he could not, being under arrest in the town lockup, and that as soon as released he came to the courthouse, but found that his case had been continued. The solicitor replied that Holt had not renewed his bond after being called out, that he had not attended court after the *sci. fa.* issued, and was now a fugitive from the State; that, when called out, said Holt was in town custody on a charge of being drunk and disorderly.

(451) It is very true, as Sir Boyle Roche said in the Irish Parliament, that "no man can be in two places at the same time, barring he is a bird," and that Holt could not be down and drunk in the town guardhouse and at the same instant soberly and seriously conducting his defense in the Superior Court. But he had no business to be drunk. His being in town custody was neither "the act of God nor the public enemy." He could not plead his own wrong.

The surety (Ballard) says he was not surety that Holt should keep sober and out of custody of the law on some other charge; hence he is not responsible for Holt not appearing on Wednesday when called. If that be conceded, the surety (Ballard) was, nevertheless, not discharged

from liability on the bond until Holt renewed his bond or appeared and stood his trial. The continuance of the case, unless the bond is renewed, does not discharge the surety. *S. v. Morgan,* 136 N. C., 602. The judgment *nisi* did not discharge the surety, for that was a conditional judgment against both principal and surety, with opportunity to show cause why it should not be made absolute. If sufficient excuse has been shown for the failure to answer on Wednesday, none has been shown why Holt did not give bond during the term, after his release or later. The liability of the surety is a continuing one until discharged by renewing the bond or producing the prisoner and surrendering him into custody. Certainly a defendant cannot relieve himself and surety by getting drunk and arrested, and then avoid all consequences by taking flight when released from that arrest. The town authorities may not have known of Holt being bound over to court. If they did, it was not their duty, but his surety's, who had so contracted, to deliver him to the court when called for. The judgment absolute is

Affirmed.

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(452)

STATE v. CLYDE BOWMAN.

(Filed 30 October, 1907.)

1. **Lynching — Legislature—"Oblivion of Offense"—Witness Examined—Incrimination—Pardon.**

Legislation in "abolition or oblivion of the offense" specified, applicable to all in a given class, is valid. Therefore, when under Revisal, sec. 3200, *et seq.*, the defendant was summoned, sworn, and examined by and for the State touching an alleged lynching under investigation by the court, he shall be altogether pardoned of any and all participation therein under the statute or existing law, whether the evidence elicited from him tends to incriminate him or not.

2. **Same.**

Article III, sec. 6, of the Constitution confers on the Governor the power to exercise clemency after conviction in some particular case and in favor of an individual or individuals especially charged with the offense. The exercise of such power is an executive act of a *quasi*-judicial kind, and does not conflict with or exclude the power of the General Assembly to pass an amnesty act in abolition or oblivion of the offense.

3. **Appeal and Error—State Appeal, When.**

The right of appeal on the part of the State is confined to cases specified in Revisal, sec. 3276, being: On special verdicts, upon demurrer, on motion to quash, upon arrest in judgment.

4. Same—Motion to Quash, What Considered—Record, Matters Dehors.

A motion to quash in this State, in proper cases, can be made for matters *dehors* the record, and such matters may be averred by plea, as in this case, duly entered and then supported by proof. In the present case the order of the judge may be treated as an order quashing the bill, and the appeal upheld on that ground.

INDICTMENT for taking part in lynching, heard on plea of amnesty before *Peebles, J.*, at July Special Term, 1907, of UNION.

At the hearing it was made to appear, on plea duly entered, that in proceedings instituted by the solicitor, under sections 3200, 3201, etc., of Revisal of 1905, and at his instance, the present defendant was summoned, sworn and examined by the State touching this al-
(453) leged lynching, which was then being investigated before his Honor, *Walter H. Neal. Judge Peebles* dismissed the case against defendant, holding that, on the facts, the legislation on the subject protected defendant from further prosecution by reason of this charge; and thereupon the solicitor for the State excepted and appealed.

Assistant Attorney-General Clement for the State.

J. A. Lockhart, H. H. McLendon, F. J. Coxe, and T. L. Caudle for defendant.

HOKE, J., after stating the case: Our statute on this subject (Revisal, secs. 3200, 3201 *et seq.*) directs that, whenever a solicitor is advised that a lynching has occurred in his judicial district, he shall at once institute proceedings before a coroner, justice of the peace or judge of the Superior Court for an investigation of the crime and the apprehension of the offenders; that on such investigation, or any other, into the crime, made pursuant to law, no person shall be excused from testifying on the ground that his evidence might subject him to prosecution or in any way tend to incriminate him, etc.; and the statute further provides as follows: "and such person, when so examined as a witness for the State, shall be altogether pardoned of any and all participation in any crime arising under the provisions of the preceding section or under existing law concerning which he is required to testify." On the facts, therefore, which were established at the hearing by the express provisions of the act, the defendant was fully pardoned of any and all participation in the crime charged, as well as any and every offense against existing law concerning which he was required to testify; and the judge below correctly held that the charge should be dismissed and the defendant protected from further prosecution concerning it. Legislation of this kind, acting in "abolition or oblivion of the offense," and applicable to all persons, or all persons in a given class, has been uni-

formly upheld with us, and is sustained by well-considered deci- (454) sions in other jurisdictions. *S. v. Blalock,* 61 N. C., 242; *S. v. Keith,* 63 N. C., 140; *S. v. Applewhite,* 75 N. C., 229; *In re Briggs,* 135 N. C., 119-144; *S. v. Nichols,* 26 Ark., 74; *S. v. Forkner,* 94 Iowa, 1. These cases in no way conflict with or trench upon the provisions of Article III, section 6, of our Constitution, conferring on the Governor the power to grant reprieves, commutations and pardons, after conviction, etc. As said in one of them, "The power thus granted is held not to be exclusive." And, I apprehend, the ruling could further be safely made to rest upon the principle that the section in question confers on the Governor the power to exercise clemency in a particular case and in favor of an individual or individuals especially charged with the offense, this being an executive act of a *quasi*-judicial kind permissible to the Governor by reason of this express provision of the Constitution, while an amnesty act establishes a general rule abolishing the offense and applicable to all persons, or persons of a given class, whether charged or not, being more especially an act legislative in its nature. In any event, the power to enact such legislation is well established here, and, this being true, we hold that any and all further prosecution of defendant by reason of this offense is forbidden. We are not impressed by the position taken by the State's counsel, that defendant is not entitled to the benefit of the law because "the evidence given by him did not in any way tend to incriminate himself." The statute makes no such qualification. The language is: "When so examined as a witness for the State, he shall be altogether pardoned of any and all participation in the crime under investigation, and all offenses, under existing law, concerning which he is required to testify." The Legislature evidently considered that the crime of lynching, subversive, as it is, of all law, a menace to the very existence of organized society, should be dealt with by unusual and extraordinary methods, and intended to make the investigation as extended, searching and effective as legislation could make it. The act, therefore, pro- (455) vides that every person may be examined by the State and may be compelled to speak to every matter relevant to the inquiry, and the pardon is given in language so plain and so full that no claim or suggestion could arise or exist that any constitutional right of the witness would in any way be impaired or threatened.

We are not inadvertent to the suggestion made by defendant's counsel that no appeal lies for the State in cases like the present. The right of the State to appeal only exists in the four cases specified in Revisal, sec. 3276; on special verdicts; upon demurrer; on motion to quash; upon arrest of judgment; and the Court has been very insistent in holding the State to the cases specified. *S. v. Moore,* 84 N. C., 724; *S. v. Ballard,* 122 N. C., 1024.

Without deciding the question, the Court is inclined to the opinion that this may, for the purpose of the appeal, be considered and treated as a motion to quash, and so brought within the direct provisions of the law. While it is held in many jurisdictions that a motion to quash can only be made for matter apparent in the record (Clark's Criminal Procedure, 363), it is otherwise with us. *S. v. Horton,* 63 N. C., 595. And a plea of the kind interposed here has been sanctioned as a proper method, in motions to quash, by which the relevant facts existent *dehors* the record should be made to appear. *S. v. Smith,* 80 N. C., 410.

There is no error in the proceedings below, and the judgment dismissing the case is

Affirmed.

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(456)

STATE v. RILEY HARRIS.

(Filed 30 October, 1907.)

1. Indictment—Feloniously — Sufficiency — Power of Legislature—Constitutional Law.

While it has been held that, in indictments for felonies, the word "feloniously" must appear as descriptive of the offense, the Legislature has the right to modify old forms of bills of indictment or to establish new ones, provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the offense of which he stands charged.

2. Same.

Revisal, sec. 3247, establishing a form for an indictment for perjury, that A. B. did unlawfully commit perjury, giving in addition the court where the trial was had, the title of the cause, the statement alleged to be false, with proper averments as to *scienter*, is a valid exercise of such power, and is in accord with our Bill of Rights, which requires that the defendant be informed of the accusation against him.

3. Same.

An indictment is sufficient when charging the defendant with unlawfully committing perjury upon the trial of a specified action before a certain justice of the peace, at a certain time and place, by falsely asserting on oath, the same being material to the inquiry when made, that he did not turn over to a certain person named, his account and statement of rent due him, etc., knowing the said statement to be false, against the form of the statute, etc.

PERJURY, tried before *Council, J.,* and a jury, at April Term, 1907, of ANSON on the following bill of indictment:

The jurors for the State, upon their oaths, present: That Riley Harris, late of the county of Anson, on 9 March, in the year of our

Lord 1906, with force and arms, at and in the county aforesaid, did unlawfully commit perjury upon the trial of an action in the court of a justice of the peace in Anson County, wherein the State of North Carolina was plaintiff and Jeff Ratliff was defendant, by falsely asserting on oath that he, the said Riley Harris, never turned over to (457) Y. C. Allen his account and statement of rent due him, the said Riley Harris, by Jeff Ratliff, as security for the payment of house rent due said Y. C. Allen, and that he never told Jeff Ratliff to pay the same to Y. C. Allen; and that he, the said Riley Harris, never delivered to Y. C. Allen a statement of said account of rents due him by W. T. Ingram, knowing the said statement or statements to be false, against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

ROBINSON, *Solicitor.*

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

Assistant Attorney-General Clement and H. H. McLendon for the State.

J. W. Gulledge for defendant.

HOKE, J., after stating the case: It is chiefly urged against the validity of this conviction and sentence that the word "feloniously" is not used in the bill of indictment. The question is distinctly and properly raised, both by motion to quash and in arrest of judgment, but we are of opinion that the position cannot be sustained. It has been frequently held with us that, in indictments for felonies, the word "feloniously" must appear as description of the offense, and that no other or equivalent term will suffice. This principle, however, does not obtain where the Legislature otherwise expressly provides; and so it is here. Our Revisal of 1905, ch. 80, sec. 3247, establishes a form for a bill of indictment for perjury, and enacts in express terms that this form shall be sufficient. The statute does not make the word "feloniously" a part of the bill, and it does not appear in the form set out, and the same is, therefore, no longer required. The General Assembly has the undoubted right to enact legislation of this character, to modify (458) old forms of bills of indictment, or establish new ones, provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. "To be informed of the accusation against him" is the requirement of our Bill of Rights, and unless such legislation is in violation of this principle or in contravention of some express constitutional provision, it should and must be upheld by the courts. The act in question is open to no objection of the kind suggested. "Did unlawfully commit per-

jury" is the descriptive part of the charge required by the statute, giving, in addition, the court, the cause, the statement alleged to be false, with proper averments, also, as to the *scienter;* and, by the terms of such a bill, therefore, the defendant is fully notified of the charge made against him, and the present indictment, following with exactness the form established by law, the objection of the defendant must be overruled. *S. v. Hester,* 122 N. C., 1047; *S. v. Moore,* 104 N. C., 743-751; *Commonwealth v. Truelove,* 150 Mass., 66; Cooley Cons. Lim. (1 Ed.), p. 382, note 3, and p. 436, note 2. The form established by the statute has been expressly approved in several decisions of this Court. *S. v. Thompson,* 113 N. C., 638; *S. v. Gates,* 107 N. C., 832; *S. v. Peters,* 107 N. C., 876.

Our attention has been called by counsel to the cases of *S. v. Bunting,* 118 N. C., 1200; and *S. v. Shaw,* 117 N. C., 764. These cases were indictments for perjury, in which it was expressly held that the term "feloniously" was required to make a good bill of indictment for this offense. Both of them, too, were on indictments instituted after the statute which established the form followed in the present bill. The Court, however, in rendering these decisions, was evidently not advertent to the statute above referred to, for the reason probably that it does not appear in the general Code of 1883, and was, therefore, not
(459) called to its attention; the statute having been enacted at a subsequent session and being chapter 83, Laws of 1889. This law we hold to be controlling on the question, and the cases cited are overruled.

It is further contended that the bill is defective, for that the matter alleged therein to be false is not material, and objection is made on this account to the form of the bill and to the testimony offered in support of the charge as laid; but this objection is without merit. It is undoubtedly a correct position that one of the essentials in a charge of "perjury" is that the matter alleged to be false must be material. The conclusion is sound, but the premise is defective, or rather, it is nonexistent, for the alleged testimony was material. It was given in a criminal action, in which the present defendant, as landlord, was prosecuting one Jeff Ratliff, a tenant, for removing crops without having paid the rent. Ratliff's defense was that the defendant's claim for rent had been assigned by him to one Y. C. Allen, and that he (Ratliff) had paid the claim, or adjusted it with the assignee. This testimony, tending, as it did, to establish the assignment of defendant's claim as landlord, was not only material, but directly relevant to the issue, and the judge below made a correct ruling on defendant's objection.

There is

No error.

Cited: S. v. Cline, 146 N. C., 642; *S. v. Holder,* 153 N. C., 609.

(460)

STATE v. WILLIAM JONES.

(Filed 6 November, 1907.)

Indictment—Petty Misdemeanor.

In the Superior Court, upon appeal from a conviction for a petty misdemeanor, indictment by grand jury is dispensed with.

CRIMINAL ACTION, tried before *Ferguson, J.*, and a jury, in the Superior Court of FORSYTH.

Assistant Attorney-General Clement for the State.
Defendant not represented in this Court.

PER CURIAM: By chapter 573, Laws 1907, the recorder's court was created at Winston for the trial of petty misdemeanors, but with right of appeal to the Superior Court. By section 4 of said act, larceny of goods less than $10 was made a petty misdemeanor. The defendant, convicted in said court on a charge of petty misdemeanor, in stealing shipstuff of the value of $3, appealed to the Superior Court, and, being put on trial *de novo,* objected because no indictment against him had been returned by a grand jury. The judge overruled the exception; the defendant excepted and, there being a verdict of guilty, appealed.

There is no error. The same point has been fully discussed and settled in *S. v. Lytle,* 138 N. C., 738. In like manner, when a case is tried in the Superior Court on appeal from a justice of the peace, no indictment is required. *S. v. Quick,* 72 N. C., 243; *S. v. Thornton,* 136 N. C., 616.

No error.

Cited: S. v. Shine, 149 N. C., 482; *S. v. Collins,* 151 N. C., 649; *S. v. Brown,* 159 N. C., 469; *S. v. Dunlap, ib.,* 493; *S. v. Hyman,* 164 N. C., 415; *S. v. Tate,* 169 N. C., 374.

(461)

STATE v. VERNON GODWIN.

(Filed 6 November, 1907.)

1. Instructions—Mandatory Charge—Questions for Jury.

It is error in the trial judge to charge the jury peremptorily to find the defendant guilty upon a certain phase of the testimony, without directing them to pass upon the evidence or the credibility of witnesses. The instruction should be based upon their belief of the evidence, or, which is in better form, upon their finding of the facts in accordance with the evidence.

2. Same—Nuisance—Streets—Obstruction—Remedy of City—Remedy of Citizen.

The act of obstructing a street, which is a public highway, by one build- a fence across it, is an indictable nuisance, and abatable both by the proper town authorities and by the person who is annoyed or injured by it. Therefore, when, under an indictment for removing a fence surrounding a yard, etc. (Revisal, sec. 3673), there is evidence on the part of the defendant that he was town marshal, duly acting, after notice, under an order from the proper authorities of a town having the power by its charter to remove it, and there is also evidence that the marshal had personally the right to remove it, irrespective of the order, and that the street had been dedicated, it was error in the court below to direct a verdict against the defendant.

3. Streets—Adverse Possession—Right of Public.

Possession of a street by one claiming it adversely cannot now divest or destroy the right of the public therein. Revisal, sec. 389.

CRIMINAL ACTION, tried before *Justice, J.*, and a jury, at September Term, 1906, of ANSON.

This is an indictment for injuring and removing a fence surrounding a yard, garden, and cultivated field, under Revisal, sec. 3673. When the evidence was closed the court instructed the jury to return a verdict of guilty.

The defendant contended that the fence obstructed West Street (extended), in the town of Polkton, while the State insisted that the land surrounded by the fence had not been dedicated to the public for the purpose of being used as a street, and to these respective contentions the testimony was addressed. There was evidence tending to
(462) show, as we think, that the property was originally owned by L. L. Polk, who extended West Street as at first dedicated or laid out by him and accepted by the town, and then sold lots—at least two—on the extended portion of the street. The defendant testified as follows: "Mr. Briley lives in my house, which is situated in the town of Polkton. The residence is situated on the Sturdivant lot, which is one square acre. There was a street in front of my house when I bought it, twenty-five or thirty years ago. Elms had been set out as shade trees along this road, which were eight or ten years old at the time. The street was opened at that time 75 or 100 yards below my house. The fence constructed by Dr. Smith ran straight across the space opened up for the street, and then ran down the space with my line for some distance and across this space again. The road had been used up to the house. It had been cut out for some distance below, but had never been used. There was a clear space, 40 or 50 feet wide, opened along my eastern line to the Austin line, now the Beachum line. All of this property was owned by L. L. Polk when I bought the Sturdivant lot and

when the Sturdivant lot was bought from me, and also the second lot that I bought from L. L. Polk. Large trees had been cut out and this space opened up for a street, and has now grown up in bushes. I set out shade trees along the space which had been opened for this street eighteen or twenty years ago. The shade trees are there now—some of them 8 or 10 inches in diameter, or larger. When I bought my property this open space and street in front of my house were called West Street (extended), or the extension of West Street. I had no ingress to my property below this fence, except along this avenue which had been opened." There was also evidence that the defendant, as town marshal, removed the fence as an obstruction to the street, under an order from the proper authorities of the town, which was incorporated by Private Acts of 1874-75, ch. 158. Notice of ten days was given to the prosecutor, L. C. Smith, to remove the fence before (463) the defendant tore it down. A map of the premises was introduced, which shows the extension of West Street and a lot or lots fronting upon it. There was other evidence supporting the defendant's contention, and also evidence contradicting it and sustaining the theory of the State. In view of the charge of the court, it is not necessary to state it. There was a verdict of guilty, and judgment was entered thereon. Defendant excepted and appealed.

Assistant Attorney-General Clement for the State.
H. H. McLendon and T. L. Caudle for defendant.

WALKER, J., after stating the case: The charge of the court was a peremptory one, by which the jury were instructed to find the defendant guilty, without any direction that they should pass upon any of the evidence or even the credibility of the witnesses. We cannot approve the form of the charge. *Mfg. Co. v. R. R.*, 128 N. C., 284, 285. It is for the jury to find the ultimate fact of guilt upon the evidence and under the instructions of the court as to the law. The jury were not even told that, if they believed the evidence or if they found the facts to be according to the evidence, which is the better form of expression, even when all the evidence bears one way, or if they found certain facts, they should then return a verdict of guilty, but were simply directed to find the defendant guilty. We have recently disapproved an instruction much less mandatory upon the jury than the one given in this case. *S. v. Simmons,* 143 N. C., 613. See, also, *Merrell v. Dudley,* 139 N. C., 59; *S. v. Garland,* 138 N. C., 675; *S. v. Barrett,* 123 N. C., 753; *Sossaman v. Cruse,* 133 N. C., 470; *S. v. Green,* 134 N. C., 658; *Bank v. Pugh,* 8 N. C., 206; *Mfg. Co. v. R. R., supra; S. v. R. R., post,* 495.

But we think the court erred in directing a verdict, because there

(464) was evidence in the case that the place where the fence stood was a part of West Street. It can make no difference in the result whether it was a part of the original street or of the extension. The question to be considered was whether the fence was built across a public street and thereby became an obstruction to its free use by the citizens of the town. If so, the authorities of the town had not only the right, but it was their duty to have the fence removed, under the powers vested in them by the town charter, if it constituted a nuisance; and there was evidence tending to show that the defendant himself also had the right to remove it, irrespective of the order to do so. *Wolfe v. Pearson,* 114 N. C., 621; *S. v. Parrott,* 71 N. C., 311; *S. v. Dibble,* 49 N. C., 107. If the fence obstructed the street, which is a public highway, and thereby rendered its use less convenient, it was an indictable nuisance. *S. v. Whitaker,* 66 N. C., 630; *S. v. McIver,* 88 N. C., 686; *S. v. Long,* 94 N. C., 896; *S. v. McCarson,* 8 N. C., 446; *S. v. Hunter,* 27 N. C., 369; *S. v. Smith,* 100 N. C., 550; *S. v. Eastman,* 109 N. C., 785; Revisal, sec. 3784 (Code, sec. 2065). And such a nuisance is abatable by the town authorities charged with the duty of keeping the streets open and in proper repair, and also by any person who is annoyed or injured by it. *S. v. Higgs,* 126 N. C., 1023; *S. v. Parrott,* 71 N. C., 311; *Wolfe v. Pearson,* 114 N. C., 634; *Hester v. Traction* Co., 138 N. C., 293.

The questions whether the fence was of such a description, with reference to the character of the land it surrounded, as to come within the terms of the statute and the indictment thereunder (*S. v. Biggers,* 108 N. C., 763), and whether the land had been dedicated by L. L. Polk to the use of the public for a street, and perhaps others, were for the consideration of the jury upon the evidence and under proper instructions of the court as to the law. The question of dedication

(465) may depend somewhat upon whether L. L. Polk platted the ground and in the map described this street, and thereafter sold lots fronting on it, as the defendant's testimony, if true, might convince the jury was done. *Moose v. Carson,* 104 N. C., 434; *S. v. Fisher,* 117 N. C., 740; *Smith v. Goldsboro,* 121 N. C., 355; *Hughes v. Clark,* 134 N. C., 460; *Milliken v. Denny,* 135 N. C., 22.

It may be inferred, from what was said on the argument and what we find in the briefs, that the court charged as it did because it was thought not to be necessary to show any criminal intent, the doing of the prohibited act being sufficient if it was done intentionally, and that the question of title was not in controversy. But this was not the only point upon which the case should have turned. If it was a public street and the prosecutor obstructed it, to the inconvenience and detriment of the public, the defendant could rightfully remove it, if himself annoyed or

prejudiced by the obstruction, or he could lawfully do so if acting under the order of the proper authorities, whose duty it was to keep it open. Possession of the street by any one claiming it adversely cannot divest or destroy the right of the public therein. Acts of 1891, ch. 224; Revisal, sec. 389. The Court, in *Moose v. Carson*, 104 N. C., at p. 434, seems to have overlooked what was decided in *S. v. Long*, 94 N. C., 896, with respect to the effect of adverse possession of a highway upon the right of the public or the citizen therein prior to the act of 1891.

The material questions raised in this case should be submitted to a jury, and a new trial is ordered for that purpose.

New trial.

Cited: Holt v. Wellons, 163 N. C., 131; *Threadgill v. Wadesboro*, 170 N. C., 643.

(466)

STATE v. FRAZIER JONES.

(Filed 20 November, 1907.)

1. **Indictment—Murder—Premeditation—Evidence—Instructions.**

Upon evidence tending to show that, after a slight quarrel with his wife, the defendant followed her into an adjoining room, where they were alone, and, after having some altercation with her, three pistol shots were heard and three wounds were found on the deceased wife's person, some shown to be fatal; that the defendant soon thereafter came out of the room and acknowledged that he had killed his wife and knew he would hang for it, it is proper for the judge to charge the jury: "If you are satisfied, beyond a reasonable doubt, that the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or remote, put it into execution, you should convict the prisoner of murder in the first degree."

2. **Same—Murder—Extenuating Circumstances.**

It is no evidence of extenuating circumstances, under an indictment for murder, that the deceased threw a piece of meat at the prisoner, leaving some grease upon his face, as an act of retaliation, for defendant to follow her into an adjoining room and kill her with premeditation.

3. **Same—Murder—Confession, Voluntary.**

Confessions made by defendant to an officer arresting him, without threat or inducement, that he had shot and killed the deceased and knew he would hang for it, being voluntary, are competent evidence upon a trial for murder.

MURDER, tried before *Moore, J.*, and a jury, at December Term, 1906, of GUILFORD.

The defendant was indicted for and convicted of killing his wife, Lula Jones. The exceptions were mainly directed to the evidence and the charge of the court upon the question whether the killing was done with deliberation and premeditation, so as to constitute murder in the first degree, and to the instruction as to murder in the second degree. There was no evidence of manslaughter or excusable homicide. The testimony relating to the killing was as follows:

(467) Bettie Holt testified that she and Lula Jones, on Thanksgiving Day, 1906, were in the kitchen, getting dinner, and the prisoner was outdoors, somewhere. He came in at 12 o'clock and called for something to eat, and Lula, his wife (the deceased), gave him a piece of meat. The prisoner said he didn't want that piece, but wanted a piece with a bone in it, and threw it at his wife. His wife returned the compliment, and in the exchange of meat some grease found its way into the prisoner's face, and "he got angry because she put some grease on his face." The prisoner's wife then went out of the door, into the adjoining room, and prisoner followed right behind her. Witness heard them talking pretty loud, and in a short time heard the report of a gun. Ethel Gibson, another witness, stepped to the door and, looking in, said "Uncle Frazier has killed Aunt Lou." Witness then ran, and, while running, heard the gun fire, and when she had run as far as the hog pen, heard the gun fire again. Witness also testified that she saw deceased lying in front of the fireplace, and that one bullet went in one ear and out the other; another entered the back of the head and came out of her forehead; the third went through deceased's hand. Witness also testified that the prisoner was the only person in the room with the deceased.

Ethel Gibson testified that when she heard the first shot she stepped up to the door and, looking in, saw deceased sitting by the fire, in a chair, and the prisoner was standing on her left side. She then saw the prisoner hold the pistol up to the left ear of deceased. She then hallooed and ran. Witness heard three shots in all, and then the prisoner ran out of the house, towards the railroad, with a pistol in his hand.

Caleb Summers testified that when the first shot was fired he was standing about 25 or 30 feet from the house, and when he heard the shot he looked towards the house and saw the prisoner shoot right down at his wife, who was lying on the floor; then he saw him come out of the house and kneel down by the deceased. He then got up and came

(468) out, with the revolver in his hand.

Gus May, a policeman, testified that he was near the house when the shooting occurred, and saw the prisoner come out of the house with the pistol in his hand; that he ran after the prisoner and called upon him to halt, and arrested him and asked him why he shot his wife, and the prisoner said: "Maybe I will tell that later, but her business

and my business is our business, and nobody else's"; and, further: "I shot my wife, and if she is dead, I killed her. I am satisfied that she is dead, but I want to see her stretched out. I have killed her and can pay the penalty. I will be hanged, and I don't expect anything else." He also told the witness that he had shot her three times, and for the witness to keep the crowd from shooting him, as he wanted to be hanged and not butchered.

Dr. Jordan testified as to the death of the deceased, the wounds, the range of the bullets, and also that the deceased's clothing was burned from powder.

The prisoner introduced no evidence.

The court, after explaining the nature of the charge to the jury, the different degrees of homicide, and the bearing of the evidence, instructed the jury as to premeditation and deliberation, as follows: "If you are satisfied beyond a reasonable doubt that the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and, at a subsequent time, no matter how soon or how late, put it into execution and killed the deceased in pursuance of such fixed design to kill, then you should convict the prisoner of murder in the first degree. When the purpose or design to kill is formed with deliberation and premeditation, it is not necessary that such purpose or design be formed any particular length of time before the killing. The law does not lay down any rule as to the time which must elapse between the moment when a prisoner premeditates and comes to a determination in his own mind to kill another person and the moment when he does the killing, as (469) a test. It is not a question of time. It is merely a question of whether the accused formed in his own mind the determination of killing the deceased, and then, at some subsequent time, either immediate or remote, carried his previously formed determination into effect by killing the deceased. If there be an intent to kill and a simultaneous killing, then there is no premediation. If the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and, at a subsequent time, no matter how soon or how remote, put it into execution and killed the deceased, then he is guilty of murder in the first degree. The question of when or how long he had the fixed purpose to kill, if you find that he had such purpose, is determined independently of when he took up the pistol. If the prisoner intentionally shot Lou Jones, the deceased, with a pistol and intentionally killed her, and if the State has failed to show beyond a reasonable doubt that the killing was done with deliberation and premeditation, then the prisoner would be guilty of murder in the second degree. The jury are instructed that the prisoner cannot be found guilty of murder in the first degree unless the jury are satisfied from the evidence, beyond a reasonable doubt, not only that the

prisoner is guilty of feloniously and intentionally killing the deceased, but it must appear from the evidence, beyond a reasonable doubt, that the killing was done with deliberation and in pursuance of a fixed and premeditated design on the part of the prisoner to kill the deceased."

There was a conviction of murder in the first degree, and, judgment having been pronounced upon the verdict, the defendant excepted and appealed.

Assistant Attorney-General Clement for the State.
J. A. Barringer for defendant.

(470) WALKER, J., after stating the case: The charge of the court to which exception has been taken by the defendant conforms to the rule of law which we have repeatedly laid down as applicable to cases of this kind. It was full and explicit, and there was evidence to sustain it. Indeed, the proof tended to show, not only premeditation and deliberation, but that the defendant committed a cruel murder, in cold blood, upon his weak and defenseless wife. The language used by us in *S. v. Daniel,* 139 N. C., at page 553, is appropriate to the facts as they appear in the record: "When we consider these facts in connection with the utter and cold indifference of the defendant after the shooting, what more deliberate act, upon previous reflection and meditation, we may well ask, could be imagined than this one? The evidence was quite as strong as it was in *S. v. Hunt,* 134 N. C., 684; *S. v. Teachey,* 138 N. C., 587; *S. v. Exum, ib.,* 599; *S. v. Conly,* 130 N. C., 683; *S. v. Lipscomb* and *S. v. McCormac, supra,* in which convictions for the capital felony were sustained. Indeed, the defendant's intent to kill was more calmly and deliberately conceived and executed than was the intent of any one of the defendants in the cases above cited. There was some ground to argue in those cases that the slayer might have committed the act in a transport of passion, but there is no evidence in this case to indicate anything but coolness of design and a deliberate purpose recklessly and wantonly to take human life, all of which was prompted by a bad heart, desperately wicked and fatally bent upon mischief. The mere fact that the defendant accomplished his purpose within a comparatively short space of time can make no difference." The cases therein collected, and *S. v. Banks,* 143 N. C., 652, fully sustain the charge. In the case last cited *Justice Hoke* says: "In this charge, as to murder in the first degree, the court excludes all idea of a killing simultaneous with the conception of the homicidal purpose, and directs the jury, in effect, that, before they can convict of the higher crime, the killing must be from a fixed determination, previously formed, after weighing (471) the matter. The charge, we think, gives the prisoner the full

benefit of the principle contended for by him, and is fully sustained by authority," referring to numerous cases. We have examined the entire charge carefully, and have failed to discern any error therein. The evidence tends to show that the defendant made up his mind as to what he would do, or, in other words, premeditated the killing, when he left the house in which his Thanksgiving dinner was being prepared, and that he executed his purpose deliberately and with heartless brutality. The manner of the killing tends to show that he had fully determined to do his innocent victim to death. His wife's slight retaliation when he threw the meat at her was not sufficient legal provocation under the circumstances of the case; and if, after so slight a provocation—if provocation it was, in law—he slew upon a principle of revenge, after sufficient time had elapsed thereafter, in which he premeditated and deliberated upon his act, he is as guilty as if there had been no such alleged provocation. Foster, in his Crown Law, p. 296, says: "For, let it be observed that, in all possible cases, deliberate homicide upon a principle of revenge is murder. No man, under the protection of the law, is to be the avenger of his own wrongs. If they are of such a nature as for which the laws of society will give him an adequate remedy, thither he ought to resort; but be they of what nature soever, he ought to bear his lot with patience."

The confession made to the policeman was competent, it appearing that no threat was made to extort it, and that there was no promise to induce the defendant to make it. There is nothing to indicate that it was not voluntary. The fact that the defendant was in the custody of an officer when the confession was made does not of itself render it incompetent. The question is, was it voluntary? *S. v. Bohannon,* 142 N. C., 695; *S. v. Conly,* 130 N. C., 683; *S. v. Flemming, ib.,* 688; *S. v. Edwards,* 126 N. C., 1051; *S. v. Smith,* 138 N. C., 700. There was no promise held out, and no influence exerted, which would (472) be calculated, under the circumstances, to induce a confession, irrespective of its truth or falsity. Wigmore on Ev., sec. 831.

Upon a review of the record and case on appeal, we find no error in the proceedings below.

No error.

Cited: S. v. Drakeford, 162 N. C., 671; *S. v. McClure,* 166 N. C., 327; *S. v. Cameron, ib.,* 382; *S. v. Lance, ib.,* 412; *S. v. Cooper,* 170 N. C., 721.

STATE v. CEPHAS RAYNOR.

(Filed 20 November, 1907.)

1. **Indictment—Seduction—Evidence.**

Under an indictment for seduction under promise of marriage (Revisal, sec. 3354), when the prosecuting witness had previously stated that she and the defendant had had sexual intercourse at the time alleged, it is competent for the witness to testify, "I could not help it; he kept right on at me; I told him he was trying to fool me into it; he said he was not; that he was going to marry me," as an implied admission by her seducer of the fact in issue. A repetition of this evidence was within the discretion of the trial judge.

2. **Same—Seduction—Evidence—Supporting Evidence.**

It was sufficient to support the witness in her statement that the defendant had seduced her under a promise of marriage, when the evidence of witness's mother is that defendant had admitted in her presence and hearing that he had made the promise and thereby accomplished the ruin of her daughter.

3. **Same—Seduction—Instructions, Misleading.**

A prayer for special instructions must be specified and not misleading. Where there is evidence that the daughter told her mother that the defendant had seduced her under a promise of marriage, and afterwards such was admitted by the defendant to the mother in the presence and hearing of the daughter, a prayer for instruction directed to the incompetency of what the daughter said, but including in its general terms the defendant's said admission, is properly refused.

4. **Same—Seduction—Evidence—Defendant's Promise.**

In the trial of an indictment for seduction under a promise of marriage (Revisal, sec. 3354), it was proper for the judge below to instruct the jury, "If you find that she (prosecutrix) was induced to yield and submit her person to the defendant by reason of his promise of marriage, so made at the time, or before that time, the defendant would be guilty, there being supporting evidence under the statute," when the evidence showed that the prosecutrix trusted to defendant's pledge "never to forsake her," and to his promise of marriage, when she was seduced, though the promise existed before the seduction.

(473) INDICTMENT for seduction, tried before *Long, J.*, and a jury, at January Term, 1907, of PENDER.

From judgment of conviction defendant appealed.

Assistant Attorney-General Clement for the State.
R. G. Grady and W. T. Dortch for defendant.

WALKER, J. The defendant was indicted and convicted of seduction under promise of marriage (Revisal, sec. 3354), and appealed.

He assigns four errors, as follows:

1. The court erred in permitting the prosecutrix to answer the question asked by the solicitor, towit: "Why did you yield to the defendant and have intercourse with him that night?" The witness had previously stated that they had sexual intercourse at the time mentioned. She answered: "I could not help it; he kept right on at me; I told him he was trying to fool me into it; he said he was not; that he was going to marry me." The answer was also objected to. The court overruled the objections and admitted the evidence. We do not see why it was not competent and relevant. It tended to prove directly the very fact in issue. As an admission, it was clearly competent. *S. v. Lawhorn,* 88 N. C., 634; *S. v. Horton,* 100 N. C., 445. The fact that it was a repetition of evidence to the same effect previously introduced did not render it incompetent. It was in the discretion of the court to permit the witness to repeat her answer if it was thought that the jury had not understood her, or for any other good reasons.

2. That the court erred in refusing to instruct the jury, as (474) requested by the defendant, that there is no evidence in the case supporting the testimony of Eddie Jones, the prosecutrix, as to the promise of marriage, and the jury should acquit. There was evidence, we think, sufficient to support the witness in her statement that the defendant had seduced her under a promise of marriage. Her mother, Catherine Jones, testified that the defendant had admitted, in her presence and hearing, that he had made the promise, and thereby accomplished the ruin of her daughter. This admission was made to the prosecutrix in the hearing of her mother, when she was reproving him for his vile conduct and his faithlessness. She was then pleading with him to save her from the consequent disgrace. There was other testimony which was competent to be considered by the jury in this connection. The defendant admitted the seduction.

3. The court erred in refusing to instruct the jury, as requested by the defendant, that the supporting testimony required by the statute is something more than corroborative evidence; it must be such independent facts and circumstances as tend to establish the credibility of the prosecutrix [and the statements of the latter to her mother after the alleged seduction, that the defendant had promised to marry her, are competent only to corroborate her as a witness, and are not such supporting testimony as is required by the statute]. The instruction was given, except the part inclosed in brackets. If there was not evidence in this case that the prosecutrix had told her mother, in the presence of the defendant, of the seduction under promise of marriage, and he did not deny it, but, in fact, admitted it, the objection of the defendant would have to be sustained, under *S. v. Ferguson,* 107 N. C.,

841. It is true there was evidence that she had told her mother the circumstances before the time they had the conversation in the defendant's presence; but if the court had given the instruction without qualification or explanation, it may have misled the jury by inducing (475) them to believe that the instruction embraced every statement made to her mother, whether the defendant was present or not. In view of the entire evidence, the prayer was not sufficiently specific. In this respect this case differs from *S. v. Ferguson, supra,* and *S. v. Whitley,* 141 N. C., 825. The instruction was so framed that it might have produced the impression on the jury that there was no supporting evidence in the case, but only corroborative, and his Honor seems, from the last instruction he gave, to have taken this view of it.

4. The court erred in charging the jury as follows: "If you find that she (the prosecutrix) was induced to yield and submit her person to the defendant by reason of his promise of marriage, so made at the time or before that time, the defendant would be guilty, there being other supporting evidence required by the statute." This instruction was proper, under *S. v. Ring,* 142 N. C., 596, where we said: "In an indictment for seduction under promise of marriage, when the evidence shows that the prosecutrix trusted to the defendant's 'pledge that he would never forsake her,' and to his promise of marriage, when she permitted him to accomplish her ruin, a conviction was proper, and the mere fact that the promise existed long before the seduction can make no difference if he afterwards took advantage of it to effect his nefarious purpose. His conduct in such a case would be the more reprehensible, as showing a studied and deliberate purpose, first, to engage her affections, and then, by taking advantage of her weak and confiding nature and the trustfulness he had inspired by his perfidy, to insidiously ensnare her with his wicked and faithless promises of love and constancy. Such conduct is the legal equivalent of an express promise to marry if she would submit to his lecherous solicitations, provided the jury found, as they did, that it had the effect of alluring her from the path of virtue." The evidence in this case is, if anything, much stronger against the defendant than that in *S. v. Riley* was against the defendant there to establish the (476) essential elements of the crime charged in the indictment. We think, from the entire case, that the jury fully understood the difference between "corroborating" and "supporting" evidence, and in other respects were properly instructed by the court.

No error.

Cited: S. v. Malonee, 154 N. C., 203.

STATE EX REL. J. J. WOOTEN v. W. M. SMITH.

(Filed 27 November, 1907.)

Quo Warranto—Public Administrator—City Recorder—Public Officer—Constitutional Law.

A public office is an agency for the State, and the person whose duty it is to perform the agency is a public officer. A public administrator is not a holder of a public office within the constitutional prohibition, and an action in the nature of *quo warranto* will not lie against a person for the reason of his holding the office of recorder of a city and the position of public administrator at the same time.

QUO WARRANTO, heard by *Ferguson, J.* (jury trial waived), at July Term, 1907, of MECKLENBURG, to determine the right of defendant to hold the office of recorder of the city of Charlotte and at the same time to act as public administrator of the county of Mecklenburg.

From judgment in favor of the defendant and dismissing the action the relator appealed.

Maxwell & Keerans for defendant.
No counsel contra.

BROWN, J. As we were not favored with either brief or argument on the part of the relator, we are at a loss to comprehend exactly upon what grounds the contention is based that the public administrator of a county fills an office or place of trust within the meaning of Article XIV, section 7, of the Constitution of this State. We presume it is supposed that he fills a place of trust within the meaning of that article.

The office or place of trust there indicated involves the delega- (477) tion to the individual of some part of the sovereign functions of the Government, to be exercised for the benefit of the public. In *Clark v. Stanly,* 66 N. C., 59, it is said: "A public office is an agency for the State, and the person whose duty it is to perform the agency is a public officer." At common law there was no limit on the right of a citizen to hold two or more offices, except the incompatibility of their duties. Now it is a matter of constitutional prohibition, and it is not necessary to determine whether there is any incompatibility, but only whether the places filled constitute offices or places of trust coming within that prohibition.

An office or place of trust requiring a proceeding by *quo warranto* for the amotion of the incumbent is defined as follows: "A public position to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public." High Ex. Leg. Rem., sec. 620; Mechem Pub. Off., sec. 1.

The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the Government. In this respect the terms "office" and "place of trust," as used in our Constitution, are synonymous. *Doyle v. Raleigh,* 89 N. C., 136; *Barnhill v. Thompson,* 122 N. C., 495. As there used, the word "office" is to be distinguished from those agencies or administrative places which are *quasi* public only, as the charge or office of an administrator or guardian.

The place of public administrator partakes of some of the usual incidents of an office, but not of the essential one to bring it within the purport of the Constitution.

A term is fixed and an oath is required, but so is an oath required of all administrators, executors, and guardians. The public administrator is not required to take an oath to support the Constitution, but
(478) simply to discharge the duties of his trust, similar in all respects to the oaths administered to all other administrators.

At the expiration of his term, or upon resignation, the same individual may continue to manage the several estates committed to him until he shall have fully administered them. Revisal, sec. 21. It is incompatible with our received ideas of a public office that the former incumbent may continue to discharge some of its duties and receive some of its emoluments for an indefinite period after vacating it. The public administrator exercises no governmental function whatever, and is the depository of none of the State's sovereignty, and in that respect the place lacks the essential element necessary to constitute a public office.

It is an administrative agency of public employment, and, as was said by *Chief Justice Marshall,* "although an office is an employment, it does not follow that every employment is an office." *United States v. Maurice,* 2 Brock. (U. S. C. C.), 96.

The duties performed by the public administrator are services performed under the public authority, as those of other administrators are performed, and for the public good, but they are not performed in the exercise of any standing laws considered as rules of action applicable to the public generally. The place does not carry with it the dignity or essential characteristics of a public office. It does not affect the public generally, but is confined entirely to the settlement of such estates as are necessarily committed to its charge. It is, therefore, evident that a writ of *quo warranto* will not lie either to remove the incumbent or to inquire by what authority he performs the duties or receives the emoluments of the place.

We are of opinion that his Honor properly dismissed this proceeding at the cost of the relator.

Affirmed.

Cited: Boynton v. Heartt, 158 N. C., 490; *Whitehead v. Pittman,* 165 N. C., 90; *Groves v. Barden,* 169 N. C., 9; *S. v. Knight, ib.,* 341, 349, 350, 358, 361.

(479)

STATE v. CHARLES LORD.

(Filed 27 November, 1907.)

1. Recorder—Justice of the Peace ex Officio—Costs.

The fee of the recorder of a city for the trial of an offense should, in proper instances, be taxed against the defendant as a part of the costs, upon the trial in the Superior Court, upon appeal, when it is provided by statute that he shall be an "*ex officio* justice of the peace, and, before assuming the duties of his office, shall take the oath required by law to be taken by justices of the peace."

2. Same—Justices of the Peace—Two Offices—Constitutional Law.

Article XIV, sec. 2, of the Constitution does not forbid appellant to hold the position of recorder of the town of Charlotte and the office of justice of the peace at the same time.

THE defendant pleaded guilty at MECKLENBURG September Term, 1907, to a charge of illegal sale of liquor; *Ferguson, J.,* presiding.

The court refused to tax certain costs claimed by W. M. Smith, recorder and *ex officio* justice of the peace for the city of Charlotte. Said Smith excepted and appealed.

Assistant Attorney-General Clement for the State.
John A. McRae for appellant.
F. M. Shannonhouse for defendant Lord.

BROWN, J. The charter of the city of Charlotte creates a recorder's court for said city, defines its powers and jurisdiction, and provides for the election of a recorder. Section 53 provides: "That said recorder shall be an *ex officio* justice of the peace, and, before assuming the duties of his office, shall take the usual oath required by law to be taken by the justices of the peace, and also an oath to honestly and faithfully perform the duties of his office."

One Earnhardt, a duly qualified justice of the peace, who also acts as desk sergeant at police headquarters in said city, issued a warrant for defendant and made it returnable before W. M. Smith, the appellant, who is the recorder and *ex officio* justice of the peace. Upon the hearing, Smith bound the defendant over to the Superior (480)

Court. It is contended that the act of Earnhardt, justice of the peace, was illegal; that the hearing before Smith was void, and that therefore the latter's costs cannot be taxed. His Honor so held, in which ruling we do not concur.

Section 3162 of the Revisal provides that persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant, etc. The clause, "where no provision is otherwise made," clearly implies that the magistrate who issued the warrant had the authority to make the warrant returnable before himself or before some officer having like jurisdiction, to conduct the preliminary hearing.

The court of the recorder exercises a jurisdiction limited to the city of Charlotte, and its criminal jurisdiction may be somewhat greater than that of a justice of the peace. If the Legislature had not also made the incumbent of the office of recorder a justice of the peace, we should have no hesitation in holding that a justice of the peace could not lawfully make a warrant returnable before that court any more than he could make it returnable before the Superior Court. Having been appointed a justice of the peace by the General Assembly, and having duly qualified as such, the incumbent of the recorder's office is invested with the complete jurisdiction of a justice of the peace, as defined by our Constitution, in addition to that which he exercises as recorder by virtue of the city charter. There is nothing in our fundamental law which forbids the appellant to hold the office of recorder and justice of the peace at one and the same time. Article XIV, section 7, Constitution.

We will, of course, presume that, when the appellant had the warrant made returnable before him, he acted in his capacity as a justice of the peace, and bound the defendant over to the Superior Court. We, therefore, think that the lawful fees prescribed by law for a justice of
(481) the peace should have been taxed against the defendant.

There is nothing in *S. v. Joyner,* 127 N. C., 542, which militates against our conclusion. In that case the mayor was not created a justice of the peace and required to qualify as a justice of the peace. He simply exercised the jurisdiction which a justice of the peace might concurrently exercise. That did not make him a justice of the peace. The appellant, Smith, is a justice of the peace, and as such he may lawfully exercise all the constitutional jurisdiction, in addition to his jurisdiction as recorder, which any other justice of the peace in his township may exercise. He is required to take the oaths prescribed by law for justices of the peace and the additional oath prescribed by the charter to honestly and faithfully perform the duties of his office as recorder. The case is remanded, with directions to tax the fees allowed by law to the appellant as a justice of the peace. The costs of this Court are to be taxed against appellee, defendant Lord.

Error. 348

STATE v. FRED CARMON.

(Filed 27 November, 1907.)

Assault and Battery—Evidence—Questions for Jury—Motive.

Evidence is sufficient to go to the jury, of an assault and battery, that witness had known defendant for two months; that, while it was dark when the assault was committed, he "got a glimpse" of him just after the pistol was fired (causing the injury); that "he took it to be" the defendant, at that time only 15 feet from him; by another witness, that though his vision was obscured by the lights of the room in which he was sitting, from looking out into the darkness, and, therefore, almost impossible to recognize a person upon the outside, he "threw his eyes around" immediately after he heard the pistol shot, and saw a person whom he "took to be" defendant, who had a pistol in his right hand, or something like one—there being evidence of a motive for the assault.

CRIMINAL ACTION, tried before *Moore, J.*, and a jury, at May (482) Term, 1907, of ROWAN.

The defendant was indicted for a secret assault, and was convicted of an assault and battery. The testimony was as follows:

George Kluttz testified: "The defendant is a negro. I live in East Spencer, with my father, and he and I are engaged in running a store and meat market. On 27 April, 1907, about 10:30 p. m., I was shot in the leg. At the time I was shot I was sitting on the counter in the store, about 4 or 5 feet from the door. It was a dark night, except a little light given by the moon. There were no lights in the street, near or in front of the store where I was sitting. The store was lighted with three lights, and at the front door there was a shed, the width of the store, over the sidewalk, about 7 or 8 feet high. There was a small lamp burning in the hallway of the Climax Hotel, which was diagonally across the street from the store. It was dark in the street. I did not see the defendant when he came up, and did not know he was in the street. I did not see him shoot a pistol and did not see his face, but after the shot was fired I got a glimpse of a person I took to be defendant. The pistol was fired from the street into the store, a distance of 15 or more feet from where I was sitting. The defendant had been in the store about 8 o'clock p. m. previous to the shooting, and had some words with my father about his account, and when he went out my father followed him and beat him. When the pistol fired I looked and saw some person running in the direction of the Climax Hotel. Defendant lives in a different direction from this hotel. I have known the defendant about two months. I have been laid up, under the care of a doctor, since I was shot, and the bullet is still in my leg, near my ankle. Not more than a second elapsed from the time of the shooting until I got the glimpse of some person leaving, whom I thought was defendant."

(483) J. R. Kluttz testified: "The shot was fired about 10:30 p. m., and hit my son, George Kluttz. It was dark in the street, and no lights were there or in front of the store, and the only light was from the store, where we were sitting. I know it was almost impossible for us, being where the lights were shining, to see out into the dark and recognize a person 10 or 15 feet from where we were sitting, as the light naturally would blind a person looking from a lighted place into the darkness; but immediately after the shot was fired I threw my eyes around and saw a person I took to be defendant, and saw in his right hand something that looked like a pistol to me. The defendant ran in the direction of the Climax Hotel."

There was evidence on the part of the defendant tending to show an *alibi,* but it is not necessary to state it. Judgment was rendered on the verdict of guilty, and the defendant excepted and appealed.

Assistant Attorney-General Clement for the State.
R. Lee Wright and P. S. Carlton for defendant.

WALKER, J. The jury might well have acquitted the defendant upon the testimony in this case, but we are unable to declare that there is no evidence of his guilt. We admit that some of the testimony was not of a very satisfactory character and might be denominated as slight, but the evidence, taken as a whole, was sufficient for the consideration of the jury, and we are not permitted to interfere and set aside the verdict in such a case. Indeed, we are expressly forbidden by a provision of the Constitution of many years standing, and a most wise and wholesome one, from doing so. This is a court for the correction of errors in law. In this case we would not disturb the verdict if we had the power, as the trial was presided over by an eminently fair and able judge, who, we are sure, was careful to safeguard the rights of the defendant. The judge below receives a better impression of the true merits of a
(484) case than we possibly can do, who do not see and hear the witnesses and are not able to observe the other incidents of the trial. He is, therefore, the proper one to determine whether the verdict is against the weight of the evidence or not.

We cannot reverse the ruling of the court upon the sufficiency of the evidence, unless we overrule several cases decided by this Court, which we are unwilling to do. The witness George Kluttz testified that he knew the defendant and had known him for two months; that, while it was dark when the assault was committed, he "got a glimpse" of him just after the pistol was fired, a second only intervening, and that he "thought" it was and "took it to be" the defendant, the latter being only 15 feet from him at the time. His father stated that, while his

vision was obscured by the fact that he was looking from a lighted room, his store, into the darkness without, and it was almost impossible for that reason to recognize a person, yet he "threw his eyes around" immediately after the firing of the pistol and saw a person whom he "took to be" the defendant, and he also saw a pistol in his right hand, or something that looked like one. He further stated that the defendant ran in the direction of the Climax Hotel, though it appeared that this was not in the direction of his home. It seems to us that this testimony is as strong as that which, in *S. v. Lytle,* 117 N. C., 803, was permitted to go to the jury, and upon which their verdict and the judgment were sustained by this Court. Indeed, we are of the opinion that the testimony in this case is much stronger than the testimony of the witness John Dawkins was in *S. v. Lytle.* He testified in that case as follows: "I recollect the night when the barn was burnt. I met a man whom I took to be Lytle; I was in seven steps of him, the man whom I took to be Lytle, in the road, near my house. He was a low, chunky man. It was too dark to see whether he was white or black. He had his back to me; had on a dark sack coat. I have known Lytle ten years; have seen him often. Had I spoken to him I would have (485) called him Lytle. This was almost 7:30, on the Howard Gap Road. This was the night the barn was burnt." The court held this evidence fully sufficient to uphold a conviction. Wherein is the difference between the two cases? If there is any, it is in favor of the sufficiency of the evidence in this case, because here we have, in addition to the impression made upon the minds of the *two* witnesses, the further fact that the defendant had been beaten by one of them less than two hours before the assault occurred, and, therefore, had the motive to shoot into the store. He may have missed his mark, it is true, but this does not destroy the force of the evidence as to the malicious motive. Besides, in *Lytle's case* there was but one witness to identify the defendant as the barn burner, while here we have the concurring testimony of two "eye-witnesses," upon whose minds the form and appearance of the fleeing criminal made identically the same impression. Then, again, one of the witnesses, George Kluttz, stated that he knew the defendant well enough, of course, to recognize him, and that he not only "took" him to be, but he "thought" that he was the defendant. We should not attach much importance to the particular form of the words used by the witnesses. When they said that they "took" the person who fired the pistol to be the defendant, or "thought" he was the defendant, it was evidently just another way, and their way, of saying that they recognized him. It was the simple language of men who plainly intended to convey that idea, but were not careful or accurate in expressing it. We might well refer to the fact, also, that the witness J. R. Kluttz, whose testi-

mony was less positive and satisfactory than that of his son, stated that he saw a pistol in the hand of the person who was running in the direction of the hotel. It might reasonably have been argued that, as he knew the defendant and had an altercation with him that night, if he could see so small an object in the dark as a pistol well enough (486) to know what it was, he could just as well recognize the much larger object of a man whom he knew so well.

As to the motive being an important circumstance or link in the chain of evidence, it was not necessary, it is true, to show a motive for the shooting, but it became a most relevant fact, and one of much weight, in ascertaining the identity of the defendant. *S. v. Adams,* 138 N. C., 688. It was absent in the cases we cite in support of our ruling upon the evidence. With the other facts and circumstances showing a recognition of the defendant as the intended assassin, admitting that they were very slight and almost inconsequential, why might not the jury, with evidence of the motive so recently formed, inquire, who else could have committed the crime? Who had any reason for making the assault? And then conclude, as we generally are influenced in our actions and conduct by our motives, malice or desire for vengeance, that the evidence clearly pointed to the defendant as the culprit. Motive may sometimes be a most cogent and convincing fact in the determination of guilt, even though in other respects the evidence may be destitute of reasonable precision or fail to afford just grounds for inferring the essential and ultimate fact of guilt. In *S. v. Costner,* 127 N. C., 566, the Court said that the testimony, while of the same general character, was weaker than it was in *S. v. Lytle,* and yet there was more than a *scintilla,* and it was, therefore, sufficient to support the conviction. See, also, *S. v. Woodruff,* 67 N. C., 89; *S. v. Telfair,* 109 N. C., 878. We conclude that the evidence in this case was not inconclusive as to the defendant's guilt, and was properly submitted to the jury.

No error.

Cited: S. v. Walker, 149 N. C., 531; *S. v. Lane,* 166 N. C., 336; *S. v. Carlson,* 171 N. C., 824, 826.

(487)

STATE v. E. S. TUTTLE.

(Filed 27 November, 1907.)

Indictment—Trespass—Mortgage—Cancellation.

An indictment of defendant for forcibly obtaining the cancellation of a mortgage from the prosecutrix sufficiently charges a forcible trespass which alleges that the defendant "unlawfully, violently, forcibly, injuriously, and with a strong hand and threats and cursing, did compel the prosecutrix to sign an order directing the cancellation of a specified chattel mortgage recorded (as described) in the office of the register of deeds," etc.

CRIMINAL ACTION, tried before *Ferguson, J.*, and a jury, at June Term, 1907, of FORSYTH.

The defendant was indicted on the following bill:

"The jurors for the State, upon their oaths, present: That E. S. Tuttle, late of Forsyth County, on 9 January, 1906, did execute unto V. R. Anderson a certain chattel mortgage, therein conveying certain personal property to secure unto the said V. R. Anderson the payment of the sum of $100 at the maturity of a note in like amount, which said chattel mortgage was duly recorded in the office of the register of deeds of Forsyth County. That the said E. S. Tuttle afterwards, towit, on 1 January, 1907, with force and arms, at and in the county aforesaid, unlawfully, violently, forcibly, injuriously and with a strong hand, and by threats and cursing, did compel the said V. R. Anderson to sign an order directing the cancellation of the said chattel mortgage so recorded in the office of the register of deeds of Forsyth County, against the will of the said V. R. Anderson and against the protest of her, the said V. R. Anderson, to the great damage of her, the said V. R. Anderson, to the evil example of others in like case offending, against the form of the statute in such cases made and provided, and against the peace and dignity of the State."

The defendant made a motion to quash, and excepted to its (488) refusal. After verdict, he moved in arrest of judgment, which motion being denied also, he again excepted and appealed.

Assistant Attorney-General Clement for the State.
Lindsay Patterson and F. T. Baldwin for defendant.

CLARK, C. J. The indictment sufficiently charges a forcible trespass. It alleges that the defendant "unlawfully, violently, forcibly, injuriously, and with a strong hand, and by threats and cursing, did compel the said V. R. Anderson to sign an order directing the cancellation of the said chattel mortgage so recorded in the office of the register of deeds

of Forsyth County, against the will of the said V. R. Anderson and against her protest, to her great damage," etc.

Suppose the allegation had been that the defendant had slapped a pistol to the prosecutrix's head and thus compelled her to sign a check or do any other act. It is the show of force and compelling the doing of an act against the will of the prosecutrix which makes the forcible trespass. No assault need appear in the indictment. Wharton Cr. Law (10 Ed.), sec. 1092; also, *S. v. Mills,* 13 N. C., 423, where *Judge Ruffin* says that an actual breach of the peace is not necessary, and that, while there must be something more than a mere civil injury, it is a forcible trespass if the act tends to a breach of the peace by being done in the presence of the prosecutor, "to his terror or against his will." Certainly the violence, threats and cursing towards a female, which caused her against her will to sign an order for cancellation of a mortgage held by her against the defendant, were terror and violence making a forcible trespass.

In *S. v. Tolever,* 27 N. C., 454, the Court sustained an indictment for forcible trespass which charged that the defendant did "curse, abuse and threaten" a woman and throw a dead cat into her house through the open door. It was not charged there, as here, that the terror com-
(489) pelled her to do any act against her will.

The gist of the offense is the violence and intimidation. That is sufficiently charged when it is alleged that the violence, cursing and threatening made the woman, against her will and protest, sign the order to cancel on the record the mortgage which she held against the defendant. In *S. v. Mills,* 104 N. C., 907, the indictment was not quashed, but the Court held that the facts found by the special verdict did not constitute forcible trespass, because "there was nothing done or said which should have intimidated or overawed a man of ordinary firmness." But the allegation of the bill in this case is that the woman was intimidated by the violence, threats and cursing, and that to the extent that the defendant compelled her to sign the paper he wanted, against her will and protest.

In *S. v. Gray,* 109 N. C., 790, the defendant was held guilty on a special verdict, where, without violence, he procured of a female a due bill, and by using rough language intimidated her so that she made no effort to take it back. Here the defendant took and carried away the paper which he made the prosecutrix sign, against her will and protest, by his violence, threats and cursing.

In *S. v. Armfield,* 27 N. C., 207, which is very like this case, the Court held that the indictment was sufficient, and sustained the charge of the trial judge, which was, in part, as follows: "That it was not a necessary constituent of such an offense that the individual whose

rights were violated should oppose the seizing or taking away of his property by force, provided he were overawed and prevented from doing so by a superior force and a disinclination to engage in a breach of the peace."

"Whenever a man, either by his behavior or speech, gives those who are in possession just cause to fear that he will do them some bodily hurt if they will not give way to him," he is guilty of forcible trespass. Archbold Cr. Pr. and Pl., p. 1133.

"No particular words are necessary in the indictment at com- (490) mon law; all that is required is that it should appear by the indictment that such force and violence have been used as constitute a public breach of the peace" (*ib.*, 1134), or tend thereto. *S. v. Mills,* 13 N. C., 423.

The charge is sufficiently made, and it appears that the jury had no difficulty in finding the proof sufficient. There is no exception to the evidence or to the charge of the court.

Affirmed.

STATE v. REESE WRIGHT.

(Filed 27 November, 1907.)

1. **Murder—Evidence.**

Upon the trial, under an indictment for murder, in the Superior Court, when there is testimony upon both sides as to whether or not the defendant struck the deceased, it is immaterial and irrelevant, under the defendant's contention, as to deceased's having testified before the committing magistrate, before his death, "He did not know who struck him," the dying declarations of the deceased not being offered in evidence.

2. **Appeal and Error—Instructions—Judge's Charge—Language of Judge.**

When done in a respectful manner, it is not reversible error in the judge below to speak of one of the defendant's witnesses as "the Smith woman."

INDICTMENT for murder, tried at July Term, 1907, of CATAWBA, before *Ward, J.,* and a jury.

The defendant was convicted of murder in the second degree. From the judgment and sentence he appealed.

Assistant Attorney-General Clement for the State.
Self & Whitener for defendant.

BROWN, J. The defendant was convicted of murder in the second degree for the killing of one Lowry.

(491) There are only two assignments of error:

First. Four witnesses for the State testified that the prisoner is the person who struck the deceased; that he picked up something from the ground, threw it at Lowry and hit him while Lowry and the prisoner were in a quarrel.

The prisoner, his wife and two other witnesses, Tom Smith and his wife, testified that there was no quarrel between deceased and the prisoner, and that the prisoner did not throw anything at Lowry or any one else.

The prisoner offered to show that, on his trial before the mayor of Hickory, a day or two thereafter, on a charge of having assaulted Lowry, Lowry, introduced as a witness for the State, testified that he "did not know who hit him." The court, upon objection by the solicitor, refused to admit this testimony, and prisoner excepted.

It is unnecessary to consider the effect of the failure of the committing magistrate to reduce the evidence to writing and have it signed by the witnesses, as required by the statute, and as to whether such failure will necessarily deprive either the State or defendant of the benefit of Lowry's evidence, testified to before the mayor during life. The evidence is irrelevant and immaterial and proves nothing. The State had not offered the dying declarations of Lowry to prove that defendant was the person who hit him. Lowry's ignorance as to who hit the blow does not in the least tend to contradict the positive testimony of the State's witnesses, who testify that the defendant is the person who did it.

Second. His Honor, in referring to the testimony of the prisoner's witness, Ila Smith, spoke of her as "the Smith woman." The record states that this language was used in a respectful manner. The point made on the prisoner's behalf is that the jury may not have understood the reference to be "respectful."

We do not think the manner of referring to the witness tended to prejudice the defendant in the least, and we have no idea that
(492) the conscientious judge who presided ever had the slightest purpose of being discourteous to any witness, however humble in the walks of life. It is frequently the case in *nisi prius* trials that witnesses are referred to without "putting a handle to their names."

We find nothing in the record of which the defendant can justly complain.

No error.

STATE v. MAJOR GUTHRIE.

(Filed 27 November, 1907.)

1. Murder—Evidence—Proof, Order of—Trial Judge—Discretion—Appeal and Error.

While it is usual, upon trials of homicides, that the *corpus delicti* be first shown before the evidence of the defendant's guilt, the order of proof is usually left to the sound discretion of the trial judge, and is not reviewable on appeal unless it is made to appear that some substantial injustice has been done.

2. Same—Evidence—Demurrer—Declarations—Admissions.

Upon the trial of defendant for the murder of his wife a demurrer to the evidence will not be sustained when the evidence tends to show motive based upon jealousy; repeated threats of defendant to kill his wife, made up to the very night of the homicide; a violent altercation in deceased's room, and that defendant refused to let a witness enter; marks around the throat of deceased, as if choked to death, together with an admission by defendant of his carrying out his threat.

3. Same—Trial Judge—Mistrial—Appeal and Error—Record.

In capital felonies the trial judge has not the same discretion to make a mistrial as in other cases, and to constitute reversible error in his refusal to do so the record should disclose how the defendant was unduly prejudiced. It is not reversible error for the court below to refuse to make a mistrial of the case because a child of one of the jurors was accidentally killed during the trial.

INDICTMENT for murder, tried before *Council, J.*, and a jury, at August Term, 1907, of DURHAM.

The prisoner was convicted of murder in the first degree for (493) the killing of his wife, Lizzie Guthrie, by means of choking or strangulation, under a bill of indictment in the proper statutory form. From the judgment of the court sentencing him to death defendant appealed.

Assistant Attorney-General Clement for the State.
Benjamin Lovenstein for defendant.

BROWN, J. We find three assignments of error relied upon in this Court by the prisoner's counsel:

1. The admission of Louis Atkins' conversation with the prisoner before establishing the *corpus delicti.*

2. The refusal of the court to sustain prisoner's demurrer to the whole evidence.

3. That Juror Homer's child was killed by an automobile accident during the progress of the trial and before defendant's counsel made his speech and before his Honor's charge.

It is contended with much earnestness by prisoner's counsel that the court erred in receiving evidence tending to prove the guilt of the prisoner before requiring evidence to establish the *corpus delicti,* viz., the body of a crime—the body upon which a crime has been committed.

The *corpus delicti* has two components—death as a result, and the criminal agency of another as the means. It is fundamental that no person may be convicted of the commission of a crime until a crime has been proven. It is, therefore, usual in trials for homicide to prove the fact of death, and facts tending to prove that such death was brought about by some criminal agency, and then to offer proof connecting the accused with it. This order of proof is but just to the accused, and should be followed generally, although in this State the order of proof is usually the sound discretion of the trial judge, and will not be reviewed by us unless it is made plain that some substantial injustice has been done.

(494) If any error was committed in receiving the declarations of Louis Atkins before proof of death, we think it was cured by the subsequent introduction of abundant independent evidence tending to prove the fact of death by criminal means and connecting the prisoner therewith. *Anthony v. State,* 32 So. Rep., 818; *Holland v. State,* 39 Fla., 178.

Mr. Wigmore writes with much sound sense on the subject: "To purport to preside over the investigation of truth, and then, at an inordinate expense of time, labor and money, to insist on reopening the entire investigation because a minor witness has been asked a minor question some half-hour before he should have been asked, is to furnish a spectacle fit to make Olympus merry over the serious follies of mortals." Section 1867.

We think the court properly overruled the demurrer to the evidence. It is ample to go to the jury, and fully justifies their verdict, if credited by them. There is evidence of a powerful motive, based upon intense jealousy; evidence of repeated threats to kill his wife, made up to the very night of the homicide; evidence tending to prove a violent altercation in the deceased's room, and that the prisoner refused to let a witness enter; evidence of marks around the throat of the deceased, tending to prove that she was choked to death, together with a declaration of the prisoner tending to prove an admission that he had carried out his threat. The evidence in this case is stronger than that held to be sufficient in *S. v. Jones,* 98 N. C., 651.

The third assignment of error is very imperfectly stated in the record, but we infer that, during the argument and before the prisoner's counsel had addressed the jury, a child of one of the jurors was

killed by an accident, and that the prisoner's counsel moved for a discharge of the jury and for another trial before another jury.

The record fails to disclose how the prisoner was unduly prejudiced, and whether the trial was temporarily suspended or not.

The trial judge has not the same unreviewable power to make (495) a mistrial in capital felonies as in other cases. *S. v. Jefferson,* 66 N. C., 309. The law is well stated in *S. v. Tyson,* 138 N. C., 628: "It is well settled, and admits of no controversy, that in all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge; but in capital cases he is required to find the facts fully and place them upon record, so that upon a plea of former jeopardy, as in this case, the action of the court may be reviewed." It may be that inexorable necessity imposed a great hardship upon the afflicted juror, but we fail to see how the prisoner was unduly prejudiced, or any reason for reviewing the exercise of his Honor's discretion. Upon a careful review of the record, we find

No error.

Cited: S. v. Dry, 152 N. C., 815; *S. v. Upton,* 170 N. C., 770.

STATE v. SOUTHERN RAILWAY COMPANY.

(Filed 4 December, 1907.)

1. **Constitutional Law—Trials—Reasonable Opportunity—Appeal and Error.**

   While it is a violation of defendant's constitutional rights to force him, in a criminal action, into a trial with such undue haste as to deprive him of the ability to prepare and concert his defense, such is not available to him when it appears from the record on appeal that every reasonable opportunity was afforded him.

2. **Power of Court—Courts—Term—Extension of Time.**

   The trial judge has the power to extend the time beyond that limited for the term by statute when such is necessary to develop all the facts in the case then being tried.

3. **Foreign Defendants—Civil Action—State Courts—Criminal Actions—Estoppel.**

   Foreign defendants cannot prevent the prosecution of criminal proceedings against them in the State courts by setting up proceedings in a suit of a civil nature they have instituted in the Federal court.

4. **Federal Courts—Equity—Jurisdiction—Injunction—Criminal Action.**

   The jurisdiction of courts of equity is limited to the protection of rights of property, and does not extend to interference with the prosecution or

punishment of crimes. A Federal court of equity cannot in any manner, by injunction or otherwise, stay the trial of a criminal action in the State court for the violation of the State's laws.

5. **Same — Constitutional Rights — United States Supreme Court — Writ of Error.**

It is in violation of the sovereign rights of the State for a circuit judge of the Federal courts, by injunction or otherwise, to interfere with the State in the trial of offenders against the State laws in her own courts. Such offenders can only set up such rights, privileges, or immunities as they may claim under the Constitution and laws of the United States upon the trial in the State court, and go direct, by writ of error, to the Supreme Court of the United States from the Supreme Court of the State, should the last named court deny such rights.

6. **Constitutional Law—Suit Against State—Officers—Real Party in Interest.**

In an action brought in the Federal court against the State Corporation Commission and the Attorney-General and his assistant, when it appears that the statute under which the defendant is being tried in the State court is self-executing, and that the State is the real party in interest, and the officers are only directed and required to prosecute in the name of the State any crime committed in violation of the act, an injunction against such officers proceeding as directed is a suit against the State, and, as such, is in violation of the Eleventh Amendment of the Constitution of the United States.

7. **Railroads — Carriers — Penalty Statutes—Principal and Agent—Separate Offense.**

When an act of the Legislature prohibits a common carrier from charging more than 2¼ cents per mile for transporting passengers, and in a different section provides that the carrier violating the act shall be liable in a civil action to the party aggrieved to a penalty of $500 for each violation, and that the agent violating the act shall be guilty of a misdemeanor, prescribing the punishment, it is discriminative as to the violation by the carrier and the agent, creating a separate offense and punishment for each.

8. **Same — Carriers — Penalty Statutes — Penalty Prescribed — Additional Penalty.**

When an offense is created by a statute not existing at common law, and the penalty for its violation is prescribed by the same statute, the particular remedy thus prescribed must alone be pursued, for the mention of the particular remedy makes the latter exclusive. Hence, when the statute makes the carrying of passengers at a greater charge than the fare therein specified unlawful, and a particular penalty is prescribed for its violation, it was error in the court below to impose a fine upon the carrier violating the act, as for a misdemeanor.

9. **Same—Accessory Before the Fact.**

When a statute creates an offense not existing at common law, and imposes a separate and distinct punishment upon the carrier and its agent for violating it, the carrier cannot be held further liable as an accessory before the fact to the act of the agent violating the provision of the statute.

10. Same—Corporation—Principal and Agent.

A corporation can only act through its agent; and when a legislative enactment forbids an act to be done, and provides a penalty for the guilty corporation, and makes the agent liable criminally, the corporation cannot be held liable as an accessory before the fact to the act of the agent.

11. Statute—Interpretation—Decisions of the Supreme Court.

The law as declared in a decision of the State Supreme Court is presumed to be known to and in contemplation of the State Legislature in enacting a statute, and the enactment will be construed with reference to the decision.

12. Federal Court—Civil Action—State Court—Criminal Action—Evidence—Record—Constitutional Law.

When a Federal court has no jurisdiction to enjoin a criminal proceeding in a State court, the record in an equity suit pending in the Federal court in which the injunction is alleged to have been issued, and introduced in evidence on the trial of a criminal action in the State court, will not be considered as a defense, though involving rights claimed under the Constitution of the United States.

BROWN, J., concurring, *arguendo;* CLARK, C. J., dissenting, *arguendo.*

INDICTMENT for misdemeanor, tried before *Long, J.,* and a jury, at July Term, 1907, of WAKE.

This is an indictment against the defendant for the violation of the provisions of chapter 216, Laws 1907, ratified 2 March, 1907, commonly known as the "Passenger Rate Law." The act does away with the requirement that all railroad companies shall furnish first- and second-class passenger accommodations, and establishes a uniform (498) rate of 2¼ cents per mile for passenger travel.

The material portions of the act necessary to an understanding of the questions decided by the court are as follows:

"SECTION 1. That no railroad company doing business as a common carrier of passengers in the State of North Carolina, except as hereinafter provided, shall charge, demand, or receive for transporting any passenger and his or her baggage, not exceeding in weight 200 pounds, from any station on its railroad in North Carolina to any other station on its said road in North Carolina, a rate in excess of 2¼ cents per mile; and for transporting children 12 years of age or under, one-half of the rate above described.

"SEC. 2. The rate for carrying passengers on leased lines shall be the same as is prescribed for the lessor or company operating the same, and the Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this State on or before the first day of June, 1907.

"SEC. 3 (refers to mileage books).

"SEC. 4. That any railroad company violating any provision of this act shall be liable to a penalty of $500 for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of this State having competent jurisdiction thereof; and any agent, servant, or employee of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

"SEC. 5 (relates to free transportation).

"SEC. 6. That section 2618 of the Revisal of 1905 is hereby repealed, and all laws and clauses of laws in conflict with this act are hereby repealed.

(499) "SEC. 7. That this act shall be in force from and after its ratification."

On 8 May, 1907, the defendant, Southern Railway Company, filed a bill in equity in the Circuit Court of the United States for the Eastern District of North Carolina, on behalf of itself as complainant against Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, North Carolina Corporation Commissioners, and Robert D. Gilmer, Attorney-General, and Hayden Clement, Assistant Attorney-General, defendants, for an injunction against the enforcement of said act, and on that day his Honor, *J. C. Pritchard,* United States Circuit Judge, issued a temporary restraining order and required the said defendants to appear before him at Asheville on Wednesday, 26 June, 1907, to show cause why an injunction *pendente lite* should not be issued. On 29 June, after a hearing in which the jurisdiction of the Circuit Court was challenged by the defendants, an interlocutory injunction was granted upon the bill of complaint and the answer thereto treated as affidavits, and upon affidavits filed therein by the complainants, and the cause was referred to the Hon. W. A. Montgomery, standing master of the Circuit Court for the Eastern District of North Carolina, to take and report to the court such evidence on any of the issues therein as either party might offer, and to make all needed computations, and to report fully to the court all the facts therein, and the cause was set down for hearing before the Circuit Court in Asheville on the first Monday in October, 1907.

In the meantime, at July Term, 1907, of Wake Superior Court, the defendant having refused and failed to obey the said statute, and having sold tickets to passengers throughout the State at a greater rate than 2¼ cents per mile, the grand jury indicted the defendant and its agent at Raleigh, T. E. Green, for the violation of said act. At the trial of the indictment at said term the defendant, Southern Railway Company, entered a plea to the jurisdiction of the Superior Court of Wake

County and put in evidence the proceedings of the Circuit Court (500) of the United States in which the injunction was granted.

The bill of complaint in the equity suit alleges certain facts from which the complainant draws the conclusion that the act of 1907 is confiscatory and in other respects violates its constitutional rights. It is averred in the bill that the Corporation Commissioners are given by the laws of this State such general control and supervision as is necessary to carry into effect the statutory regulations in regard to railroad companies and corporations engaged in the carrying of freight or passengers, and have the power to obtain such information as may be necessary to enforce the provisions of the said law, and that it is provided by the law of this State that any railroad company doing business in the State, or any railroad company organized under the laws of any State and doing business in this State, is made liable to heavy penalties if it fails to comply with the provisions of the law concerning the charges for freight and passengers, and in such case it is made the duty of the Corporation Commission to notify the Attorney-General, who shall take such proceedings in regard thereto as he may deem expedient. That the Assistant Attorney-General is invested with the same powers and is required to perform the same duties as the Attorney-General, including the duties and powers just mentioned. It is further averred that the Corporation Commission is required by the act of 1907 to publish the rates fixed by that act for the several railway companies operating in this State, on or before 1 June, 1907, and, for the reasons just stated, the members of the Commission and the Attorney-General and his assistant are made defendants to the suit. The complaint also alleges certain matters tending to show its net earnings from intrastate traffic for 1906 to be $324,754.64 under the rate existing prior to the operation of the act of 1907, when the passenger rate was 3¼ cents per mile, and then concludes (without any satisfactory statement of the facts or reasons as to how the result is reached) that, under the new (501) rate, the maximum of net earnings for the same year would have been $28,077.47, showing a reduction, by reason of the reduced rate, of $296,747.17. It then tabulates the figures so as to show how the maximum of net earnings for 1906 was ascertained, from which table it appears that the maximum earnings from intrastate traffic in this State, after paying the cost of operation for said year, amounted to $453,811.41, and that the ratio of the intrastate gross traffic in this State for said year to the entire gross traffic, both interstate and intrastate, was 27.60 per cent, and by deducting from the total amount of the maximum earnings for intrastate traffic ($453,811.41) the proportion of the taxes chargeable to it and based upon said ratio ($74,423.73) and its proportion of the cost of improvements and betterments not capitalized ($54,633.64),

the maximum *net* intrastate earnings would be $324,754.64. The complainant then attempts to show that the new rate would, as it says, inevitably affect its intrastate business by reason of the fact that many of its intrastate rates and all or nearly all of its interstate rates for passengers are made, and necessarily made, on a combination of "locals," or by the use of "locals" as factors in the computation, and when the local rate in this State is reduced, the effect would be to reduce the rate upon its interstate traffic, and consequently the loss of the complainant in the equity suit, the defendant in this criminal action, would be much more appreciable and much greater than is represented by the figures already given. The complainant in the bill then recites several acts of the General Assembly which it alleges would also diminish its income—for example, the assessment of railroad property in stock-law territory for local benefits, the act prescribing the hours of service for employees of railway companies engaged in the operation of trains, the law authorizing the Corporation Commission to require railroads to erect and maintain depots, and an act to enlarge the powers of (502) the Corporation Commission, which, upon examination, seems to confer upon that body ample authority to keep the railway corporations of the State within the law and under proper control. These acts are virtually alleged to be hostile to the interests of the railway companies and to impose additional and heavy burdens upon them, too grievous to be borne with a reduced passenger tariff. The complainant in the equity suit, and defendant in this indictment, further complains that there is a difference between the commercial value of property in this State and its value as assessed for taxation, and this applies to all classes of property subject to taxation, and that the value at which its property is assessed for taxation is not really the true value, which is much more, and that the real or commercial value (which we assume to be its market value) should be considered only in determining what is a fair and reasonable passenger and freight rate in its business as a common carrier and in performing the public service required of it by the law, but it alleges that the State should be estopped to deny that the property is not worth as much as its assessed value. The complainant then tabulates certain figures showing (as it avers) the *ad valorem* assessment of its property which it thinks should be apportioned to its intrastate traffic as the basis of determining the reasonableness of the legislative rate for the carriage of passengers, towit, $7,213,222.74, and showing also other items, such as the amount of its bonded indebtedness, which is a lien upon its property in this State ($24,623,078.29), the interest thereon ($714,103.08), the annual trackage and rentals paid for lines used by it here ($481,189.99), the net income for intrastate business which should contribute its *pro rata* part to the payment of said

interest ($329,900.89), and the total net earnings under the new rate, based upon preëxisting conditions, showing, according to its calculation and the basis upon which it proceeds, a deficiency of $301,893.42 for the fiscal year ended 30 June, 1906. It then alleges that there has been an increase in the operating expenses since June, 1906, (503) which will reduce the net result proportionately. It admits that the general commercial conditions in this State are of a prosperous kind, and that intrastate passenger traffic is large, but it avers that there will be no comparative or substantial increase in its business or tonnage resulting from the proposed reduced rates, passenger and freight. It further alleges that its operations have been economically conducted, and insists that, as the cost of performing the service to the public has been increased, the former rate of 3¼ cents per mile, instead of being reduced, should be raised still higher, so as to meet the increased cost of operation. The complainant in the bill then avers that the former rate, or the one existing prior to July, 1907, when the said act became effective, is a reasonable one, and fairly and properly adjusted in its proportion to the value of its property and its sources of income in this State, and to diminish it would result in taking its property without due process of law, and in depriving it of that equal protection of the law to which it is entitled under the Constitution. It complains of the provision in regard to mileage books, and especially the requirement that it must accept the mileage books of other railroad companies for transportation of passengers over its own lines, without any proper limitation as to the time for redemption of such books. There is a special allegation in the bill that if the defendants are not restrained by the process of the court the complainant will be exposed to a multiplicity of suits for penalties which it will be impossible to defend by proving the facts in each case, which would show the confiscatory and otherwise unconstitutional character of the said legislation, and that by reason thereof its credit will be injured and its business and property wrecked; whereas in the said suit in equity the said matters can be fully shown, once for all, and great expense and unnecessary litigation avoided. That the said suit was instituted for the purpose of determining, in an orderly and conclusive way and by a proceeding in which all the diverse interests can be represented, the essential questions in controversy (504) between the complainant and the State in respect to the validity of the said legislation and of obtaining injunctive relief to preserve the *status quo* until the final decision is made. In this connection it avers its willingness to protect the rights of the traveling public, if the suit shall finally be decided against the complainant, by giving a transferable coupon to each passenger, representing the difference between the old and the new rate, and to secure the payment of the same by proper and sufficient indemnity.

The defendants appeared and answered the bill of complaint, denying its material allegations, except as to the official character of the defendants, and they aver, and support their averment by the statement of pertinent facts, that the State, in enacting the legislation which is assailed by the complainant in the equity suit, was only exercising its sovereign power and authority, and that the legislative will as thus expressed should be respected and obeyed until its enactment is declared by a court of last resort to be invalid, and that the general charges and speculative theories of the complainant, based upon incorrect averments of facts and inaccurate estimates contained in the bill, should not be allowed to stay the immediate and effective operation of the act of 1907. That the complainant has, in the ways mentioned, been selling tickets at 2 cents and 2¼ cents per mile. They aver that the figures and estimates as given by the complainant in its table do not agree with those it reported under oath to the Corporation Commission, as it was required by the law to do, and that if the calculation is made upon the basis of the reports thus made to the said Commission, it will show conclusively, or "demonstrate," that the increase for the year ended 30 June, 1906, should have been considerably in excess of a just and reasonable compensation for the value of the service rendered by the complainant or the use of the property employed by it. They aver that the maximum earnings of complainant for the year ended June, 1906,
(505) were nearly twice as much as is stated in its bill of complaint, and, instead of being $453,811.41, they were, in fact, $823,546.80, as shown by its sworn report of 9 November, 1906, and, deducting therefrom the amount of taxes chargeable to intrastate business ($74,423.79) and the cost of betterments ($54,633.04), the maximum net earnings for the said year were $694,490.03, which would produce an income of 9¾ per cent on $7,213,322.74, the proportionate assessed value of the complainant's intrastate property and franchises; and if the reduction in the rate would diminish the net earnings to the extent of $296,747.17 (which is denied), there would still be left net earnings to the amount of $397,742.86 instead of $28,007.47, as stated in the bill, which amount would yield a net income of 5½ per cent on the said value; and that even this percentage of income is far below the real per cent of the actual net income as shown by verified reports of the complainant to the Corporation Commission, which is more than 9 per cent. The true result is shown in this way: The gross earnings in the State, including freight, passenger, express, mail, and miscellaneous earnings, were $3,159,156.89, and the operating expenses charged against such intrastate traffic were $2,335,610.09. The amount of operating expenses is clearly erroneous, as shown by the items thus reported to the Commission. These are set out in the answer and reduce the above amount

($2,335,610.09) to $2,063,726.19, which is 65.48 per cent of the gross earnings in this State ($3,159,156.89), and the actual earnings, therefore, were $1,080,420 instead of $823,346, as alleged by the complainant in the bill. Deducting the amounts properly chargeable for taxes and betterments—that is, $74,423.73 and $54,633.04, respectively—the maximum actual net earnings were $951,363.23 instead of $324,764.64; and if, by the act of 1907, the reduction in the earnings would be $296,747.17, there would still be left $654,616.06, as against $28,607.47, the amount stated in the bill, which would have been more than 9 per cent of the assessed value of its property used in intrastate commerce; (506) and even if the said property were assessed at its commercial or true value instead of its value for taxation, the business of the complainant would yield a fair profit thereon. If the interstate as well as the intrastate business of the complainant in this State is taken into the calculation, the net earnings, after paying taxes and making all other proper deductions, would have been $3,967,218.13; and, assuming that the loss of income will be $296,747.17, as alleged by the complainant, there would still be left net earnings on the business in this State of $3,690,476.96, which would yield 14 per cent of the assessed valuation of its property. The defendants further aver that large sums have been paid for grossly extravagant salaries and for improper and unlawful purposes by the complainant, which should be excluded from the computation, and there should be excluded also sums paid out by the complainant on account of the negligent management of its property. That the sum of $672,543.14 was paid out on account of its interstate business which is not chargeable to its intrastate traffic and which should not be included in the calculation. The defendants then aver that the earnings of the complainant for the year 1906 were greatly increased over those of the previous year, and, counting back of that year and comparing each year with its successor, a *very large* increase is shown, while there was a steady decrease in the operating expenses. The figures are given as shown in complainant's report to the Corporation Commission. It is also alleged that the stock of the defendant is "watered," or, in other words, is larger in proportion than the real value of its property, and that its bonded indebtedness is also largely in excess of the actual value of its property. They deny that there has been any discrimination against the complainant in the legislation of the State relating to stock laws, hours of service of railroad employees, or in any other respect, and they aver that the legislation so complained of is merely for (507) the protection of life and property and reasonably required for the proper and humane operation of railroads. The defendants further allege that the complainant has grossly discriminated against the traffic and the shippers of this State in its scale of rates, and state circumstantially why this charge is made.

The defendants insist, upon the facts stated in the bill and upon the several legislative acts mentioned therein, that the Attorney-General and his assistant and the Corporation Commission are not charged with any duty the performance of which is essential to the complete operation of the act of 1907 from and after the time when it is therein declared to have effect, and that the act is therefore self-executing. They then deny the right of the United States Circuit Court to enjoin the said officers from discharging their duties in the enforcement of the criminal laws of the State.

Affidavits were filed in support of the bill to show what was a fair return for capital invested in industrial enterprises, the increase in the cost of the operation of railroads, and that there is no discrimination by the defendant as between individuals or localities in this State, and that if there is any increase in travel by reason of the reduced rates there must be a corresponding increase in expense to provide additional facilities to accommodate it. These affidavits, though, are of a most general and unsatisfactory nature and seem to be the expression of witnesses, experts though they declare themselves to be, as to what may happen in the future, under changed conditions produced by the enactment of the law of 1907. Upon the showing made by the complainant, the United States circuit judge issued an interlocutory injunction to the final hearing, by which the defendants were restrained from proceeding to perform the duties assigned to them under the laws of this State with reference to the enforcement of the act of 1907. The defendants filed a plea to the jurisdiction of the Superior Court, which was based upon
(508) the proceedings in the Circuit Court of the United States, and which was heard as upon demurrer thereto by the State and overruled by the court. The defendant excepted, upon the ground that the United States Circuit Court had acquired jurisdiction of the suit therein pending and of all matters pertaining thereto, and that the proceeding in the State court is void and deprives it of due process of law and of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. The defendant then requested the court to pass upon its motion to quash the bill previously made in apt time. The motion was overruled.

The defendant moved for a continuance, which motion was also overruled, but this Court is of the opinion that the motion, as appears from the record, was dilatory and was properly overruled, even if the ruling of the court upon such a discretionary matter can be reviewed in this Court. There were various objections taken to the rulings of the court upon other questions raised during the course of the trial, but if any of them are tenable they are not material in the view we take of the case. The court then required the defendants to plead to the indictment,

and gave them time to do so. They declined to do so, and the court directed the clerk to enter for each of the defendants the plea of "Not guilty."

The defendant requested the court to charge the jury as follows:

"1. The court instructs the jury that the statute on which the indictment in this case is founded does not make the railroad company guilty of a misdemeanor for selling a ticket or causing a ticket to be sold at more than 2¼ cents per mile, and that therefore the jury must disregard the second count in the indictment and cannot find the Southern Railway Company guilty.

"2. The act under which the bill of indictment is drawn does not make the defendant railroad company guilty of a violation of the criminal law by selling passenger tickets at a greater rate than (509) 2¼ cents per mile, and upon the second count the court charges the jury that they shall render a verdict of 'Not guilty.'"

These instructions were refused by the court, and the defendant excepted.

So much of the charge of the court to the jury as is necessary to be set out was as follows:

"This is an indictment under an act of the Legislature of North Carolina, ratified on 2 March, 1907, chapter 216, which has been read in your hearing and which declares that no railroad company doing business as a common carrier of passengers in the State of North Carolina, except as in the act provided, shall charge, demand, or receive for transporting any passenger and his or her baggage not exceeding 200 pounds in weight, from any station on its road in North Carolina to any other station on its road in North Carolina, a rate in excess of 2¼ cents per mile, and for transporting children under the age of 12 years one-half of the above rate prescribed.

"One of the counts in the bill is against the defendant T. E. Green, and the other count includes in the indictment the Southern Railway Company. The court instructs you that the common law obtains in North Carolina, except when it is changed or modified by statute.

"If a statute of the State prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command of a statute injurious to the public, being misdemeanors at common law, are punishable by indictment.

"A crime or misdemeanor may be defined to be an act committed or omitted in violation of a public law, either forbidding it or commanding it. In other words, a crime is any wrong which the Government deems injurious to the public at large and punishes through a judicial proceeding in its own name.

(510) "Therefore, under the laws of the State of North Carolina, a railroad company doing business as a common carrier of passengers and selling tickets from one point on its line of road in the State of North Carolina to another point in the State, and having and operating more than 60 miles of road, and not being exempted from the provisions of the act, as read in your hearing, which sells passengers such tickets for a greater rate than 2¼ cents per mile, is guilty of a violation of the law and of the commission of a misdemeanor.

"If you find, therefore, from the evidence, and beyond a reasonable doubt, that the defendant, the Southern Railway Company, is a corporation doing business as a common carrier of passengers in the State of North Carolina, and that on 8 July, 1907, or on any other date since 1 July, 1907, and before the finding of the bill of indictment in this case, sold, through its servants or agents at Raleigh, or any of them, to W. F. Jones, a ticket from Raleigh to Cary, from which the coupon introduced in evidence was detached, at a greater rate than 2¼ cents per mile for the distance between these stations, and charged, demanded, and received such amount in excess of 2¼ cents per mile in transporting the said Jones as a passenger, then, upon such finding made by you, the court charges you that the defendant, the Southern Railway Company, would be guilty of the misdemeanor charged in the bill, and your verdict as to the Southern Railway Company upon such finding would be 'Guilty.' "

The jury returned a verdict of guilty. The defendant, Southern Railway Company, moved for a new trial, and, the motion being overruled, it excepted. The said defendant then moved in arrest of judgment. This motion was also overruled, and the defendant excepted. The court, on motion of the solicitor and upon the verdict of the jury, adjudged that the defendant, Southern Railway Company, pay a fine of $30,000, it appearing that the defendant railway company
(511) had been violating the act of Assembly since 1 July, 1907, throughout the State.

Before imposing the fine, the court stated that if the Southern Railway Company would agree to obey the law until a court of last resort could pass upon the questions involved, it would impose a light sentence upon it, as it had done upon the defendant T. E. Green. The railway company refused to comply with the law, but announced that it would stand upon its rights. The judgment, as aforesaid, was thereupon entered, and the defendant, having duly excepted to all the rulings and to the judgment, appealed to this Court.

Assistant Attorney-General Clement, Aycock & Daniels, E. J. Justice, and S. G. Ryan for the State.

A. P. Thom, W. B. Rodman, F. H. Busbee, A. C. Avery, J. H. Pou, and A. B. Andrews, Jr., for defendant.

WALKER, J., after stating the case: This in one respect is a case of supreme importance. It involves the right of the State to enforce its criminal laws without interference by the National Government or its courts. If the defendant is right in its contention, the authority or separate sovereignty of the State is a myth, and not, as we had supposed, a reality. We had taken it to be settled, without leaving room for cavil or controversy, that a Federal court could not stay the arm of a sovereign State in the execution of its criminal laws. If any exception to this just and necessary rule exists, it must be a very rare one, and cannot for a moment be considered as applying to this case. But before analyzing the ingenious but specious argument advanced in favor of so astounding a doctrine as that upon which the defendant relies, and showing its utter fallacy, let us consider, first, the preliminary questions raised by the defendant. It is but fair to the able, learned, and just judge who presided at the trial that we should do so. The defendant complains that it was not given proper time to prepare its defense. In other words, that it was *forced* hurriedly into the trial, and, too, with such undue haste as to deprive it of the ability to concert its (512) defense. This is a grave charge to make, and, if substantiated by the record, it was a violation of the defendant's constitutional rights, we admit; but we are able to state that it is met conclusively and disproved by the facts as they appear in the case. We are convinced that every reasonable opportunity was afforded the defendant, not only for entering its pleas and submitting its motions, but for trying the case and defending itself upon the real legal merits. The presiding judge distinctly announced that the court would sit as long as it was necessary to develop all the facts of the case, even though the term of the court should be extended beyond the time allotted by the statute. This the judge had the power to do. Revisal, sec. 3266. Could the defendant expect to receive a more liberal allowance of time? The other positions taken are equally untenable, and we overrule all of the preliminary motions as dilatory and declare that the judge's rulings thereon did not affect any substantial right of the defendant. We will not refer to the other exceptions, as the view we take of the case renders it unnecessary to do so. The defendant received absolutely fair treatment from the court in very respect.

We now proceed to consider the case upon its legal merits. Two questions are raised:

1. Did the proceedings in the United States Circuit Court constitute a defense to the indictment or prevent the grand jury from returning the bill and the State court from taking cognizance of the same and trying the case?

2. Is any criminal offense charged in the bill of indictment?

These are the pivotal and decisive questions in the case. We would not discuss the first question stated, in view of our ruling upon the second, but for the fact that the arguments of counsel and their briefs are largely devoted to its consideration, and it is a question of the greatest magnitude and gravity. We think, though, that it has been conclusively settled against the defendant's contention by the
(513) rulings of the court of last resort having the power and jurisdiction to finally pass upon it. It is so serious a question and so far-reaching in its consequences, if the defendant be right in respect to it, that it cannot perhaps be too often decided against its present contention, if this is to remain a government of the people, by the people, and for the people, as originally contemplated by its framers, and the rights of the States are to be preserved unimpaired. If it is ever held, as it surely will not be, that the Federal courts can virtually take charge of our State governments by the process of injunction, the separate sovereignty of the States, as distinct from that of the Federal Government, will be completely extinguished. It has been said, at least once, by the Court of highest authority:

"We have already had occasion to remark at this term that 'the people of each State compose a State, having its own government and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their government are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White,* 7 Wall., 725; *Lane v. Oregon, ib.,* 71.

And this was so said since the Thirteenth and Fourteenth Amendments to the Constitution of the United States were ratified.

Can this possibly be so if the defendant's contention as to the effect of the equity proceedings in the Federal courts is the correct one? The trend of the argument it now makes was clearly seen at once by
(514) the Supreme Court of the United States, and they paused to examine it and refused finally to accept it as based upon the correct theory of our government. If we adopt it as sound and carry it to its logical results, it would destroy the proper functions of the States.

We will first refer to the latest exposition of the Constitution in this respect and quote from the most recent case upon the subject, decided in

1906, at the last term of the Supreme Court of the United States (*Urquhart v. Brown,* 205 U. S., 179, opinion by *Justice Harlan*);

"It is the settled doctrine of this Court that, although the circuit courts of the United States and the several justices and judges thereof have authority under existing statutes to discharge upon *habeas corpus* one held in custody by State authority in violation of the Constitution or of any treaty or law of the United States, the court, justice, or judge has a discretion as to the time and mode in which the power so conferred shall be exerted; and that, in view of the relations existing under our present government between the judicial tribunals of the Union and of the several States, a Federal court or a Federal judge will not ordinarily interfere by *habeas corpus* with the regular course of procedure under State authority, but will leave the applicant for the writ of *habeas corpus* to exhaust the remedies afforded by the State for determining whether he is illegally restrained of his liberty. After the highest court of the State competent under the State law to dispose of the matter has finally acted, the case can be brought to this Court for reëxamination. The exceptional cases in which a Federal court or judge may sometimes appropriately interfere by *habeas corpus* in advance of final action by the authorities of the State are those of great urgency that require to be promptly disposed of—such, for instance, as cases 'involving the authority and operations of the General Government, or the obligations of this country to or its relations with foreign nations.' The present case is not within any of the exceptions recognized in our former decisions. If the applicant felt that the decision upon *habeas corpus* in the Supreme Court of the State was in violation of his (515) rights under the Constitution or laws of the United States, he could have brought the case by writ of error directly from that court to this Court."

The same Court, in *Reid v. Jones,* 187 U. S., 153, said that one convicted for an alleged violation of the criminal statutes of a State, and who insists that he is held in violation of the Constitution of the United States, "must ordinarily first take his case to the highest court of the State, in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this Court by writ of error; that only in certain exceptional cases, of which the present is not one, will a circuit court of the United States, or this Court upon appeal from a circuit court, intervene by writ of *habeas corpus* in advance of the final action by the highest court of the State." So, in *Drury v. Lewis,* 200 U. S., 1, it was held that in case of the custody by State authorities of one charged with crime, the settled and proper procedure is for a circuit court of the United States not to interfere by *habeas corpus* "unless in cases of peculiar urgency, and that instead of discharging they will leave the

prisoner to be dealt with by the courts of the State; that after a final determination of the case by the State court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this Court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a State court and subject to its laws may, by the decision of a single judge of the Federal court upon a writ of *habeas corpus,* be taken out of the custody of the officers of the State and finally discharged therefrom." It is true, and we will give the defendant the full benefit of this concession, that in *Urquhart v. Brown, supra,* the Court was considering a question which arose upon a petition for the writ of *habeas corpus,* but it is not so much the particular (516) form of the controversy as the principle involved in it that controls as a precedent. The point intended to be decided was that full play should be given to the procedure of the State courts in the prosecution of its criminals, provided the latter have the right of appeal to the courts of last resort in the State, to the judgments of which a writ of error will lie from the Supreme Court of the United States to review the judgment of the State court when any question as to an invasion of the constitutional rights of the defendant may be presented. Instead, therefore, of pleading the proceedings in the Federal Court, the defendant should have set up its defense upon the merits in the State court and have brought any unfavorable or adverse rulings of the court below here for review, and if it had been deprived of any constitutional right or guaranty we would have corrected the error. If we should have decided against the defendant's contention—for example, that its property was about to be confiscated and its constitutional rights denied—it still would have had the remedy by writ of error to review the judgment of this Court—that is, if *Urquhart v. Brown* states the correct principle and will continue to stand as a precedent, and we think without doubt that it will.

But there is a more serious and conclusive answer to the defendant's contention. It is stated with great clearness and force in the briefs of counsel for the State, where the true doctrine is ably and learnedly presented. The question of separate State sovereignty may not directly and necessarily be involved, but it is incidentally. Can a judge of the Circuit Court of the United States stay proceedings by the State in the prosecution of its criminals? This is not too broad a statement of the proposition upon the affirmative of which the learned counsel for the defendant rest their case. Let us see what this Court, and the Supreme Court of the United States, whose decisions we must respect and obey, have said upon this subject. It should require no legal argument to demonstrate the fallacy of the defendant's position. The question is

merely what has been decided, for the identical matter has fre- (517)
quently been considered and determined by this Court and by the Supreme Court of the United States. There can now be no doubt as to how this Court has ruled upon it, and that ruling is in perfect harmony, as we think, with the determination of the highest Court. If anything, the latter has been more pronounced in denying to the Federal courts the jurisdiction now asserted to reside in them.

The question was fully considered by this Court in *Paul v. Washington,* 134 N. C., at p. 380, and, without quoting liberally from the opinion, we will extract therefrom the general principle established. It is there substantially said that there are two objections to the plaintiff's right to maintain this action—first, the courts cannot enjoin the enforcement of the criminal law or of municipal ordinances imposing fines or penalties. In regard to the first objection, we must bear in mind that if the court should issue an injunction against the institution of a criminal prosecution, it would not only interfere with the due administration of the criminal law, which is of the first importance in any well-ordered system of government, but it would have to restrain action by the State, in whose sovereign name and capacity all criminal cases are commenced and prosecuted, and the State is not even a party to the action and her rights cannot be prejudiced without notice and a hearing, even if we could entertain for a moment with any seriousness the proposition that a court of equity can interfere by injunction with the administration of the criminal law. The violation of a town ordinance is made by our statute a misdemeanor. The Code, sec. 3820. If it is contended that the ordinance imposes a penalty for each violation of it, and that a court of equity will interfere on behalf of the plaintiff to prevent vexatious litigation and a multiplicity of suits, one answer, and a conclusive one, is that a court of equity will never assume jurisdiction in such a case until the rights of the complaining party or, in this particular case, the validity of the ordinance has been first deter- (518)
mined in an action at law.

In *Wallace v. Society,* 67 N. Y., 28, the general rule is stated to be that a court of equity will not restrain a prosecution at law when the question is the same at law and in equity. An exception exists where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the court acts in such cases by granting an injunction only after the controverted right has been determined in favor of the defendant in a previous action. On this ground the chancellor in *West v. Mayor,* 10 Paige, 539, dissolved a temporary injunction restraining the defendant from prosecuting suits against the complainant for violation of a municipal corporation ordinance claimed to be invalid. The unconstitutionality of the act of 1872, he said, would

be a perfect defense to a prosecution for the penalties given by it, and the question as to the validity of the act has not been determined. It would doubtless be convenient for the plaintiff to have the judgment of the court upon the constitutionality of the act before subjecting himself to liability for accumulated penalties. But this is not a ground for equitable interference, and to make it a ground of jurisdiction in such cases would, in the general result, encourage rather than restrain litigation. The question as to the validity of a corporation ordinance does not properly belong to the court for decision, where the complainants, as in the case presented, have a perfect defense at law, if the ordinances are invalid or if they do not render the complainants, or those in their employ, liable for the penalties. And it would be an usurpation of jurisdiction by the court if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court. The court would not grant an injunction to protect him against the multiplicity of suits until his right to such protection had been established by a successful defense at law in some of the suits. We find the rule stated in 16 A and E. (519) (2 Ed.), 370, as follows: "It is a well-settled rule, both in England and America, that a court of equity has no jurisdiction to interfere by injunction to restrain a criminal prosecution, whether the prosecution be for violation of statutes or for an infraction of municipal ordinances. The rule applies, whether the prosecution is by indictment or by summary process, and to the prosecutions which are merely threatened or anticipated, as well as those which have already been commenced. So it is not within the power of the parties to waive the question relating to the jurisdiction of the court to compel it to try the cause. If the prosecution is under an ordinance, no ground for enjoining it is constituted by the fact that the ordinance is void or that the party seeking the injunction has not committed a violation of the ordinance, or that the complainant in the prosecution under the ordinance states no cause of action."

"We have no case, however," says the Court, in *Burwell v. Craig,* 30 Ala., 138, "where chancery has restrained a simple trespass or succession of trespasses on either the person or personal goods. The utmost extension of the principle which has come under our observation embraces only the trespasses to realty, where the remedial agency is shown to be necessary to prevent multiplicity of suits or to avert irreparable mischief. The judgment and sentences of the town council, of which the appellant complains, were *quasi*-criminal proceedings. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of novel impression. We have not been able to find any principle or adjudged case which justifies an injunction to stay a prosecution, either

criminal or *quasi*-criminal, or to restrain a trespass to the person or personal property. We think such a precedent would be an alarming stretch of equity jurisdiction. In considering this case simply on the equity of the bill we have necessarily regarded its averments as true. It is not intended by this to intimate an opinion on the validity or invalidity of the ordinance, or of the fines imposed on the appellant; they will be considered when properly presented." (520)

And, later, in *Moses v. Mayor,* 52 Ala., 198, it was held by the same Court that courts of equity will not interfere to stay proceedings in criminal matters or in any case not strictly of a civil nature. They will not grant an injunction to stay proceedings on a *mandamus,* or an indictment, or an information, or a writ of prohibition. The courts of law have complete jurisdiction to punish the commission of crimes, and can interpose to prevent their commission by imprisoning the offender or binding him to keep the peace. But courts of equity have no jurisdiction over such matters; at least, a court of equity cannot entertain a bill on this ground alone. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of the first impression, and there is neither principle nor authority to support it. Municipal authorities, it is said, would be paralyzed in discharging the public duties entrusted to them if every offender against the ordinances they have proclaimed could by injunction arrest them, or could by multiplying his offenses invoke the interference of a court of equity. The counsel for the appellant sought to withdraw the case presented in the bill from the operation of this general principle and the authorities by which it is supported, upon the ground that the interference of a court of equity is necessary in this case for the prevention of vexatious litigation and of a multiplicity of suits. It could well be said in answer that the litigation and multiplicity of suits apprehended are criminal in their character and without the jurisdiction of the court.

In *Hottinger v. New Orleans,* 42 La. Ann., 629, the Court refused to exercise its equity jurisdiction to restrain the enforcement of an ordinance penal in its nature, upon the ground that "the ordinance was enacted in pursuance of the police power vested in the city, whether rightfully or wrongfully is not to be determined in this suit. It was a police regulation in the interest of public health, with a penalty for its violation. The pecuniary loss in the enforcement of the ordinance cannot therefore be considered in determining the ques- (521) tion of jurisdiction. The enforcement of the ordinance is vested by the Constitution and law of the State in the recorder's court of the city of New Orleans. If the ordinance is unconstitutional, as alleged, the plaintiff can suffer no injury, as she has her remedy and can urge her defense in the recorder's court. Failing there, she has her remedy

by appeal to this Court." See, also, *Devron v. First Municipality,* 4 La. Ann., 11; Beach on Injunction, sec. 520; *Eldridge v. Hill,* 2 Johns. Ch., 281; *Field v. Western Springs,* 181 Ill., 186; 1 Spelling Inj. and Extr. Rem., sec. 694; *Burch v. Cavanagh,* 12 Abb. Pr., 410; *Wardens v. Washington,* 109 N. C., 21; *Scott v. Smith,* 121 N. C., 94; *Vickers v. Durham,* 132 N. C., 880; *Busbee v. Lewis,* 85 N. C., 332; *Busbee v. Macy,* 85 N. C., 329; *Pearson v. Boyden,* 86 N. C., 586.

In *Cohen v. Comrs.,* 77 N. C., 3, the Court held that if the defendants have an unlawful and void ordinance and have arrested and fined the plaintiff, he has a complete remedy at law by exception and appeal, and cannot resort to the jurisdiction of a court of equity for relief. "We are aware of no principle or precedent for the interposition of a court of equity in such cases."

All the cases we have cited were approved by this Court in *Paul v. Washington,* 134 N. C., 363, the opinion in which the principle was considered and the cases relied on were reviewed, having been concurred in by four of the members of the Court, as then constituted—the *Chief Justice, Justice Douglas, Justice Connor,* and the writer of this opinion—and becoming thereby the opinion of the Court upon that question, which really decided the case (as *Justice Douglas* well said) without regard to the question as to the validity of the ordinances. In the leading opinion the correctness of some of the decisions is questioned, but the learned justice who spoke for the Court frankly states that, while "the writer of this opinion is in sympathy with the argument of counsel of the appellant, the majority of the Court are of the opinion that the law as laid down in the cases above cited is correct in (522) principle and applies to the facts of this case and to all others in which the attempt may be made to test the validity of a municipal ordinance by injunction." So that the doctrine may be considered as settled in this State against the authority of a court exercising equitable jurisdiction to interfere by injunction with other courts in the due course of administering and enforcing the criminal laws of the State. Whether this rule is of universal application, or will in extreme circumstances admit of exception when justice would otherwise be defeated, we need not decide, as the principle thus established is clearly applicable to the facts of this case. If the court of a State will not thus interfere with another court of the same State and arrest by injunction the prosecution of a defendant for a crime, surely it will not recognize the power of a court in another and practically a foreign jurisdiction to do so.

We must adhere to our own rulings, which have become settled precedents upon this subject, and hold that the United States Circuit Court had no power to enjoin the prosecution of the defendant in the

court below, and the proceedings of that court introduced in evidence, and on which the defendant relies, can afford it no protection against the indictment or prevent a conviction thereunder.

This places our decision, so far, upon a general principle in the law of injunctions which governs in courts of equity. But the same doctrine, to the extent that it affects this case and as obtaining in the Federal courts, is fully stated by *Justice Gray* in *Ex parte Sawyer,* 124 U. S., 200: "Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sus- (523) tain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law or the executive and administrative department of the Government. Any jurisdiction over criminal matters that the English court of chancery ever had, became obsolete, long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned. 2 Hale P. C., 147; *George v. Pritchard,* 2 Swanst., 402, 413; 1 Spence Eq. Jur., 689, 690; *Attorney-General v. Ins. Co.,* 2 Johns. Ch., 371, 387. From long before the Declaration of Independence it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the court of chancery, whether those proceedings are by indictment or by summary process."

Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause that he should not move for an injunction in chancery in the meantime, said: "Sure, chancery would not grant an injunction in a criminal matter under examination in this Court, and if they did, this Court would break it and protect any that would proceed in contempt of it." *Holderstaffe v. Saunders,* 6 Mod., 16. *Lord Chancellor Hardwicke,* while exercising the power of the court of chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff who had by his bill submitted his rights to its determination from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a

bill for an injunction to stay criminal proceedings, saying: "This Court has not originally and strictly any restraining power over (524) criminal prosecutions"; and again: "This Court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of." *Mayor of York v. Pilkinton*, 2 Atk., 302 (*s. c.*, 9 Mod., 273); *Montague v. Dudman*, 2 Ves., Sr., 396. The modern decisions in England by eminent equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by the party to a suit already pending before it, and to try the same right that is in issue there. Attorney-General v. Cleaver*, 18 Ves., Jr., 211; *Turner v. Turner*, 15 Jur., 218; *Saull v. Brown*, L. R., 10 Ch., 64; *Kerr v. Preston*, L. R., 6 Ch., 463. *Mr. Justice Story*, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Story Eq. Jur., sec. 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld and has been applied alike, whether the prosecutions or arrests sought to be restrained arose under the statutes of the State or under municipal ordinances, citing many cases to sustain the principle.

There is, perhaps, a more conclusive reason why we should hold that the suit in equity pending in the United States Circuit Court and the restraining process issued therein by the circuit judge cannot be of any avail to this defendant, so as to prevent a prosecution against it in a State court for the commission of a crime. The Circuit Court of the United States has no jurisdiction to entertain a suit to enjoin a State, brought by a citizen of any other State or country, even though it may appear that the law upon which the prosecution in the State court is founded conflicts with the Constitution of the United States and is therefore void. This rule is evolved from the Eleventh Amendment to the Constitution, which provides as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United (525) States by citizens of another State or by citizens or subjects of any foreign State." It is well known that this provision was inserted in the Constitution as a result of the decision in *Chisholm v. Georgia*, 2 Dallas, 419, decided in 1793, and it was construed in *Osborne v. Bank*, 9 Wheat., 738, in which case the Court said: "In all cases where jurisdiction depends upon the party, it is the party named in the record. Consequently, the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against the States, is of necessity limited to those suits in which a State is a party on the record." But that narrow interpretation of the amendment has long since been rejected by the same Court, and by many successive de-

cisions it has firmly established the principle to be that if the State is substantially or really a party to the record against whom the suit is directed, she comes within the protection of the amendment. In *Ex parte Ayers,* 123 U. S., 443, a leading case upon this question, it appeared that Ayers, as Attorney-General of the State of Virginia, and the Commonwealth's attorneys of the several judicial circuits were authorized by a legislative act to bring suit against delinquent taxpayers who had tendered coupons which had been taken from the bonds of the State in payment of taxes, the burden of proving the genuineness of the coupons being placed by the act upon the defendants. A suit in equity was brought in the United States Circuit Court to restrain and enjoin the said Ayers from bringing actions under the act or attempting to enforce its provisions, and an injunction was issued from that court according to the prayer of the bill. Ayers refused to obey the writ, and was accordingly attached for contempt, whereupon he applied for and obtained a writ of *habeas corpus* from the Supreme Court of the United States, and at the hearing was discharged from custody. With reference to these facts, the Court, by *Justice Matthews,* said: "The question really is whether the Circuit Court had jurisdiction to entertain the suit in which that order was made, because (526) the sole purpose and prayer of the bill was by final decree perpetually to enjoin the defendants from taking any steps in execution of the act of 12 May, 1887. The principal contention on the part of the petitioners is that the suit nominally against them is, in fact and in law, a suit against the State of Virginia, whose officers they are, jurisdiction to entertain which is denied by the Eleventh Amendment to the Constitution, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State.' It must be regarded as the settled doctrine of this Court, established by its recent decisions, 'that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record.' *Poindexter v. Greenhow,* 114 U. S., 270. This, it is true, is not in harmony with what was said by *Chief Justice Marshall* in *Osborn v. Bank,* 22 U. S. (9 Wheat.), 738. Accordingly, in *Cunningham v. R. R.,* 139 U. S., 446, it was decided that in those cases where it is clearly seen upon the record that a State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. . . . The relief so sought is against the defendants, not in their individual but in their representative capacity as officers of the State of Virginia. The acts sought to be restrained are

the bringing of suits by the State of Virginia in its name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by a process served upon its Governor and Attorney-General, according to the precedents in such cases. If a
(527) decree could have been rendered enjoining the State from bringing suit again its taxpayers, it would have operated upon the State only through the officers who by law are required to represent it in bringing such suits, namely, the present defendant, its Attorney-General, and the Commonwealth's attorneys for the several counties. For a breach of such an injunction these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment. The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name except by constraining the conduct of its officers, attorneys, and agents? And if all such officers, attorneys, and agents are personally subject to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant? It is, however, insisted upon in argument that it is within the jurisdiction of the Circuit Court of the United States to restrain by injunction officers of the State from executing the provisions of State statutes void by reason of repugnancy to the Constitution of the United States; that there are many precedents in which that jurisdiction has been exercised under the jurisdiction of this Court, and that the present case is covered by their authority."

The Court, after reviewing the authorities at length, denied the contention of the complainants and held with the petitioner that the suit was one against the State, and the proceedings against him for the alleged contempt in disobeying the order of injunction therein issued was consequently null and void. Referring again to the suit in equity for an injunction as being one essentially against the State of Virginia in its sovereign capacity, though nominally against its prosecuting
(528) officers, the Court said: "It is therefore within the prohibition of the Eleventh Amendment to the Constitution. By the terms of that provision it is a case to which the judicial power of the United States does not extend. The Circuit Court was *without jurisdiction* to entertain it. All the proceedings in the exercise of the jurisdiction which it assumed are null and void. The orders forbidding the petitioners to bring the suits, for bringing which they were adjudged in

contempt of its authority, it had no power to make. The orders adjudging them in contempt were equally void, and their imprisonment is without authority of law."

The next case in order, which presented the precise question we have here, is *Reagan v. Loan and Trust Co.*, 154 U. S., 362. It was attempted in that suit, as here, to enjoin the Corporation Commission and other officers of the State of Texas from enforcing a statute authorizing them to prescribe the maximum rate of charges by railroads as carriers. The Court laid down certain specific propositions as having been settled by its former adjudications. The great question involved is stated to be the right of the State to regulate or limit traffic charges, and it was held that the Legislature had the power to fix rates and the extent of judicial interference as protection against unreasonable rates. The question of the validity of a rate or charge for transportation in respect to passengers or freight, involving as it does the element of reasonableness, both as regards the company and as affecting the public, is eminently one for judicial investigation, requiring the process of law for its determination. *R. R. v. Minnesota,* 134 U. S., 418. The power thus to regulate the affairs of corporations, and, in the case of carriers, to limit their charges for transportation, is not without limit. It is not a power to destroy, and regulation is not the equivalent of confiscation. Under the pretense of prescribing a maximum charge for fares and freights, the State cannot require the carrier to transport persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use (529) without just compensation or without due process of law. *Stone v. Loan and Trust Co.*, 116 U. S., 307; *Dow v. Beidelman,* 125 U. S., 680. It was also decided by the Court that the undoubted general power of a State to regulate the fares and tolls which may be charged and received by railroad or other carriers can be exercised through the medium of a commission or administrative board created by the State for that purpose and in order to execute the will of the State as expressed by its legislation. *Stone v. Loan and Trust Co.*, 116 U. S., 307. In that case it was held to be the settled doctrine of the Court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. General statutes regulating the use of railroads in a State, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the State of its property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution

of the United States, nor take away from the corporation the equal protection of the laws. While the principles thus stated were recognized and affirmed in *Reagan v. Loan and Trust Company, supra,* the Court distinctly adopts as a rule equally well established what is said in *Ex parte Ayers, supra. Justice Brewer,* delivering the opinion of the Court, refers to that decision and classifies the cases in which interference by injunction is and is not permitted. He says: "We are met at the threshold with the objection that this is a suit against the State of Texas, brought by a citizen of another State, and, therefore, under the Eleventh Amendment to the Constitution, beyond the jurisdiction of the Federal court. The question as to when an action against offi-
(530) cers of the State is to be treated as an action against the State has been of late several times carefully considered by this Court, especially in the case of *Ex parte Ayers,* 123 U. S., 433. To secure the manifest purpose of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectually operates. It is well settled that no action can be maintained in any Federal court by the citizens of one of the States against a State without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides, 'No State shall pass any law impairing the obligation of contracts.' This immunity of a State from suit is *absolute* and *unqualified,* and the constitutional provision securing it is not so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against officers of a State to compel them to do the acts which constitute a performance by it of its contracts is, in effect, a suit against the State itself. In the application of this latter principle two classes of cases have appeared in the decisions of this Court, and it is in determining to which class a particular case belongs that different views have been presented. The first class is when the suit is brought against the officer of the State as representing the State's action and liability, making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. The other class is where a suit is brought against defendants who, claiming to act as officers of the State and under the color of an unconsti-
(531) tutional statute, commit acts of wrong and injury to the rights

and property of the plaintiff acquired under a contract with the State. In the *Reagan case* the suit had proceeded to final hearing and decree, and a perpetual injunction was granted upon the findings of fact, which showed that the rates were confiscatory, and, besides, the Legislature did not itself prescribe the maximum of charge for transportation, but left that matter to be determined by the Commission. The provisions of the act were not enforcible except by the Commission. In this particular that case and this one are clearly distinguishable.

Before proceeding to discuss further the rulings in the Supreme Court of the United States upon this important and far-reaching question, which now engages perhaps more of the attention and anxious consideration of the public and of the courts of this country than any other, as it should, for it vitally concerns the due and lawful exercise of the powers conferred by the Constitution upon the Federal Government and those reserved, respectively, to the States or to the people, and should be settled definitely and conclusively in order to avoid unfortunate judicial conflicts, we will pause to decide one question involved in this case which also differentiates it from *Reagan v. Loan and Trust Co.* There is nothing in our act which makes its operation depend at all upon anything to be done by the Corporation Commission, or the Attorney-General or his assistant. The said officers last named are required to prosecute in the name of the State any crime committed in violation of the act, but *Ex parte Ayers* is direct authority that they cannot be reached by an injunction while in the performance of this official duty. Besides, can it be said, with any show of reason or even with the sanction of plausible argument, that a suit for an injunction directed against the Attorney-General in the prosecution of criminal cases in which the State, under our law, and the sovereign under all (532) law, is the plaintiff of record and, too, the real plaintiff, is not, in its very nature and in its natural and necessary effect, a suit against the State? Can it be said, in answer to this suggestion, that the State can proceed against criminals and yet at the same time that she can be deprived of all power to do so by her duly constituted law officers, charged with the duty of enforcing the criminal law? The injunction had just as well be issued against the grand juries or the judges who preside in her courts. The act provides (Public Laws 1907, ch. 216, sec. 7) that it shall be in force from and after 1 July, 1907, and the provision that the Corporation Commission is required to publish the rates "fixed by this act" on or before 1 June, 1907, for the information of the public and the railroads concerned, is directory and not intended to stay the operation of the act beyond 1 July, 1907, should the Commission fail in the performance of that duty, nor in law, by any reasonable construction of the act, does it have any such effect. The maximum rate

prescribed by the act was unconditionally effective from and after 1 July, 1907, and the act was therefore self-executing. For this reason alone, if for no other, the suit in equity pending in the United States Circuit Court cannot be permitted to affect the proceedings in the court below in this case.

R. R. v. Minnesota, 134 U. S., 418, so much relied on by the defendant's counsel, is also far from being an authority against the ruling we now make. The act, construed and held valid in that case, provided that the tariff of rates as made and published by the Railroad Commission should be final and conclusive as to what are equal and reasonable charges, and that there should be no judicial inquiry into the matter for the purpose of determining the reasonableness of the rates so prescribed. Quite a different case from this one. We do not say that a judicial inquiry cannot be made in a proper way, but that the State, in the exercise of its sovereign power, cannot be enjoined under the
(533) guise of restraining her officers in the performance of a duty which is not required to make the rate act effective. Nor can the State be controlled by the Federal courts in the execution of her criminal laws. But it may be remarked, in passing, that the opinion of the Court in *R. R. v. Minnesota,* as well as the concurring opinion of *Justice Miller,* especially cited by the defendant's counsel as controlling this case, was met by an exceedingly strong dissent from *Justices Bradley, Gray,* and *Lamar,* who asserted that what is a reasonable charge is not a judicial question, but is "preëminently" a legislative one, involving considerations of public policy as well as of remuneration, and that the Legislature may itself fix the maximum and thus exclude judicial inquiry, or it may merely provide that the rate shall be reasonable, or that reasonable rates shall be determined by a commission or by the common law, when the question of reasonableness is open to judicial investigation. They further asserted that the Court, in *R. R. v. Minnesota,* had virtually overruled *Munn v. Illinois,* 94 U. S., 113, and the cases afterwards decided and based upon the principle of that case. When we consider the real nature of a corporation, the source of its creation, and the tenure, if we may so speak, by which it exercises its privileges and franchises, and, indeed, holds its property, the reserved power of the State with respect to it and many other facts and reasons that can easily be adduced, it may well be a question whether the advantage and strength of the argument in that case was not all with the dissenting justices. But, accepting the principle announced by the majority of the Court as the law with us, and we so accept it, it does not bear upon this case and should not control our decision. We also think the many other cases on which the defendant's counsel rely are equally inapplicable to the facts of this case. There is no evidence in this case,

and of course no adjudication binding upon us, that the rate prescribed by the act of 1907 is confiscatory, nor do we understand the defendant to rely upon the record of the proceedings in the (534) Federal court as establishing that fact (for it would not be evidence for that purpose), but merely as showing that complete and exclusive jurisdiction of the entire matter was in that court by virtue of the suit therein pending, and that its order of injunction extends so far in its broad sweep as to stop the State in the ordinary enforcement of its criminal laws. This would be a very alarming doctrine if true, but fortunately it is not.

Recurring to that part of our opinion where we digressed in order to consider the nature of the act of 1907 and to determine when it became effective, and to distinguish from the case at bar certain cases decided by the Supreme Court of the United States which it is contended by the defendant are decisively in its favor, we will refer to one other case recently decided by the Court.

In *Fitts v. McGhee,* 172 U. S., 416, it was attempted to enjoin the Attorney-General of Alabama and the solicitor of one of her judicial circuits from prosecuting suits for penalties provided for violations of an act fixing the maximum tolls to be charged by a bridge company for the use of its bridge across the Tennessee River. The Supreme Court denied the jurisdiction of the Circuit Court of the United States, and the case, as we understand, establishes three propositions, as follows:

"1. A suit to restrain officers of a State from taking any steps by means of judicial proceedings in execution of a State statute to which they do not hold any special relation is really a suit against the State within the prohibition of the Eleventh Amendment to the Federal Constitution.

"2. The Circuit Court of the United States sitting in equity is without jurisdiction to enjoin the institution or prosecution of criminal proceedings commenced in a State court.

"3. The power of the Federal courts to interfere by *habeas corpus* with the trial of indictments found in State courts, on the ground that the State statutes under which the indictments are found are repugnant to the Federal Constitution, laws or treaties, will not (535) be exercised, in the first instance, unless there are exceptional or extraordinary circumstances to require it, but the party will be left to make his defense in the State court." In the course of the opinion *Justice Harlan* says: "Let them appear to the indictment and defend themselves upon the ground that the State statute is repugnant to the Constitution of the United States. The State court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. *Robb v. Connolly,* 111

U. S., 624. And if the question is determined adversely to the defendants in the highest court of the State in which the decision could be had, the judgment may be reëxamined by this Court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a Federal court of equity should assume to interfere with the ordinary course of criminal procedure in a State court." The Court then proceeds to distinguish the cases cited in the defendant's brief filed in this Court, upon the ground that the State officer in each of them was committing or about to commit some specific act of trespass, to the injury of the complainant's rights. Other equally satisfactory reasons could be assigned why the suit in equity now pending in the Circuit Court of the United States should not be allowed to defeat the prosecution of the indictment in the court below, but we do not deem it necessary to consider or even state them, as what we have already said upon this point is sufficient to convince us that the Federal court was and is without jurisdiction to stay the institution of criminal proceedings in a State court, and we would affirm the judgment in this case if it did not appear that no criminal offense is charged in the bill of indictment We will now consider that question.

The State contends that the first section of the act of 1907 contains a distinct prohibition against common carriers of passengers charg-
(536) ing more than 2¼ cents per mile, and that, while a penalty is imposed for a violation of that section, it is done by a subsequent section of the act, and where this occurs, although the offense may be a new one, or one not existing at common law, the State can proceed by indictment to punish a violation of the first section, and the party specially aggrieved thereby may also at the same time recover the penalty, it being conceded, as we understand, that if the penalty had been imposed in the first section, where the prohibition is found, this would not be so, and an indictment would not lie. If there is any respectable authority for such a position—and we do not think there is—it is not only inherently unsound, but exceedingly refined and technical, and Mr. Bishop says that it is not only refined, but is contrary to all reason. It is a distinction without a difference, in law or in fact. The act prohibits a charge above 2¼ cents, and then provides in a subsequent section (4) that any railroad company violating its provisions shall be liable to a penalty of $500 for each violation, recoverable by the person aggrieved, in a civil action, and any agent of the company violating the act shall be guilty of a misdemeanor. How could the Legislature more clearly or convincingly have expressed its intention to discriminate, as to the consequences between a violation by the railroad company and a similar violation by its agent, and what practical difference can it make whether the penal provision is in the first or the fourth section of

the act? Does not the latter section distinctly refer to the former, the same as if it had been incorporated with it?

The rule of construction relied on by the State seems to have arisen from a total misconception of the English authorities and a rank *dictum* of *Justice Ashurst* in *Rex v. Harris,* 4 T. R., 205, with no authority cited to support it. *Lord Kenyon,* who wrote the leading opinion in the same case, expressly states that the offense created by the act of Parliament (26 Geo. II., ch. 6, sec. 1), namely, disobedience of an order of the King in council, was in itself an offense at common law, (537) and *Lord Ashurst,* afterwards, in his opinion, explains, if he does not destroy, his *dictum* by confining it to the special facts of that case.

The law is thus stated by Bishop in his work on Statutory Crimes (1873), sec. 250: "The doctrine is, that where an offense is created by statute, and the same statute prescribes the penalty or the mode of procedure, or anything else of the sort, only that which the statute prescribes can be followed. But where the offense is at common law, statutory provisions not directly repugnant to the common law are cumulative, and either law may be followed. And where a statute forbids a thing before lawful, but provides no penalty, the indictment for the offense is at common law. So, where it prescribes no mode of prosecution, the common-law indictment lies." He cites numerous cases in the note to that section, among them several English cases which sustain his statement of the rule, and under it the case of *Rex v. Harris, supra,* was correctly decided, because the penalty imposed by the statute construed in that case was for an offense which previously existed at the common law. The authorities cited by the learned counsel for the State can be easily reconciled with the principle as stated by Mr. Bishop, if they are read with reference to the particular facts being considered in them. *Reg. v. Buchanan,* 8 Ad. and El. (55 E. C. L.), 883, was a case of like kind with *Rex v. Harris,* as the offense of an attorney practicing without having been duly admitted or called to the bar or enrolled was made a contempt of court which, we know, and it is so held in the opinion of *Lord Denman,* was also a misdemeanor at common law. It is intimated by the *Chief Justice* that if a penalty had been imposed instead of the remedy by attachment for contempt given, the result in that case would have been different. Section 237, cited from 1 Bishop on Cr. Law, is, in our opinion, inferentially against the State's contention. We reproduce it here: "It is obvious that to prohibit a thing by a statute is to bring it within the jurisdiction of the tribunals. Whence we see, carrying in our minds what is stated in the last section, how and why, as explained in another volume, when a statute forbids a thing affecting the public, *but is silent as to* (538)

any penalty, the doing of it is indictable at the common law." (Italics ours.) In *Rex v. Wright,* 1 Burr., 543, it was held that "indictment lies not upon an act of Parliament which creates a new offense and prescribes a particular remedy." *Lord Mansfield* said in that case: "I always took it that where new created offenses are only prohibited by the *general prohibitory* clause of an act of Parliament, an indictment will lie; but where there is a prohibitory *particular clause,* specifying only *particular remedies,* there such *particular remedy* must be *pursued,* for otherwise the defendant would be liable to a double prosecution—one upon the general prohibition and the other upon the particular specific remedy." And when afterwards informed that the counsel for the Crown "gave up the matter," he replied, "I do not wonder at all at it; I thought he would do so. I have looked into it, and there is nothing in it. That case of Crofton (where the contrary is supposed to have been decided) has been denied many times." In *Rex v. Robinson,* 2 Burr., 799-803, the great *Chief Justice* (*Lord Mansfield*) said: "But where the offense was antecedently punishable by a common-law proceeding and a statute prescribes a particular remedy by a summary proceeding, there *either* method may be pursued, and the prosecutor is at liberty to proceed either at common law or in the method prescribed by the statute, because there the sanction is cumulative and does *not exclude* the common-law punishment. 1 Salk., 45. *Stephens v. Watson* was a resolution upon these principles. In that case keeping an alehouse without license was held to be not indictable, because it was no offense at common law, and the statute which makes it an offense has made it punishable in another manner." And again in the same case, when discussing the same point, he sums up, at page 805, as fol-
(539) lows: "The true rule of distinction seems to be that where the offense intended to be guarded against by statute was *punishable before* the making of such a statute prescribing a particular method of punishing it, there such particular remedy is *cumulative* and does not take away the former remedy; but where the statute only enacts 'that the doing any *act not punishable before* shall for the future be punishable in such and such a *particular* manner,' there it is necessary that such *particular* method by such act prescribed must be *specifically pursued,* and not the common-law method of an *indictment.*" In *Castle's case,* 2 Cro. Jac., 644, it was resolved that where a statute imposes a penalty for doing a thing which was no offense before, and provides how it shall be recovered, it shall be punished by that means and not by indictment. The offense being new, the particular mode of punishment must be pursued. The generally accepted rule upon this subject is thus stated in 1 McClain's Cr. Law, sec. 8: "If the act prohibited has been previously an indictable offense, it will be presumed that the

civil penalty therefor is cumulative; but when the act creates a new offense and makes that unlawful which was lawful before, and prescribes a particular penalty and mode of procedure, that penalty alone can be enforced." See, also, 16 Enc. Pl. and Pr., 239; *Reg. v. Wigg,* 2 Salk., 460; *Com. v. Bridge Co.,* 68 Mass., 67; *S. v. Maze,* 25 Tenn., 17; *People v. Hislop,* 77 N. Y., 331; *Com. v. Evan,* 13 Serg. and R., 426; *McElhiney v. Com.,* 22 Pa. St., 365; *Hellings v. Com.,* 5 Rawls, 63; *Journey v. State,* 1 Mo., 428; *Com. v. Howes,* 32 Mass., 231; *S. v. Sinnot,* 15 Neb., 472; *U. S. v. Laeskl,* 29 Fed., 699; *Pentlarge v. Kirby,* 19 Fed., 501; *Carle v. People,* 12 Ill., 285; *Reed v. R. R.,* 33 Cal., 212; *S. v. Crocroft,* 2 *ibid.,* 233; *Battleboro v. Wait,* 44 Vt., 459; *Moses v. Sprague,* 11 R. I., 541; *Confrey v. Stark,* 73 Ill., 187. But *S. v. Snuggs,* 85 N. C., 542, is exactly in point, for the act of issuing a marriage license to persons under 18 years of age was forbidden in one section and the penalty was imposed in another section, *Ruffin,* (540) *J.,* for the Court, said: "The statute not only creates the offense, but fixes the penalty that attaches to it, and prescribes the method of enforcing it; and the rule of law is, that wherever a statute does this, no other remedy exists than the one expressly given and no other method of enforcement can be pursued than the one prescribed. The mention of a particular mode of proceeding excludes that by indictment, and no other penalty than the one denounced can be inflicted. 1 Russell on Crimes, 49; *S. v. Loftin,* 19 N. C., 31." It has held, therefore, that no criminal offense was charged in the indictment, and it was quashed. In this connection *Ruffin, J.,* at page 544, further said: "We are convinced that his Honor's ruling in quashing the indictment is correct, in view of the fact that the statute creates the offense, affixes the penalty, and prescribes the mode of proceeding—the mention of the *particular* method operating to the exclusion of every other." (Italics ours.) In *Loftin's case, supra,* which is relied on by the Court in *Snuggs' case,* and which states the same rule, *Judge Gaston,* who wrote the opinion, cites with approval *Castle's case,* Cro. Jac., 64; 1 Salk., 45, and *Rex v. Robinson,* 2 Burr., 803, which we have already mentioned as English cases sustaining the rule. *S. v. Snuggs* was expressly approved in *S. v. Bloodworth,* 94 N. C., 918, and by the strongest implication in *S. v. Parker,* 91 N. C., 650, and *S. v. Addington,* 121 N. C., 538. There is no sound reason for, and, not intending to use too harsh a term, no practical sense in the distinction between a statute which prohibits an act to be done, and then in the section denounces the penalty, and one in which the penalty is imposed in a separate section; and especially can no such rule be applicable to the statute we are now construing, as the legislative intent is unmistakably expressed—that for disobedience to the provision of section 1 the carrier shall pay a

(541) penalty only to the party aggrieved, and the agent shall be liable to indictment for a misdemeanor; and counsel for the State, on the argument, answered a question from the Court in such a way as clearly recognized this to be the intention. Being asked why the Legislature had discriminated against the agent, the reply was (and undoubtedly the correct one), it was supposed that the penalty could not be recovered from the agent, while it could be from the carrier.

But it is suggested that the defendant, while not liable as a principal for doing the act itself, is liable criminally as accessory before the fact, having counseled, aided and abetted the agent in the sale of the ticket, and, as all accessories in misdemeanors are regarded as principals, the defendant thereby became a principal under the law. This is a very strange and, to our minds, a very illogical argument and a palpable *non sequitur*. The judge who presided at the trial evidently did not take this view of the case, for he charged the jury upon no such theory. He plainly thought that the sale of the ticket by the agent made the defendant, his employer, liable *per se*. In other words, that the act of the agent was the act of the principal under the first section of the act and the doctrine of *S. v. Kittelle,* 110 N. C., 560. But he failed, inadvertently, to take into account the fact that in the case cited (if it can be considered as stating a correct rule) there was no special provision in the statute under which Kittelle was indicted for penalizing the employer, as there is in the act of 1907, which brings this case directly within the decision in *S. v. Snuggs* and takes it out of the principle decided in *S. v. Kittelle.* In the latter case Kittelle was held liable for the act of his employee because he held the license to sell liquor, and, further, upon the principle applying to the law of contracts and civil torts, that the principal must answer for the acts of his agent (*respondeat superior*), and that he who does an act through the medium of another party is in law considered as doing it himself.

(*Qui facit per alium, facit per se.*) The difference between that (542) case and this one is manifest. Besides, the defendant here is a corporation and can act only by its agents. It has no personality or individuality. The principal can do no more by this agent than if he were personally present and acting. The very thing the agent does, whether he be the agent of a corporation or of an individual, marks the extent of the principal's liability. It cannot go beyond the limits of the agent's act. So, in this case, when the agent sold the ticket, even under the order of his principal, the defendant, he did the very thing and the *only* thing prohibited by the act of 1907, ch. 216, for which he and his principal are made liable by the act —he to an indictment for a misdemeanor and the principal to a penalty. How could the defendant, a mere legal entity, commit the act prohibited by the statute

except by its agent? The statute itself, by its very terms, recognizes this fact—that the corporation can act only by its agent, and, therefore, that the act of its agent is what renders it liable for the penalty. If a corporation can act only through its agent, and thereby becomes, in law, completely identified with its agent, how can it be an accessory to his act? For in such case it must be accessory to its own act, which is a legal absurdity.

It appears from the act of 1907 that a penalty is denounced against the carrier and the agent is made criminally liable for the same offense, namely, disobedience of the prohibition in section 1, against charging more than 2¼ cents per mile. The Legislature, by an elementary rule of statutory construction, is presumed to have had the law as settled by *S. v. Snuggs,* in mind when it passed the act of 1907, and that act will be construed according to the rule as therein stated. The Legislature is presumed to know the existing law and to legislate with reference to it. The case of *Kittelle* and cases of its class do not apply, as no special punishment was provided for the principal in the law upon which they were decided, while in the act of 1907 there is a special remedy against the principal. The doctrine of accessories does not apply, as we have shown, and the corporation would, even (543) under that doctrine, commit the identical act for which the penalty is provided; and, besides, no one can be an accessory to his own act, as already explained. The legislative intent is so clear and unmistakable that it would seem to be impossible to misunderstand what is so plainly expressed.

Much is said in the briefs about the equity of the suit in the Federal court and the complainant's right to an injunction. We would not agree with the learned judge who issued the interlocutory injunction if that matter were strictly before us and we were required to pass upon it, for we do not think there was a sufficient disclosure of the facts which are necessarily within the knowledge of the complainant in that suit (the defendant in this indictment) to entitle it to the favorable consideration of a chancellor. It is a very serious matter to suspend the operation of a public statute and to postpone the execution of the people's will at the instance of a private suitor, even upon the allegation that his property is about to be confiscated or some other constitutional right is about to be impaired, and it should not be done except upon a *full* disclosure of all the facts in the complainant's possession and upon the clearest showing that the threatened injury will at least probably result. "It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at the final hearing the writ should be denied." *Hall Signal Co.*

v. R. R. Signal Co., 153 Fed. (C. C. A.); *City Signal Co. v. R. R.,* 75 Fed., 1004. It has been held by at least one Federal court, when considering the identical question presented in this case, that it would be impossible to decide whether the reduction of a rate will be confiscatory in the absence of an actual test of the same. The Court held that

(544) whether it would be so or not was speculative and mere guesswork, and that the testimony of an ordinary business man, expressing his opinion, or even of railway experts also giving opinions and illustrating them by the use of many figures based upon past experience, was not satisfactory and did not relieve the doubt and uncertainty sufficiently to warrant the issuing of a preliminary injunction. *R. R. v. Hadley,* 155 Fed., at p. 225.

In this case the reports of the defendant to the Corporation Commission do not tend to diminish the uncertainty as to what effect the lower rate will have upon the defendant's income, but rather to increase it. It would be natural to suppose that a lower rate would cause increased travel, and, while additional facilities must be provided for it, the relative increase of the cost of the latter and of the remuneration from the natural increase in passenger traffic cannot be determined with any degree of certainty except by actual trial. We have carefully examined the opinion of the Federal court in this matter, and have not been convinced thereby that we have erroneously decided any of the questions growing out of the equity suit. We refer especially to *Ex parte Wood,* 155 Fed., 190, in which the petitioner, a ticket agent of the defendant, who applied for the writ of *habeas corpus,* was granted the writ and then discharged for a violation of the act of 1907. The decision is based upon the ground that the sale of tickets was "an act done in pursuance of an order, process, or decree of a court of the United States or judge thereof," under Rev. Stat. of U. S., sec. 753 (U. S. Comp. Stat., p. 592). This is giving a very broad and liberal construction to that section. Can it mean that the criminal laws of a State shall be suspended by the order of a single Federal judge, even if they conflict with it? We cannot give our assent to such a construction, and we are quite sure that our *Chief Justice* did not intend to sanction it in the quotation made by the learned circuit judge in *Ex parte Wood* from *S. v. Boone,*

(545) 132 N. C., 1108. He was speaking there of a duty enjoined by a valid Federal law not being punishable by the State as a crime, and not merely of one imposed by the order of a Federal judge.

But it is unnecessary to continue this comment any further, as the defendants in the equity suit must avail themselves of any erroneous ruling therein by exception and an appeal from the decree entered in that suit at the final hearing. We do not think, upon the question of the jurisdiction of the Federal court, that *Mfg. Co. v. Los Angeles,* 189

U. S., 207, and *Dobbins v. Los Angeles,* 195 U. S., 241, which are cited in *Ex parte Wood,* bear any analogy to the equity suit wherein the order of injunction was issued, under which Wood is alleged to have been acting when he sold the tickets. In the former case (189 U. S., 207) *Justice Brown* clearly distinguishes the two classes of cases from each other. The State in this proceeding is enforcing her criminal laws.

It must not be understood by what we have said that we are criticising the decision of the Federal court, but merely examining the grounds and reasons upon which it rests, with a view of determining whether it should have any influence upon our conclusion in this case. We always discuss respectfully the decisions of other courts, however much we may disagree with them, and it is our pleasure as well as our duty to do so, for any other course would be most unseemly.

The question here is not whether one who advises or commands a criminal act to be committed is himself liable, nor whether that admitted principle applies to corporations, for it clearly does; nor is it whether a railroad company is liable civilly for any damages caused by the unlawful act of its agent which he has been required by the company to do, or which it has afterwards ratified.

All these principles are elementary, but they have no application to the facts in this case, no more than the right of a creditor to enforce the payment of a debt legally due to him by his debtor could have. The question, and the only one, is whether the Legislature has created a new offense and prescribed a specific punishment or penalty (546) for its commission, and if so, whether this does not exclude the common-law remedy by indictment. We cannot pervert the meaning of plain words and change the intent of the Legislature, because able lawyers may have been members of that body. If that be so, more is the reason why we should construe the statute according to its clearly expressed meaning. What the Executive shall do if any emergency has arisen requiring him to act is not a question in this case, and we have, and should have, no suggestion to make as to his duty in the premises. We are assured that, in the independent exercise of his high official functions he will act wisely and well and for the best interests of the people.

Since this opinion was prepared we have found that the Supreme Court of the United States, in *Yates v. Bank,* 206 U. S., 158, has decided the very question presented in this case precisely as we have in regard to the right to indict. It says: "The civil liability of National bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the 'National Bank Act,' it is self-evident that the rule expressed by the statute is exclusive because of the elementary

principle that, where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed in the statute is the exclusive test of liability," citing *Bank v. Dearing,* 91 U. S., 35. So, in a note to *Leathers v. Tobacco Co.,* 144 N. C., 330, which is reported and annotated in 9 L. R. A., at page 349, it is said, at page 392: "If a statute imposes a new duty and creates a new right, and at the same time provides a specific remedy to punish the neglect of the one and to secure the other, that remedy is exclusive, and no other action lies for an infraction of the statute. But if a statute, recognizing an old right, imposes another duty in respect to it, and provides a method of enforcing it, the remedy provided in the statute is cumulative, and existing rights (547) of action are unaffected unless expressly taken away. These authorities treat the principle as elementary and undeniable.

Upon a review of the whole case our opinion is that the Federal court had no jurisdiction to enjoin the finding and prosecution of this indictment, and that the suit in that court is virtually one against the State, within the meaning and intent of the Eleventh Amendment to the Constitution of the United States. But it is clear that, as no criminal offense is alleged in the indictment, there is nothing for us to do but to arrest the judgment.

Judgment arrested.

BROWN, J., concurring: I would be content to simply concur in the very able and exhaustive opinion prepared for the Court by *Mr. Justice Walker,* without any expression of my own, but for a suggestion made in the dissenting opinion that our decision probably necessitates the calling of a special session of the General Assembly, and the regret therein expressed that so heavy an expense should be incurred by the taxpayers.

In view of what this Court has decided in this case, it is hard to believe that any one should seriously entertain the idea that a special session of the General Assembly is either necessary or advisable as a result of its decision. We have held: (1) That the Federal courts have no power whatever to interfere in this matter with the enforcement of our statute. (2) That every agent of the defendant, from the president down, who sells a ticket or directs the sale of one above the statutory rate may be indicted, fined, and imprisoned. (3) That for each ticket so sold, the corporation itself, as a distinct inanimate entity, separate and apart from its agents who control it, may be mulcted to the extent of $500.

With the proper enforcement of this statute, as expounded by (548) us, no railway company could survive a week's violation of it.

The railway officials know this, and for that reason it is universally understood that they have entered into an agreement to keep in force the statutory charge until the rate litigation pending in the Federal

court and referred to in our opinion shall have been finally determined by the Supreme Court of the United States. That the railroad companies will continue to obey the law until then, and notwithstanding our decision, no reasonable man can scarcely doubt. But considerations of that kind ought not to control our decision when we are firmly convinced of its inherent soundness. We have based our decision upon that part of section 4 of the statute which does not appear in the dissenting opinion, but does appear in the opinion of the Court, and is in these words: "That any railroad company violating any provision of this act shall be liable to a penalty of $500 for each violation," to be recovered by the party aggrieved.

We find that the following principle of statutory construction is imbedded in our law and has been acted upon from time immemorial: that where a statute creates a new offense (an act which was not an offense before) and imposes a money penalty for its violation and provides how that penalty shall be recovered, the offender shall be punished by that method only, and the remedy by indictment is forbidden.

The application of that established principle of statutory construction to this case necessarily destroys this indictment. Any lawyer or layman who reads the opinion of *Mr. Justice Walker* will see that he has traced the establishment of this principle down through the centuries from the earliest days of the common law to recent decisions of this Court, and fortified it by an unbroken and overwhelming line of judicial precedents and the opinions of the most eminent text-writers, none of which is controverted or denied. It is suggested, however, that we should overrule our decisions if they stand in the way of sustaining the indictment against this corporation. There are some decisions which (549) have been overruled because experience has shown their inutility. But the authorities relied on by us establish a great and beneficent principle of human rights, applicable to individuals as well as to corporations, and that is, that no one shall receive double punishment, and never unless the power to inflict it and the intent to impose it are perfectly clear.

It is plainly manifest that the General Assembly did not intend that double punishment should be inflicted in this case. No penalty is imposed on the agents who control and act for the railway corporation. They are indictable for a simple misdemeanor, as they are responsible human beings who control and act for the corporation and may be punished. But, inasmuch as the corporation itself is an inanimate thing and cannot be punished by imprisonment, the General Assembly wisely determined it should be punished by money penalties, and that, instead of the penalties going to the State, they should go to the traveling public who suffer by a violation of the law.

We have decided this case upon a construction of our statute, and that we have decided it according to the established law of the land I have no doubt will be the conclusion of the fair-minded and unprejudiced lawyers and laymen who may read these opinions.

"It is the function of a judge," says my *Lord Coke,* "not to make but to declare the law according to the golden metewand of the law, and not by the crooked cord of discretion."

CLARK, C. J., dissenting from the conclusion and from that part of the opinion upon which it is based. Laws 1907, ch. 216, provides:

"SECTION 1. No railroad company doing business as a common carrier of passengers in the State of North Carolina, except as hereinafter provided, shall charge, demand, or receive for transporting any passenger and his or her baggage, not exceeding in weight 200 pounds, from any station on its railroad in North Carolina to any other station on its said road in North Carolina, a rate in excess of 2¼ cents per
(550) mile, and for transporting children under 12 years of age, one-half of the rate above prescribed."

"SEC. 4. . . . And any agent, servant or employee of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court."

It is elementary and hitherto uncontroverted law that any one who commands and directs another to commit a misdemeanor is himself guilty of a misdemeanor. He need not be actually present at the time, but if he knowingly, willfully, and unlawfully commands and directs another to violate the law, he himself is equally guilty with that other. A printed order from the passenger department of the defendant company was put in evidence without objection, wherein the agents were commanded, instructed, and directed to sell tickets at the old rate, disregarding and in open violation of the law of this State, above set forth. This order the defendant Green, agent of the defendant railroad, obeyed instead of the statute. This made him guilty of a violation of law. He was found guilty, and has not appealed. It also made the defendant railroad guilty, because it commanded, ordered, and directed the said agent to violate the law. The brief of the defendant railroad filed in this case admits that it issued to the defendant Green and other agents the order to sell tickets at a rate in excess of that allowed by the above statute.

It is now conceded that a corporation can commit a crime just as an individual can. There have been too many indictments against corporations sustained in this Court, as for issuing free passes (*S. v. R. R.,* 122 N. C., 1052; *S. v. R. R.,* 125 N. C., 666), running trains on Sun-

days (*S. v. R. R.*, 119 N. C., 814), and for a hundred other acts, necessarily done through its agents, for this to be a debatable question. It has always been law, founded upon reason, that he who aids (551) in the commission of or procures another to commit crime is also guilty, and this is as true when a corporation procures the commission of a crime as when it is an individual that procures it to be done. If the act is a misdemeanor, both are guilty of the same misdemeanor and can be indicted together.

If one man commands another to strike a third person, and his command is executed and physical injury results, the person who gave the command may be indicted alone or jointly for the battery, and this though the first party may be liable also for actual and punitive damages. If any other person or corporation than the defendant railroad procured or induced the defendant Green to violate this law, or any other law, it will not be denied that such person or corporation would be indictable with Green. Upon what principle is it that this railroad is exempt from punishment for the identical act which would be criminal if committed by any other corporation or individual in the State? Our laws are not thus wont to discriminate. The defendant railroad is the more guilty, and not guiltless, because it had more and greater powers of persuasion to cause its agents to violate the laws of their State. It could persuade to crime because it could coerce. It had its hand upon the livelihood of its agents. It boldly defied the act of the Legislature and commanded its agents to disregard and violate it openly, daily, and hourly. Can it be heard to say that it is not guilty of the violation of the law which it has commanded and forced its agents to commit? Is there one law for the defendant railroad which exempts it from liability, when it compels so many men to commit crime, and another which subjects those very men to liability for the act, and would subject any one else who would advise or procure them to break the law?

It is inconceivable that the Legislature of this State should make such an exemption in favor of the defendant company from the settled law of the ages that he who procures or causes another to commit (552) a crime is himself guilty. If the Legislature intended to so order, it would surely have made its intention clear and beyond dispute. It has not written a line into this law to indicate such intention. It is inconceivable that the General Assembly of North Carolina should wish to punish the agents and conductors, its own citizens, criminally, for an act from which they would receive no profit, and should at the same time withdraw from any liability to the criminal law the great and powerful corporation which compels them to commit the crime and which receives the sole profits therefrom—profits which, in fact, it is contending will be very great.

It has not only always been human law that he who causes another to commit crime is equally as guilty as he who does the act, but it is the divine decree in the first recorded judgment. The serpent received no part of the fruit; it did not compel Eve to eat it, but because it suggested and encouraged the violation of the law, it received the heavier sentence. Here the railroad both compelled the act to be done and received all the profits of the crime. Adam did not procure the violation of the law, but only received part of the fruit. Yet was he also punished.

It is true that the rate is established in section 1, and its violation is made a criminal offense in section 4. But the Court well says in the opinion in this case: "What practical difference can it make whether the penal provision is in the first or fourth section of the act? Does not the latter section distinctly refer to the former the same as if it had been incorporated with it?" And of course exactly the same is true of the criminal provision of the act. When it made any one indictable for selling a ticket at a rate higher than that named in the law, the statute thereby made indictable any one who should procure or compel such person to sell tickets at the forbidden rate. "Agents, conductors, (553) and employees" are named only because they are those who usually sell tickets. The use of those words cannot be an implied exemption from liability of those who procure or force the persons named to break the law—and the evidence and admission here is that the defendant company issued its orders to the defendant Green and its other agents to do that very thing and to sell tickets at a price forbidden by law.

The contention that the Legislature has exempted the defendant company from that liability which rests now, and has always rested, upon all others who aid in or procure others to break the law, is placed upon the sole ground that the same chapter, section 4, gives to any one who shall be forced to buy a ticket at an illegal rate a civil action for a specified sum. But that is only an additional remedy to aid in the enforcement of the law. There are many opinions that are exactly in point. In *Moore v. State,* 17 Tenn., 353, it is held: "If an act creates an offense, and in a different clause gives an action for a penalty, it shall be considered as an accumulative remedy, and an indictment will lie for a misdemeanor upon the prohibitory clause." Exactly the same ruling is made in *Phillips v. The State,* 19 Tex., 159, citing as authority Whar. Cr. L. (3d Ed.), 80; 2 Hale P. C., 171; Burr., 545; 1 Arch. Pl., 1-2; *King v. Harris,* 4 Term, 205.

A civil action for a penalty is not incompatible in any way with the State's enforcement of the law by its own process in the criminal courts. In *School Directors v. Asheville,* 137 N. C., 510, *Connor, J.,* says: "A party violating a town ordinance may be prosecuted by the State for

the misdemeanor and sued by the town for the penalty," citing *S. v. Taylor,* 133 N. C., 755. In a more recent case—*S. v. Holloman,* 139 N. C., 642 (at Fall Term, 1905)—this Court with unanimity held (page 648): "The State prosecutes for the misdemeanor, and the board of supervisors can sue for the penalty." It is not unusual; indeed, it is very frequently the case that there is both a civil remedy and a criminal one. Indeed, Rev., 353, expressly provides: "Where the (554) violation of a right admits of both a civil and a criminal remedy, the right to prosecute the one is not merged in the other." This recognizes that both remedies may coexist and that one does not exclude the other. The State might, coexistent with its criminal process, have given to its own officers the right to sue for a civil penalty. But the Legislature simply thought it better policy to give the penalty to the citizen, reserving to itself its criminal process to enforce observance of its law. It could not have been thought that by giving the citizen a civil remedy it was abdicating its power—a power it has in regard to every one—to enforce the observance of its law by its criminal courts. It did not intend thereby to give the chief and real lawbreaker an "indemnity bath." Had such an unprecedented thing been intended, it was without conceivable motive and would have been clearly expressed.

But it is said that *S. v. Snuggs,* 85 N. C., 541, has had that effect, and therefore that the Legislature did so exempt the defendant company, even if "unbeknownst" to itself. If *S. v. Snuggs* can have that construction, then it should follow the fate of *Hoke v. Henderson, Barksdale v. Comrs.,* and hundreds of other cases in which this Court has held that preceding decisions were not rendered by infallible judges.

But, in my humble judgment, *S. v. Snuggs* has not the remotest application to this case. In that case the Legislature forbade the issuing of a marriage license without proper inquiry, and gave a civil action for $200 for issuing a license without such inquiry. The statute did not make it a misdemeanor, and the Court simply so held. It did not hold and could not have held, that if a criminal proceeding had been added it would have been void because the civil remedy had been given to the citizen. In every case, without exception, cited to sustain *Snuggs' case,* there was (unlike this case) no provision making the act indictable. In *Yates v. Bank,* 206 U. S., 158, the question is not raised whether the directors are indictable, but it is held that they are not civilly liable for negligent conduct where the statute makes them liable (555) only for a knowing violation of the act. In this case the civil remedy is given to the citizen, and also the selling the ticket is expressly made a misdemeanor in the agent. The two remedies coexist. When the agent or conductor sells the ticket or collects fare in excess of the legal rate, then, by immemorial and hitherto uncontroverted law, any person

or corporation who procures the agent or conductor to do the illegal act, or knowingly receives the fruits of it and orders its repetition, is equally indictable.

Most certainly the Legislature did not intend, and the words of this statute cannot be construed to intend, that the enforcement of the law against this great and powerful corporation should be left to the chance and haphazard of a civil action by citizens for a penalty, when it is well known that with unlimited resources the defendant company would make each case cost the venturesome plaintiff more in lawyers' fees, witness tickets, delay, vexation and expense than the recovery would amount to. The State did not intend to reserve to itself the enforcement of the law only against the agents and conductors, who have no money to spend in lawsuits, while shoving off on casual or possible plaintiffs the sole enforcement of the law against the great and wealthy corporation itself. The State of North Carolina has never yet thus shirked a contest nor placed the burden and brunt of the execution of its laws upon individual patriotism.

The remedy by civil action given to the citizen makes the company liable for what the agent has done, whether the company ordered it done or not. That is a principle of civil liability. But the company is not indictable for what the agent did (on which alone the civil action is based), but on what it did itself, on the principle, old as the Garden of Eden, that he who aids or influences another to commit crime is himself guilty of the crime. In *S. v. Snuggs* there was no misde-
(556) meanor. Here there is, and the defendant company is the promoter and sole cause of its commission.

As was well said by *Walker, J.*, in *S. v. Hicks,* 143 N. C., 693, though this law "is of a penal nature and to be construed strictly, yet it must at the same time receive a reasonable interpretation, so as to discover the real intention of the Legislature and to execute its will." Every one knows that the intention of the Legislature was to use the full power of the law to make the defendant company obey the law, and there is no line in the statute indicating an intention to repeal in favor of the railroad companies the world-old principle received and held *semper, ubique et ab omnibus,* always and everywhere, that he who procures the commission of a crime is himself guilty. This would be to exempt the real criminal and punish those it forced to do its work.

It would have been surplusage for the General Assembly to have provided in the act that any person commanding an agent of a railway company to sell a ticket at a rate in excess of that allowed by law shall be guilty of a misdemeanor. This has always and everywhere been law. If it is true as to a natural person, it is equally so as to any corporation, especially one having power to compel the illegal act and actually re-

ceiving the money derived therefrom. Indeed, the opinion of the Court in this case says that the principle that he who aids or procures another to commit a crime is himself guilty "clearly applies to corporations." There were many excellent lawyers in the General Assembly, and every one of them knew that if the persons named—agents, conductors and employees, who usually sell tickets and collect fares—were made indictable, the company itself, or any one else who could be shown to have procured or aided in the act, would be equally liable. If, therefore, there had been any intention, for any inconceivable reason, to exempt from criminal liability this great corporation, while making its agents liable, the Legislature would have clearly so said. It is (557) true a corporation acts only through its agents, but when the corporation, acting as such, directs those agents to violate the law, it is criminally liable like a natural person, not for the act of the agent, but for its own act in aiding and procuring the violation.

The corporation has an entity and volition of its own. It speaks and acts, orders and directs, through its officers. In the case of *Stewart v. Lumber Co.*, recently filed, some of the Court contended in their opinion that the corporation was not responsible for the willful and wanton act of its agent in blowing the whistle, unless the corporation directed the agent to do it or ratified his act. It could only so direct an agent through one of its officers. Here it is admitted and proven that the corporation did direct and command its agents to do this act. The statute makes that act a misdemeanor. As this is a motion in arrest of judgment, the only question is, can this corporation be indicted for procuring its codefendant, Green, to commit the act which the corporation further ratified by putting the money thus illegally collected into its treasury?

The defendant company could not deny, if it would, that it was the corporation itself which procured and ordered Green to violate the law, for it has pleaded in this case and set up as an exhibit a copy of the proceeding brought by the corporation in its own name in the Federal court, in which it averred that it was causing its agents to sell tickets above the rate allowed by the statute, and asked an injunction against interference with it in so doing.

I concur cordially with the Court, for the reasons it so well gives, that the act of the Federal court in enjoining the civil remedy given by the act, and also in withdrawing by *habeas corpus* the agents of the defendant company from the criminal process of the State courts, is unwarranted and contrary to the decisions of the United States Supreme Court. But this can avail naught, and is merely *obiter dicta,* for we cannot review the action of the Federal court.

The sole remedy left the State after this action of the Federal (558)

court was by the enforcement of its criminal process against the defendant company, which daily and hourly and defiantly has violated the State statute, though no court has yet held the act void or unconstitutional, till stopped by this proceeding. It was only by the defendant's fear of the enforcement of the criminal law, which the Federal court could not enjoin, and against a corporation for whose intangible body the Federal judge could not issue his *habeas corpus,* that the Executive of this State was able to put the statute in force. It is due to this alone that for three months our citizens have been able to use the passenger trains without being compelled to pay illegal fares. And now the majority of the Court holds that the State cannot enforce the criminal law against the corporation!

There is a great contest going on, not only here, but elsewhere, whether the people are powerful enough to enforce their laws against the great artificial creatures of their own statutes. Till of late years they have been powerful enough to prevent legislation not to their liking. Now that such statutes are being passed in response to a public demand which can no longer be disregarded, efforts are made in the courts by resort to injunctive proceedings to restrain, prevent or nullify the action of legislative bodies. The Legislature of North Carolina well knew from the experience of other States that this would be attempted here. Hence, to secure enforcement of the law, it gave both the civil remedy for penalties to the ticket buyer, if compelled to pay an excessive and illegal fare, and made the selling a misdemeanor which must be enforced in our own courts and cannot be enjoined, as is well shown by the opinion of the Court in this case. The Legislature neglected no means to cause our laws to be respected and obeyed.

(559) The remedy by indictment of the defendant company not only cannot be enjoined by another jurisdiction (even illegally), nor can the defendant company be spirited away by *habeas corpus,* as has been done with individual agents, but there is the further consideration that the facts set up to defeat the operation of the law must be found in the constitutional mode by a jury of twelve men, and are not to be found by a judge or his clerk, as in the injunction or *habeas corpus* proceedings which have been resorted to. Besides, in the trial before a jury, matters beyond a very limited time will not be shut out from a fair and full investigation.

It is scarcely possible that the State will submit to be controlled by injunction proceedings against the enforcement of its laws. If this Court concludes that the act is defective, the General Assembly can, of course, amend the law, but it cannot more clearly, than it has done in this act, express the determination of the freemen of North Carolina that the law shall apply to all alike, and that this corporation is not

exempt from its power. Should a special session be deemed necessary, it is a matter of regret that this great expense shall be thrown on the taxpayers and the defendant company exempted from liability to a fine which was justly imposed for its open, continued and contemptuous disregard of a statute which no court has yet held void or unconstitutional.

Cited: Harvey v. R. R., 153 N. C., 577; *Lumber Co. v. Trading Co.*, 163 N. C., 317; *Express Co. v. High Point*, 167 N. C., 106; *R. R. v. Morehead City, ib.*, 121; *S. v. R. R.*, 168 N. C., 105; *S. v. Berry*, 169 N. C., 373; *Corporation Commission v. R. R.*, 170 N. C., 570; *Davis v. R. R., ib.*, 600.

(560)

STATE v. HAWS KEEBLER AND V. SCOTT.

(Filed 11 December, 1907.)

Appeal and Error—Abandonment—Fleeing Jurisdiction—Motion to Dismiss.

Upon appeal, the trial and judgment in the court below is presumed to be correct. When the defendant in a criminal action appeals to the Supreme Court, but, pending appeal, breaks jail and flees the jurisdiction of the court, this is an abandonment of the appeal; and, upon motion of the Attorney-General, the appeal will be dismissed, or case continued, or judgment affirmed, in the discretion of the Court.

WALKER and CONNOR, JJ., dissenting.

CRIMINAL ACTION, tried before *Peebles, J.*, and a jury, at September Term, 1907, of McDOWELL.

From conviction and judgment defendants appealed.

The facts sufficiently appear in the opinion of the Court.

Assistant Attorney-General Clement for the State.
J. L. C. Bird for defendants.

CLARK, C. J. When this case was called the counsel of record for the defendants stated that his clients, who had been convicted of larceny, had broken jail and were beyond the process of the Court. This admission was entered on our records, and the Assistant Attorney-General, in behalf of the State, has filed his motion to dismiss the appeal upon the authority of *S. v. Jacobs*, 107 N. C., 772, and *S. v. Anderson*, 111 N. C., 689.

In *S. v. Jacobs, supra*, which was a conviction for murder, the Court held (*Avery, J.*) that, "where one convicted of a crime appeals from the

judgment and escapes, the appellate court may, in its discretion, proceed with the hearing or dismiss the appeal, or continue, and either of these judgments will be valid, though the defendant may not be in custody or not represented by counsel." *Avery, J.,* quotes a wealth of
(561) authority holding that, if, when the case is regularly reached for hearing on appeal, the defendant "has escaped and is not in actual custody, it is clearly within the sound discretion of the Court to determine whether the exceptions shall be argued and passed upon, the appeal dismissed, or the hearing postponed to await the recapture of the alleged offender (*Smith v. United States,* 94 U. S., 97; *Bonehan v. Nebraska,* 125 U. S., 692; *Leftwich's case,* 20 Gratt., 722; *Sherman v. Comrs.,* 14 Gratt., 677; *McGowan v. People,* 104 Ill., 100; *Wilson v. Comrs.,* 10 Bush., 522; *S. v. Sites,* 20 W. Va., 16)," and further says that the general, if not universal, rule is that when a defendant has absconded and thus put himself in contempt of court, to refuse to dispose of his appeal or to make any order in it, at his instance or for his benefit, but on the motion of the prosecuting officer the case will be continued, dismissed or heard, citing *Anson's case,* 31 Mo., 592; *Commonwealth v. Andrews,* 97 Mass., 544; *People v. Genet,* 59 N. Y., 81; *Warwick v. State,* 72 Ala., 486.

Judge Avery (*supra,* at p. 775) also quotes *Waite, C. J.,* in *Smith v. United States,* 94 U. S., 97, as follows: "It is clearly within our discretion to refuse to hear a criminal case in error unless the convicted party suing out the writ is where he can be made to respond to any judgment we may render. . . . If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear, or not, as he may consider most for his interest." No court will ordinarily decide a moot point, a mere abstraction; and to cumber the docket by continuing the case would ordinarily be useless, leading merely to a dismissal of the appeal at some future term, as in *State v. Cody,* 119 N. C., 908.

The opinion in *S. v. Jacobs, supra,* further says: "The courts of Georgia, Indiana, and Kentucky also concur in the holding that it is the proper practice to dismiss, on motion of the prosecution, an appeal by one charged with felony, when it is made to appear satisfactorily that he has escaped custody pending the appeal and is still at
(562) large. *Madden v. State,* 70 Ga., 38; *Sargeant v. State,* 96 Ind., 63; *Wilson v. Comrs.,* 10 Bush., 522."

In *S. v. Anderson,* 111 N. C., 689, which was also a conviction for murder, the Court quoted *S. v. Jacobs,* 107 N. C., 772, and "on motion of the Attorney-General," dismissed the appeal. In *S. v. Cody,* 119 N. C., 908 (conviction, for burglary, of three men), the appeal was also dismissed, on authority of *S. v. Jacobs* and *S. v. Anderson.* All three

cases were cited and approved in *S. v. Dixon,* 131 N. C., 813, where it is said: "One who thus dismisses himself abandons his appeal and has no ground to invoke a review of the trial by the appellate court." That also was a conviction of murder, but, there being doubt whether the prisoner had escaped, the Court considered the exceptions and, finding no error, affirmed the judgment below.

The trial and judgment below are presumed to be correct. If not reviewed by an appeal, this presumption is conclusive. In England there has never been any appeal in criminal cases. In many States of the Union there is no appeal in such cases, unless upon certificate of probable error by the judge. In this State an appeal is a right, but not an absolute right. If the appeal bond is not given, or the proper certificate in lieu thereof, the appeal is dismissed. *S. v. Bramble,* 121 N. C., 603, and cases cited. Likewise for failure to print the record (unless a pauper appeal.) For a stronger reason, apart from our precedents, an appeal should be dismissed when the prisoner himself abandons it by breaking jail and fleeing the jurisdiction of the Court.

We will not look into the record or review the exceptions, but, on motion of the Attorney-General, will dismiss the appeal. We will not deal with a defendant who is in the woods.

Appeal dismissed.

WALKER and CONNOR, JJ., dissent.

Cited: S. v. Moses, 149 N. C., 581; *S. v. Smith,* 152 N. C., 843; *S. v. Cherry,* 154 N. C., 628; *S. v. DeVane,* 166 N. C., 283.

(563)

STATE v. ROBERT McDOWELL.

(Filed 11 December, 1907.)

1. Murder—Evidence—Premeditation—Questions for Jury.

The deceased, while on the train with L., had a difficulty with him and struck him. L. continued to curse the deceased, and the prisoner appeared to be intimately associated with L., to sympathize with him and had evidently prepared to take his part, having pulled out his pistol, shifted it from one pocket to another to have it "more handy," and gone out on a platform to a station where the train stopped, looked at the cars and brandished his pistol. Thereafter, when he fired the fatal shot, he reached his arm over the shoulder of another person and snapped his pistol several times before it fired: *Held,* there was sufficient evidence of premeditation and deliberation to sustain a verdict of guilty of murder in the first degree.

2. Same—Instructions—Evidence—Revenge.

A prayer for special instructions embodying in part a correct proposition as to the findings of the jury on the question of murder, but also susceptible to the construction that, if the prisoner fired the fatal shot for revenge for the treatment his companion had received, it would only be murder in the second degree, is erroneous.

INDICTMENT for murder, tried before *Webb, J.*, and a jury, at Special Term, July, 1907, of MCDOWELL.

The prisoner, Bob McDowell, was indicted for the murder of J. L. Millen and convicted of murder in the first degree. From the judgment and sentence of the court the prisoner appealed.

Assistant Attorney-General Clement for the State.
Pless & Winborne for defendant.

BROWN, J. The prisoner introduced no testimony, and that admitted in behalf of the State tends to prove the following facts: The prisoner, with one Long and some others, were on the train, going *via* Vein Mountain to Marion. A difficulty occurred on the train between a party of negroes in the second-class coach. Millen, the flagman, went in
(564) and tried to quiet them. Long came up to Millen and asked what authority he had to interfere with the fight. Millen replied that it was none of Long's business, and that it was his business to quell disturbances. Long thereupon cursed Millen, and Millen hit Long with his fist. Millen made Long sit down and be quiet. Millen then went back in the smoker, and the prisoner got up, walked up the aisle to the baggage car and changed his pistol from one pocket to another, came back and said he did not allow any —— to run over him, and sat down in the seat with Long. Long all this time was cursing Millen and saying that he wasn't going to be run over and wasn't going to take that of anybody. When the train stopped at Vein Mountain the prisoner got out and walked up and down the track, looking back at the train, with his pistol in his hand. Millen was not outside at that time, but in the smoker. When the train left Vein Mountain some one told the conductor that there was disorderly conduct in the second-class car; he walked up through the second-class car to where the prisoner and Long were sitting. The conductor testified that the prisoner was sitting in the seat in front of Long, but the other evidence seems to contradict this, and it seems that the prisoner was sitting in the same seat with Long, the prisoner being nearest the aisle. Long was still cursing Millen, when the conductor came up and said: "You be quiet, or I will have to put you off." Long replied: "I don't allow any man to curse me like he did," and said he was not going to "take it." Millen came in and heard the

remarks of Long, and walked up to about two seats behind Long and the prisoner, and asked Long if that was Long cursing him. Long said "Yes," and Millen hit Long with his fists. Long jumped up and opened a knife, and Millen hit Long and knocked him down. Millen then stepped back about four steps from where they were sitting, making him about four seats away, and stood there, looking at the conductor, attempting to hold Long in his seat. While Long was struggling with the conductor, the prisoner jumped up and, turning around, (565) faced the conductor, jerked his pistol out, threw his arm so his pistol extended over the conductor's right shoulder, snapped it once or twice, then fired it twice, hitting Millen in the left temple, killing him instantly. The conductor and one of the witnesses threw the prisoner down and tied him. When the prisoner shot deceased, the deceased was standing with his head turned to the right, looking at the conductor and Long, and was shot in the left temple.

The few exceptions to testimony appearing in the record, we find, upon examination, to be without merit and not of sufficient novelty or importance to warrant discussion.

The prisoner excepts to the refusal of the court to instruct that there is no evidence of premeditation and deliberation, and, therefore, the jury could not convict of murder in the first degree. We think the jury were warranted in finding, from all the circumstances surrounding the homicide, that it was the result of preparation and premeditation upon the part of the prisoner. He and Long appeared to be intimately associated. When Long provoked the difficulty with the deceased, the prisoner evidently sympathized with his companion and prepared to take his part. He pulled out his pistol, shifted it from one pocket to another so as to have it "more handy"; went out on the platform at the station when the train stopped, looking at the cars and brandishing his pistol. When he fired the fatal shot, the prisoner reached his arm over the conductor's shoulder, or around his neck, and snapped his pistol several times before it would fire. There is no pretense of self-defense and nothing in the evidence tending to prove any personal injury to the prisoner sufficient to arouse such violent passion. From these circumstances the jury might well conclude that the prisoner slew the deceased on a principle of revenge for the fancied wrong to himself or his companion, which was trivial in its nature, so far as the prisoner was concerned, and that he had determined to slay the deceased (566) before he fired the fatal shot. *S. v. Johnson,* 47 N. C., 247; *S. v. McCormac,* 116 N. C., 1034; *S. v. Lipscomb,* 134 N. C., 694. The evidence of preparation, deliberation and premeditation submitted to the jury in this case appears to be equally as strong, if not stronger, than

that held to be sufficient in *S. v. Daniel,* 139 N. C., 549; *S. v. Hunt,* 134 N. C., 684; *S. v. Teachey,* 138 N. C., 587.

The conduct of the prisoner throughout indicates thought, contrivance and design in the manner of securing and handling his pistol prior to firing the fatal shot, and to such a degree as manifests an exercise of judgment and deliberation rather than unpremeditated and ungovernable passion. *S. v. Daniel, supra.* It is not necessary to conviction that the State should prove express malice or motive. The malice is implied from the manner of the slaying, and the motive, although unnecessary to be proven, is perfectly apparent from all the evidence. *S. v. Adams,* 136 N. C., 617; *S. v. Wilcox,* 132 N. C., 1143; *S. v. Turner,* 143 N. C., 642.

The prisoner excepts because the court refused to give the following instruction: "If defendant, upon the impulse of the moment, or without having fully determined so to do before, suddenly began shooting, or shot at the flagman because of the treatment which his companion was receiving, or about to receive, it would be murder in the second degree." The first score of words embodies a correct proposition of law. The remaining part of the instruction is susceptible to the construction that, if the prisoner fired the fatal shot in revenge for the treatment his companion had received, or was receiving, it would be only murder in the second degree. This is erroneous. Revenge implies malignity, retaliation, not impulsive passion.

"May my hands
Never brandish more revengeful steel."

(567) It indicates a deliberate and premeditated purpose. *S. v. Daniel, supra.* A portion of the prayer being erroneous, the court did not err in rejecting the whole.

We have examined the record with that careful scrutiny which cases of this gravity demand, and we find

No error.

Cited: S. v. McKenzie, 166 N. C., 294; *S. v. Walker,* 170 N. C., 717; *S. v. Hand, ib.,* 706.

STATE v. N. G. WALKER.

(Filed 11 December, 1907.)

1. **Jurors—Challenge—Array.**

It is not a challenge to the array for the solicitor to ask, "if any member of the jury had formed and expressed the opinion that the prisoner was not guilty, to let it be known."

2. **Manslaughter—Evidence—Charge—Question for Court.**

When the evidence tends to show that, without provocation from deceased, the prisoner challenged the deceased, "Don't you come on; if you do, I will kill you," and repeated the challenge, the deceased cursed the prisoner and said, "You will have to do it, for I am coming"; that deceased drew his knife, but made no motion or offer to strike, was 6 feet away and too far to strike; that the prisoner fired his pistol and killed the deceased, the defendant cannot complain that the court below charged the jury, if they found the evidence to be true, to return a verdict of manslaughter.

WALKER and HOKE, JJ., dissenting.

INDICTMENT for murder, tried before *Guion, J.*, and a jury, at Spring Term, 1907, of POLK. Defendant appealed.

Assistant Attorney-General Clement for the State.
J. E. Shipman for defendant.

CLARK, C. J. The solicitor asked that "if any member of the jury had formed and expressed the opinion that the prisoner was not guilty, to let it be known." No juror answering thereto, the prisoner thereupon admitted the cause as a challenge to the array. The (568) court properly held that this was not a challenge to the array by the solicitor.

The other exceptions may be disposed of by considering the fifth exception, which embraces all that is presented by the others. This exception is to the following charge: "The court, after reading the evidence, charged the jury that, from the entire evidence, the defendant had rebutted the presumption of malice and was not guilty of murder in the second degree; that in no aspect of the case does the evidence justify a verdict of not guilty, and upon the whole evidence offered by the State, if believed by you, and if the facts are found to be true and believed, you will return a verdict of guilty of manslaughter."

There was no conflict of evidence, which, omitting unessential details, is that the deceased and prisoner were at a disorderly house, which the prisoner had entered first. The deceased asked the prisoner why he had not opened the door for him to come in. The prisoner replied it

was not his door. The deceased was standing by the fireplace, with his hands in his pockets; the prisoner was facing him, 6 feet away, and with an open door 2 or 3 feet away at his back. There had been no quarrel between the men, and the deceased was making no movement towards the prisoner, when the latter said to the deceased: "Don't you come on me; if you do, I'll kill you." He said this a second time, whereupon the deceased pulled a penknife out of his pocket and half opened it, and said: "D—n you, you will have it to do, for I am coming." The deceased did not advance his body, but put forward one of his feet. The prisoner at the instant drew his pistol and fired, killing the deceased instantly.

The killing with a deadly weapon being shown, the law presumes malice, and the burden of proving matter in mitigation is upon the prisoner. The court having held that the presumption of malice was rebutted, the State, under our present statute, cannot except, and (569) that matter is not before us. The witnesses testified that there was no offer to strike made by the deceased, and that he was not near enough to reach the prisoner if he had done so. As the only two witnesses who give the distance between the men place it at 6 feet, this is apparent. A third witness states, without giving an estimate of distance, that they were close together, but she says one was at the fireplace and other was at the door, and the house was 12 by 14 feet, and shows no offer to strike by deceased. There was an open door immediately behind the prisoner. The burden to show self-defense was on the prisoner. There was here no evidence sufficient to go to the jury tending to show self-defense. The prisoner, without previous provocation, challenges deceased to "come on him"; he repeats the challenge, the deceased still standing by the fire, with his hands in his pockets. When the deceased draws a penknife and expresses his intention to accept the challenge, the prisoner, before the deceased moves his body forward (and it is not shown that he would have moved, though he said "I am coming"), and when the deceased had made no motion or offer to strike, and was 6 feet away—indeed, too far away to strike with his pen-knife if he had so wished—the prisoner fires his pistol and kills. There was an open door behind, through which the prisoner might have retreated. He was not pushed to the wall. He provoked the drawing of the penknife. He used excessive force—a pistol against a penknife 6 feet away. He did not kill to save himself from imminent bodily peril. He fought willingly. He was at least guilty of manslaughter. The court could properly have left it to the jury to find whether the prisoner was not guilty of a greater offense. *S. v. Gentry,* 125 N. C., 733; *S. v. Hunt,* 128 N. C., 587. Certainly it was not error to charge that the evidence, if believed, did not show a killing in self-defense.

In *S. v. Kennedy,* 91 N. C., 572, the deceased was 10 feet away, with a brickbat, about to throw it (which was in striking distance), and the prisoner told him not to come on; the deceased advanced, (570) and the prisoner fired. This Court held: "If, so situated that he could escape, he preferred to shoot rather than escape, then he would be at least guilty of manslaughter." "If two persons, upon a sudden quarrel, fight, and one kills the other, it is voluntary manslaughter." *S. v. Floyd,* 51 N. C., 392. The prisoner certainly cannot claim more than that. Indeed, the deceased did no fighting, made no offer to strike, and was not even in striking distance, and there was a disparity of force—a pistol against a half-opened penknife 6 feet away.

There is no error of which the prisoner can complain.

No error.

WALKER and HOKE, JJ., dissent.

Cited: S. v. R. R., post, 573, 579; *S. v. Dunlap,* 149 N. C., 551.

STATE v. SEABOARD AIR LINE RAILWAY.

(Filed 11 December, 1907.)

Instructions—Power of Court—Opinion.

It was error for the court below, in instructing the jury, to charge, "if they believed the evidence they would return a verdict of guilty," such being an expression by the court prohibited by Revisal, sec. 535. The proper manner is to instruct them, "if they find from the evidence," a certain fact or facts to be true, then the defendant is guilty or not, as the case may be.

CLARK, C. J., dissenting, *arguendo.*

INDICTMENT for running freight train on Sunday, tried at August Term, 1907, of FRANKLIN, before *Neal, J.,* and a jury.

Verdict of guilty. Defendant appealed.

Assistant Attorney-General Clement for the State.
Day, Bell & Allen and T. W. Bickett for defendant.

BROWN, J. The court instructed the jury that, if they believed (571) the evidence, they would return a verdict of guilty. To this instruction the defendant excepted, and we think the exception is well taken. Section 535 of the Revisal provides that "No judge, in giving a

charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." This section of the Revisal has been on the statute books of this State since the year 1796 (Code, sec. 413), and has often been construed by this Court in relation to just such a charge as was given in this case. In *S. v. Matthews,* 78 N. C., 537, *Rodman, J.,* speaking of the duty of a judge in charging the jury in a criminal case, says: "We think he is required, in the interest of human life and liberty, to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which, upon the evidence, they may reasonably find to be the true one. To do otherwise is to fail to declare and explain the law arising on the evidence, as by the act of Assembly he is required to do." In *S. v. Mooney,* 61 N. C., 435, *Judge Reade* says: "His Honor's charge, 'that in any view of the case the defendant was guilty,' is so broad as to entitle the defendant to a new trial, if there is any view consistent with his innocence." *Judge Henderson* says, in *Bank v. Pugh,* 8 N. C., at page 206: "The jury are the constitutional judges, not only of the truth of the testimony, but of the conclusions of fact resulting therefrom." In considering a charge similar to that given in this case, *Mr. Justice Walker* well says: "The evidence may, in the opinion of the court, have been ever so strong against the defendant, yet it was for the jury to find the ultimate fact of guilt, without any suggestion from the court, direct or indirect,
(572) as to what the finding should be. The presumption of innocence and the doctrine of reasonable doubt require that method be pursued, and it is clearly enjoined by the statute we have cited (Code, sec. 413), the restraining words of which define clearly the respective functions of court and jury in the trial of causes." *S. v. Simmons,* 143 N. C., at page 619.

The expression, "if the jury believe the evidence," has been often condemned by this Court, and we have repeatedly held that the proper way to instruct the jury is that, *if they find from the evidence* a certain fact or facts to be true, then the defendant is guilty, or not guilty, as the case may be. *Sossaman v. Cruse,* 133 N. C., 470; *Wilkie v. R. R.,* 127 N. C., 203; *S. v. Barrett,* 123 N. C., 753. In *S. v. Green,* 134 N. C., 658, the court instructed the jury that, if they believed the evidence, they should convict the defendant. A new trial was granted for error in this charge, and *Judge Connor* says: "Section 413 of The Code prescribes the duty of the judge in charging the jury: 'He shall state in a plain and correct manner the evidence given in the case, and

declare and explain the law arising thereon.' We feel sure that the error of the learned and careful judge who tried this case was an inadvertence. The testimony strongly tended to show the defendant's guilt, and doubtless so impressed his Honor. In the administration of the criminal law it is wise to observe the 'landmarks' and preserve the well-defined rights and duties of the court and jury."

The evidence in the case before us is indefinite and uncertain, and the facts to be found therefrom and the inferences to be drawn were matters peculiarly within the province of the jury. If there was any phase of the evidence from which the jury might infer that the defendant was not guilty, the defendant was entitled to go to the jury on it. *S. v. Lilly,* 116 N. C., 1050.

New trial.

CLARK, C. J., dissenting: When the intent is an essential in- (573) gredient of an offense, then it is error to charge the jury, "If you believe the evidence, you will find the defendant guilty," for the jury, not the court, must draw the inference of intent. To this class of cases belongs every case cited by the Court.

But when, as here, the doing the act condemned by the statute (Revisal, sec. 3844) makes the offense, then if, as here, the evidence is plain and uncontradicted that the defendant willfully did that act, the court can properly discharge its duty to "apply the law to the facts" only by instructing the jury, as his Honor did here, "If you believe the evidence, the defendant is guilty." There is nothing else he could say. This distinction is drawn in *S. v. R. R.,* 122 N. C., 1061 (the "free-pass" indictment), with citation of numerous authorities, where the Court said: "This has been settled law for a long time."

We have a case *exactly in point* and for this *same offense,* the facts being as here. The judge there charged, as *Judge Neal* has charged here, that "If the jury believe the testimony, the defendant is guilty." The defendant excepted, but this Court unanimously affirmed the judgment. *S. v. R. R.,* 119 N. C., 821. There is no reason shown to overrule that case. From immemorial time, in our State, in the other States of the Union, and in England, such instructions have been sustained where the evidence is uncontradicted and no inference of intent has to be drawn as an element of the offense. Our reports show numbers of cases affirmed on exactly such instruction by the judge, among them the very last case, *S. v. Walker, ante,* 567.

The act of 1879, chs. 97, 203, amended 1897, ch. 126, now Revisal, sec. 3844, provides: "If any railroad company . . . shall permit any car, train of cars, or locomotive to be run on Sunday on any railroad, except such as may be run for the purpose of transporting the United

(574) States mails and passengers with their baggage, and ordinary express freight in an express car exclusively, and such as may be run by law, such railroad company shall be guilty of a misdemeanor in each county in which any such car, train of cars, or locomotive shall run," with a proviso that "Sunday" shall embrace only from sunrise to sunset, and that freight trains *in transitu* which have started on Saturday may be run not later than 9 o'clock a. m. on Sunday, but only for the purpose of reaching the terminus or shops. If running a train for carrying live stock, etc., under Revisal, sec. 2613, can be construed as an exception to this statute, that is purely a matter of defense, and there was no evidence to that effect.

The statute is plain, clear, explicit. The indictment followed the statute. The State could not be required to charge more facts than the law making the offense prescribed as constituting it. The evidence, if believed—and the jury have said they did believe it—proved conclusively, and it was not contradicted, every fact prescribed by the statute and charged in the indictment. W. J. Ballard, living at Franklinton, N. C., testified that, at 2:30 p. m. on Sunday, last year, he saw No. 41, a freight train, pass that place; that he noticed all the cars; there were 18 cars, empty, and all the doors open; train was going north; that another freight train passed about the same time, also going north; this train contained 15 empties, 5 cars of lumber, and a car of pig iron; all doors open; that the doors of the first train were wide open; that he looked in the cars of the first train (18 empty cars) and could see in one end as they passed, but not in the other; that the second train, which stopped at Franklinton for another train to pass it, was composed of 15 "empties," 5 cars of lumber and a car of pig iron; that he examined that train, and there was nothing on it except the lumber and pig iron, as above described; the doors were standing wide open; that this was between first of May and last of July of last year.

(575) There is nothing doubtful or uncertain about this evidence. If Mr. Ballard swore to the truth, no other conclusion could be possibly drawn but that on a certain Sunday, about 2:30 in the afternoon, in May, June, or July, last year, and therefore within two years, the defendant did run "a car, train of cars, or locomotive" on its road, which was "not run for the purpose of transporting the United States mails and passengers and express car." That is the offense which is prescribed in Revisal, sec. 3844, and charged in the indictment. If there was any matter of defense, outside that section, the burden was on the defendant to prove it, and it did not. *S. v. Long,* 143 N. C., 676; *S. v. R. R.,* 119 N. C., 814. The whole case turned upon whether the state of facts which the witness Ballard described was true or not, for, if true, it was the identical state of facts, *verbatim,* which the law-

making body decreed (Revisal, sec. 3844) should be a misdemeanor. Necessarily, therefore, "if the jury believed the evidence," the defendant was guilty.

In the "free-pass" case (*S. v. R. R.*, 122 N. C., 1070) attention was called to the fact that that was the first indictment against a railroad company for violation of the law against issuing free passes, though the law had been enacted seven years previously. But the statute now before us was enacted in 1879—now nearly twenty-nine years ago—and it may well be doubted (if it is, indeed, a subject of any doubt) whether a single Sabbath day in all those years has passed in which this statute has not been openly and notoriously violated in North Carolina. Yet only once before has an indictment for its violation been presented here (*S. v. R. R.*, 119 N. C., 814) for review. The law was passed to insure rest from 9 a. m. to sunset on the Sabbath day for a most deserving and hard-working body of men, who daily and almost hourly risk their lives. They have had no powerful lobby to represent them before the Legislature, and this small enactment in their favor has not been enforced. It is to the public interest that they should have this short weekly cessation of work (only about one-third of that (576) allowed by the Mosaic dispensation), not only for their own benefit and the benefit of those dependent upon their continuance in life and health, but also for the benefit of the public at large, whose lives and limbs are put in jeopardy when railroad operatives on any train which may collide with a passenger train, are worked 365 days a year, with no Sabbath interval of rest, which is accorded for twenty-four hours to other vocations of men. It has been expressly held that the Legislature had the power to pass the act. *S. v. R. R.*, 119 N. C., 894. If (as the judge charged) the witness Ballard swore the truth, the law has been violated. Why should this defendant not pay the fine prescribed by law for this act?

The railroad corporations are officered by educated, intelligent men. In *S. v. R. R.*, 122 N. C., 1063, *Montgomery, J.*, says: "It is not too much to say in a judicial opinion that the defendant is represented in its legal department by many of the best equipped lawyers in the country, and it would be a most violent presumption to say, or even to think, that they were not thoroughly posted as to the laws, State and Federal, concerning the interests and liabilities of their clients." The railroads are not only not poor and ignorant, but, of all, they are most beholden to respect and obey the law. They are beneficiaries of the State. Their reports, published as official records by the State, and of which hence we have often taken judicial notice, show that they collected from the people of North Carolina last year $28,000,000, of which more than $9,000,000 was net profit. In all their immense work in

gathering up this profit and these receipts, and over every foot of their extensive properties, and as to every dollar of their holdings, they are guarded and protected by the might and majesty of our law, maintained and executed at the cost of the public. They are safe behind the terrors of the law, whose weight will be surely and unerringly felt by whoever shall dare to violate that protection. Yet, when for the
(577) second time only in the more than twenty-eight years elapsed since the passage of this law for the protection of railroad employees, an indictment for its violation is presented in this Court, when the uncontradicted evidence, if believed, makes the defendant guilty of the very act prescribed by the statute, and the judge so tells the jury, and it cannot be denied that such is the law, it is argued to us that there is reversible error because the judge said, "If you believe the evidence," instead of "If you believe *from* the evidence," that the defendant did the act described by the witness, *i. e.,* run a freight train on a Sunday afternoon.

None of these cases cited by the Court condemns the phrase here used by the judge, which has been sanctioned by immemorial usage. In all of them the emphasis is on "evidence," not on "from." In *S. v. Barrett,* 123 N. C., 753, the Court criticised, in a case of larceny involving intent, the expression, "If you believe such facts," on the ground that the jury might believe such to be facts otherwise than from the evidence (as from their own knowledge, for instance), and, therefore, they should be told "if they found such facts from the evidence," etc. This does not apply here, where the judge told the jury "if they believed the *evidence.*" *Wilkie v. R. R.,* 127 N. C., 213, repeats what is said in *S. v. Barrett, supra,* and gives the same reason, that the jury should not take their own knowledge, but base their verdict on the *evidence,* which the judge in this case told them to do. Exactly the same was held in *Sossaman v. Cruse,* 133 N. C., 472.

In *S. v. Green,* 134 N. C., 650, the Court did not hold that the expression "If you believe the evidence" was error (though it said it was open to criticism), except for the fact that in that case there were two aspects of the evidence, in one of which, if found by the jury, the defendant was not guilty. In the case now before us there was
(578) only one possible aspect, if the evidence was believed, for there was no conflict and only one witness. The defendant did or did not run its freight train by Franklinton on a Sunday afternoon within two years previously. The judge expressed no opinion on the evidence, but simply told the jury, if they believed the evidence of the witness (Ballard), the defendant was guilty; and, "beyond all controversy," the facts testified to by Mr. Ballard were the facts which the statute says constitute a misdemeanor.

In *S. v. Riley,* 113 N. C., 648, where the whole subject is fully discussed, the Court said (p. 651) that, in a criminal case, if the testimony is uncontradicted and no inference of intent is to be drawn, the court can "charge the jury that, if they believe the evidence, the defendant is guilty." This charge has been upheld in *S. v. R. R.,* 119 N. C., 814, above cited, which was an indictment for this offense, and in a very great number of other cases, the point not being headnoted because deemed elementary law. In *S. v. Journigan,* 120 N. C., 569, the Court said that such a charge would be error if "the intent is a material element." In *S. v. Woolard,* 119 N. C., 779, and *S. v. Neal,* 120 N. C., 621, the Court held that it was not error to charge that, "If the jury believe the defendant's testimony, he is guilty." Such instruction as was given in this case is very different from "directing a verdict," which cannot be done in a criminal case, in which the credibility of the evidence must be left to the jury, as was done in this case. *S. v. Riley, supra.* The three cases cited as criticising, not condemning, this form of charge do not apply, as will be seen by examining them.

In a very recent case (*Clark v. Traction Co.,* 138 N. C., 78) *Brown, J.,* speaking for a unanimous Court, said: "His Honor instructed the jury, if they believed the evidence, to answer the issue 'Yes.' In this instruction we are *unable to discover any error.* The evidence in the case was practically undisputed, and we do not see how any reasonable mind can draw more than one inference from it." That (579) case cannot be differentiated from this. To same effect *S. v. Walker, ante,* 567.

The jury have "believed the uncontradicted evidence" that the defendant ran its freight train on that Sunday afternoon. There was no evidence set up in defense to show that the trains were such as were allowed to be run on Sundays. The evidence is that the cars were either "empties" or loaded with lumber and pig iron. Could the jury have possibly "believed *from* the evidence" that the defendant did not illegally run its freight trains on that occasion? If not, how could the omission of the word "from" have affected their finding or be reversible error?

Cited: S. v. R. R., 149 N. C., 473; *Holt v. Wellons,* 163 N. C., 131.

STATE v. W. T. BOSSEE.

(Filed 11 December, 1907.)

1. **Indictment—Cruelty to Animals—Poison—Chickens.**

A charge in an indictment, under Revisal, sec. 3299, of poisoning a chicken, the property of the prosecutor, comes within the purview of the statute against cruelty to animals.

2. **Same—Cruelty to Animals—Jurisdiction.**

The punishment fixed by Revisal, sec. 3299, cannot exceed "$50 fine or thirty days imprisonment," and the Superior Court has no original jurisdiction of the offense of cruelty to animals.

3. **Jurisdiction, Defect of—Notice—Supreme Court.**

A defect of jurisdiction may be taken advantage of for the first time in the Supreme Court, though not raised below. This Court should take notice thereof *ex mero motu.*

CRIMINAL ACTION for cruelty to animals, tried before *Guion, J.,* at August Term, 1907, of TRANSYLVANIA.

Upon a special verdict the court adjudged the defendant not guilty, and the State appealed.

The facts sufficiently appear in the opinion of the Court.

(580) *Assistant Attorney-General Clement for the State.*
No counsel for the defendant.

CLARK, C. J. The charge against the defendant is set out in proper form, under Revisal, sec. 3299, for cruelty to animals, in poisoning a chicken, the property of the prosecutor. That section enumerates as subjects protected from cruelty "any useful beast, fowl, or animal." It also provides that the words "torture," "torment," or "cruelty," shall "include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted."

It is clear, therefore, that poisoning chickens comes within the purview of the statute, as is held in *S. v. Neal,* 120 N. C., at pp. 618-620, citing *S. v. Butts,* 92 N. C., 784; *Johnson v. Patterson,* 14 Conn., 1, where a neighbor's chickens were killed by strewing poisoned meal on one's own premises; *Clark v. Keliher,* 107 Mass., 406, where the defendant killed a neighbor's chickens while trespassing, and many other cases.

But we are precluded from going beyond the form of the indictment and passing upon the question whether the defendant is guilty upon the facts found in the special verdict in this case, because Mr. Clement, the Assistant Attorney-General, has frankly and most properly

called our attention to the fact that this action originated in the Superior Court, which, under the statute as it now reads, has no original jurisdiction of this offense.

Laws 1891, ch. 65, amending Code, secs. 2482, 2490, fixed the punishment at "not more than $50 fine or thirty days imprisonment, *or both.*" As this might exceed the jurisdiction of a justice of the peace, as prescribed by the Constitution, Art. IV, sec. 27, the jurisdiction was vested in the Superior Court. But in the Revisal, sec. 3299, the words "or both" are stricken out, so that now the punishment cannot exceed "$50 fine or thirty days imprisonment." Original jurisdiction of the offense is, therefore, in the court of a justice of the peace.

Whether this omission of the words "or both" in the Revisal and the consequent transfer of jurisdiction, was inadvertently or (581) intentionally made, the law is so worded. The punishment prescribed determines the jurisdiction. *S. v. Lewis,* 142 N. C., 630; *S. v. Fesperman,* 108 N. C., 772.

There is no exception on this ground in the record, but a defect of jurisdiction is one of the matters which may be taken advantage of for the first time in this Court, though not raised below. Rule 27 of this Court. Indeed, the Court should take notice thereof *ex mero motu. Fowler v. Fowler,* 131 N. C., 171, and cases there cited.

Action dismissed.

STATE v. IRA HOOKER.

(Filed 11 December, 1907.)

1. **Indictment—Surplusage.**

In an indictment charging the "breaking and entering a storehouse, shop, etc., where any merchandise, chattel, etc., or other personal property shall be," etc. (Revisal, sec. 3333), with the additional words, "with intent to commit larceny," the additional words are surplusage.

2. **Same—Surplusage—Proof—Harmless Error.**

When the indictment correctly charges the offense, and has additional words therein which are surplusage and unnecessary to be proven, any proof offered thereof is irrelevant and harmless.

3. **Same—Same Offense—Different Offense.**

While one cannot again be put in jeopardy for the same offense, the offense is not the same when some indispensable element in the charge in the indictment of the one is not required to be shown in the other.

4. **Same.**

An acquittal on prosecution for larceny will not bar a subsequent prosecution for breaking and entering to commit larceny.

5. Same—Remarks of Counsel—Prisoner Not Being Witness.

It is not a criticism upon the failure of defendant to go upon the stand for the solicitor to comment to the jury that none of the State's witnesses had been contradicted, especially so when the trial judge instructed the jury not to consider it to defendant's prejudice.

(582) CRIMINAL ACTION, tried before *Webb, J.*, and a jury, at August Term, 1907, of MOORE.

The defendant was charged with breaking and entering the storehouse of W. M. Rogers & Co., and, upon conviction, appealed.

The facts sufficiently appear in the opinion of the Court.

Assistant Attorney-General Clement for the State.
R. L. Burns for defendant.

CLARK, C. J. The defendant was acquitted of a charge of stealing certain articles. He was later tried and convicted, under Revisal, sec. 3333, of breaking and entering a store where those articles were kept, with intent to steal the same. The defendant's first three exceptions are to evidence as to those articles being in the store, and to any evidence tending to show that the defendant took them, this being offered, not to show the larceny, but to show that the breaking and entering the storehouse, which was proven, was with intent to commit larceny.

Revisal, sec. 3333, makes it indictable to "break and enter a storehouse, shop, etc., where any merchandise, chattel, etc., or other personal property shall be." The addition in the indictment of the words "with intent to commit larceny" was surplusage, hence unnecessary to be proven, and any proof offered of intent to steal was merely irrelevant and harmless.

But if it were otherwise the exceptions could not be sustained. The charge of larceny of the articles, of which the defendant had been acquitted, and that of "breaking and entering with intent to steal," are distinct offenses, but it was competent, in order to show the intent to steal, to prove that the defendant took the articles. *Ruffin, C. J.*, in *S. v. Jesse,* 20 N. C., 105, citing Hale P. C., 560; Arch. Cr. Pl., 260.

(583) The previous acquittal protects him from being tried again for the same offense, but it is not an estoppel on the State to show the same facts if, in connection with other facts, they are part of the proof of another and distinct offense. This has been often held. *S. v. Jesse, supra; S. v. Birmingham,* 44 N. C., 120; *S. v. Revels, ib.,* 200; *S. v. Nash,* 86 N. C., 650. The evidence in the trial for larceny would not have supported a verdict on this charge of breaking and entering, and, though some of the facts in that case must be used in this case, they are different offenses. In *S. v. Nash, supra, Ruffin, J.*, says: "To

support the plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the same offense—*the same both in fact and in law.*"

In *S. v. Lytle,* 138 N. C., 740, the Court showed that it was possible that selling the same glass of liquor, in an unusual combination of circumstances, might be put in evidence as one of the essential facts in proving five separate and distinct offenses: (1) It might be put in proof on a trial for a violation of the Federal statute in selling without United States license. (2) It might also be proven in a trial for a sale without payment of the State tax and without State license. (3) And for selling without payment of town tax and license. (4) For selling on Sunday. (5) For selling to a minor. The Court there says: "Though there is a single act, it may thus be a violation of five statutes, and when, in such case, as *Burwell, J.,* says, in *S. v. Stevens,* 114 N. C., at p. 877, 'each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution under the other.'" The fact of the sale of the glass of liquor must be proven in each of these cases. While failure to prove that the sale was on Sunday would acquit on one indictment, or that the sale was to a minor would acquit on another, none the less the defendant could be convicted on the other indictments if the sale was made without a United States license, or without paying State tax and getting a county license, or without paying the town tax (584) and getting the town license, where required.

This is an extreme case, and not likely ever to occur, but it illustrates the point. *Burwell, J.,* in *S. v. Stevens,* 114 N. C., 878, just quoted, cites *Arrington v. Commonwealth,* 87 Va., 96; *Ruble v. State,* 51 Ark., 170; Black Intox. Liquor, sec. 555, and has himself been cited and followed; *S. v. Reid,* 115 N. C., 741; *S. v. Robinson,* 116 N. C., 1048 (which was the case of conviction of an assault with a deadly weapon and a subsequent indictment for carrying the weapon concealed on the same occasion, the conviction for the first offense being held not a bar to a conviction for the second); *S. v. Downs, ib.,* 1067; *S. v. Lawson,* 123 N. C., 742; *S. v. Smith,* 126 N. C., 1059; *S. v. Lytle,* 138 N. C., 740.

The principle stated in all the authorities is: "Though the same act may be necessary to be shown in the trial of each indictment, if each offense requires proof of an additional fact which the other does not, an acquittal or conviction for one offense is not a bar to a trial for the other." One cannot be put twice in jeopardy for the *same offense.* When some indispensable element in one charge is not required to be shown in the other, they are not the same offense.

Prosecution for larceny will not bar a subsequent prosecution for breaking and entering with intent to commit larceny, the larceny being

necessarily distinct from the breaking and entering. *S. v. Ridley,* 48 Iowa, 370; *Fisher v. State,* 46 Ala., 717; *S. v. Ford,* 30 La. Ann. (Part I), 311; *People v. Curtis,* 76 Cal., 517; *Smith v. State,* 22 Tex. App., 350; *Copenhaven v. State,* 15 Ga., 64.

The last exception is to the solicitor's comment, that "none of the evidence as testified to by the State's witnesses had been contradicted, and no one had said that it was not true." This could not be taken as a criticism upon the failure of the defendant to put himself upon the stand. The court refused to stop the solicitor, but, out of abun-
(585) dant caution, when the judge charged the jury, he told them that the fact that the defendant did not go upon the stand could not be considered by the jury to his prejudice, and that, if they had understood the solicitor as meaning to comment on that fact, they should disregard it, and directed them not to consider it in making up their verdict.

No error.

Cited: *S. v. McAden,* 162 N. C., 577; *S. v. Spear,* 164 N. C., 455, 456, 457.

STATE v. W. G. LEWIS.

(Filed 14 December, 1907.)

Appeal and Error—Case—Service—Practice.

The Supreme Court will not consider a case on appeal when it does not appear to have been served upon opposing party and no case on appeal appears in the record proper.

INDICTMENT for seduction, tried before *Moore, J.,* and a jury, at November Term, 1905, of COLUMBUS.

Verdict of guilty. Judgment, and the defendant excepted and appealed.

Attorney-General for the State.
H. L. Lyon for defendant.

PER CURIAM: No statement of case on appeal having been served on the solicitor, or tendered, and no copy of the defendant's case on appeal having been served on him or accepted by him, and no case appearing in the record proper, the judgment is affirmed on authority of *S. v. Clenny,* 133 N. C., 662, and *S. v. Cameron,* 121 N. C., 572.

Judgment affirmed.

Cited: *S. v. Bailey,* 162 N. C., 584.

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.

QUESTIONS FOR COURT—*Continued.*

4. *Answer — Admissions — Pleadings — Actions—Apparently Barred—Defenses.*—Where the complaint sets out a cause of action which is barred, and the facts are admitted by answer, and the statutory bar is pleaded, the court may decide the question as a matter of law; but where the complaint states a cause of action apparently barred, and the answer denies the facts and sets up the bar, the court cannot dismiss on a motion for nonsuit, since, under Revisal 1905, sec. 485, a plea of the statute does not require a reply; and further, since, under section 248, the fact that the action is not barred on the ground of infancy, etc., may be shown by evidence. *Oldham v. Rieger*, 254.

5. *Manslaughter—Evidence—Charge.*—When the evidence tends to show that, without provocation from deceased, the prisoner challenged the deceased, "Don't you come on; if you do, I will kill you," and repeated the challenge, the deceased cursed the prisoner and said, "You will have to do it, for I am coming"; that deceased drew his knife, but made no motion or offer to strike, was 6 feet away and too far to strike; that the prisoner fired his pistol and killed the deceased, the defendant cannot complain that the court below charged the jury, if they found the evidence to be true, to return a verdict of manslaughter. *S. v. Walker*, 567.

QUESTIONS FOR JURY.

1. *Principal and Agent—Vendor and Vendee—Change of Agent—Contract.* When the plaintiff has bought for cash of the defendant, through his broker, certain goods for prompt delivery, of which only a part were actually delivered, and suit is brought for the balance, and the defense is, that, subsequent to the sale, the plaintiff made a separate arrangement with the broker, as his agent, for the delivery of the goods, the question raised is one of fact, and under conflicting evidence the verdict thereon will not be disturbed. *Strickland v. Perkins*, 92.

2. *Presumptions — Evidence — Jury.*—When the evidence disclosed that the act complained of was induced by those in friendly relations and from one in a position of dependence or habitual reliance for advice, a presumption of fraud is raised as a matter of fact, and is alone sufficient to go to the jury. *Balthrop v. Todd*, 112.

3. *Mistake—Correction—Chain of Title—Pleadings.*—A plaintiff in an action for the recovery of land may, upon proper averment and proof of mistake, have a deed in his chain of title corrected. The facts upon which the equity for correction is based must be alleged, to the end that, if denied, an issue may be submitted to the jury. *Webb v. Borden*, 188.

4. *Evidence — Principal and Agent—Misrepresentations—Fraud—Opinion Expressed.*—Upon evidence that plaintiff's agent induced the agent of defendant by false and fraudulent misrepresentations to buy certain metal or steel, called "metalose," as being preferable to metal or steel used by defendant in a limited way; that defendant's agent was one of limited authority, and ignorantly purchased a greater quantity than defendant's business and his authority as such agent would justify, of which plaintiff's agent had notice: *Held*, (1) it was error in the court below to direct a verdict against the defendant upon an appropriate issue of fraud; (2) such direction was an expression of opinion by the court, prohibited by Revisal, sec. 535. *Metal Co. v. R. R.*, 293.

RAILROADS.

1. *Logging Roads — Negligence—Proximate Cause—Damages.*—When the trains upon logging roads of defendant are operated by steam or other mechanical power, the employees engaged in operating its trains are required to keep a careful and continuous outlook along its track, and the defendant is responsible for injuries resulting as the proximate consequence of negligence in the performance of this duty, whether in remote or populous localities. *Sawyer v. R. R.*, 24.

2. *Same — Contributory Negligence — Last Clear Chance — Proximate or Concurrent Cause.*—A negligent act of the plaintiff is not contributory unless the proximate cause; and, though plaintiff may have been negligent in going upon defendant's track, when he has become helpless and down thereon, the responsibility of defendant attaches when it negligently fails to avail itself of the last clear chance. *Ibid.*

3. *Same—Last Clear Chance—Instructions—Issues—Discretion of Court.* While the doctrine of the last clear chance is frequently submitted under a separate issue, and sometimes it is desirable to do so, it is not always necessary to so present it, and it is within the discretion of the trial judge to submit it upon the issue of contributory negligence under proper instructions. *Ibid.*

4. *Carriers—Terminal Charges—Wharfage.*—A general custom or usage in regard to terminal charges, in addition to the charges for carriage, is a part of the contract of carriage which the law reads into it. Therefore, in the absence of an express stipulation to the contrary, a wharfinger may recover of the consignee reasonable wharfage charges established by the general custom or usage, and thus recognized and acquiesced in at the port of delivery. *Riddick v. Dunn*, 31.

5. *Evidence, Corroborative—Employer—Jumping from Engine—Self-preservation—Extent of Injury—Damages.*—In an action against defendant railroad company to recover damages for injuries alleged to have been sustained by plaintiff, its fireman on its engine, on account of being compelled, for self-preservation, to jump therefrom immediately preceding a collision with another train on defendant's track, wherein the defendant denied the necessity for plaintiff's jumping and the extent of the injuries alleged, evidence of the speed of the engine and the conditions of the wrecked engine and cars is competent upon the questions of the necessity for plaintiff's jumping and of the extent of the injury, being corroborative of the plaintiff's evidence thereon. *Davis v. R. R.*, 95.

6. *Negligence—Duty of Employer—Competent Assistance—Ordinary Care.* It was the duty of defendant railroad company to furnish the plaintiff, its engineer, a competent person to assist him in fixing his locomotive, the engineer acting under the instruction of the defendant, and such assistance being necessary from the character of the work being done; and the defendant is liable in damages when the assistant fails to exercise reasonable or ordinary care to prevent an injury, such failure being the proximate cause of the injury. *Horton v. R. R.*, 132.

7. *Same—Instructions.*—While a party to the litigation is entitled to have correct propositions of law applicable to phases of the testimony given as instructions to the jury, when aptly tendered, it is not reversible