ANNOTATIONS INCLUDE 174 N. C.

NORTH CAROLINA REPORTS

VOL. 146

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1907
(IN PART)

SPRING TERM, 1908
(IN PART)

ROBERT C. STRONG,
REPORTER

ANNOTATED BY
WALTER CLARK
(2 ANNO. ED.)

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FALL TERM, 1907
SPRING TERM, 1908

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CASES REPORTED IN THIS VOLUME

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FALL TERM, 1907

RICHARD EAMES v. C. A. ARMSTRONG.

(Filed 13 November, 1907.)

1. Deeds and Conveyances—Covenants—Seizin—Estoppel—Title, as Between Parties—Third Persons.

The covenant of seizin in a deed extends only to guarantee the bargainee against any title existing in a third person, and which might defeat the estate granted. In an action upon a covenant of seizin in a deed from defendant to plaintiff, the plaintiff is estopped to set up his own title, which he knew he possessed at the time the deed was made.

2. Same—Tax Deeds—Tender—Owner—Husband and Wife—Tenant by Curtesy—Third Persons.

Under Revisal, sec. 2894, it is immaterial for the purpose of a valid tax deed made by the sheriff, that the land sold was listed in the name of some other person than the owner, unless the true owner listed and paid the taxes on it. Therefore, when the land had been listed in the name of the husband, which belonged to the wife, and the husband had no interest therein, the tender to redeem made by the husband, notwithstanding birth of issue, when he is not acting for her or claiming under her, is not a sufficient one to invalidate the tax deed.

3. Same—Tax Deeds—Validity Attacked—Notice to Owner—Husband and Wife.

Under Revisal, sec. 2903, the notice required to be given before the expiration of the time of redemption is to be given by the purchaser, etc., at a tax sale of land to the owner; and Revisal, sec. 2909, provides, among other things, that "No person shall be permitted to question the title acquired by this chapter without first showing that he, or the person under whom he claims, had title to the property at the time of the sale," etc. Hence the husband, in whose name the wife's land was listed, cannot, in his own right, attack the sheriff's deed for taxes given to the purchaser.

4. Husband and Wife—Purchaser of Tax Title—Action Upon Warranty—Damages—Reconveyance.

When it appears that the plaintiff and his wife conveyed certain lands of the latter to a third person, which he had acquired from defendant, a purchaser at a sale for taxes, under a deed with covenants and warranty of title, he may not, in an action upon the warranty, recover the purchase price of the defendant, not being in a position to reconvey the land to him. (Assuming a breach of defendant's covenant, the measure of damages would be such sum as was required to perfect his title, with interest from date of payment.)

(2) APPEAL from *Moore, J.*, at February Term, 1907, of MOORE.

This was an action for breach of covenant of seizin. The facts, in regard to which there is no controversy, are as follows:

The tract described in the deeds and in the complaint as the "Russell Gold Mine," containing 356 acres, was prior to 5 May, 1902, the property of Mrs. Elizabeth Eames, the wife of plaintiff. The tract described as the "Coggins Meeting House," containing 3 acres, was at said date the property of plaintiff. On 6 May, 1903, W. D. Clark, sheriff of Montgomery County, executed to defendant a deed conveying, by the same metes and bounds set out in the complaint, the "Russell Gold Mine," containing 359 acres. The preamble to the deed is in the following words: "Whereas, at a sale of real estate for the nonpayment of taxes, made in the county aforesaid, on 5 May, 1902, the following described real estate was sold, to wit, 359 acres in Eldorado Township, listed by Richard Eames," etc. In this, and all other parts, the language
(3) of the deed conformed to the provisions of the statute (Revisal, sec. 2906). The deed was duly proven and recorded 7 May, 1903.

On 7 May, 1903, defendant C. A. Armstrong and his wife, in consideration of $2,300, executed a deed to plaintiff, conveying, by metes and bounds as in the deed to them, the "Russell Gold Mine," containing 356 acres, and, by a separate description, the "Coggins Meeting House" of 3 acres. This deed was duly proven and recorded, and contains the following covenant: "To have and to hold the aforesaid tracts of land; . . . and the said parties of the first part covenant that they are seized of said premises in fee and have a right to convey the same in fee simple; that the same are free and clear from all encumbrances."

On 9 May, 1903, plaintiff and his wife conveyed both said tracts to George T. Whitney in consideration of $5,000. Plaintiff paid to defendant the consideration of $2,300 named in his deed. Plaintiff alleges that at the time defendant executed the deed of 6 May, 1903, and made the covenant therein, he was not seized of either of the tracts therein conveyed, and had no title thereto, and for breach of said covenant demands as damages the amount of the purchase money. Defendant denies the allegation, and alleges seizin, etc.

In response to issues submitted, the jury found that at the date of the deed the "Coggins Meeting House" was the property of plaintiff, and, under the instructions of the court, found that plaintiff was not entitled to recover any damage on account thereof; that defendant was seized of the "Russell Gold Mine," and that there had been no breach of the covenant in respect thereto.

It was in evidence that plaintiff was desirous of selling both tracts to one Whitney, and had entered into a contract to do so for the sum of $5,000; that his attorney, residing in Salisbury, went to the town of Troy, Montgomery County, for the purpose of examining the title; that a few days thereafter plaintiff met defendant in Troy, and, after some negotiations, agreed to pay him $2,300 for deed with full (4) covenants; that some question was raised in regard to whether the sheriff's deed covered the "Coggins Meeting House," whereupon plaintiff said that, while the land was his, defendant could put it in the deed to satisfy Mr. Whitney, and that no trouble would ever come to him on account of it. Upon the execution of the deed by plaintiff and wife to Whitney, he went into and has continued in the unmolested possession of the land.

His Honor instructed the jury to answer the issues. Judgment was thereupon rendered for defendant. Plaintiff's exceptions are noted in the opinion. Plaintiff appealed.

J. S. Henderson for plaintiff.
T. F. Kluttz, L. H. Clement, and T. J. Jerome for defendant.

CONNOR, J., after stating the case: We were of the opinion, when this case was here at Fall Term, 1906, that the covenant of seizin extended to the "Coggins Meeting House" tract. 142 N. C., 506. It appears that at the time the deed was made by Armstrong to the plaintiff the title to that tract was in the plaintiff, and that this was well known to him. It further appears that plaintiff immediately conveyed the same land to Whitney, who went into possession and remains therein. In *Fitch v. Baldwin,* 17 Johnson, 166, it is said: "The covenant of seizin extends only to guarantee the bargainee against any title existing in a third person, and which might defeat the estate granted." In *Furness v. Williams,* 11 Ill., 229, *Treat, C. J.,* says: "It is attempted on the part of defendant to establish a breach of the covenant by proving that he was himself seized, instead of his grantor. The law does not allow this to be done. The covenant of seizin extends only to a title existing in a third person. It does not embrace a title that may be already in the grantee. The grantee is estopped from setting up the title previously acquired against his vendor." Tiedeman Real Prop., sec. 851; Rawle

(5) on Cov., 431; Jones Real Prop., 444; 11 A. & E., 442. His Honor, therefore, correctly instructed the jury to answer the issue in regard to that tract.

For the purpose of showing that defendant was not seized of the "Russell Gold Mine" tract, plaintiff sought to attack the deed executed by the sheriff to the defendant of 6 May, 1903. To this end he offered to show that a tender of the taxes, interest, cost, etc., was made by his attorney and the attorney of Mr. Hambley to the defendant on 5 May, 1903, and declined. He further offered to show that plaintiff tendered the amount both to the defendant and the sheriff, and that both declined. He further offered to show that defendant had not given the notice required by the statute before calling for the deed. To each of the questions bearing upon these contentions defendant objected. His Honor ruled "That plaintiff not having shown that he had title to the 'Russell Gold Mine' tract of 356 acres at the time of the sale of the same for taxes, on 5 May, 1902, and not having shown that he now claims the same under the person who had the title at the time of such sale, and not having shown that all taxes due upon the property had been paid by him or the person who had the title at the time of the sale, the court held that the plaintiff could not be permitted to question the title which had been acquired by the defendant under the sheriff's tax deed, nor could the plaintiff question the validity of the deed." The objection was sustained, and plaintiff excepted. It will be observed that the land conveyed by defendant to plaintiff was, at the time it was listed for taxation, sold, and the deed executed by the sheriff, the property of Mrs. Eames. The deed recites that it was listed by Richard Eames. This we think, in view of the provisions of section 2894 of Revisal, immaterial. It is therein expressly provided that the fact that the land is listed in the name of some one other than the owner shall not invalidate the deed, unless it is shown that the true owner listed and paid
(6) the taxes on it. No evidence was offered that Mrs. Eames did either. The tender to redeem was not made by Mrs. Eames or any one acting for her or claiming under her. That her husband had no "estate or interest" in the land, notwithstanding birth of issue, is settled. *Tiddy v. Graves,* 126 N. C., 622; *Hallyburton v. Slagle,* 132 N. C., 948. Plaintiff, however, insists that he had a right to show that the defendant failed to give the notice required by section 2003 of Revisal, being sections 15-17, ch. 558, Laws 1901, and thereby invalidated the deed, under the decision of this Court in *King v. Cooper,* 128 N. C., 347, and *Matthews v. Fry,* 141 N. C., 586. It will be observed that in both of those cases the controversy was between the owner of the land and the purchaser, whereas section 2909 of Revisal, which is the same as section 20, ch. 558, Laws 1901, provides: "In all controversies,

actions, and proceedings involving the title to real property claimed and held under and by virtue of a deed made substantially as required by this chapter, the person claiming title adverse to the title conveyed by such deed shall be required to prove, in order to defeat the title which such deed purports to convey, either that such real property was not subject to taxation for the year or years named in the deed, or that the taxes had been paid before the sale, or that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of the persons having the right of redemption under the laws of this State, or that there had been an entire omission to list or assess the property, or to levy the taxes or to sell the property. No person shall be permitted to question the title acquired by a sheriff's deed, made pursuant to this chapter, without first showing that he, or the person under whom he claims, had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person under whom he claims title." It is clear that the plaintiff never had any title to the property and never had any claim thereto under the owner (7) thereof. He is, in contemplation of law, an absolute stranger to the title. If any effect is to be given to the plain language of the statute, it is manifest that his Honor's ruling is correct.

It is difficult to see how or why plaintiff should be permitted, as a volunteer, to come into the court to attack a deed the validity of which can in no possible contingency affect him.

Mrs. Eames, the owner of the property, assuming for the sake of the argument that the defendant's title was not good as against her, has parted with her title, and there is no person in existence who can attack the title of her grantee or disturb his possession.

The facts presented upon the record are peculiar. At the time the land was listed for taxation it was the property of Mrs. Eames. The tax not having been paid on 5 May, 1902, the sheriff sold it for nonpayment of taxes, when the defendant Armstrong became the purchaser. It appears that plaintiff had entered into a contract to sell the land to Mr. Hambley, who represented Mr. Whitney. On 5 May, 1903, Mr. Henderson, who had gone to Troy to investigate the title "in behalf of Richard Eames and Hambley," offered to pay defendant "all the taxes, interest, cost, and penalties," which offer was declined. The same offer was made to the sheriff and declined. A few days after Mr. Henderson's visit to Troy plaintiff went there and, after some negotiation with defendant and his attorneys, agreed to pay him $2,300 and take the deed. Pursuant to this agreement, the deed containing the covenant was delivered and the money paid on 7 May, 1903. Plaintiff, before taking the deed, offered to pay defendant and the sheriff the taxes, etc., which

offer was declined. On 9 May, 1903, the plaintiff and his wife, Mrs. Elizabeth Eames, conveyed the land to Whitney for $5,000, and he went into possession and has remained therein, unmolested. This action was brought 4 March, 1904.

If plaintiff should recover, as he seeks to do, the purchase money paid defendant, he should be required to reconvey to him such title or
(8) interest as he acquired by the deed. This he cannot do, because, assuming his contention correct, that the title was not devested out of Mrs. Eames by the tax deed, he has joined with her in conveying his rights to Whitney. While it is true that usually the purchase money is the measure of damages for breach of covenant of seizin, it is equally true that, if the covenantee perfect his title for a less amount, he will recover only the amount paid by him therefor. In this case he and his wife sold to Whitney for $5,000. It does not appear that he paid Mrs. Eames any sum whatever for her interest or title, or whether the whole of the purchase money went to him. It does appear that his contract was to sell the land to Hambley, representing Whitney, for $5,000, and that by reason of acquiring defendant's title he was enabled to carry out his contract. It is certain that he and Mrs. Eames have conveyed to Whitney a perfect title, and that plaintiff cannot put defendant back in the position which he occupied when he made the covenant. This he should be able to do. Rawle Covenants, sec. 184. Is it not clear that, if plaintiff should recover the purchase money upon the theory that defendant had no title, he should reconvey to the defendant?

In *Stinson v. Summer,* 9 Mass., 150, *Parker, J.,* says: "It would certainly be manifestly against the principles of justice that a grantee should recover either his purchase money or the value of the land against the grantor upon an alleged breach of covenant that nothing passed by the deed, and that he should be considered the owner of the land under the very deed which he alleged to be inoperative."

The plaintiff has conveyed the land to Whitney for an amount more than double the purchase money paid by him to defendant. The fact that his wife joined in the deed, from this point of view, does not affect the question. He cannot restore to defendant the title which he got from him. How, then, can he call upon him to restore the purchase money? It may be, assuming that there was a breach of the covenant, that he could recover such sum as he was required to pay out to perfect his title. In *Bank v. Glenn,* 68 N. C., 35, it is said: "If
(9) there be an outstanding paramount title, which the covenantee purchases, he is not entitled to recover the whole of the purchase money, with interest, but only the amount paid to perfect the title, with interest from date of payment. In other words, when the loss has been less than the purchase money and interest, the plaintiff can recover only

for the actual injury sustained." The language of the Court in that case is applicable here. "The plaintiff does not stand in a very graceful attitude before the Court when it seeks to recover the purchase money after its title to the land has been perfected and when it has by a deed in trust conveyed the same land to secure its debts. The bank is seeking to have the land and the purchase money. To allow it to do so would be grossly inequitable." The purpose of the covenant is indemnity, not speculation.

The defendant, in addition to the defenses to which we have adverted, urges us to reverse the former rulings of the Court that a covenant of seizin does not run with the land. He cites a number of cases in which it is held that the breach is continuing and the right to sue passes with the title and may be prosecuted whenever the paramount title is asserted to the disturbance of the possession of the grantee under the deed containing the covenant. From this position defendant concludes that Whitney is the owner of the covenant and the real party in interest, who alone can sue. It is true, as contended by the learned counsel, that the law has been so held by a number of highly respectable courts. The other view has always been held by this Court, and we are not disposed to reverse these decisions. Mr. Rawle, in his excellent work on Covenants (5 Ed.), 205, discusses the question, reviews the authorities, and concludes that the weight of authority is with the opinion of this Court. We noted the cases upon the subject in *Eames v. Armstrong,* 142 N. C., 506.

We are of the opinion that his Honor's ruling upon the admissibility of the evidence offered by plaintiff for the purpose of attacking the sheriff's deed was correct. This renders it unnecessary to discuss a number of the plaintiff's exceptions. The constitutionality of (10) our revenue and machinery acts is not presented.

The judgment must be affirmed.

No error.

Cited: Jones v. Schull, 153 N. C., 521, 522; *Rexford v. Phillips,* 159 N. C., 221; *Jackson v. Beard,* 162 N. C., 116; *Crowell v. Jones,* 167 N. C., 389; *Townsend v. Drainage Comrs.,* 174 N. C., 560.

JOSEPH ADEN v. J. F. DOUB.

(Filed 13 November, 1907.)

1. Negotiable Instruments—Collateral Agreements—Parties—Third Person.

A negotiable instrument, given by defendant to a soliciting agent for the payment of an insurance policy, contemporaneously with a collateral written agreement, as a part of the contract, to the effect that defendant should have one month after the date of the note to determine whether or not he would take the policy, and if not, the note to be void, is not enforcible between the parties when the defendant has elected to reject the policy under the collateral agreement; and the rule of law protecting an innocent purchaser of a negotiable instrument for value has no application, being irrelevant.

2. Procedure—New Trials—Newly Discovered Evidence—Affidavits, Sufficiency of.

In a motion for a new trial upon the ground of newly discovered evidence, whether in the court below or in the Supreme Court, it should be made to appear by affidavit (1) that the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is material; (4) that due diligence was used in discovering it prior to the first trial. And a new trial is only allowed in such a case when manifest injustice and wrong will be done, or there is no other obtainable relief. The motion will be disallowed when such evidence is merely cumulative, when it only tends to contradict a witness or to discredit an opposing witness, and when the applicant does not state the effort made to find the witness, so that the Court may judge of its sufficiency, but states only that every means had been used.

3. Issues—Sufficiency.

Issues are sufficient when they present all the material matters in controversy.

APPEAL from *Ferguson, J.*, at March Term, 1907, of FORSYTH.

(11) This is an action brought to recover the amount of $257.35 and interest, alleged to be due by a note given by the defendant to the plaintiff, as agent, for a policy in the Security Life and Annuity Company for $5,000. At the time of the execution of the note the parties entered into a collateral written agreement, as a part of their contract, to the effect that the defendant should have one month after the date of the note to determine whether he would take the policy, and if he decided not to accept it, then the note to be void.

The court submitted to the jury certain issues which, with the answers thereto, are as follows:

"1. Did the defendant execute the note described in the complaint?" Answer: "Yes."

"2. At the time of the execution of said note, did the plaintiff execute the agreement set out in the answer?" Answer: "Yes."

"3. Did the defendant, within one month from the execution of the note and agreement, notify the plaintiff that he would not accept the policy of insurance, and offer to return the same and demand a return of the note?" Answer: "Yes."

"4. What amount, if any, is due from the defendant to the plaintiff?" Answer: "Nothing."

The plaintiff excepted to the submission of the first three issues, and insisted that the fourth issue was sufficient to cover the matters in controversy.

Upon the verdict the court rendered a judgment for the defendant, and the plaintiff appealed.

J. E. Alexander and G. H. Hastings for plaintiff.
Watson, Buxton & Watson and Benbow & Hall for defendant.

WALKER, J., after stating the case: There is nothing in this case, unless we greatly misunderstand it, but an issue of fact. The jury have found that the note was given subject to the written condition that the defendant might reject the policy within thirty days, upon due (12) notice, which was given. The position taken by the plaintiff, that the evidence tended to contradict a written instrument, and, besides, a negotiable instrument, is clearly without any support in law. In the first place, the written agreement was made at the very time the note was given, as a part of the same transaction, and the plaintiff is the original payee. This does not bring the case within the rule of evidence by which it is forbidden to vary or contradict a written instrument, nor within that other rule protecting an innocent purchaser for value of a negotiable instrument. It is not a correct proposition in law, as stated in the plaintiff's prayer for instructions, that a negotiable instrument is of such high dignity as a medium of exchange that the parties cannot annex any lawful condition to its payment at the time it is given, when the action to recover it is between the original parties to it. The question is fully discussed in *Evans v. Freeman,* 142 N. C., 61.

This suit is nothing more nor less than an attempt by the plaintiff to recover from the defendant a sum of money contrary to his express written agreement, which was executed cotemporaneously with the note, that the defendant should not be liable therefor if he rejected the policy, which he did. That is, if the verdict is true; and there was strong evidence to support it.

The plaintiff moved in this Court for a new trial, upon the ground that, since the trial of the cause, he had discovered other material evidence. We have examined this evidence, and find it to be merely cumulative to that introduced at the trial, and, besides, it does not impress us

as having sufficient weight so as to render it probable or likely that the result would be changed by it if a new trial is awarded. The nature of the evidence would indicate, too, that the plaintiff had been guilty of laches in not discovering it before he did. As he wrote the letter to the defendant, dated 15 May, 1905, and countersigned the receipt, he should certainly have known of their existence and called for their pro-
(13) duction at the trial by a specific notice or demand upon the defendant.

In *Turner v. Davis,* 132 N. C., 187, the present *Chief Justice* states fully the law applicable to motions of this kind: "Our own decisions require as prerequisites for such motions, whether made below or in this Court, that it shall appear by affidavit (1) that the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is material; (4) that due diligence was used in securing it. Such motions have been allowed only in cases of manifest injustice and wrong, and where there was no other relief obtainable. But the motion will be denied if the new evidence merely tends to contradict a witness examined on the trial or to discredit the opposing witness, or is merely cumulative; and it is not sufficient to state that 'every means had been used to find out where the witness was.' The applicant should state what means he did use, and let the Court judge of its sufficiency," citing *Carson v. Dellinger,* 90 N. C., at p. 231; *Brown v. Mitchell,* 102 N. C., at p. 367; *S. v. DeGraff,* 113 N. C., 688; *S. v. Starnes,* 97 N. C., 423, and *Shehan v. Malone,* 72 N. C., 59. See, also, *Wilkie v. R. R.,* 127 N. C., 213; *Simmons v. Mann,* 92 N. C., 12, and *Love v. Blewitt,* 21 N. C., 108. The motion is denied.

The objection to the issues is untenable. Those submitted fully presented all the material matters in controversy, and when this is the case the issues are sufficient for the purpose of the trial. *Deaver v. Deaver,* 137 N. C., 240; *Hatcher v. Dabbs,* 133 N. C., 239; *Clark v. Guano Co.,* 144 N. C., 64; *Moseley v. Johnson,* 144 N. C., 257; *Main v. Fields,* 144 N. C., 307. We find no error in the rulings of the court.

No error.

Cited: *Hughes v. Crooker,* 148 N. C., 321.

(14)

JOHN W. MORROW v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 13 November, 1907.)

1. Railroads—Contributory Negligence—Crossings—"Look and Listen."

It is not error in the court below, upon the question of contributory negligence, to refuse a motion as of nonsuit at the close of the evidence which tended to show that, after waiting at the railroad crossing on a public highway for about five minutes for defendant's freight train to pass, the plaintiff immediately proceeded to cross, and was struck by a passenger train of the defendant going in an opposite direction to the freight; that he did not know of the approach of the passenger train, though he had looked and listened; that the noise and smoke from the freight train, and it being a dark and cloudy winter evening, about 5 o'clock, with fog rising from the ground covered with sleet, and there being no lights, prevented him from so doing.

2. Same—Contributory Negligence—Crossings—"Look and Listen"—Judge's Charge—Harmless Error.

It is error for the court below to charge the jury that, if conditions were such that the plaintiff could not have seen an approaching train, which struck and injured him, at a public crossing, by looking and listening, he would be absolved from the failure to do so, but harmless error when the evidence established the fact that he did look and listen and took the precautions required.

ACTION to recover for personal injuries received by the plaintiff, tried at August (Special) Term, 1907, of ALAMANCE, before *O. H. Allen, J.*, and a jury.

Verdict and judgment for the plaintiff. The court submitted the usual issues of negligence, contributory negligence, and damage, all of which were answered for the plaintiff. From the judgment rendered the defendant appealed.

Brooks & Thompson and W. H. Carroll for plaintiff.
King & Kimball and Parker & Parker for defendant.

BROWN, J. There are a number of exceptions in the record to the admission of evidence, but as none of them are mentioned in appellant's brief, or were called to our attention in the argument, we deem them to have been abandoned.

The defendant offered no evidence. That which was offered (15) on behalf of the plaintiff tended to prove these facts: The plaintiff, who lived in Alamance County, about 17 December, 1905, went to Greensboro. While there, in company with a friend, he approached a crossing of the defendant railroad company, near the coal chute in the

suburbs of Greensboro. Upon reaching the crossing, which was a public highway, he found it obstructed by a freight train, headed in the direction of Charlotte. He waited about five minutes for the freight to clear the crossing, and at once started to the track to cross. A passenger train, coming from the direction of Charlotte into Greensboro at a high rate of speed, ran against him, knocking him off the track and breaking his right arm. That it was between 4 and 5 o'clock in the afternoon, on a cloudy day, and drizzling rain upon melting sleet and ice. That from the ground, on account of the thawing of the ice and heavy atmosphere, a fog was rising; that the smoke from the outgoing freight train circled back, mingling with the fog and settling over the track and crossing. That before going upon the track, in his effort to safely cross, plaintiff stopped and looked out to see if there was any train approaching, and listened likewise; that he saw no train and heard none. He did not know there was a double track along the line at this crossing, and the passenger train came upon him suddenly, without ringing its bell or blowing its whistle or giving any other signal or warning of its approach.

At the close of the evidence the defendant moved his Honor to dismiss the plaintiff's complaint, and for judgment as of nonsuit, for that, on the plaintiff's evidence, his injury resulted from his own negligence and not from any negligence of the defendant.

The refusal to grant this motion is assigned as error, and the correctness of the ruling seems to be the principal contention in the case.

(16) In view of the decided character of the testimony of the plaintiff himself, it is difficult for us to comprehend upon exactly what theory of the law the court was expected to grant the motion. He states that when he reached the crossing a freight train occupied it, and he waited for five minutes, until it could pass. After the freight train passed he looked to see if there was another train coming, and he could neither see nor hear any except the freight. Then he started across the track. He further states that he could not see the incoming passenger train that struck him, on account of the smoke and noise from the freight train, and because it was not lit up or anything of the kind. It was a dark and cloudy evening, just after a big sleet; it was in the winter-time; it was misting rain, and the fog was rising from the ground, and the smoke and fog made it darker.

According to this evidence, the plaintiff brought himself fully within the standard of duty laid down by the authorities.

The duty of one approaching a railroad track is very clearly and fully discussed by *Mr. Justice Hoke* in *Cooper v. R. R.*, 140 N. C., 215, and the precedents are there collected. Tested by the rule there laid down,

and by many other precedents that can be cited, the court did not err in holding that, upon his own showing, plaintiff was not guilty of contributory negligence.

If we believe what he says about the matter, he exercised his senses of hearing and sight, and, nevertheless, failed to detect the approach of the passenger train.

His Honor was quite right in submitting the question to the jury, upon the principle laid down in *Laverenz v. R. R.*, 56 Iowa, 689, and approved in *Cooper v. R. R., supra:* "That a person who voluntarily goes on a railroad track at a point where there is an unobstructed view of the track, and fails to look or listen to danger, cannot recover for an injury which might have been avoided by so looking and listening; but when the view is obstructed or other facts exist which tend to complicate the matter, the question of contributory negligence (17) then becomes one for the jury."

We think his Honor was in error in instructing the jury that, "If the conditions from the smoke and cloudy weather, the lateness in the day, and the moving of the freight train were such that looking would not disclose the approaching train, and there was no sounding of whistle or bell, so that listening would not disclose the approaching train, and the plaintiff crossed, even without looking and listening, and was injured," he would be absolved from the usual consequences of the failure to perform such duties.

The condition of the atmosphere and the hour of the day do not constitute the "obstructions" referred to in *Cooper's* and other cases, and do not excuse a traveler from exercising his senses of sight and hearing in crossing a railroad track. On the contrary, the darker it is the more careful he should be. Nor is the traveler to listen for bell or whistle and nothing else. He must use due care to listen for the approach of the train as well, for common experience teaches us there are times when the approach of a train may be detected without hearing either bell or whistle. But we think this instruction was unnecessarily given, and, in view of the evidence, was entirely harmless to defendant. The case was not tried upon the theory that the plaintiff did not look and listen and otherwise exercise due care, but upon the theory that he did do all the law required of him. He did not offer as an excuse for not looking and listening the fact that the conditions were such he could neither see nor hear. On the contrary, he testifies positively that he did both, and gives the conditions surrounding him as a reason for his failure to detect the train until it was within 6 feet of him.

We do not think this error could have possibly misled the jury, in view of the fact that there was no conflicting evidence whatever; and

(18) plaintiff's own evidence, if believed by them, established the fact that he both looked and listened and exercised proper vigilance when he started across the track.

In all other respects we find no error in his Honor's instructions.

No error.

Cited: Inman v. R. R., 149 N. C., 126; *Farris v. R. R.*, 151 N. C., 491; *Fann v. R. R.*, 155 N. C., 142; *Johnson v. R. R.*, 163 N. C., 447; *Penninger v. R. R.*, 170 N. C., 475; *Lutterloh v. R. R.*, 172 N. C., 118.

ANNE ELIZA McCOLLUM ET AL. v. MARY CHISHOLM ET AL.

(Filed 13 November, 1907.)

1. Deeds and Conveyances—Estates Conveyed—Undivided Interests—Burden of Proof.

The father conveyed to his son and daughter a one-half undivided interest each in certain lands. The son died, and his interest descended to the daughter, the defendant. The defendant conveyed a one-half undivided interest in the lands to her father in fee, and at the same time conveyed the other half interest for life, without specification as to which. The father conveyed his entire interest to his second wife and their child, the present plaintiffs. The interest of the son was sold by his administrator to make assets, and a partition was had. The father being dead and the daughter in possession of her original interest, plaintiff sues in ejectment, claiming this interest as that conveyed to their grantor in fee, which defendant denies. *Held*, the burden of proof is upon plaintiffs, and, having failed to show which of defendants' deeds to their grantor conveyed the fee, they cannot recover.

2. Same—Estoppel by Judgment—Pleadings.

When the plaintiffs allege their title by a certain specified deed, they cannot set up an estoppel by judgment in a different action, wherein they and defendant were parties defendant, where their rights *inter sese* were not put in issue by appropriate pleadings, and which, also, was not pleaded in the present action.

EJECTMENT, tried before *Justice, J.*, and a jury, at September Term, 1907, of MONTGOMERY.

This is an action for the recovery of a tract of land described in the complaint. Plaintiffs allege that they are the owners of the land, (19) and that defendants are in wrongful possession thereof. Defendants deny plaintiffs' allegation of ownership, and set out their chain of title.

His Honor being of the opinion that, upon the entire evidence, plaintiffs were not entitled to recover, they submitted to judgment of nonsuit and appealed.

The facts are set out in the opinion.

R. T. Poole and J. A. Spence for plaintiffs.
Adams, Jerome, Armfield & Maness for defendants.

CONNOR, J. The facts as disclosed by all of the evidence are: Neil McCollum was, on and prior to 2 July, 1892, the owner in fee of a tract of land, of which the *locus in quo* is a part, and on said day conveyed the entire tract to his two children, John McCollum and defendant Mary E. Chisholm, as tenants in common.

On 20 December, 1894, John McCollum died intestate and without issue, his one-half undivided interest in said land descending to his sister, defendant Mary E.

On 16 November, 1895, said Mary E. Chisholm conveyed to her father, Neil McCollum, "a one-half undivided interest" in said land in fee. On the same day said Mary E. Chisholm conveyed to her said father, "for the term of his natural life, one-half undivided interest" in the same land. In this deed is a clause providing that upon his death the land should revert to her.

On 30 October, 1900, said Neil McCollum, for a recited consideration of $400, conveyed the entire tract of land to plaintiffs, Anne Eliza, his wife, and Annie McK. McCollum, an infant child. This deed was recorded 27 November, 1900.

On 29 November, 1901, E. D. McCollum, administrator of John McCollum, deceased, filed his petition in the Superior Court of Montgomery County against plaintiffs Anne E. and Annie McK. McCollum, Mary E. Chisholm and her husband, in which he alleged that his intestate died seized of one undivided half interest in the same land; that the said lands descended to his sister, M. E. Chisholm, and (20) that she and her husband "deeded" the same to Neil McCollum, deceased, upon condition that he pay the debts of said John McCollum, deceased. The petition further alleged that Neil McCollum was dead and that a sale of said land was necessary to pay the debts of said John McCollum. In said special proceeding the present plaintiff Anne E. McCollum was duly appointed guardian *ad litem* of the infant defendant therein, and plaintiff herein duly filed her answer, in which she admitted each and every of the allegations of the petition. An order was made in said proceeding directing the sale of the real estate of John McCollum, deceased. Sale was duly made to B. F. Simmons and confirmed. A deed was executed to him by the administrator. On 22 Octo-

ber, 1902, said B. F. Simmons instituted a special proceeding in the Superior Court of Montgomery County against plaintiffs and defendants herein for the purpose of having partition of said land. In his complaint he alleged that he was tenant in common with defendants therein; that he was the owner of one-half undivided interest and defendants were the owners of the other half. In said proceeding the defendant therein, Anne E. McCollum, in behalf of herself and as guardian *ad litem* of the infant defendant, Annie McK. McCollum, filed an answer, admitting that plaintiff B. F. Simmons owned one-half and that she and her ward were the owners of the other half thereof. An order was duly made for the partition of said land, and commissioners appointed, who filed their report, setting forth that they had allotted to plaintiff one-half by metes and bounds, and to "Daniel Chisholm and his wife, Anne Eliza McCollum, and Annie McK. McCollum" the other half by metes and bounds.

It will be observed that plaintiffs allege that they are the owners of the entire tract, being one-half of the land conveyed by Neil McCollum to his son John and daughter Mary.

(21) Defendants, denying the material allegations in the complaint, set out the several deeds of conveyance, alleging that defendant Mary conveyed to her father in fee the one-half undivided interest which descended to her by the death of her brother John; and the one-half undivided interest which was conveyed to her she reconveyed to her father for his life.

Plaintiffs replied to the answer, saying "That the deed executed by Mary Chisholm and husband to Neil McCollum, 16 November, 1895, in fee simple, was her original one-half undivided interest in said land, and the other one-half undivided interest which she deeded to Neil McCollum on the same day for the term of his natural life was that which descended to her from John McCollum.

Thus the issue between the parties is clearly presented. The burden is upon the plaintiffs to show that the one-half undivided interest which they claim through Neil McCollum was the original share conveyed to defendant Mary by said McCollum and reconveyed to him in fee, 16 November, 1895. The two deeds are made on the same day and contain nothing on their face to indicate which one refers to and conveys the original interest owned by the grantor, Mary E., or which was executed first in order of time. In this condition of the evidence there would be no presumption to aid the plaintiffs, and they would fail in their action. If permitted to speculate, we should say that, in view of the fact alleged by plaintiffs, and not denied, the deeds to both John and Mary were voluntary and "deeds of gift"—evidently made pursuant to some family settlement. It is probable that, upon the death of her brother John,

unmarried and without issue, Mary reconveyed his interest, which descended to her, to her father, and conveyed to him a life estate in the share originally conveyed to her. This view is strongly supported, if not conclusively shown, by the fact that, after the death of Neil McCollum, the administrator of John files a petition to sell John's undivided interest for the purpose of paying his debts. In his petition, to which the plaintiffs and defendants are made parties, he expressly (22) alleges that it was John's interest which was "deeded" to Neil McCollum by defendants upon condition that he pay the debts of the said John McCollum, deceased. This allegation is admitted by plaintiff Anne Eliza, as guardian *ad litem* of the infant plaintiff. Whether this admission and the judgment rendered in that proceeding constitute an estoppel of record, it is not necessary to decide. It is clearly competent evidence, tending to show which interest was conveyed by defendant to her father in fee.

In any point of view, the plaintiffs fail to make good their allegation, and must fail in their action to recover the land described in the complaint. They insist that, notwithstanding this difficulty, they are entitled, by way of estoppel, to recover an undivided interest in the land, relying for this purpose upon the record in the proceeding for partition by B. F. Simmons. It will be noted that in the complaint herein plaintiffs allege title in themselves, generally, of the entire land. The defendants, in their answer, set out the history of the title, whereupon plaintiffs, replying, state specifically the basis of their title to be that the deed executed by Mary Chisholm to Neil McCollum in fee was her original *one-half undivided* interest in said land, and that the other one-half interest "deeded" to Neil for life was John McCollum's share. The plaintiffs thus set out clearly their title, and the parties are brought by the pleadings to a single issue: Did Mary Chisholm convey, by her deed of 16 November, 1895, to Neil McCollum, in fee, her original one-half undivided interest? If so, plaintiffs are entitled to the land under the deed from Neil McCollum to them; if not, they fail in their action.

In this condition of the pleadings, may plaintiffs, failing to prove their allegation, rely upon an entirely different title, having its origin in an estoppel and entitling them to some unascertained interest? In *Richards v. Smith,* 98 N. C., 509; *Merrimon, J.,* says: "If the plaintiff should allege title in himself, derived in a specified way, it may be that he would be compelled to prove it substantially as alleged, (23) unless, upon application to the court, he be allowed to amend the complaint." In Tillinghast and Sherman Tr. Tit., sec. 443, it is said: "If the plaintiff sets out a specific chain of title, his evidence will be confined to the title as alleged; and while it is not necessary to aver the evidences of plaintiff's title, yet, if these be alleged, the substantial ele-

ments of the title must be stated." This, we think, is in accordance with orderly procedure and good pleading. If the plaintiffs wish to rely upon some other title than that which they have set out and called upon defendants to answer, they should have asked an amendment to their complaint, giving defendants an opportunity to answer and prepare their defense to "the change of base."

In the pleadings there is no reference to or suggestion of a title by estoppel by reason of a proceeding for partition. We are of the opinion that his Honor, for this reason, correctly held that plaintiffs could not recover. We are further of the opinion that, if plaintiffs had amended their complaint, they could not have succeeded. The sole purpose of the proceeding for partition was to enable Colonel Simmons, who had purchased the one-half undivided interest of John McCollum, to have such interest set apart to him. There was no reason for making the plaintiffs herein parties, as they had no interest in the land after the death of Neil McCollum, under whom they claimed. The petition did not undertake to set out the interests of the defendants *inter sese*. No such question was presented or decided. The only fact adjudged in the proceeding was that Colonel Simmons was the owner of a half undivided interest. It would have been entirely proper, and probably better practice, to have set forth the condition of the title as between all of the parties, but not necessary for the purpose of accomplishing what the petition desired.

This case is easily distinguished from *Armfield v. Moore,* 44 N. C., 157, the leading case in this State. There the interest of each party to the record was ascertained. *Pearson, J.,* says: "An estoppel (24) must be certain—that is, the fact agreed on, or found by the jury, must be some particular fact, and not a generality or matter of inference. Here the fact agreed on is certain, to wit, that Jane Moore was entitled, as a tenant in common, to one-third part of four slaves." Here there is no finding in respect to the interest of the defendants, except that they are tenants in common with petitioner; that was the only fact alleged, and the only fact necessary for him to allege. As between Simmons and the defendants, in that proceeding, all parties are estopped to deny that Simmons was entitled to one-half the land. *Carter v. White,* 134 N. C., 466. The decision in that case is based upon the fact that the exact interest of each party was put in issue and settled by the judgment, citing *Forder v. Davis,* 38 Mo., 107, in which it is said of the judgment: "The partition establishes the title, severs the unity of possession, and gives to each party an absolute possession *of his portion.*"

"As a general rule, parties to a judgment are not bound by it in a subsequent controversy between themselves, unless they were adversary

parties in the original action—that is to say, a judgment for or against two or more joint parties ordinarily determines nothing as to their respective rights and liabilities as against each other in their own subsequent controversy." 2 Black on Judgments, sec. 599. Of course, if codefendants, by appropriate pleadings, put their rights *inter sese* in litigation, they are bound by the judgment rendered upon the questions litigated. 1 Freeman on Judgments, sec. 158. It would work a great wrong to defendants herein to permit the judgment in the partition proceedings, the only purpose of which was to have Colonel Simmons' one-half interest in the land set apart to him, to devest them of their title to a share of the land not in any way in litigation. To do so would make estoppel justly odious.

The judgment of his Honor must be

Affirmed.

Cited: Buchanan v. Harrington, 152 N. C., 335; *Weston v. Lumber Co.,* 162 N. C., 171, 199.

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(25)

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF W. S. BALDWIN.

(Filed 13 November, 1907.)

Wills—Attestation—Witnesses—Time of Signing—Presence of Testator.

The signing of the will by attesting witnesses, two being required, must be in the presence of the testator. Revisal, sec. 3113. When a witness who had properly signed as such, no other witness signing, had the will copied upon different paper in the absence of the testator, signed the copy, left it at the home of the testator with the original, who afterwards procured the due attestation and signature of the other witness on the copy, both of which were found among the papers of the testator after his death, but the original was destroyed, the copy is not valid as a will, and evidence that the first draft was identical with the copy is incompetent, the first witness having signed before the testator signed, and not in his presence, there being no physical connection between the original and copy, and not upon the same paper as that of the signature of the testator.

DEVISAVIT VEL NON, heard by *Moore, J.,* at April Term, 1907, of MONTGOMERY.

By agreement, the court found the facts. From the judgment rendered H. T. Baldwin, one of the propounders, appealed.

Findings of fact:

1. That the propounders, H. T. Baldwin and J. H. LeGrand, produced in court a paper-writing purporting to be the last will and testament of W. S. Baldwin, deceased, a copy of which is made a part of this finding:

STATE OF NORTH CAROLINA—Montgomery County.

I, W. S. Baldwin, of the county and State above named, being of sound mind and memory, but considering the uncertainty of my earthly existence, do make and declare this my last will and testament, in manner and form following:

I hereby will the children of my daughter, Dicey LeGrand, deceased, $20 each; and to the children of D. C. Baldwin, deceased, $10 each; and to J. B. Baldwin, my son, 15 acres of land, including all the
(26) buildings where I now live, after his mother's death, and if he should die without any children, his part to be equally divided between H. T. Baldwin, Rebecca Ewing, and Emma LeGrand and their children after them. The remainder of my real estate to be equally divided between H. T. Baldwin, J. B. Baldwin, Rebecca Ewing, and Emma LeGrand and their children after them, and for my wife, Charlotte Baldwin, to have her dower off of each child's part equal, and for her to have all the personal property as long as she shall live, and at her death the same to be equally divided between H. T. Baldwin, J. B. Baldwin, Rebecca Ewing, and Emma LeGrand and their children after them.

I do hereby constitute and appoint my son H. T. Baldwin and J. H. LeGrand my lawful executors to all intents and purposes, to execute this my last will and testament according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made.

In witness whereof I have hereunto set my hand and seal this 11 September, 1907. W. S. BALDWIN. [SEAL]

Signed, sealed, published, and declared by the said W. S. Baldwin to be his last will and testament, in the presence of us, who, at his request and in his presence, do subscribe our names as witnesses thereto.

J. A. COVINGTON,
B. B. BOWLES.

2. That the said witness J. A. Covington was called in by the alleged testator, W. S. Baldwin, and, as dictated by the said testator, wrote a paper-writing purporting to be the last will and testament of the alleged testator, wrote the attestation clause and, at the request of the testator

and in the presence of the said testator, signed his name as a (27) witness thereto. No other witness attested this paper-writing. Said W. S. Baldwin signed the paper-writing as his last will in the presence of said J. A. Covington.

3. That the paper-writing purporting to be the last will and testament of the alleged testator, W. S. Baldwin, deceased, as referred to in the second article of this finding of facts, not being on as good quality of paper as the said witness desired to have the same, said J. A. Covington took the said paper-writing, above referred to, to the home of the said witness and there transcribed it on better paper, and at the same time, at his home and in the absence of the alleged testator, wrote out the attestation clause and wrote his name as a witness thereto.

4. That, after making an exact copy of the paper-writing referred to in the second article of this finding, and signing his name thereto as an attesting witness, the said J. A. Covington returned the copy for probate, and also the original copy of the said paper-writing, to the home of the said alleged testator, and, the said W. S. Baldwin being away from home, left them with the wife of the said testator. Said Covington did not see the said paper-writing any more until after the death of said Baldwin, and did not see said Baldwin sign it or hear him acknowledge it.

5. That some time after this the alleged testator brought the copy of the purported will, to wit, the one offered for probate, to the other witness, B. B. Bowles, and asked him to "witness a paper for him," which the witness did, in the presence of the alleged testator, and the testator asked him to say nothing about it.

6. That the original paper-writing, being the one written at the dictation of the alleged testator and signed by the said alleged testator in the presence of the witness Covington, and witnessed by the said witness Covington at the request of and in the presence of the alleged testator, W. S. Baldwin, deceased, and also the copy of the original paper-writing, being the one witnessed by the witness B. B. Bowles at (28) the request of and in the presence of the said alleged testator, were both in the possession of the said alleged testator at the time of his death.

7. That both copies of the alleged will were signed by the alleged testator in his own handwriting.

8. That after the death of the alleged testator the copy (meaning the one that was on the best paper) was carried to the clerk of the Superior Court for probate, and the original copy was, at the request or advice of friends, burned by the wife of the alleged testator, then deceased.

9. That the alleged testator, at the time of his signing both paper-writings, was of sound mind and discretion.

10. That the witnesses J. A. Covington and B. B. Bowles are men of sufficient knowledge to act as such.

11. That the said paper-writing offered for probate, which purported to be the last will and testament of the said W. S. Baldwin, deceased, appeared on its face to be written and attested in due form.

Upon the foregoing facts the court is of the opinion that the paper-writing offered for probate is not the last will and testament of W. S. Baldwin, deceased.

It is, therefore, on motion of R. T. Poole, Esq., attorney for the objectors, ordered and adjudged by the court that the said paper-writing is not the last will and testament of said W. S. Baldwin, deceased, and is not entitled to probate as such, and that this proceeding for the probate of the same be and the same hereby is dismissed.

It is further adjudged that said H. T. Baldwin and J. H. LeGrand, the propounders, pay the costs of this proceeding, to be taxed by the clerk.

FRED MOORE,
Judge Presiding.

J. T. Brittain and R. O. Frye for appellant.
R. T. Poole for appellee.

(29) BROWN, J. Our statute (Rev., 3113), referring to wills of the character of the paper-writing offered for probate, contains a specific requirement that the will shall be subscribed, in the presence of the testator, by two witnesses at least.

The paper offered by the propounders was never signed by witness Covington in the presence of Baldwin. It appears that Covington wrote a will for Baldwin, and he and Baldwin signed it in the presence of each other. There is no finding of fact that such paper had any other witness than Covington. It was destroyed after Baldwin's death. It was not attached in any way to the paper offered for probate, and had no physical connection with it. The fact that it is said to be exactly like the paper offered, and that the latter is a copy of the former, will not "mend matters." In the absence of any sort of physical connection between the two papers, resort cannot be had to parol proof to show a similarity of contents and that they constituted one and the same will.

The paper offered was written by Covington and signed by him as a witness before the testator signed, and not in his presence. In fact, Covington never saw Baldwin at all after he wrote and attested the paper and left it at the former's residence to be executed by him. Not only did Covington not sign in the presence of the testator, but his attestation preceded the signing of the maker of the will.

Some authorities hold that everything required to be done by the testator in the execution of a will shall precede in point of time the sub-

scription by the attesting witness, and that, if the signature of the latter precede the signing by the testator, the will is void. Gardner on Wills, 236. Until the testator has signed, there is no will and nothing to attest. There are eminent authorities, however, which hold that where the signing of the testator and of the witnesses took place at the same time and constituted one transaction, it is immaterial who signed first. Gardner, *supra*. While this is very reasonable, it does not help the propounders, upon the facts as found. Nor does the recognized legal presumption that the testator signed first, since that is re- (30) butted by the admitted facts.

The propounders can take no benefit from the fact that Covington signed the destroyed paper after testator had signed it, in his presence and at his request, although the contents of the two papers may have been identical. That will not help out the probate of the paper offered, for the reason, as we have observed, that there was no physical connection between the two. The authorities all hold that the attestation or subscription by witnesses must be on the same sheet of paper as that which contains the testator's signature, or else upon some paper physically connected with that sheet.

Mr. Schuler says: "Attestation or a subscription by witnesses on a paper detached and separated from the will and the testator's signature, nor affixed in his presence to the paper at the time of execution, fails of compliance with the policy of our law. We may assume it to be void, as otherwise a door must be open to fraud and perjury." Wills, sec. 336 (2 Ed.); *Cox's Will*, 46 N. C., 323. 30 A. & E. Enc. (2 Ed.), 603, says: "An attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet, although no particular mode of fastening the papers together is required."

The judgment is

Affirmed.

(31)

L. A. LENTZ v. JAMES HINSON.

(Filed 13 November, 1907.)

Justice of the Peace—Appeal and Error—Failure to Docket—Motion to Dismiss.

An appeal from the court of a justice of the peace in a civil action should be docketed by the subsequent term of the Superior Court for the trial of criminal cases. When it appears that the justice of the peace was paid for transcript of appeal, made it out the day of the trial and handed it to the clerk of the Superior Court, but the appellant neither tendered nor paid the clerk his fees nor requested that it be docketed, a motion to dismiss will be granted upon failure to docket the appeal.

MOTION to dismiss appeal from a justice of the peace, heard by *Moore, J.*, at March Term, 1907, of STANLY.

From the judgment of the Superior Court dismissing the appeal the plaintiff appealed.

J. R. Price and R. L. Smith for plaintiff.
R. E. Austin for defendant.

BROWN, J. The record shows that the defendant secured judgment against plaintiff on a counterclaim before the justice of the peace on 29 April, 1904, and at the time the plaintiff took an appeal to Superior Court and paid the justice's fees. The justice made out the transcript of appeal and handed it to the clerk of said court the same day. The clerk's fee for docketing was not paid or tendered, and he was not requested to docket the appeal, and it was not docketed or filed regularly until 12 September, 1904. A regular term of the court was held 18 July, 1904, and although it was for the trial of criminal cases, the appeal should have been docketed by that term.

The point is expressly decided and the reasons given in *Blair v. Coakly*, 136 N. C., 407.

Affirmed.

Cited: *McClintock v. Ins. Co.*, 149 N. C., 36; *McKenzie v. Development Co.*, 151 N. C., 277; *Love v. Huffines, ib.*, 380.

(32)

S. W. GERRINGER, ADMINISTRATOR, v. NORTH CAROLINA RAILROAD.

(Filed 13 November, 1907.)

Railroads—Crossings—Warnings—Negligence—Contributory Negligence.

When it appears that plaintiff's intestate was killed by the engine of the lessee of the defendant company while it was backing, on a dark night, over a crossing, without light, signals, or any other warning, in a thickly settled community, a clear case of negligence is made out against the defendant, and, without other evidence, the question of contributory negligence does not arise.

(The rule upon the issue of damages in *Mendenhall v. R. R.*, 123 N. C., 278, approved.)

CLARK, C. J., concurring.

ACTION to recover damages for the negligent killing of plaintiff's intestate, tried before *Justice, J.*, and a jury, at April Term, 1907, of GUILFORD.

The following issues were submitted:

1. Was the death of the plaintiff's intestate caused by the negligence of the defendant's lessee, as alleged in the complaint? Answer: "Yes."

2. Was the plaintiff's intestate guilty of contributory negligence, as alleged in the answer? Answer: "No."

3. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: "Eight thousand dollars."

From the judgment rendered defendant appealed.

R. C. Strudwick and Stedman & Cooke for plaintiff.
King & Kimball for defendant.

BROWN, J. At the conclusion of the argument of the learned counsel for the appellant, this Court intimated an opinion that it was unnecessary to hear from the appellee. The case appeared to us to present, upon appellant's own presentation of the facts, a clear case of liability. Our subsequent examination of the record confirms fully the correctness of our intimation, and that the presiding judge committed no error on the trial. The evidence showed that plaintiff's intestate (33) was run over and killed by an engine of the Southern Railway Company, lessee of defendant, whilst backing over a crossing in the night-time, without any light or man with a light on the front in the direction in which the said engine was backing, and without giving any of the signals of its approach; that it rang no bell and blew no whistle; that the said Beck's Crossing is a public crossing at Greensboro suburbs and in a thickly settled community; that there was a freight train pass-

ing said crossing on a parallel track, going east, towards Greensboro; that the engine which killed plaintiff's intestate was backing west, towards Pomona; that they passed each other near the crossing, and that the engine ran up some 50 yards after having run over and killed the plaintiff's intestate; that the engine was running along at a very slow rate of speed, and, as one of the witnesses said, went along like something slipping along on something soft: that plaintiff's intestate had been in a store at the crossing, and was talking with a number of people, who were witnesses in this case, and stated that he was going to church, and went towards the crossing; that he was not seen after he had gotten out of the light of the store door until his dead body was found on the track about five minutes later; that no engine except the shifting engine had passed along that track between the time the plaintiff's intestate left the store door and the time when his dead body was found, about five minutes later, upon the track; that the engine stopped and the engineer stated that he had killed somebody, and came back with his lights to see who it was; that he was a sober, industrious boy, 16 years and 22 days old, and had been working for the railroad as a telegraph operator and was getting $57.50 a month.

Accompanying young Gerringer was a companion, named Craven, who was evidently killed at the same time, and whose body was found near Gerringer's, on the first track next to Beck's store.

(34) No exception was taken to any of the evidence offered by plaintiff, and defendant introduced none.

In the view we take of this case, it would be a waste of time to discuss *seriatim* the twenty-five exceptions appearing in the record.

The case appears to have been tried by the learned judge who presided upon well settled principles laid down in numerous cases. *Purnell v. R. R.*, 122 N. C., 840; *Stanley v. R. R.*, 120 N. C., 514; *Lloyd v. R. R.*, 118 N. C., 1010; *Mayes v. R. R.*, 119 N. C., 758. The evidence that the shifting engine was backing up the track towards the crossing, upon a dark night, without any light or precautionary signal, and ran over and killed the plaintiff's intestate and his companion, Craven, is full and convincing. The facts of this case disclose a degree of carelessness upon the part of the engineer in charge of the shifting engine that is almost criminal, and for the consequences of which the company could not reasonably expect to escape liability. It would seem to those who are not initiated in the methods of railway management that it would be profitable to the company, as well as a great protection to human life, to place a watchman at Beck's Crossing, where so many people and so much traffic must necessarily cross its tracks. The recovery in this case alone would pay the salaries for a number of years to come.

The exceptions to his Honor's charge upon the issue of contributory negligence cannot be sustained. While contributory negligence, like any other fact may be proven by circumstantial evidence, there is no fact in this record from which contributory negligence can be justly and reasonably inferred. If the court committed any error in that portion of the charge, it is harmless, for the judge might well have instructed the jury that there was no evidence of contributory negligence.

The exceptions, so earnestly pressed upon the argument, to (35) that portion of the charge upon the issue of damages are untenable. His Honor charged fully upon this phase of the case. The charge is full, comprehensive, and complete upon the rule for assessing damages, and is sustained by *Mendenhall v. R. R.*, 123 N. C., 278; *Carter v. R. R.*, 139 N. C., 499; *Poe v. R. R.*, 141 N. C., 525; *Watson v. R. R.*, 133 N. C., 188. In the charge is copied the very lucid statement of the rule by *Judge Oliver H. Allen,* commended by this Court in the *Mendenhall case.*

No error.

CLARK, C. J., concurring: In view of the simultaneous deaths of these two young men at this crossing near Greensboro, and the not infrequent instances of death or maiming by railroads at the crossings near that constantly growing town (many of which have been presented by cases in this Court), the railroads might well consider appropriate steps to abolish all grade crossings near that and other populous towns in this State wherever accidents at crossings have become numerous. The crossing of public roads by a railroad track on the same grade is well-nigh unknown in Europe. It has been abolished in Massachusetts and Connecticut and to a large extent in New York. The State courts and the United States Supreme Court have concurred in numerous decisions which hold that the abolition of grade crossings may be ordered at the expense of the railroads. See numerous cases cited in *Wilson v. R. R.*, 142 N. C., at p. 349, and *Cooper v. R. R.*, 140 N. C., at p. 229.

The act of 1899, ch. 164, now Revisal, sec. 1097 (2), confers on the Corporation Commission power "to require the raising or lowering of a track at any crossing where deemed necessary." This is reënacted and emphasized, Laws 1907, ch. 469, sec. 1 (c).

The laws and the courts are not solely for the protection of (36) property rights, but for enforcement as well of the constitutional guarantee of the protection of life and limb. This Court has performed this duty in the *Greenlee* and *Troxler cases,* 122 N. C., 977, and 124 N. C., 189, which held that the absence of automatic car couplers is negligence *per se*—a negligence which is now punishable by act of Congress (1893, ch, 196; 3 U. S. Compiled Statutes, 3174); also, by a similar

holding as to the lack of a "block system" (*Stewart v. R. R.*, 137 N. C., 687), which was repeated and reiterated in the same case (141 N. C., 253); and such system is now required by statute also. Laws 1907, ch. 469, sec. 1 (b). There are other decisions of this Court which might also be cited in which we have sought to protect the lives and limbs of those exposed to unnecessary danger by the application of familiar principles, or have called the attention of the Legislature to defects in the laws. This matter of abolishing grade crossings near populous towns is on the same footing as car couplers and block systems. As Lord Chancellor Erskine observed when at the bar, "Morality comes in the cold abstract from the pulpit, but men smart practically under its lessons when juries and judges are the teachers."

The courts cannot be ignorant, nor should they feign to be, of matters well known to every intelligent person. We know, from the reports of the railroads themselves, as tabulated and published by the Interstate Commerce Commission, as required by act of Congress, that last year 95,000 persons were injured and 10,000 were killed—a total of 105,000 people killed and wounded by the railroads of the United States, as against a total of 1,685 killed and wounded in our army in the war with Spain. In the last ten years the injured and killed by railroads in this country would make a procession of nearly 1,000,000 people, most of whom had others dependent upon them. That this immense amount of suffering and death is largely due to mismanagement and reck-
(37) lessness in the railroad authorities is evidenced by the fact, equally well known, that in Europe, where there must also be some unavoidable accidents and some negligence, the ratio of casualities on the railroads in porportion to the number of passengers and employees is less than one-twentieth of what it is in this country.

Whatever the courts can do to sustain the constitutional protection of life and person to every citizen, they should do. We have done so as to automatic couplers and the block system. On such an occasion as this, of a double death at a crossing, it is not amiss to call attention to this evil also. It may be, and doubtless is, cheaper for the railroads to pay for those killed and wounded than to take efficient steps to prevent these lamentable casualties. But considerations of humanity should have some weight. That full nineteen-twentieths of these casualties are avoidable the above figures for European railroads conclusively show. And is there no responsibility upon the authorities of the counties and towns where dangerous crossings are located to apply to the railroad officials to raise or lower their tracks at those points? If a reasonable and just application of this kind is refused, the county or town authorities can and should apply to the Corporation Commission, which is vested with full and complete power to compel the raising or lowering of the track,

to remove all danger to those using the public roads. This has been done by the authorities of Wake County as to several crossings at or near Raleigh, where the street or county road now passes under the railroad track. Their example might well be followed elsewhere. In a government avowedly of and for the people some consideration should be paid to the safety of the life and limb of the citizen.

Cited: Champion v. R. R., 151 N. C., 197; *Trull v. R. R., ib.,* 551; *Roberson v. Lumber Co.,* 154 N. C., 330; *R. R. v. Goldsboro,* 155 N. C., 365; *Speight v. R. R.,* 161 N. C., 86; *Shepherd v. R. R.,* 163 N. C., 522; *Hill v. R. R.,* 166 N. C., 597; *Embler v. Lumber Co.,* 167 N. C., 464; *Le Gwin v. R. R.,* 170 N. C., 361; *McMillan v. R. R.,* 172 N. C., 858.

(38)

J. A. LOGAN v. J. D. HODGES.

(Filed 13 November, 1907.)

1. Libel—Evidence—Postal Card.

In an action to recover damages for publication of a libel concerning a robbery of public moneys from the plaintiff, the county treasurer, a postal card mailed by defendant is actionable libel, *per se,* whereon he had written: "Turn your searchlights on your treasurer and the man who boards with him, and the postmaster, and you will find where the money went."

2. Libel—Evidence—Postal Card—Publication—Mail.

The publication of the libel is shown when proved by the addressee that he had received a postal card in course of mail, whereon the libelous matter was written by the defendant, as such is likely to be communicated to the postal clerks and employees through whose hands it may pass.

3. Libel—Postal Card—Absolute Privilege—Qualified Privilege.

A postal card containing a libelous communication concerning a public official of a county, though written in the public interest, is not absolutely or qualifiedly privileged when not addressed to some person having jurisdiction to entertain the complaint, or power to redress the grievance, or some duty to perform, or interest in connection with it.

4. Libel—Postal Card—Pleadings—Evidence—Good Faith—Malice.

When in an action for damages for the publication of a libel justification is not pleaded, such defense is not open; and when all the evidence tends to show that the defendant published the libel by writing it on a postal card and mailing it, the judge below should charge the jury, if they find the evidence to be true, or to be the facts, some damages should be awarded. The defendant having pleaded good faith and lack of actual malice, it is open to him to offer evidence thereof in mitigation of damages.

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

LOGAN *v.* HODGES.

ACTION to recover damages for publication of a libel, tried before *Moore, J.*, and a jury, at April Term, 1907, of YADKIN.

At the conclusion of the evidence, upon an intimation from his Honor that he would charge the jury that, if they believed the evidence, the mailing of the postal card declared upon was qualifiedly privi-
(39) leged, that the burden of showing malice was upon the plaintiff, and that there was no evidence of actual malice, the plaintiff, having duly excepted, submitted to a nonsuit and appealed.

Holton & Reece and Benbow, Hall & Hanes for plaintiff.
E. L. Gaither for defendant.

BROWN, J. As gathered from the record, the facts upon which the plaintiff bases his right of action are as follows: The plaintiff was the treasurer of Yadkin County at the time the cause of action arose, having been elected to said office at the regular election on 6 November, 1904. As such treasurer he had in his hands, belonging to said county, the sum of $4,139.09 and other moneys in cash, and had the same securely locked in an iron safe in his store in the town of Yadkinville, the county-seat of Yadkin; and on the night of 6 September, 1904, the storehouse in which the said safe was located was broken into and said safe, containing said funds and moneys, was blown open by unknown parties, supposed to be burglars, and robbed of its contents. On 9 September, 1904, the defendant J. D. Hodges wrote a postal card to one A. J. Martin and sent same through the United States mails from some point in Davie County to Longtown postoffice, in Yadkin County, the contents of the card being as follows:

DEAR SIR:—From conversation I have had with a gentleman from Davie County who was in Yadkinville the day after the robbery, I believe the guilty men live in Yadkinville. Turn your searchlights on your treasurer and the man that boards with him and the postmaster, and you will find where the money went.

Yours truly, J. D. HODGES.

Augusta, N. C., 9 Sept., 1904.

(40) The defendant was at that date superintendent of public instruction and a resident of Davie County, and the addressee of the postal card, Martin, held the same office in Yadkin County.

1. That the words written upon the postal card are of such character as makes them actionable *per se* is hardly debatable. They plainly imply the commission of a crime which not only involves moral turpitude and is punishable by imprisonment, which is sufficient to make

words actionable *per se,* but, under the law of this State, constitutes a felony, punishable by imprisonment in the State's Prison. Odger Libel and Slander, pp. 2, 53-56; *Brayne v. Cooper,* 5 M. & W., 249; *Posnett v. Marble,* 62 Vt., 486, and cases cited.

2. That there was a publication of the libel is proven by the testimony of the addressee, who testifies he received it in the mail, as well as by the testimony of the carrier and others. Communications in the nature of telegrams and postal cards containing defamatory matter, transmitted in the usual manner, are necessarily liable to be communicated to all the clerks through whose hands they pass. Newell on Slander and Libel, p. 233. The exact question was decided by the Supreme Court of Tennessee. In that case a clerk in one bank wrote on a postal card and mailed it to a correspondent bank in reference to a draft held for collection by the former for the latter: "Bowdie in the hands of a notary." The Court held it to be a publication, and that the words, being false, were libelous and actionable *per se,* without proof of special damage. This case is cited with approval by Newell, *supra,* note, p. 233. Besides it is to be noted that the very method of making this communication adopted by defendant is prohibited by law and made a crime against the United States, for the evident reason of its publicity. While the Government may legislate against the reading of postal cards by those through whose hands they pass, it, nevertheless, recognizes the frailty of human nature, and prohibits the mailing of postal cards containing defamatory matter, under severe penalties. United States (41) Compiled Statutes 1901, Vol. II, p. 1661.

3. The occasion of the publication was neither absolutely nor qualifiedly privileged. It is contended by the learned counsel for defendant that the occasion was qualifiedly privileged, because the communication concerned a public offical of the county of Yadkin and was written in the public interest. We admit the general proposition that it is the duty of all who witness or have knowledge of the misconduct of any public officer to bring such misconduct to the notice of those whose duty it is to inquire into it, but the complaining party must be careful to apply to some person who has jurisdiction to entertain the complaint, or power to redress the grievance, or some duty to perform, or interest in connection with it. Newell on Slander and Libel, pp. 504 and 505; *Neyley v. Farrow,* 60 Md., 158; *Lansing v. Carpenter,* 9 Wis., 540; *Hamilton v. Eno,* 81 N. Y., 116. To illustrate: Words charging a party with theft, spoken in good faith, under a belief of their truth and with probable cause, to a *police officer* employed to detect the robber, are in the nature of a privileged communication. *Smith v. Kerr,* 1 Edm. N. Y. Select Cases, 190. So, a letter accusing a school mistress of unchastity, written

in good faith to the *school committee,* is privileged, so as to put the burden on plaintiff to show actual malice. *Bodwell v. Osgood,* 3 Pick. (Mass.), 379.

The A. & E. Enc. states the law as follows: "A communication in regard to the character or conduct of a public official is privileged if addressed to a functionary having the authority to redress grievances or to remove the official from office, and, for the purpose of making such communication, every citizen is regarded as having an interest or duty in the subject-matter. But a communication addressed to a third person having no such authority is not privileged." (42) 18 A. & E. Enc. (2 Ed.), p. 1040. The author has there collected many adjudications on the subject. In commenting on the subject Mr. Odger says: "But in seeking redress the defendant must be careful to apply to some person who has jurisdiction to entertain the complaint or power to redress the grievance. Statements made to some stranger who has nothing to do with the matter cannot be privileged." Page 222. Newell, p. 475; Folkard Starkie, sec. 294, p. 356. *Bryan v. Collins,* 11 N. Y., 150, is a full and instructive case. To the same effect are the rulings of the English courts. *Dickerson v. Hilliard,* 9 Exchequer L. R., 79.

In *Bragg v. Sturt* it was held by the Court of Queen's Bench, in an action for libel, that a letter to the Secretary of State by an inhabitant of a borough, imputing corruption in office to a person who is town clerk and clerk to the justices of the borough, is not a privileged communication. 593 C. L., 899. *Lord Denman,* delivering judgment, said: "We are of opinion that the defendant was not exempt from responsibility for that which would otherwise be a libel by reason of its being an application to a competent tribunal for redress, because the Secretary of State has no direct authority in respect to the matter complained of, and was not a competent tribunal to receive the application."

In *Harrison v. Bush,* 5 Ellis and Black (Q. B.), 344, the rule is thus stated: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminatory matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation."

This has been generally approved by judges and text-writers since. In *Toogood v. Springs,* 1 Cr., M. & R. (Ex.), 181, quoted in *Bryan v. Collins, supra,* and commended by *Folger, J.,* in *Klench v. Colby,* 46 N. Y., 427, and in *Hamilton v. Eno,* 81 N. Y., 116, it is said (43) that the law considered a libelous "publication as malicious

unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs and in matters where his interest is concerned."

As privileged communications are exceptions to the general rule which implies malice in a libelous publication and infers some damage, it rests with the party claiming the privilege to show that the case is brought within the exception. In this case the defendant has wholly failed to show such facts and circumstances as will give him the protection of either an absolute or a qualified privilege.

4. The defendant having failed to plead justification, that defense is not open to him, even if he had any evidence to support such a plea. It therefore follows that his Honor erred in his intimation. He should have instructed the jury that if the evidence is believed by them to be true, and the facts found as testified to by the witnesses, the plaintiff is entitled to recover some damages. Of course, upon all the authorities, the defendant having pleaded his good faith and lack of actual malice in mitigation of damages, it is open to him to offer testimony of that character, as well as other competent and pertinent facts tending to mitigate the damage. Damages may be mitigated by showing the general bad character of plaintiff, by showing any circumstances which tends to disprove malice, but do not tend to prove the truth of the charge. In his valuable work on slander and libel, Mr. Newell has published the headnotes of a large number of cases which admirably illustrate how this rule of mitigation of damages has been applied, and what facts and circumstances have been admitted in evidence under it. In actions for libel juries have great latitude in the matter of damages. They may, and sometimes do, award nominal damages only, and then again substantial damages, and in some cases exemplary damages by way of punishment.

In such actions juries are authorized to give such exemplary (44) damages as the circumstances justify when the evidence shows that the publication (as expressed by the Supreme Court of the United States) "was the result of that reckless indifference to the rights of others which is equivalent to the intentional violation of them." (*R. R. v. Arms,* 91 U. S., 489), or "when the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations." *R. R. v. Quigley,* 21 How., 213.

New trial.

CLARK, C. J., concurring: The act of Congress, 18 June, 1888, ch. 394, sec. 2 (2 U. S. Compiled Statutes, sec. 3894, subsec. 5, p. 2661), provides that "All matter, otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which any . . . language of a . . . libelous or defamatory . . .

character, or calculated by the terms and manner, . . . and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, is hereby declared nonmailable matter; . . . and any person who shall knowingly deposit or cause to be deposited for mailing or delivery" any such matter "shall, for each and every offense, upon conviction thereof, be fined not more than $5,000 or imprisoned at hard labor not more than five years, or both, at the discretion of the court." It should seem too clear for argument that, when any act is made indictable and punishable by heavy penalties by the Federal Government, which has sole jurisdiction of any criminality attaching thereto, the defendant cannot be held privileged or *quasi* privileged to commit such act when sued in the State court. There is a copy of the Postal Laws in possession of every postmaster—more copies than of State laws.

This act of Congress is a part of the law of the land. No one who violates the criminal law can claim that he is privileged or *quasi* privileged to do so. The defendant's communication was not addressed to one charged with the public duty of investigating the charge. (45) Even if it had been, the defendant should have sent it, if through the mail, in a sealed envelope. Being made openly on a postal card, this was in violation of law, if libelous; and his only defense is to prove that it was true and, therefore, not libelous.

It is not unusual for a judge to file a concurring opinion giving his reasons, or additional reasons, for assenting to the opinion of the Court, but, of course, no other member of the Court is in any wise responsible for the views expressed in a concurring opinion.

CONNOR, J., concurring: For the reasons and upon the authorities cited in the opinion of *Mr. Justice Brown,* the court below was in error in holding that the communication was privileged. I cannot assent to the suggestion that the Federal statute referred to can be invoked to show malice. I am unable to perceive how, in this Court and in this action, the statute has any bearing upon or connection with the case or its merits. While, for the purpose of enforcing obedience to public statutes, the courts, of necessity, have always held that every person was presumed to know the law, I cannot think that such presumption can be invoked for any other purpose or in any other jurisdiction than that of the government in whose courts its statutes are being enforced. The presumption used as a basis for visiting pains and penalties is sufficiently harsh and works sufficient hardship when confined within its legitimate sphere. To fix upon a person, for an act being litigated in a State court, a malicious motive by reason of a presumption that he had actual knowledge of the existence and provisions of a Federal statute buried somewhere between the covers of one of three volumes of more than 1,300

pages each, is well calculated to make our jurisprudence a rock of offense and a pitfall of destruction to lawyers no less than laymen. I venture the suggestion that, except in the public and Federal court libraries, there are not twenty-five copies of the Revised Statutes in this State of two million souls. This statute is not invoked by (46) counsel, and it is no reflection on their learning to suppose that they did not know of its existence. Of course, when either the State or Federal Government, in its own courts, seek to enforce its statutes, the presumption has its full and conclusive force; but to "call them in aid" in other courts and in civil actions is not only dangerous to the rights of the citizen, but conducive to jurisdictional conflict between the courts in our dual system of government. State courts can neither construe nor enforce Federal statutes. Under proper limitations, and with wise administration, these agencies of proof, based upon long experience, are useful in the trial of causes; but, like "fictions" and other expedients, they should be resorted to only to aid in the ascertainment of truth and the administration of substantial justice. With the enlightened relaxation of the rules of evidence and the tendency of the courts to permit the jury to hear all relevant testimony, the necessity for resorting to presumption largely disappears. We should endeavor to so try causes that the very truth of the matter shall be established by evidence and not by arbitrary presumptions. If, as a matter of fact, this defendant, as is quite certain, knew nothing of the statute sought to be used to his undoing, how is it possible that the *animus* with which he wrote and sent the postal card can be affected by it? I am strongly inclined to think that, if it had been shown that the money which was stolen from the plaintiff, or any part of it, belonged to the public school fund of Yadkin County, the postal addressed to the superintendent of education of that county by defendant, the superintendent of Davie County, would have come within the principle of the authorities cited in the opinion as a privileged communication. I think that both defendant and Martin, the addressee, had such relation to the school fund of either county as made it their duty to protect it, and, in good faith, seek its recovery if stolen or lost. I cannot forbear saying that, in my opinion, a postmaster or mail carrier who reads a postal card is guilty of a (47) gross breach of duty. I do not assent to the suggestion that the contents of postal cards are not as sacred from officious interference as those of a letter. As the case goes back for a new trial, I forbear saying more.

WALKER, J., concurs in opinion of CONNOR, J.

J. W. STEWART v. CARY LUMBER COMPANY.

(Filed 20 November, 1907.)

1. Railroads—Tramroads as Railroads—Negligence.

A railroad operated for the purpose of conveying lumber, though not a carrier of passengers, falls within the ordinary acceptation of a railroad in a suit for personal injury caused by the negligence of the employees of the company in operating its trains.

2. Railroads—Negligence—Wanton Negligence—Malicious Act of Employee—Damages.

While, as a general rule, a master is not answerable in damages for the wanton and malicious act of his servants, when not done in the legitimate prosecution of the master's business, this immunity is not generally extended to railroads whose servants are intrusted with such unusual and extensive means for doing mischief. The defendant, a corporation operating a train for the purpose of conveying lumber, is liable for the actual damage sustained by plaintiff, caused by the employees on its train wantonly and unnecessarily blowing the engine whistle for the sole purpose of frightening plaintiff's mule, causing the mule to run away and injure plaintiff.

3. Same—Negligence—Wanton Negligence—Malicious Act of Employee—Damages—Exemplary Damages.

When an agent for a railroad company, going out of his line of duty or beyond the scope of his employment, and not in furtherance of his master's business, commits a pure tort on his own account, the master, whether an individual or corporation, cannot, nothing else appearing, be held to respond in exemplary damages. The plaintiff cannot recover exemplary damages of the defendant railroad company arising from an injury received in the running away of his mule, when it appears that the employees on defendant's engine, not acting within the scope of their employment, blew the engine whistle and made other noises for the sole purpose of frightening the mule, when it does not appear that the defendant received benefit therefrom or in any manner acquiesced in or ratified the act.

CLARK, C. J., and HOKE, J., concurring, in part; CONNOR and WALKER, JJ., dissenting, in part.

(48) APPEAL from *Peebles, J.*, at November Term, 1906, of HARNETT.

From judgment for plaintiff, defendant appealed.

The facts sufficiently appear in the opinion of the Court.

Stewart & Muse and Godwin & Townsend for plaintiff.

H. E. Norris, Godwin & Davis, and D. H. McLean for defendant.

BROWN, J. The plaintiff's evidence tends to prove that the defendant is operating a railroad for conveying lumber; that on 20 May, 1903, the engineer of one of its log trains, as he was passing near plaintiff, wantonly and unnecessarily blew the whistle of the engine on purpose to

frighten plaintiff's mule; that the whistle was blown violently and for some time, and for the sole purpose of frightening the mule; that this blowing did not take place at a crossing and was not done in furtherance of the defendant's business. The evidence tends to prove that the engineer blew the whistle for amusement and to "make the mule dance."

His Honor submitted these issues:

1. Did defendant's engineer, fireman, or servants unlawfully and wantonly halloo, make noise, and sound the whistle of the engine for the purpose of frightening the horses of the plaintiff, and was the plaintiff injured thereby? Answer: "Yes."

2. What damage, if any, is plaintiff entitled to recover? Answer: "One thousand dollars."

The defendant's counsel contend, through prayers for instruc- (49) tion, first, that it is not liable at all for the wanton tort of its engineer, not done in furtherance of its business and not in the discharge of his duty; second, that it is liable in any event, under the facts of this case, for actual damage only.

1. In considering the first proposition, I regard the defendant, although not a carrier of passengers, as a railroad, within the ordinary acceptation of that term. *Sawyer v. Lumber Co.*, 145 N. C., 24. I admit that the entire evidence shows that plaintiff's cause of action grows exclusively out of the wrongful and unnecessary act of the engineer, done wantonly for his own amusement. I fully agree that the rule obtains generally that a master is not answerable in damages for the wanton and malicious act of his servant when not done in the legitimate prosecution of the master's business, and that the evidence in this case presents a "positive affirmative tort, pure and simple," committed by the engineer without the master's knowledge, approval, or ratification.

If we had not held that lumber railroads of the kind operated by defendant are to be governed by the same rule in relation to the public and to employees as steam roads which are common carriers, I should sustain the contention of defendant in this case. *Hemphill v. Lumber Co.*, 141 N. C., 487; *Bird v. Leather Co.*, 143 N. C., 283. But this immunity from liability for tort referred to is not generally extended to railroads, whose servants are intrusted with such dangerous instrumentalities and have thereby such unusual and extensive means of doing mischief. This exception to the general rule seems to be established by most abundant authority and for the reason I have given.

In the well considered case of *Bittle v. R. R.*, 23 L. R. A., 282, the New Jersey Apellate Court says: "The rule obtains generally that a master is not answerable in damages for the wanton and malicious acts of his servant. Yet this immunity is not generally extended to railroad corporations, whose servants have such extensive means (50)

of doing mischief. Accordingly, it has been established that if their servants, while in charge of the company's engines and machinery and engaged about its business, negligently, wantonly, or willfully pervert such agencies, the company must respond in damages, and this is the principle deducible from the authorities upon this subject."

Mr. Jaggard expresses the principle as follows: "The master's duty to third persons may arise from ownership or custody of dangerous things, and it may extend to the conduct of the servant, though forbidden, and for the servant's private purpose and not for the master's benefit." Jaggard on Torts, sec. 88.

It is held by the Circuit Court of Appeals of the United States that the wanton and malicious use of the steam whistle of a locomotive by servants of the railroad company in charge of the locomotive, while in motion on a regular run, renders the company liable for damages on account of injuries caused thereby. *R. R. v. Serville,* 62 Fed., 730. The Supreme Court of Illinois held the railroad liable in a case where the engineer, while his locomotive was standing near a crossing at the instant a person was passing the track in front of his engine, *negligently or maliciously* caused the steam to escape, whereby the team was made to run off and injure plaintiff. *R. R. v. Harmon,* 47 Ill., 299. This view of the law by which railroads are excepted from the general rule is supported by an array of authority. *R. R. v. Harrison,* 47 Ill., 298; *R. R. v. Dickson,* 63 Ill., 151; *Ockridge v. R. R.,* 90 Ga., 233; *R. R. v. Triolett,* 54 Ark., 289; *Cobb v. R. R.,* 37 S. C., 194; *R. R. v. Starns,* 56 Tenn., 52; *Everett v. Receivers,* 121 N. C., 521; *Brendle v. R. R.,* 125 N. C., 474.

I think the form and wording of the first issue submitted in this case should make no difference whatever in considering the liability of the defendant for some damage. The case should be considered as if
(51) the usual issue as to whether plaintiff was injured by the negligence of defendant had been submitted. I agree with *Judge McCormick,* in *R. R. v. Scoville, supra,* that "We are in danger of refining too much when we attempt to distinguish between a negligent and a wanton or malicious use of the steam whistle of the locomotive engine in charge of the proper servants of the company."

This seems to be the view of this Court in *Foot v. R. R.,* 142 N. C., p. 52, where it is said: "The breach of duty can be, and frequently is, intentional and willful, and yet the act may be negligent." To same effect is *Hayes v. R. R.,* 141 N. C., 197. The wrongful act in this case, in its relation to the engineer, was a wanton tort; in relation to the master it was merely a breach of duty, growing out of the doctrine of negligence, for which motives of public policy require that the master should compensate the plaintiff for the injury sustained.

2. The defendant offered the following prayer, and excepted to the refusal of the court to give it:

"The plaintiff has offered no evidence tending to show that the defendant authorized or ratified the wrongful act of defendant's agents and servants, and the plaintiff is not entitled to recover any amount as exemplary, punitive, or vindictive damages."

I think the court erred in refusing the prayer and in instructing the jury that they might award punitive damages.

It seems to me that, under all the authorities governing the relation of master and servant, and the liability of the former for the tort of the latter, the defendant is not liable at all for the act of the engineer, except upon the one ground that I have stated. To hold it liable on any other ground is directly against our own recent utterance. *Sawyer v. R. R.,* 142 N. C., p. 5, and cases cited. This ground of liability, it appears to me, does not warrant the imposition of punitive damages in the absence of evidence tending to show either authorization, ratification, or negligence upon the part of its managers in select- (52) ing a reckless and improper engineer. How far a principal may be mulcted in punitive damages for the act of his agent is a question about which there is much contrariety and not a little confusion of authority; yet the defendant's contention, upon the facts of this case, appears to me to be supported by most abundant authority, is not in conflict with any of our own decisions, and is founded upon reason and justice. I admit that where the servants of a corporation engaged in carrying passengers are guilty of acts towards the injured party as a passenger which would subject the servants to exemplary damage, the great weight of authority holds the corporation liable to similar damages, without proof that it ratified or directed the wrongful acts. 3 Sutherland, sec. 950, where all the cases are collected. This is because the corporation can act only through its agents; and when it commits to them the safety and comfort of persons *in transitu* over its road, the authority of the corporation *pro hac vice* is vested in such agents, and "as to such passengers they are the corporation."

Upon this theory a railroad company may be held liable for punitive damages for the insults and rudeness of a conductor to a passenger. *Holmes v. R. R.,* 94 N. C., 318. I admit that where the agent of the company is acting within the scope of his duty and in furtherance of its business, the company may be held, under certain circumstances, liable for exemplary damages, even though the injured party is not a passenger. Thus, if the agent of the carrier maliciously uses unnecessary force in ejecting a trespasser, it may be a case for punitive damages. Thompson on Negligence (2d Ed.), sec. 3253. Upon this principle this Court allowed such damages against the company for the conduct of its brake-

man in ejecting a trespasser from a train with reckless and unwarranted violence. *Hayes v. R. R.*, 141 N. C., 199. In that case this Court said:

"It would seem, from the authorities, that where the brakeman is
(53) acting for the company and within the scope of his agency, the general principles of the law relating to exemplary or punitive damages apply to him as well as the conductor." It was the duty of the brakeman to eject trespassers, and in doing so he represented his master, who was held responsible to the same extent that his servant would be held if he acted maliciously and with unnecessary force. As I read the authorities, the master cannot be *punished* if the servant, in the language of *Lord Kenyon*, "quits sight of the object for which he is employed and, without having in view his master's orders, pursues that which his own malice suggests. He then no longer acts in pursuance of the authority given him." *McManus v. Crickett*, 1 East, 106.

Mr. Sedgwick declares that it is the better opinion that no recovery for exemplary damages can be had against the principal for the tort of the agent unless done under the *authority* of the principal, or he afterwards approved it, or was grossly negligent in hiring such a servant, or in not preventing him from committing the act. 1 Sedgwick on Damages, sec. 378, and cases cited.

The Encyclopædia, in discussing the liability of corporations for punitive damages, says: "A corporation is liable in exemplary damages for the tortious acts of its agents, if done *within the scope of their authority*, in all cases where natural persons, acting for themselves, guilty of like tortious acts, would be liable to such damages." 12 A. & E., 40.

Cyclopædia states, after discussing both sides of the question, that the better opinion is that a principal should not be held liable in exemplary damages unless it be shown that the agent acted within his authority, or that the principal approved the act, participated in it, or was guilty of negligence in selecting his servant. 13 Cyc., 114. In support of his text the author cites a great array of cases from many States of the Union.

Mr. Sutherland, in discussing exemplary damages, sums it up
(54) that, where the servant commits a tort in the exercise and scope of his agency, it is deemed, for purposes of compensation, his master's tort, and exemplary damages are allowable. But, says the author, "it is otherwise as to torts which the servant steps aside from or goes beyond his master's employment to commit." "The master is only to be held liable (in exemplary damages) for the act of his servant when the latter is within the scope of his employment."

It has been held by the Supreme Court of the United States and by some twenty or more State courts of last resort that neither a corporation nor an individual is liable for exemplary damages for the pure torts of employees, although committed while generally on duty, where the act

was without authority, not ratified, and diligence was exercised in selecting suitable agents. *Prentice v. R. R.*, 147 U. S., 106. See list of courts and cases so holding, cited in 13 Cyc., 117.

There is no judicial deliverance that I can find, from the original charge of *Chief Justice Pratt* (afterwards *Lord Camden*), quoted by *Justice Gray* in the *Prentice case, supra,* down to the present time, wherein exemplary damages were allowed or justified, other than as a punishment upon the offender. As they are never awarded by way of compensation, but only for punishment of the offender and as a warning to others, they can only be awarded against one who has actually or by legal construction participated in the offense. *Prentice v. R. R., supra.*

In discussing the facts in the opinion of the Court in the case of the *Amiable Nancy,* 3 Wheaton, 546, *Justice Story* pronounces the transaction a gross and wanton outrage. Nevertheless, in weighing the extent of the liability of the owners, he says: "They are innocent of the demerit of this transaction, having neither directed it nor countenanced it nor participated in it in the slightest degree. Under such circumstances we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they (55) are not bound to the extent of vindictive damages."

The rule in admirality as to exemplary damage is the same as in the common-law courts. *Boston Co. v. Fiske,* 2 Mason, 119-121.

Chief Justice Martin expresses the view of the Louisiana Court with much clearness: "It is true, juries sometimes very properly give what is called smart money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his agent." 8 La., 26.

"This rule has same application to corporations as individuals." *Prentice case, supra.* The true ground for holding the master liable in exemplary damages is stated very clearly by *Justice Field* for the Supreme Court of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is, perhaps, less when the principal is a person than when it is a corporation; still, the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but that, the act having been done for his benefit by his agent, acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages." *Lathrop v. Adams,* 133 Mass., 471.

I take it now to be generally accepted law that where the agent of a corporation commits a wanton and malicious tort when acting for the

master in the scope of the agency and in furtherance of his master's business, he acts "as and for" the corporation, and for the time being is the corporation, so that the criminal intent necessary to warrant the imposition of exemplary damages is thus brought home to the
(56) corporation. But where the agent, going out of the line of his duty, beyond the scope of his agency and not in furtherance of his master's business, commits a pure tort on his own account, the master, whether an individual or a corporation, is never to be held in exemplary damages. There may be cases where, as in this case and that of the *Amiable Nancy,* the master should award just compensation for all real injury sustained, but there are none that I can find where, under such circumstances, the master has been made to pay smart money in addition. If the evidence had disclosed that the engineer, in order to frighten plaintiff's mule, recklessly, wantonly, and unnecessarily blew his whistle when approaching a crossing, where it was his duty to blow, then his act would be constructively the corporation's act, and his malice and wantonness could be imputed to it. But it is admitted there is no such evidence or finding. The entire evidence shows that it was the pure tort of the servant, committed without the scope of his duty and not in furtherance of his master's business. While reasons of public policy may hold the master liable for compensatory damages solely upon the grounds stated heretofore in his opinion, there are no reasons of policy or justice for *punishing* the master for the malicious tort of his servant, which the master could not help, which was not done in the scope of the servant's duty, from which the master derived no benefit, which he did not ratify, and under circumstances when the servant could not be said in any sense to represent or act for him.

For the reasons given, I think there should be a new trial on the issue of damages.

CLARK, C. J., concurring, in part: I concur in the opinion of *Mr. Justice Brown* that, when the whistle is blown, either negligently or willfully, to frighten horses, the corporation is responsible for any damages resulting therefrom.

In *Dunn v. R. R.,* 124 N. C., 257, it is said, citing authorities: "'Although a railroad company is not liable, under ordinary cir-
(57) cumstances, for the fright of horses caused by the operation of its road in the usual manner, it is liable for frightening horses and causing injury by unnecessary and excessive whistling or letting off steam under such circumstances as to constitute *negligence or willfulness.*' 3 Elliott Railroads, sec. 1264. 'When a railway company is entitled by law to run its trains along a street, it is not liable for damages caused by the horses of a traveler taking fright at the *necessary* blowing off of steam from one of its locomotives; but if the steam is blown off

negligently it would be liable.' 2 Thomp. Neg., sec. 1910. 'Such noises as blowing whistles, sounding large bells, or letting off steam, made *without necessity,* when animals are near and likely to be frightened, and when ordinary care would have permitted or dictated a postponement of the noise until the animals were out of hearing, will sustain a verdict of negligence.' 2 Shearman and Redfield Neg., sec. 426."

This same case (*Dunn v. R. R.,* 124 N. C., 258) cites other authorities (for all the authorities are uniform to same effect), among them "the English case of *R. R. v. Fullarton,* 108 C. L. R., 54," in which the company was held liable where the engineer "blew off steam from the mud-cocks in front of his engine to frighten horses," citing, also, *R. R. v. Barnett,* 59 Pa. St., 263, where the engineer blew his whistle under a bridge while a traveler was passing over it, whereby his horse took fright, ran off and injured him, the company being held liable.

In *R. R. v. Dickson* (Illinois), 14 Am. Rep., 114, it is held: "If defendant's engineman wantonly and maliciously sounded the locomotive whistle so as to frighten the horses of the plaintiff, whereby he was injured, the company is liable."

In *Billman v. R. R.* (Indiana), 40 Am. Rep., 230, it is held: "If the engineer of a locomotive engine unnecessarily and wantonly sounds the whistle near a highway, and thus frightens a team of horses on the highway, causing it to run away and kill another horse, the company is liable." The Court calls attention to the fact that there was (58) "not merely passive negligence, but willful and wanton wrong."

In *Voak v. R. R.,* 75 N. Y., 320, cited by Wharton Neg., sec. 836, and approved in *Billman v. R. R., supra,* the following is stated to be the rule of law: "Where the whistle is negligently and wantonly sounded, so that the horses in the vicinity are caused to run off, and injury is inflicted, the company is liable."

In *R. R. v. Scoville* (Texas), 62 Fed., 730, it was held: "The wanton and malicious use of the steam whistle of a locomotive by servants of a railroad company in charge of the locomotive while it is in motion on a regular or authorized run is an act within the scope of their employment so far as to charge the company with liability for injury caused thereby."

In *Culp v. R. R.,* 17 Kan., 475, it is held that when the whistle or steam is let off carelessly, heedlessly, and without necessity, the company is liable for damages caused by a horse being frightened thereby and running off. The opinion is by *Brewer, C. J.,* now of the United States Supreme Court.

In *Bittle v. R. R.,* 55 N. J. L., 615, it is held that, even when approaching a crossing or a station where the whistle is required to be blown, if this is done "negligently, wantonly, or maliciously, the company is liable for any damage resulting." This case cites many others

(p. 623), among them: "If the whistle is blown in a spirit of wanton playfulness, the company is liable" (*R. R. v. Starnes,* 9 Heisk [Tenn.], 52); or, "if blown louder than necessary or with intent to frighten horses." *R. R. v. Dunn,* 52 Ill., 451; *Hill v. R. R.,* 55 Me., 438.

A railroad is liable for injury caused when a horse is frightened by the negligent or careless blowing of the whistle or escape of steam. *R. R. v. Bœttcher,* 131 Ind., 82. The whole subject of liability of a railroad for damages caused by willfully and wantonly blowing the
(59) whistle is reviewed and reaffirmed in *Alsever v. R. R.* (1902, Iowa), 56 L. R. A., 748, and previously in *R. R. v. Scoville,* 27 L. R. A., 179.

The cases to above effect are numerous and, it is believed, without any to the contrary. Among others in point, but not above cited, are *R. R. v. Harmon,* 47 Ill., 298; *R. R. v. Dickson,* 63 Ill., 151; *Hahn v. R. R.,* 51 Cal., 605; *Andrews v. R. R.,* 77 Iowa, 669; *Cobb v. R. R.,* 37 S. C., 194; *R. R. v. Starnes* (Tenn.), 24 Am. Rep., 296. In 3 Elliott Railroads, p. 1987, in note 3, many cases to above purport are collected, and also in 2 Thompson Neg., secs. 1909-1914 and notes, and notes to Wharton Neg., sec. 836.

The text-books are all to same effect. Besides those already cited, Wood Master and Servant, 539; Cooley Torts, 536; 12 A. & E. (2 Ed.), 31, 40; Wharton Neg., 107, which is cited and approved on this very point; *Myers v. R. R.,* 87 N. C., 350.

I believe no case has been found holding that a railroad is not responsible for damages caused by negligently or willfully and wantonly blowing the whistle, though there are some ancient cases, especially in England, and possibly a few later ones, where the master was held not liable for willful or wanton acts of employees. But Cooley Torts, sec. 536, shows that this reasoning does not now apply to railroads, if it ever did. It would be too unreasonable, for they exercise a public employment, and the public is entitled to protection from the willful, wanton, arrogant, or arbitrary conduct of railroad employees, especially when frightening horses along the public road. The employee cannot be identified, and if he were, he usually could not respond in damages. It is the defendant's engine which makes the noise, and the defendant, having put the engineer in charge of it, is responsible, whether he runs the engine willfully over a man or willfully frightens a horse with the whistle. The principle is the same.

(60) It cannot be logically maintained that, while a railroad is responsible for injuries caused by the negligent acts of the servants, there is no such responsibility if the servant acts willfully and wantonly. Besides the above authorities to the contrary, our own cases are all to the same effect.

In *Cook v. R. R.*, 128 N. C., 333, the flagman and brakeman threw rocks at a tramp stealing a ride under a car, making him get off and causing him to be injured. The Court held the company responsible, citing *Pierce v. R. R.*, 124 N. C., 84. Yet there the brakeman and flagman were not employed to throw rocks, and the tramp was a trespasser. Here the plaintiff was not a tramp, but a peaceable traveler on the public road, where he had a right to be, and blowing the whistle was one of the duties in the scope of the engineer's employment. In *Everett v. Receivers*, 121 N. C., 521, where the facts were almost identical with those in this case, the court charged: "If the engineer wantonly and maliciously made unnecessary noise for the purpose of scaring the horses, and thereby the injury was brought about in the loss of the horses, the defendant would be liable." On the defendant's appeal, the Court affirmed the judgment. On rehearing (122 N. C., 1010), this ruling was adhered to.

In *Brendle v. R. R.*, 125 N. C., 474, which was an action on the same facts for injury to the driver, the Court held that the defendant was "responsible for the willful and wanton injury occasioned by its employees while on duty in its service."

In *Hussey v. R. R.*, 98 N. C., 34, the defendant was held liable for the wanton and willful misconduct of its servant, though the act was *ultra vires*, the Court saying: "It is no defense to legal proceedings in torts that the torts are *ultra vires*. *Gruber v. R. R.*, 92 N. C., 1; *R. R. v. Quigley*, 21 How., 202."

In *White v. R. R.*, 115 N. C., 636, the Court said: "It is contended, also, that there is a distinction between the liability of the master for negligence and that for a willful wrong committed by the servant," and proceeded to show that this contention was un- (61) founded.

In *Waters v. Lumber Co.*, 115 N. C., 652, the Court (*Avery, J.*) says that the principal (defendant company) was "liable for any trespass committed in the course of his employment or the scope of his agency by the person acting for him, to the same extent that he would have been answerable had the wrong been done by him in his own proper person." This, in the case of a corporation, which has no "proper person," means, of course, as fully as if specifically directed to do the wrong by resolution of the governing board. Here the blowing of the whistle was an act both in the course of the engineer's employment and in the scope of his agency. No one else was employed or authorized to blow it. In a recent and unanimous opinion, *Foot v. R. R.*, 142 N. C., 52, the defendant was held liable for the willful and wanton misconduct of its employee, citing *Brendle v. R. R.*, 125 N. C., 474.

It is contended that a railroad is only liable for the acts which the servant is employed to do. When an engineer runs over a man or an animal on the track, which, with due care, he ought to have seen, is he employed by the company to do the act? Certainly the engineer is in the course of his employment in running the engine, and so was the engineer in this case when he willfully and wantonly blew the whistle to frighten the plaintiff's horses. Would the company be absolved from the responsibility because the engineer willfully and wantonly ran over a man or an animal on the track, instead of negligently? Of course, not. 3 Elliott Railroads, p. 1969, and cases cited in note 3. Is the company less responsible because the engineer, in running his engine, uses its steam to injure a peaceable traveler at a distance by sounding his whistle to frighten his horses, instead of using it to willfully crunch and grind the body of a man or an animal on the track? The en-
(62) gineer was not "employed to do" either act, but he did both alike "in the course of his employment."

A locomotive engine is a dangerous, indeed, a deadly, instrumentality. The whistle is a part of the engine. It is dangerous if negligently or improperly used. These engines, crossing public roads and running along them, would be *per se* nuisances, and the use of their whistles, too, but for the overwhelming public necessity. The right to use locomotives whether on lumber roads or on railroads, is permissible only on condition that competent and careful men are put in charge of them, and that they are not used to the public detriment. If so used, whether negligently or willfully, the company is responsible. What is more calculated than a locomotive whistle to frighten brute or beast? Not the roar of lion, not the horn of Roland at Roncesvalles,

"On Fontarabian echoes borne,"

could shake the nerves and "set the echoes flying" like the shrill shriek of this demon imprisoned in the energies of steam.

The whistle should be blown to give notice and save from danger, not to cause danger. If the whistle is not blown at a public crossing, and one is run over, the company is responsible. *Willis v. R. R.*, 122 N. C., 910; *Norton v. R. R.*, 122 N. C., p. 935, and cases cited. If the engineer, seeing that a rider's horse is frightened, blows the whistle unnecessarily in too shrill a manner, this would be negligence, if it causes any injury which, by due care, could be avoided. For a stronger reason, the company is responsible when the whistle is purposely blown to frighten a horse and causes him to run and injure his driver. *Bittle v. R. R.*, 55 N. J. L., 615. If by a sudden draft the engineer negligently throws out

sparks which set out fire, the company is responsible. If the engineer purposely turns on the sudden draft in order to set out fire, is it possible that the company is less responsible?

The defendant was allowed to use this dangerous and deadly (63) instrument, running it across and along public roads, but subordinate to the rights of the public. It put this engineer in charge. It is responsible for his conduct in discharging that duty when it causes injury to others, whether that misconduct was omission or commission, whether it was willful and wanton or merely negligent. We cannot divide the engine up and say that the company is responsible for misconduct of the engineer in running over people or in setting out fires, but not for his use of the whistle. The company was held responsible for not blowing the whistle, whereby (in *Randall v. R. R.,* 104 N. C., 410) the plaintiff's oxen along the county road (not at a crossing) were not turned out and were frightened and killed. The more is the defendant liable here, when its agent blew the whistle purposely to frighten the plaintiff's horse.

In *Fulp v. R. R.,* 120 N. C., 525, the company was held liable for killing one on the track, though not at the crossing, because by not blowing the whistle at a crossing he had no notice to get off the track. The cases where the company has been held responsible for the engineer's failure to blow the whistle are numerous, not only at crossings, but along the track, when its use would give people or animals notice. Can we divide up his duty as to the whistle and say that the company is responsible if he negligently or willfully fails to blow the whistle (*Wilson v. R. R.,* 90 N. C., 69), but not if he negligently or willfully does blow it? He is not employed negligently "not to blow it"—if that is the test—any more than he is employed to wrongfully blow it.

There is no analogy between the use of the deadly instrumentality of a locomotive engine and the misuse of its dangerous whistle and a farmer sending his wagon to town with a driver and his whip. Not only are the wagon and whip not dangerous or alarming *per se,* but the wagoner knows he can be promptly identified and arrested, and no public policy requires the liability of his master to enforce the (64) wagoner's regard for the rights of others.

In *Pierce v. R. R.,* 124 N. C., 94, the point was fully discussed and decided by a unanimous Court, after citation of numerous authorities. It is there said: "The assumption in these prayers that the defendant is not liable if the plaintiff's intestate was killed by the wanton and malicious act of one of the employees of the defendant, and especially if such act was not done in furtherance of the business of the defendant, cannot be sustained. The *true test is, Was it done by such employee in the scope of the discharge of duties assigned him by the defendant and*

while in the discharge of such duties? 'In furtherance of the business of the employer' means simply in the discharge of the duties of the employment, and the court below properly told the jury that the defendant is responsible for the injury if caused by the wrongful act of the employee while acting in the scope of his employment. In *Ramsden v. R. R.,* 104 Mass., p. 120, *Gray, J.* (now of the United States Supreme Court), says: 'If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent (*Howe v. Newmarsh,* 22 Allen, 49), or even if contrary to an express order of the master. *R. R. v. Darby,* 14 Cushing, 468.'" After stating above, this Court further proceeded to say (p. 95): "The rule is thus laid down (2 Wood Railways, sec. 316, p. 1404, 2 Ed.): 'Where the act is within the scope of the servant's authority, express or implied, it is immaterial whether the injury resulted from his negligence or from his willfulness and wantonness; nor is it necessary that the master should have known that the act was to be done. It is enough if it is within the scope of the servant's authority.'" The Court, after approving the above quotation, followed with many more authorities to the like purport, and this case (*Pierce v. R. R.*) has been since often quoted with approval on this point, among the
(65) instances, *Cook v. R. R.,* 128 N. C., 333; *Lewis v. R. R.,* 132 N. C., 387. In the last case three of the present Court concurred.

Rounds v. R. R., 64 N. Y., 129, held: "To make the master liable it is not necessary to show that it expressly authorized the particular act; it is sufficient to show that the servant was acting at the time in the general scope of his authority, and this although he departed from his instructions, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury." To same purport, *Carter v. R. R.,* 98 Ind., 552; *Lovett v. R. R.,* 91 Mass., 557.

In Clark on Corporations, sec. 208, the authorities are thus clearly summed up: "A corporation is liable for acts done by its officer or agent, apparently in the course of his employment and within the scope of his general authority, though the particular act is unauthorized." This must necessarily be so if corporations are liable for torts of their servants at all, for it is very rarely that servants are "employed to do those acts." Even if it were true that the company is responsible for such torts only when it fails in selecting careful and prudent men, the evidence shows that it did not select careful and prudent agents in selecting this engineer and his crew.

There are circumstances under which it has been held that the corporation would not be liable for mere negligence, but only if the act of its servants was willful or wanton or reckless. *Moore v. Electric Co.,* 136

N. C., 554. But this is the first time it has been contended in this Court that, though the defendant would have been liable if the engineer had negligently frightened plaintiff's horse in the road by blowing the whistle (*Wilson v. R. R.*, 90 N. C., 69), it is not liable if he purposely blows the whistle.

As to this suggested distinction, 2 Sutherland Damages, sec. 410, quotes with approval *Chief Justice Ryan,* in *Craker v. R. R.*, 36 Wis., 673: "It is contended that, though the principal would be liable for negligent failure of the agent to fulfill the principal's contract, the principal is not liable for the malicious breach by the agent. (66) As we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable."

We have not cited any of the numerous cases in this Court where the corporation has been held liable for the wanton and willful misconduct of its employees to passengers, if done in the scope of their employment. The above cited cases are all where the willful and wanton injury was done to others. But it is not perceived why there should be any distinction. If the test is, as contended by defendant, "Was the servant employed to do the act?" it is certain that the railroad agent was not employed to kill the ex-passenger, in *Daniel v. R. R.*, 117 N. C., 592, nor was the conductor employed to kiss the female passenger, in *Strother v. R. R.*, 123 N. C., 197. If the corporation is liable at all for the willful and wanton misconduct of its employees, done in the course of their employment and in the scope of their agency, it cannot affect the liability therefor, whether such misconduct is perpetrated on passengers or the public. As a corporation acts only through agents, it is responsible for the willful and wanton act of an employee in the scope of his agency and in the course of his employment, as fully as if the act were done by its president or other officer, or by their order.

The next proposition is also well settled by the decisions of this Court, that where the tort is committed, as here, willfully and wantonly, the corporation is liable for exemplary damages. I fully concur in the able and well considered dissent of *Brother Hoke* on this point. In *Redditt v. Mfg. Co.*, 124 N. C., 100, it is held that, "When liability is established, and the circumstances are aggravating or malicious, the company is subject to punitive damages on the same principles that natural persons are." The liability of corporations in exemplary damages for the wanton or malicious conduct of its employees has been (67) again and too recently held by a unanimous Court, with citation of authorities, to be so soon questioned. *Hutchinson v. R. R.*, 140 N. C., 127.

In 1 Cook Stockholders, sec. 150, p. 69, it is said that, while there are some cases to the contrary, the better rule is that if injury "has resulted through the willful misconduct of employees, or through such reckless indifference to the rights of others as amounts to an intentional violation of them, punitive or exemplary damages may be awarded," citing numerous cases, among them *R. R. v. Harris,* 122 U. S., 610; *R. R. v. Crews,* 91 U. S., 493.

In 2 Sutherland Damages, sec. 410, it is said, quoting with approval from *Henson v. R. R.,* 62 Me., 84: "Since these ideal existences can neither be hung, imprisoned, whipped, nor put in the stocks—since, in fact, no corrective influence can be brought to bear upon them except that of pecuniary loss—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants will for a moment reflect upon the absurdity of their own thoughts, this anxiety will be cured. Careful engineers can be selected, who will not run their trains into open draws; and careful baggagemen can be secured, who will not handle and smash trunks and bandboxes, as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences called corporations, and that is the pocket of the moneyed power that is concealed behind them, and if that is
(68) reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents or reckless and insolent servants, better men will take their places, and not before."

In the next section (411) *Judge Sutherland* gives a long list of States and decisions establishing "the views of the liability of corporations to punitory damages" for the misconduct of employees.

In Clark on Corporations, sec. 69, p. 197, it is said, citing authorities: "A corporation may not only be held liable for actual damages resulting from a malicious wrong, but it may also, by the weight of authority, be held liable for exemplary damages, where, under similar circumstances, a natural person would be held so liable. A corporation is liable for the acts of its servants and agents, including their wrongful acts, on the same principles."

In *Jackson v. Tel. Co.,* 139 N. C., 347, it was held that the master must answer for the servant's wrongful act; "if committed in the course

and scope of the servant's employment," and that he is in the course of his employment "when he is engaged in that which he is employed to do, and is at the time about his master's business," citing numerous authorities. And that case also holds that, where the act was wantonly done, the plaintiff can recover exemplary damages, citing *R. R. v. Prentiss,* 147 U. S., 106; *R. R. v. Arms,* 91 U. S., 489; *Hansley v. R. R.,* 117 N. C., 565. To same effect, *Foot v. R. R.,* 142 N. C., 52; *Hutchinson v. R. R.,* 140 N. C., 127.

In *Daniel v. R. R.,* 136 N. C., 527, *Walker, J.,* says: "If the servant, instead of doing that which he is employed to do, does something else which he is not employed to do at all, the master cannot be said to do it by his servant, and, therefore, is not responsible for what he does. It must be something done in attempting to do what the master has employed the servant to do. Nor does the question of liability depend on the quality of the act, but rather upon the other ques- (69) tion, whether it has been performed in the line of duty and within the scope of the authority conferred by the master." Here the servant was doing what he was employed to do—running this engine—and was not doing "something else which he was not employed to do at all." In discharging that work, and "incident to the furtherance of the duties intrusted to him by the master" (*Roberts v. R. R.,* 143 N. C., 176), it was for him to blow the whistle. If he negligently blew it, or failed to blow it, and caused injury, the master is liable, and equally so if the misconduct in blowing or failing to blow the whistle was wantonly done, as here, and was not merely negligent. That it was an act of commission, not of omission, does not relieve the master who put the engine in the servant's charge, for the wanton act was done in operating the engine and in the course of the employment.

Whenever the facts are such that the rule of *respondeat superior* will make the master responsible in damages for the servant's negligence, it will make the master responsible for exemplary damages if there was wantonness, insult, or oppression, as where the train ran by a station without stopping to take on a passenger (*Walker, J., Williams v. R. R.,* at last term, 144 N. C., 503, and cases there cited; *Thomas v. R. R.,* 122 N. C., 1005; *Hansley v. R. R.,* 117 N. C., 565; *Purcell v. R. R.,* 108 N. C., 414; *R. R. v. Arms,* 91 U. S., 489; 2 Sutherland Dam., sec. 937), or where a passenger is wrongfully put off the train under circumstances showing indifference to consequences, or rudeness (*Rose v. R. R.,* 106 N. C., 168), or false imprisonment (*Lovick v. R. R.,* 129 N. C., 437), and similar cases. If the corporation here was liable for damages for injury caused by the negligence of the engineer, the judge was right in charging that, if the engineer's conduct was wanton and willful, the

master was liable for exemplary damages. This is already so held. *Purcell v. R. R.*, 108 N. C., 418.

(70) The rule is thus stated in both the Encyclopædias, with copious citation of authorities: The master is "liable in exemplary damages for any act of his agent or servant committed in the course of or in connection with his duties or employment; and this irrespective of whether the particular act has or has not been expressly authorized or subsequently ratified by the principal or master. If the tortious act of the agent or servant, when committed in the business of his principal or master, is such as would have subjected the agent to exemplary damages had he been sued as principal, the principal will be responsible for like damages when sued for the misconduct of the agent; or, as it has been otherwise expressed, the principal or master is in such cases liable precisely as if he were the original wrongdoer." 12 A. & E. (2 Ed.), 32, 33. The employment of the agent "afforded him the means and opportunity which he used while so employed in committing the willful wrong. The agent's conduct, therefore, is attributable to the principal, though he may not have specially authorized the particular act or afterwards ratified it." *Ib.*, 33. "The general rule is that these artificial bodies are liable in the same manner and to the same extent that . . . natural persons, acting for themselves, guilty of like tortious acts, would be liable to such damages. In some cases the rule of punitive damages has been held especially applicable and salutary in its operations as affecting corporations." *Ib.*, 40, 41.

"The better rule seems to be that, where a wrong is committed in the ordinary course of the servant's duty, and is committed willfully, the corporation can be held liable as in ordinary cases of tort. Since a corporation can only act through its agents or servants, a stricter rule has sometimes been applied than in cases of individual liability, and they have been held liable in exemplary damages, although there was no previous authorization of the wrong nor subsequent ratification of it." 13 Cyc., 117.

(71) The great majority of the vast army of men engaged in running locomotives and trains for common carriers or for lumber companies and street railways are good men, but necessarily there are always some who are not. It is to the interest of the good men thus employed, and an absolute necessity to the public, that there shall be some rigid restraint to prevent injury, insolence, and arrogance towards the public being perpetrated by those who "have no fear but of human law." With the almost insuperable difficulty of identifying men engaged on moving trains, the only possible regulation is by their officers, who can readily hunt the guilty out. This protection cannot be secured unless the corporations themselves are liable, as heretofore, in punitive dam-

ages for willful and wanton wrongs inflicted upon the public, as well as on passengers, by any employee of such corporations, "when on duty" or, as our decisions say, "in the course of their employment."

In so vast a number of decisions as has been poured out by the numerous courts of this country and in England, some can be found, by a little diligence, on either side of almost any question. There are, it is true, some few decisions in a few courts contrary to those above cited. These are almost solely those whose views on this question were expressed at an early day, before this matter was thoroughly discussed (see 1 Cooley Torts, p. 199) and before the absolute necessity was fully comprehended of protecting the public against insult and wrong from irresponsible employees, who could not be identified, and before it was fully seen that the only possible way to insure this protection to the public is by punitive damages against the corporation, to be assessed by juries, who, in fixing the amount, will consider the greater or less care shown by the corporation in selecting their servants and in supervising their conduct. There may, indeed, be a few courts whose expressions on this subject should be entitled to small weight for other reasons. We cannot particularize and weigh each case. These decisions of our own Court should rather be followed, and not be lightly set aside for (72) those of any other court, when our own decisions have been uniform and are based on sound reasons and the absolute necessity of giving adequate protection to the public, and, besides, are supported by the great weight of authority elsewhere, as above shown.

The facts as found by the jury on the conflict of evidence present an aggravated case of wanton wrong. An old man, accompanied by two lady relatives, peacefully traveling along the public road, at a place where he could not turn out, has his horses wantonly frightened by those in operation of the defendant's engine and cars, that they may have the pleasure of seeing his horses "jump about" and enjoy his terror and fright. It is peculiarly a case permitting exemplary damages—if the jury should think proper—that the people living in the country may know that they can travel along their public highways without fear of exposing their lives and limbs to such wantonness.

If a corporation is liable for injuries caused to travelers along the public road by the negligence of its servants, but exempt if their acts are willful and wanton, it can always escape liability by thus aggravating the nature of the wrong inflicted. The misconduct of the engineer and other employees was wanton and willful and committed "while on duty, in the course of their employment and in the scope of their agency" in operating the defendant's engine and train of cars. There was no evidence of contributory negligence, and that phase of the case is immaterial to be considered.

It is true that this is not a public-service corporation, but the same principle against wanton frightening of the plaintiff's horses would apply if the wrongdoer had been operating a railroad locomotive or was the chauffeur of an automobile. The public is entitled to use its public roads with its horses without fear of such wanton wrongs being inflicted upon it in the use of the superior power of steam, and that willful wrongdoers shall be restrained by the fear of exemplary damages against themselves or their master for such misconduct.

(73) HOKE, J., concurring, in part: I differ from the Court in its decision on the question of damages, and am of the opinion that no error appears affecting the determination of either of the issues submitted, and that the judgment on the verdict should be affirmed as rendered.

The evidence of plaintiff tends to show that he was driving in a buggy along a public highway which ran parallel to defendant's tramroad at a point where there was 30 feet space between the railroad and a fence, which also ran parallel to both roads, and where he was not able to get out of the way with the vehicle after seeing defendant's engine and cars approaching; that plaintiff's sister and niece were just behind him, in another buggy, and when the train came in sight they all got out, and plaintiff led the horse drawing the rear buggy up by his own, and was holding both animals at their heads; that when the engine and cars came within 75 yards of plaintiff, and where he was in full view, the engineer, or an employee on the engine, commenced blowing short, sharp, piercing blows with the engine whistle, and the hands commenced to halloo and cry out at plaintiff, and continued this conduct until the train was 75 yards beyond plaintiff, causing his horses to take fright and, by their action, do him severe bodily injuries.

The plaintiff charges that this conduct was done unnecessarily and wantonly and with intent to frighten the horses, and that, in consequence of the shrieks and piercing sounds from the engine, and the shouts, yells, etc., of the crew, the horses did become badly frightened, demoralized, and unmanageable, causing the serious injuries, as stated.

The sister and niece of plaintiff gave substantially the same testimony. There was also evidence to the effect that Troy Monds, the engineer, was heard to say that he blew the whistle "to see the horses jump about." There was evidence on the part of defendant denying these allegations and affirming that the whistle was only sounded as required by the rules of the company as the train approached a
(74) crossing at or near this place, and that no whistle was blown to frighten any one's stock.

The issues submitted were as follows:

"1. Did defendant's engineer, fireman, or servants unlawfully and wantonly halloo, make noises, and sound the whistle of the engine for the purpose of frightening the horses of the plaintiff, and was the plaintiff injured thereby?" Answer: "Yes."

"2. What damage, if any, is plaintiff entitled to recover?" Answer: "One thousand dollars."

Under the charge the jury answered the first issue "Yes" and the second issue "One thousand dollars."

It is assigned for error in the determination of the first issue, "That, on the facts presented, the judge below should have held that the defendant was not liable."

These facts tend to show that plaintiff was on the public highway, where he had a right to be, and doing all he could to shield himself, and has suffered a grievous injury from the employees of defendant company while operating its engine and train in the course of the company's business; and if the position of defendant can be maintained, plaintiff is left without any means of substantial redress, for we know that, as a rule, the employees individually are not pecuniarily responsible. A decision which works this untoward result calls for most careful scrutiny, and, to my mind, is based neither upon right reason nor well considered authority. As I understand it, the contention proceeds upon the theory (1) that by his allegation and testimony the plaintiff is confined to a recovery for a willful and malicious tort; (2) that on the entire evidence no case for such a recovery is made out. I do not think that either position should prevail. Treating them in reverse order, there is no need to combat the proposition urged upon our attention with such fullness of learning, that to hold a corporation or other employer responsible for the malicious torts of its agents or employees, the (75) wrong must, as a general rule, be one committed by authority of the employer, either expressly conferred or fairly implied from the nature of the employment or the duties incident to it.

This was announced as correct doctrine by this Court in *Sawyer v. R. R.*, 142 N. C., 1, but with this important and essential modification, "that the test suggested applies only when the question of fixing responsibility depends exclusive on the relationship of master and servant," and does not apply when the wrong complained of is a violation of some duty which the master owes directly to the injured person. Nor is there any question made of the principle so well announced and sustained in *Jackson v. Tel. Co.*, 139 N. C., 347, "That authority for the wrong on the part of an employee will be implied and responsibility imputed when the wrong is done in the scope and course of the servant's employment." And further: "That a servant is acting in the course of his employment when he is engaged in that which he was employed to do, and is at the

time about his master's business. He is not acting in the course of his employment when he is engaged in some pursuit of his own." Mr. Jaggard, in his work on torts, suggests that the term "course of employment" is the better term in these cases, as both most accurate and comprehensive.

It may be that, under the principles maintained in both of these cases, responsibility for the wrong could well be imputed here to the defendant company, because done in the course of its employment; for, as said in Tiffany on Agency, p. 270, quoted with approval in *Jackson v. Tel. Co., supra,* "A servant is acting in the course of his employment when he is engaged in that which he was employed to do, and is at the time about his master's business." But he is not acting in the course of his employment if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility; but if
(76) there is a total departure from the course of the master's business the master is no longer responsible for the servant's conduct.

But there is an additional principle present in the case we are now considering, which is, to my mind, controlling, and which the argument on the part of the defendant seems to entirely ignore, and that is, when the master or employer owns and operates in his business dangerous instrumentalities, and authorizes their use in places where harm to others is likely to arise, unless a very high degree of care is shown, the employer in such case must be held to responsibility for injuries wrongfully caused by such agencies while engaged in his work, whether the injury was brought about by the negligent or intentional misconduct of his employees. Whether this occasion for responsibility should be referred to a breach of an independent duty owing direct from the owner to the injured party, being the limitation on the general doctrine we are considering, suggested in *Sawyer's case, supra,* or whether it arises because, the danger being great, public policy requires that the corporation and employer shall be held to insure this careful handling, so far as the general public is concerned—which seems to me only a different way of stating the same doctrine—the principle is well grounded in reason and is fully sustained by authority.

It is stated by Mr. Jaggard, in his work on torts, as follows:

"SEC. 86. The master is liable for the conduct of his servant, within the course of his employment, not only (*a*) where responsibility would attach under the test of scope of his employment, but also (*b*) where the conduct is not intended to be for the master's benefit, but for the servant's malicious, capricious, or other private purpose, and (*c*) whenever a duty rests on the master to avoid doing harm to the third persons and the servant violates that duty in the course of his employment.

"SEC. 87. The duty owed by the master to third persons may (77) arise from contractual or conventional relationship of the master to the person seeking to charge him for his servant's wrong, especially where the master's premises, instrumentalities, and facilities of business made the harm possible, or where the master will be held estopped to deny liability.

"SEC. 88. The master's duty to third persons may arise from ownership or custody of dangerous things, and it may extend to (*a*) the conduct of the servant, though forbidden, and for the servant's private purpose and not for the master's benefit."

Pursuing his last statement, the author says: "When the master owns, uses, or controls such instrumentalities, he is bound to perform that duty, and he cannot escape it by the exercise of care in the selection of his servants. Therefore, the master was held liable for the forbidden act of his employees, who frightened horses by blowing steam from an engine of which they had full charge." And the statement of the doctrine is supported by a large number of well-considered decisions in this and other jurisdictions. *R. R. v. Scovell,* 62 Fed., 730; *R. R. v. Harrison,* 47 Ill., 298; *R. R. v. Dickson,* 63 Ill., 151; *Ackridge v. R. R.,* 90 Ga., 232; *R. R. v. Triplett,* 54 Ark., 289; *Bittle v. Camden,* 55 N. J. Law, 615; *Cobb v. R. R.,* 37 S. C., 194; *R. R. v. Starnes,* 56 Tenn., 52. And recovery on this principle has been sustained in direct decisions of our own Court, in *Everett v. Receivers,* 121 N. C., 519; *Brendle v. R. R.,* 125 N. C., 474; *Foot v. R. R.,* 142 N. C., 52. This last case is in all of its essential features like the one before us, except in that case the implement was a hand car operated on the defendant's road—a difference which makes in favor of the present recovery, if any weight is to be attached to it.

In *Foot's case* the evidence is not set out in full, but an examination of the record shows that the plaintiff was in a buggy, driving on a highway, and was injured by his horses running away, which was caused by loud cries and noises made by defendant's employees while operating a hand car of the company, with the intent to frighten the (78) horses. A recovery was sustained.

In *Bittle v. Camden, supra,* cited in 9 Am. Corp. and Ry. Cases, 472, because, no doubt, considered especially instructive, the plaintiff had been nonsuited by the lower court and the nonsuit was set aside and a *venire de novo* awarded, and the case is very similar to the one we are considering. There the plaintiff was holding his horse on a highway which ran parallel to defendant's road, and the horse was frightened by blowing the whistle of the engine. It was claimed by plaintiff that this blowing was an unnecessary, wrongful, and willful act on the part of the engineer. The evidence on the part of the plaintiff as to blowing

the whistle was as follows: "I did not think of him blowing the whistle there, because he was just beyond the crossing when he blew the whistle, and he was looking, with his head out of the cab window, and saw me, and he was smiling, and he just reached up and pulled the whistle, as I call it, wide open, and the instant he did that the horse jumped. As soon as he saw me he reached right up and pulled the whistle." The witness never heard a shriller whistle in his life; it was a great deal louder than usual, and was so blown for 200 yards; that it did not blow until it was beyond the crossing, opposite the point where the plaintiff was, with a horse and wagon, and the whistle has never been since blown at that point; and at the time it was so blown in this manner there was nothing on the track ahead to provoke such a whistle. It was held that, on the plaintiff's claim, he had a cause of action to be presented to a jury, and in laying down the principle the Court said: "The rule obtains generally that a master is not responsible in damages for the wanton and malicious acts of his servant, yet this immunity is not generally extended to railroad corporations whose servants are intrusted with such extensive means to do mischief. Accordingly, it has been established that, if such servants, while in charge of the com-
(79) pany's engines and machinery and engaged about its business, negligently, wantonly, and willfully perverted such agencies, the company was responsible in damages; and this is the principle deducible from the authorities upon this subject."

In *R. R. v. Dickson, supra,* it is held that, "Where the servants of a railway company, while in the discharge of their duties, pervert the appliances of the company to wanton and malicious purposes, to the injury of others, the company is liable for such injuries."

In *R. R. v. Harrison, supra,* the Court, in upholding the principle, not inaptly said: "The life and property of individuals cannot be lightly or wantonly placed in jeopardy. If that might be done, then these great instruments of prosperity and agents in the development of the resources of the country and promoters of its commerce, instead of a blessing, would become a nuisance, if not a curse, to our citizens. If the lives of men and their property must be endangered in the pursuit of their ordinary and legitimate business while lawfully passing over our public highways, and no person can be held responsible, then it has become an injury instead of a blessing that they were constructed." Again, "The appellee had the undoubted right to travel this public highway, and the appellants had no right, by their agents, to unnecessarily hinder him or his property while thus exercising his right. Both parties have the right to pass and repass over the roads in the modes adapted to their construction, and each is under equal and reciprocal obligation to observe the rights of the other; and neither can willfully, wantonly, or

negligently endanger, obstruct, or delay the other in the enjoyment of his rights, without incurring liability for the injury, and each party, in the exercise of his rights, must observe the highest degree of prudence, circumspection, and skill to avoid the infliction of injury." And further, "It can make no difference whether the escape of steam was negligently permitted or willfully done by the engineer, any more than if he had willfully run his engine against the appellee's wagon (80) and team and thus produced the injury. The question whether it was negligently or intentionally done can, we think, make no difference in the result."

These authorities, and the principle on which they rest, are, in my opinion, decisive of the question, and show that, on the facts disclosed, the defendant is responsible for the misconduct of its employees while operating the engine, whether the demand be asserted as for malicious or negligent tort. And it is ignoring this important and wholesome principle of imputed authority that the error of defendant's position consists (6). It is in this respect entirely unlike the case of an owner sending his wagon to town by a driver, as suggested in (7); and the further suggestion that the engine whistle is no part of its neccessary or operating machinery is not a pertinent or permissible view of the question. The engine may be dangerous to persons on the train by reason of its operating machinery, but to persons on the highways the engine and its sounds are the chiefest elements of danger. The whistle is put on the engine for the purpose of warning, and is desirable chiefly by reason of the startling sounds it may make; and where the injury has occurred to one on a highway, to suggest that the whistle is no part of the structural or operating part of the engine's machinery, and to make deductions from it prejudicial to the plaintiff, is to assume out of the case the controlling and certainly the most important element.

In nearly every authority cited and relied upon as upholding a contrary view—certainly (8) in those I have examined—it will be found either that the implement used was not one that essentially imported danger to outsiders, or the act complained of was not done while operating or using the instruments in the course of the employee's business. Thus, in *Smith v. R. R.*, 73 Hun., 524, the "torpedo case," the agent was acting entirely outside of the course of employment; (81) and so in similar cases suggested and relied on by counsel, as if an engineer should shoot another from the cab, or intentionally strike another with a piece of coal or wood. None of these acts are within the course of employment. They could be likened to *Roberts v. R. R.*, 143 N. C., 176, where two employees had a fight, and it was held that the mere fact that the fight occurred while they were both on duty did not import responsibility of their common employer for injury inflicted

by one upon the other. And in *Evers v. Krouse,* 70 N. J. Law, 653, the hose used by the little boy did not import an injury threatened or reasonably contemplated to one who was going along the street, and the father was, therefore, excused.

Of the cases cited by the Court, which I have examined, the only one which tends to uphold the decision upon the facts of the present case is that of *Stevenson v. Pacific Railway,* from California. This case may possibly be distinguished on the ground of the defense suggested, that the engineer was not at the time running the engine for the company, but intentionally moved it for the purpose of frightening the passengers, and so did not do the wrong while operating the engine in the course of defendant's service. The case is published in 15 L. R. A., 475, with the comment by the editor that it possibly ignores the principle of responsibility in the use of a dangerous agency, and, to the extent that it does this, I think the case is clearly against the almost uniform current of authority.

I have thus far endeavored to show that the defendant company, on the facts of this case, is responsible for the wrongs of its employees, whether redress is sought for a malicious or a negligent tort. But I think the other proposition asserted in behalf of defendant is equally untenable—that, on the facts and testimony, the plaintiff is confined to recovery as for a malicious or willful tort—predicating such a position on a former decision of this Court (12 N. C., 185), in which
(82) it was held that, for an injury wrongfully caused by beating a drum and thereby causing a plaintiff's horse to run away, the action should be in trespass and not in case—this last being the technical term for actions of negligence.

The position seems to admit that recovery could be had if redress had been sought for negligence, but holds that relief should be denied because of the allegation and evidence to the effect that the noises were willfully and wantonly made. It would roll back our procedure to perplexing subtleties of a bygone time to deny relief on any such ground as this. *Judge Gaston,* in speaking of these actions—trespass and case—in *Dodson v. Mock,* 20 N. C., 282, said: "The distinction between injuries which are the proper subject of an action of trespass and those which are to be redressed by an action on the case, between injuries immediate and those which are consequential, is sometimes very subtle and attenuated." It was largely on account of just such distinctions that our Legislature felt called on to interfere and establish our present beneficent method of procedure. The change had for its basic principle an abolition of these very distinctions. In section 354 of the Revisal it is said: "The distinction between actions at law and suits in equity and the form of all such actions and suits are abolished, and there shall

hereafter be but one form of action for the enforcement or protection of private rights and the redress of private wrongs." Carrying out the idea in section 467: "The complaint shall contain a plain and concise statement of the facts constituting a cause of action." Construing this legislation, the Court has, by numerous and well-considered decisions, established that the plaintiff now recovers on facts, and is entitled to any relief to which the facts alleged and proved show him to be entitled. *Hendon v. R. R.*, 127 N. C., 111. And if these facts, which are fully set out, show that the plaintiff is entitled to recovery for a negligent wrong, he should not be barred of relief because he has gone farther than the case required and stated his cause as for a willful injury.

It is urged, however, that plaintiff cannot maintain this last (83) position because the issue shows that the cause has been determined on the theory of a willful wrong, and that if only recovery for negligence is allowable, the verdict should be set aside.

There is doubt if the allegation and issue make out more than a claim for a negligent wrong. It is not stated or found that the employees of defendant intended to harm or injure the plaintiff, but that they intended to frighten the horses, whereby the damage was caused. As we have held, in *Foot v. R. R., supra,* it is only where the *injury* was willful that the idea of negligence is necessarily eliminated. Negligence is there defined to be a breach of duty, causing unintended damage. "The breach of duty can be willful and the action can still be maintained for negligence if the harm was not intended." The allegation, evidence, and issue establish that the breach of duty was intentional, but not the injury done. But, assuming that the recovery was had for a willful wrong, when it should have been for negligence, the results of the trial should not be disturbed unless this difference has wrought in some way to the defendant's prejudice. *Cherry v. Canal Co.*, 140 N. C., 422, where it is said, quoting from *Ashe, J.*, in *Butts v. Screws:* "A new trial will not be granted when the action of the trial judge could by no probability injure the appellent." In this aspect of the case it is urged that no issue of contributory negligence was submitted, and that this defense would have been open to the defendant in an action for negligence. There was, however, no evidence tending to show contributory negligence. All of the witnesses on both sides seem to have been examined, and, in the entire absence of any evidence tending to sustain it, the error in declining to submit an issue as to contributory negligence was harmless.

Again, it is submitted that the jury were allowed to give punitive or exemplary damages. But the jury have found that the wrongful act of the defendant's employees was unlawful and wanton and done for the purpose of frightening the plaintiff's horses, whereby the (84)

injury was caused. While there are some decisions to the contrary, the great weight of authority is to the effect that in such case a corporation may be held responsible in exemplary damages for the torts of its agents under such circumstances, whether the demand be asserted for a malicious or a negligent wrong. Hale on Damages, 218; Joyce on Damages, sec. 139; Sutherland on Damages, sec. 410; Sedgwick on Damages, sec. 380; *R. R. v. Steem,* 42 Ark., 321; *Illinois Co. v. Seed,* 115 Ala., 670; *Goddard v. R. R.,* 57 Me., 202; *Hanson v. R. R.,* 62 Me., 84; *Baltimore v. Blocker,* 27 Md., 277; *Traction Co. v. Orban,* 119 Pa., 37. In our State the doctrine is firmly established. *Hutchinson v. R. R.,* 140 N. C., 123, and numerous decisions of this Court to same effect could be cited.

In Sedgwick, *supra,* it is said: "I find it is held in many, perhaps most, jurisdictions that a corporation is liable to exemplary damages, if to any, for an act of its servant which would subject the servant to exemplary damages." In Hale, *supra,* quoting from decisions of high authority it is said: "It is usually held that corporations are liable for exemplary damages for the acts of their agents or servants in cases where the agent or servant would be liable for such damages. This is placed on the ground that otherwise corporations would never be liable for exemplary damages, since they can act only by agents or servants." If this is the correct principle, then punitive damage could be awarded, whether the action be considered one for a malicious or negligent tort.

There was, therefore, no harm done to the defendant in trying the cause on the issue submitted, and I am of opinion that the verdict and judgment should not be disturbed.

The facts show that the plaintiff, on the public highway, where he had a right to be, and doing all he could to save himself, has been subjected to an outrageous wrong, causing serious bodily injuries, by the misconduct of the defendant's employees operating an engine in
(85) the defendant's service on its tramroad; and, when called on to answer, the defendant's reply is: "Yes; I sent out the engine, an instrument essentially dangerous and not unlikely to frighten your horses, and my employees, by their misconduct in operating my engine, in the course of my employment, did you grievous wrong, but I should not be held responsible, because, in sounding the whistle, my engineer was not then acting in the course of my business, but was only doing it for his own diversion and to see the horses jump."

But for the sanction given it by my brethren, for whose learning and ability I have the greatest respect, I should say that such an answer is not deserving of serious consideration, and that the plaintiff, on the allegations, evidence, and the issues as they now stand, should be allowed to

recover either for a negligent or a malicious tort; and the judge below made a correct ruling in allowing the jury to award punitive as well as compensatory damages.

CONNOR, J., dissenting, in part: I dissent from so much of the opinion of *Mr. Justice Brown* as decides that any cause of action is shown, either in the pleadings or proof, against defendant. I concur with so much of the opinion as decides that, in any point of view, the defendant could be liable only for actual damages. I have given to the case my most careful and anxious consideration and investigation, because of the divergent views of the judges and the far-reaching effect of the holding upon the liabilities of all of our citizens in their business and industrial life. The plaintiff, by his allegation and proof, has narrowed the question to its simplest possible form. He has carefully excluded any suggestion of negligence, resting his action upon a willful, wanton tort. In *Loubz v. Hafner,* 12 N. C., 185, *Taylor, C. J.,* said: "For beating a drum on the highway, where a wagon and team are passing, by which the horse takes fright, runs away and damages the wagon, the action is properly brought in trespass." So it is held that willfully discharging a (86) gun, whereby a sick person is frightened, is an indictable assault. *Com. v. Wing,* 9 Pick., 1, citing *Cole v. Fisher,* 11 Mass., 137. The evidence fully sustains the allegation. The blowing of the whistle, hallooing and shouting of the hands was wanton and willful, without any purpose to or having any connection with the discharge of any duty to the plaintiff or the public. One witness swears that the engineer said he did it "to see the horses jump about." His Honor correctly interpreted the complaint, and, therefore, declined to submit an issue in regard to contributory negligence, because it did not arise upon the pleadings. There can be no contributory negligence when the defendant has been guilty of no negligence to which plaintiff's negligence could contribute. "An assault and battery is not negligence." Beach Cont. Neg., sec. 65. The cause of action is the unlawful, wrongful act, resulting in injury—the frightening of the horse; the damage which proximately flowed from the wrong measures the extent of the recovery. The wrongdoer is liable for all damages which proximately flowed from the act. *Ramsbottom v. R. R.,* 138 N. C., 38; *Johnson v. R. R.,* 140 N. C., 574; Hale on Damages, 36-38. Hence the plaintiff's cause of action is the wrongful act of the engineer and other servants, and he recovers for the damage sustained by him in his efforts to control the horses after being frightened, because such damage proximately flowed from the wrongful act. We then have this case: Defendant, for the purpose of hauling logs to its mill, and such other purposes as its business required, owned and operated a "tramroad," located some 20 feet from and running parallel with the public highway. On 20 May, 1903, the plaintiff was passing

along the highway, at the point named, not a public crossing, when he met the engine operated by the engineer and several hands, fireman, etc. The highway and tramroad ran parallel some 300 yards; the engine was that distance from plaintiff when he first saw it. His
(87) horse and mule were gentle and not afraid of the usual noise of trains; had been around them and were not frightened. When about 75 yards from plaintiff, the engineer began blowing the whistle and continued for about 75 yards after passing him, giving short, quick, and loud shrieks and blasts. The hands on the train waved their hats and hands toward plaintiff and "hallooed" very loud. This conduct was, on the part of the engineer and other servants, willful and wanton and "for the purpose of frightening the horses of the plaintiff," and he was "injured thereby." This is the case as stated by the plaintiff and found by the jury. Is the defendant liable for the injury thus sustained by plaintiff, and if so, is it liable for punitive or vindictive damages? The engineer and the other persons engaged in the conduct described are criminally liable, and in a civil action may be held to compensatory and vindictive damages. The natural indignation aroused by a recital of their conduct, in the light of the gross, wanton wrong done plaintiff, must not be permitted to disturb our judgment in inquiring into the liability of the defendant. There is no suggestion, otherwise than is shown by their conduct on this occasion, that the servants employed by the defendant to conduct its legitimate business were unfit persons. There is no negligence alleged or shown in regard to their selection for the business for which they were employed; nor is there any suggestion that the tramroad was negligently placed, so that, in the proper and careful operation of the engine, the horses of the plaintiff or other persons would have been frightened. The plaintiff says: "The mule and horse were both gentle and not afraid of the usual noises of the train." This case is clearly distinguished from *Daniel v. R. R.*, 117 N. C., 592. There the liability of the defendant was based upon the fact that, at the time of the shooting by the station agent, plaintiff's intestate was a passenger. The principle upon which that case is decided is uniformly recognized and enforced. A full
(88) note, with the citation of many decided cases, may be found in 4 L. R. A., N. S., 485, where *Daniel v. R. R.* is reported. I also concur in the principle upon which this Court sustained a recovery in *Pierce v. R. R.*, 124 N. C., 83, and *Cook v. R. R.*, 128 N. C., 333; *Hayes v. R. R.*, 141 N. C., 95 All of these and similar cases rest upon the fact that, in ejecting persons wrongfully on the cars, the servant, in the discharge of his duty, used excessive force It was held in those cases that the fact that defendant's servant acted wantonly and willfully was immaterial. I have no purpose to call into question the decision in

either of these cases. There are but two cases in our reports which in the slightest degree militate against the conclusion reached by me in this case. I will refer to them later.

The principle involved in the case differs in no respect from one in which a farmer, owning a threshing machine attached to a portable engine, operated by his servants by the side of a public highway, finds himself sued for damages because his servant, for some purpose of his own, either wantonly or maliciously, blows the whistle or makes some other noise of which the machine is capable, but not necessary in its operation, whereby some person passing along the highway is injured. Nor can I see any difference in principle between this case and one in which a person owning and operating a steam cotton gin near the roadside, whose servant, for some purpose of his own, and not to manage or control the movement of the gin, blows the whistle and frightens a horse. In neither case is there any negligence. Formerly it was held that a master was not liable for the tort of his servant, although committed in the scope of his employment, when the tortious act was wanton or willful. *Campbell v. Staiert,* 6 N. C., 389; *Harris v. Mabry,* 23 N. C., 240. These and many other cases decided in other jurisdictions follow the decision in *McManus v. Crickett,* 1 East, 105; *Wright v. Wilcox,* 19 Wend., 343; *Vanderbilt v. Turnpike Co.,* 2 N. Y., 479. This view has been abandoned by the courts, both in England and in (89) this country, and it is now generally held that the test of liability is not whether the wrong is willful, wanton, or malicious, but whether it is done in the scope of the employment. This Court, without expressly overruling the earlier cases, has adopted the modern view. It is said in Pollock on Torts (7 Ed.), 91: "A master may be liable for willful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes; and this, no less than in other cases, although the servant's conduct is of a kind actually forbidden by the master. Sometimes it has been said that a master is not liable for the 'wilful and malicious' wrong of his servant. If 'malicious' means committed exclusively for the servant's private end, or 'malice' means private spite, this is a correct statement; otherwise it is contrary to modern authority."

It is uniformly held at this time that the test of liability of the master for torts of his servant is whether, at the time he did the act complained of, he was acting within the scope of his employment. Various theories are advanced by judicial writers and judges as the basis of the doctrine, but all of them concede that none are entirely satisfactory. If we adopt the maxim *respondeat superior* as the basis, we find ourselves but little advanced in the solution of many cases. It is very easy to say, let the principal be responsible for the acts of his agent. We are at once con-

fronted with the question, What acts? The answer is, Those which he has employed him to do. Mr. Jaggard finds the same difficulty when he invokes the maxim, *Qui facit per alium, facit per se*—a maxim which, he says, "in the law of torts, has created much confusion." 1 Torts, 38. In many of the cases the liability is based upon the theory that the act which the servant does is commanded by the master, and he is liable for the manner in which the command is executed. This is illustrated in *Cook's case, supra.* The master imposes the duty upon his serv-
(90) ant to eject persons wrongfully on the train. This the master has a right to do, and if he uses excessive force, or acts from anger, he is liable. When he commands his servant to act, the act of the servant is his act, with all of the legal consequences growing out of the manner of doing it.

Mr. Jaggard says: "If a master assists a servant in an assault, they are actual joint tort feasors. If he commands his servant to assault, they are constructively joint tort feasors. This is also true when he directs his servant to do something which necessarily or naturally involves an assault. But when a servant, contrary to orders and without the knowledge of the master, assaults, for example, the master's customer or the master's passenger, the master is sometimes held responsible, not because the tort is really his, but because of the relationship he bears both to the servant and to the injured man. *If he sustain no relationship to the complainant which imposes on him a duty which his servant violates, there is no responsibility.*" Torts, 39.

As is said by *Mr. Justice Hoke,* in *Sawyer v. R. R.,* 141 N. C., 1, quoting from Wood on Master and Servant, "The question usually presented is whether, as a matter of fact or law, the injury was received under such circumstances that, under the employment, the master can be said to have *authorized* the act; for if he did not, either in fact or law, he cannot be made chargeable with its consequences, because, not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim previously referred to does not apply. The test of liability in all cases depends upon the question whether the injury was committed by the *authority* of the master, *expressly conferred or fairly implied from the nature of the employment and the duties incident to it.*"

Justice Walker, in *Daniel v. R. R.,* 136 N. C., 517, puts the principle clearly: "The act of the servant must be something done in attempting to do what the master has employed the servant to do." If the
(91) liability grow out of the idea that the master has commanded his servant to do the thing of which complaint is made, or has commanded him to do something which involves—that is, renders necessary to its accomplishment—the thing complained of, how is the defendant

liable for the servant's act in this case? The servants were employed to operate the engine over the tramroad. This was not in itself wrongful or dangerous, unless negligently done. While it is not alleged or proven, we know from observation and experience that engines have attached to them an appliance by the use of which the steam is made to escape in a way to make a loud noise. We know, also, that this appliance is no part of the motive power of the engine; it does not contribute to or regulate its movement, but is intended and used only to give notice of the starting, approaching, or stopping of the train, for the various purposes commonly understood. For these purposes it may fairly be supposed the master commands the engineer to use the appliance known as the whistle, and for the manner in which this command is executed the master is liable. We know equally well, and the plaintiff evidently knew, that it was no part of the duty or business of the engineer to blow the whistle, or of the hands to wave their hats and halloo to persons passing along the highway, except at certain times and places and for the usual purposes. There was, therefore, no command, either actual or constructive, to do so. Hence the plaintiff truthfully alleged that they did so, not for the purpose of operating the train, but "for the purpose of frightening his horse." Unless, therefore, the master be liable upon some other ground than that of a command or authority to do the act, it cannot be so at all. If he did not command the act, neither the maxim *respondeat superior* nor *qui facit,* etc., applies. It is impossible, upon this theory, to conceive how the master can be liable for an act which he neither actually nor constructively commanded or authorized to be done. It no more commanded the act of which plaintiff (92) complains than the farmer who sends his wagon and mules to town by his servant commands the servant to strike a person by whom he is passing. It is inconceivable how one can be said to do, by another, an act which he neither commands nor authorizes another to do.

This brings us to inquire whether the act of the servants was in the scope of their employment. There was no duty resting on the master to sound the whistle or wave hats at the place described. No such duty was either imposed upon or delegated to the servants, and any suggestion that the servants were acting for the master or in the discharge of any duty resting upon it is expressly negatived by the fact that they did it for a purpose of their own—that is, to frighten the plaintiff's horses. All of the authorities concur in the statement that the master is liable for the tort of his servant when committed in the scope of his employment, and is not liable when the act is not within the scope of such employment, or, as said by Jaggard, "is the independent tort of the servant." Torts, 276.

It will be observed that Sir Frederick Pollock, probably the most accurate writer on the subject, is careful to say that, while the master is liable for even willful and deliberate wrongs committed by the servant, "provided they be done on the master's account and for his purposes, sometimes it is said that the master is not liable for willful and malicious wrong of his servant. If 'malicious' means committed exclusively for the servant's private ends, or 'malice' means private spite, this is a correct statement." The law is well stated and frequently formulated as laid down in Smith Master and Servant, 151; 2 Foundations Legal Liability, 470.

Harrelson, J., in *Goodloe v. R. R.*, 107 Ala., 154 (54 Am. St. Rep., 67), says: "What is meant by the words 'while acting within the range of the authority of the employment of the servant' is made the
(93) ground for contention in each case. . . . It is said, on the point under consideration, that the rule of the responsibility of the master for the acts of his servant does not apply simply from the circumstance that, at the time when the injury is inflicted, the person inflicting it was in the employment of another; but that, in order to make the master liable, the act inflicting the injury must have been done in pursuance of an express or implied authority to do it—that is, it must be an act which is fairly incident to the employment."

In *R. R. v. Baum*, 26 Ind., 70, it is said: "It is not to be understood, however, that the master is never liable for the willful and malicious acts of the servant unless he has directed those specific acts to be done. The rule is not so broad as that. If the act of the servant complained of was necessary to be done to accomplish the purpose of the servant's employment—if it was essential as a means to attain the end directed by the master, and was intended for that purpose—then it was implied in the employment, and the master is liable, though the servant may have executed it willfully and maliciously. But *when it is unnecessary to the performance* of the master's service, *and not really intended for that purpose,* but is committed by the servant *merely to gratify his own malice,* though under pretense of executing his employment, it is not done to serve the master, and is not, in fact, within the scope of the employment, and the master is, therefore, not liable. It will not do to say that he shall answer in damages because, by employing the servant, he gives him an opportunity to maltreat those with whom he comes in contact in discharging his duties."

The disastrous results of adopting the reasoning repudiated in the opinion are apparent. The difficulty experienced by the courts in applying the term "scope of employment," or, as is sometimes said, "course of employment," is illustrated in a large number of cases.

In a well considered case the Court of Errors of New Jersey, (94) discussing the changes made in the original rule, says: "The rule has been gradually extended until it may be said that the liability of the master now extends to every case when the act of the servant is done with a view to the furtherance and discharge of his master's business and within the scope and limits of his employment. Beyond the scope of his employment the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master. The rule as it is now established by the later judicial declarations should be strictly held within its defined limits. It is a rule capable of great abuse and much hardship, and the courts should guard against its extension or misapplication." *Holler v. Ross,* 68 N. J. L., 324.

Lord Holt, in *Middleton v. Fowler,* 1 Salk. (10 Wm. III.), said: "No master is chargeable with the act of his servant but when he acts in execution of the authority given by his master."

In *McManus v. Crickett, supra, Kenyon, C. J.,* said: "Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such acts." It is said by the Reporter "that this cause was very much discussed at the bar, and the Court took time to consider of their judgment." It is said "the modern law largely has its roots" in the words of *Lord Kenyon.*

In *Craft v. Allison,* 6 E. C. L., 528 (4 Barn. and Ald., 590), it is said: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person and produces the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in (95) pursuance of the servant's employment."

Creswell, J., in *Mitchell v. Crasweller,* 13 C. B., 76 (E. C. L., 257), said: "No doubt, if a servant, in executing the orders, express or implied, of his master, does it in a negligent, improper, and roundabout manner, the master may be liable. But here the man was doing something which he knew to be contrary to his duty and a violation of the trust reposed in him. I think that it would be a hardship upon the employers to hold them to be responsible under such circumstances." The case of *Limpus v. Lon. Omnibus Co.,* L. J., 1863 (N. S., 32, 35), is regarded as the controlling authority on the subject. All of the judges wrote opinions. *Williams, J.,* said: "If a master employs a servant to drive and manage a carriage, the master is, in my opinion, answerable

for any misconduct of the servant in driving or managing it which can fairly be considered to have resulted from the performance of the functions intrusted to him, and especially if he was acting for his master's benefit and not for any purpose of furthering his own interest, or for any motive of his own caprice or inclination."

In *Poulton v. R. R.*, L. R., 1866 (2 Q. B. D., 534), the English cases were reviewed, *Blackburn, J.*, saying: "Then comes the question we have to determine, Can there be said to be any evidence from which it may be inferred that the railway company authorized the station master to do an act which, it appears on every view of the facts, he would be utterly unauthorized to do? We think not. We do not think it is within the scope of his authority, in what he was authorized to do, to bind the company. It was an act out of the scope of his authority, and for which the company would be no more responsible than if he had committed an assault or done any other act which the company never
(96) authorized him to do." *Gaff v. R. R.*, 30 L. J., Q. B., 148 (107 E. C. L.); *Seymour v. Greenwood*, 30 L. J. Ex., 328 (7 H. and N., 358), and the *Limpus case, supra,* are noted and distinguished, saying: "If the station master had made a mistake in committing an act which he was authorized to do, I think, in that case, the company would be liable, because it would be supposed to be done by their authority." To the same effect are the American authorities.

In *Cosgrove v. Ogden*, 49 N. Y., 255, it is said: "If the servant (intrusted with removing timber from the roof of a house) *for some purpose of his own* intentionally threw material upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to effect some purpose of his own."

In *Rounds v. R. R.*, 64 N. Y., 129, *Andrews, J.*, says: "It seems to be clear enough, from the cases in this State, that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business. On the other hand, the master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. . . . If, however, the servant, under the guise and cover of executing his master's orders and exercising the authority conferred upon him, willfully and designedly, *for the purpose of accomplishing his own independent, malicious, or wicked purposes,* does an injury to another, the master is not liable. The relation of master and servant, as to that transaction, does not exist between them." To the same effect are *Mott v. Ice Co.*, 73 N. Y., 543; *Ochsin-*

bein v. Shapley, 85 N. Y., 214. *Smith v. R. R.,* 78 Hun, 524, (97) is an instructive case on this subject. Plaintiff was standing on the platform; a local freight stopped and switched some cars, and was about to start, when Riker, defendant's station agent, stepped out and placed two torpedoes on the track, under one of the freight cars, and then ran back into the station-house. The train moved off; the torpedoes exploded, causing a sharp fragment to strike and injure the plaintiff. The agent testified that he placed the torpedoes on the track to hear the explosion and with no object of signaling the train, the purpose for which the torpedoes were furnished. *Haight, J.,* said that the only question was whether the agent, in placing the torpedoes on the track, was acting within the scope of his employment, in the performance of a duty imposed upon him by the company. "If so, it was negligent and dangerous to explode the torpedoes in the vicinity of the station, where persons were standing upon the platform, and the company is liable; but if, by doing what he did, he went outside of his employment in order to effect a purpose of his own in exploding the torpedoes for his own amusement, and not for the purpose of signaling the train, then the company would not be liable."

The leading case in Massachusetts is *Howe v. Newmarch,* 94 Mass., 49. *Hoar, J.,* in a well-considered opinion, reviews the English and American authorities, and says: "In an action of tort, in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority and not for the purpose of executing his orders or doing his work. So that, if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong be occasioned by negligence or by wanton or reckless purpose to accomplish (98) the master's business in an unlawful manner."

In *Brown v. Jarvis Eng. Co.,* 166 Mass., 75, *Lathrop, J.,* says: "The act of defendant's servant was not a necessary or natural or proper result of anything that the servants were employed to do." *Obertoni v. R. R.,* 186 Mass., 481.

In *Berry v. Elec. Railway,* 188 Mass., 536, referring to the act complained of, the Court says: "The boys were well known to the conductor, and it was apparent from evidence that the conductor was playing a practical joke on the policeman." Held, that defendant company was not liable.

In *Cobb v. Simon,* 119 Wis., 597 (100 Am. St., 909), the master was held not liable for wrongful arrest of a person by his clerk, who knew that no goods had been stolen, but made the arrest for the purpose of extorting money from the plaintiff. In *R. R. v. Brown,* 26 Ind., 70, the authorities are reviewed and the general principles clearly set forth.

In *Cousins v. R. R.,* 66 Mo., 572, it is said: "Two classes of cases have arisen under the rule now being considered, in which the master is not liable for the acts of his servant. The first is when the servant was, at the time the injury was inflicted, engaged in the performance of the service which he was engaged to render, but the act which occasioned the injury did not pertain to the particular duties of the employment. Thus, if an engineer, while running a train, should shoot an unoffending man upon the roadside, the injury would be inflicted while the engineer was engaged in serving his master, but the act causing the injury would have no connection with that service and could not be considered as done in the course of the servant's employment."

Alvey, C. J., in *Fletcher v. R. R.,* 6 Dist. Col. App. Cases, 385, p. 397, says: "The person who threw off the piece of wood that injured plaintiff was not in the performance of any duty required of him, but his act was wholly independent of any duty imposed upon him by his
(99) employment to work for defendant. In other words, his act was not one within any limit or scope of authority derived from the defendant as agent or servant in the performance of duty."

In *Stephenson v. R. R.,* 93 Cal., 558, the action was for injuries sustained by the action of the engineer in moving his engine with the intent to frighten the passengers on a street car. *DeHaven, J.,* said: "The engineer was not acting within the scope of his employment if his object in moving the engine was simply to frighten the passengers in the street car. Such an act, done for such a purpose, was entirely foreign to the object of his employment. The work which the engineer was to perform for defendant was to manage the engine while it was engaged in switching cars; and if he started the engine, not for the purpose of employing it in the service of the defendant, but to accomplish an independent purpose of his own, . . . it is immaterial that he used the engine of the defendant in order to accomplish his purpose." By way of illustration, he says: "It would not be contended that one who employs another to sprinkle his garden and places in his hands a hose to be used for that purpose would be civilly responsible in damages if, stepping aside from that employment, the servant should, either in sport or from malice, turn the same upon a person passing along the street. . . . In all the affairs of life men are constantly obliged to act by others; but no one would venture to so act if the mere circumstance that he employed another to act for him about any general or

particular business made him an insurer against all wrongs which such persons might possibly commit during the period of such employment." The distinction is clearly stated in *R. R. v. Wetmore,* 19 Ohio St., 110. The action was for an assault committed by the servant. The Court said: "The assault was in no way calculated to faciliate or promote the business for which the servant was employed by the master, nor could it have been supposed to be or intended as an act with that view or object. It is not a case of excess of force and violence (100) in executing the authority of the master, but rather an act beyond such authority or foreign to the objects of the employment." *Gilliam v. R. R.,* 70 Ala., 268.

In *R. R. v. Routt,* 76 S. W., 513, the Supreme Court of Kentucky held that the company is not liable for the act of a locomotive fireman in purposely throwing a piece of coal at one standing beside the track, not with any purpose of protecting the master's property or furthering "its interest."

In *R. R. v. Cooper,* 88 Tex., 607, the Court says: "The distinction is this: That if the act done was one authorized to be done by the servants, and was at the time being done in the discharge of their duty as such servants, then the master would be responsible for the consequences to the plaintiff, although the servants might, in the discharge of their duty, maliciously or mischievously have thrown the water upon the plaintiff. It cannot be said that the act of putting the water upon the plaintiff must have been authorized, because such an act would never be authorized by a master; but it is the act itself of discharging the hot water that must have been done in the course of the employment of the servant and for the purpose of forwarding the business of the master. It does not matter that the servant might have used the same appliances in the discharge of a duty to the master, but the question definitely and distinctly presented is, Was the servant, in the particular case, in the discharge of such duty?"

The last case from which we quote is *Evers v. Krouse,* 70 N. J. L., 653. There the infant son of defendant was directed to sprinkle water on the lawn in front of the house. While engaged in this work, plaintiff left a horse tied near by. The boy turned the hose on the horse, so frightening it that it ran away and was killed. In an action for damages against the father, he took an exception to the instruction that he would be liable if the boy, "through a mischievous dispo- (101) sition, threw the water upon or over the horse." *Gummere, C. J.,* wrote an interesting opinion for the unanimous Court of Errors and Appeals sustaining the exception. Referring to the case of *Holler v. Ross, supra,* he said that, while the rule laid down in that case had been followed in other jurisdictions, there had been much contrariety in its

application. "This is due to the assumption in some courts that an act done by a servant while engaged in the master's work is necessarily an act within the scope of the former's employment. But this is conspicuously a *non sequitur*. An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent, malicious, mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master, in any sense, and should not be deemed to be so as a matter of law." The learned justice notes the distinction between that case and *Bittle v. R. R.*, 55 N. J. L., 615. In the last named case the statute required the company to blow 300 yards distant from a highway crossing. The evidence showed that the engineer saw that plaintiff's horse had become frightened at the approach of the train, when he wantonly and maliciously blew an extraordinarily loud and shrill blast from the whistle. The company was held liable, *because it was the duty of the engineer to blow the whistle at that point.* It was within the scope of his employment, and because of that fact the rule of *respondeat superior* applied. The question has been before almost every court in this country, and, with a very few exceptions, decisions have been in harmony with those from which I have quoted. *Turley v. R. R.*, 70 N. H., 348; *R. R. v. Little,* 67 Ohio St., 71; *Healy v. Patterson,* 123 Iowa, 73; *R. R. v. West,* 125 Ill., 320; *Slater v. Thresher Co.,* 5 L. R. A., N. S., 598; *Smith v. R. R.*, 95 Ky., 11 (22 L. R. A., 72); *Porter v. R. R.*, 41 Iowa, (102) 358; *R. R. v. Bayfield,* 37 Mich., 205; *Palmer v. Elec. Co.,* 131 N. C., 250.

In *Daniel v. R. R., supra,* and *Sawyer v. R. R., supra,* this Court applied the principle upon which we have decided this case. In *Jackson v. Tel. Co.,* 139 N. C., 347, the master was held liable upon the same principle. *Brendle's case* is noted in *Foot v. R. R.*, 142 N. C., 52, but the question presented here was not involved. Mr. Jaggard says that the English courts, at an early period, recognized the doctrine of a particular command in the test of liability; hence the maxim *respondeat superior* was usually invoked. By the modern view the test is generally held to be the scope of employment; but when we reason back to the principle, we find that, as said by many courts and writers, the basis in either view is the same—the master commands the servant to do the particular thing, and, by construction, such other things as are necessary to execute the command, such things being thereby brought within the scope of the employment. For the manner of doing the thing commanded to be done, including such things as are involved therein, the master is liable. When we use the term "command" we do not overlook the fact that the failure to obey instructions in the manner of executing

the command does not absolve the master. If the servant keep within the scope of his employment, and, with the purpose of discharging his duty to his employer, depart from the orders given, or wantonly and willfully injure another in doing his master's business, the master is liable. In many cases the extent of deviation from the orders of the master which will absolve him is presented. No such question arises here, and I simply refer to these phases of the question for the purpose of excluding the suggestion that I have overlooked them. It is said that in *Everett v. R. R.*, 121 N. C., 521; *S. c.*, 122 N. C., 1010, and *Brendle v. R. R.*, 125 N. C., 474, the defendant was held liable upon an allegation and proof similar to that made in this case. (103) We have examined the original record in these cases. In *Everett's case* the complaint discloses an action for negligence, pure and simple. The allegation is that defendant's servants "willfully, maliciously, *negligently*, and unnecessarily" blew the whistle, etc., and *"did frighten the plaintiff's horses."* etc. The issue was in the usual form: "Were the plaintiff's horses injured by defendant's negligence, as alleged?" The question under discussion was not raised or suggested, except in an instruction asked by the defendant: "Unless the jury believes that the person who blew the whistle blew it wantonly or maliciously, for the purpose of frightening the horses, he is not entitled to recover." The instruction was refused. The court instructed the jury that if the servant blew the whistle *negligently*, for the purpose of frightening the horses, the defendant was liable. It is evident, from the record and the language of the Court, that the question was not raised or considered respecting the "scope of employment." The petition to rehear raises no such question. In *Brendle's case* the complaint was in the same language, the action being for the injury to the driver upon the same occasion. It is true that the issue there contained the words "for the purpose of frightening the horses," etc., but there was no such allegation. Both were actions for negligence, and not for assault. Neither court nor counsel, nor does this Court, consider the question presented here. The case is simply referred to in *Foot v. R. R.*, 142 N. C., 52, and not commented upon. I do not think that, in view of the facts appearing in the record, the cases can be regarded as establishing the principle that a master is liable for the tort of his servant, committed while on duty, but for his own purpose and not in furtherance of his employment. In this case there is no suggestion that the defendant was negligent in the placing of its tramroad, the construction or condition of its engine, the employment of or instruction to its servants, or that it in any way ratified or approved the conduct of its servants. To hold it liable simply because it employed servants who departed from their duty, without any regard to the purpose of their employment and (104)

for a purpose of their own, wantonly and willfully diverted the instrumentality furnished for a legitimate use to the injury of the plaintiff, is, I respectfully submit, doing violence to the principles of both natural justice and sound law. Undoubtedly, persons—natural or corporate—should be required to exercise due care, to be measured by the peril to others, in intrusting dangerous instrumentalities in the hands of their servants, and it is but just to hold them liable for a breach of duty in that respect; but, in the absence of any suggestion of want of such care, "it would be a hardship on the employers to hold them liable" for acts committed outside the scope of the employment.

The basis upon which the master is held liable for the acts of his servant is restated by the editor, in an exhaustive discussion of the subject, in 26 Cyc., 1518: "The master may be liable for the acts of his servant on either of the following grounds: (1) Negligence of the master in selecting his servants or instructing them as to the duties of their position; (2) an express command to the servant to do the act resulting in the injury to the third person; (3) acquiescence in or assent to former like acts of the servant or to the act in question; (4) the fact that the act of the servant was within the scope of his employment and in the line of his duties while engaged in such employment; and (5) ratification by the master of the act of the servant causing the injury to the third person." It is manifest that this case does not come within either of the above classes.

It is strongly insisted, however, that because of the dangerous instrumentality used, and the manner and place of its use, the owner is held to insure that persons passing along the highway shall not suffer any injury. This duty, if it rest upon the defendant, removes the case from the domain of negligence and of the law regarding the liability of (105) the master for the acts of his servant. It falls within the class known as absolute duties, and is based upon the maxim, *sic utere tuo ut alienum non lœdas*. If the instrumentality in the manner and place of its use comes within the principle involved in the maxim, no question of care, either in regard to the selection of the servant or his conduct, can arise. It is the fact of sending the engine upon his premises, near the highway, resulting in injury to the plaintiff, which makes him liable. No amount of care or caution relieves the owner of liability in the use of such instrumentalities. If the engine used, as described by plaintiff, is so essentially dangerous that, in contemplation of law, any damage flowing from its operation is actionable, although the complaint is drawn upon an entirely different theory, the plaintiff is entitled to at least actual damages.

The principle is thus stated by Pollock: "The law takes notice that certain things are a source of extraordinary risk, and a man who exposes

his neighbor to such risk is held, although his act is not of itself wrongful, to insure his neighbor against any consequent wrong not due to some cause beyond human foresight and control." The learned and accurate author says: "A rule casting the responsibility of an insurer on innocent persons is a hard though it may be a just one, and it needs to be maintained by very strong evidence or very clear grounds of policy. . . . The liability seems to be rested only in part on the evidently hazardous character of the state of things artificially maintained by the defendants on their land. In part, the case is assimilated to that of a nuisance." Torts, 480. The principle, in its application, is illustrated in a large number of cases in the reports. *Rylands v. Fletcher,* L. R., 3 (H. L., 330), has been very much modified, both in this country and in England. In this State the liability for setting fire to adjacent buildings or woods by the engines of railroad and lumber companies is confined to negligence, either in the construction or operation of the engine or of the condition of the right of way. *Anderson v.* (106) *Steamboat Co.,* 64 N. C., 399; *Aycock v. R. R.,* 89 N. C., 321; *Craft v. Lumber Co.,* 132 N. C., 151; *Simpson v. Lumber Co.,* 133 N. C., 95; *Knott v. R. R.,* 142 N. C., 238.

In *Thomason v. R. R.,* 142 N. C., 300, the liability for injuries sustained by an adjacent owner and resident by noises, smoke, cinders, etc., in the operation of steam engines, is made to depend upon an allegation and proof of negligence; and in plaintiff's appeal (p. 318) a demurrer was sustained because it was not alleged that the injury was caused by a negligent use of the engines. For killing stock the liability is dependent upon negligence. I should hesitate to hold that a steam engine operated over a tramway, near to a highway, for hauling logs, or stationary for ginning cotton or sawing lumber, or for any of the numerous lawful uses to which it is applied, is, in the absence of negligent construction, condition, or use, within the principle fixing liability upon the owner as an insurer.

In *Losee v. Buchanan,* 51 N. Y., 416, the action was for the recovery of damages caused by the explosion of a boiler attached to a steam engine operated by defendants, throwing parts of the iron on plaintiff's premises and building, injuring his property. The plaintiff contended that, in the absence of negligence, defendant was liable for trespass. *Earl, J.,* reviewed the authorities, including *Rylands v. Fletcher,* concluding an able opinion: "In this case the defendants had the right to place the steam boiler upon their premises. It was in no sense a nuisance, and the jury have found that they were not guilty of any negligence."

In *R. R. v. Farver,* 111 Ind., 195, *Mitchell, J.,* discussing the liability for damages caused by frightening a horse by the operation of a porta-

ble engine near the highway, says: "The work contracted to be done was not in itself unlawful, nor was it necessarily a nuisance to operate
(107) a portable steam engine in a careful manner in close proximity to a public highway."

The same is held in a very strong opinion by *Cooley, C. J.*, in *Macomber v. Nichols*, 34 Mich., 212. *Judge Thompson*, after discussing the question, concludes: "The sound view would seem to be that such an engine, as a means of locomotion, is not necessarily a nuisance, and the question whether its use as such has in a particular instance been so negligently managed to the injury of others as to give rise to a right of action is one of fact for the jury as a question of reasonable conduct and management." 1 Neg., 1312. It would be difficult to distinguish this case from one in which sparks are emitted, setting fire to woods or buildings, or where noises, smoke, etc., injure persons and property. Why would it not follow, applying the maxim, *sic utere*, etc., that any blowing of the whistle, whether excessive of otherwise, or any other noise made by the engine by which a horse passing along the highway is frightened, gives a cause of action? Certainly, if the same rule of liability be imposed as in the case of dangerous animals escaping from one's premises, the doctrine must be carried to its logical results or the law made to adjust itself to each case as it comes before the courts. No matter how perfect the machine, how competent and careful the engineer, the instrumentality on or near the highway being under the ban of the law, all injuries caused by its use are actionable. The principle, within proper limitations, is sound and just. If I wish to keep a dangerous or vicious animal on my premises, it is but just that I should pay for any damage which my neighbor sustains by its escaping and going upon his premises, or to one passing along the highway. If, however, I wish to gin my cotton, bale my hay, or saw the timber on my land into boards, or haul my logs to the mill, and for either of these purposes use a steam engine, it has heretofore been supposed that my duty to my neighbor and the public was met by a proper placing, construction, selection of
(108) my servants, and careful operation of the engine; that for a breach of duty in either of these respects I am liable, in the first case, as an insurer for any damage which my animal does; in the last I am liable for negligence, either on my own part or of my servants, and for torts committed by them within the scope of their employment. It may be that the defendant's tramway was negligently placed, so that *any* blowing of the whistle would have frightened the horses of persons passing the highway, or that it did not exercise due care in selecting its engineer; but none of these things are alleged. As the case goes back for a new trial, it is within the discretion of the court to permit amendments to the complaint presenting these or any of these questions which

would be for the jury. I am of the opinion that, in the present condition of the pleadings, the defendant is not liable, no negligence being alleged or shown. I am not able to say, as a matter of law, that the engine, as operated, was so essentially dangerous as to impose upon the owner the absolute duty of insurance against all damage. Much that is said upon the principal question assumes that the term "while in the employment" is synonymous with "in the scope or course of the employment." The line is not always easy to draw, yet, if not drawn, the employer is made responsible for every tort committed by the employee *during the time of his employment.* No one has ever so contended, and certainly no court has ever so held. I have examined many of the authorities relied upon to maintain the liability of defendant. Many of them are actions for negligence in blowing the whistle, and all of them assume that the injurious act is done in the scope of the employment. In some of the cases there is a manifest confusion of expression and thought upon the subject, and an evident desire to confine the departure from principle and precedent to railroad companies. If conditions be such that the law should be so made, it would be much better for the Legislature to do so, defining clearly its limitations. I must confess that I am unable to see where the Court is to fix the line of responsibility when it departs from principle and author- (109) ity. My acquaintance with and observation of the character and conduct of locomotive engineers—men into whose care and to whose skill, courage, and fidelity we daily commit our own and the lives of our families, to say nothing of property—do not impress upon my mind the necessity for departing from the ancient landmarks and making exceptions to the universal principles of law. It is hardly probable, and the records of the courts do not show, that these men who, with heroic courage, wonderful skill, and almost uniform fidelity, expose their lives driving these locomotives through the country by day and through the darkness, will wantonly, willfully, and maliciously use steam whistles for the purpose of destroying life and property. They may do so negligently, and for this it is but just that their employers should be responsible. The relative rights and duties growing out of the relation of principal and agent, master and servant, employer and employee, both as between the parties and third persons, in the complex business of modern life, are of the utmost importance.

I do not suppose that in the application of the general principle any distinction is to be made between natural persons and corporations. In *R. R. v. Baum, supra,* it is said: "Nor will sound policy maintain the application of a rule of law to railways or corporations on this subject which shall not be alike applied to others, as has been intimated in some quarters." All of the courts recognize this principle. It can be of no

concern to us whether the stockholders of the defendant are operating as a corporation or a partnership, or, for that matter, each individual conducting the business separately. In either case the necessity for employing servants is the same. The defendant insisted, and introduced evidence tending to show, that the whistle was blown and the other noises made because they were approaching a crossing, and that no more
(110) noise was made than was necessary for that purpose. This contention was properly presented to the jury. They found against it.

The defendant requested the court to instruct the jury that, in the absence of any evidence tending to show a command or ratification of the act of its servants, they were not authorized to award punitive or vindictive damages. This the court declined, and instructed the jury that, if they answered the first issue "Yes," they could, in their discretion, give the plaintiff such damages. This Court has frequently held that, for assaults committed by the employees of a railroad upon passengers, the jury could, if they found wanton, malicious, or even excessive force used, give punitive or vindictive damages. *Holmes v. R. R.*, 94 N. C., 318; *Kelly v. Traction Co.*, 132 N. C., 368, and many other cases. To what extent these decisions, and those to the same effect in other States, are applicable to a case like this may be open to discussion. The general rule may be found in 3 Joyce on Damages, 2034: "In order to recover punitive damages against a master for the wrongful, negligent, or grossly negligent acts of his servant, such acts must have been authorized, affirmed, or ratified by the master, or they must have been done in the line of the servant's duty or employment, or the master must have known of the servant's unfitness; and if the servant's acts are wanton, willful, or malicious, the master is liable for exemplary damages, if such acts are authorized, directed, or ratified by him or the latter was implicated therein or instigated the same, or they were done for the master in the line of the servant's duty, or were generally within the scope of his authority." This language quoted does not appear to me very clear. Of course, if the wrongful act is wanton, willful, etc., and if expressly commanded or authorized or ratified, it becomes the act of the master in fact, and there can be no question of his liability to the same extent as the servant; they are joint tort feasors. But if the liability attaches by reason of the doctrine of representation as a matter of law—
(111) that is, because within the scope of employment—a much more serious question arises. One may direct his servant to perform an act, giving express command respecting the manner of its performance, carefully warning him against negligence. If in doing the act, obeying his command in that respect, but in utter disregard of his directions and caution, he by wanton, willful negligence injure another, the master is liable for at least compensatory damages. Is he liable for vindictive damages?

The Supreme Court of Tennessee, in *R. R. v. Starnes,* 56 Tenn., 52, held the company liable for the conduct of the engineer, and, in passing upon the exception to the instruction given the jury in regard to exemplary damages, said: "But this is not a case, we think, in which exemplary damages can be allowed. The act complained of was manifestly done without defendant's knowledge or consent, and was the willful and unauthorized act of the servant alone. If the action had been against the actual tort feasor, the rule would be otherwise." This language opens up the original question of liability for the act of the servant. If the act was "unauthorized," how did any liability attach? There is much confusion of language in the decisions growing out of the extension of the liability of the master for wanton, willful torts of the servant. Doubtless the Court, in the cases cited, hesitated to carry the doctrine of liability to its logical conclusion. The question is discussed in an extensive note to *Crane v. Bennett,* 101 Am. St., 722. The line of distinction between the cases in which the master's liability for punitive damages is coextensive with the servant's, and those in which it is confined to compensatory damages, has not been drawn.

WALKER, J., dissenting: I concur in the opinion of *Justice Con-* (112) *nor.* It seems to me that a master cannot be liable for the malicious tort of his servant, committed, not in the line of his duty nor within the scope of the authority which is conferred upon him by the master, but of his own head and imagination and prompted solely by his own vicious disposition. As we said in *Daniel v. R. R.,* 136 N. C., 522, which is cited with approval by our brethern who differ with us, "It is not intended to assert that a principal cannot be held responsible for the willful or malicious acts of the agent, when done within the scope of his authority, but that he is not liable for such acts unless previously and expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment and beyond the scope of his authority, as when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity or to give vent to some private feeling of his own (*McManus v. Crickett,* 1 East, 106); and, as is forcibly stated by *Lord Kenyon* in the case cited, quoting in part from *Lord Holt,* 'No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for his acts." What better authority can we invoke in support of our position than the opinions of the Court of King's Bench, as delivered by *Lord Holt* and *Lord*

Kenyon? But this Court has gone very far, though not by any means to the verge, in sustaining what I conceive to be the only just and safe rule in cases of this kind. The principle announced (in the case to which I refer) by the present *Chief Justice,* speaking for the Court, is this: That a master is not responsible for any illegal action taken or directed by his servant which he did not advise, consent to, or participate in, and which was not justified by any authority he had given. *Moore v. Cohen,* 128 N. C., 345. I quote almost literally from the opinion, and certainly the substance of what was decided is given.
(113) Numerous authorities are cited for this position as fully settling the principle. *Ferguson v. Terry,* 40 Ky. (1 B. Mon.), 96; *Welsh v. Cochrane,* 63 N. Y., 181; *Brown v. Kindall,* 90 Mass. (8 Alto), 209; *Fire Assn. v. Fleming,* 78 Ga., 733, and Cooley on Torts, 131. In that case (*Moore v. Cohen*) an attorney who had been employed to collect a claim undertook, in good faith, to have the defendant arrested upon the ground of fraud committed in contracting the debt, without any express authority of his principal or any subsequent ratification by him. That would appear to be more nearly within the scope of the attorney's authority than the malicious and wanton act of the engineer in blowing the whistle of his engine for no other purpose than to frighten the horses on the public highway and, as a necessary consequence, injuring the plaintiff, was within the scope of his employment, and yet the Court held, in *Moore v. Cohen,* that the principal was not liable for his attorney's unwarranted act. As said by *Justice Blackburn,* in discussing a somewhat similar tortious act, when it was attempted to charge the master with liability, there is no difference, and can be none, between a railroad company, which is a corporation, and an individual. The principle must apply to every class of employment, and every merchant will be responsible for a similar act of his agent and every person for the act of his butler or coachman. To pursue this idea further, the former will be mulcted in heavy damages for the willful and malicious act of his employee or laborer who is in charge of stationary or portable machines, or of implements just as liable to frighten an animal as a steam engine operated by steam; the owner of an automobile for a similar act of his chauffeur, and so on indefinitely. We cannot coin a principle and restrict it to special cases if it is in its very nature inherently applicable to all other cases of a similar kind, for then we must extend it to them and thus carry it by logical sequence to its natural result. When we stop short of so applying it because of any hardship which may ensue in the particular case, we virtu-
(114) ally admit its unsoundness, for a just and correct legal principle should naturally and consistently apply to all cases which may legitimately come within its reach. The true doctrine is well stated in

Ferguson v. Terry, 40 Ky., 96, as follows: No one is liable for trespasses committed by others in his employ unless he gives previous authority or command to do the tortious act, or afterwards assents thereto, or it is done in the discharge of the business which the agent was appointed to do. In the last two cases the law will imply authority to do the unlawful act. See *Daniel v. R. R.,* 136 N. C., 517; *Jackson v. Tel. Co.,* 139 N. C., 347.

In *Roberts v. R. R.,* 143 N. C., 176, *Justice Hoke,* quoting from Wood on Master and Servant, sec. 307, and approving what is said therein, and also what is decided in *Sawyer v. R. R.,* 142 N. C., 1, to the same effect, thus states the doctrine: "The simple test is whether they were acts within the scope of his employment—not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may be fairly said to be authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and written orders. An employer who leaves to an employee to do certain acts for him according to the employee's judgment and discretion is answerable for the manner or occasion of doing it, provided it is done *bona fide* and within the scope of the servant's express or implied authority, *and not from mere caprice or wantonness and wholly outside of the duties conferred upon him.*" (Italics mine.) And again in the same case, at page 180, quoting and approving what is said in *Mott v. Ice Co.,* 73 N. Y., 543, he says: "For the acts of a servant, in the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interests, the latter is responsible, (115) whether the act be done negligently, wantonly, or even willfully. The quality of the act does not excuse. *But if the employee, without regard to his service, or to accomplish some purpose of his own, act maliciously or wantonly, the employer is not responsible.*" (Italics mine.) He then adds: "The general doctrine on the subject is fully considered in *Daniel v. R. R.,* 136 N. C., 527," which case and *Jackson v. Tel. Co.,* 139 N. C., 347, were approved in *Sawyer v. R. R.,* 142 N. C., at p. 8. I think *Sawyer v. R. R., supra,* is also, in principle, clearly in conflict with the doctrine now about to be announced.

Justice Connor has so lucidly and fully explained the distinguishing characteristics of the principles in the law of torts which determine the liability or nonliability of the master for the acts of his servant that discussion is rendered useless. I could not, though, be silent when the Court is establishing a precedent which, in my judgment, is calculated not only to extend the liability of the principal for the act of his agent,

and the master for the act of his servant, far beyond the settled principle of the law relating to that question, but to seriously embarrass and hamper the business transactions of the merchant, the farmer, and every person who, in his ordinary affairs, must employ agents or servants to assist him. My apprehensions will be fully justified if the doctrine thus settled by the decision in this case is hereafter logically and fairly applied, as it should be, to all cases of a kind coming within its scope.

When we charge the defendant with liability, upon the facts stated in this record, for the reason that it, a lumber company, is using its track and appurtenances for its own purposes, even if it had carried passengers or freight for accommodation, we are going a long way towards unsettling the foundation upon which the law of torts has rested (116) for so long a time; and I view this radical departure from the cardinal principle of that law not only with apprehension, as I have said, but with alarm. We must sooner or later abrogate or greatly modify the rule as thus formulated, or the business of this State, which is largely conducted through agents and servants, must be seriously hindered, to say the least. This Court cannot well afford to state a principle of law as applicable to the ordinary and everyday affairs of our people, and then refuse to give it the full scope to which it is entitled when it may be found to operate oppressively. It must be remembered that we are making precedents for all time to come, and not merely deciding cases.

As I do not think the plaintiff should recover at all, I must, of course, agree with *Justices Connor* and *Brown* that he cannot in any event be awarded vindictive damages.

PER CURIAM. Three justices concurring in the opinion of *Justice Brown* upon each issue, it becomes the opinion of the Court, and a new trial is ordered upon the second issue, relating to damages.

Cited: S. v. Fulton, 149 N. C., 501; *Powell v. Fiber Co.,* 150 N. C., 15; *Jones v. R. R., ib.,* 476; *Blackburn v. Lumber Co.,* 152 N. C., 363; *Marlowe v. Bland,* 154 N. C., 146; *Dover v. Mfg. Co ,* 157 N. C., 329; *Bucken v. R. R., ib.,* 447; *Huffman v. R. R.,* 163 N. C., 173.

L. N. RUSSELL v. O. M. WADE.

(Filed 20 November, 1907.)

1. Deeds and Conveyances — Options — Fraud — Parties — Title in His Own Name—Uses and Trusts—Trusts and Trustees—Specific Performance.

Action to declare defendant a trustee, and not to enforce specific performance of a parol contract, is one wherein plaintiff alleges that he and defendant had agreed, upon a consideration, to acquire together an option on a certain tract of land; that pursuant to the agreement the defendant secured the option, but in fraud of plaintiff's rights had it made to himself alone, and, also in fraud of the plaintiff's rights, secured to himself the land under the option, and conveyed an undivided one-half interest therein to a third person, when the relief asked is that defendant be decreed to convey the one-half undivided interest in the land remaining in defendant's name.

2. Same—Options—Fraud—Parties—Evidence.

When defendant, under an agreement with plaintiff, secures an option on lands, taking it in his own (defendant's) name, and afterwards acquired an extension of the option, again in his own name, acknowledged orally that the option should have been taken in both of their names, and offered to give plaintiff a writing to that effect, the evidence as to the writing is corroborative of the original agreement, and, when so restricted by the trial judge, is competent in an action to declare the defendant a trustee for the plaintiff in the land acquired under the option of defendant in fraud of plaintiff's rights.

3. Same—Option—Fraud—Parties—Uses and Trusts—Trusts and Trustees—Ex Maleficio.

When defendant, willfully violating his agreement with the plaintiff to secure an option on a tract of land for them both jointly, by taking it in his own name, assured the plaintiff that the land taken under the option was to be held by him under the agreement, and, while each party was endeavoring to raise money to secure the land under the option, the defendant represented to plaintiff that he could borrow the money for them both, to which plaintiff agreed, equity will create and enforce a constructive trust upon the land in plaintiff's favor when defendant secured title to the land in his own name, and conveyed an undivided half interest therein to the one from whom he borrowed the money, and secured the loan by a mortgage upon the other like interest. In such cases the Court, to prevent fraud, will declare defendant a trustee *ex maleficio.*

APPEAL from *Moore, J.*, at April Term, 1907, of MONTGOMERY. (117)

Plaintiff alleges that he and defendant, some time during April, 1902, entered into an agreement to procure an option on and, some time later, to purchase a tract of land containing 2,500 acres, fully described in the complaint, which was owned by Miss Adelaide Kron; that plaintiff and defendant were each to have one-half undivided interest; that they were to sell the land and divide the profits equally. Defendant agreed that, if plaintiff would negotiate the trade for the

option he (defendant) would advance the money necessary to pay therefor; that, pursuant to said agreement, plaintiff did negotiate with the owner of the land for an option; that he sent defendant to Miss
(118) Kron to get the option and to pay the amount of cash agreed upon; that defendant wrongfully, in violation of the contract and without knowledge of plaintiff, had said option executed to himself, omitting the name of plaintiff therefrom. When plaintiff first had knowledge thereof, defendant promised to give him a writing showing that he (plaintiff) owned one-half interest in said option, but failed to do so; that about the time said option was to expire the parties made arrangements with Miss Kron for a new or extended option; that said second option was also taken by defendant to himself, but he promised to give plaintiff a writing showing his interest therein; that plaintiff negotiated with one or more persons to sell the option at a large profit, but was induced by defendant to let him borrow some money from O. R. Cox, the father-in-law of defendant, to pay for said land; that defendant got the money from Cox and had Miss Kron to make a deed to himself for said land, again promising plaintiff to make him a writing showing his (plaintiff's) interest therein; that without plaintiff's knowledge and in fraud of his rights, defendant conveyed one-half interest in said land to said O. R. Cox, and executed a mortgage to him for the other one-half undivided interest, to secure a note of $2,400, being the amount of one-half the purchase money paid to Miss Kron, with interest; that the land is very valuable, being worth more than $10,000; that he is ready and able to pay one-half the purchase money and redeem the one-half interest covered by the mortgage to Cox, etc.

Plaintiff alleges that by virtue of the facts set forth he is the equitable owner of a one-half undivided interest in said land, and demands appropriate relief in the premises, etc.

Defendant denies the material allegations in the complaint and states his version of the transaction. It is unnecessary to set forth more fully defendant's contentions.

His Honor submitted the following issue to the jury: "Is the plaintiff the equitable owner of a one-half undivided interest in the lands described in the complaint, subject to the mortgage deed executed
(119) by O. M. Wade and wife to O. R. Cox for one-half the purchase money thereof?" The defendant excepted to the issue submitted to the jury.

Both parties introduced testimony tending to sustain their contentions. At the close of the evidence defendant moved for judgment as of nonsuit. Motion denied, and defendant duly excepted.

The court charged the jury fully upon the different contentions of the respective parties, and, among other things, explained to the jury and

charged them that where evidence had been admitted in the cause for a limited purpose, they could consider said evidence only for the purpose for which it was admitted, and pointed out to the jury in each instance, as set forth in the foregoing evidence, for what purpose the evidence was admitted, and explained to them the purpose for which they could consider the evidence in each instance. The court also made this explanation to the jury in each instance at the time the evidence was admitted. Among other things, the court charged the jury that, if the plaintiff believed that he had arrangements made to secure his part of the purchase money of the land in controversy, and informed the defendant that he had such arrangement made, and that the defendant thereupon told him that he had arranged to secure the whole of the purchase money from his father-in-law for the benefit of both plaintiff and defendant, and thereby induced the plaintiff to refrain from any further effort to secure his part of the purchase money, it made no difference whether the plaintiff could have secured his part of the money or not.

To the foregoing paragraph of the charge the defendant excepted.

The jury answered the issue submitted to them in favor of the plaintiff. Motion for a new trial; motion overruled, and the defendant excepted. There was judgment upon the verdict, to which the defendant excepted and appealed.

U. L. Spence, J. A. Spence, and R. T. Poole for plaintiff.
Adams, Jerome & Armfield for defendant.

CONNOR, J., after stating the case: The issues tendered by de- (120) fendant were properly rejected. They are based upon a misconception of plaintiff's allegation. The action is not brought to enforce specific performance of a parol contract to convey land, but to declare defendant a trustee in respect to one-half undivided interest in the land described in the complaint. While there is contradictory evidence, the verdict of the jury, construed with reference to the instructions, establishes plaintiff's allegation that he and defendant entered into a contract to procure an option on the land and secure the title thereto for the purpose of selling and dividing the profit made on the transaction; that defendant took the option to himself, or in his own name, but recognized plaintiff's interest therein, and promised to give him a writing showing that he was joint owner. The conduct of both parties in negotiating sales of the property, and otherwise, strongly corroborates plaintiff's contention. There is but little difference in the testimony in this respect. Miss Kron says that when she gave the option she understood that it was for the benefit of both parties. It appears that, upon the expiration of the first option, a new one was given under substantially the same conditions as the first, so far as the interests of plaintiff and defendant were

concerned. When the time came to raise the purchase money plaintiff was negotiating with several parties to get his part, and the defendant then suggested that he could borrow the whole amount "for both of us" from O. R. Cox, his father-in-law. Plaintiff, relying upon this suggestion, made no further effort to raise the money, stating that he wished his interest to stand security for his part of the debt. Defendant, instead of doing as he had proposed, obtained the money from Cox, took title to himself, and immediately conveyed one-half interest to Cox in full, and executed a mortgage to him (Cox) for the other one-half interest to secure a note of $2,400, being one-half the purchase money, thereby depriving plaintiff of any interest in the land. The value of the

(121) land is very greatly in excess of the amount paid. The plaintiff's equitable right is based upon the well settled principle and authorities discussed and cited by *Mr. Justice Walker* in the recently decided case of *Avery v. Stewart,* 136 N. C., 426. In that case the plaintiff had contracted for the purchase of a tract of land, and, being unable to raise the purchase money, procured the defendant to pay the amount and take title for his (plaintiff's) benefit and convey to him upon payment of the amount advanced, with a bonus agreed upon. We held the trust valid, upon the authority of a long line of cases decided in this Court. In this case defendant, in violation of his duty to plaintiff, takes the option to himself, whereas he should have taken it to the plaintiff and himself jointly. This was a clear breach of duty, both legal and moral, and so recognized by defendant, who promised to give plaintiff a "writing" showing his interest in the option. The promise to give the writing, made at various times after getting the option, is not the basis of plaintiff's claim, but corroborative of his evidence in regard to the original agreement. The trust arises and is attached to the legal title procured by defendant "by operation or construction of law." *Mr. Justice Walker,* in *Avery v. Stewart, supra,* after enumerating the several ways in which such trusts arise, says: "Trusts of the second class exist purely by construction of law, without reference to any actual or supposed intention to create a trust for the purpose of asserting rights of parties or of frustrating fraud, and are, therefore, termed constructive trusts. . . . The party guilty of the fraud is said in such case to be a trustee *ex maleficio,* and will be decreed to hold the legal title for the use and benefit of the injured party, and to convey the same when necessary for his protection, as when one has acquired the legal title to property by unfair means," citing *Wood v. Cherry,* 73 N. C., 110, and other cases. "When one party has, by his promise to buy, hold, or dispose of real property for the benefit of another, induced action or forbearance by reliance upon such promise, it would be a fraud that

(122) the promise should not be enforced." The following language in

the opinion extracted from *Glass v. Hulbert,* 102 Mass., 2 Am. Rep., 418, is pertinent and conclusive of the plaintiff's equity: "When a party acquires property by conveyance secured to himself under assurances that he will transfer the property to or hold and appropriate it for the use and benefit of another, a trust for the benefit of such person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself." If the plaintiff had contracted with Miss Kron for an option to himself, and, after doing so, procured defendant to take the option upon an express promise to hold for his (plaintiff's) benefit and transfer to him, can there by any question that the court would have enforced the promise? Can it be that there is any substantial difference when, as in this case, he having procured a promise from Miss Kron to give the option to them jointly, and pursuant to an arrangement between the parties that the option was to be so taken, defendant, in violation of his promise, takes the option to himself? Is not this a clear case of obtaining the property by unfair means? If he took the option in his own name, intending to exclude plaintiff from any interest therein, it presents a clear case in which the Court declares him a trustee *ex maleficio.*

In *Cloninger v. Summit,* 55 N. C., 513, in which the same principle is involved, *Pearson, J.,* says: "The plaintiff's equity does not rest upon the idea of the specific performance of a contract. The parties did not occupy the relation of vendor and vendee. The defendant did not agree to *sell* the land to the plaintiff, for, at the time of the arrangement, he did not have the land, or any interest therein, to sell; nor was the plaintiff to pay a price for it. But the plaintiff's equity rests upon the idea of enforcing the execution of a trust." *Hargrave v. King,* 40 N. C., 430. If, as is probable, defendant took the option to himself, intending in good faith to carry out his agreement with plaintiff, and there- (123) after, for any reason, changed his purpose or decided to hold for himself, is the plaintiff without remedy? We think not. To permit defendant to so deal with the property to plaintiff's injury would be to encourage instead of to prevent fraud and wrong.

It is true, as contended by defendant, "that a breach of a mere moral obligation is not, by itself, sufficient ground for the interference of the court." But, as said in *Avery v. Stewart, supra,* "The evidence, if taken as true, shows that there was more than that in this instance, and that the defendant has acquired property which he could not have obtained but for the plaintiff's request that he furnish the money and take the title, and his promise to do so. . . . The plaintiff's equity seems to us to be plain." The difference in the two cases consists in the fact that in one the defendant agreed to take the title to himself for the benefit of

plaintiff, whereas in the other he was to take the option in the name and for the benefit of both, and, in violation of his promise and his duty, he took it to himself. In one the wrong was in refusing to execute an express promise, upon the faith of which defendant got the property, whereas in the other defendant took title in violation of his agreement. In the first case the Court enforces the execution of an express parol trust. In this case the Court declares defendant a trustee to prevent fraud *ex maleficio*. The law and the authorities have been so recently discussed and cited in *Avery v. Stewart, supra,* that we deem it unnecessary to repeat what was so well said in that case.

The doctrine of trusts, both parol and constructive, has been frequently before this Court, and the principles so clearly stated that we prefer to adhere to our own decisions. In several jurisdictions the statutes differ from ours. The Court has uniformly held that parol and, of course, constructive trusts are not within our statute of frauds.

(124) Defendant's counsel, in his very excellent brief, stresses the principle and authorities relating to *resulting trusts,* which usually arise when the purchase money is paid by one person and the title taken by another. As we have seen, this case does not come within that class, and is not, therefore, affected by the fact that defendant furnished the money to pay for the option. The trust attached to the option, and the interest acquired by defendant by virtue thereof, and, in the absence of any action on the part of plaintiff releasing such equity, it adhered to such title as defendant acquired pursuant to the original option. The evidence tends to show, and the fact passed into the verdict, that plaintiff was at all times asserting his rights. His Honor expressly submitted the question to the jury whether he was induced to discontinue his efforts to raise the purchase money by the promise of the defendant to do so for both. If defendant intended to put an end to the relation established between himself and plaintiff by the original agreement, he should have given him clear, express, and unequivocal notice thereof, and thereby let plaintiff understand that he must assert his rights or lose them. This he did not do.

While there is some evidence indicating a purpose to exclude plaintiff from further participation in the transaction, the first unequivocal act done by defendant was the execution of the deed to his father-in-law. Since then we find no change in the status of the parties in respect to their rights and liabilities.

The defendant lodges a number of exceptions to the admission of evidence. They are based upon the theory that they were offered to establish the plaintiff's case by acts and declarations subsequent to the execution of the first option. His Honor confined them at all times during the

trial to the office of corroboration of the substantive evidence upon which the cause of action was based. The testimony was competent for this purpose. His Honor correctly refused to dismiss the action.

The judgment secures to the plaintiff what was to be his by the original agreement—that is, a one-half interest, after paying one-half the purchase money. If the defendant has lost his one-half in- (125) terest by conveying it to his father-in-law in fee, he has no one to blame except himself. He had no right to give away the interest of the plaintiff, who, it seems, originated the idea and plan, which, if carried out as agreed upon, would have given each party a handsome profit on the purchase.

We have examined the record with care, and find

No error.

Cited: *Brogden v. Gibson,* 165 N. C., 20.

MELVIN W. PARRISH v. HIGH POINT, RANDLEMAN, ASHBORO AND SOUTHERN RAILWAY COMPANY.

(Filed 20 November, 1907.)

Evidence, Expert—Questions for Jury—Hypothetical Questions.

Upon competent evidence, an expert may be asked and he may answer a hypothetical question as to his opinion upon or conclusion from certain facts in controversy, assuming that the jury should find them to be true, which leaves the findings of those facts exclusively for the jury. A physician, admitted to be an expert witness, who had examined the plaintiff sustaining an injury, shortly thereafter, and had found and had testified that the plaintiff's kidney had been injured, may, upon competent evidence be asked and may give his opinion as to what was the cause, if the jury find from the evidence that plaintiff was injured by falling back against the arm of a seat in the train and struck his back over the region of the kidney, and that at the time it gave him great pain, followed by nausea, etc.

APPEAL from *Justice, J.,* at July Term, 1907, of RANDOLPH.

This action was brought to recover damages for injuries to the plaintiff by defendant's negligence. The plaintiff had taken passage on defendant's train from Greensboro to Ashboro on 23 July, 1906. He went to get some medicine for his wife and a glass of water, and while returning to his seat he received a severe shock, which was caused by the backing of the engine against the cars. He was hurled forward and then backward, falling against the arm of a seat, which in- (126)

jured his back, hips, and spinal column. There was evidence tending to show the extent of his injuries. In order to further prove the extent and nature of the injuries to himself, the plaintiff introduced Dr. Lewis, admitted to be a medical expert, who testified: "I have been a physician nearly twenty years. I examined the plaintiff on 7 and 8 July, 1907. There was nothing the matter with his lungs, but his heart beat a little fast. I found trouble—a swelling, puffiness, and tenderness over his right kidney." The witness was then asked the following question: "If the jury find the facts to be, from the evidence, that the plaintiff was injured by falling back against the arm of a seat in the train, and struck his back over the region of the kidney, and at the time it gave him great pain, followed by faintness or nausea, and that the second morning thereafter he passed urine mixed with blood, and that several times since he has passed bloody urine, as late as the 5th day of this month; that his nervous system was affected, and when he makes a misstep or has a sudden jar he has acute pain in the region of the kidney, followed by passing bloody urine, what, in your opinion, is the cause of his being affected in this way?" The witness answered: "In my opinion, the kidney was dislocated by the fall, and the dislocation is permanent, and the plaintiff will be disabled for life, unless he has the kidney removed by an operation." The question and answer were objected to by defendant in apt time. The objections were overruled, and defendant excepted.

The exception as above stated was the only one in the case. There was a verdict for the plaintiff, and, judgment having been entered thereon, the defendant appealed.

J. A. Spence and Morehead & Sapp for plaintiff.

J. T. Brittain and King & Kimball for defendant.

(127) WALKER, J., after stating the case: We cannot agree with the learned counsel of the defendant that this case bears any resemblance to *Summerlin v. R. R.*, 133 N. C., 550. In that case the questions excluded by the Court were so framed as to require the witnesses to express an opinion as to the existence of a fact which was controverted, and it was there said by the Court that this was not the proper form for the question to take, but that the expert's opinion should be founded upon a hypothetical question containing a statement of facts which the jury might find from the evidence, and supposing, of course, that they will find them to be as stated in the question. The rule is stated in 3 Wharton & Stille's Medical Jurisprudence (5 Ed.), p. 580, as follows: "An opinion that an injury resulted from a certain designated act, being the one upon which the action is based, as distinguished from an opinion that certain causes would produce certain results, is improper as usurping the province of the jury." And so did we say, substantially,

in *Summerlin v. R. R.*, upon the authorities therein cited. The same rule, practically, is stated in 6 Thompson on Negligence, sec. 7755 (p. 694), as follows: "A medical expert is generally allowed to state his opinion as to whether the injury for which the action is brought *might* have resulted from a particular cause." But in this case the witness was not asked to give an opinion as to the mere existence of a controverted fact, but, upon the assumption that the jury found certain facts from the evidence as to the symptoms of the plaintiff's disease, including the fact that he had been injured by the jar in the manner described, he was asked to give his scientific opinion as to what produced those symptoms. He answered that the kidney had been permanently dislocated by the fall, and that he would be disabled for life, unless the kidney was removed by an operation. The injury from the jar, and the marked symptoms immediately following it, were assumed as facts that the jury might find to have existed, and his opinion was based on the facts so to be found. He was not asked, if the symptoms existed, what particular injury caused them, but the injury and (128) its instant manifestations were first assumed as established, and his opinion was deduced from these supposed ascertained facts. It was necessarily assumed by the very form of the question that whatever injury the plaintiff had suffered was *directly* caused by the fall, and the witness was called upon to state what the physical conditions produced by the fall indicated to his trained and experienced mind as a medical practitioner. We think the evidence comes strictly within the rule admitting expert testimony, or that which is given by a witness having special or peculiar knowledge and skill in the particular calling to which the inquiry relates, and the competency of the question, as predicated on the hypothetical facts stated, is sustained by the best considered authorities. *Longan v. Weltmer,* 180 Mo., 322 (64 L. R. A., 969); *Stouter v. R. R.,* 127 N. Y., 661; *Perkins v. R. R.,* 44 N. H., 223; *S. v. Bowman,* 78 N. C., 509. The question was not so put to the witness "as to require him to draw a conclusion of fact nor to pass upon the effect of the evidence in proving controverted facts," but merely to express his opinion upon the facts stated in the question, leaving them to be found exclusively by the jury. There was evidence upon which the jury could have made such a finding.

The ruling of the court in admitting the evidence of Dr. Lewis was, therefore, correct.

No error.

Cited: Lynch v. Mfg. Co., 167 N. C., 100; *Shaw v. Public Service Corporation,* 168 N. C., 620; *Cochran v. Mills Co.,* 169 N. C., 64; *McManus v. R. R.,* 174 N. C., 737.

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JOHN L. AND M. P. EFLAND, TRADING AS THE ORANGE MANUFACTURING COMPANY, v. SOUTHERN RAILWAY COMPANY.

(Filed 20 November, 1907.)

1. Railroads—Carriers—Overcharge—Penalties—Demands, Specific.

The mere fact that the plaintiff, the party aggrieved, inclosed separate written demands in the same envelope and gave an aggregate amount thereof in a letter accompanying them, does not affect the demands being specific, under the statute, when the overcharges were separate and distinct, the statement or demand made specifically as to each, accompanied separately with the paid freight bill and duplicate bill of lading, and each demand was complete in itself; and such is a compliance with the provisions of Revisal, sec. 2643, requiring that, in case of an overcharge, the person aggrieved may file with the agent of the collecting (railroad) company a written demand, supported by a freight bill and original bill of lading, or duplicate thereof, for refund of the overcharge.

2. Railroads—Carriers—Penalty Statutes—Construction—Disproportionate.

The penalty fixed by the Revisal, sec. 2644, to enforce the duty of the carrier in regard to proper charges for transporting freight and refund of overcharges, and which cannot in any event exceed $100, is enforcible for a default established against defendant, though the particular transportation charges may appear disproportionately small. It is on failure to return small amounts wrongfully overcharged that penalties are especially required. In large matters the claimant can better afford the cost of litigation.

PLAINTIFF'S APPEAL.

ACTION to recover for an overcharge on freight bill, and penalty for not returning same within the time required by law, tried on appeal from a justice's court before *Councill, J.*, and a jury, at August Term, 1907, of ORANGE.

The following appears in the record as statement of case on appeal:

This action was tried before the Hon. W. B. Councill and a jury, at August Term of Orange County Superior Court. There were two causes of action joined therein:

(130) 1st. For an overcharge on a car-load of excelsior shipped by plaintiffs from Efland, N. C., to the Taylor Mattress Company at Salisbury, N. C., 3 September, 1906, the freight for the same, including an overcharge of $1.39, having been paid by plaintiffs 9 September, 1906.

2d. For $100 penalty, under Revisal, secs. 2642-2644, inclusive, the claim for said charge, accompanied by the proper papers, having been filed with the defendant 20 September, 1906, and still remaining unsettled.

It appeared on the trial that the plaintiffs at the time of filing said claim, 20 September, 1906, inclosed in the same envelope another claim

for an overcharge of $7.96 on the shipment of a car-load of excelsior to Lexington, N. C., on which judgment had been obtained at the same term of the court for $7.96 overcharge and $100 penalty for failure to settle claim within sixty days. Revisal, secs. 2642-2644. In each case the claim was supported by the paid freight bill, a duplicate bill of lading and by an itemized statement on the billheads of the plaintiffs, as follows (in the Lexington case the letters and figures being changed only so far as to make them fit the case):

EFLAND, N. C., 20 Sept., 1906.

SOUTHERN RAILWAY COMPANY,
Washington, D. C.

Bought of THE ORANGE MANUFACTURING COMPANY,
MANUFACTURERS OF EXCELSIOR AND LUMBER.
EXPORT HARDWOOD A SPECIALTY.

Overcharge in freight, $1.39.

On Southern car No. 133420. Excelsior shipped Taylor Mattress Company, Salisbury, N. C., 3 September, 1906. This car contained 21,900 pounds of excelsior, and the correct amount of freight is $22.70; we paid $24.09, making an overcharge of $1.39.

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When filing these claims with J. J. Hooper, freight claim agent of the defendant company at Washington City, the plaintiffs inclosed a letter, of which the following is a copy:

M. P. EFLAND JOHN L. EFLAND

THE ORANGE MANUFACTURING COMPANY,
MANUFACTURERS OF EXCELSIOR AND LUMBER.
EXPORT HARDWOOD A SPECIALTY.

EFLAND, N. C., 20 Sept., 1906.

J. J. HOOPER, F. C. A.,
Washington, D. C.

DEAR SIR:—Inclosed please find claim:

Overcharge in freight to Lexington, N. C.	$7.96
Overcharge in freight to Salisbury, N. C.	1.39
Please let us have prompt adjustment.	$9.35

Very truly,
ORANGE MANUFACTURING COMPANY.

Upon the cause of the action for penalty his Honor charged the jury that the statute (Rev., 2643) required a specific written demand for each overcharge, as well as the lapse of time, to render the defendant

liable for the penalty imposed thereby; that the letter of plaintiffs to Hooper (set out in full above) did not constitute the specific written demand required by the statute, in that two overcharges set out therein were lumped together and the demand was made for the total sum of $9.35 and not specifically for $1.39. They should answer the second issue "No," as the plaintiffs are not entitled to the penalty in this case. To this charge the plaintiffs excepted.

Under the charge and on the testimony, the jury responded to the issues submitted as follows:

(132) "1st. Is defendant indebted to plaintiffs by reason of overcharge, and if so, in what amount?' Answer: "Yes; $1.39."

"2d. Is defendant indebted to plaintiffs by reason of penalty, and if so, in what amount?" Answer: "No."

Plaintiffs moved for a new trial for error in the charge on the form and sufficiency of the demand, which was overruled, and plaintiffs excepted. There was judgment for plaintiffs for $1.39, and they again excepted and appealed.

Frank Nash for plaintiffs.

F. H. Busbee & Son and S. M. Gattis for defendant.

HOKE, J., after stating the case: We are of opinion that there was error in the charge of the court on the question of plaintiffs' demand.

1. The statute on the subject (Revisal, secs. 2642, 2643, 2644) provides that no railroad shall make a charge on a freight shipment greater than the rates appearing in the printed tariff of the Company.

2. In case *any* overcharge is made, the person aggrieved may file with the agent of the collecting company a written demand, supported by a freight bill and original bill of lading, or duplicate thereof, for refund of the overcharge.

3. That any company failing to refund such overcharge for more than sixty days shall be subject to a penalty.

There was evidence tending to show that defendant company had made and received from plaintiffs in the present case an overcharge of $1.39 in shipment of freight from Efland, N. C., to Salisbury, N. C., and had failed to return same for more than sixty days after demand was made therefor. There was also evidence tending to show that defendant company had made and received, at a different time and for a different shipment, to Lexington, N. C., an overcharge of freight of $7.96, and had failed to return same for more than sixty days, and plaintiffs had recovered the amount of this last overcharge and a penalty for wrongfully failing to return same, in a separate action, tried

(133) and determined at the same term of the court.

The statute imposes the penalty for failure to return each overcharge. The two shipments were entirely distinct, and two distinct overcharges were made and received, and the statement of this overcharge in the form set out, accompanied in each case with the paid freight bill and a duplicate bill of lading, amounted to a written demand for each, and so complied with the statute. *Breckenridge v. State,* 4 L. R. A., 363; *Pa. Co. v. R. R.,* 69 Fed., 482.

The mere fact that the plaintiffs inclosed these separate demands in the same envelope and gave an aggregate of the amount in the accompanying letter does not affect the result. The two overcharges, as stated, were entirely distinct; the statement as to each, with the paid freight bill and duplicate bill of lading, amounted to a specific separate demand, complete in itself, and there was error in holding otherwise.

It was suggested on the argument that the penalty was objectionable, in that the same was entirely disproportionate to the amount of the claim. The point is hardly presented in the appeal of plaintiffs, but we are of opinion that the position is not well considered. The statute provides that the penalty in no case should exceed $100, and it is imposed, as stated, not primarily to faciliate the collection of claims, but to enforce the performance of the carrier's duties, and it is in reference to these smaller claims that penalties are desirable and chiefly required. In larger matters the claimant can better afford the costs of litigation.

Speaking of the statute and the reasons for its efficient enforcement, the *Chief Justice,* in *Cottrell v. R. R.,* 141 N. C., 383, said: "This statute was enacted in pursuance of a well-known public policy and to remedy a well-known evil. It is common knowledge that there are countless cases of shortage in freights and of overcharge, either by freight collected on such shortage or otherwise. Errors will happen, and sometimes are well-nigh unavoidable, but, none the less, justice (134) and sound policy require the prompt investigation of all claims and prompt payment of those that are just. These sums aggregate very many thousands of dollars annually, but each amount usually is too small a sum to justify the expense of litigation. Unless the railroad companies will promptly investigate and refund in such cases, the aggregate loss to the public is very great, and the exasperation in the public mind at the injustice is greater still. To give the public a remedy by insuring speedy investigation and payment, this statute was passed, requiring all common carriers, telegraph and telephone companies to investigate all claims for overcharges and refund in sixty days, prescribing a penalty of $25 for the first day's delay beyond sixty days and $5 for each day's delay thereafter; the total penalty, however, in no event to exceed $100. The companies that, either voluntarily or in obedience to law, investigate promptly and refund all claims for overcharge, which

are found to be just, within sixty days, suffer no inconvenience from this statute. Those who are so inconsiderate of just claims as not to adjust them within sixty days are proper subjects of the penalty, and prove the necessity for this statute, without which those having claims for overcharges could not get payment of them without great delay and annoyance, if at all, when the sum is too small to justify payment of a lawyer's fee and advancement of court costs."

The constitutionality of the act has been upheld in an opinion delivered at the present term on defendant's appeal. There is error, which entitles plaintiffs to a

New trial.

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JOHN L. AND M. P. EFLAND, TRADING AS THE ORANGE MANUFACTURING COMPANY, v. SOUTHERN RAILWAY COMPANY.

(Filed 20 November, 1907.)

1. Railroads—Carriers—Class Discrimination—Reasonable Regulations.

As to intrastate or domestic matters, the General Assembly has the right to establish regulations for public-service corporations and for business enterprises in which the owners have devoted their property to public use, and to apply these regulations to certain classes of pursuits and occupations, imposing these requirements equally on all members of a given class, the limitation of this right of classification being that the same must be on some reasonable ground that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.

2. Same—Carriers—Class Discrimination—Overcharge—Penalty Statutes.

Revisal, secs. 2642, 2643, 2644, establishing certain regulations as to charges by railroad, steamboat, express, and other transportation companies, and imposing a penalty on said "companies" for failure to return an overcharge wrongfully made within a given time, applies to all corporations, companies, or persons who are engaged as common carriers in the transportation of freight, and does not discriminate against defendant corporation by excepting either firms or individuals engaged in this service from its provisions.

3. Same—Debt.

The penalty imposed by Revisal, sec. 2644, to be recovered by the party aggrieved, for the failure of the railroad to refund an overcharge under the conditions therein named, is not for the nonpayment of a debt, in the ordinary acceptation of the term, but for wrongfully withholding an amount charged contrary to law, after the railroad company has time to investigate the demand therefor and to be informed of the facts, and it is in direct enforcement of the carrier's duty.

4. Same—Rates—Printed Tariff—Refund—Statutory Time—Constitutional Law.

These sections of the Revisal—section 2642, directing that no railroad company shall collect or receive for the transportation of property more than the rates appearing in the printed tariff; section 2643, prescribing the method of making demand upon the company for return of the overcharge, allowing sixty days for such return, and section 2644, providing a forfeiture, etc., to the party aggrieved—impose reasonable regulations for certain classes of pursuits and occupations equally on all members of a given class, applying alike in a just and proper relation to corporations, companies, firms, or individuals therein engaged, and, therefore, not inhibited by the Fourteenth Amendment to the Federal Constitution.

5. Same.

When it is established by the verdict of the jury, under admitted facts and proper instructions from the court, that the defendant railroad has failed to return an overcharge to the plaintiff, made in excess of the rates appearing in the printed tariff, for the shipment of freight within the statutory time allowed, in accordance with the provisions of Revisal, secs. 2642, 2643, the defendant is liable for the penalties prescribed in Revisal, sec. 2644. *Cottrell v. R. R.*, 141 N. C., 383, cited and approved.

DEFENDANT'S APPEAL (136)

APPEAL from a justice of the peace, tried before *Councill, J.*, and a jury, at August Term, 1907, of ORANGE.

The demand was for the amount of an overcharge paid by plaintiffs on a shipment from Efland, in North Carolina, to Lexington, N. C., and for a penalty for failure to adjust same, imposed by section 2644, Revisal 1905.

There was evidence on the part of plaintiffs tending to establish the claim and formal demand therefor, as required by the statute.

The judge charged the jury as follows: "That if they should find from the evidence that the plaintiffs had paid an overcharge of $7.96, as alleged by plaintiffs, and that plaintiffs had filed claim, as alleged, on 20 September, 1906, accompanied with paid freight receipt and bill of lading, with the freight claim agent of the defendant company, and the same was not refunded within sixty days after the filing of said claim, then the plaintiffs would be entitled to recover $100 as penalty for such failure to settle the demand, it being admitted that more than sixty days had elapsed since the claim was filed."

On the testimony and under the charge, the jury rendered the (137) following verdict: "Is defendant indebted to plaintiffs, and if so, in what amount?" Answer: "Yes; first, by way of overcharge, $7.96; second, by way of penalty, $100."

Defendant, by exception duly noted, objected to the validity of the judgment, and appealed, assigning for error: That the statute imposing

the penalty is in violation of section 1 of the Fourteenth Amendment to the National Constitution, and denies to the defendants the equal protection of the law.

Frank Nash for plaintiffs.
F. H. Busbee & Son and S. M. Gattis for defendant.

HOKE, J., after stating the case: Our statute applicable to the questions involved in this appeal (Rev., 2642) directs: "That no railroad, steamboat, express, or other transportation company engaged in the carriage of freight, and no telegraph company or telephone company shall demand, collect, or receive for any service rendered or to be rendered in the transportation of property or transmission of messages more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law." In section 2643 a method is established by which formal demand for return of an overcharge shall be made, which allows a maximum period of sixty days within which to return the same; and section 2644 (the section objected to) provides as follows: "Any company failing to return such overcharge within the time allowed shall forfeit to the party aggrieved the sum of $25 for the first day and $5 per day for each day's delay thereafter until said overcharge is paid, together with all costs incurred by the aggrieved: *Provided,* the total forfeiture shall not exceed $100."

Under the charge of the court, and the admissions therein referred to, the facts are necessarily established that there has been an over-
(138) charge for freight collected from plaintiffs by defendant; that demand for its return has been formally made as required by the statute, and that there has been a failure to return the amount to plaintiffs for a period greater than the sixty days declared to be the maximum period allowed, and for a time more than sufficient to make the maximum penalty of $100. On the facts, therefore, the plaintiff's claim comes directly within the provisions of the statute, and, unless the law is invalid, the judgment in their favor must be upheld. This being a domestic or intrastate shipment, the commerce clause of the Federal Constitution, and the various decisions construing it, do not affect the case; and the question presented, and which the defendant desired and intended to present, is whether this legislation is in conflict with the provisions of the Fourteenth Amendment, guaranteeing to every citizen of the United States equal protection of the law. The statute has been passed upon by direct adjudication of this Court in *Cottrell v. R. R.,* 141 N. C., 383, and we might well refer to that decision as conclusive of the matter, without more. It was, however, earnestly urged on the argument of the present appeal that the law in question is in violation of the section of the Constitution referred to. And as the constitutionality of the statute

was accepted without debate, in *Cottrell's case, supra,* we have deemed it well that the positions contended for by defendant should be more fully considered.

The right of the State to establish regulations for these public-service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is now and has long been too firmly established to require or permit discussion. *Harrill v. R. R.,* 144 N. C., 532; *Stone v. R. R.* 144 N. C., 220; *Walker v. R. R.,* 137 N. C., 168; *McGowan v. R. R.,* 95 N. C., 417; *Branch v. R. R.,* 77 N. C., 347; *R. R. v. Florida,* 203 U. S., 261; *R. R. v. Helms,* 115 U. S., 513; *Mobile v. Kimball,* 102 U. S., 691; *Munn v. Illinois,* (139) 94 U. S., 112.

As said by *Associate Justice Fields,* in *R. R. v. Helms, supra,* "The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every State of the Union provide for the increase of damages where the injury complained of results from neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages." And the right to establish such regulations for certain classes of pursuits and occupations, imposing these requirements equally on all members of a given class, has been made to rest very largely in the discretion of the Legislature. *Tullis v. R. R.,* 175 U. S., 348; *Ins. Co. v. Daggs,* 172 U. S., 562; *McGowan v. Savings Bank,* 170 U. S., 286.

In *Tullis v. R. R.,* just referred to, *Chief Justice Fuller,* quoting with approval from the decision in *Ins. Co. v. Daggs, supra,* said: "The State in exercising the power to distinguish, select, and classify objects of legislation necessarily has a wide range of discretion; it was sufficient to satisfy the demands of the Constitution if the classifications were practical and not palpably arbitrary." There are limitations on the right of a State Legislature to impose these regulations, as indicated in *Smith v. Ames,* 169 U. S., 466, and other cases of a like import, the exact nature and extent of which are not as yet fully or clearly (140)

defined. As said by Mr. Freunde, in his work on the Police Power, sec. 550, "It has been shown that, after some hesitation, the courts have asserted and now fully exercise the power to control the legislative determination that a rate is reasonable. It has, therefore, become incumbent upon the courts to lay down the principles by which the question of reasonableness must be judged, and the Federal Supreme Court alone can conclusively establish these principles in an affirmative manner. However, this important problem has not yet been finally solved."

From the very nature of the case, it would be difficult, perhaps impossible, to lay down a general rule so plain and precise that different cases could be readily referred to the one side or the other; and the United States Supreme Court has very wisely determined that the line shall be marked and the doctrine explained and applied by their decisions on the varying cases as they may arise.

This phase of the matter is not pursued further, for the reason that the defendant does not assail the law because the regulations thereby imposed are unreasonable in themselves, but because it establishes an unreasonable and arbitrary classification:

1st. In imposing the regulation therein specified on corporations and companies engaged in the transportation of freight, while individuals engaged in like service are not included.

2d. Because a penalty is imposed on corporations and companies mentioned for not paying their debts, and in this denying such companies the equal protection of the law, on the principle established more especially by the decision of the Supreme Court of the United States in *R. R. v. Ellis,* 165 U. S., 151. In that case it is held: "The mere fact of classification is not sufficient to relieve a statute from the reach
(141) of the equality clause of the Fourteenth Amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection." And, while this Court gives full adherence to the principle there stated, we are of opinion that its proper application does not sustain the defendant in either position maintained by it.

As to the first, "That it denies to defendant equal protection of the law, in that individuals engaged in like occupations are not included in the terms of the statute," even if the construction assumed as the basis of this position should be the true one, we are inclined to the opinion that the classification could be upheld, applying as it does to all corporations and companies engaged in the transportation of freight as common carriers. The terms are, we think, sufficiently broad and the regulations thereunder have such a reasonable relation to the occupation in which

the companies are engaged that the Legislature, in the proper exercise of its police power, might well have determined that such a classification could be upheld on the principle established by the cases heretofore cited, and that, even if individuals were shown to have engaged in like occupations, their enterprises would necessarily be so restricted and of such little moment that their cases would not require that they should be embraced by the statute. But we are of opinion that the construction of the law assumed by the defendant is not the correct one. A perusal of the entire statute and its different sections, taken in connection with those sections of chapter 20, Revisal of 1905, which deal with cognate subjects and whereby the Corporation Commission is given power to establish these regulations in reference to companies engaged in domestic traffic, leads to the conclusion that the Legislature applied, and intended to apply, these provisions of the law to all corporations and companies engaged in the transportation of freight for the public; (142) that it was the occupation which it had chiefly in mind, rather than the agency engaged, and that the term "company" was used and intended to include all corporations, companies, firms, or individuals who were engaged as common carriers in the transportation of freight. Many of the sections of the statute could be referred to in support of this construction, and this interpretation has been frequently applied to the word "company" in statutes passed in promotion of the public weal, in enforcement of the collection of revenue, in regulating the proper exercise of *quasi* public franchises, and in other regulations of like character.

This significance was given to the term "company" in *Sewing Machine Co. v. Wright,* 97 Ga., 114, where an occupation tax was collected from an individual engaged in a pursuit where only "companies" were taxed, and *Lumpkin, J.,* said: 'The most serious question for determination as to the constitutionality of the law in hand, in view of the 'uniformity clause' above mentioned, is this: Is its language sufficiently comprehensive in meaning to embrace all manufacturers of sewing machines who sell at retail? Unless it is, the law must fail, because, when once a class is established, every member properly belonging to that class must be taxed, or else the uniformity required is destroyed. If the words 'every sewing machine company' are applicable only to corporations or partnerships, then individuals manufacturing and selling sewing machines would not be reached. It may be true, in point of fact, that there are no single individuals in Georgia answering to this description; but the law should be broad enough in its terms to include any person who may at any time, upon his own account, enter upon such business, for otherwise it would be possible for an individual to begin the transaction of this very business and escape tax which corporations in the same business are compelled to pay. An

(143) omission of this kind in a taxing law might in some instances operate as an invitation to individuals to undertake business enterprises because of an attendant nonliability for taxes, and a consequent advantage to be gained over competitors engaged in the same business who are specifically named and taxed. At any rate, such an omission makes a discrimination, which the Constitution forbids. We think, however, that, so far as the law with which we are now dealing is concerned, the whole difficulty may be properly removed by simply holding that the words 'every sewing machine company' would apply to every sewing machine 'man' who undertook to engage in the manufacture and sale of such machines in this State. This construction, upon reflection, will be found not to be a strained or unreasonable one. On the contrary, we think it is entirely permissible when reference is had to the object of the law in question, that object being, not to tax a company or person carrying on the business, but the business itself. Of course, if the tax be upon the business, it is entirely immaterial whether such business be carried on by an individual, a partnership, or a corporation. As has been seen, the power of the Legislature extends only to classifying business occupations into different branches and laying upon each separate branch thus created such a tax as is deemed proper. The Legislature has absolutely no power to classify persons, natural or artifical, engaged in precisely the same occupation, laying a tax upon some of them and exempting others, or imposing a tax not operating uniformly upon all. Therefore, it would certainly seem the most natural and reasonable inference that the General Assembly, in passing the law in question, attempted to accomplish what it had an undoubted right to do, rather than that which the Constitution expressly forbids. It should be the purpose of the courts to give effect to legislative intention, and, where the intention is not perfectly clear, the unbending rule is that such a reasonable construction of the statute as will render it harmonious with the constitutional restrictions should invariably be adopted. In the present
(144) instance we are quite sure the Legislature intended that this tax should apply to the business in question, no matter by whom the same might be conducted."

And decisions of like import have been made elsewhere by courts of the highest authority. *Missouri v. Stone,* 118 Mo., 388; *Dock and Canal Co. v. Garrets,* 115 Ill., 155; *Morvan v. Ross,* 79 Cal., 159; *Mfg. Co. v. Wright,* 33 Fed., 121. The statute in question does not make the discrimination complained of by defendant, and its first position, therefore, finds no support in the law as correctly construed.

And we hold that the second ground of defendant's objection to the statute is not well considered, being of opinion that it does not come within the principle of the decision relied on to support it. *R. R. v.*

Ellis, 165 U. S., 151. That decision involved the validity of a statute of the State of Texas which imposed a fee of $10 on claims against railroad companies, not exceeding $50, for personal services rendered or labor done, a damage for overcharge on freight, etc., which the company failed to pay for thirty days after demand was duly made, and which claimant was compelled to collect by action, etc. The statute was held unconstitutional and a recovery by plaintiff denied. This, as we understand the opinion, was on the ground that the statute embraced claims for personal services rendered or labor done, as well as for damages for all overcharges of freight, etc., and the Supreme Court of Texas having held the statute constitutional as a whole, the United States Supreme Court, accepting that construction of the statute, considered it as one imposing a penalty for the nonpayment of debts, and, as such, having no reasonable reference especially to a railroad, as distinguished from any other corporation, or the proper exercise of its franchise, or the performance of its duties, or the dangers incident to its operation, and held that such a classification was, therefore, arbitrary and colorable, and the penalty imposed pursuant to same was contrary to law. But the principle does not obtain where the law which establishes the regulations and imposes the penalties makes a classification resting on some rea- (145) sonable ground and having some real relation to the privileges enjoyed or duties especially incumbent on all members of the class which it creates. Accordingly, in several opinions determined since *R. R. v. Ellis, supra,* notably in *R. R. v. Paul,* 173 U. S., 404, and *R. R. v. Mathews,* 174 U. S., 96, the same high Court, the final arbiter in such questions, has upheld classifications for the reason indicated, and these opinions are, to our mind, controlling in the case we are considering, and decide the questions raised against defendant's position.

In *R. R. v. Matthews, supra,* a statute of the State of Kansas allowed an attorney's fee in case of recovery against railroad compaines for damages caused by fires in the operation of the company's trains. The statute was upheld because the Court was of the opinion that the classification established was not arbitrary, as in *R. R. v. Ellis,* but was made in reference to the damages from fires peculiarly incident to the operation of trains. *Mr. Justice Brewer,* for the Court, said: "Its monition to the roads is not 'Pay your debts without suit, or you will have to pay for attorney's fee,' but, rather, 'See to it that no fire escapes from your locomotives, for if it does, you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fee of the owner of the property injured or destroyed.'" And so it is here. The penalty imposed is not for the nonpayment of a debt, in the ordinary acceptation of that term, but it is for having made an extortionate charge and failing to return the same within a reasonable time after demand was formally made, pursuant to law.

The regulation established in section 2642, applying, as we have seen, to all corporations and companies, including firms and individuals, engaged as common carriers in the transportation of freight, is one that the Legislature had the undoubted right to make. Its proper (146) application and efficient enforcement are of supreme importance to shippers and the public. The Legislature could, no doubt, have imposed a penalty for making an extortionate charge, and its power, of a certainty, is not impaired or destroyed because, in reasonable consideration of the carrier's interest, it is allowed time to investigate the demand and inform itself of the facts. The penalty is imposed, as stated, not for the nonpayment of a debt, but for wrongfully withholding an amount charged contrary to law, and is in direct enforcement of the carrier's duties.

Since this opinion was prepared, our attention has been called to an opinion just delivered by the United States Supreme Court in *R. R. v. Seigers,* in which a statute of the State of South Carolina, similar to the one we are considering, was declared to be constitutional and valid. This opinion of the United States Court is decisive of the principal questions involved in this appeal, and the full and learned opinion of the South Carolina Supreme Court (reported in 73 S. C., 71) also gives convincing reason in support of the position.

There is no error in the defendant's appeal, and the judgment of the court below is affirmed.

No error.

Cited: Morris v. Express Co., post, 170, 171; *Cardwell v. R. R., post,* 219; *Iron Works v. R. R.,* 148 N. C., 470; *Reid v. R. R.,* 150 N. C., 757; *Asbury v. Albemarle,* 162 N. C., 250; *Jeans v. R. R.,* 164 N. C., 229; *Thurston v. R. R.,* 165 N. C., 599.

(147)

EDMUND T. MUDGE, TRADING AS DOBLER & MUDGE, v. H. B. VARNER.

(Filed 27 November, 1907.)

1. Guarantor of Payment.

Plaintiff, holding a valid account, past due, against a corporation of which defendant was president, placed it in the hands of an attorney for collection. The defendant wrote, protesting against such course, and the plaintiff replied that if defendant would indorse notes for the account against the corporation he would withdraw the claim immediately. Thereupon defendant wrote, saying: "Will you hold up this account until July 10th inst.? If so, I will guarantee that it will be paid on that date."

Plaintiff immediately agreed to delay: *Held*, that the defendant's agreement to pay the debt of the corporation was a personal one and absolute, upon default of the principal after the agreed time, and that it was a guarantee of payment and not of collection.

2. Same—Contracts, Written—Parol Evidence.

When from the entire correspondence it conclusively appears that the defendant personally guaranteed the payment of the debt of a corporation of which he was president, he may not testify as to what he intended, so as to contradict or alter the clear import of the terms expressed in the correspondence.

ACTION to recover on an account for goods sold and delivered and guaranteed by defendant, tried before *Moore, J.*, and a jury, at May Term, 1907, of ROWAN.

Verdict and judgment for plaintiff, and defendant excepted and appealed.

John L. Randleman and Adams, Jerome & Armfield for plaintiff.
R. Lee Wright and P. S. Carlton for defendant.

HOKE, J. Plaintiff, holding a valid account, past due, for goods sold and delivered to the Globe Publishing Company, to the amount of $286.88, and having some reason to complain of inattention on the part of the company to his letters concerning it, placed the same in the hands of an attorney for collection. Defendant, who was the (148) president of the Globe Company, wrote protesting against such course, whereupon plaintiff wrote that if defendant would give notes for the account and indorse the same, the plaintiff would withdraw the claim from the hands of the attorney. Defendant replied, giving plaintiff general assurance of payment, but not offering to indorse any notes for the account. Thereupon plaintiff wrote defendant a letter containing this statement: "Now, please do not misunderstand us; we are making a claim against the Globe Publishing Company, and not against you, and if you have any confidence yourself in the Globe Publishing Company you will indorse the notes. Should we have a satisfactory settlement from you by Friday of this week, properly secured, we will withdraw the claim entirely from the hands of the attorney; otherwise, we will authorize him to proceed to collect the account by suit, if necessary. If you should decide to indorse the note, and will wire us at once, we will withdraw the claim immediately." In reply, defendant wrote, on 25 June instant, saying: "Will you be so kind as to hold up this account until 10 July? If so, I will guarantee that it will be paid on that date." Plaintiff immediately replied, agreeing to the delay.

The account was not paid, and some time thereafter the company became insolvent, and the present action was instituted against defendant,

personally, on the agreement contained in this written correspondence. Recovery was resisted by defendant, chiefly on the ground that the plaintiff was required to show that he had proceeded with diligence against the principal debtor. The evidence does not indicate very clearly that the plaintiff has been at all remiss in this respect, but, conceding that this should be established, we are of opinion that it would not avail to relieve defendant from liability, for the reason that the agreement shown by the correspondence is a guarantee of payment and not
(149) simply of collection, and, on default of the principal, the defendant's obligation to pay became absolute. *Cowan v. Roberts,* 134 N. C., 415; *Jenkins v. Wilkinson,* 107 N. C., 707; *Jones v. Ashcraft,* 79 N. C., 173. In *Jenkins v. Wilkinson, supra,* the distinction between the two kinds of guarantee is well stated, and in that case the Court held: "(1) A. was indebted to B. and gave his promissory note, which at maturity, he failed to pay. In consideration of a further extension of the time for payment, C. executed a writing, promising to guarantee the payment of the debt, provided B. would hold a certain mortgage as collateral: *Held,* C. was liable as a guarantor of payment, and not as a mere guarantor of collection. (2) A guarantor of payment is liable upon an absolute promise to pay, upon failure of the principal debtor. (3) A guarantor of payment is liable upon a promise to pay the debt, upon condition that the guarantor shall diligently prosecute the principal debtor without success." The authority is decisive against this position of defendant.

It is objected further that the court declined to permit defendant to testify as to what he intended by the letter in which he guaranteed the payment, to wit, that he only intended to give the promise as president of the company and not as an individual, citing in support of his position the case of *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, and other cases of like kind. But the principle announced in those cases has no application here, where the entire contract is shown to be in writing and the terms are explicit and free from ambiguity. The guarantee of defendant as president would have given no additional value to plaintiff's claim against the company; that was already acknowledged and complete. The entire correspondence conclusively shows that the guarantee expressed was that of defendant personally. In such case the correct doctrine is that a party to such a contract is not permitted to contradict or alter the agreement by showing that he did not intend the clear import of the terms in which the contract is expressed.
(150) *Bank v. Moore,* 138 N. C., 529, and authorities cited; Clark on Contracts, pp. 386-401.

In the case before us the letters express the entire contract between the parties. The obligation on the part of the defendant is explicit and

absolute. The consideration, the assent to the delay asked for, is sufficient (Clark on Contracts, p. 121), and there is no reason shown why the plaintiff's recovery should not be sustained. The objection to the second deposition is without merit, and we find no error which gives defendant any just ground for complaint.

No error.

Cited: Basnight v. Jobbing Co., 148 N. C., 357; *Rivenbark v. Teachey*, 150 N. C., 292; *Hilliard v. Newberry*, 153 N. C., 109; *Kernodle v. Williams, ib.*, 485; *Johnson v. Lassiter*, 155 N. C., 52; *Sykes v. Everett*, 167 N. C., 608.

C. M. CRITCHER v. JAMES WATSON.

(Filed 27 November, 1907.)

Landlord and Tenant—Lease—Betterments—Promise of Landlord to Pay.

If it can be done without injury to the freehold, a tenant has the right to remove all betterments affixed by him thereto, if done before the expiration of the lease; and the promise of the landlord to pay for them, made during the continuance of the lease and the possession of the tenant thereunder, is enforcible and not *nudum pactum*.

ACTION, tried before *Justice, J.*, and a jury, at April Term, 1907, of GRANVILLE.

From judgment for defendant, plaintiff appealed.

Graham & Devin for plaintiff.
B. S. Royster for defendant.

CLARK, C. J. Action for recovery of rents, begun before a justice of the peace. The only exception is to the following charge of the court: "If defendant bought and paid for the window and frame and put it in the house, and, after that time, told plaintiff he had done so, and plaintiff could pay for it or not, as he saw fit, and plaintiff ratified and accepted it, and plaintiff said he would pay for it, the plaintiff would be liable for the value of the window and frame, and de- (151) fendant would be entitled to credit for the same."

The defendant could not put a betterment on the house without request, and by such officious act, make the landlord his debtor. Nor, if the consideration was passed, would the promise of the plaintiff to pay therefor be binding, being gratuitous and without a consideration moving thereto. But the window and frame being a betterment to the house of future benefit, if the plaintiff "accepted the same and promised to pay

for it" (as the court charged), there were all the elements of a valid contract, for the tenant had a right to remove all betterments affixed by him, if done before the lease expired, if this were done without injury to the freehold. *S. v. Whitener,* 93 N. C., 594, bottom of page, citing Tyler on Fixtures, pp. 384, 385, on the very point of the right of a tenant to remove windows placed by him in a windowless house. If, under such circumstances, the plaintiff promised to pay for the window, this was ratification and acceptance.

This distinction reconciles the authorities. As the plaintiff contends, an executed or past consideration is no consideration to support an express promise in cases where the law does not raise an implied promise. 6 A. & E., 690, 693; *Allen v. Bryson,* 67 Iowa, 591. In *Bailey v. Rutjes,* 86 N. C., 522, Rutjes was lessee of the premises for five years, under a contract to make certain betterments. The plaintiff furnished the lumber to Rutjes for the purpose. He sued Rutjes and the lessors jointly, and the Court held that, unless the lessors "were originally liable by reason of a contract of some sort, they cannot be made so because of their having resumed possession of the premises, with its improvements, upon the surrender of their tenant; . . . nor, under such circumstances, would a promise to pay, after the lumber had been furnished and used, be binding on them, since it would be purely gratuitous, and, as such, would make no contract."

(152) But here the jury find that the plaintiff expressly agreed to pay for the window and frame their cost—$1.72—and the only query is whether the promise is void for lack of consideration. If the only claim were that, at the expiration of the lease, as in *Bailey v. Rutjes,* the property passed to the plaintiff, with the window and frame added, there would be, as in that case, no liability of plaintiff, either to the maker of the window and frame or to the defendant. And even if, after the expiration of the lease, when the house, with its betterments, had already passed back to the landlord, he had then made an express promise to pay for the betterment, this would have been unenforcible because *nudum pactum,* being a promise to pay for what had already become his property.

But here the express promise, which the jury find was made, was made during the tenancy. The tenant had a right to remove the window, if before he went out, provided this could be done without injury to the freehold. 24 Cyc., 1101. It does not appear that it would have been irremovable, for the jury find that the plaintiff promised to pay for it. If so, he must have desired to keep it there, and that it was desirable to keep it appears from the plaintiff's own testimony that "the room was 18 x 18 feet, with no light except from the door." Such a house was unsanitary and would be condemned by any board of health. Both par-

ties testify that the conversation occurred during the tenancy and at the time when the defendant was doing work putting in the window, the plaintiff denying and the defendant affirming a promise to pay for the same.

A landlord cannot be "improved" into a liability for improvements put upon his property by the tenant without authority. Nor can any one be held liable legally for a promise made without consideration; but here the betterment to the house was accepted at the time by the plaintiff, who promised to pay the $1.72 for it, as the jury find. He has lost nothing, but still has the consideration of better light for a large room, which before had no light except from the door.

No error.

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(153)

T. G. ROLLINS v. SEABOARD AIR LINE RAILWAY.

(Filed 27 November, 1907.)

1. Railroads—Penalty Statutes—Consignor and Consignee—Party Aggrieved.

The plaintiff may maintain his action against the defendant railroad company, under Revisal, sec. 2632, for wrongful failure to transport certain goods received by the latter, and bill of lading issued by it to plaintiff, when it appears that plaintiff shipped the goods to be for his benefit sold by the consignee, and that he (the plaintiff) was the one who alone acquired the right to demand the service to be rendered by the defendant, and was the party aggrieved.

2. Same—Penalty Statutes—Transport—Reasonable Time—Evidence.

When there is evidence that the time in transporting a certain shipment from one station to another on the same railroad, leading directly to the point of destination, and only 25 miles apart, was twelve days, the jury will be permitted, from their common observation and experience, to consider and determine the question of ordinary time between the two points, and in the absence of explanation by defendant, fix the amount of wrongful delay. Revisal, sec. 2632.

3. Same—Initial Point.

When in an action for a penalty under Revisal, sec. 2632, all the testimony was to the effect that the delay of twelve days complained of arose and existed altogether at the point of shipment, it is evidence sufficient for the jury to find such delay was unreasonable.

4. Same—Penalty Statutes—Party Aggrieved—Knowledge or Notice of Carrier.

When it is shown that the plaintiff is the "party aggrieved," under Revisal, sec. 2632, on account of the wrongful failure of defendant to transport certain goods within a reasonable time, it is of no importance and

bears in no way on the justice of plaintiff's demand or of defendant's obligation, whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time.

5. Same—Issues.

Issues submitted to the jury upon the question of notice to or knowledge of the defendant that plaintiff was the party aggrieved are immaterial.

6. Same—Penalty Statutes—Revisal, Sec. 2632—Constitutional Law.

Revisal, sec. 2632, is constitutional and does not deny to the carrier the equal protection of the laws.

(154) APPEAL from a court of a justice of the peace, tried before *Webb, J.*, and a jury, at August Term, 1907, of CHATHAM.

This action was to recover a penalty for unreasonable delay in shipment of a car-load of wood from Merry Oaks, N. C., to Raleigh, contrary to provisions of section 2632, Revisal 1905.

There was evidence on the part of plaintiff tending to show that Merry Oaks was a regular station on the main line of the Seaboard Air Line Railway, about 25 miles distant from Raleigh, N. C., and that there had been a wrongful delay of twelve days in the shipment of the wood after the defendant company had received the wood and given bill of lading for same; that the delay occurred at the initial point, the car on which it was loaded having remained on the defendant's side-track at Merry Oaks from 6 February, 1906, to 20 February, 1906, and the wood was shipped on consignment, to be sold for the benefit of plaintiff and as plaintiff's wood. The testimony of plaintiff on that question was as follows: "I got Mimms to load car and get bill of lading for it. It was my load of wood. (Bill of lading introduced in evidence, dated 6 February, 1906.) Mr. Marks was agent of defendant company at that time. I told agent of defendant, the first or second day after the bill of lading was issued, that I insisted on the shipping of the wood; that I could not get my money for the wood until it was sold. I told him that I was shipping the wood to Mr. J. O. Morgan for him to sell for me, and that I could get no money for the wood until it was shipped. I had not sold or agreed to sell the wood at that time. I shipped it to be sold for me."

There was evidence on the part of defendant in explanation of the delay, as follows:

(155) "1. That the side-track on which the car was placed was torn up and had to be repaired, which prevented the car from being taken out on time.

"2. That all northbound local freights had their tonnage and were unable to take the wood before it was done."

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

"1. Did the plaintiff deliver to the defendant a car of wood on 6 February, 1906, and did the defendant deliver a bill of lading therefor, as alleged?" Answer: "Yes."

"2. Did defendant take an unreasonable time in transporting said car of wood from Merry Oaks to Raleigh, under the circumstances in this case?" Answer: "Yes."

"3. Did the defendant have notice, at the time the contract of carriage was made, that the plaintiff was the owner of the wood and that he retained title to the same?" Answer: "No."

"4. Did the defendant, at any time before the said car was shipped, have notice that the plaintiff had retained title to the same?" Answer: "Yes."

"5. What amount, if any, is the plaintiff entitled to recover?" Answer: "Eighty dollars."

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

H. A. London & Son for plaintiff.
Day, Bell & Allen and Womack, Hayes & Bynum for defendant.

HOKE, J., after stating the case: We find nothing in the record or case on appeal which gives the defendant just ground for complaint. It was chiefly urged for reversible error that the judge below should have instructed the jury that, if they believed the testimony, the plaintiff was not the "party aggrieved," under the principle established in *Stone v. R. R.*, 144 N. C., 220. But the facts do not bring the present case within the principle of that decision. In that case the Court prop- (156) erly held that, "When goods are delivered to a common carrier for transportation, and bill of lading issued, the title, in the absence of any direction or agreement to the contrary, rests in the consignee, who is alone entitled to sue as the party aggrieved, under the statute." And, applying the principle, the Court was of opinion that there was no testimony which tended to withdraw the case from the general principle. In our case, however, the undisputed testimony was to the effect that at the time of the shipment plaintiff had made no sale of the wood, but the same was shipped to be sold for the benefit of the plaintiff, the consignor, and that he alone had the legal right to demand that the transportation be promptly made, as required by law and the terms of the contract. This brings the present case clearly within the principle declared in the opinion of *Summers v. R. R.*, 138 N. C., 295. In that decision the Court said: "In giving the penalty to the party aggrieved, the statute simply designates the person who shall have a right to sue, and restricts it to him who, by contract, has acquired the right to demand

that the service be rendered. The party aggrieved, in statutes of this character, is the one whose legal right is denied, and the penalty is enforcible independent of pecuniary injury. *Switzer v. Rodman,* 48 Mo., 197; *Qualls v. Sayles,* 18 Tex. Civ. App., 400; *Grocery Co. v. R. R., supra.* Ordinarily, in case of a shipment of goods by a railway to a person who has ordered them, on delivery to the railroad the company receives them as the agent of the vendee or consignee, and such person would be the aggrieved party by delay in forwarding. But in this case, by the terms of the agreement between the plaintiff and Ward & Son, the plaintiff was not to get credit for the returned goods till they were received by Ward & Son. It made no difference to this firm whether the goods were returned or not; they had their account against the plaintiff,

(157) and a fair interpretation of the agreement between the parties is that no credit was to be given till the goods came to hand. Until this occurred, the loss of the goods would have been the loss of the plaintiff, and he alone was interested in urging the shipment." This authority is controlling and decides the point against defendant's position.

It was objected, further, that the court should have held that there was no testimony to be considered by the jury that there had been unreasonable delay in the shipment, and this for the reason that no witness had stated in express terms what was the ordinary time required for a freight train between Merry Oaks and Raleigh. The objection is hardly open to defendant on this record, for all the testimony was to the effect that the delay complained of arose and existed all at the point of shipment—Merry Oaks; but, considering that the exception was properly presented, we think that there was testimony sufficient to carry the case to the jury. The time of delay was shown, and it was also found that Merry Oaks, the point of shipment, was a regular station on the main line of the Seaboard Air Line Railway, leading directly to Raleigh, the point of destination, and only 25 miles distant; and with facts and conditions so simple and circumscribed, the jury might well be permitted, from their common observation and experience, to consider and determine the question of ordinary time between the two points, and, in the absence of explanation, fix the amount of wrongful delay on the principle established in *Wright v. R. R.,* 127 N. C., 225, and *Deans v. R. R.,* 107 N. C., 693.

Exception was also made that the court permitted the plaintiff to testify that he told defendant's agent, a few days after the bill of lading was given, that he was shipping the wood to be sold on account, and that plaintiff could get no money till the wood was sold. The evidence was introduced on the third and fourth issues, as to whether the defendant was notified that plaintiff was the "party aggrieved"; but we do not

think that the issues themselves were material to the controversy, (158) or that the testimony was in any way relevant to the inquiry.

It should always be required, for a lawful recovery, on a statute having this wording, that plaintiff should establish that he is the party aggrieved, for, as said by *Mr. Justice Connor,* in *Stone v. R. R., supra,* "It is manifest that the statute does not contemplate that two recoveries should be had for the same breach of duty." But when this is done, and defendant is thereby protected from responsibility, except to the rightful claimant, it is of no importance and bears in no way on the justice of plaintiff's demand or of defendant's obligation, whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time.

The exception noted on the trial, that the statute was unconstitutional in denying to defendant the equal protection of the law, was not insisted upon here. The Court, in several decisions, has held that the statute is valid, and the objection cannot be sustained. *Walker v. R. R.,* 137 N. C., 163; *Stone v. R. R., supra.*

No error.

Cited: Cardwell v. R. R., post, 220; *Robertson v. R. R.,* 148 N. C., 324; *McRackan v. R. R.,* 150 N. C., 332; *Lumber Co. v. R. R.,* 152 N. C., 74; *Buggy Corporation v. R. R., ib.,* 121; *Elliott v. R. R.,* 155 N. C., 236; *Ellington v. R. R.,* 170 N. C., 37; *Phillips v. R. R.,* 172 N. C., 91; *Whittington v. R. R., ib.,* 505.

NORFOLK LUMBER COMPANY ET AL. V. M. A. AND E. S. SMITH.

(Filed 27 November, 1907.)

1. Deeds and Conveyances—Timber Contracts—Time Limited—Interpretation of Contract.

When, under a contract to convey all the timber of specified dimensions upon certain described lands, it is stipulated that the bargainor, "his heirs and assigns, shall have four years to cut, haul, and remove said timber from the lands, and, if a longer time is desired to remove the timber, right is hereby granted, upon the payment of 8 per cent upon the purchase price for the time it takes after the expiration of the four years herein granted," etc., he or those claiming under him should at least have begun the cutting and removal of the timber within the four-year period, as, by interpretation of the contract, the extension of time was given in the event the period therein specified should be found insufficient for the purpose.

2. Same—Timber Contracts—Time Limited—Injunction.

When it appears that the bargainee, or the plaintiff claiming under him, has slept upon his rights to remove, under a contract to convey, the

timber upon certain described lands within the specified time, and that within such period he has not commenced to so remove the timber, it is proper to dissolve plaintiff's restraining order upon the hearing, it being apparent that he will eventually fail in his suit.

(159) APPEAL from *Jones, J.*, at May Term, 1907, of HARNETT.

This is an action brought for an injunction against the cutting of timber on the land described in the pleadings, containing 375 acres and known as the "Smith tract." The question in the case for our consideration arises upon the construction of a contract between J. D. Barnes and James E. Ethridge, the plaintiffs having acquired the interest of Ethridge under the said contract by *mesne* conveyances or assignments, and the defendants having acquired the title and interests of J. D. Barnes by a deed to M. A. Smith, whose husband and codefendant, E. S. Smith, cut the timber by her permission and authority. The material part of the contract between Barnes and Ethridge is as follows:

"In consideration of the sum of $1,400 in cash, the receipt of which is hereby acknowledged, I have this day agreed to bargain and sell, and by these presents do bargain and sell, to James E. Ethridge, of Norfolk, Va., his heirs and assigns, with the privilege of moving, as hereinafter stated, at any time within four years from date, subject to the conditions hereinafter contained, all of the pine sawmill timber of the following dimensions: that is, 12 inches in diameter at the stump at the time of removing, on that tract or parcel of land situated in the county of Harnett and the State of North Carolina, and bounded as follows: (Description here given.) The said James E. Ethridge, his heirs and assigns, shall have four years to cut, haul, and remove said timber from the land; and if longer time is desired to remove the timber, right is hereby granted,

upon the payment of 8 per cent per annum on the purchase price
(160) for the time it takes after the expiration of the four years herein

granted, together with the rights and privileges, for and during the said period from this date, of his agents, heirs, or assigns to enter upon said land or any other land owned by him, and to pass and repass on the same at will, on foot or with teams and conveyances; to build lumber camps, stables, and other fixtures; to cut and remove the said timber, and to construct and operate any roads, tramroads, or railroads over and upon said lands as the said James E. Ethridge, his heirs or assigns, may deem necessary for cutting and removing said timber; and to use such trees, underwood, and brush on said land as may be needed in the construction and operation of said roads, tramways, and railroads; and to use and operate any railroad, tramways, or roads that the grantee herein, or his heirs, may construct or cause to be constructed, so long as they may desire, not exceeding two years, (with) the right to remove any

and all fixtures, roads, railroads, and tramways or anything put up by said James E. Ethridge, his heirs or assigns, on said lands."

His honor, *Judge Jones,* issued a restraining order to stop the cutting and removal of timber, and an order to show cause why the injunction should not be continued to the final hearing, at which time he refused to continue the injunction, and the plaintiffs appealed.

Rose & Rose for plaintiffs.
E. F. Young and J. C. Clifford for defendants.

WALKER, J., after stating the case: It seems to us that the presiding judge correctly interpreted the agreement between Barnes and Ethridge. The parties evidently intended that Ethridge should begin the cutting and removal of the timber within the first four years, and the additional two years were granted, not as an original period for the cutting and removal, but for the purpose of enabling Ethridge to complete the cutting and removal commenced during the four years, provided it should be found that it was not sufficient time for cutting and (161) removing all the timber from the land which is described in the complaint. Surely it was not the intention of the parties that Ethridge should lie by and not cut a tree during the four years and then claim the right to cut and remove the timber during the two supplementary years. They were allowed, as we have said, for the purpose of completing the cutting and removal, and not as additional time to provide against the delay and laches of Ethridge in performing the work. The plaintiffs' construction of the contract is utterly inadmissible. Our opinion, therefore, is that Ethridge should have begun cutting and removing the timber within the four years, and if, in the exercise of reasonable diligence, he was not able to finish during said period, then it is provided that he shall have the additional time, not exceeding two years, to complete the work. It was admitted that Ethridge did not attempt to cut or remove a single tree during the four years first allotted to him. Would it not be a perversion of the terms of the contract to permit him to take advantage of his neglect and to use any part of the two years to cut and remove the timber, which were merely intended to supplement the four years to the extent that further time was needed to do what could not be done within that period? The stipulation is, not that if another full term is required to begin and finish the work, but if *longer* time is required for that purpose. This necessarily implies that at least some of the cutting and removing should be done during the first mentioned period. The plaintiffs cited in support of their position the cases of *Hawkins v. Lumber Co.,* 139 N. C., 160; *Lumber Co. v. Corey,* 140 N. C., 462; *Mining Co. v. Cotton Mills,* 143 N. C., 307; *Woody v. Timber Co.,* 141 N. C., 471. Those cases are not in point. They relate altogether to a different ques-

tion from the one presented in this case. *Bunch v. Lumber Co.*, 134 N. C., 116, is also referred to in the plaintiffs' brief; but that case, as well as *Hawkins v. Lumber Co.*, decides that the party who has (162) by a contract been given permission to cut and remove timber must proceed to do so with reasonable diligence, where no time is fixed. And so in this case it was not contemplated that Ethridge should waste the whole period of four years by idleness or inaction and claim the right to cut and remove the timber during the time limited for finishing the work. If we give such a meaning to the contract it will contravene the plainly expressed will of the parties, and it cannot be warranted by any recognized rule of construction. If we should so decide, both the spirit and the letter of the agreement would be violated. The law does not permit a party to sleep upon his rights. He must be diligent.

Lumber Co. v. Cedar Co., 142 N. C., 411, also cited, has no application to the facts stated in the record. That decision was based upon the statute which requires a bond to be given by the defendant in certain cases if an injunction is refused. But why do the vain thing of requiring a bond in this case, when it is apparent that the plaintiff *must* eventually fail in its suit?

The ruling of his Honor in refusing to continue the injunction to the final hearing, being right, is affirmed.

No error.

Cited: *S. c.*, 150 N. C., 253.

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(163)

JULIA A. DAVIS ET AL. v. W. P. DAVIS ET AL.

(Filed 27 November, 1907.)

Deeds and Conveyances—Feme Coverts—Privy Examination—Evidence—Set Aside—Notice to Grantee.

In an action to invalidate a deed to lands because, in fact, the privy examination of the *feme covert*, the owner and plaintiff, had not been taken, though expressed to have been taken, as required in the certificate of the justice of the peace, the burden is upon the plaintiff, by clear, cogent, and convincing proof, to show that her examination had not been taken at all. When, under a proper charge thereon from the judge, the jury has found that such examination was not taken, the verdict will stand, though the grantee may not have been fixed with notice.

ACTION tried before *Peebles, J.*, and a jury, at Spring Term, 1907, of WATAUGA, to set aside the execution and privy examination of a deed, dated 13 May, 1904, purporting to have been made by plaintiff to her son, Eugene Davis.

His Honor, without objection, submitted the following issues:

"1. Was the privy examination of Julia A. Davis to the deed of 13 May, 1904, taken separate and apart from her husband, M. M. Davis?" Answer: "No."

"2. Was the plaintiff the owner in fee of the lands described in the pleadings when she signed the deed to her son on 13 May, 1904?" Answer: "Yes."

From judgment upon the issues defendants appealed.

Edmund Jones for plaintiffs.
R. Z. and F. A. Linney for defendants.

BROWN, J. The evidence tends to prove that the plaintiff Julia A. Davis inherited the land described in the complaint from her father. She is the widow of M. M. Davis. She and her husband had but one child, a son, by name of Eugene O. Davis. Early in life, when this son was about 17 or 18 years of age, he developed tubercu- (164) losis and died. While in this diseased condition and enfeebled by the ravages of his fatal malady, the plaintiff and her husband, M. M. Davis, joined in a deed purporting to convey plaintiff's land to said son, who within a few months thereafter died. The father, M. M. Davis, also died within two years of the death of his son.

Treating the deed from his mother and father to the son as a conveyance of the fee, the land inherited by plaintiff from her father passed to the son absolutely, and upon the demise of the son became, by descent and under the statute, the land of his father. Upon the death of M. M. Davis the land went, in the absence of direct heirs, to the collateral heirs of the said M. M. Davis, who are the defendants in this action, subject to the dower interest of the widow, who is the plaintiff.

No valuable consideration whatever was ever paid by Eugene O. Davis, or by any one from him, or by any one at all, and the plaintiff never received anything for the land. In her complaint the plaintiff alleges, in substance, that the so-called execution of the deed by her was procured by the force and fear of her husband, with intent, as it is inferred, of becoming the absolute owner of his wife's land upon the expected death of the son. She alleges that she was never privily examined touching her voluntary consent to the execution of the deed, and that the deed is void, but that the deed is a cloud upon her better title, and asks relief that the court remove the same. There was evidence offered by plaintiff tending to prove that her husband and herself acknowledged the signing of the deed before a justice of the peace; that her husband was present during the entire ceremony; that the justice

did not examine her at all as to her voluntary assent, and that, in fact, no privy examination whatever was taken, either in her husband's presence or out of it.

Although the language of the first issue would seem to indicate that the case turned upon the mere presence of the husband at the
(165) ceremony of privy examination, yet such is not the fact. The charge of the court shows plainly that it turned upon the sole question as to whether any examination at all was taken. The defendants requested the court to charge: "(1) That there is no evidence in this case that Eugene Davis, the grantee in the deed of 13 May, 1904, offered in evidence, had at any time any knowledge or notice of the alleged defect in said deed to him. The plaintiffs, in no aspect of the case, can recover. (2) That the certificate of the justice taking the private examination of a married woman is a judicial act, and ought to stand, unless the evidence offered to set it aside is full and convincing." The court refused to give the first instruction, but gave the second, to the effect that the proof should be clear, strong, and convincing. The court further charged the jury that they should be fully satisfied, by strong, clear, and convincing proof, that there was no private examination taken.

The presence and undue influence of the husband at the ceremony of privy examination would not vitiate a certificate in all respects regular unless the grantee had notice of it, and the burden would be upon plaintiffs to show such notice. Revisal, sec. 956. But that is not the theory upon which this case was tried. The charge of the court made the case turn upon the contention as to whether any such ceremony ever took place at all, and not what occurred at it. The testimony of the plaintiff herself is to the effect that she was never, at that or any other time, examined as to her voluntary execution of said deed. The cases cited by the learned counsel for the defendants undoubtedly support their contention, that the presence and undue influence of the husband will not avoid the legal effect of the certificate of privy examination made by one qualified to take it, unless the grantee is fixed with notice of it. *Riggan v. Sledge,* 116 N. C., 92; *Bank v. Ireland,* 122 N. C., 575. But we have held at this term that, while the certificate, if regular
(166) on its face, precludes all inquiry into the fraud or falsehood in the *factum* of the privy examination, unless the grantee is fixed with knowledge thereof, yet it is open to the *feme covert* to show, if she can, that, in fact, no examination whatever was taken. *Lumber Co. v. Leonard,* 145 N. C., 339. The theory upon which this case was tried, and the manner in which it was presented to the jury by the court, brings it within that ruling. His Honor very properly placed the burden on plaintiff to establish her contention by clear, cogent, and convincing proof.

It may be that the jurors were unduly influenced by the evident wrong which had been perpetrated on plaintiff by her husband, but we cannot correct that. We repeat again what we said in substance in *Lumber Co. v. Leonard, supra:* The judges of the Superior Court should be extremely careful, in cases of this kind, to explain to the jury that the solemn acts of judicial officers are not to be lightly set aside, as titles to land depend upon the validity of their certificates, and never upon a mere preponderance of evidence, but only upon clear, strong, and convincing proof. Unless, in their opinion, the proof measures fully up to this high standard, we think the trial judge should not hesitate to set aside a verdict which destroys the legal effect of such an important judicial act.

No error.

Cited: *Brite v. Penny,* 157 N. C., 111.

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(167)

MORRIS-SCARBORO-MOFFITT COMPANY v. SOUTHERN EXPRESS COMPANY.

(Filed 27 November, 1907.)

1. Railroads—Penalty Statutes—Transport—Construction—Discrimination—Payment of Debt—Constitutional Law.

Section 2634, Revisal, imposing a penalty of $50 on common carriers on failure, for more than ninety days after demand duly made, to adjust and pay a valid claim for damages to goods shipped from points without the State, is not in violation of Article IV, section 1, of the Constitution of the United States, in denying to common carriers the equal protection of the laws nor in making arbitrary discrimination against them. The penalty imposed by the said section is not for the nonpayment of a debt, in the ordinary acceptation of that term, but the same bears a reasonable relation to the business of common carriers, and is in direct enforcement of the duties incumbent on them by law.

2. Same—Interstate Commerce, Aid to.

Revisal, sec. 2634, is not repugnant to or in contravention of Article I, section 8, of the Constitution of the United States, conferring upon Congress the power to regulate commerce between the States. The penalty is in direct enforcement of the duties incumbent on the carriers by law to adjust and pay for damages due to their negligence; is imposed for a local default arising after the transportation has terminated; is not a burden on interstate commerce, but in aid thereof, and, in the absence of inhibitive congressional legislation, the matter is the rightful subject of State legislation.

3. Same—Failure to Pay Claim for Damages.

When it appears that defendant, having charge of the goods as common carrier, shipped from Cincinnati, O., to Ashboro, N. C., delivered same to plaintiff's consignees at the point of destination in a damaged condition, the package having been broken open and part of the goods taken therefrom; that claim for damages has been formally made, and defendant has failed to pay or adjust same for more than ninety days, and that the full amount of the claim was established on the trial, the penalty of $50 imposed by section 2634 will attach as a conclusion of law, and judgment therefor in favor of plaintiff should he affirmed.

APPEAL from a justice's court, tried before *Moore, J.*, and a jury, at March Term, 1907, of RANDOLPH.

(168) There was evidence tending to show that defendant company, having undertaken, in the line of its duty as common carrier, to deliver certain goods to plaintiff, at Ashboro, N. C., the same having been shipped from Cincinnati, Ohio, in breach of its contract and agreement delivered only part of said goods, the package in which they were shipped having been broken open while in defendant's custody, and part of the goods taken; that after said package had arrived at Ashboro and been delivered to plaintiff in its damaged and defective condition, plaintiff duly filed a claim for damage, pursuant to statute, and defendant wrongfully failed and refused to adjust the claim for more than ninety days, etc., the claim being, in amount, as follows:

ASHBORO, N. C., 25 September, 1906.

Bought of MORRIS-SCARBORO-MOFFFIT COMPANY,
WHOLESALE AND RETAIL DEALERS IN DRY GOODS, NOTIONS, GROCERIES AND GENERAL MERCHANDISE.

To one (1) overcoat	$20.00
To one (1) overcoat, less 10 per cent	18.00
To one (1) overcoat and trousers	21.75
To part express	.21
	$ 59.96

Issues were submitted and responded to by the jury:

NORTH CAROLINA—Randolph County.

Superior Court, March Term, 1907.

E. H. Morris, P. H. Morris, W. J. Scarboro, B. Moffit, M. A. Moffit, E. L. Moffitt, and E. Moffitt, trading as Morris-Scarboro-Moffitt Company, *v.* Southern Express Company.

"1. Is the defendant indebted to the plaintiff on account of loss, as alleged? If so, in what sum?" Answer: "Yes; $59.96 and interest from 26 September, 1906."

"2. Was the claim of plaintiff filed ninety days before the (169) bringing of this suit?" Answer: "Yes."

There was judgment on the verdict for the amount of the loss and for the penalty of $50 imposed by the statute, and defendant excepted and appealed, and assigned for error that the statute imposing the penalty (section 2634, Revisal 1905) was invalid as to interstate shipments because in contravention of Article I, section 8, of the Constitution of the United States, conferring upon Congress the power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

Elijah Moffitt for plaintiff.
John A. Barringer and T. H. Calvert for defendant.

HOKE, J., after stating the case: The statute in question enacts: "That every claim for loss of or damage to property while in possession of a common carrier shall be adjusted and paid within sixty days in case of shipments wholly within this State, and within ninety days in case of shipments from without the State, after the filing of such claim with the agent of such carrier at the point of destination of such shipment or the point of delivery to another common carrier: *Provided,* that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods, respectively, herein prescribed shall subject each common carrier so failing to a penalty of $50 for each and every such failure, to be recovered by any consignee aggrieved, in any court of competent jurisdiction: *Provided,* that unless such consignee recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest, as aforesaid. Causes of action for the recovery of the possession (170) of the property shipped, for loss or damage thereto, and for the penalties herein provided for may be united in the same complaint."

It is established that the defendant company had charge of the goods, having undertaken to transport and deliver same as common carriers; that when delivered to plaintiff by defendant the package had been broken open and goods to the value of $59.75 had been taken out, which, with the proportional express charge of 21 cents, caused damage to plaintiff, by reason of negligent default in the contract of carriage, to the amount of $59.96; that formal demand for this exact amount had

been made and filed with defendant's agent, and the company had failed and refused to pay the same for more than ninety days. According to the provisions of the statute, therefore, the penalty would attach as a conclusion of law from the verdict and facts admitted, and if the statute is valid the recovery by plaintiff must be sustained. We have held at the present term in *Efland v. R. R.* (the defendant's appeal), *ante,* 135, that as a general rule the State or government having control of the matter had the right to establish certain regulations for these public-service corporations, and to enforce the same by appropriate penalties, and that in the fixing of such penalties the right of classification was referred largely to the legislative discretion, citing *Tullis v. R. R.,* 175 U. S., 348, and other authorities referred to and approved in that decision, the limitation on this right of classification being that established in *Ellis v. R. R.,* 165 U. S., 151, as follows: "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear, not merely that a classification has been made, but, also, that it has been made on some reasonable ground—some-
(171) thing which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

The statute construed and upheld in *Efland v. R. R., supra,* was section 2642, Revisal, imposing a penalty for wrongfully failing to return the amount of an overcharge; but the principle applies here, and shows that the statute now before us (section 2644) is not open to the objection sustained in *Ellis' case, supra,* but is a penalty, moderate in amount, imposed only after giving opportunity for investigation, that does not attach unless full recovery is had in accordance with demand made, and, moreover, is in reasonable and direct enforcement of the duties incumbent upon common carriers, and imposed alike on all members of a given class. The statute, therefore, is not subject to the criticism that it denies to defendant the equal protection of the law, and we do not understand that the defendant insists on this objection.

It is strongly urged, however, that the law is in violation of Article I, section 8, of the U. S. Constitution, conferring on Congress the right to regulate commerce among the several States. Supreme Court of the United States has uniformly held that under this clause of the Constitution commerce between the States shall be free and untrammeled by any regulations which place a burden upon it, and these decisions also hold that, in the absence of inhibitive congressional legislation, a State may enact and establish laws and regulations on matters local in their nature which tend to enforce the proper performance of duties arising within the State, and which do not impede, but aid and facilitate, inter-

course and traffic, though such action may incidentally affect interstate commerce. Calvert on Regulation of Commerce, pp. 76, 152, 159.

Harrill v. R. R., 144 N. C., 532, well illustrates the distinction between the two positions, and the decision in that case is an apt authority, we think, in support of the present judgment. In that case the consignee demanded his goods, held by the carrier at the point of (172) destination, tendering the lawful charges due for the shipment, and defendant's agent wrongfully refused to deliver. A recovery by consignee of a penalty imposed by a State statute for such wrong was sustained, and it was held as follows: "A railroad company owes it as a common-law duty to deliver freight upon tender of lawful charges by the consignee, and in the absence of a conflicting regulation by Congress, Revisal, sec. 2633, imposing a penalty upon default of the railroad company therein, is constitutional and valid, and is an aid to, rather than a burden upon, interstate commerce." The same doctrine was announced and upheld in *Bagg v. R. R.*, 109 N. C., 279, as applied to a penalty imposed on the carrier for failure to start an interstate shipment within the time required by law. In that well sustained opinion *Mr. Justice Avery*, for the Court, said: "The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and under our system of government is vested in the Legislatures of the several States of the Union, the only limit to its exercise being that the statute shall not conflict with any provision of the State Constitution or with the Federal Constitution or laws made under its delegated powers. *Martin v. Hunter*, 1 Wheaton, 326; *S. v. Moore*, 104 N. C., 714; *State Tax on Railroad Gross Receipts*, 15 Wall., 2841. So long as the State legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates, in fact, to aid commerce and to expedite instead of hinder the safe transportation of persons or property from one Commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced, either as supplementary to partial Federal statutes relating to the same subject, or in lieu of such legislation, where Congress has not exercised its powers at all. *Steamship Co. v. Louisiana*, 118 U. S., 455; *Train v. Disinfecting Co.*, 144 Mass., 523; *Smith v. Alabama*, 124 U. S., 465; *R. R. v.* (173) *Alabama*, 128 U. S., 96; *Wilton v. Missouri*, 91 U. S., 275; *R. R. v. Fuller*, 17 Wall., 560. The power of Congress over commerce between the States is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the States for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid Federal legislation.

Cooley Const. Lim., 595; *Mobile v. Kimball,* 102 U. S., 697; *Wilson v. McNamee,* 102 U. S., 572; *Wilson v. B. B., etc., Co.,* 2 Peters, 245; *Pound v. Turck,* 95 U. S., 459; *Turner v. Maryland,* 107 U. S., 38; *Steamship Co. v. Louisiana, supra.*"

A like decision has been made on a statute similar to the one we are now considering in our neighboring State of South Carolina (*Porter v. R. R.,* 63 S. C., 169), where it was held as follows: "The act (22 Stat., 443) providing a penalty on common carriers for failure to pay or to refuse to pay damages, etc., to freight within 60 days does not conflict with those sections of the State and Federal Constitution providing for the equal protection of the laws to all, nor with the interestate commerce clause of the Federal Constitution or acts of Congress relating thereto." These opinions are in accordance with the principle established by numerous and well-considered decisions of the United States Supreme Court, which are alone authoritative on such questions. *Mobile v. Kimball,* 102 U. S., 691; *Smith v. Alabama,* 124 U. S., 465, 476; *Telegraph Co. v. James,* 162 U. S., 650; *Hennington v. Georgia,* 163 U. S., 299; *R. R. v. Solan,* 169 U. S., 133, 137; *R. R. v. Florida,* 203 U. S., 261: In *Smith v. Alabama, supra, Mr. Justice Matthews,* for the Court, said: "It is among these laws of the States, therefore, that we find provisions concerning the rights and duties of the common
(174) carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier, exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the State in its courts; or, if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in *Sherlock v. Alling,* above cited." In *R. R. v. Solan, supra, Mr. Justice Gray,* for the Court, said: "A carrier, exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the law of the State for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is

given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of intrastate commerce, although they control in some degree the conduct and (175) the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

The case before us comes clearly within the principle of these decisions. The penalty is imposed, not directly upon interstate commerce itself, or during the transportation of the goods, but it arose by reason of default on the carrier's part after the transportation had terminated, and is in enforcement of the duty incumbent upon it by the law to adjust and pay for damages arising by reason of its negligent default. The penalty is in no sense a burden on intercourse and traffic between the States, but it is in aid of such traffic, and, in the absence of congressional legislation to the contrary, is a proper subject of State regulation.

We were referred by counsel to *R. R. v. Murphey,* 196 U. S., 195; *R. R. v. Mayes,* 201 U. S., 321; *McNeal v. R. R.,* 202 U. S., 543, but we do not think that these decisions are in conflict with the views we have held to be controlling in the case before us. As we understand them, they all proceed upon the idea, not that the regulations in question were void because they affected in some way interstate commerce, but because they interfered directly with intercourse and traffic between the States and were of a character that imposed an undoubted and distinct burden upon them. A careful perusal of either of these cases will show this to be the correct deduction from the decisions. Thus *Mr. Justice Brown,* in *R. R. v. Mayes, supra,* on page 328, says: "The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. It can only be illustrated from the decided cases by applying the principles therein enunciated, determining from these whether in the particular case the rule be reasonable or otherwise. That States (176) may not burden instruments of interstate commerce, whether railways or telegraphs, by taxation, by forbidding the introduction into the State of articles of commerce generally recognized as lawful, or by prohibiting their sale after introduction, has been so frequently settled that a citation of authority is unnecessary. Upon the other hand, the

validity of local laws designed to protect passengers or employees, or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized." And on page 329: "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subjects of speed, length and frequency of stops, the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration, except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of 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 weather." And on page 330: "Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the State, and may have been intended merely to secure promptness on the part of the railroad companies in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads and to impose heavy penalties for trivial, unintentional, and
(177) accidental violations of its provisions, when no damages could actually have resulted to the shippers." And again on page 331: "While railroad companies may be bound to furnish sufficient cars for their use in usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance. Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the Legislature."

These citations, we think, give clear indication that we have correctly interpreted the opinion and that the decision in no way conflicts with the disposition we have made of the present case.

We find no error in the record to the defendant's prejudice.

No error.

Cited: *Jenkins v. R. R., post,* 183; *Davis v. R. R.,* 147 N. C., 70; *Marble Co. v. R. R., ib.,* 56; *Iron Works v. R. R.,* 148 N. C., 470; *Hockfield v. R. R.,* 150 N. C., 422; *Reid v. R. R., ib.,* 760, 764; *Garrison v. R. R., ib.,* 590; *Reid v. R. R.,* 153 N. C., 492, 495; *S. v. Davis,* 157 N. C., 651; *Jeans v. R. R.,* 164 N. C., 228; *Thurston v. R. R.,* 165 N. C., 599.

(178)

J. F. JENKINS v. SOUTHERN RAILWAY COMPANY.

(Filed 27 November, 1907.)

1. **Railroads—Penalty Statutes—Transportation — Reasonable Time — Ordinary Time—Burden of Proof.**

In an action to recover the penalty given by section 2632, Revisal, the burden of proof is on the plaintiff to show that the carrier failed to transport and deliver the goods within a reasonable time, which is defined to be the "ordinary time" required to transport and deliver. This may be shown by proving the distance over which the goods are to be transported and the time consumed therein. From this evidence the jury may, as a matter of common knowledge and observation, draw the conclusion whether, in view of the usual speed of freight trains, the time consumed, the distance, and other conditions, the carrier has failed to transport and deliver within a reasonable time.

2. **Same—Revisal, Sec. 2632—Construction.**

The statute does not fix a "hard and fast" rule in defining reasonable time. From the "ordinary time" within which the jury find the goods should have been transported and delivered, the court must deduct two days at the "initial point" and forty-eight hours at each "intermediate point," as defined by the Court in *Davis v. R. R.,* 145 N. C., 207, and for all time in excess thereof the statutory penalty may be recovered.

ACTION to recover penalty imposed by Rev., 2632, for failure to transport freight within a reasonable time, tried before *Ferguson, J.,* and a jury, at Summer Term, 1917, of CLEVELAND.

Judgment for plaintiff. Defendant noted exceptions and appealed.

Quinn & Hamrick for plaintiff.

W. B. Rodman and O. F. Mason for defendant.

CONNOR, J. The following case is disclosed by the record: On 7 December, 1906, Nissen & Co. delivered to defendant company at Winston-Salem, N. C., one wagon for transportation and delivery to plaintiff at Grover, N. C. The wagon was delivered to plaintiff 12 January, 1907. The distance between the two stations is "more than 100 and less than 200 miles." There was no testimony tending to (179)

show the ordinary time required to transport freight from Winston-Salem to Grover. Defendant introduced no evidence. Motion for judgment of *nonsuit* denied. Defendant excepted. This ruling of the court presents the question whether, the distance between the two points and the time consumed in the transportation being shown, plaintiff is entitled to have his case submitted to the jury to find whether the freight has been transported within the ordinary time required, etc. We undertook, so far as necessary upon the record, to construe the statute in *Stone v. R. R.*, 144 N. C., 220. We there held that no other duty was imposed upon the carrier, in regard to the time within which the freight should be transported, than was imposed by the common law. The statute permits the plaintiff to go to the jury, as upon a *prima facie* case, by showing that the defendant omitted and neglected to transport the freight within the "ordinary time required," etc. The issue, therefore, in this case is, Did the defendant transport, etc., within the "ordinary time required?" The burden of this issue is upon the plaintiff. What is "ordinary time" is a question of law. The Court defines the term, fixes the standard. Whether the transportation is made within such time is a question of fact for the jury. In *Stone v. R. R., supra,* we found that "ordinary time" is the usual, regular, customary time within which, by the means and facilities in general use for the performance of the duty, the service should be completed. In other words, how long, over defendant's road, by the use of the locomotive and cars in general use, by the usual schedules of its freight trains used for that purpose, should the defendant have been given to transport this freight? The time actually taken was thirty-five days. If the jury find that this was more than "ordinary time required," etc., the statute declares
(180) such time *prima facie* unreasonable and imposes the penalty. If the plaintiff failed to introduce evidence tending to show facts from which the jury may find the fact in issue, the court should have granted the motion for judgment of nonsuit. He failed "to make out his case." Plaintiff insists that, having shown the distance and the time consumed, the jury may, as a matter of common knowledge, observation, and experience, find as a conclusion of fact that more than ordinary time elapsed between the shipment and delivery. The general rule is that facts in issue must be found by the jury upon testimony introduced in the orderly way prescribed in judicial procedure. To this rule there is a well settled exception, the application of which is sometimes difficult. For the purpose of this discussion, it may be said that there are certain matters of which, by reason of common knowledge, observation, and experience, the courts take judicial notice. These, "courts may and should notice without proof, and assume as known by others whatever (as the phrase is) everybody knows." Thayer on Ev.,

301. Greenleaf says: "In general, the jury may, in modern times, act only upon evidence properly laid before them in the course of the trial. But so far as the matter in question is one upon which men in general have a common fund of knowledge and experience, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this possession in making up their minds. . . . But the scope of this doctrine is narrow and is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and everyday life." 1 Evidence (16 Ed.), 17. Professor Thayer, discussing the subject, says: "But as the jury is bound to keep within the restrictions imposed upon courts by the principle of judicial notice, so also it has the liberty which that principle allows to courts. The circumstance that the jury is a subordinate tribunal does not change the nature of their office." Ev., 296; Wigmore Ev., sec. 2565. In *Com. v. Peckham,* 2 Gray, 514, cited by Professor Thayer, the judge said: "Jurors are (181) allowed to act upon matters within their general knowledge, without any testimony on these matters." *Shaw, C. J.,* said: "The jury may properly exercise their own knowledge and experience in regard to the general subject of inquiry," being the value of certain goods. It becomes material and of interest to inquire how far the principle, or, speaking more accurately, the exception, has been applied in cases germane to this appeal. In *Hipes v. Cochran,* 13 Ind., 175, it was said: "We are of the opinion that the fact that the usual route and speed of travel from C. in Indiana to R. in New York is by railroad is a public fact, of which this Court can as well take notice as the route and mode of passing from point to point."

In *Oppenheimer v. Wolf,* 3 Sandf. Ch., 571, it was material to fix the date as nearly as possible of the death of one Joseph Wolf, lost in a voyage across the Atlantic. This fact was dependent upon the time ordinarily required to make the trip in vessels of the character of that in which he sailed. The Vice Chancellor said: "These are facts forming a part of the experience and common knowledge of the day, and as such are legitimate grounds for the judgment of the Court." In *Pearce v. Langfit,* 101 Pa. St., 507, it is said: "We apprehend that the ordinary speed of railway trains is a matter of judicial cognizance, and hence a very simple computation will demonstrate with approximate certainty the time within which mails may be transported between such cities as New York and Pittsburg." In *Williams v. Brown,* 53 App. Div. (N. Y.), 486, *Jenks, J.,* says that "the time of railroad travel and transportation of the mails between two cities is less than two days" will be taken notice of by the Court. In *Bradford v. Steamship Co.,* 147 Mass., 55, *Holmes, J.,* says that the jury would be justified in fixing damage to the goods in controversy "as a matter of common experience."

(182) This Court, in *Deans v. R. R.*, 107 N. C., 686 (at p. 693), speaking through *Mr. Justice Avery*, says: "The jury were at liberty to exercise their common sense and to use the knowledge acquired by their observation and experience in everyday life in solving the question," in that case, of the distance within which the engineer could see a man on the track. "Courts and juries, acting within their respective provinces, must take notice of matters of general knowledge, and use their common sense when the evidence makes the issue of law or fact depend upon its exercise." While we are not disposed to extend the application of the doctrine further than we can clearly see is conducive to substantial justice, it is manifest in this case that the court may, as something known of all men, or, as said by Professor Thayer, "everybody knows," have told the jury as a matter of law that a railroad freight train over defendant's track did not ordinarily require thirty-five days to travel 200 miles.

To have nonsuited plaintiff upon the record would have been trifling with the administration of the law.

While we are clearly of the opinion that in this case the jury were fully justified in finding the issue for the plaintiff, we do not commend the practice, becoming too common, of submitting causes to juries upon slight evidence, especially when the party having the burden of the issue may so easily show the very truth of the matter. When the distance is greater and the time shorter, we would not be disposed to relax the safe rule that the plaintiff must make out his case by the introduction of evidence. If, as is contended, the matter is so well known that jurors are asked to act upon their common knowledge, it certainly cannot be an unreasonable burden upon the plaintiff to require him to introduce some evidence. The purpose of a trial by jury is to establish the truth, to the end that a righteous judgment be rendered.

If the defendant be so advised, it may, of course, show that, notwithstanding the time consumed in the transportation is in excess of the ordinary time, extraordinary conditions, unforeseen and unfore-
(183) seeable causes, intervened and prevented the discharge of the duty within the ordinary time. If such conditions as the law deems adequate are shown, the *prima facie* case is repelled and the question of reasonable time is measured by the unusual and unexpected conditions. *Whitehead v. R. R.*, 87 N. C., 255. We are of the opinion that his Honor properly denied the motion for judgment of nonsuit.

In *Walker v. R. R.*, 137 N. C., 163, there was no evidence as to the distance or delay. There was a total absence of any data upon which the jury could find an unreasonable delay. In *Morris v. Express Co., ante*, 167, *Mr. Justice Hoke* discusses the doctrine regarding the extent to which the Court will take judicial notice of distance between cities

and towns. His Honor instructed the jury: "Reasonable time is the ordinary time according to the means and opportunities which the shipping company had to deliver the goods. Our Legislature has said that it would allow two days at the receiving point, forty-eight hours or two days delay at some intermediate point in each 100 miles or fractional part of 100 miles, and if the goods are delivered within that time, that is a reasonable time. But if the goods are not delivered at the station to which they are consigned within that time it is *prima facie* evidence that they are not delivered within a reasonable time, the ordinary time. And if they are not delivered within the time mentioned by the statute, it devolves upon the defendant to show that it is not the length of time required for the ordinary delivery of the goods from the receiving station to that to which they are consigned." Defendant excepted. There can be no just criticism of his Honor's definition of the term "reasonable time." He evidently experienced the same difficulty which confronted us in construing the statute, by reason of the peculiar placing of the words, "and a failure to transport within such time shall be held *prima facie* unreasonable." As placed, they would seem to refer to the sentence immediately preceding, thus making the "lay days," or days "not charged," the standard of "reasonable time." This construction nullifies the language which makes "ordinary time" the (184) standard.

His Honor told the jury that if the goods were not delivered within two days from the day of receipt and forty-eight hours at intermediate points, there was *prima facie* an unreasonable delay. This view entirely eliminates the element of "ordinary time," making a "hard and fast" rule. Endeavoring to avoid this construction, which we thought inconsistent with the general provisions and purpose of the statute, we held in *Stone's case, supra,* that the last sentence in order of arrangement should be referred to the former sentence making "ordinary time" the *prima facie* standard, thus making the act read: "A failure to transport within ordinary time is *prima facie* unreasonable." Thus construed, the jury find, first, whether the transportation was within the "ordinary time." This being found, the question arises, What time should be allowed defendant as "ordinary time" for transporting? For all in excess of this time it is liable for the statutory penalty, less two days at the "initial point" and forty-eight hours at one intermediate point for each 100 miles of distance, etc., which shall not be charged against such carrier as unreasonable. Thus construed, the two days at the initial point and forty-eight hours at each intermediate point are not the standards by which "reasonable time" is measured, but are not to be charged as "unreasonable," or, as we said in *Stone's case,* to this extent the standard of the common-law duty is lowered. We have defined the term

"intermediate point" in *Davis v. R. R.,* 145 N. C., 207. Applying the principles announced in *Stone's case,* and herein, we have this result: Assuming that the time consumed in the transportation from 7 December, 1906, to 12 January, 1907, is more than the ordinary time, and, therefore, *prima facie* unreasonable, the question arises, What is reasonable time? Assuming, for the purpose of illustration, that two days for the transportation is such, we have a delay of thirty-three days; from this is to be deducted two days at the initial point, giving thirty-
(185) one days. If there be "intermediate points" coming within the definition given in *Davis's case,* they are to be deducted, thus giving the number of days during which the transportation was unreasonably delayed for which the carrier is liable for the penalty. We have endeavored to give the statute a fair construction, having in view the language from which we must ascertain the intention of the Legislature and the evil intended to be remedied. We have been embarrassed in this and other cases by the very meager testimony set out in the record. While we do not wish to impose any unreasonable burden on the plaintiff, we cannot make out his case by an unwarranted extension of presumptions. For the errors in the charge the defendant is entitled to a

New trial.

Cited: *Hamrick v. R. R., post,* 186; *Wall v. R. R.,* 147 N. C., 412.

HAMRICK BROS. & CO. v. SOUTHERN RAILWAY COMPANY.

(Filed 27 November, 1907.)

The opinion in *Jenkins v. R. R.*, next above, is decisive of, and the digest thereto is alike applicable to, this case.

ACTION for penalty imposed by section 2632, Revisal, for failure to transport freight within reasonable time, tried before *Ferguson, J.,* and a jury, at August Term, 1907, of CLEVELAND.

At the conclusion of the entire evidence defendant requested the court to instruct the jury that plaintiffs were not entitled to recover, and to the refusal to do so excepted. Defendant noted exception to instructions given the jury. Judgment for plaintiffs. Defendant appealed.

W. B. Rodman and O. F. Mason for defendant.
No counsel contra.

CONNOR, J. The record shows that the freight was delivered to defendant company at Winston-Salem on 25 January, 1907, to be transported and delivered to plaintiffs at Lattimore, N. C. There (186) was evidence tending to show that the freight was delivered to plaintiffs at Lattimore on 25 February, 1907. The distance between Winston-Salem and Lattimore is 154 miles. There was evidence on the part of plaintiff showing the ordinary time required to transport freight between the two points. There was evidence on the part of defendant tending to show reasons for and causes of delay. In the view which we take of the appeal, it is not necessary to set out this testimony.

For the reasons set forth in *Jenkins v. R. R., ante,* 178, his Honor properly declined to enter judgment of nonsuit or to direct a verdict for defendant.

His Honor instructed the jury, "That a man who has goods consigned to him, after being received by defendant railroad company, may expect the goods within two days from the time they were delivered. Then add two more days for 100 miles and two more days for the next 100 miles or fraction thereof, that at that time he may expect his goods to be delivered at the station to which they were consigned. The Legislature says that being within a reasonable time, nothing else appearing, the jury will not count that time," etc. The instruction is based upon the same construction of the statute as in *Jenkins v. R. R., supra.* We endeavored to so construe the statute in that case as to give to every part of it force and effect. The instruction given by his Honor in this case is open to the same objection as in that, and for the reasons set out in the opinion there we must grant a new trial.

We would suggest that in the trial of cases prosecuted under this statute two issues be submitted: (1) Was the freight transported and delivered within a reasonable time? (2) In what sum is the defendant indebted to the plaintiff? In this way the attention of the parties and the jury is drawn to the real questions in issue.

There must be a

New trial.

Cited: Davis v. R. R., 147 N. C., 70.

(187)
THE PATAPSCO GUANO COMPANY v. THE BOWERS-WHITE LUMBER COMPANY.

(Filed 27 November, 1907.)

Deeds—Conveyances—Description—Boundaries—Pond.

When a pond has become permanent by long, continuous use, it acquires a well-defined boundary, and there is no presumption that such pond, in the call of a deed, extends to the thread of the stream. When, as one of the calls of a deed, it appears, "and thence down the bottom to the pond and Kehukee Swamp," the pond being well known and established from time immemorial, the call stops at the boundary of the pond, and the use of the words "Kehukee Swamp" serves only to indicate what waters flow into and make up the pond, and thus to locate it.

ACTION to recover damages for unlawfully trespassing upon and cutting timber on plaintiff's land and to enjoin further cutting. The cause was heard upon a statement of facts agreed, by his Honor, *Judge Lyon,* at November Term, 1906, of HALIFAX, and judgment was rendered by him in favor of the plaintiff. Defendant appealed.

Albion Dunn for plaintiff.
Kitchin & Smith for defendant.

BROWN, J. It is unnecessary to set out the lengthy statement of facts agreed contained in the record. It is admitted that the case turns upon the construction of a deed from R. H. Smith to George W. Grafflin and upon the following call in the deed: "and thence down the bottom to the pond and Kehukee Swamp." His Honor was of opinion that this line extended to the run of the swamp and did not stop at the edge of the pond. It is admitted that the pond called for is a well known and long established pond, known as "Smith's Mill Pond." Taking the deed by "its four corners" and reading it in the light of the facts agreed, we find ourselves unable to agree with his Honor. We are of opinion that "the reason of the thing," as well as the authorities, sustain the defendant's contention that the aforesaid line stops at the edge of the pond.
(188) It is unnecessary to discuss *Wall v. Wall,* 142 N. C., 387; *Brooks v. Britt,* 15 N. C., 481, and other cases cited in the brief of the learned counsel for plaintiff. They do not militate at all against our conclusion. If the words "down the bottom to the pond" did not occur in this deed, the authorities cited would be in point. The insertion of those words in this deed, under the circumstances under which it was made, denotes the intention of the grantor to stop at the pond, and the use of the words "Kehukee Swamp" serves only to indicate what waters flow into and make up the pond, and thus to locate it. If this were not

so, there would have been no use in calling for the pond. Smith's pond appears to be an old established pond, of large dimensions, which has existed "since the time whereof the memory of man runneth not to the contrary." It appears to us that the circumstances and facts of the case strongly support defendant's contention. Smith owned the land covered by the pond and swamp and the lands adjoining, including the lands described in the deeds to plaintiff and in the deed to Brinkley, through whom defendant claims. He was the owner and operator of the mill, which from time immemorial had been run by the waters of the pond. The pond covered 100 acres or more, and had been maintained through generations. The margin, bank, or edge of said pond is clearly marked by nature and well defined. The channel or run (to which plaintiff claims the call in said deed extends) of said pond and swamp had a well known and specific name, separate and distinct from the pond and swamp, rising miles above the said swamp and pond. This was known as Kehukee Run, while the swamp—the low, boggy land on either side—was known as Kehukee Swamp, and the pond as Smith's Mill Pond.

With these patent facts before the parties when the deed was made, it is evident Smith intended to convey only to the pond and did not intend to convey the pond itself, which he would have done had he extended the call to the run of the swamp from which the pond had been created. It is hardly to be presumed that Smith intended to de- (189) stroy the value of his mill by selling its pond, for it appears that immediately after the execution of the Grafflin deed Smith conveyed to Brinkley "the tract of land known as Smith's Mill Pond, including the mill pond, mill," etc. Ever since then Brinkley and those claiming under him have operated the mill by the power furnished by the waters of that pond. Our conclusion is supported by abundant authority. The two encyclopedias sum up the authorities by saying: "It is perhaps the prevailing doctrine, regarded as particularly applicable to the large lakes of this country and qualified in the case of artificial ponds, that while a general grant of land on a river or stream which is nonnavigable extends the line of the grant to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge." 12 A. & E Enc. (1 Ed.), 642.

"Land bounded on a pond extends only to the margin, and the margin of the pond as it existed at the time of the conveyance is the limit, whether the pond was then in its natural state or raised above it by a dam." 5 Cyc., 901.

The *American and English Encyclopedia* (at p. 653) states the true principle of construction which differentiates this case from those cited by plaintiff: "The boundary upon an artificial pond raised by a dam swelling a stream over its banks presumptively extends to the thread of

the stream, *unless the pond has been so long kept up as to have become permanent and to have acquired another well defined boundary.*

To the same effect and in practically the same language the rule is announced in *Waterman v. Johnson,* 13 Pick. (Mass.), 261, and afterwards approved in *Paine v. Woods,* 108 Mass., 160. This rule of construction would not hold good in the case of a purely artificial pond temporarily maintained, the margin or banks of which had not been long established and clearly marked. Smith's pond is a permanent
(190) body of water, which has existed in its present status for generations past, and its margin must necessarily be a landmark well known in the community. We think the principles herein laid down are fully supported by the following authorities among text-writers: Angell on Watercourses (6 Ed.), sec. 41; 3 Wash. Real Prop. (5 Ed.), p. 443; Gould on Waters, sec. 203; Devlin on Deeds, sec. 1026; and also by many decided cases. *West Roxbury v. Stoddard,* 7 Allen, 167; *Nelson v. Butterfield,* 21 Me., 238; *Hawthorne v. Stinson,* 28 Am. Dec., 167; *Diedrich v. R. R.,* 42 Wis., 248. It being admitted that the pond called for is known as Smith's Mill Pond, we have a definite and certain identification of the thing called for, amply sufficient to uphold a conveyance of the land covered by its waters, had the land under the pond been conveyed by that name. *My Lord Coke* says, in substance, that where a collection of water has by long existence and usage acquired a specific name, the land by which it is covered may be conveyed under that name, and illustrates it thus: "Stagnum or poole doth consist of water and land, and therefore by the name of stagnum or poole the water and land shall pass also." Co. Litt., 5b.

If land may be conveyed by describing it by a well known name given to a collection of water covering it, we think that it is equally proper to hold that a boundary line might be located and terminated by calling for such body of water by name. The most interesting and well considered case on the subject that we have examined is *Boardman v. Scott,* 102 Ga., 404, also reported with copious notes in 51 L. R. A., 178. In this case all the authorities are collected and carefully and elaborately reviewed by *Mr. Justice Fish,* who, in a headnote by himself, states the great weight of authority to hold: "Under a deed bounding the land therein conveyed by an artificial pond which had been in existence for more than forty years, and which had thus become a permanent
(191) body of water and was still being kept up and maintained as such, its waters, however, ebbing and flowing from time to time, so as to leave a margin of land between its high and low water marks, the line of the land so conveyed did not extend to the thread of the stream from whose waters the pond was formed, but only to the low-water mark of the pond at the date of the deed." In that case the collection of water

called for was known as McCall's Mill Pond, and it was formed exactly in the manner as Smith's pond was formed, by constructing a dam across a swamp.

Smith's pond has existed for so long a period that it must have become a well known landmark in the neighborhood, and may justly be considered a permanent body of water and to have acquired in the community as well known and as well defined boundaries as most natural lakes or ponds; and under these circumstances we think the rule is the same as that universally applied to natural lakes and ponds.

The judgment of the Superior Court is reversed and the action is dismissed.

Reversed.

Cited: *Fowler v. Coble,* 162 N. C., 502.

CASHMAR-KING SUPPLY COMPANY v. DOWD & KING.

(Filed 27 November, 1907.)

1. Principal and Agent—Ratification.

The principal may not repudiate the act of his agent in compromising a debt due, and receive the benefit of the consideration therefor.

2. Limitation of Actions—Compromise—Payments.

When a payment is made by defendant only in contemplation of an agreed compromise of a debt, such payment will not repel the bar of the statute of limitations as to the balance thereof. Revisal, sec. 371, provides that "This section shall not alter the effect of the payment of any principal or interest," and leaves in operation the rule of law that the circumstances under which payment was made must be such as to warrant the clear inference that the debtor recognized the debt and his obligation to pay it.

3. Same—Mutual Accounts—Knowledge—Concurrence—Compromise.

An account of transactions between two persons, to be mutual, when kept by only one of them, must be with the knowledge and concurrence of the other, so as to make a credit given to such other repel the bar of the statute of limitations.

APPEAL from *Ferguson, J.,* at July Term, 1907, of MECKLEN- (192) BURG.

This action was brought to recover the sum of $1,274.02, being the balance of an account alleged to be due by Dowd & King, of which firm the defendant is a member, to the plaintiff, for money advanced and goods sold and delivered. The original amount was $7,589.18, but on

28 February, 1903, Dowd & King paid thereon $3,162.01, leaving a balance as of that date of $4,393.17. The debt of Dowd & King was contracted with the Dowd & King Supply Company, whose interest therein has passed to the plaintiff corporation, which is entitled to recover the balance of the account, if any is due. The firm of Dowd & King ceased to do business after the organization of the Dowd & King Supply Company, and went into liquidation. On 16 March, 1904, the defendant W. F. Dowd agreed with S. F. King, his former partner, who was at the time the treasurer and general manager of the plaintiff company, that he would pay to the plaintiff the sum of $3,119.15 in full satisfaction and discharge of his part of the liability as a member of the firm of Dowd & King to the plaintiff for the said balance of $4,393.17, it being two-thirds thereof, which was W. F. Dowd's just proportion of the liability as between him and S. F. King, the said Dowd having an interest of two-thirds and King the remaining interest of one-third in the partnership of Dowd & King. In pursuance of this agreement, he paid the sum of $3,119.15 to S. F. King as treasurer and general manager of the plaintiff company in discharge of his said liability to it, and the money, or its equivalent, was received by King for that purpose and cred-
(193) ited on the books of the plaintiff to Dowd & King by S. F. King.

It appears that on 6 April, 1903, the Dowd & King Supply Company sold to Dowd & King merchandise to the amount of $6.25, and they are charged with that sum on the books of the supply company as of that date, and are credited with $34 collected by the supply company for Dowd & King as of 20 February, 1903. These amounts are included in the general balance of $7,589.18. The defendant W. F. Dowd, among other defenses, pleaded the statute of limitations. One of his defenses was that there had been a full accord and satisfaction of his liability to the plaintiff by virtue of the transactions between him and S. F. King, its treasurer and general manager. W. F. Dowd had been an officer of the Dowd & King Supply Company and was an officer of the plaintiff company before and after the transaction with S. F. King, but had no official connection with the latter company at the time of the said transaction. Evidence was taken upon the controverted matters between the parties, but it is not necessary to be stated, as it has no practical bearing upon the case as decided by the Court. The court submitted three issues to the jury, which with the answers thereto, are as follows:

"1. Is the defendant W. F. Dowd indebted to the plaintiff, and if so, in what amount?" Answer: "$1,272.04, with interest from 16 March, 1904."

"2. Was the payment of $3,119.15 in full accord and satisfaction, as alleged in the answer?" Answer: "No."

"3. Is the plaintiff's claim barred by the statute of limitations, as alleged in the answer?" Answer: "No."

At the close of the testimony the judge charged the jury: "That if they found the facts to be in accordance with the testimony introduced in the cause, they would answer the first issue '$1,272.04, with interest from 16 March, 1904'; the second issue 'No,' and the third issue 'No.'"

Upon the verdict judgment was entered for the plaintiff, and the defendant appealed, having duly reserved exceptions to all errors in the rulings and charge of the court.

Stewart & McRae for plaintiff. (194)
Pharr & Bell and T. C. Guthrie for defendant.

WALKER, J., after stating the case: We need not stop to inquire whether S. F. King had sufficient authority to enter into the agreement with W. F. Dowd, by which the latter was discharged from all liability upon the debt due to the plaintiff by Dowd & King, as we decide the case upon another ground, though we are inclined to the opinion that there was no evidence of authorization or of ratification by the plaintiff.

The plaintiff's cause of action is barred by the statute of limitations, in any view of the evidence. It was not denied that W. F. Dowd paid the money to the plaintiff through its general manager, S. F. King, in full satisfaction and discharge of his liability to the plaintiff. It was only contended that King had no express authority to make the settlement with Dowd, and that there was no ratification of his act by the plaintiff, and especially that King was interested in the transaction and could not, therefore, represent his principal so as to bind him. Whether the agent must derive some personal benefit from the transaction in order to disqualify him to act for his principal and so as to produce a conflict between his own interest and that of his principal, is another question, which was ably argued before us, but the discussion of which we may well pretermit.

If W. F. Dowd paid the money to King as general manager in satisfaction of his liability, it is not within the power of the plaintiff to repudiate his act as being one not authorized, and apply the money as a payment on the debt. The money must be accepted according to the intention of the parties to the transaction and applied accordingly; that is, to full discharge of Dowd's liability, or rejected for the want of authority, in which case the parties would be restored to their original rights. Sound morality and fair dealing imperatively (195) require the law to apply this rule to our business affairs. The plaintiff is not permitted "to blow hot and cold," or to accept and reject at the same time. As the two rights are conflicting, the law gives to it

an election to ratify the act of its agent when it was discovered, and thereby discharge Dowd, or to reject the unauthorized act and stand upon its rights, unaffected by it. This principle is such a just and salutary one that it would surprise us if we should find that the law had not adopted it. But the law has, and by the decisions of this very Court it has been fully recognized and applied to cases very much like the one at bar. What stronger statement of the doctrine do we need than the language of the Court in *Hewlett v. Schenck,* 82 N. C., 234, as follows: "A partial payment, though the evidence need not be in writing, being *an act* and not a mere declaration, revives the liability, because it is deemed a recognition of it and an assumption anew of the balance due. But if at the time such payment is made the presumption arising from the unexplained fact is disproved by the attending circumstances or other sufficient evidence of a contrary intent, the payment will not have such effect. Here, not only can no inference of such intention be drawn, but there was an express agreement that Hart was not to be held responsible for the residue of his principal's defalcation, and the payment is made upon that understanding. While the chairman had no authority to enter into such an engagement, and if he had, it would be inoperative for want of a consideration, as is held in *McKenzie v. Culbreth,* 66 N. C., 534; *Bryan v. Foy,* 69 N. C., 45, and *Mitchell v. Sawyer,* 71 N. C., 70, the evidence is competent and sufficient to repel the presumption of intention to assume the entire debt. *Smith v. Leeper,* 32 N. C., 86; Angell Lim., 211, *et seq.,* note, and numerous other cases cited for the defendants from reports in other States."

(196) The law as to the legal effect of a partial payment in discharging the entire debt, where there is an agreement of that kind, has been changed by Laws 1874-75, ch. 178 (Revisal, sec. 859). But that change does not in the least impair the force of the case we have cited as a conclusive authority against the plaintiff upon the facts in the record before us. Rev., 371, declares as follows: "No acknowledgment or promise shall be received as evidence of a new or continuing contract from which the statute of limitations shall run, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." It will be seen that there is no express provision that a partial payment shall prevent the operation of the statute except from the time it was made. The statute merely leaves its effect to be determined by the law as it was before the enactment of the section as to a new promise. There was no reference in the Statute of 21 Jas. I., ch. 26, to a payment as operating to stop the running of the statute, and as fixing a new *terminus a quo,* as in the case of a promise to pay. A payment was allowed this effect by the courts, and for the reason that it raised an

implied promise to pay the residue of the debt. But the rule is limited in its application to the reason upon which it is based, and the payment consequently must have been made under such circumstances as will warrant the clear inference that the debtor recognized the debt as then existing, and his willingness, or at least his obligation, to pay the balance. *Battle v. Battle,* 116 N. C., 161; *Pickett v. King,* 34 Barbour (N. Y.), 193; *Richardson v. Thomas,* 13 Gray, 381; 1 Wood on Limitations, sec. 99; *Bank v. Harris,* 96 N. C., 121; *Riggs v. Roberts,* 85 N. C., 151. The payment should be of such a nature and made in such a way as to imply in law that the debtor acknowledges the debt as still existing and promises distinctly and unequivocally to pay the same, just as *Lord Ellenborough,* in *Fleming v. Hayne,* 1 Starkie, 370, said should be the character of the promise when it is express. In 25 Cyc., 1373, (197) we find it said: "A payment of part, in full satisfaction of the whole, or accompanied by acts or declarations showing that the debtor does not intend to pay the balance, will not suspend the statute or revive the balance of a barred debt." *Linsell v. Bonsor,* 29 E. C. L., 319 (9 Bing. N. C., 241); *Jones v. Langhorne,* 19 Col., 206; *Brisbin v. Farmer,* 16 Minn., 215; *Compton v. Bowns,* 25 N. Y. Suppl., 465 (5 Misc., 213); *Rowker v. Harris,* 30 Vt., 424; *United States v. Wilder,* 13 Wall., 254; *Crow v. Gleason,* 141 N. Y., 489; *Aldrich v. Morse,* 28 Vt., 642; *Hale v. Morse,* 49 Conn., 481; *Jewitt v. Petit,* 4 Mich., 508; *Cronshore v. Knox,* 10 Atl., 25. In *Compton v. Bowns, supra,* the Court (at page 466) says: "It is elementary law that the effect of part payment in defeating the operation of the statute of limitations depends upon the promise it implies to pay the residue; but if the payment be intended, not as a discharge *pro tanto,* but as a complete liquidation of the entire demand, how can an engagement to pay more be inferred? The implication of an acknowledgment of the continuance of the debt from an act supposed an designed to extinguish it, and of a promise of further payment from a payment made and intended as final and complete, is a palpable absurdity," citing *Weston v. Hodgkins,* 136 Mass., 326, and other authorities. *Compton v. Bowns* seems to be directly in point as to all the questions considered by us in this case. The general principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to de due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment. *United States v. Wilder, supra.*

The intention of W. F. Dowd to pay only in full settlement and discharge of his liability is too plain in this case to admit of the slightest doubt. He expressly stipulated for exemption from payment of the balance of the debt.

(198) The law will not permit the amount collected by the Dowd & King Supply Company from Dowd & King, to wit, $34, and credited on their account without any authority from them, and the amount collected, $6.25, to be considered as constituting a mutual account between the parties, so as to put the statute in motion only from the last item. In *Hussey v. Burgwyn,* 51 N. C., 385, it was said that the sending of a draft to the creditor, without any reference to the debt, was not sufficient to stop the running of the statute. It was also held that, in order to make an account a continuing one from its commencement to its close, there must be mutual accounts between the parties, or an account of mutual dealings kept by one only, with the knowledge and concurrence of the other, for otherwise an item within time cannot have the effect of preventing the application of the statute. As said in that case, "Here there was no mutual account kept by the parties, and there was no proof that the defendant intrusted the plaintiff to keep such an one." The $6.25 for merchandise was a distinct item, disconnected from the prior account, Dowd & King having gone out of business and being then in liquidation, and the credit of $34 for collections was applied to the old account without authority. There was no semblance of mutuality of accounts. The cause of action accrued not later than 28 February, 1903, and was barred on 1 March, 1906, when the action was brought.

The charge of the court was, therefore, erroneous. It should have been the very reverse of what it was as to the third issue.

New trial.

Cited: S. c., 150 N. C., 790; *Bank v. King,* 164 N. C., 308; *French v. Richardson,* 167 N. C., 43.

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(199)

CALDWELL LAND AND LUMBER COMPANY v. JOHN M. SMITH.

(Filed 27 November, 1907.)

1. Taxes, Unlisted—Notice—Collection—"Due Process"—Revisal, Sec. 5232—Constitutional Law.

Proceedings for the assessment, collection, and enforcement of taxes are *quasi* judicial and have the effect of a judgment and execution, and come within the "due process clause" of the Constitution, Art. I, sec. 17. While the Legislature has the constitutional right to provide for the listing, assessing, and taxing of personal property omitted to be listed as the law requires of the owner, for five or more preceding years, an opportunity must be given by notice to the taxpayer, permitting him to be heard before the board of assessors or the tribunal having the power to list and assess such property, or before the courts of the State in some appropriate proceeding, before the assessment can be conclusive.

2. Same—Parties—Injunction—"Due Process."

An injunction will be granted to the hearing against the sheriff for collecting back taxes on a solvent credit, under Revisal, sec. 5232, upon the ground that plaintiff was not given notice of the assessment or opportunity to be heard before the board of assessors or the tribunal having the power to list or assess such property. The sheriff is the proper party defendant, but the commissioners may make themselves parties if they think the rights of the county require it.

Motion to dissolve restraining order, heard by *Ward, J.*, at chambers in Newton, on 9 July, 1907.

This action is brought by the Caldwell Land and Lumber Company, against the sheriff of Caldwell, to enjoin the collection of certain taxes assessed against its property.

The facts disclosed by such allegations in the complaint as are not denied or are admitted by the answer are: That board of commissioners of Caldwell, at its meeting in May, 1907, placed upon the tax list as a solvent credit certain notes, amounting to $417,000, executed by one George O. Shakespeare, 13 February, 1902, to plaintiff, and secured by a deed in trust. These notes had not been listed for taxation. The commissioners valued the notes at the sum of $417,000, being their face value, and assessed them for taxation at said sum as a solvent (200) credit for 1902 and 1903, adding to the tax the penalty of 25 per cent, aggregating the sum of $7,655.16. No notice was given plaintiff, either of listing, valuing, or assessing said notes. The commissioners immediately placed the said tax list in the hands of the defendant sheriff for collection, and he at once advertised for sale plaintiff's real estate, consisting of some 42,982 acres of land. Plaintiff instituted this action 12 June, 1907, asking for an injunction, etc. *Judge Councill* granted a restraining order, returnable before *Judge Ward,* who, on the hearing, 9 July, 1907, "continued the injunction until the final hearing of the cause." He did not find any facts, simply referring to the pleadings. Defendant excepted and appealed.

W. C. Newland and Jones & Whisnant for plaintiff.
Mark Squires, Lawrence Wakefield, and M. N. Harshaw for defendant.

CONNOR, J., after stating the facts: The Machinery Act (Rev., 5232), being the same as the act of 1901, sec. 69, ch. 7, and all other acts on the subject subsequent thereto, provides that "In all cases where any personal property, chose in action, or any property, except land, liable to taxation, shall have been omitted, or shall be omitted, in any future year from the tax list by the owner or persons required by law to list the same, the board of commissioners shall enter the same on the duplicate of the next succeeding year and shall add to the taxes of the current year the

simple taxes of such preceding year, not exceeding five years, with 25 *per centum* added thereto, in which such personal property as aforesaid shall so have escaped taxation, and the said board of commissioners shall value and assess the personal property aforesaid for those years, and are empowered to examine witnesses and to call for papers to determine the value and to ascertain the persons liable for the tax upon said (201) personal property." This is the only section in the statute concerning or regulating the listing and assessment of personal property omitted from the tax list by the owners. It omits to provide that notice shall be given the owner, or to give him any opportunity to be heard, either before or after the property is listed, valued, and assessed. We have no doubt of the power of the Legislature to provide for the listing, assessment, and taxing of personal property omitted to be listed by the owner as the law requires. Nor do we perceive any reason why it may not be taxed for five or more preceding years if it has escaped taxation so long. These questions have been settled by several decisions of this Court. *Kyle v. Comrs.*, 75 N. C., 445; *R. R. v. Comrs.*, 82 N. C., 259; *Wilmington v. Cronly*, 122 N. C., 388. It is the settled policy, and so required by the Constitution, that all of the property, including solvent credits, in the State shall be assessed and taxed at its value in money. The method of enforcing this constitutional requirement is left with the Legislature, subject to other provisions of the Constitution securing to the citizen the right to be heard before his property is subjected to taxation. We are also of the opinion that an industrial corporation is liable to pay tax on its solvent credits under such regulations as to the method of listing and assessment as may be provided by law. Of course, the special statutory provision prescribing the mode of assessing the property of banks and building and loan associations is exclusive of all others.

A number of interesting questions are raised by the pleadings upon controverted allegations. In the absence of any finding of the facts, we are unable to discuss or decide them intelligently. There are, however, several questions respecting the procedure in such cases which we think best to dispose of at this time. We would hesitate to give the construction to the statute for which defendant contends. It must be conceded that the provisions of the section in regard to listing, valuing, and (202) assessing unlisted property are painfully indefinite and obscure.

While no express power is conferred upon the commissioners after making the assessment to place the list so made in the hands of the sheriff, we think that by a fair construction, in the light of the power conferred in other portions of the statute respecting the regular tax list, such power is given. The courts have so held. "Assessments of escaped property are made *nunc pro tunc*, and it is immaterial that the regular

periods for making and reviewing assessments, levying the taxes or placing the rolls in the hands of the collection officers have elapsed when they are made, *unless the owner is thereby deprived of some constitutional right* or the statute limits the time." 27 A. & E. Enc., 700. The qualifying language in this quotation presents the difficulty in this case. If the section stands alone and is to be construed without reference to other sections in the statute, or the universal principle that no property of the citizen may be taken or taxed without an opportunity to be heard before the board of assessors or tribunal having the power to list and assess such property, or before the courts of the State in some appropriate proceeding, we would find it difficult to reconcile it with section 17, Article I of the State Constitution. If, as contended by defendant, section 5233 empowers the board of commissioners, by simply examining the books of the register of deeds, to place upon the tax list any notes or other choses in action secured by mortgage which they may find thereon for five preceding years, and, without notice to the supposed owner, to place a value upon them, assess them for taxation, add the penalty and summarily enforce the payment of such tax and penalty by a sale of the property of the owner, the protective provisions of section 17, Article I of the Constitution would, *pro hac vice,* be annulled. The power to tax, it has been said (and the truth of the saying too frequently exemplified) is the power to destroy. While the power is essential to the life of the State, its enforcement by constitutional methods and within constitutional limitations is essential to the safety of the (203) property of the citizen. "Proceedings for the assessment of a tax being *quasi* judicial, it follows that in order to give validity to the assessment, notice thereof should be given to the owner of the property to be assessed." 27 A. & E. Enc., 704. The nature of tax proceedings is summary, of necessity. "Every inhabitant of the State is liable, by means thereof, to have a demand established against him on the judgment of others regarding the sum which he should justly and equitably contribute to the public revenues. Every owner of property in the State, whether he be an inhabitant or not, is liable to have a lien in like manner established against his property. Moreover, the persons who make the assessment lighten the burden upon themselves in proportion as they increase it upon others. They must act, to a large extent, upon imperfect and unsatisfactory information, and the danger that, when most honest and fair-minded, they will misjudge and thus do injustice, is always imminent. It is, therefore, a matter of the utmost importance to the person assessed that he should have some opportunity to be heard and to present his version of the facts before any demand is conclusively established against him; and it is only common justice that the law should make a reasonable provision to secure him, as far as may be prac-

ticable, against the oppression of unequal taxation *by making the privilege of being heard a legal right.*" Cooley on Taxation, 625. The learned author proceeds to say, and the importance of the subject, in the light of the loose and unsatisfactory provisions in our revenue laws, justifies the quotation, at some length: "In substance, the question will be whether the right to be heard in tax cases is a constitutional right and indefeasible. Upon this subject there is a general concurrence of authorities in the affirmative. It is a fundamental rule that, in judicial or *quasi* judicial proceedings affecting the rights of the citizen, he shall have notice and be given an opportunity to be heard before any
(204) judgment, decree, order, or demand shall be given and established against him. Tax proceedings are not, in the strict sense, judicial, but they are *quasi* judicial, and, as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when the conclusive steps are to be taken. Provision for notice is, therefore, part of the 'due process of law' which it has been customary to provide for these summary proceedings; and it is not to be lightly assumed that constitutional provisions, carefully framed for the protection of property rights, were intended or could be construed to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion without giving him an opportunity to contest the justice of the assessment." Cooley, 628. The text is illustrated and supported by an abundance of authority from both State and Federal courts. No case is cited from this State, because no attempt, so far as records show, has been made to disregard in practice a truth so manifest and fundamental. It is held that, if possible, statutes will be so construed as to require notice. *Kansas v. R. R.,* 8 Kan., 558; *Baltimore v. Grand Lodge,* 60 Md., 280; *Gibson v. Munson,* 114 Mich., 671. Section 5235 makes provision for the equalization of values after notice. This, however, refers to the regular tax list, and the time is fixed for making such equalization. Section 5236 provides for complaints by owners of property for improper valuation. This, of course, applies to property which has been listed by the owner. If he has no notice that claim is made, that he has omitted to list his property, and it is summarily listed, valued, and assessed, and the list, with the force and effect of a judgment and execution, given to the sheriff, how is he to make complaint—how is he to know until the "conclusive act is completed" either that his property is assessed or the value put upon it? We are clearly of the opinion that either the assessment is void and should be so declared, or
(205) that the plaintiff should have an opportunity to contest all of the questions in the court which would have been open to it if notice had been given at the inception of the matter. In view of the many and more or less difficult questions raised upon the pleadings regarding the

liability of the notes to taxation by reason of the peculiar facts relating to their execution, etc., and the manner in which they should be assessed, if liable, the parties should be permitted to litigate them in this action. The necessity for giving notice to owners of choses in action before assessment is manifest. It by no means follows that every note secured by mortgage is solvent to the extent of its face value, or that the full amount is due. Payments may have been made upon it. Again, "All *bona fide* indebtedness owing by any person may be deducted by the tax lister from the amount of said person's credits." Section 5227. If all of the notes, bonds, and other choses in action appearing upon the register's books for five preceding years are to be regarded as solvent credits and listed at their face value, and if such listing and valuation is "conclusively correct," having the "force and effect of a judgment and execution," the question of securing revenue for the State and counties would be solved, but possibly the rights of the individual citizen would be sacrificed. For even so desirable a purpose the end would hardly justify the means. If the plaintiff corporation had, during the years 1902 and 1903, a solvent credit for $417,000 subject to taxation which it omitted to list, it should, even at this late day, pay the taxes justly due upon it; but before the fact is conclusively established by a *quasi* judicial tribunal, full and ample notice should be given and an opportunity to be heard afforded. We have no doubt that the plaintiff is entitled to injunctive relief pending the hearing. *Purnell v. Page,* 133 N. C., 125. By the same authority the sheriff is the proper party defendant. If for any reason the commissioners think that the rights of the county require, they may be made parties. We take the liberty of suggesting that the Legislature, at its next session, consider the propriety of amending section 5232, Revisal, so that provision be made for notice before the personal property omitted from the tax list be listed, valued, (206) and assessed.

The order of his Honor continuing the injunction is

Affirmed.

Cited: Kinston v. Loftin, 149 N. C., 256; *Land Co. v. Smith,* 151 N. C., 72; *Sherrod v. Dawson,* 154 N. C., 528; *Guano Co. v. New Bern,* 172 N. C., 260.

J. M. BERNHARDT v. J. M. DUTTON.

(Filed 27 November, 1907.)

1. Pleadings—Amendments—Counterclaim—Motion—Judgment.

Amendments to pleadings allowed by the trial judge in his discretion will not be reviewed by the Supreme Court on appeal. The counterclaim of defendant not having been denied by plaintiff, it was in the sound discretion of the judge below to permit plaintiff to reply, for the purpose of denial, and overrule defendant's motion for judgment thereon, when such is proper.

2. Verdict—Evidence—Appeal and Error—Record—Presumptions.

The verdict of the jury will not be disturbed, on appeal, when there is nothing in the record to show error therein, for in such cases the Supreme Court will assume there was evidence to support the verdict.

3. Appeal and Error—Objections and Exceptions—Record—Burden of Proof—Appellant, Duty of—Presumptions.

An exception to the exclusion of evidence will not be considered in the Supreme Court unless the appellant, upon whom is the burden of proof, makes the relevancy and purpose appear in the record, as the presumption is against error in the ruling of the trial judge.

4. Principal and Surety—Surety—Recovery.

A judgment allowed against a surety for an amount exceeding that specified in his undertaking is erroneous.

APPEAL from *Councill, J.*, and a jury, at June Term, 1907, of WILKES.

This is an action to recover 80,000 feet of lumber, or $400, the value thereof, under a contract, dated 18 July, 1900, by which the defendant agreed to deliver to the plaintiff, at Lenoir, within twelve months after date, "the merchantable timber and lumber of oak, poplar, and
(207) white pine from the land which is described in the contract and containing 400 acres, at prices therein stated, the plaintiff to pay for the stumpage and sawing, as done, an amount which, with the stumpage and sawing, will make $6.50 per 1,000 feet as the lumber is put on sticks; all timber and logs for which he pays to be the property of the plaintiff; payment to be made by him every two weeks for the timber as put on sticks, and the balance as the lumber is delivered at Lenoir." The testimony taken in the case was not sent up.

The defendant, who testified in his own behalf, was asked by his counsel the following question: "In this contract I find this language: 'J. M. Dutton contracts to deliver all merchantable timber, such as oak, poplar, and white pine, from the lands of T. S. McNeil and W. T. Land, on the waters of Elk Creek, Elk Township, Wilkes County; also, F. L. Dula, G. W. McNeil, John Dula, Tom Dula, containing 400 acres, more or less, at $7, $10, and $19 for oak, $8, $11, $13.50, and $20 for poplar,

$9, $15, $25 for white pine.' Tell his Honor and the jury how much white pine and poplar you sawed and furnished the plaintiff in this case from the tracts mentioned in this paper." The court ruled out the evidence, upon objection by the plaintiff, and the defendant excepted. There was a verdict and judgment for the plaintiff, and defendant appealed.

Edmond Jones for plaintiff.
W. W. Barber and R. Z. Linney for defendant.

WALKER, J., after stating the case: The defendant moved for judgment upon his counterclaim, which was alleged to consist in the fact that the plaintiff, since the seizure of the lumber and before the defendant replevied, had disposed of or wasted about 15,000 feet of it, which is valued at $150. The plaintiff did not reply to this averment in the answer, but the court permitted him to do so, and overruled the motion. It was within the sound discretion of the court to allow a reply to be filed at any time. "The law invests the court with ample powers in all questions of practice and procedure, both as to amendments (208) and continuances, to be exercised at the discretion of the judge presiding, who is presumed best to know what orders and what indulgence will promote the ends of justice in each particular case. With the exercise of this discretion we cannot interfere, and it is not the subject of appeal." In that case the plaintiff had moved for judgment and the court allowed the defendant to file an amended answer, and then overruled the motion. See, also, *Austin v. Clark,* 70 N. C., 458; *Gilchrist v. Kitchin,* 86 N. C., 20. There was certainly no abuse of judicial discretion in this case. The motion was properly overruled.

We have read the affidavit of the plaintiff in reply to one by the defendant for a continuance of the cause which the defendant offered in evidence and which was excluded by the court. It is very long, and it is not necessary to set it out. We have discovered nothing in it which is relevant to the controversy, and the defendant was not in the least prejudiced by the ruling of the court.

Nor do we see the exact bearing of the question put to the defendant as a witness in his own behalf and ruled out by the court. The evidence is not stated in the case. If it had been the materiality of the fact proposed to be proved might more clearly appear. The real question was whether the plaintiff had complied with the condition of the contract that he should pay for the lumber before the title should vest in him, and particularly whether he had paid for the 80,000 feet of lumber for the recovery of which the suit was brought. As the verdict was in favor of the plaintiff, we must assume that there was evidence to support it, in the absence of any showing to the contrary by the defendant. In this

view, and without having the evidence before us, it does not appear that the quantity of pine and poplar sawed and shipped to the plaintiff could aid the jury in reaching a verdict. The questions were, How much had been cut and paid for? and, Had the plaintiff paid the price of (209) the 80,000 feet? The brief of defendant's counsel states that the amount paid by the plaintiff was uncontroverted, but it does not so appear in the case. When the court excludes evidence the party who excepts to the ruling must at least show what he proposes to prove and the relevancy of the evidence. He cannot very well be prejudiced by the exclusion of it if it was not pertinent to the issue. The presumption in this Court is against error, and the appellant, in order to succeed, must make it appear. The burden is upon him.

The plaintiff sued for $400 and recovered judgment against the defendant and his surety for $525.64 as the value of the property and $157.69 as interest on the same. This was error. The recovery as against the surety should have been limited to the amount of the undertaking given by him. *Machine Co. v. Seago,* 128 N. C., 158. In this respect the judgment is modified. Each party will pay his own costs in this Court.

Modified and affirmed.

W. L. PHILLIPS v. SALEM IRON WORKS.

(Filed 27 November, 1907.)

1. Employer and Employee—Safe Place to Work—Safe Appliances.

The usual measure of duty imposed upon the employer requires him to furnish to his employee a reasonably safe place to work and such reasonably safe appliances as are known, approved, and in general use.

2. Same—Safety Appliances—Duty of Employer—Questions for Jury.

When it is admitted or the jury find that standard safety appliances are known, approved, and in general use in respect to the particular character of machinery furnished, or upon which plaintiff is employed, the law imposes the duty upon the employer to furnish such appliances, this being the standard of duty. When the evidence in this respect is conflicting, or the inference to be drawn from it doubtful, the question should be submitted to the jury, under proper instructions in regard to the standard of duty.

(210) ACTION tried before *Ferguson, J.,* and a jury, at March Term, 1907, of FORSYTH.

From judgment for defendant, plaintiff appealed.

Action for damages alleged to have been sustained by plaintiff by reason of defendant's negligence. There was a verdict and judgment for defendant. Plaintiff noted exceptions to the charge and appealed.

The facts pertinent to the exceptions and the decision of the appeal are: Defendant company, in connection with its other business, made "dry cans," which were used in woolen mills to dry yarn after it had been dyed. It was necessary that they should be steam-tight in order that they could be filled with steam, and heat the surface so that yarns would dry. They were cylindrical in shape, 6 or 7 feet long and from 1 foot to 1½ feet across the ends, with iron heads and bands shrunk around the heads. The manner of testing the cans for leaks was as follows: The cans, after having the iron heads strongly fastened on by shrinking an iron band around them, were taken outdoors, near the boiler house, and a pipe connected with the boiler would carry steam into an opening at one end of the cans, this opening being half an inch in diameter. On the pipe taking the steam into the can there was a steam cock to turn off the steam, the amount of steam passing through the pipe depending on how far this valve or cock was turned. There was also on this pipe a steam gauge to indicate the amount of steam pressure passing through the pipe into the can. In order to test the cans it was necessary to hold the pressure at from 10 to 15 pounds, the cans being capable of standing a pressure of 50 pounds. After the steam had been let into the can, the can was struck with a hammer in the hands of the person whose business it was to see if there were any leaks, the stroke of the hammer being intended to indicate the leaks by the steam coming out. At the opposite end of the can into which the steam came there was a pipe sticking out, with an outlet 1 inch in diameter, and at this end, to (211) regulate the amount of steam pressure, the plaintiff was at work with a piece of scantling pressed against a stob in the ground, or the toe of his foot, as he chose; upon the scantling there was nailed a piece of leather, and at the point where the leather was nailed the scantling was pressed against the outlet. It was his business to watch the steam gauge at the other end, which was some 6 or 8 feet from him, and, by turning the scantling from side to side, reduce or increase the pressure. While at work, for some reason, the head blew out and the scantling struck the plaintiff on the head.

Plaintiff alleged that defendant was negligent, in that it failed to provide a safety valve which was in general use by those performing this class of work, so that the steam would automatically escape beyond the pressure desired. There was evidence tending to show that safety valves are in common use wherever any pressure is used in the form of steam or water; that they are used on everything that contains a pressure, in order to make it safe. It is very important to have a safety valve there when one would not know the condition of the steam gauge; it may be right or it may be wrong. It is proper to use a safety valve on a machine when testing it. One could not guarantee it unless a safety valve was

on it. It was not safe to test the cylinder with steam without using a safety valve. It is dangerous, for the simple reason that a steam gauge cannot be adjusted as quickly as steam will adjust itself. Steam itself will find a way out of a boiler quicker than one can turn it out if the proper spring is waiting for it at the point to take action. A steam gauge is no safety whatever on a boiler. It simply gives you time to get away before it blows up. A safety valve is simply to take care of you while around the boiler. It is not safe for a man to stand at this end of this cylinder here and adjust it with a stick and tell by looking at that gauge what pressure of steam was in the cylinder, if he did that constantly.

A witness testified: "I understand the use of a safety valve. It (212) is used to carry a certain amount of pressure in the boiler and give number of pounds to the square inch. It is set for the purpose required. It works automatically. When it gets to the given pounds of pressure it is set back and relieves the pressure itself. If it is set for 10 pounds pressure and the pressure becomes more than 10 pounds, it blows off. Safety valves are in general use in steam machinery or vessels charged with steam. I do not remember ever seeing a boiler that did not have some kind of a safety valve on it. If a safety valve had been on the can, set for 10 pounds, and more than 10 pounds came into the pipe leading to the can, it would have relieved itself. It is the general use to have safety valves on all vessels carrying steam."

There was evidence that safety valves corrode and fail to operate. There was also evidence that the way provided for plaintiff to do the work assigned to him was safe; that the steam gauge indicated the amount of steam in the boiler. There was no evidence of any defect in the material of which the boiler was constructed.

Defendant contended that plaintiff was guilty of contributory negligence. Both parties submitted a number of prayers for special instructions.

Among other instructions given by his Honor, he said to the jury that the duty of the employer was met if he furnished to his employee reasonably safe appliances for his work, etc. He further said: "If the gauge was a reasonably safe appliance, it does not make any difference that the defendant didn't furnish a safety valve; but if it was not reasonably safe without a safety valve, then it would be negligence on the part of the defendant not to furnish a safety valve, provided that you should find that safety valves were in common use in work of this kind." Plaintiff excepted. "When you come to consider the allegations of negligence directed at the fact that the defendant did not furnish a safety valve, I charge you that you cannot find that the defendant was negligent in this respect from the fact alone that you may find that if it (213) had been adopted it would have had a tendency to decrease the

risk and make the work safer; but in order to find the defendant guilty of negligence on account of this allegation, you must find from the evidence that a safety valve was so manifestly serviceable and necessary as to command the adoption thereof by reasonably prudent men in the same business so generally that it could not reasonably be ignored or disregarded." Plaintiff excepted.

Watson, Buxton & Watson and Lindsay Patterson for plaintiff.
Manly & Hendren for defendant.

CONNOR, J., after stating the facts: There can be no just criticism of his Honor's charge, in so far as he defines the duty of the master to furnish to his servant a reasonably safe place to work and reasonably safe appliances with which to perform the service.

Plaintiff contends that he should have gone further and told the jury that when a safety appliance in the operation of dangerous instrumentalities is known, approved, and in general use, the standard of duty fixed by the law requires the employer to furnish such appliance to his employee; that the use of such appliance became the standard of duty in respect to the safety of the employee; in other words, in contemplation of law, the reasonably prudent man will furnish to his employee such appliances as are known, approved, and in general use, rather than rely upon his own judgment of what is reasonably safe.

In applying this principle, care must be taken to correctly define the terms "known, approved, and in general use," in respect to the extent and the time during which it is in such general use. The employer is not required to adopt every new appliance or invention which may be put upon the market. A sufficient number of persons for a sufficient length of time must be shown to have approved and used the appli-
ance to test its value and efficiency to make it generally approved (214)
and used, within the meaning of the term. It must further appear
that such appliance is reasonably within the reach of the employer.

Applying the rule to the admitted facts and to plaintiff's evidence, we have, for the purpose of passing upon the exception, this case: Defendant, for the purpose of testing the capacity to resist the pressure of steam for the purpose for which it was made, attached the cylinder by means of an iron pipe one-half inch in diameter to a boiler, and, by turning the valve, the steam from the boiler rushed into the cylinder. The cylinder had a capacity to resist a pressure of 50 pounds. The test could be made by putting in it 10 to 15 pounds. The boiler had a generating capacity of 60 to 80 pounds of steam. The evidence tended to show that the valve was turned one-fourth of an inch. On the pipe a gauge was set, and plaintiff was placed, for the purpose of discharging

the duty imposed upon him, 8 or 10 feet from the guage. At the end of the cylinder and at the point at which plaintiff stood was an appliance for turning off the steam if the gauge indicated too much pressure. This appliance was in charge of plaintiff. The cylinder exploded, as described by the witnesses, and injured plaintiff.

Plaintiff insists, and introduced evidence tending to show, that the known, approved, and generally used method of preventing an explosion of such a cylinder by reason of an excess of steam was a safety valve. His evidence tended to show that a steam gauge was not reliable. One witness said: "A man cannot constantly look at a gauge without his eyes getting so that the figures run together. Looking at a gauge five minutes, a man cannot tell one figure from another. A man cannot look at a gauge constantly at 10 and watch it stand at 10 for five minutes and hold the pressure in, himself. It would not be safe to put any steam in there without having a safety valve."

On the other hand, the defendant introduced several witnesses who said that the gauge and arrangement made for letting off the
(215) steam were safe and much better than a safety valve, giving reasons for their opinion.

In this condition of the evidence the rule laid down by his Honor was clearly correct, and in this aspect of the case no just criticism can be made of the charge.

But the plaintiff insists that he has gone further and shown, not only that a safety valve was the safer mode of letting off excessive steam, but that it was the method known, approved, and in general use. The witnesses upon this point say that they have had experience in operating cylinders into which steam was put, and that it is usual to have a safety valve upon them; that this was the general custom. They explain by saying that if in any way a greater quantity of steam went into the cylinder than the valve was "set for," it would automatically open and the steam in excess of the quantity provided for would, as the witnesses say, "blow out."

If the jury should find as a fact that the safety valve upon such cylinders or similar vessels into which steam is put and which were subjected to pressure was known, approved, and in general use as a safety appliance, we are of the opinion that the defendant owed to plaintiff the duty of using it; that is, furnishing such appliance to plaintiff for his protection.

In *Packing Co. v. Vaughan,* 27 Col., 66, it appeared that a cylindrical apparatus called a cooker, made of iron, in which the vegetables previously canned were placed for the purpose of subjecting them to a sufficient degree of heat to complete the process of canning, was used. This was done by closing the cooker perfectly tight and turning in steam

which was supplied from boilers through a pipe connecting the two. It was alleged in that case "that the explosion was due to the excessive pressure of steam confined in the cooker, which would have been avoided had it been provided with a safety valve so regulated as to allow the escape of steam upon reaching a pressure within the limits of safety, or the pipe connecting the cooker with the boiler had been equipped with a pressure regulator which would have automatically prevented the pressure exerted by the steam reaching beyond a fixed point."

The Court says: "In some establishments safety valves were (216) used; in others only the thermometer and gauge used by appellant. . . . Which of these appliances was the one which the exercise of reasonable care and prudence would adopt? Steam has ever been acknowledged as a dangerous agency, the use of which results in accidents, even when the most approved safety appliances are utilized. The cooker was connected directly with the boilers, and was only capable of withstanding a much less degree of pressure than the steam generated in these receptacles usually exerted. It was designed to be used with a safety valve. The thermometer and gauge on the cooker would not instantly indicate the pressure of the steam within it. The steam was only controlled by a globe valve on the pipe through which it was conducted to the cooker. Before any warning of dangerous pressure would be indicated by the thermometer and gauge, an explosion might occur."

In that case there was no evidence that the safety valve was in general use; on the contrary, it appeared that both appliances were used. The Court held that the failure to furnish the safety valve was evidence of negligence for the jury. A verdict for the plaintiff was sustained.

We do not hold in this case that the mere failure to furnish the safety valve as a safety appliance was, as a matter of law, negligence, but that if the jury find that it was known, approved, and in general use, the failure to do so would be negligence. The testimony upon this question is conflicting and was properly submitted to the jury.

The error consists in failing to direct the minds of the jury to the effect which they should give to the failure of defendant to have the safety valve, if they further found that it was known, approved, and in general use.

The principle which this Court has adopted, and which we think correct, is thus stated by *Mr. Justice Hoke* in *Bradley v. R. R.*, 144 N. C., 555: "When the employees are engaged in the operation of mills and other plants having machinery more or less complicated and (217) usually driven by mechanical power, in such case an arbitrary standard of duty has been fixed, and the employer is required to provide methods, placing, implements, and appliances such as are known, approved, and in general use," citing *Hicks v. Mfg. Co.*, 138 N. C., 319;

Horne v. Power Co., 141 N. C., 50; *Fearington v. Tobacco Co.*, 141 N. C., 80. Defendant insists that no general use was shown.

While it is true that the evidence does not show that others were engaged in the manufacture of cylinders or iron cans of the exact size, strength, and character as the one in controversy, it does appear that when cylinders of similar kind, construction, etc., are in use, the known, approved, and usual method of providing against danger from an explosion caused by excessive steam is to place upon them a safety valve, which, for the reasons given by the witnesses, would appear to be the most reliable safety appliance.

It is impossible for courts to do more than apply the principles by which the duty of the employer is fixed to the cases as they arise. An examination of Labatt's work on Master and Servant and the elaborate notes, together with the encyclopedias, shows the almost innumerable decisions applying the general principles to particular cases. While the courts are not disposed to unduly burden the industries of the country by imposing unreasonable or impracticable demands upon the employer, yet it is their duty to so declare and enforce the law that the lives and limbs of employees are rendered as safe as reasonable care can secure. It is in accordance with a humane and sound public policy that employers be required to exercise the degree of care known, approved, and in general use. To require this imposes no hardship upon them. We have so held, and the law in that respect has been crystallized into a statute that railroad companies must do so. *Greenlea v. R. R.*, 122 N. C., 977; *Troxler v. R. R.*, 124 N. C., 189.

(218) There was evidence tending to show that the method of testing the cylinder in use at the time of plaintiff's injury had been used for a long time without accident, and that it was not only reasonably safe, but to be preferred to the safety valve. It may be that the jury did not find that the safety valve was approved and in general use on such cylinders as the one by the explosion of which plaintiff was injured. If they had found otherwise, his Honor's instruction did not permit them to give to such finding the effect of imposing the duty to furnish the safety valve. It is this omission of which plaintiff complains. Defendant insists that the evidence, if believed, did not show a general use of the safety valve on such cylinders, citing *Marks v. Cotton Mills*, 135 N. C., 287. We think that there was evidence fit to be submitted to the jury upon the question. Of course, its weight and value were for the jury. For the error in the instruction in this respect there must be a

New trial.

Cited: Avery v. Lumber Co., post, 595; *Nail v. Brown*, 150 N. C., 535; *Walker v. Mfg. Co.*, 157 N. C., 135; *Tate v. Mirror Co.*, 165 N. C., 282.

N. S. CARDWELL v. THE SOUTHERN RAILWAY COMPANY.

(Filed 27 November, 1907.)

1. Railroads—Penalty Statutes—"Party Aggrieved"—Real Party in Interest.

The plaintiff is entitled to recover the penalty as the "party aggrieved," under Revisal, sec. 2632, for the defendant's wrongfully failing to transport freight within a reasonable time, where the facts show that, from the attendant circumstances or terms of the agreement, he is the one whose legal right is denied and who is alone interested in having the transportation properly made.

2. Same—Knowledge of Notice.

The real "party aggrieved" is entitled to recover the penalty, under Revisal, sec. 2632, irrespective of the question of knowledge of or notice to the defendant.

APPEAL from a justice of the peace, tried before *Allen, J.*, and a jury, at July, 1907, Special Term of ALAMANCE.

There was evidence tending to show that plaintiff had sold to (219) one M. J. Blue a package of harness worth $24.50, to be delivered at Efland, N. C., the stipulation as to delivery at Efland being part of the contract of sale. The plaintiff had same shipped by defendant company from Burlington, N. C., to Efland, N. C., prepaying the freight charges and taking a bill of lading therefor as shipped to M. J. Blue. That defendant failed to transport and deliver said harness within ordinary time, in accordance with the contract, and plaintiff, having made good the loss to the purchaser, M. J. Blue, by supplying him with other harness, filed his claim as required by the statute, and instituted this action to recover for the loss of the harness and for the penalty for wrongfully failing to transport freight, allowed by section 2632, Revisal of 1905.

Under the charge of the court there was a verdict for plaintiff for the value of the goods and the penalty. Judgment on the verdict, and defendant excepted and appealed.

Brooks & Thompson and W. H. Carroll for plaintiff.
King & Kimball and Parker & Parker for defendant.

HOKE, J., after stating the case: The statute has been upheld as a constitutional enactment in *Walker v. R. R.*, 137 N. C., 163; *Stone v. R. R.*, 144 N. C., 220, and other decisions of like import, and the principle upon which it rests has been affirmed in *Efland v. R. R.* (defendant's appeal), *ante*, 135. It is chiefly urged for error by appellant that plaintiff is not the "party aggrieved," under the principle announced in *Stone v. R. R., supra*, in that it was held: "When goods are delivered

to a common carrier for transportation, and bill of lading issued, the title, in the absence of any direction or agreement to the contrary, vests in the consignee, who is alone entitled to sue, as the 'party aggrieved,' for the penalty given by section 1467, Revisal." This is undoubtedly a correct decision, applying, as stated, where it appears that goods (220) are shipped and bill of lading taken to a consignee, without more.

As indicated in the opinion, however, where the facts show, as in this case, that from the attendant circumstances or the terms of the agreement some person other than the consignee is the one whose legal right is denied and who is alone interested in having the transportation properly made, a different rule obtains and the case comes within the principle of *Summers v. R. R.*, 138 N. C., 295. In that opinion it was said: "In giving the penalty to the party aggrieved, the statute simply designates the person who shall have the right to sue, and restricts it to him who, by contract, has acquired the right to demand that the service be rendered. 'The party aggrieved is the one whose legal right is denied.'" Nor is it a valid objection to this recovery that defendant may not have been made aware of the facts which gave to plaintiff the right to sue as the "party aggrieved," under the statute. As shown in *Rollins v. R. R., ante,* 153, neither the issue as to defendant's actual knowledge nor the evidence tending to support it are, as a general rule, relevant to the injury. In the absence of any counterclaim or offset in favor of defendant against the person who, as consignee, appears to be the "party aggrieved," under the contract, if the case is tried and determined in accordance with law and in a way to protect defendant from a second recovery, it is not material whether the real party in interest was known to defendant or not.

We are of opinion that the authorities referred to are decisive against the defendant's position, and we find no error in the proceedings below that gives appellant any just ground of complaint.

No error.

Cited: Davis v. R. R., 147 N. C., 70; *Box Factory v. R. R.*, 148 N. C., 422; *McRackan v. R. R.*, 150 N. C., 332; *Gaskins v. R. R.*, 151 N. C., 21; *Lumber Co. v. R. R.*, 152 N. C., 74; *Buggy Corporation v. R. R., ib.*, 122; *Elliott v. R. R.*, 155 N. C., 236, 237; *Withrow v. R. R.*, 159 N. C., 226; *Ellington v. R. R.*, 170 N. C., 37; *Tilley v. R. R.*, 172 N. C., 365; *Whittington v. R. R., ib.*, 505.

(221)

W. A. LEMLY v. W. B. ELLIS.

(Filed 4 December, 1907.)

1. Deeds and Conveyances—Warranty, Defective—Consideration, Entire—Title Paramount—Measure of Damages—Instructions.

Action for breach of warranty in sale and conveyance by defendant to plaintiff of several tracts of land for an entire consideration, and the title to one of the tracts was defective: *Held,* (1) The rule for estimating plaintiff's damages is the proportion that the value of the land covered by title paramount bears to the whole, estimated on the basis of the actual consideration paid. (2) If a good title has been procured by the vendee, the basis for the correct apportionment would be the amount reasonably paid to buy in the outstanding title, not exceeding the purchase money. (3) It was error in the court to charge the jury to make the apportionment on the basis of the actual value of the land, when there was evidence tending to show that the actual value exceeded the amount of the consideration.

2. Attachment—Insane Persons—Support of Family, Provisions Therefor—Creditors.

When it appears at the time of final entry appropriating the funds that the defendant is insane, a resident of another State, and being taken care of there; that his wife and child are residents of North Carolina, for whose support the defendant had otherwise provided, and that defendant's creditors have attached certain of his property here for the payment of this debt to them, the property attached will not be set aside for the support of the wife and child.

ACTION to recover damages for breach of warranty arising in sale and conveyance of land, tried before *Ferguson, J.,* and a jury, at March Term, 1907, of FORSYTH.

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

Manly & Hendren for plaintiff.
Lindsay Patterson for defendant.

HOKE, J. This case was before us on a former appeal, and was sent back for a new trial of the issue as to damages. See *Lemly v. Ellis,* 143 N. C., 200. The action was for breach of warranty, in (222) the sale and conveyance of realty, on the part of defendant to plaintiff, and it appears that defendant sold and conveyed to plaintiff eight tracts of land for an entire consideration of $37,000, a part of which was in money and another part in bonds. The title to one of the tracts proving to be defective, the present action was instituted and, defendant being a nonresident, an attachment was issued and levied on $16,000 of bonds as the property of defendant and which were at the time in possession and control of plaintiff. The consideration being en-

tire, and the title to one of the tracts having proved defective, the correct rule for estimating the plaintiff's damages is the proportion that the value of the land covered by title paramount bears to the whole, estimated on the basis of the consideration paid, the real consideration; or if a good title has been procured by the vendee, the basis for the correct apportionment would be the amount reasonably paid to buy in the outstanding title, provided such amount did not exceed the purchase money. *Price v. Deal,* 90 N. C., 295; Woods Mayne on Damages (1 Am. Ed.), pp. 285, 286.

Under the charge of his Honor, by fair intendment, the jury were directed to make the apportionment on the basis of the actual value of the land, and in this there was error, to defendant's prejudice, for there was some evidence tending to show that the actual value exceeded the amount of the consideration.

Defendant further excepts to the refusal of the court below to set aside a portion of the attached property for the support of defendant and his family, it having been made to appear that defendant is now insane and has a wife and infant child resident in the State, and there being evidence tending to show that defendant is insolvent.

It is an established principle with us that the property of an insane person, certainly where same is in custody of the court, will not be applied to the payment of his general indebtness, as distinguished (223) from claims for his present maintenance, until a sufficient fund is set aside for the support of the lunatic and his family, including his wife and infant children, who are a part of his household. *In re Latham,* 39 N. C., 231; *Adams v. Thomas,* 81 N. C., 296; *Adams v. Thomas,* 83 N. C., 52. *In re Latham* the doctrine and the reason upon which it rests is stated by *Daniel, J.,* as follows: "But the better opinion is that the said statute was not introductive of any new right, but was only declaratory of the common law. *Beverly's case,* 4 Steph., 126, 127; Ves. Jr., 71; Bac. Abr., title Idiots and Lunatics, C.; Shelford, 12. And we take it that the king, as *parens patriæ,* by the common law, had the protection of all his subjects, and that in a more particular manner he is to take care of all those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves. Bac. Abr., Idiots and Lun., C."

All the lunatic's estate has been converted into money, and only the sum of $942.14 is now within the reach of this Court. We think that this fund must be retained by the committee, not to pay his balance or the debts of any of the creditors, but for the purpose of maintaining the lunatic and his wife and infant children. That the court must reserve a sufficient maintenance for the lunatic before making an order for payment of debts, or allowing to the committee sums already applied by him

to that purpose, is clear from the nature of the jurisdiction in lunacy, as well as from the decisions. In *Ex parte Hastings,* 14 Ves., 182, *Lord Eldon* said he could not pay a lunatic's debts and leave him destitute, but must reserve a sufficient maintenance for him; and in *Tally v. Tally,* 22 N. C., 385, that case is cited with approbation by this Court.

With respect to the maintenance of the wife and such of the children as, from tenderness of age or other causes, are dependent upon the parent, this Court, in *Brooks v. Brooks,* 25 N. C., 389, gave the opinion that, though it was not mentioned in our statute, it was a proper (224) charge upon the lunatic's estate—it not preventing the maintenance of the lunatic himself—upon the ground that the lunatic himself was chargeable with it; and, among the demands on his estate to be provided for by order of the court, none can be more meritorious, certainly, and no disposition of the lunatic's estate is so likely to promote the comfort and due care of the lunatic himself. Both the decisions and the legislation on the subject, of like import, give clear indication that the duty is enjoined in the proper care of unfortunates who are citizens or resident within the jurisdiction. And a further consideration of the question will require that the doctrine be modified or be further applied and expressed, to the effect that the just and lawful demands of creditors should not be stayed or denied them, when it is made to appear that the care and support of the lunatic and his family are otherwise provided for, such provision belonging to them as of right, and not arising from the private bounty or charity of others.

On the first trial of this case the judge below was correctly advertent to the modification suggested, and rendered judgment directing an application of the property attached, and its proceeds, to the judgment, after hearing evidence and finding that the defendant himself was a resident of the State of New York and being cared for in a hospital there for the insane, and that his wife, a resident in Winston, N. C., with an infant child, aged about 13 years, had property, conveyed to her by defendant, to the value of at least $10,000, and affording an annual income of about $1,200.

It may be well to note that the time when the facts and circumstances pertinent to this question should be ascertained and declared is when the judgment is finally entered appropriating the funds, and it may be that a new inquiry should be had. But if these or substantially similar conditions exist when the judgment is rendered, we think that the plaintiff should be allowed to have judgment appropriating the (225) property attached to the amount he may recover.

For the error in the charge there will be a new trial on the issue as to damages.

Partial new trial.

Cited: Campbell v. Shaw, 170 N. C., 187.

ROSA PRENDERGAST v. J. S. PRENDERGAST.

(Filed 4 December, 1907.)

1. Divorce, Absolute, from Husband—"Fornication and Adultery."

Under The Code of 1883, sec. 1285, as amended by chapter 499, Laws 1905, an absolute divorce shall only be granted to the wife when the husband commits fornication and adultery, or when such misconduct of the husband has been habitual.

2. Same—Statute—Interpretation—"Fornication and Adultery"—"Adultery."

The legislative intent of chapter 499, Laws 1905, amending The Code of 1883, sec. 1285, was to draw a distinction between the grounds of absolute divorce given for acts of the husband and those of the wife, *i. e.*, (*a*) if the husband shall commit fornication and adultery, and (*b*) if the wife shall commit adultery, making only one act sufficient as to the wife.

ACTION for divorce *a vinculo,* tried before *Councill, J.,* and a jury, at September Term, 1907, of ALAMANCE.

Plaintiff alleged and offered evidence tending to prove one act of illicit intercourse on the part of the husband, defendant. Without evidence *ultra,* the trial judge thereupon intimated that he would charge the jury that in no aspect of the evidence was the plaintiff entitled to the relief prayed for, in that the laws of North Carolina did not allow a dissolution of the bonds of matrimony for one act of adultery on the part of the husband. Thereupon plaintiff, having excepted, submitted to a nonsuit and appealed.

(226) *Parker & Parker for plaintiff.*
Defendant not represented in this Court.

HOKE, J., after stating the case: Under The Code of 1883, sec. 1285, and for years prior thereto, the causes for absolute divorce in this State were as follows: (1) If either party shall separate from the other and live in adultery. (2) If the wife shall commit adultery. (3) If either party, at the time of the marriage, was and still is naturally impotent. (4) If the wife, at the time of the marriage, be pregnant and the husband be ignorant of the fact of such pregnancy and be not the father of the child with which the wife was pregnant at the time of the marriage. By chapter 499, Laws 1905, the first clause of the foregoing section was stricken out and there were substituted the words, "If the husband shall commit fornication and adultery," making that part of the law, in effect, as follows: That an absolute divorce shall be granted, (*a*) if the husband shall commit fornication and adultery, and (*b*) if the wife shall commit adultery.

To adopt the position contended for by the plaintiff would require that these terms should have one and the same meaning, whereas the marked

difference in the two clauses, standing as they do in such close juxtaposition, gives clear indication that the Legislature intended to make a distinction between the man and the woman in this feature of our laws of divorce, and we are of opinion that, in allowing a divorce when the man shall "commit fornication and adultery," it was intended to give those terms the distinctive meaning acquired by the words when associated together and as contained in section 3350 of the Revisal, defining the crime of "fornication and adultery." The uniform construction put upon this statute has established that, to constitute fornication and adultery, the misconduct must be habitual, and the General Assembly was no doubt advertent to this construction in making the amendment referred to.

There are grave reasons for the distinction made by this legis- (227) lation, which the General Assembly evidently regarded as controlling, but, being matters more properly for legislative consideration, they are not specified or dwelt upon here, and are only referred to in a general way in support of the construction we have given the statute. It is argued that this interpretation would leave the amendment without any force or effect on the law as it formerly stood, but a reference to the statute will readily indicate the change that was made and intended. Formerly, in order to obtain a divorce for such misconduct on the part of the husband, it was required that he should withdraw from his household and live in adultery, or force the wife to leave him, while this is now no longer required.

We think his Honor correctly interpreted the amendment, and there is no error in his decision.

Affirmed.

BROWN, J., concurring in result: I concur in the opinion of the Court construing the act of 1905. It is evident that when the General Assembly of 1905 enacted the divorce law of that session it had in mind the indictable offense of fornication and adultery, and intended that the offense of the husband must amount to that in frequency before the wife could secure a divorce, but that one act of adultery is sufficient to justify the husband in putting away the wife. But, with entire deference, I cannot concur in the suggestion of the Court that there are "grave reasons for the distinction made by this legislation." On the contrary, I feel that such legislative discrimination against the wife and in favor of the husband is inherently and morally wrong, and unjust to the wives and mothers of our State. The result, as the law now stands, is that if the husband be endowed with the powers which Gibbon ascribes to Mahomet, he may with impunity have intercourse with thirty different prostitutes in one night, and the unfortunate wife must hang her helpless head in shame and bear her humilation as best she (288)

can; while if the husband shall confine his attentions to one "soiled dove" for a few times only, the law will avenge the wrong done the outraged wife by divorcing her from her unfaithful spouse. On the contrary, let the wife step aside but once from the path of virtue, and the strong arm of the law will turn her out of her husband's house to starve, and free him forever from her degrading company, if he so wills. "Grave and weighty reasons" for such discrimination against the pure women of this State do not readily suggest themselves to me. On the contrary, it appears to me that every consideration of justice and right demands that the husband should be held to as strict a moral accountability as the wife. Reasons for such discrimination do not seem to have suggested themselves to legislators in other States. One act of adultery on the part of either party to the marriage is ground for absolute divorce in every State of this Union except North Carolina, Kentucky, and Texas (9 A. & E. Enc., 746), and no injurious results have followed in those States which have repudiated the fallacy that public policy requires such a discrimination between husband and wife. Our law is more unjust than the ancient common law of our English ancestors in its treatment of women in this respect. In those days, if either party committed adultery it was ground for divorce from bed and board, but not *a vinculo matrimonii,* for the reason that, if absolute divorce were allowed to depend upon a matter within the power of either of the parties, it would probably be extremely frequent. 1 Blackstone, p. 441. Under our law, the wife is not even justified in leaving the husband for one act of infidelity, and if her outraged feelings force her to do so, the husband need not support her. The fear that the husband will commit one act of adultery in order to enable his wife to procure a divorce is absolutely groundless, as is shown by the experience of those (229) States which have done equal and exact justice in this matter, and where divorces are no more frequent than in this State and her two sister Commonwealths. The truth is that a husband who will openly commit one act of adultery to make evidence against himself will commit as many such acts as are necessary to accomplish his purpose. In the ancient days of feudalism the adulterous wife frequently suffered death, not so much because of any moral delinquency on her part as because the blood of the heir might become tainted. We have no primogeniture now, and the husband can devise his lands away from his "tainted heir" if he so wills. This reason, if ever valid, is now worthless, since we are considering only the rights of the wife against the husband, and not of the husband against the wife. The law should not be relaxed in favor of the wife, but made stricter in regard to the husband, so as to hold both to the same standard of conjugal loyalty to each other and require both to obey the commandment of God.

It is to be hoped that some future General Assembly will abolish this unjust discrimination and follow the example of the forty-three States of this Union in dealing impartially between those who plight their mutual faith at the altar.

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J. F. WHITE COMPANY v. C. A. CARROLL.

(Filed 4 December, 1907.)

1. Pleadings—Mortgage — Right of Possession — Parol Contract — After-acquired Property.

When the complaint, in a suit for the recovery of a stock of goods embraced by a mortgage given by defendant, alleged the right of possession thereunder, and the answer denied the execution of the mortgage and alleged the consideration had failed, in that the goods covered by the mortgage had been sold, it was error for the court below to strike out, upon motion, a reply that had been filed for several terms of the court, and to exclude evidence thereupon, to the effect that the defendant agreed by parol, after the execution of the mortgage, that the lien thereof should apply to goods in defendant's store, afterwards acquired, as security for the payment for goods the defendant bought from the plaintiff from time to time.

2. Same.

When plaintiff alleges that the defendant had mortgaged, as security for credits extended by the plaintiff, "all of the goods in said store at the time of the bringing of the action," by a liberal interpretation (Revisal, sec. 495), the averment will include a separate and independent agreement, apart from that contained in the original mortgage, to give a lien by parol on after-acquired stock in said store.

3. Same—Reply Explanatory of Complaint.

The plaintiff, in his reply to defendant's answer, may amplify the statement of his title to the goods in dispute by alleging in his complaint his title and right of possession and in the reply showing how he acquired them.

4. Mortgage—Stock of Goods—Parol Agreement.

A parol mortgage of after-acquired goods, not then *in esse*, or not belonging to the mortgagor at the time, is good and binding between the parties.

APPEAL from *Justice, J.*, at April Term, 1907, of GRANVILLE.

This action was brought to recover a stock of goods. It appears that the defendant had given to the plaintiff, on 16 March, 1900, a mortgage on the stock of goods then in his store to secure the price of goods bought by him. The plaintiff alleged that he was entitled, under this mortgage, to the property. (231)

The defendant answered, on 1 August, 1906, and denied the execution of the mortgage, and averred that it was without consideration; that it does not embrace any goods seized by the sheriff in this action, or any goods now in the defendant's store, the stock of goods described in the mortgage having long since been sold or disposed of. He then avers that the mortgage, together with two others made at the same time, each for $300, was executed by agreement of the parties to defraud the defendant's creditors.

The plaintiff replied, on 10 November, 1906, as of August Term, 1906, as follows: "That, subsequent to the execution and assignment of said bond and mortgage, defendant bought other goods from the plaintiff, which he expressly agreed should be included in and held subject to the lien of said mortgage, and, from time to time and until shortly before the bringing of this action, continued to buy other goods from the plaintiff, under an agreement that the goods so purchased, and all other goods in the defendant's store, should be subject to the lien of said mortgage, and mortgaged to plaintiff, as security for the credits so extended, all of the goods in said store at the time of the bringing of this action." He also denied the fraud alleged in the answer. The reply remained on file for two terms of the court before the trial of the case.

At April Term, 1907, on motion of the defendant, the judge struck out the reply because it had not been filed by order of the court and was not marked "Filed," and, further, because the answer did not call for a reply.

At the trial the plaintiff offered to introduce evidence tending to show "that the defendant told the plaintiff, a day or two after the date of the mortgage, that he had given the mortgage to secure that debt and such as might be contracted thereafter; that he had given Brown a paper that would protect the plaintiff as to the goods he already had, and as to such as he might purchase thereafter, and from time to time he con-
(232) tinued to buy other goods from the plaintiff under an agreement that the goods so purchased and all other goods in the defendant's store should be subject to the provisions of the plaintiff's mortgage." The court excluded the evidence, and the plaintiff excepted.

The court having inspected the mortgage and held that the plaintiff had no lien on the goods, except those in the store at the date of the mortgage, the plaintiff excepted to the ruling, submitted to a nonsuit, and appealed.

Graham & Devin for plaintiff.
Winston & Bryant for defendant.

WALKER, J., after stating the case: If it was the intention of the pleader to allege, in the third section of the reply, that there was a

mutual mistake in drawing the mortgage, and that the real contract between the parties was that the instrument should embrace not only the goods then in the store, but all thereafter purchased to renew or replenish the stock, he should have so plainly stated and asked for a correction of the mortgage in that respect. But, while it would seem from the proof tendered that he intended so to allege, in part, we think that both the reply and the proof which were rejected by the court must be given a broader scope, and extend not only to a mistake in the mortgage, but also to include a separate and independent agreement to give the plaintiff a parol mortgage upon the original stock and all subsequent additions to it, or all goods thereafter purchased, to secure the entire indebtedness due to him. The expression in the reply, "and (the defendant) mortgaged to plaintiff, as security for the credits so extended, all of the goods in said store at the time of the bringing of this action," would seem to bear this construction if we give it a liberal interpretation, which we are required to do in order to administer substantial justice between the parties. Revisal, sec. 495. The pleading is not very explicit, we admit, but is sufficient, by the indulgence of the law, to embrace the idea of a parol lien or mortgage upon after-acquired goods. Such a mortgage is as good, at least between the parties, (233) as if it had been in writing, provided, if reduced to writing, it would have been valid. Cobbey on Chattel Mortgages, sec. 14; *McCoy v. Lassiter,* 95 N. C., 88; *Moore v. Brady,* 125 N. C., 35. There can be no objection to the validity of the parol mortgage upon the ground that it embraced future acquisitions of goods, not then *in esse* or not belonging to the mortgagor at the time. *Perry v. White,* 111 N. C., 197; *Brown v. Dail,* 117 N. C., 41. Jones, in his work on Chattel Mortgages (4 Ed.), sec. 154, says that a mortgage upon a stock of goods, and any new goods acquired by way of renewal or substitution for them, is valid, at least between the parties to it. See, also, section 172 and Cobbey on Chattel Mortgages, secs. 355 and 370. The reply is susceptible of the construction that the plaintiff and defendant agreed that the latter might sell the original stock in the ordinary course of trade, and that all new goods bought and substituted for those sold should be subject to the lien. This agreement would seem to come within the principle stated and applied in *Sharpe v. Pearce,* 74 N. C., 600; Jones on Mortgages (4 Ed.), sec. 71; and would, perhaps, be valid as between the parties to the mortgage. We have held that no particular form of words is necessary to create a lien or to constitute a mortgage, it being sufficient that the parties intended their agreement to operate as such. *McCoy v. Lassiter, supra.* The law seeks after the common intention of the parties, and enforces it as between them when it is ascertained. The ruling of the court, by which the reply was stricken out, we think, was erroneous.

If it was necessary for the defendant to aver that the mortgage given to the plaintiff did not embrace the property in dispute, instead of simply denying the plaintiff's title and right of possession thereto, this new matter is deemed to be controverted by the plaintiff as upon a direct denial or avoidance, as the case may require (Revisal, sec. 503;
(234) *Fitzgerald v. Shelton,* 95 N. C., 519; *Buffkins v. Eason,* 110 N. C., 264; Clark's Code [3 Ed.], sec. 268, and cases cited at pp. 268 and 269); and, this being so, why should it be held improper for the plaintiff to file a written reply in order to state distinctly his defense to the new matter, whether a counterclaim or not, instead of relying upon the statutory reply? Such a written reply was made in *Bean v. R. R.,* 107 N. C., 731, and expressly approved by the Court. Whether he would be bound by such a pleading, and forbidden at the trial to prove other matter by way of avoidance, we need not decide, for the question is not before us. How was the defendant prejudiced by being informed of the particular grounds upon which the plaintiff claimed the right to recover the property? We are inclined to the opinion that, as the plaintiff merely alleged his title and right to possession, a general denial by the defendant would have sufficiently presented the real issue between the parties, unless the plaintiff sought to reform the mortgage. There is a marked difference between such an equity to reform the instrument and an agreement merely to substitute other property for that described in the mortgage. We think the court erred, also, in striking out the reply after it had remained on file several terms without any objection from the defendant. *Dempsey v. Rhodes,* 93 N. C., 120; *Kerchner v. Riley,* 72 N. C., 171; *McMillan v. Baker,* 92 N. C., 110; *Corn v. Stepp,* 84 N. C., 599.

We do not find any inconsistency between the complaint and the reply. In the complaint the plaintiff alleges simply his title and right of possession, and in the reply he shows how he acquired them. Where is the conflict? *Houston v. Sledge,* 98 N. C., 414; *Hardin v. Ray,* 94 N. C., 456. There is no departure in pleading here, as we understand the several allegations of the complaint and the reply. The plaintiff merely amplifies in the latter the statement of his title; and the case is, in principle, therefore, exactly like *Simpson v. Lumber Co.,* 133 N. C., 95. There is no new cause of action set up.

(235) It is not necessary that we should consider the other matters discussed in the learned and well prepared briefs of counsel. We are of the opinion that the court erred in its rulings upon the pleadings and the evidence.

New trial.

Cited: *S. c.,* 147 N. C., 332.

J. W. SHAW v. HIGHLAND PARK MANUFACTURING COMPANY.*

(Filed 4 December, 1907.)

1. Principal and Agent—Respondeat Superior—Employer and Employee—Safe Appliances—Help—Negligence—Question for Jury.

In an action to recover damages for injuries sustained while in defendant's employment in directing the tearing down of a cloth press in defendant's mill, the evidence showed that plaintiff was directed by defendant's superintendent to move heavy parts of the press, weighing some 5,000 pounds, to another part of the mill, the superintendent being present and overlooking the work when it was being done; plaintiff told the superintendant that the appliances being used were too small and that he wanted heavy ones, and the superintendent said go ahead and use those furnished, as they were all right; that a part of the appliances were out of repair, which was known to the superintendent; that the plaintiff was experienced in this kind of work, had been working for defendant for some years, and had theretofore used heavier appliances for work of this character; that plaintiff complained of having insufficient help, and the superintendent replied that he knew the help was worthless: *Held*, (1) the defendant was responsible for the acts of its superintendent; (2) the defendant failed in its legal duty to furnish safe appliances for the work and adequate help to do it; (3) the evidence was sufficient to go to the jury upon the question as to whether the negligent failure to furnish sufficient appliances and help was the cause of defendant's injury. *Stewart v. Carpet Co.*, 138 N. C., 60, cited and distinguished.

2. Evidence—Negligence—Safe Appliances—Explanation of Operation.

It was competent for the plaintiff, experienced in the work, to explain the use of the machinery he had requested for the work he was employed to do, and was refused, as a connection between the negligence and the injury he had received, owing to the unsafe character of the appliances he was instructed to use.

3. Evidence, Expert—Matter of Fact—Causal Connection—Question for Jury.

It is competent for a jury to consider injury to plaintiff's eyesight as an element of damage, a causal connection between the injury received and the subsequent paralysis, upon testimony of plaintiff and without expert evidence: "The muscles and tendons were torn loose in my right side, and my arm was affected—paralyzed, to a certain extent. It is still dead and numb. It also affected my eyes; they are crossed and I see two objects. I could see perfectly good before I sustained the injury; since then and to the present time I cannot see at all hardly."

APPEAL from *Ward, J.*, and a jury, at June Term, 1907, of (236) MECKLENBURG.

This action was instituted by the plaintiff to recover damages for injuries sustained while in the employment of the defendant on 18 May, 1905, plaintiff being engaged at the time in directing the work

*WALKER, J., did not sit.

of tearing down a cloth press in defendant's mill, preparatory to moving it to another part of the building.

The court submitted these issues:

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

2. "Did the plaintiff, by his own negligence, contribute to his own injuries?" A. "No."

3. "What damage is the plaintiff entitled to recover? A. "Five thousand dollars."

From the judgment rendered defendant appealed.

McNinch & Kirkpatrick, R. S. Hutchison, and Burwell & Cansler for plaintiff.

Tillett & Guthrie for defendant.

BROWN, J. The matter involved in this appeal was before this Court at a former term, and constitutes the second cause of action, (237) *Shaw v. Mfg. Co.*, 143 N. C., 134. That opinion is referred to for a general statement of the case. The jury having found the issue of contributory negligence against the defendant, and there being no error committed by the court upon the trial of that issue pointed out to us, that question may be considered settled.

The learned counsel for defendant contends now that the plaintiff is not entitled to recover in any aspect of the case, (*a*) because there is no evidence that the defendant was guilty of negligence in failing to furnish two chainblocks and tackle or other proper appliances; (*b*) there is no evidence that the failure to furnish sufficient hands caused the injury; (*c*) the defendant's negligence was in no sense the proximate cause of the plaintiff's injury.

We will not consider in detail the numerous exceptions for failure to give defendant's prayers for instruction on the issue of negligence, as in the view we take of the case it is needless to do so.

His Honor might well have instructed the jury that, if they believed the evidence in the case, the defendant was guilty of negligence in failing to furnish the plaintiff with sufficient and proper tools and appliances reasonably necessary for the accomplishment of the work the plaintiff was commanded to do, and also for failure to furnish sufficient assistants reasonably necessary to help in performing it. The entire evidence upon this issue is embraced by the testimony of the plaintiff himself, and that tends to prove that plaintiff was ordered by Superintendent Constable to move the bedplate and plunger, weighing some 5,000 pounds, to another part of the mill, and that Constable was present, overlooking the manner in which the work was done. Plaintiff told Constable that he needed a two-ton chainblock, but Constable said he

could not afford to hire it, as it would cost him a dollar a day and it would take two weeks to finish the job, and that the mill was not making any money and the plaintiff would have to make out with the two small chainblocks. The plaintiff protested, stating that the small (238) chainblocks were too little, but was told by Constable to go ahead and use them anyway. Plaintiff again told Constable that he thought they were too small and he wanted a heavier one, but was again instructed by Constable to go ahead and use them, as they were all right.

When plaintiff went to use these chainblocks he found that one of them was defective, or out of repair, so that he could not use it.

Both Constable and Johnson, the general manager of the mill, knew at the time that this chainblock was out of repair, and that plaintiff could, therefore, only use one of the two chainblocks in tearing down the press.

The evidence tends to prove that plaintiff had large experience in moving heavy machinery and knew what was necessary; that he had been working for defendant some ten years and had used a two-ton chainblock frequently in unloading heavy machinery, and that such chainblock is nearly double the size of the chainblock used on this occasion.

The evidence shows that insufficient help was furnished (one man and three inexperienced colored boys), and, upon plaintiff's protesting that such help was insufficient, Constable said he knew the three boys were not "worth a damn," but that they were all he had, and he directed plaintiff to go ahead, and promised to furnish more help, which he failed to do.

Upon this uncontradicted evidence his Honor would have been justified in charging the jury that, if believed to be true, it proved that the defendant's superintendent had been undeniably negligent in his duty to plaintiff.

The defendant failed to furnish appliances proper and necessary for such work; it furnished defective appliances and such as were insufficient in size and number. It failed to furnish sufficient assistants, although repeatedly demanded by plaintiff, and three of those furnished were inexperienced and unsuitable for that kind of (239) work. The uncontradicted declarations of the superintendent himself prove that the appliances and help demanded by plaintiff were necessary for the safe performance of the work, and that those furnished were utterly insufficient. It is immaterial that the superintendent was a competent one.

Those intrusting authority to control others are held responsible for the manner of its exercise; if abused, those conferring it are held responsible for its abuse. *Tanner v. Lumber Co.,* 140 N. C., 475; *Mason v. Machine Works,* 28 Fed., 228.

We scarcely deem it necessary to cite authority to sustain our view that the defendant fell far short of its legal duty to plaintiff, but the controlling principles are to be found in *Phillips v. Iron Works, ante,* 209, where some of the precedents in our own reports are cited. 2 Labatt, secs. 572, 573; *Lamb v. Littman,* 128 N. C., 361; *Means v. R. R.,* 124 N. C., 574; *Fleke v. R. R.,* 53 N. Y., 549; *Mason v. Machine Co., supra; R. R. v. Fort,* 17 Wallace, 553; *R. R. v. Ross,* 112 U. S., 377.

With due deference for the learned counsel for defendant, we think *Stewart v. Carpet Co.,* 138 N. C., 60, relied on by them, has but little bearing on this controversy. In that case the negligence charged was not that the master had altogether failed to furnish an elevator, or that the one furnished was out of repair, but that the elevator which he had furnished was lacking in certain safety appliances in general use. Hence the Court held that, in order to convict the defendant of the negligence charged, the plaintiff must offer evidence tending to show that the elevators in general use were equipped with the safety appliances which this particular one lacked.

No complaint is made of the design and constructing of the chainblocks furnished the plaintiff, but the charge is that those furnished were insufficient for the work in hand, because one was broken (240) and the other too small. As was tersely said by the learned counsel for the plaintiff, Mr. Cansler, "The master is just as culpable in furnishing appliances sufficient in *quality,* but deficient in *quantity,* as he is for furnishing those sufficient in *quantity,* but deficient in *quality.*"

It is contended, again, that the failure to furnish proper chainblocks and assistants was not the proximate cause of the injury, and, therefore, the negligence is not actionable. *Covington v. Furniture Co.,* 138 N. C., 374, relied upon by defendant, differs materially from this. There the case was made to turn upon the contributory negligence of the defendant. Here that defense is eliminated by the finding of the jury. We think his Honor properly submitted the question to the jury as to whether the negligent failure to furnish sufficient appliances and help was the cause of plaintiff's injury. This is a deduction to be drawn by the jury from the facts in evidence, and the evidence abundantly supports the conclusion they reached.

His Honor properly permitted plaintiff to testify what he would have done with the two-ton chainblock, and how he would have suspended the bedplate by means of it, and whether under such conditions it was possible for the bedplate to have fallen on him. These statements of the witness were competent to explain the connection between the alleged negligence and the injury. Before the jury can safely draw any inference from the lack of such machinery, they should understand its opera-

tion. Certainly, the plaintiff demonstrated that he was fully competent to explain it.

The defendant excepted to the charge of the court permitting the jury to consider injury to plaintiff's eyesight as an element of damage, upon the ground that there is no evidence to support such claim. Upon this subject the plaintiff testified: "The muscles and tendons were torn loose in my side, and my arm was affected—paralyzed, to a certain extent; it is still dead and numb. It also affected my eyes. My eyes are crossed; I see two objects. I could see perfectly good before I sustained the injury. Immediately after the injury, and from that time up (241) to the present, I cannot see at all hardly."

It may be that plaintiff is not an expert on diseases of the eye, but he is a competent witness to testify to a fact. If the jury believed that his eyesight was perfectly normal before the injury, and that immediately after the injury he could not see "at all hardly," they might well refer this misfortune to the injury received, and find a causal connection between the two, there being no other apparent cause. The injury to the sight following almost instantly upon the bodily injury, differentiates this case from those cited by defendant, where the disease was not developed until months afterwards.

Proulx v. Bay City, 143 Mich., 550, is very much in point. The plaintiff fell upon the sidewalk and sustained physical injuries, consisting of a bruise to the knee and the running of a sliver into her left hand. Some days after this accident, paralysis in the left side, pains in the back, difficulty of articulation, and trouble with the vision appeared.

In holding that the question whether the injuries were the direct cause of the subsequent ailments was for the jury, the Michigan Supreme Court said: "We think it was so clearly a question of fact for the jury as to whether the physical injury was the direct cause of the paralysis and other symptoms as not to require discussion." In that case there was no expert or opinion evidence introduced. The matter was left to the jury to say, from the facts testified to, as to whether there was any causal connection between the injury received and the subsequent paralysis. See, also, *Hirte v. R. R.,* 127 Wis., 230; *Adcock v. Navigation Co.,* 77 Pac., 78; *Lindeman v. R. R.,* 74 N. Y. Sup.; *Selman v. Wheeler,* 54 Atl., 512; *Wright v. City,* 60 Wis., 119.

Upon a review of the whole record, we find

No error.

Cited: Avery v. Lumber Co., post, 595; *Bennett v. Mfg. Co.,* 147 N. C., 622; *Noble v. Lumber Co.,* 151 N. C., 78; *Walters v. Sash Co.,* 154 N. C., 325; *Hamilton v. Lumber Co.,* 156 N. C., 523; *Walker v. Mfg. Co.,* 157 N. C., 135; *Pigford v. R. R.,* 160 N. C., 100; *Tate v. Mirror Co.,* 165 N. C., 280; *Hollifield v. Telephone Co.,* 172 N. C., 725.

(242)

MRS. MINERVA NEILL ET AL. V. F. G. WILSON, ADMINISTRATOR OF R. Q. WILSON, DECEASED.

(Filed 4 December, 1907.)

1. Vested Rights—Property—Cause of Action.

A vested right of action is property in the same sense tangible things are property, and it is frequently so treated in constitutions and statutes, where the words permit and the spirit and intent of the law require it.

2. Same—Property—Revisal, Sec. 59—Cause of Action, When Vested.

Revisal, sec. 59, providing that "Whenever a death of a person is caused by the wrongful act . . . of another, . . . such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person that would have been so liable . . . shall be liable to an action for damages," etc., impresses upon the right of action the character of property as a part of the intestate's estate; and, for the purpose of devolution and transfer, the rights of the claimants are fixed and determined as of the time the intestate died.

3. Revisal, Sec. 59—Executors and Administrators—Guardian and Ward—Husband and Wife—Distribution.

When one entitled as a distributee of the amount recovered under Revisal, sec. 59, is dead, and her husband has qualified as her administrator, but removed on account of his since becoming *non compos mentis*, the administrator of the wife, *de bonis non*, and guardian of the husband, is entitled to her share of the fund, to be held by him for the benefit of the husband.

4. Revisal, Sec. 59—Recovery—Distribution—Creditors.

Revisal, sec. 59, providing that a recovery for damages thereunder by the administrator for the death of his intestate, caused by the wrongful act, etc., of another, "is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in the case of intestacy," extends to the creditors of the intestate, and not to the creditors of the distributees.

CONTROVERSY without action, regularly submitted and determined, before *Ward, J.*, at May Term, 1907, of GASTON.

From the facts agreed upon, it appears that defendant's intestate, Robert Q. Wilson, died on 10 September, 1904, leaving surviving (243) him, as next of kin and distributees under the law, his mother and several brothers and sisters, among the last Mrs. Elizabeth Quinn, wife of J. R. Quinn; that defendant F. G. Wilson was qualified as administrator of intestate on 15 September, 1904. Mrs. Elizabeth Quinn died on 30 September, 1904, and on 24 October, 1904, her surviving husband, J. R. Quinn, was duly qualified as her administrator, and said J. R. Quinn having become *non compos mentis*, E. L. Wilson, one of the plaintiffs, became administrator *de bonis non* of Elizabeth

Quinn, deceased, and also guardian of J. R. Quinn; that defendant administrator has on hand an amount of money arising from a recovery had by said defendant by reason of negligence of a railroad company, causing the death of intestate; that action against the company for such wrongful act was begun in November, 1904, judgment obtained in December, 1904, and the amount was paid on 11 January, 1905. And the question presented, on these and other facts stated, is whether E. L. Wilson, one of the plaintiffs, administrator *de bonis non* of Elizabeth Quinn and guardian of the husband of Elizabeth Quinn, who had been her qualified administrator, is entitled to her proportion of the fund as distributee.

The judge below held and entered judgment as follows: "This cause coming on to be heard upon the statement of the facts in the case agreed, and after hearing argument and duly considering the same, now, upon motion of O. F. Mason, attorney for E. L. Wilson, administrator *de bonis non* of Mrs. Elizabeth Quinn, it is adjudged by the court that the said E. L. Wilson, administrator as aforesaid, is entitled to recover, and that he do recover, of the defendant F. G. Wilson, administrator of the estate of Robert Q. Wilson, the sum of $628.34, the admitted balance in his hands, which sum, in the opinion of the court, belongs to the estate of the said Elizabeth Quinn, under the facts agreed upon as aforesaid. It is further adjudged that Mrs. Minerva Neill, Mrs. Daisy Hutchison, Willis Wilson, Connie Wilson, Charles Wilson, Re- (244) becca Wilson, and Shelton Wilson have received their full share of the estate of Robert Q. Wilson, as well as their share in the fund recovered from the Southern Railway Company by F. G. Wilson, administrator of Robert Q. Wilson, and the said parties are, therefore, excluded from participating in the funds in controversy. It is adjudged that the administrator, F. G. Wilson, pay the costs of this proceeding out of the said funds."

From the judgment the distributees, other than E. L. Wilson, administrator and guardian, appealed.

A. G. Mangum for plaintiffs.
O. F. Mason for defendant.

HOKE, J., after stating the case: Our statute addressed to this question (Revisal, sec. 59) enacts as follows: "Whenever the death of a person is caused by a wrongful act, neglect, or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors, or suc-

cessors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator, or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect, or default causing the death amount in law to a felony. The amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy."

It is said in Cooley on Constitutional Limitations (7 Ed.), p. 577, that "A vested right of action is property in the same sense that tangible things are property," and, quoting this authority with approval in *Duckworth v. Mull,* 143 N. C., 466, the Court said: "While in (245) ordinary transactions the term 'property' is not supposed to include a right of action, yet in constitutions and public statutes, where the words permit and the spirit and intent of the law require, a vested right of action is frequently considered and treated as property."

It is not required, however, to resort to this rule of construction, as on a statute of doubtful import, for we are of opinion that the statute quoted gives clear indication of the purpose of the Legislature to impress upon the right of action the character of property as a part of the intestate's estate, and that, for the purpose of devolution and transfer, the right of the claimants should be fixed and determined as of the time when the intestate died. Even if the statutes were less explicit, the inconvenience of adopting any other period for determining who should be the rightful claimants, and the uncertainty that would attend it, extending in many instances over a long period of time, would almost of necessity compel such a construction.

This position finds some support in *Baker v. R. R.,* 91 N. C., 308, where the Court sustained and made effective a release given by one of the beneficiaries prior to recovery. According to the interpretation we have given it, that the right of action conferred is property and to be treated for the purpose of distribution as a part of the intestate's estate, the recognized principle applies, referring to the time of the intestate's death as the period when the distributees, as the rightful claimants of vested interests, shall be fixed and determined. *Whit v. Ray,* 26 N. C., 14; *Rose v. Clark,* 8 Paige, 574; 14 Cyc., 107-109. It follows from this position that, under section 4, Revisal, the administrator *de bonis non* of Mrs. Quinn is entitled to her share of the fund in question, to be held by him for the benefit of J. R. Quinn, the husband, subject to the claims of her creditors and others having rightful demands against her; for the protection of this fund against creditors,

provided for by the statute, section 59, *supra*, refers to the cred- (246)
itors of the intestate and does not extend or apply to the creditors of the distributees.

There is no error in the judgment below, and the same is
Affirmed.

Cited: *Hall v. R. R.*, 149 N. C., 110; *Tart v. Tart*, 154 N. C., 508; *Broadnax v. Broadnax*, 160 N. C., 435; *Hood v. Tel. Co.*, 162 N. C., 94; *In re Shuford's Will*, 164 N. C., 135; *In re Stone*, 173 N. C., 211.

J. S. MYERS v. CITY OF CHARLOTTE.

(Filed 4 December, 1907.)

1. Measure of Damages—Negligence—Culverts—Lands, Flooding.

The measure of damages in an action for recovery thereof, occasioned by the taking of the plaintiff's land and the improper construction of culverts, causing water to pond back on his meadow, is the market value of so much as was taken and the deterioration of the other by flooding.

2. Same—Evidence, Corroborative.

In an action to recover damages on account of defendant taking a part of plaintiff's farming land for sewer purposes and negligently damaging the rest, when the plaintiff has testified as to his income from the hay formerly produced thereon, it is competent for experienced farmers who knew the land well, though without personal knowledge of what the land had produced, to testify, in corroboration of the plaintiff, the amount of hay it would probably have produced before and what it would probably produce since the injury complained of.

APPEAL from *Ferguson, J.*, at July Term, 1907, of MECKLENBURG, and brought by the plaintiff to recover damages from the defendant on account of the wrongful establishment and maintenance of an elevated sewer over and through his lands.

Judgment for plaintiff. Defendant excepted and appealed.

R. S. Hutchison and Burwell & Cansler for plaintiff.
Hugh W. Harris and John A. McRae for defendant.

CLARK, C. J. This is an action for damages to plaintiff's meadow from a sewer built through it, partly above ground, inclosed within a concrete wall and partly under or through the soil. There was evidence that, after heavy rains, the culverts under the sewer did (247) not always fully carry off the water, causing it to pond back on the meadow, to its injury. Besides, the defendant, in its answer, asked for the condemnation of a strip 40 feet wide for right of way, and assessment of its value in this action.

There are but two exceptions, both to the admission of evidence. The plaintiff testified to the market value of the land, and, as a basis for his opinion, testified, without objection, what had been his income from it in the value of the hay produced before the sewer was built. The defendant excepted because two other witnesses were permitted to confirm plaintiff by giving their opinion, as farmers, as to the amount of hay the meadow would probably produce. Though they had no personal knowledge of what it had actually produced, they were experienced farmers, knew this meadow well, and owned land near by. Their evidence was competent and was such as a jury would naturally desire to aid them in coming to a just conclusion. It was such information as an intending purchaser would always seek. It is true, the measure of damages is the market value of so much of the land as was taken and the deterioration of the rest by flooding. The estimate of its yield in hay, for raising which it had been used, was competent to confirm the plaintiff's estimate of its market value. The greater or less acquaintance of the witnesses with the land went to the weight to be given to their testimony, but did not render it incompetent.

The second exception is to the admission of the evidence of two witnesses, also neighboring farmers of experience, as to what the land would produce in its present condition, since the sewer was built, this being for the purpose of showing that it has now no productive capacity and hence no market value. As the land is used only for agriculture, we do not see how the defendant is hurt by the witnesses giving, as the basis of their estimate of market value, the amount of produce the
(248) land will yield in its present condition. The witnesses examined the land, but had no previous acquaintance with it. They were experienced farmers, and what weight should be given to their testimony that the land could not produce crops by reason of ponding water was a matter for the jury.

The value of land is largely a matter of opinion, derived from a variety of circumstances, and, when it is agricultural land, one of the most important is the yield of crops therefrom. That is a matter upon which farmers acquainted with the land, or who have examined it, can express an opinion more or less accurately. This opinion is subject to the test of cross-examination, and the weight to be given to it is a matter for the jury. This matter has been recently fully discussed. *Creighton v. Water Comrs.*, 143 N. C., 171; *Brown v. Power Co.*, 140 N. C., 341.

No error.

Cited: Little v. Lenoir, 151 N. C., 418; *Whitfield v. Lumber Co.*, 152 N. C., 214; *Williams v. Lumber Co.*, 154 N. C., 310.

Q. A. HAUSER v. W. S. MORRISON.

(Filed 4 December, 1907.)

1. Ejectment—Landlord and Tenant—Equity—Mortgagor and Mortgagee—Justice of the Peace—Jurisdiction.

Summary proceedings in ejectment given by the landlord and tenant act (Revisal, sec. 2001) are restricted to the cases expressly specified therein: and when on the trial it is made to appear that the relation existing is that of mortgagor and mortgagee, giving a right to account, or vendor and vendee, requiring an adjustment of equities, a justice's court has no jurisdiction, and the proceedings should be dismissed.

2. Same.

Plaintiff leased the *locus in quo* to defendant at a certain sum per week, with provision that, on default of the payments, defendant could be evicted without notice. On the same day plaintiff gave defendant a written option to purchase the property at a certain sum, less certain payments theretofore made under a former contract respecting the same land. Defendant continued to hold possession and pay upon the purchase price: *Held*, (1) that plaintiff has accepted and recognized the relationship of vendor and vendee; (2) that in a possessory action equity would recognize the contract as a mortgage, requiring an account and adjustment of the dealings in reference to the land; and (3) that a justice of the peace has no jurisdiction thereof.

SUMMARY PROCEEDINGS in ejectment, tried on appeal from a (249) justice of the peace, before *Ward, J.*, and a jury, at August Term, 1907, of WILKES.

On the issues submitted, there was a verdict for plaintiff, judgment on verdict, and defendant excepted and appealed, assigning for error that the court should have dismissed the action for want of jurisdiction in the justice to try the cause.

Finley & Hendren and O. C. Dancy for plaintiff.
F. D. Hackett for defendant.

HOKE, J., after stating the case: The authorities of this State have established the principle that the remedy by summary proceedings in ejectment given by the landlord and tenant act (Revisal, sec. 2001, *et seq.*) is not coextensive with the doctrine of estoppel arising where one enters and holds land under another, but is restricted to the cases expressly specified in the act, and where the relation between the parties is simply that of landlord and tenant; and when, on the trial of such a proceeding, it is made to appear that the relation existing is that of mortgagor and mortgagee, giving the right to an account, or vendor and vendee, requiring an adjustment of equities, a justice's court has no jurisdiction of such questions, and the proceeding should be dismissed.

Parker v. Allen, 84 N. C., 466; *Hughes v. Mason,* 84 N. C., 473. In this last case *Dillard, J.,* for the Court, said: "The landlord and tenant act, in Battle's Revisal, ch. 64, p. 9, by its terms and the construction put upon it by the Court, gives the remedy of summary ejectment before a justice of the peace only in the case when the simple relation of lessor and lessee has existed and there is a holding over after the term
(250) has expired, either by efflux of time or by reason of some act done or omitted contrary to the stipulations of the lease. *Credle v. Gibbs,* 65 N. C., 192; *McCombs v. Wallace,* 66 N. C., 481; *Forsyth v. Bullock,* 74 N. C., 135. And it is equally well settled that the jurisdiction does not extend to the relation of mortgagor and mortgagee and vendor and vendee, in which, although the martgagor and vendee may technically be tenants at law, they are viewed in equity as the owners of the estate, and are allowed, in order to avoid the circuity of letting judgment go and then going into equity to enjoin the execution, to set up in one action under our present system their equitable title in defense to any action which may be brought to recover the possession. *Heyer v. Beatty,* 76 N. C., 28; *Abbott v. Cromartie,* 72 N. C., 292; *Calloway v. Hamby,* 65 N. C., 631; *Turner v. Lowe,* 66 N. C., 413; *Forsyth v. Bullock, supra.*"

We are of the opinion that a proper application of the doctrine requires that the present action should be dismissed for want of jurisdiction in the justice's court. From the evidence offered on the triad, it appears that in February, 1904, plaintiff sold and conveyed to defendant a house and lot in Wilkesboro for the sum of $2,800, and took notes and mortgage, or deed of trust, to secure the purchase price, one note being for $1,000 and the second for $1,800, etc.; that defendant made some payments, but failed to comply with the contracts, and on 15 September, 1905, defendant reconveyed the property to plaintiff, and on 16 September plaintiff leased the property to defendant at the price of $4 per week, with a provision that on default of any of the payments defendant could be evicted without notice. And on the same day (16 September, 1905) plaintiff gave defendant a written option for sixty days to purchase the property at $2,800, less payments already made. Defendant continued to hold the property and has remained in possession until the present time, having the interest conferred by these contracts and the conduct of the parties under and in reference to them.
(251) There was admission made that defendant had paid $800 or $900 on the purchase price to September, 1905, and evidence tending to show that since that date defendant had at different times paid as much as $189.50 in money and other articles of value, and had further deposited in some bank a note of one Crouch, to the amount of $1,000, the proceeds of which, when collected, were to be applied on the pur-

chase price. The testimony does not clearly disclose the exact nature of the arrangement between the parties as to the Crouch note, but it tends to show that plaintiff has asserted some interest and control over this note and its proceeds as applicable to his claim under the contract. There is grave doubt, on the face of these contracts and the evidence as it now appears, if the relationship of vendor and vendee, as it was established by the original contract between the parties in February, 1904, has ever been changed or materially affected by these subsequent agreements, on the principle established by the decision of *Dawkins v. Patterson,* 87 N. C., 387; *McLeod v. Bullard,* 84 N. C., 515, affirmed on rehearing, 86 N. C., 210, to the effect that a mortgagee who purchases the equity of redemption direct from the mortgagor, in order to uphold his purchase, has the burden of showing that his purchase was entirely fair and without undue oppression. And it will be noted in this connection that both the so-called options and many of the receipts recognized the first mortgage and the purchase notes originally given as still subsisting. But, assuming that the parties are in a position to assert in strictness their rights as they appear under the lease and the option of date 16 September, 1905, and that under them the defendant was given an option to purchase the property, we think it clear, from the facts shown forth in evidence, and the manner in which the payments have been made and received, that defendant has exercised the privilege conferred, and has taken and now holds the position of purchaser under these contracts, and that plaintiff has accepted and recognized this position and taken the money as if the contract (252) relationship between them was that of vendor and vendee; and that, as such, an account and adjustment is required of their dealings in reference to this property.

There are decisions here and elsewhere to the effect that a mortgagee of property, after default, and a vendor, under an executory contract, may at times rent the property to the mortgagor or vendee in possession, as in *Crinkley v. Edgerton,* 113 N. C., 444, and that such a lease will, under certain circumstances, be upheld so far as to give the lessor the benefit of a landlord's lien as against a claim by outsiders. But these cases and the principle upon which they rest do not go to the extent of depriving the mortgagor or vendee occupying the property of his right to account and adjustment; or of conferring on a landlord under such a contract the right of summary proceedings in ejectment, which, as stated, applies only when the simple relation of landlord and tenant exists between the parties. Thus, in *Crinkley v. Edgerton,* in upholding a landlord's lien, as stated, in preference to the claim of an outsider, the Court said: "It is true that, in *Puffer v. Lucas,* 112 N. C., 377, the Court held that, as *between the parties,* if the lessor attempted, after sundry

payments made, to declare them forfeited and to retake possession of the property, the Court would, in equity, in such case hold the contract a mortgage and direct an accounting and sale as on a foreclosure. And so it is here as to this land, should the landlord attempt to resume possession of it." *Hamilton v. Highlands,* 144 N. C., 279, bears a strong analogy to this, and the general principles applied in that case are in accord with those we hold to be controlling here.

There was error in refusing to dismiss the action for want of jurisdiction in the justice, and the judgment is

Reversed.

(253) CLARK, C. J., concurring in result: The amount which would be involved in stating an account in this case would necessarily place the cause beyond the jurisdiction of a justice of the peace. It is also true that there are many cases which hold that a justice of the peace is ousted of jurisdiction, however small the amount, if an equity has to be administered.

It is, perhaps, as well to call attention in this case as in any other to the fact that these rulings were first made by the courts under the influence of decisions rendered under the former Constitution and procedure, and are not warranted under the present Constitution and procedure. They have been reiterated only because not called in question.

The present Constitution (Art. IV, secs. 1, 2, and 27) is quite explicit. Section 1 provides: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished." They are abolished absolutely, not only as to the Superior Courts, but for the courts of justices of the peace and clerks and all other courts; for the next section (2) enumerates the courts, to all of which, of course, section 1 applies. There is no exception of any court from the provisions of section 1.

Section 27 confers on justices of the peace jurisdiction of all civil actions founded on contract, where the amount does not exceed $200 and wherein title to land is not involved, and authorizes the Legislature to give jurisdiction of all other civil actions where the property in controversy does not exceed $50, and this the General Assembly has done. Revisal, sec. 1420. The Constitution withdraws cases involving title to land, but neither the Constitution nor any statute withdraws any case, within the amount prescribed for a justice, from his jurisdiction because an equity or an equitable element arises or must be administered; and, indeed, this could not be done, for the distinction between actions at law and suits in equity is abolished. The statute could not revive it for the court of the justice of the peace nor of the clerk. That (254) the courts have attempted to revive it as to the justices of the

peace and clerks, not always logically or without difficulty, is a curious instance of the persistence of the ideas prevalent under a former procedure, after that procedure and everything pertaining to it have been abolished. In the nature of things, there is no reason why a justice of the peace or a clerk, within his jurisdictional limits, should not administer rights involving equitable elements, as well as an action for the same amount in a case formerly not cognizable in a court of equity. A justice of the peace or clerk of the court cannot issue injunctions or appoint receivers, not because an equitable element arises, but because the statute does not name them as officers authorized to issue those writs. They are authorized to issue process in the ancillary remedies of arrest and bail, attachment, and claim and delivery.

Cited: *McIver v. R. R.*, 163 N. C., 545; *McLaurin v. McIntyre*, 167 N. C., 352; *Lutz v. Hoyle, ib.*, 636; *Burwell v. Warehouse Co.*, 172 N. C., 80.

IN RE WILL OF JAMES BEAUCHAMP.

(Filed 4 December, 1907.)

1. Wills—Probate—Solemn Form—Unreasonable Delay.

The probate of a will in common form is valid until set aside, and the right to require probate in solemn form may be forfeited, either by acquiescence or unreasonable delay, now seven years, under chapter 862, Laws 1907.

2. Same.

An action to probate a will in solemn form will be dismissed when the petitioner had knowledge of the probate of the will in common form and the qualification of the executors for forty years, of their removel from the State many years thereafter, of the appointment of an administrator *c. t. a.*, and of his proceedings for final account and settlement, to which she was a party.

3. Same—*Limitation of Actions—Construction.*

While chapter 862, Laws 1907, fixes seven years after probate of a will in common form as a limitation, and permits seven years after its ratification as to wills theretofore proven, it will not apply to revive a cause of action theretofore barred.

4. Same—Limitation of Actions, Repeal of.

Chapter 78, Laws 1898, repealing, as to married women, sections 148 and 163 of The Code (1883) and suspending the running of the statute of limitations, has no application to a *caveat* to a will theretofore barred and for which there was no such statute prior to 1907.

5. Same—Feme Covert—Legal Excuse.

The fact that the petitioner to probate a will in solemn form is now and has at all times been a *feme covert* since the probate in common form, is no legal excuse for her unreasonable delay.

(255) ACTION heard before *Ward, J.*, at Spring Term, 1906, of DAVIE.

James Beauchamp died in Davie County on or about 10 August, 1863, and a paper-writing purporting to be the will of said Beauchamp was admitted to probate in common form by the county court of Davie in September, 1863.

On 17 November, 1903, Sarah J. Sparks, one of the heirs of said Beauchamp, joined by her husband, filed her *caveat* and petition before the clerk of the Superior Court of Davie County, asking for probate of the paper-writing in solemn form. The cause was transferred to the civil-issue docket and came on for trial at Spring Term, 1906.

Upon the face of the petition, and the record of the will and probate thereof referred to in the petition, his Honor, *Judge Ward,* dismissed the petition of the *caveator,* who excepted and appealed.

A. H. Eller and E. E. Raper for caveators.

E. L. Gaither and T. B. Bailey for respondents.

CLARK, C. J. This is a *caveat* to the will of James Beauchamp, who died 10 August, 1863, filed by his daughter, 17 November, 1903, asking for probate in solemn form. She was a married woman at the time the will was probated, in September, 1863, and is still. The respondents are her younger brother and sister, who were infants of tender years in September, 1863.

(256) The probate of the will in common form in 1863 is valid till set aside. *Armstrong v. Baker,* 31 N. C., 114; Revisal, sec. 3128. While the next of kin and heirs at law have the right to require probate in solemn form, this right may be forfeited, either by acquiescence or unreasonable delay after notice of the probate. *Etheridge v. Corprew,* 48 N. C., 18. In that case *Pearson, J.,* says (p. 21) that the court, in passing upon the preliminary question whether or not the right to *caveat* has been forfeited by unreasonable delay, "cannot be expected" to try "allegations as to the execution of the will and the capacity of the testator." Those matters are for consideration only after the probate in solemn form is allowed. On this preliminary question, the Court will only consider whether the lapse of time, under the attendant circumstances, was an unreasonable delay. *Armstrong v. Baker,* 31 N. C., 109, 112.

Here the petitioner had knowledge of the probate of the will and qualification of the executors more than forty years ago, of their removal from the State many years thereafter, in 1878, of the appoint-

ment of an administrator *c. t. a.*, and of his proceeding for final account and settlement, to which she was a party. The court properly dismissed the action. *Randolph v. Hughes,* 89 N. C., 428; *Osborne v. Leak, ib.,* 437.

It is true, the petitioner has all the time been a *feme covert,* but she could have brought suit without joining her husband, if he were opposed (and there is no reasonable ground to apprehend he would be). Revisal, sec. 408 (1). It is true, also, that till chapter 862, Laws 1907, there was no statute of limitations as to the time in which a *caveat* must be filed. But it was well-settled law (see cases *supra*) that the right would be forfeited by unreasonable delay. The above act of 1907 now fixes seven years after probate in common form as a limitation, and permits seven years after ratification of the act as to wills theretofore proven. But this last must be taken to apply to cases where a *caveat* was not already barred by the lapse of unreasonable time, for it has (257) been held that, while the Legislature can suspend the running of the statute of limitations or extend the time, it will not be taken to apply to revive a cause of action already barred. *Whitehurst v. Dey,* 90 N. C., 542; *Terry v. Anderson,* 95 U. S., 628. We do not think the act of 1907 can be reasonably construed as intending to revive a right to file a *caveat* which had been lost by forty years acquiescence. Indeed, the act shows a contrary intent by restricting to seven years absolute bar that which formerly was unlimited, save by the court's conception of what would be unreasonable delay under all the circumstances of the particular case.

The petitioner also insists that chapter 78, Laws 1899, repealing, as to married women, the sections (The Code of 1883, secs. 148, 163) suspending the running of the statute of limitations, was made prospective only, and that time up to its passage is not to be counted against married women. But that statute has no application, for the very sufficient reason that there was no statute of limitations as to the *caveat* of a will, and its repeal could not apply. Said sections 148 and 163 provided that, as to actions therein named (which do not include filing a *caveat*), the following persons would not be barred by the time prescribed: (1) infants, (2) insane, (3) convicts, (4) married women. Governor Fowle, in his message to the Legislature of 1889, recommended that married women be taken out of that company. This was done by the act of 1899, which was introduced and urged by *Judge W. B. Councill,* then a member of the General Assembly. But it will be seen at once that this act can have no bearing at all upon a case like this, to which there was then no statute of limitations applicable.

Affirmed.

Cited: In re Lloyd, 161 N. C., 562; *In re Dupree,* 163 N. C., 259; *In re Bateman,* 168 N. C., 235; *Love v. West,* 169 N. C., 15; *Coxe v. Carson, ib.,* 139.

(258)

WILLIAM SPRINKLE ET AL. v. C. S. HOLTON ET AL.

(Filed 4 December, 1907.)

1. Executors and Administrators—Wills—Power of Sale—Deeds and Conveyances—Distributees—Interests—Merger.

When an executor, acting under the power conferred in the will, sells lands of his testator and takes a note secured by a mortgage for the purchase price, the interest of the devisees and legatees in the lands merge into the note, and cannot be reinstated in the land without the consent of all parties to the transaction.

2. Same—Distributees, Paid and Unpaid—Agreement to Convey—Deeds and Conveyances—Cancellation.

An executor, with authority under the will to sell lands of his testator, having sold them to the widow and received as payment a note and mortgage which were not paid, and judgment was had thereon, may by deed convey the land to the widow and all the unpaid distributees under the will, in accordance with an agreement, recited in the conveyance, made between them, good against such of the distributees who have received their share of the assets.

3. Same—Wills—Distributees, Paid and Unpaid—Deeds and Conveyances—Cancellation—Solvency.

A deed made by an executor to lands of his testator will not be set aside, in the absence of collusion or fraud, at the instance of some of the distributees claiming they have not received their full share of the assets, when it appears that the executor is solvent and has other assets out of which they could recover any amount to which they could show themselves entitled.

4. Same—Wills—Distributees, Paid and Unpaid—Accounting.

A legatee who has received only his distributive share of the estate of his testator is not liable to an account from another distributee who claims that he has not received the full amount of his share.

(A discussion of the question of subrogation of a legatee to the rights of the executor under certain circumstances, and of the doctrine of acquiescence, in an agreement contained in a registered conveyance, by lapse of time, by CONNOR, J.)

APPEAL from *Ward, J.*, at March Term, 1907, of MECKLENBURG.

The plaintiff's evidence, the material parts of which are of record, discloses this case:

(259) Thomas J. Holton died 27 December, 1860, having first made and published his last will and testament, in which he made the following disposition of his estate:

"Item 1. I will, devise, and bequeath my whole estate, real and personal, including my choses in action, to my friend, Ebenezer Hutchison, in trust, primarily, for the payment of all my debts, and, secondly, for the equal use and benefit of all my children, subject, nevertheless, to the

reservation on the part of my beloved wife, Rachel, of the same rights in my estate to which she would have been entitled under the law of North Carolina in case I had died intestate, hereby investing said Hutchison with full power and authority to make such disposition by sale of all or any portion of my estate, either publicly or privately, as he may deem most judicious for the promotion of the interest of my creditors and that of my children by way of distribution.

"Item 2. I hereby nominate and appoint my said friend, E. Nye Hutchison, sole executor of this my last will and testament."

The will was duly admitted to probate, and the executor qualified according to law. The testator left surviving his widow, Rachel Holton, who dissented, and dower was duly allotted to her; Mary, who married plaintiff William Sprinkle, and died, leaving the plaintiffs Walter Sprinkle, Thomas H. Sprinkle, and Mary S. Bentheim her heirs at law, and plaintiff Sarah, who intermarried with J. L. Deaton; defendants Charles S. Holton, Harriet Holton, Rachel (who intermarried with Crisp), Edwin Holton, Harrison Holton, and Virginia, who died intestate and without issue.

Thomas J. Holton, at the time of his death, was the owner of several lots of real estate, all of which, except that allotted to the widow as dower, were sold by his executor, pursuant to the power conferred by the will. He also sold the personal property. After paying the debts, he paid to the children, Mary, Sarah, and Harrison, in Confederate money, the sum remaining in his hands, less a small amount. The testator owned two lots in the city of Charlotte, which the execu- (260) tor sold at public auction, 13 October, 1863, to the widow, Rachel Holton, for $3,592.05. To secure the purchase money she executed her note, with personal security, the executor retaining the title until the note was paid. The lots brought a fair price. At October Term, 1869, of the Superior Court of Mecklenburg County the executor obtained a judgment on the note against said Rachel and her security. On 3 July, 1872, he filed an account in the Superior Court of Mecklenburg County, showing the manner in which he had administered the estate. It appears from said account that, after paying the debts, he had paid over to the plaintiffs Mary and Sarah and to defendant Harrison, in Confederate money and by sale of property, amounts aggregating more than the judgment against Rachel Holton. It also appeared that he had not paid to the other or younger children any amount whatever. On 1 October, 1872, the executor executed a deed, the material parts whereof are as follows:

"This indenture, made and executed this 1st day of October, in the year of our Lord 1872, by and between E. Nye Hutchison, executor of the last will and testament of T. J. Holton, deceased, of the city of

Charlotte, county of Mecklenburg, State of North Carolina, of the first part; Rachel R. Holton, of said city, county, and State, of the second part, and Charles S. Holton, Edwin J. Holton, Hattie C. Holton, and Rachel Holton, *herein,* all of said county and State, of the third part.

"Whereas, at a sale of the real estate of the said T. J. Holton, pursuant to the will of said testator, by the party of the first part, the said Rachel R. Holton became the purchaser of two lots, viz., one situated in the city of Charlotte aforesaid, on the northeast corner of Trade and College streets, fronting 99 feet on each of said streets, with the *alternate*
lines parallel to the same and of the same length, and one other
(261) in said city, on the northwest corner of Trade and B streets, lying
between B Street and the dower lines of said Rachel R. Holton, and on which she resides, fronting 76 feet on Trade Street, and on B Street 198 feet, with alternate lines parallel to the same and of corresponding lengths with those on said streets, and gave her note therefor, the title being retained until the said note should be paid; and whereas the parties of the third part have this day paid to the party of the first part the sum of $3,592.05, each paying one-fourth of said sum, in discharge of a judgment rendered and now docketed in the Superior Court of Mecklenburg County on the note given as aforesaid for the purchase of said two lots; and whereas the said payment has been made by an arrangement and agreement between the parties of second and third parts, and this deed of conveyance and all its provisions, limitations, and conditions are made in conformity with said arrangement and agreement as settled and determined by and between themselves:

"Therefore, this indenture witnesseth, that the party of the first part, for and in consideration of the said sum of $3,592.05, paid as aforesaid by the parties of the third part, and with the consent and agreement of the party of the second part, and for the further consideration of the sum of $5 in hand paid by the party of the second part," etc.

He proceeds to convey to the said Rachel in fee the second lot described in the preamble, and the first lot (being the lot described in the complaint) to the said Rachel for life, remainder to the defendants herein, with certain contingent limitations, etc., not necessary to be set out here. This deed was duly proven and recorded in the office of the register of deeds of said county, 2 January, 1873. The said Rachel and the defendants took possession of said property and remained therein until her death, 22 November, 1905, the defendants continuing to hold the possession. The plaintiffs introduced the deposition of Dr. E. Nye
Hutchison, the executor, who, upon cross-examination, said that
(262) the deed was executed pursuant to and in execution of a settlement made between Rachel Holton, the younger children, represented by Mr. H. W. Guion, and himself, represented by Mr. Joseph

H. Wilson, members of the bar; that upon examination it was found that the older children had received a sum from their father's estate larger than the interest of the younger children in the judgment against Rachel Holton; that when he made the deed he considered it a final settlement of the estate. There was no suggestion of any fraud in the transaction. The defendants have put valuable improvements on the lot conveyed to them, and have executed deeds in trust to secure indebtedness to defendants, trustees of the Union Theological Seminary, W. S. Alexander, trustee, and the Southern Real Estate, Loan, and Trust Company. Their interests are not, however, affected by this litigation. The plaintiffs demand judgment that the deed of 1 October, 1872, be declared invalid; that the plaintiffs and defendants be adjudged to own the property as tenants in common, and for other relief. Defendants, among other defenses, pleaded the several statutes of limitation.

His Honor, being of the opinion that plaintiffs were not entitled to recover, rendered judgment of nonsuit. Plaintiffs excepted and appealed.

W. J. Montgomery, Chase Brenizer, and Maxwell & Keerans for plaintiffs.

Clarkson & Duls, R. S. Hutchison, and Burwell & Cansler for defendants.

CONNOR, J., after stating the case: There can be no doubt that, under the terms of the will of Thomas J. Holton, the executor was empowered to sell all the real estate; hence the sale of the lot in controversy to Rachel Holton was valid, and constituted, upon the execution of the note, a binding contract, whereby she acquired an interest in the property entitling her to call upon the executor for a deed by paying the note. It is equally clear that the note in the hands (263) of the executor constituted an asset or fund to be distributed in accordance with the will of Holton. The interest of the plaintiffs and defendants, devisees and legatees of Holton, in the lot was merged into the note. Only by a cancellation of the contract and of the note could their interest in the property be reinstated; this could only be accomplished with the consent of all parties in interest. The executor was in the line of his duty when he obtained judgment on the note. His next step in the settlement of the estate was to subject the lot to sale for the purpose of paying the judgment. If he had done so, it is manifest, from the state of his account, that it would have been his duty to pay the proceeds to the younger children, the defendants herein, who have received no part of their share of the estate. Any surplus from the sale of the lot would have belonged to Mrs. Rachel Holton. In this condition of the estate, the executor, the widow, and four younger children, acting under the advice of counsel, made the arrange-

ment pursuant to which the deed was executed. We do not see how the plaintiffs can justly complain of the terms upon which this deed was executed or the settlement made, or how any wrong was done them, entitling them to have the deed invalidated. If the executor had received from Rachel Holton the money and immediately paid it to defendants and she had conveyed to them an estate in fee, reserving a life estate, there can be no doubt that their title would have been perfect. We do not perceive any substantial difference in the two transactions. It is conceded that the executor is solvent, and if by the arrangement made he paid to defendants a larger amount than they were entitled to, he, and not the defendants, is liable to plaintiffs. It appears from the record not only that the executor is solvent, but that, at the time the deed of 1 October, 1872, was made, there was other property of the estate from which the plaintiffs could have received any sum to (264) which they might have shown themselves entitled by reason of the payment to defendants of the amount of the judgment against Rachel Holton. It also appears that after the death of Mrs. Holton the reversion in the dower was sold, upon petition of plaintiffs and defendants, for $14,000, and, by consent of all parties, divided equally. While, in the view which we take of the case, all of this is immaterial, it is manifest that if it be conceded that by the execution of the deed the defendants received more than their fair share of the estate, the plaintiffs have no equitable ground upon which to cancel the deed. They suggest that the sums paid them in Confederate money should be "scaled" and they be charged with the amount which it was worth in gold. While no case is cited in which this Court has held that such is the principle upon which the estate should be settled, if it be conceded that the plaintiffs' view is correct, and if it be further conceded that the plaintiffs have any cause of action against defendants, it certainly could not extend to the cancellation of the deed of 1 October, 1872. The only possible liability to which they could be subjected would be to pay to plaintiffs an amount which, together with what they have received otherwise, would make an equal distribution. It is well settled that a legatee who has received no more than his legal share of the estate is not liable to account to another legatee who, by reason of a *devastavit* of the executor, fails to receive his full share. His remedy is against the executor. The one who receives but what belongs to him has done the other no wrong. There is a line of cases which hold that if, by mistake as to the condition of the estate, the executor pay to one legatee more than his share, or if by some unforeseen cause for which the executor is not responsible and could not have reasonably anticipated, it turns out upon a final settlement that he has overpaid some

of the legatees, he, after making good to the other legatees their share, may have relief in equity against the overpaid legatees. But the Court will grant such relief only when it clearly appears that the executor was unable to foresee the "peculiar circumstances" by (265) reason of which the mistake occurred. *Alexander v. Fox,* 55 N. C., 106; *Lambert v. Hobson,* 56 N. C., 424. It may be that if the executor is insolvent and the legatee has suffered loss under circumstances which would have entitled the executor to relief in equity, such legatee would be subrogated to the rights of the executor. No such condition is shown here, for the reason that there were ample resources of the estate from which equality could have been secured, and that, with the concurrence of the plaintiffs, they have been distributed. While not technically an estoppel, the conduct of the plaintiffs in this respect is very cogent evidence of acquiescence in the settlement made by the executor with the defendants, and a recognition of the fact that, as understood by him, the execution of the deed was a final settlement. The deed setting forth the terms of the settlement was recorded 3 January, 1873. Thirty-three years elapsed during which no action was taken by plaintiffs. During this time the widow and the defendants were in possession of the property, making valuable improvements upon it, executing mortgages and in all respects treating it as their property, in a manner consistent with the terms of the deed and inconsistent with any trust relation. The fact that the widow had a life estate did not in any manner affect plaintiffs' right to sue. If the deed was invalid, she had no better right under it than the defendants. The authorities cited by counsel fully sustain their position that the defendants took and held with notice of the provisions of the will, but they took and held in accordance with the will. If executing the deed was a breach of trust by Dr. Hutchison, the cause of action therefore accrued to plaintiffs at once. They had full notice of what he had done, and for thirty-three years acquiesced in it. To permit them now, after the property has been improved by defendants and increased in value, to attach a trust to the legal title and set aside the settlement would be doing violence to an unbroken current of decided cases and sound (266) equitable principles. We have no doubt, after a careful inspection of the record, that Dr. Hutchison, under the advice of gentlemen eminent at the bar for learning and of high personal and professional position, has discharged his duty and executed the trust reposed in him with fidelity. The settlement was made without the slightest suggestion of a breach of trust, and put upon the public records. The plaintiffs, with full knowledge of it, by their silence for a third of a century, recognized its justice. The security of property rights, the peace of fami-

lies, and the public welfare demand that there must be an end of litigation. Courts of equity have always wisely refused to entertain "stale claims." *Harrison v. Hargrove,* 109 N. C., 346.

The judgment of nonsuit must be

Affirmed.

THOMAS L. FREELAND, ADMINISTRATOR, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 11 December, 1907.)

Railroads—Employer and Employee—Negligence—Brakeman—Safe Place to Work—Verdict.

It was the duty of defendant railroad company to furnish plaintiff's intestate, its brakeman, a reasonably safe place to walk over its freight train in the discharge of his duties; and when the jury found, under a correct charge of the judge, that such was not done, and that, on that account and as the proximate cause, the plaintiff's intestate fell from the train, on a dark night, and was killed, a verdict awarding damages will not be disturbed.

APPEAL from *Ferguson, J.,* at July Term, 1907, of MECKLENBURG.

Judgment for plaintiff. Defendant appealed.

The facts sufficiently appear in the opinion of the Court.

(267) *J. D. McCall and Brevard Nixon for plaintiff.*
W. B. Rodman and L. C. Caldwell for defendant.

CLARK, C. J. The plaintiff's intestate was a brakeman on the defendant's freight train. It was his duty, upon leaving a station, to go over the top of the train of cars, from one end to the other, while the train was running, to see that all brakes were off and properly adjusted. While discharging this duty, in the night-time, he fell off the train and was killed. There was in the train that night an empty "Armes palace horse car," which was built with a round top and several inches higher than the other freight cars in the train. It had no walkway on top like that on other freight cars. It was built to handle on passenger trains. Under the rules or custom of the company, cars of that kind were required to be placed at the end of the freight train, just ahead of the caboose at the rear. But on this occasion this round-top "palace car," which was empty, was placed in the middle of the train of loaded cars, and the brakeman, in going along over the top of his train while in motion, fell off said car, striking his head against the end of a cross-tie, and was killed.

The charge of the court was full and complete, and was not excepted to. The question was fairly submitted to the jury, whether placing the round-top, higher, and empty car, whose top was "built like a passenger car," in the middle of the train of loaded cars, contrary to the rule or custom of the company, was the proximate cause of the death of the intestate, and whether he contributed to his own death. There are numerous exceptions to evidence, to special prayers for instructions which were given at request of the plaintiff, and for refusal of certain of the requests of defendant to charge.

After full and careful scrutiny, we find no error in any of the particulars alleged. It was almost entirely an issue of fact for the jury, and no good purpose can be attained by setting out and passing upon each exception *seriatim*. There was no serious conflict in the evidence, and the charge was careful, clear, and full. It was the duty of (268) the defendant to give its employees a safe walkway over the tops of the cars. This car, being an empty one, among heavily loaded cars, made it unsteady. Being higher and with a round top, it could not have a walkway like the flat-top freight cars, and it was perilous to get on it, or off it, to and from the other steadier and lower cars. The jury found, under the careful charge of the court, that this was the cause of the death of plaintiff's intestate.

No error.

Cited: Ridge v. R. R., 167 N. C., 519.

IN RE ENTRY NO. 49 OF R. WILLIAMS.

(Filed 11 December, 1907.)

1. State's Land—Protestant—Nature of Action—Nonsuit.

The proceeding provided for by the statute for protesting by one the entry of another upon vacant and unappropriated State's lands is not a civil action, and the protestant cannot terminate the proceeding or void the effect of a judgment by submitting to a nonsuit.

2. Same—Protestant—Protest Withdrawn—Judgment—Appeal.

The protestant to an entry of another upon the State's vacant and unappropriated lands can withdraw his protest, but he still remains a party to the action, is bound by such judgment as the statute authorizes to be made, and may appeal therefrom.

3. Same—Protestant—Protest Withdrawn—Judgment.

When a protest to the entry of one upon the State's vacant and unappropriated lands has been withdrawn, the judgment, under Revisal, sec.

1713, should declare, after reciting the various steps in the proceedings, that the rights of the enterer or claimant, as set out in the record, be sustained and that the entry-taker deliver to the said enterer a copy of the entry, with its proper number and warrant to survey, or to survey the same in accordance with the statute providing for it, to the end that the enterer or claimant may apply for the issuance of a grant according to law.

4. Same—Protestant—Protest Withdrawn—Costs.

When the protestant withdraws his protest to the entry of another upon the State's vacant and unappropriated lands, the cost of surveying the entry should not be taxed against him, but only the costs of the Superior Court, including any survey made by the order of the court.

WALKER and HOKE, JJ., dissenting.

(269) PROCEEDING under the entry laws (Rev., secs. 1707, 1708, and 1709), heard by *Guion, J.*, at June Term, 1907, of BURKE.

From the judgment rendered the protestants, A. G. Olmstead, Marlin E. Olmstead, and F. L. Bartlett, appealed.

Avery & Avery and J. F. Spainhour for the enterer.
John T. Perkins, S. J. Ervin, and Avery & Ervin for protestants.

BROWN, J. The appellee, Williams, on 1 January, 1906, laid an entry in the county of Burke, as follows:

No. 49.—R. Williams enters and locates 2,000 acres of land lying in Burke County and State of North Carolina, in Upper and Lower South Fork Township, and on the waters of Upper and Lower South Fork River, adjoining the lands known as the Queen and Gaither lands, P. A. Carswell's grant and the Erwin and Greenlee speculation land, and the F. S. Drury grant on the west, beginning on a stake, the corner of P. A. Carswell's grant, No. 16518, and in the line of said Queen and Gaither lands, and runs south 170 poles with said P. A. Carswell's line east to a white oak, Margaret Chapman's northwest corner; thence south with her line, in part, and with F. S. Drury line 300 poles to a stake in the red line of the southern line run by Montgomery, known as the Erwin and Greenlee grant; thence west with said line to a stake in said line and corner of F. S. Drury grant; thence northwardly with said line as it meanders, and around with older deeded land to the Queen and Gaither line and various courses and distances so as to include all or any vacant lands.

This 1 January, 1906. R. WILLIAMS,
Enterer.

On 24 January, 1906, the appellants filed the following protest: (270)

To J. F. BATTLE,
Register of Deeds of Burke County.

You will take notice that A. G. Olmstead, Marlin E. Olmstead, and F. L. Bartlett claim title to the land sought to be entered by R. Williams on 1 January, 1906 (No. 49), and hereby file their protest and *caveat* to the issuing of a warrant on said entry, protesting that said land is not vacant, and pray that you certify copy of the entry and protest to the clerk of the Superior Court, as provided by law. This 24 January, 1906.

A. G. OLMSTEAD,
MARLIN E. OLMSTEAD,
F. L. BARTLETT,
By J. T. PERKINS,
Attorney.

The proceeding was transferred to the Superior Court for trial, and heard at June Term, 1907. At that term the protestants moved the court to be allowed to enter a nonsuit. This motion was denied, and protestants excepted. "Protestants come into court and, through their counsel, move to be allowed to withdraw their protest, to which R. Williams objects. Motion allowed. Judgment against protestants for the costs."

The court then, after reciting in its judgment the various steps taken in the proceeding, decreed as follows: "It is now, on motion of Avery & Avery, attorneys for said R. Williams, enterer, ordered, adjudged, decreed, and declared that the said R. Williams has the right to a warrant of survey upon the entry described in the protest, and that the land covered by said entry is vacant, and that the protestants, A. G. Olmstead, Marlin E. Olmstead, and F. L. Bartlett, are not the owners of any part of the land covered by said entry, and that, as against the protest and claim of the said A. G. Olmstead, Marlin E. Olmstead, and F. L. Bartlett, the said enterer, R. Williams, has the lawful right to call upon the State of North Carolina to issue a grant, after a survey, upon (271) said warrant for the land covered by such survey."

The protestants excepted to the form of this judgment, and appealed.

1. We are of the opinion that his Honor did not err in refusing protestant's motion to be allowed to enter a nonsuit. As we have held, this proceeding is not a civil action. *Bowser v. Westcott,* 145 N. C., 56. The protestants do not occupy the attitude of plaintiffs in such action. This is a peculiar proceeding, devised by the General Assembly for the purpose of testing the right of an enterer to enter lands under our entry laws, claiming that they are vacant and unappropriated. It is not an

action of ejectment or trespass. The proceeding is *sui generis,* but is more analogous to the *caveat* to a will than anything else. When the protest or *caveat* is filed and the proceeding transferred to the Superior Court for trial in accordance with the statute, the protestant cannot terminate the proceeding or avoid the effect of a judgment by submitting to a nonsuit.

2. While the protestant cannot take a nonsuit, he can withdraw his protest, just as a defendant in a civil action may withdraw his answer or the *caveators* to a will may withdraw their *caveat.* The protestant does not thereby part company with the proceeding. He still remains a party to it, as a defendant in a civil action does, although withdrawing his answer, and he may except to the form of and appeal from the judgment rendered, as he is unquestionably bound by that judgment to the extent the court had power to render it.

This brings us to the consideration of the exception of appellants to the judgment rendered.

As the proceeding is purely statutory, the judgment must follow the statute and be within its terms.

(272) The withdrawal of the protest gave the court power to enter the same judgment against protestants which it would have rendered had the matter been tried before a jury and the right of a claimant to make the entry been sustained. Revisal, sec. 1713. The judgment should declare, after reciting the various steps in the proceeding, as has been done by his Honor, that the right of the enterer or claimant, R. Williams, to make the entry, No. 49, as set out in the record, be sustained, and that the entry-taker deliver to the said enterer a copy of the entry, with its proper number and a warrant to the survey, or to survey the same in accordance with the statute in such cases made and provided, to the end that said enterer or claimant may apply for the issuance of a grant according to law. Revisal, sec. 1713.

Let the cause be remanded, with instructions to enter judgment in accordance with this opinion. We see no reason why the protestants should be taxed with the cost of surveying the entry, which necessarily is subsequent to the withdrawal of the protest and would have been incurred by the claimant had there been no protest. All the costs of the Superior Court should be taxed against the protestants, including the costs of any survey made by direction of the court. Let the costs of this Court be equally divided between appellants and appellee, each paying one-half.

Modified and affirmed.

WALKER and HOKE, JJ., dissent.

(273)

IN RE WILL OF ANDREW ABEE.

(Filed 11 December, 1907.)

1. Evidence—Witnesses Recalled—Discretion—Order—Questions of Law.

The matter of recalling witnesses for further examination is in the discretion of the trial judge and not open to review; and when it appears by the order made that he refused to allow a witness to be recalled as a matter of discretion, the appellant cannot be heard to contend that he refused as a matter of law.

2. Wills—Validity—Undue Influence—Evidence—Record.

In order to avoid a will upon the ground of undue influence, the influence complained of must be controlling and partake to some extent of the nature of fraud, so as to induce the testator to make a will which he would not otherwise have made. And where the case on appeal does not disclose evidence tending to show undue influence, the judgment establishing the validity of the will must be affirmed.

DEVISAVIT VEL NON, tried before *Guion, J.*, and a jury, at June Term, 1907, of BURKE.

Verdict and judgment for propounders, and appeal by *caveators,* who assigned for error:

1. That his Honor declined to allow the *caveators* to recall a witness, one Mr. Reece, to testify on a matter as to which he had been already examined.

2. That the judge held that there was no evidence tending to establish undue influence.

J. T. Perkins, Avery & Avery, and S. J. Ervin for propounders.

Self & Whitener, J. F. Spainhour, and W. C. Newland for caveators.

HOKE, J. The court below refused to allow the *caveators* to recall for further examination the witness W. B. Reece, as to a conversation had between the witness and the testator, in reference to which, as stated in the case on appeal, "he had testified and, having been recalled, had again testified." Our decisions are to the effect that this mat- (274) ter of recalling witnesses for further examination is in the discretion of the judge presiding at the trial, and his action in this respect is not open to review. *Sutton v. Walters,* 118 N. C., 495; *Olive v. Olive,* 95 N. C., 485.

It is contended by appellants that the judge below did not make this ruling in the exercise of his discretion, but on the ground that he had no power to allow appellants to recall the witness; but we do not so interpret the order made. The court held that, on the facts stated, the right to recall a witness did not exist as a matter of law, and, in the ex-

ercise of its discretion, declined to permit that this should be one. The authorities cited, therefore, are decisive against appellants' position.

It was further urged for error that his Honor held that there was no evidence tending to show undue influence. It is established with us that, in order to avoid on this ground, the influence complained of must be controlling and partake to some extent of the nature of fraud. *Marshall v. Flinn,* 49 N. C., 199; *Wright v. Howe,* 52 N. C., 412; *Paine v. Roberts,* 82 N. C., 451.

As held in *Wright v. Howe, supra,* "The influence which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not otherwise have made." It would serve no good purpose to go into any extended or detailed statement of the testimony. We have carefully read and considered it as given in the case on appeal, and we fully concur with the trial judge that there is no evidence tending to show undue influence, and are of opinion that the judgment establishing the validity of the will should be affirmed.

No error.

Cited: Myatt v. Myatt, 149 N. C., 141; *King v. R. R.,* 157 N. C., 62; *S. v. Fogleman,* 164 N. C., 460; *In re Craven,* 169 N. C., 569; *In re Mueller,* 170 N. C., 29; *In re Broach,* 172 N. C., 523; *McDonald v. McLendon,* 173 N. C., 174, 177.

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(275)

E. R. DANIELS v. JOHN Q. HOMER.

(Filed 11 December, 1907.)

APPEAL from *Allen, J.,* at Spring Term, 1907, of DARE.

It was admitted that the plaintiff was the owner and entitled to the possession of the net in controversy, unless the defendant had the right to seize the same under the provisions of section 2440, Revisal.

It was also admitted that defendant was an assistant oyster commissioner, regularly appointed, and that, upon affidavit filed, and acting under instructions from the oyster commissioner, he seized said net and intended to sell the same.

The defendant claimed that said net was being fished in waters prohibited by statute. The plaintiff admitted said net was set in the water and was being fished when seized, but denied that it was set in prohibited waters.

Judgment for defendant. Plaintiff appealed.

B. G. Crisp and Aydlett & Ehringhaus for plaintiff.
W. M. Bond and Ward & Grimes for defendant.

PER CURIAM. This appeal presents substantially the same questions considered by this Court in *Daniels v. Homer,* 139 N. C., 230, and is governed by that case. The judgment is

Affirmed.

WALKER and CONNOR, JJ., dissent.

Cited: Skinner v. Thomas, 171 N. C., 105.

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H. A. KESTERSON v. SOUTHERN RAILWAY COMPANY.

(Filed 11 December, 1907.)

1. Pleadings—Plea in Abatement—Former Action.

An action of a similar nature which is pending, but has not proceeded to judgment in a Federal court, cannot be pleaded in abatement of a like action in the State courts. The plea must aver, and the proof affirmatively show, that the former action is still pending at the time of the filing of the plea.

2. Negligence—Contributory Negligence—Joint Tort Feasors—Custom—Implied Duty.

The plaintiff was employed by C. to help in loading stone on cars furnished by the defendant railroad company. It was the custom of the defendant to back the empty cars up grade, several at the time, so that by means of brakes the cars would remain as placed until ready for loading, when, by loosing the brakes, one car at the time would go down the grade to the point where the coal would be let into it from above. The custom was for others than the plaintiff to set the brakes on each car, of which the plaintiff knew and upon this he relied at the time of the accident, but, unknown to plaintiff, only the front car had the brakes set, and, in consequence, when that was released the others followed and ran into it, causing the injury complained of: *Held,* (1) while no contractual relationship existed between the plaintiff and defendant railroad company, the joint business relationship established by known custom between it and C. was such as imposed a duty upon the defendant, making it liable to the plaintiff for its negligence; (2) there was no evidence of contributory negligence.

ACTION to recover damages for personal injury, tried before *Cooke, J.,* and a jury, at March Term, 1907, of BUNCOMBE.

The court submitted the usual issues of negligence, contributory negligence, and damages. The jury found for plaintiff on all issues. From the judgment rendered the defendant appealed.

George A. Shuford, Frank Carter, and H. C. Chedester for plaintiff.
Moore & Rollins for defendant.

(277) BROWN, J. 1. The defendant set up in its answer the pendency of an action between the plaintiff and defendant for the same cause of action set up in the plaintiff's complaint in this action, which action was begun, before this action was commenced, in the Superior Court of Buncombe County, and was thence removed to the Circuit Court of the United States.

It is found as a fact that at the time of the issuing of the summons in this action the other action was pending in the Circuit Court of the United States, but that a judgment of nonsuit had been entered therein before the complaint in this action had been filed. The plea in abatement to this suit was properly overruled upon the facts.

The pendency of a suit, *in personam,* in a State court, which has not proceeded to judgment, cannot be successfully pleaded in abatement of a suit between the same parties for the same cause of action in a Federal court.

So, too, and for like reasons, an action of a similar nature which is pending, but has not proceeded to judgment, in a Federal Court, cannot be pleaded in abatement of a like suit in a State court. The point is decided in *Sloan v. McDowell,* 75 N. C., 29, where the reasons are given by *Mr. Justice Reade* for the distinction in this respect between suits for the same cause and between the same parties, pending in the courts of the same State, and where the causes are pending in courts of different sovereigns or jurisdictions. For this reason *Curtis v. Piedmont,* 109 N. C., 401, is not in point. There the former action was pending in the same court.

Had the action in the Circuit Court of the United States been prosecuted to judgment, it would have, upon proper plea, barred further prosecution in the State courts. *Gordon v. Gilfoil,* 99 U. S., 168; 1 Cyc., 38; *North Muskequo v. Clark,* 62 Fed., 494. The plea in abatement must also aver, and the proof affirmatively show, that the former ac-
(278) tion is still pending at the time of the filing of the plea. 1 Enc. Pl. and Pr., 754; *Phelps v. R. R.,* 5 Am. St., 867.

The effective part of the plea is that the former action is still pending. Here the jury find that a nonsuit was entered in the former action before the filing of the complaint, and, therefore, necessarily before the filing of the plea.

2. The only question remaining for consideration is the exception to the ruling of the court denying the defendant's motion to nonsuit.

The plaintiff's evidence tended to prove that one Collins was engaged in quarrying rock, and to facilitate operations and the handling of the

output the defendant constructed a side-track alongside the quarry. Collins had control of the loading of cars. These cars, as required by Collins for the purposes of his businesss, were placed upon his side-track by the defendant. The side-track was built upon a heavy grade, estimated at 3½ to 5 feet in 100, and on defendant's right of way. The bins, or hoppers, from which the crushed stone was discharged into the cars were built directly over said side-track, at the bottom of said grade. The elevation of said bins, or hoppers, was such as to allow the passage underneath of the defendant's gondola cars, with a space of 12 or 14 inches between the bottom of the bin and the top of the car. The evidence tends further to prove that it was customary for the defendant to place empty cars upon this side-track in the morning and to secure them so that they would stand upon the incline, and Collins' employees would let them down by gravity, one at a time, as needed for the purpose of being loaded, regulating and controlling their movements and stopping them at the proper place by the use of the hand-brakes on said cars, and the defendant's freight trains would take out the loaded cars the following night or morning. The empty cars would stand upon the grade if the brakes were set on each, but for greater security it was customary to block or scotch the front car with a piece of wood, and, when this car was moved, to scotch the next car, and so on.

Collin's employees had nothing to do with placing the empty (279) cars on the quarry siding. In the language of the witness Allred, "It was customary for them (the railroad people) to put them in there and hold them."

At the time of the injury the plaintiff was in the employ of Collins, working in said quarry. Upon the occasion in question he was required by his employer to assist in letting down the empty cars for the purpose of being loaded. He loosed the brakes and brought down the front car to the bin and, as he passed under it, the remaining cars, which had been left by defendant on the side-track, as usual, not having brakes on, or not being checked, rushed down on the front car and knocked plaintiff off and seriously injured him. They had been held in place by the front car, and when the brakes on it were released and the car moved forward, the others, the brakes not being on, smashed into the front car when plaintiff stopped it under the bin.

It is true that the plaintiff was the servant of Collins and not of defendant, and that there were no contractual relations existing between the plaintiff and the defendant company. Yet there was that connection between Collins and the defendant in respect to the operations of the quarry which gave the employees of Collins the right to rely upon the established usuage of fastening all the cars by brakes being carefully observed by defendant. The testimony of plaintiff's witnesses tends

strongly to prove that when defendant's agents delivered the cars on the greatly inclined siding they always set the brakes on each car, and that on this occasion they set the brakes on the front car only, and did not check or set the brakes on the others.

This custom was known to plaintiff, and that he relied on it when he moved the front car is evident from his own testimony, for he
(280) says he "would not for the world have taken that car out" had he known those behind it had been left with brakes off.

There is a class of cases in which one has been held liable to another in the absence of any contractual or other relation between them. This belongs to that class. The act of negligence in leaving the cars with brakes off, or not checked, under such circumstances and conditions, in violation of defendant's custom and usage, known to plaintiff and the other employees of Collins, was highly dangerous to them, and renders the defendant liable for the injury sustained in consequence. *Roddy v. R. R.*, 21 Am. St., 333; *Thomas v. Winchester,* 6 N. Y., 397; 2 Sutherland Damages, 435.

While no contractual relation existed between plaintiff and defendant, yet Collins and the defendant had such business relations that each owed the duty to the other and his employees of properly discharging his part of the joint undertaking in respect to any matter exclusively devolving upon him.

Plaintiff had nothing to do with checking or fastening the cars properly with brakes when they were delivered on the side-track. That was a part of defendant's obligation, and in its discharge a certain usage had been established. Without plaintiff's knowledge, this usage was not observed on one occasion, resulting in injury to him.

The defendant is, therefore, liable for the consequent result. In respect to defendant's contention in regard to contributory negligence, we think his Honor might well have charged that there was no evidence of that.

No error.

Cited: Mumpower v. R. R., 174 N. C., 743.

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GEORGE DAVIS ET AL. v. JOHN MARTIN ET AL.

(Filed 11 December, 1907.)

1. Deeds and Conveyances—Option—Contract to Convey—Earnest Money—Time Not the Essence.

A paper-writing wherein the defendants contract to convey to plaintiffs certain duly described lands for a certain price, provided it be paid within three years from date, in consideration of which the plaintiffs paid defendants in cash $25 "by way of earnest," is not an option, but is an absolute contract of sale, of which time is not of the essence, and specific performance will be decreed.

2. Same—Statute of Frauds—Parties to be Charged.

When plaintiffs seek specific performance of a written contract to convey lands duly executed and delivered by defendants, the plaintiffs are not the parties to be charged, within the meaning of the statute of frauds, and the fact that they did not sign the contract is not material.

ACTION to enforce the specific performance of a contract, heard before *Peebles, J.*, at August Term, 1907, of RUTHERFORD.

The court rendered judgment upon the pleadings, from which the defendants appealed.

Gallert & Carson and McBrayer & McBrayer for plaintiffs.
D. F. Morrow for defendants.

BROWN, J. On 16 April, 1903, Amos Owens and wife executed to plaintiffs a paper-writing, duly recorded on 18 April, 1903, wherein said Owens and wife contracted to convey certain lands, duly described, to plaintiffs for $2 per acre, provided said sum be paid within three years from the date thereof. Twenty-five dollars in cash was paid, "by way of earnest," at the time the contract was executed. Amos Owens and wife executed a deed to defendant John Martin for said land, dated 7 April, 1903, which was probated 7 April, 1905, and recorded 4 January, 1906. The answer admits knowledge of the contract made by Owens with plaintiffs, and that defendants agreed to perform same, but defendants aver said contract is not a bond for title, but an option only, which has expired without being closed by plaintiffs. This is (282) the only question presented by the appeal.

We think that his Honor did not err in adjudging the paper to be a valid contract for the sale of the land, based upon consideration and in the usual form of a bond to make title. The paper has all the essential elements of a bond to make title. It is in no sense a mere option. It is not a continuing offer to sell, but a complete agreement to sell, accompanied by payment of a part of the purchase money.

There is a decided distinction between an option to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell and the other to buy certain property, the sale to be completed within an agreed time. In the latter case the mere lapse of time with a contract unperformed does not entitle either party to refuse to complete it, and, therefore, time is not of the essence of the contract; but where the contract is merely an option, generally without consideration, of course time is of the essence. The true character of the paper is manifest by its recital of the receipt of $25 as "earnest" money, evidently used in the sense of purchase money. This signifies, not a payment for the privilege of exercising a future option to buy or not, but a payment of part of the contract price for the sale of the land. "Earnest" means a part payment of the purchase price of property. It is a term taken from the civil law, and was more generally used in connection with sales of personalty to "bind the bargain." *Howe v. Hayward,* 108 Mass., 54; 2 Blackstone, 447; *Walker v. Nussey,* 16 M. & W., 302.

The fact that the plaintiffs did not sign the contract will not avail defendants. It was duly executed, delivered, and registered, and is binding on the party to be charged. The plaintiffs are not the parties to be charged, within the meaning of the statute of frauds. They (283) stand by their contract to pay, and seek to charge the defendants with its performance.

Affirmed.

Cited: Rogers v. Lumber Co., 154 N. C., 112; *Brown v. Hobbs, ib.,* 550; *Love v. Harris,* 156 N. C., 94.

GEORGE T. McNEILL v. EDMUND ALLEN ET AL.

(Filed 11 December, 1907.)

1. Deeds and Conveyances—Revisal, Sec. 980—"Unregistered Deeds"—Interpretation of Statutes—Contract to Convey.

The use of the words "unregistered deed" in the second proviso, Revisal, sec. 980, is in their broad generic sense and has reference to and the same scope as the words "conveyance of land, or contract to convey, or lease of land," used in the first part of the section. Therefore, when the defendants, holding or claiming under an unregistered bond for title, have been in actual possession since 1873, and when the plaintiff's deed, under which he claims, was executed in 1898, the requirement of registration is excluded, and the plaintiff cannot recover.

2. Same—Contract to Convey—Payment—Evidence—Question for Jury.

The question of payment under a contract to convey is a question for the jury, upon conflicting evidence.

EJECTMENT, heard before *O. H. Allen, J.*, and a jury, at November Term, 1906, of TRANSYLVANIA.

Judgment for plaintiff. Defendants excepted and appealed.

The facts sufficiently appear in the opinion.

Manly & Hendren, W. W. Barber, and R. N. Hackett for plaintiff.
Finley & Hendren for defendants.

CLARK, C. J. On 11 January, 1873, Phineas Horton delivered to the father of the defendants a bond to make title, under which he entered into possession, which he and they have held continuously ever since. Phineas Horton died in 1886. A commissioner, appointed by the court, made sale of his lands in 1898. At this sale the plaintiff became purchaser of this tract, and the commissioners executed (284) to him, 26 August, 1898, a deed therefor, which was registered 8 September, 1898. On 18 October, 1899, the bond to make title, executed to defendants' father in 1873, was registered. The defendants' evidence tended to prove that the amount named in the bond for title had been paid in full. This was controverted by the evidence for the plaintiff.

The court charged the jury, if they believed the evidence, to answer the issue "Yes"—that is, that the plaintiff was the owner of the land. The defendants excepted, and this is the only exception relied on.

In giving this charge, the court held that bonds for title were not in the purview of the second proviso of section 1, chapter 147, Laws 1885 (now Revisal, sec. 980). This proviso excludes from the operation of the act any "unregistered deed" executed prior to 1 December, 1885, when the person holding or claiming thereunder shall be in the actual possession and enjoyment of the land at the time of the execution of the second deed. The defendants contended that, while the proviso mentions only "unregistered deed," this refers to and is as broad as the words in the first part of the section, "conveyance, contract to convey, or lease of land," and is broad enough to include any kind of sealed instrument sufficient in form and terms to transfer from one person to another either the legal or equitable title to land.

2 Blackstone Com., 295, defines a deed as "a writing sealed and delivered by the parties." Anderson's Law Dictionary adopts the above definition, and says: "This comprehensive meaning includes any writing under seal, as a bond, lease, mortgage, agreement to convey realty," etc. Coke Litt., 35b, 171b, cited 4 Kent Com., 450, 452, defines a deed as a "writing sealed and delivered by the parties."

The point raised is now presented for the first time. But, considering the evil to be remedied and the evident intent that there (285) should be exempted from the provisions of the new act titles based on instruments executed prior to 1 December, 1885, we think that the words "unregistered deed," in the second proviso to Revisal, sec. 980, are used in their broad generic sense and have reference to and the same scope as the words "conveyance of land, or contract to convey, or lease of land," used in the first part of the section.

The instruction of his Honor was, therefore, erroneous. Revisal, sec. 980, does not apply where the sealed instrument was executed prior to 1 December, 1885. The rights of the parties will be determined by the law as it stood prior to the enactment of chapter 147, Laws 1885. Whether the purchase money secured by the bond for title has been paid, in whole or in part, and if in part, what part, are matters for determination by the jury.

Error.

E. D. LATTA v. CATAWBA ELECTRIC COMPANY ET AL.*

(Filed 11 December, 1907.)

1. Deeds and Conveyances—Uses and Trusts—Trusts and Trustees—Title—Equity.

The purchaser of a tract of land, the title to which was taken by another, under his direction, thereby acquires no title to or estate in the land, but an equity to call upon such person to execute the resulting trust by conveying to him the legal title to the property.

2. Deeds and Conveyances—Easements—Water and Water-courses—Adjoining Lands—Trusts and Trustees.

A conveyance of land including certain water rights does not, in itself, convey an easement in adjoining lands subsequently acquired and paid for by the grantor, the title to which was held, under his direction, by another for him, although the deed conveyed the right to erect dams such as may be "necessary to control, use, and enjoy to the full extent the full, entire available water power of the whole river between the points and within the boundaries" set out therein.

3. Deeds and Conveyances — Lands — Appurtenant—Easements—Rights Acquired.

Only incorporeal hereditaments, and not land, pass under the description of rights appurtenant to land.

4. Deeds and Conveyances—Water and Water-courses—Easements, Extent—Adjacent Lands.

An easement for ponding water back upon adjacent land, as appurtenant to the land conveyed, cannot be acquired to a greater extent than

*WALKER, J., did not sit.

that used at the time of the conveyance, unless so expressed. The fact that the grantor had theretofore acquired such adjacent lands and had the title conveyed to a third person, because at some future time he might wish to raise the dam on the *locus in quo* and back water upon it, does not affect the rights of the parties.

5. Same—Adverse Possession.

A conveyance of land, and the right to pond water within the boundaries therein set out, does not of itself convey such right upon an adjoining separate and distinct tract of land of the grantor, and such right cannot be acquired except by twenty years adverse user.

6. Deeds and Conveyances—Corporations—Insolvency—Bond Issue, Invalid—Creditors—Burden of Proof.

When the defendants, who are creditors of a corporation, allege that a deed made by it to the plaintiff's grantor was invalid, for that at the time it was executed the company was insolvent, and that it was for a preëxisting debt due the grantee, a director, and indorsed by the president, the burden of proof is upon the defendants to show that the company was insolvent at the time the conveyance was executed, and that they, as creditors, are in a position to attack it.

7. Same—Evidence—Admissions.

When the defendants seek to avoid the plaintiff's deed upon the ground that the corporation was insolvent at the time of its execution, a judgment in a separate and distinct action, to which plaintiff was not a party, adjudging the company insolvent, is no evidence thereof in this action. The admissions of the president of the corporation made therein, and in his own interest, are not competent.

8. Same—Estoppel.

The plaintiff is not estopped to deny the insolvency of a corporation which executed to him a deed for the *locus in quo*.

9. Corporations—Insolvency—Evidence—Declarations—Estoppel.

When the question of insolvency of a corporation is material to the inquiry and is dependent upon the validity of certain bonds issued by the corporation, evidence that the plaintiff, as agent of another, filed with the clerk of the court in a former action proof of claim for some of these bonds is competent as a declaration of plaintiff and his grantor prior to the conveyance to him, but such acts have no element of an estoppel when there is no contention that any one was induced to buy the bonds on that account.

10. Deeds and Conveyances—Corporations—Insolvency—Creditors—Burden of Proof.

When the creditors of a corporation attack a deed given by the corporation to the plaintiff, upon the ground of insolvency of the corporation at the time of its execution, and the question of insolvency is dependent upon whether a certain bond issue was a valid indebtedness against the corporation, the burden of proof is upon the creditors to establish the validity of the bond issue; and where there is conflicting evidence the question is one for the jury.

11. Same—Evidence—Issues.

When a deed from a corporation is attacked upon the ground of insolvency of the corporation at the time of its execution, and this question is dependent upon the further question whether certain bonds are valid, the question of validity is presented upon the issue of solvency.

12. Same—Innocent Purchasers for Value.

When the plaintiff's deed is attacked for that it is alleged to have been made by an insolvent corporation to one of its directors in payment of an antecedent debt, indorsed by its president, and there is evidence on the part of the plaintiff tending to show he did not know of the financial condition of the corporation at the time of the conveyance to his grantor, the director therein; that he did not then know his grantor was a director, and that he paid an adequate price for the land conveyed, the question of his being a purchaser for value without notice is properly submitted to the jury.

13. Evidence—Depositions—Legal Holidays.

A legal holiday has not the same status in respect to legal proceedings as Sunday; and while, under Revisal, sec. 2838, depositions opened on the latter day are void, they are not so when they are opened on a legal holiday.

14. Parties—Corporations—Insolvency—Pleadings.

When a corporation is a party defendant in an action upon the theory that it is a going concern, it is not error in the court below to permit it to file an answer, under the objection of the other defendants, upon the ground that the corporation had fraudulently disposed of its property, and that they were large stockholders, when their interests are not thereby prejudiced, especially when it appears that it is in the interest of creditors that the affirmative relief set up in the answer by way of counterclaim be maintained.

15. Corporation, Sale of Its Property—Dissolution—Parties—Answer—Counterclaim.

When under sections 697 and 698 of The Code of 1883 the defendant corporation was dissolved by sale of its property, franchises, etc., and a counterclaim was set up in the answer, in which creditors' rights were involved, relating to a time antedating the sale, it was not error in the court below to permit, under the objection of the other defendants, the defendant corporation to file an answer, as they are not otherwise in a position to litigate the counterclaim.

16. Corporation, Sale of Its Property—Officers—Fraud—Receiver.

If during the continuance of a corporation, since dissolved by the sale of its property, franchises, etc. (The Code, secs. 697, 698), its officers had fraudulently or unlawfully disposed of its property, the creditors are entitled to have a receiver appointed to sue for and recover such property.

(288) APPEAL from *Ward, J.*, at May Term, 1907, of GASTON.

This action was brought by plaintiff against defendants, Catawba Electric and Power Company, Fidelity and Deposit Company,

Alcæus Hooper and another, trustees of the estate of W. E. Hooper, the Woman's College of Baltimore, and others, pursuant to Rev., 1589, for the purpose of quieting title to the lands described in the complaint.

The plaintiff claimed three tracts of land, and showed title thereto:

(1) The Bissell tract, by deed from Emily Bissell to W. T. Jordan, bearing date 13 July, 1893. This deed, after describing the land by metes and bounds, conveys all water rights and privileges on said premises, with the right to erect dams in the Catawba River for the purpose of utilizing the fall of said river embraced in the boundaries, free from any claim for damages to any land of the grantors, provided the dam or dams may be placed in said river at what is designated in the plat as the "lower bench mark," or at any other (289) place, and that the dam shall not, wheresoever placed, raise the water at said mark more than 4½ feet above the iron peg in the rock, being the "lower bench mark," and located at the upper end or just above the upper end of the Rumfelt Island. This land, except a small portion, is covered by water.

(2) The Sample tract, by deed from Hugh Sample to W. T. Jordan, dated 6 March, 1899.

(3) The Lineberger tract, by deed from R. E. Lineberger to W. T. Jordan, dated 28 March, 1899. These deeds conveyed certain water rights not necessary to be set out here. The jury find (record, pp. 59, 60) that the said Jordan purchased these tracts of land, with the water rights attaching thereto, for W. J. Hooper, and paid for same with money furnished by said Hooper, who was carrying on business in the name of the W. J. Hooper Manufacturing Company. It was admitted that the title to said lands was in the grantors at the dates of the deeds.

(4) On 29 May, 1900, said Jordan, by direction of said W. J. Hooper, and for a nominal consideration, conveyed the three above-named tracts of land, with all of the water rights which he acquired by said deeds, to the Catawba Electric and Power Company.

(5) On 4 February, 1901, said power company conveyed the said three tracts of land, with the water rights, to William Barbour. The consideration of this deed was that said Barbour should credit the original cost of said lands, amounting to about $7,000, on a note held by him against said power company, indorsed by said W. J. Hooper and the William J. Hooper Manufacturing Company. This was done by and with the consent of said W. J. Hooper, who, together with said Barbour, was, at the date of said deeds, a director of said power company.

(6) On 11 September, 1901, Barbour, for a recited consideration of $5, but an actual consideration of $7,220, being the amount paid by Barbour, and interest, conveyed said three tracts of land, with the water rights, to plaintiff E. D. Latta.

(290) Defendant power company and its assignee showed title to a tract of land known as "The Mountain Island," on the Catawba River, containing 1,150 acres:

(1) By deed from Davidson to Pegram, 28 May, 1883.

(2) Pegram to Tate, 8 April, 1884.

(3) Tate to W. J. Hooper, 9 April, 1884. This deed conveys by metes and bounds the Mountain Island property on the Catawba River, including certain water rights described in the deeds from Davidson to Pegram and from Pegram to Tate. It appears from the map filed herein that neither of these deeds describes or covers any part of the three tracts claimed by the plaintiff. The map shows, and it was otherwise in evidence, that the Bissell tract is immediately above the Mountain Island land. The deed from Bissell to Jordan calls for the beginning point at "a hickory on the old corner on the Catawba River, between the Hooper and Bissell lands." The deed from Tate to Hooper calls for the beginning "at a hickory near the river bank." An examination of the plat shows that the hickory marked the corner of both tracts.

(4) On 20 November, 1894, W. J. Hooper conveyed to the said power company, in consideration of $25,000, the Mountain Island property, including all of the lands and water rights conveyed to him by Tate, to whose deed reference is made.

(5) On 1 May, 1895, said power company conveyed by deed in trust to the Fidelity and Deposit Company the same lands, with the water rights, including all other property thereon. The purpose of this deed was to secure the payment of (*a*) sixty-five coupon bonds, of $1,000 each, to be issued by said power company and known as "Class A"; (*b*) eighty-six coupon bonds, of $1,000 each, and known as "Class B," to be issued by said company.

(6) On 24 June, 1901, said deposit company and the alleged owners of the said bonds, the defendants herein, instituted an action in the Superior Court of Mecklenburg County against said power company for the purpose of foreclosing said deed in trust and subjecting the property conveyed therein to sale to pay said bonds and the accrued interest

(291) thereon. The proceeding was duly prosecuted to judgment. The power company, by answer, admitted the allegations in the complaint, including the insolvency of said company. The property was brought to sale on 11 September, 1901, when the defendants herein, other than the said power company and the said deposit company, purchased said property for the sum of $175,000. The sale was duly reported, confirmed, and on 21 September, 1904, the said deposit company, pursuant to the order of the court, executed a deed to said purchasers conveying said property, with all water rights and other property, franchises, etc., which passed under the deed in trust.

(7) On 29 June, 1905, the said purchasers, grantees in said deed, conveyed said property to the Catawba Manufacturing and Electric Power Company, which was made defendant herein.

The defendants contended, first, that Jordan, acting for and under the direction of W. J. Hooper, purchased the Bissell tract for the purpose of securing the right to raise the dam across the river to develop the Mountain Island power to its full capacity; that the said Jordan held title to said land in trust for Hooper, the latter having furnished the money to pay therefor, and that by reason of these facts and the peculiar relation of the Bissell tract to the Mountain Island land, Jordan (for Hooper) held same as appurtenant thereto, creating an easement or privilege in the owners of the Mountain Island property to pond water back upon it. They contend that the Sample and Lineberger tracts were purchased and held in the same way and subject to the same easement; that by virtue of the deed from Hooper to the power company, 20 November, 1894, his equitable title attaching to the water rights in the Bissell land passed to said power company, and that they passed to the Fidelity and Deposit Company by the deed of 1 May, 1895, and by the successive conveyances vested in the defendant Manufacturing and Electric Power Company. As to the Sample and Lineberger tracts, 2 miles up the river from the Mountain Island property, they make the same contention. (292)

Defendants tendered issues for the purpose of presenting their contentions in this respect, which his Honor declined to submit. Defendants excepted.

His Honor held, as a matter of law, that the Lineberger, Sample, and Bissell lands did not pass with the Mountain Island land under the sale of 11 September, 1901; that only such easement passed as existed, by ponding water on the Bissell land, at the date of the deed from Hooper to the power company. Defendants excepted.

They further contend that at the date of the deed from Bissell to Jordan, 13 July, 1893, and of the deed from Hooper to the power company, 20 November, 1894, the dam over the Catawba River backed water upon the Bissell land. The jury find that on neither of these dates, nor before, did the dam, as it then existed, back water on the Bissell tract. (Record, pp. 59, 60; issues 4, 5.)

The defendants further contend that the "lower bench mark" referred to in the deed from Bissell to Jordan was below the Bissell land and on the Tate land. The jury find otherwise. (Record, p. 60; issue 10.)

The defendants, other than the deposit company and the manufacturing and electric company, contend that if the three tracts claimed by plaintiff, or easements thereon, did not pass as appurtenant to the Mountain Island land, then and in that event the deed from the power

company to Barbour, 4 February, 1901, was fraudulent and void, for that the said power company was at that time insolvent; that both Barbour and Hooper were directors in the said company, and that plaintiff, on 11 September, 1901, the date of his deed from Barbour, had notice of these facts; that the consideration of the deed to Barbour was a preëxisting debt due Barbour, and that this was known to plaintiff.

Plaintiff denies each and every of these allegations, except that Barbour was a director in the said company. He further alleges that he was a purchaser from Barbour for value and without notice of any of the alleged vitiating facts. Appropriate issues were submitted
(293) to the jury to present these several contentions, and found for the plaintiff.

Defendants presented a number of prayers for special instructions, and duly noted exceptions to his Honor's refusal to give them. These exceptions are discussed in the opinion. There was judgment for plaintiff. Defendants excepted and appealed.

W. B. Rodman, O. F. Mason, and C. W. Tillett for plaintiff.

Armistead Burwell, F. I. Osborne, R. G. Lucas, and Maxwell & Keerans for defendants.

CONNOR, J., after stating the case: The plaintiff, having shown a complete chain of title to the Bissell, the Lineberger, and Sample properties, was, in view of the admission in the answer that defendants were claiming to own said properties or an easement in them, entitled to judgment quieting his title, unless the defendants made good either of their contentions referred to in the answer as counterclaims. The cause was well and carefully tried in the court below, and argued in this Court with more than usual learning and ability. The record contains forty assignments of error. The real merits of the controversy, however, following the orderly arrangement of the briefs, are reduced to but a few propositions. It will be convenient to discuss them in the order in which they were argued.

Defendants' first contention is thus stated in the brief: "That the Fidelity and Deposit Company and its assigns have an easement, privilege, or right to erect on the Mountain Island shoal a dam sufficient in height and extent to enable it or its assigns to use the full power of the Catawba River at that place." This right, privilege, or easement alleged to have vested in the power company, it is claimed, passed to the deposit company by the deed in trust of 1 May, 1895. His Honor held, as a matter of law, against defendants' contention. The exception to this ruling, therefore, presents the question whether, upon the entire evidence, considered most favorably for defendants, any such burden or

easement is imposed upon the properties for the benefit of the (294) Manufacturing and Electric Power Company, the present owner of the Mountain Island or Tate land. It will be well to discuss the questions as they affect the Bissell property, first, because in some aspects it differs from the Lineberger and Sample properties. The defendants' claim is based upon the following facts: Prior to 28 May, 1883, James M. Davidson owned certain water rights in the Catawba River, which he conveyed to Miles Pegram, who, on 8 April, 1884, conveyed the same water rights, etc., to James T. Tate and others, who were at the time operating the Mountain Island Mills. These water rights are described in the deed and located by the testimony of the surveyor, Fichte. They do not cover any portion of the Bissell property.

Prior to 8 April, 1884, James T. Tate and others were the owners of a tract of land lying on and going to the center of the Catawba River, containing 1,150 acres. The Mountain Island Mills, including a valuable water power, were located on this land. On 9 April, 1884, Tate and others conveyed this land by metes and bounds to W. J. Hooper, of the city of Baltimore. The water rights acquired by Tate from Pegram are conveyed by this deed. The first call in the deed is "a hickory near the river bank." The *habendum* of the deed is in the following language: "To have and to hold the same and all mills, machinery and fixtures thereon or appertaining thereto; also the right, power, and privilege to build upon or annex to the east bank of the river, at any point or points, place or places, any dam or dams, as far thereupon or into said bank as may be necessary to control, use, and enjoy to the full extent the full, entire available water power of the whole river between the points and within the boundaries hereinbefore and as set out in the deed from Davidson to Pegram." The Catawba Electric and Power Company was incorporated 6 March, 1893 (Private Laws 1893, ch. 307).

On 20 November, 1894, W. J. Hooper, by deed referring to and (295) adopting the description in the Tate deed, conveyed the same property, known as the "Mountain Island Mills," to said Catawba Electric and Power Company. It is conceded that all of the right, title, privileges, or easements to or in said property which passed to the power company have, by the deeds set out in the statement of facts herein, passed to and vested in the Catawba Manufacturing and Electric Power Company by deed dated 29 June, 1905. It is further conceded that neither of these deeds conveys, nor do they include in the description therein, the Bissell property.

Prior to 13 July, 1893, Mrs. Emily Bissell and others were the owners of a tract of land, a very large portion of which was covered by water, lying on and constituting a portion of the bed of the Catawba River.

This land adjoins the Mountain Island property, the beginning point being the hickory called for as the beginning of said land. On 13 July, 1893, W. T. Jordan was manager, etc., and W. J. Hooper was president of the Catawba Electric and Power Company. Jordan says: "I bought the Bissell property and took title in my own name. I took it in that way under instructions from W. J. Hooper, the president of our company. I purchased it because it was necessary to the Mountain Island property. The Bissell property and the Mountain Island property adjoin." He further testified that the W. J. Hooper Manufacturing Company paid for it. The deed from Bissell to Jordan of 13 July, 1893, describes the property by metes and bounds, beginning at the "hickory, the old corner on the Catawba River bank between the Hooper and Bissell lands or properties." Following the description are the words, "it being the same land which was surveyed for the parties by John C. Fichte in July, 1893, plats or diagrams of which survey are hereto annexed and marked, respectively, 'A' and 'B,' and made a part of
(296) this deed." Certain covenants in regard to water rights are set forth in the deed, to which further reference will be made.

On 29 May, 1900, Jordan, as found by the jury (issue 14), conveyed the Bissell property to the power company, by direction of Hooper. The consideration recited is $1. This deed refers to the deed from Bissell, and concludes as follows: "It is the purpose of W. T. Jordan, by this deed, to invest the Catawba Electric and Power Company with the title to all the lands, water rights, and other easements acquired by the said Jordan by said deed," etc. It will be observed that this deed bears date six years subsequent to Hooper's deed to the power company, 20 November, 1894, and five years subsequent to the deed in trust from the power company to the Fidelity and Deposit Company, 1 May, 1895. The legal title to the Bissell property was, therefore, in Jordan at the date of Hooper's deed to the power company and of the deed from the power company to the deposit company. The defendants contend that, Hooper having paid the purchase money for the property, Jordan, having bought by his direction, held the property in trust for him; that Hooper's purpose in buying through Jordan was to hold the Bissell property and the water rights attached thereto as appurtenant to the Mountain Island property, and that thereby the Bissell property, or at least an easement therein, became appurtenant to the said property to the extent set forth in the answer. The jury find that Hooper paid for the Bissell property and that Jordan took title thereto by his direction. Hooper had no title to or estate in the Bissell property, but a right to call upon him to execute the resulting trust by conveying the property. This, as said by *Pearson, J.*, in *Thompson v. Thompson*, 46 N. C., 430, "is a mere right and not an estate"; therefore, his deed to the power company could not

carry as appurtenant any easement in the Bissell property which he did not own. The jury found that the dam of the Mountain Island Mill did not, at the date of the deed from Hooper to the power company, back water upon the Bissell land. This finding eliminates (297) the suggestion that any such easement was in existence at that time. The facts that Hooper describes the Tate or Mountain Island land by an express reference to the Tate deed to himself, and that this deed confines the water rights "between the points and within the boundaries hereinbefore," and "as they are set forth in the deed from Davidson," etc., leave no room for construction in respect to the property and water rights expressly conveyed by the deed. Of course, the land covered by water did not pass either by way of description or as appurtenant, for the manifest reasons that it is not within the description, and that land can never pass as appurtenant to land. "Only incorporeal rights pass as appurtenant to land, or under the description of 'appurtenances.' Land cannot pass as appurtenant." Jones Easements, sec. 20. "A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." Coke Litt., 121b. While it is unquestionably true that an incorporeal right may pass as appurtenant without being specifically named, it is equally true that the incorporeal right must be in existence before it can pass as appurtenant. The difficulty which confronts the defendants is in the failure to show that any easement in the Bissell land had been created, used or enjoyed by the owner of the Mountain Island land at the time of or before the conveyance to the power company. Certainly the mere fact that Hooper, the owner of the Mountain Island property, caused Jordan to purchase the Bissell property, because at some time in the future he might wish to raise the dam on his own property and back water upon it, does not, *ipso facto,* create an easement in the Bissell property for that purpose. For some reason, Hooper had the title taken to Jordan and held by him. This conduct on his part indicates a purpose to keep the two properties separate. Again, when he conveys the Mountain Island property, he carefully excludes the suggestion that he intends to convey any rights which he might have in the Bissell property by confining the water rights, privileges, etc., to those (298) which he acquired from Tate. As Hooper had not subjected the Bissell land to any burden or backed water upon it while he owned the Mountain Island land, and carefully excluded it from his deed, it would be doing violence to both the language used and his manifest intention to so construe the deed as to pass as appurtenant to the lands an easement which had no existence. It is settled by decisions of this Court that if one sells land on which a mill is located, an easement will pass with it as appurtenant to pond water above the mill to the same extent

as was done at the time of the conveyance. In *Kestler v. Verble,* 52 N. C., 185, *Manly, J.,* said: "It seems entirely clear to us, upon the sale of the parcel of land, including the lower mill, to the defendant Verble, that an easement in the lands passed by implication to defendant, to the extent, at any rate, held by the judge below. The defendant purchased as appurtenant to his mill the right to keep the water power *in the condition it then was* for the purpose of propelling his machinery." So, in *Bowling v. Burton,* 101 N. C., 176, *Merrimon, J.,* says that the deed conveying a mill carried the right to erect dams across the river, at the mill mentioned, to the extent claimed and exercised by the vendor at the time he executed the deed. A large number of cases cited in plaintiff's brief recognize the principle, with its limitation. In *Lamott v. Ewers,* 55 Am. Rep., 746, it is said: "The doctrine is too familiar to justify elaboration that when the owner of an estate during such ownership has, by artificial arrangements, made one part subservient to the other, thus enhancing the value of one by burdening the other, the conveyance of that, the value of which is thus enhanced, will carry the right to an easement in the other to the extent necessary to the enjoyment of that granted in the same condition in which it was enjoyed be-
(299) fore. . . . As applicable to water rights, in a case where such rights are granted without being otherwise specifically defined, since they are in a measure at least, incorporeal and invisible, they are measured and limited as against the grantor by the extent to which they were designed to be used and had actually been made available for and applied to use." To the same effect is *Taylor v. Hampton,* 17 Am. Dec., 710. In *Hathorn v. Stinson,* 25 Am. Dec., 228, it was held that the grantee of a mill "acquired a right to continue the dam so as to raise the same head of water as the grantor had been accustomed to raise previously to the grant, provided that was necessary for the useful operation of the mill." The authorities cited by defendants are to the same effect. "Property conveyed passes with all the incidents then rightfully belonging to it *or actually or usually enjoyed with it at the time of the conveyance,* so as they are necessary to the full benefit and perfect enjoyment of the property, without any specification of them." *Dunklee v. Wilton Railway Co.,* 24 N. H., 489; Tiedeman Real Prop., sec. 842. It appears from the deeds and the testimony that Tate and his associates, prior to 8 April, 1884, had erected a dam over the river and built a mill. This dam is referred to by Fichte, defendants' witness, as the "old Tate dam," thus showing that, at the time Hooper purchased (1884) and conveyed to the power company (1894), there was a dam across the river, which did not back water on the Bissell land. It further appears that Tate acquired and conveyed to Hooper certain water rights adjoining the Bissell land. The defendants, however, contend

that the Bissell deed "shows that it was bought for the Mountain Island property, and that the privilege therein was conveyed for the Mountain Island water power to back water upon the same." The deed, after describing the property by metes and bounds, contains the following covenant: "It is expressly covenanted and agreed that the said W. T. Jordan shall have all water rights and privileges on said premises, and shall have the right to erect a dam or dams in the said river for the purpose of taking up and utilizing the full fall in said river embraced in (300) the said boundaries, and shall not be liable for any resultant damages to any of the lands of the parties of the first part or any one claiming under them, provided the dam or dams or other obstruction may be placed in said river at what is designated in the plat hereto annexed as the 'lower bench mark,' or at any other place; and provided that the said dam or obstruction, wherever placed, shall not raise the water at said lower bench mark more than four and a half feet above the iron peg in the rock, the iron peg being the lower bench mark and located at the upper end or just above the upper end of the Rumfelt Island." We find nothing in this language indicating that it has any connection with or relation to the Mountain Island property. The evident purpose of the grantor was to give to the grantees certain defined water rights in respect to other lands, limiting such right to four and one-half feet at the lower bench mark. The defendants contended that this mark was on the Tate land. His Honor submitted the question to the jury and they found against defendants. The covenant is expressly confined to dams which may be placed in the river on the lands "within said boundaries." There is no evidence that Mrs. Bissell knew that Jordan was purchasing for Hooper. We concur with his Honor that no easement to flood or back water upon the Bissell land passed to the power company by Hooper's deed, for the twofold reason that he had no title to or estate in the land at the time of the conveyance, and that his deed expressly confines the water rights to those conveyed in the deed from Tate to himself. "A right or easement does not pass as appurtenant without mention, unless it is an existing easement actually appurtenant by use and occupation at the time of the conveyance. It must actually belong to the estate conveyed in order to pass by implication." Jones Easements, sec. 25. Defendants, however, insist that, conceding that no easement passed by Hooper's deed when Jordan conveyed the Bissell land to the electric and power company in 1900, the rights to back water upon it thus acquired inured to the benefit of (301) the Fidelity and Deposit Company, the trustee. It is unquestionably true that, when property is mortgaged and, after the execution of the mortgage, an easement is acquired necessary and essential to the full enjoyment of the property, it will inure to the benefit of the mortgagee.

Bank v. Insurance Co., 83 Minn., 377. The deed from Jordan to the power company expressly confined its operation to the limitation contained in the deed from Bissell to him. Of course, no easement passed to the power company because the land itself covered by water was conveyed. The power company could not own the land and easement therein at the same time. When it acquired the land, of course, it had the right to subject it to any use which it saw proper, subject to the rights of the adjoining owners. If it had, after acquiring the title, raised the dam on the Mountain Island, and thereby backed water over the Bissell property, thus subjecting it to a burden, it may be that, upon a sale of the property by the deposit company, the purchaser would have taken title with the easement, as was held in *Whitehead v. Garris,* 48 N. C., 171. The fact is, however, that on 29 May, 1900, Jordan conveyed to the power company, and at that time it is not claimed that the power company had acquired an easement otherwise than by the Hooper deed, and on 4 February, 1901, the power company, for a valuable consideration, conveyed the same properties to Barbour. The deed contains this language: "It is the purpose of the said parties of the first part, by this deed, to invest the said party of the second part with the title to all the lands, water rights, and easements acquired by the said parties of the first part, under the aforesaid deeds, and reference is made to these said deeds for a more particular description of the lands, water rights, and easements hereby conveyed." The deed refers to the deed from Jordan, and, as we have seen, he conveyed only the water rights which he acquired from Bissell. Barbour, there-
(302) fore, took the title to the Bissell property free from any burden or easement to back water upon it. No easement was ever granted by Jordan, the holder of the legal title, or Hooper, who had the equity or right to call for it, and none could be otherwise acquired against them, except by adverse user for twenty years. There is no evidence that Latta had any knowledge of the fact that Jordan held subject to any right in Hooper to call for the legal title. It is true that the dam had been extended and, at the time Latta purchased, backed water on the Bissell land, but it does not appear how long it had done so; it could not have exceeded seven years. The Electric and Power Company held the Bissell property in the same plight and subject to the same easements, and none other, expressly conferred by the deed from Bissell to Jordan. The deed to the Fidelity and Deposit Company conveyed such rights as the power company had, and no more. The mere fact that the power company, five years thereafter, acquired the Bissell land did not prevent it from conveying it to a purchaser for value in the same plight and condition as it was conveyed to said company. We, therefore, concur with his Honor in holding that the defendant Manufacturing and

Electric Power Company did not acquire an easement to erect and maintain a dam of sufficient height to back water upon the Bissell land.

The Lineberger and Sample lands lie 2 miles up the river and consist largely of land covered by water. Their chief value consists in their water power and rights. On 28 March, 1899, Jordan, by direction of Hooper, purchased them and paid the purchase money by drafts on the Hooper Manufacturing Company. The jury find that they were not purchased for the Catawba Electric and Power Company. Jordan held them until 1900, when, by direction of Hooper, he conveyed them, together with the Bissell property, to the power company. There is no suggestion that the Mountain Island dam has backed water upon them. We can see no reason why the same conclusion reached in regard to the Bissell land does not apply to these properties. We concur (303) with his Honor's ruling in regard to them.

The defendants, other than the power company and the Fidelity and Deposit Company, claim that the deed from the Electric and Power Company to Barbour was invalid, for that at the time it was executed the company was insolvent; that the consideration was a preëxisting debt due Barbour, indorsed by Hooper; that Hooper was president and Barbour a director in said corporation. Plaintiff denies all of these averments, except that Barbour was a director, and for further defense alleges that he purchased for full value and without notice of any of the facts relied upon to invalidate the deed of 4 February, 1901. His Honor submitted the following issue: "Was the Catawba Electric and Power Company insolvent in the months of January and February, 1901?" The defendants requested the court to instruct the jury to answer the issue, upon the evidence, in the affirmative. This was refused, and defendants excepted. Under the instructions given, the jury answered the issue in the negative. The exception presents the question whether the uncontradicted testimony showed that the corporation was insolvent at the date of the deed to Barbour. It appears that on 1 May, 1895, the deed in trust was executed to the Fidelity and Deposit Company to secure sixty-five coupon bonds, known as "Class A." These bonds were issued and sold for cash. There is no controversy in regard to their validity. The same deed secured eighty-six coupon bonds known as "Class B." The bonds included in "Class A" were given priority of lien in said deed. The plaintiff contends that the bonds in "Class B" were never issued and sold to *bona fide* holders, and that no money was received by the company from them. When the Mountain Island property was sold, 11 September, 1901, by the Fidelity and Deposit Company to Theodore Hooper and others for $175,000, the court directed the clerk to give notice for the bondholders to file their bonds and to report to the court the amount of the indebtedness and interest on (304)

account of them. From the report made by the clerk it appears that the bonds described as "Class A," with accumulated interest, amounted to $88,844 on 15 February, 1902, the date of the report; deducting two years interest, $7,800, they amounted, on 4 February, 1901, to $81,044. It is conceded that the corporation owed Barbour $80,000. If the eighty-six bonds, "Class B," constituted a valid indebtedness, the corporation was, on 4 February, 1901, insolvent; otherwise it was solvent. The plaintiff insists that the defendants, Theodore Hooper and others, do not allege that they are creditors. An inspection of the answer, setting up the counterclaim, does not disclose very clearly an allegation that the defendants are creditors; but as the cause was tried by his Honor upon the assumption that the pleadings raised the issue, we will so treat them. The burden of proof was upon the defendants to show that the company was insolvent and that they, as creditors, are in a position to attack the deed to Barbour. The plaintiff insists that the defendants have failed in both respects. No bonds were produced on the trial. The only witness examined in regard to the eighty-six bonds was defendant Alcæus Hooper. He says that the bonds in "Class A" were paid for in cash; of this he has personal knowledge. In regard to "Class B," he says: "So (far) as I remember correctly, the history of the second mortgage bonds was, that Mr. William J. Hooper owed to my father, at the time of his death, a certain amount of money, and the trustees, in settling father's estate, received from W. J. Hooper, of 'Class B,' eighty-six bonds. How he got them I do not remember. I think you will find what I am now telling you is substantially correct. I paid no money for these bonds ('Class B'), except in the way of crediting him on account of indebtedness to my father's estate."

(305) W. T. Jordan, the secretary and treasurer, testified that, so far as he knew, the company got no money from these bonds. The other evidence relating to insolvency of the company in February, 1901, was conflicting. Alcæus Hooper says that it was insolvent. Jordan says that, eliminating the debt to Barbour, the company was solvent, if it could get $200,000 for its property. If this is correct, eliminating the eighty-six bonds ("Class B"), the same result would follow, including the Barbour debt. The defendants insist that the judgment in the suit brought by the Fidelity and Deposit Company fixed the validity of the bonds and the insolvency of the company. We do not perceive how, as against the plaintiff, the judgment in that action is relevant. Barbour's deed was executed 4 February, 1901. The summons in that action was issued 24 June, 1901. Barbour was not a party to the action. The answer was filed, admitting the indebtedness by W. J. Hooper, president. It was, of course, to his interest to fix upon the company the eighty-six bonds delivered by him to the trustees of his father's estate to pay his

indebtedness. His acts and declarations subsequent to the date of Barbour's deed are not competent to invalidate the deed, nor could the judgment in that suit affect Barbour or his grantee. Defendants say, however that may be, plaintiff, by making the record in that case a part of his reply to the counterclaim, is estopped from denying the truth of the facts adjudicated therein. We do not perceive how this result follows. In making the record a part of his pleadings, plaintiff can add nothing to nor take anything from its force and effect. We do not perceive any good reason for his doing so, nor do we think he thereby in any manner changed his relation to the record. Defendants also insist that plaintiff, as agent for Barbour, filed with the clerk in that suit proof of claim for nine of the bonds in "Class B," and that he thus recognized their validity. They also call attention to the fact that plaintiff made a contract with Barbour to buy these nine bonds. All of this was competent as acts and declarations of plaintiff and his grantor prior to the conveyance to him, but we do not see that they have any element (306) of an estoppel. It does not appear that these acts and declarations were made to any one for the purpose of buying the bonds, or that any one did buy or in any manner deal with them by reason of such acts and declarations. Defendants further insist that, taking the testimony of Alcæus Hooper as true, it does not show that the company did not receive value for the bonds; that the company may have owed money to Hooper; that a short time before the bonds were issued it purchased the Mountain Island Mills from W. J. Hooper, and that it may have owed him the purchase price. These were all matters for the jury upon the issue of insolvency. The burden was on the defendants to show that the company was insolvent at the date of Barbour's deed; and the court could not, in the light of the fact that no bonds were produced (no one of the defendants who claimed to be creditors testified in regard to the alleged debts, except Alcæus Hooper, who gives an account of the manner in which he came into possession of the bonds), have directed the jury to answer the issue in the affirmative. His Honor left the question to the jury, under instructions, whether the bonds were a valid indebtedness of the company. In the light of the testimony of Alcæus Hooper in regard to the receipt of the bonds for the individual indebtedness of W. J. Hooper, the president of the company, it was incumbent upon the defendants to show either that W. J. Hooper paid value to the company for them or that they were purchasers for value and without notice of any defect in them by reason of Hooper's using them to pay his debts. Defendants insist that no issue was raised by the pleadings in regard to the validity of the eighty-six bonds. The issue of insolvency involved the question of indebtedness and assets. How otherwise could that issue be decided? The only way in which the financial condition of a person

or corporation can be ascertained is to fix the amount of its valid indebtedness and its available assets. We have examined the entire charge upon this issue, and the exceptions thereto, and find no error (307) therein. The question was fairly left to the jury. The verdict upon this issue renders it unnecessary to pass upon the exceptions to his Honor's ruling and instructions upon those relating to notice. The plaintiff testified that he did not know at the time of his purchase that Barbour was one of the directors of the power company. He says: "I paid Colonel Barbour in full for the property in controversy, about $7,220, and he delivered the deeds to me which have been exhibited here. At the time the money was paid, and at the time the deeds were delivered to me, I did not know or have any notice that Colonel Barbour was a director or officer of the Catawba Electric Company." He says that he learned it in 1903. He further says that at the time he took the deeds he did not know anything of its financial condition, except that it owed Colonel Barbour a great deal of money. The jury found with the plaintiff in regard to notice, etc.

It is not necessary nor practicable to discuss each of the exceptions to the record. We have, however, examined them. The exceptions to his Honor's ruling upon the issues tendered by defendants cannot be sustained. The issues submitted clearly present the controverted question of fact.

The defendants assign as error the refusal of the court to exclude certain depositions. The facts in regard to them are: The depositions were taken upon notice and duly returned by the commissioner to the clerk, who issued notice, on 8 May, 1905, that he would open them on 10 May, 1905, at 10 o'clock a. m. Service of the notice was accepted by counsel 9 May, 1905. On 10 May, in accordance with the notice, the clerk opened the depositions, passed upon and allowed them, pursuant to Revisal, sec. 1357. On 15 May, 1905, the defendants filed exceptions to the clerk's order, for that (1) they were opened without notice; (2) they were opened on a legal holiday. The defendants appealed to the judge holding the courts of the district, etc. The clerk certified the record made by him to the judge, showing that on 10 May, 1905, pursuant to notice, in the presence of one of plaintiff's attorneys, no (308) one being present representing defendants, he opened and allowed the depositions. The judge held that the notice was insufficient, and reversed the clerk's order. Defendants thereupon moved that the depositions be quashed. This motion was refused. The judge thereupon made an order "allowing the defendants until Thursday morning in which to file exceptions to said depositions. It is now ordered that the depositions of William Barbour, J. N. Steele, and A. R. Turner, Jr.,

now on file in the clerk's office of this court, in this case, be and are hereby allowed, and said depositions are adjudged to be legal evidence." Defendants excepted.

Upon the trial his Honor admitted the depositions, and defendants excepted. The exception is based upon the proposition that the notice that the depositions would be opened on a legal holiday was a nullity, and that the action of the clerk was invalid.

The learned counsel who argued this exception based the conclusion to which he invited the Court upon the proposition that a legal holiday has the same status in respect to legal proceedings as Sunday. If he is correct in this, the conclusion is irresistible that the depositions could not lawfully be opened on 10 May, it being a legal holiday. Revisal, sec. 2838.

This Court held, in *Sloan v. Williford,* 25 N. C., 307, that a deposition taken on Sunday should be rejected. Without pursuing the discussion as to whether the deposition could be lawfully opened on Sunday, it is sufficient to say that a legal holiday is not, in this respect, *dies non juridicus.* The statute simply declares that 10 May and other days named are "public holidays." In *Glenn v. Eddy,* 51 N. J. L., 255 (14 Am. St., 684), *Magie, J.,* discussing the question, says: "The statutory declaration that these days shall be legal holidays does not indicate an intent to assimilate their status to that of Sunday. 'Holiday,' in its present conventional meaning, is scarcely applicable to Sunday. . . . When the statute declares them to be legal holidays, it does not permit a reference to the legal *status* of Sunday to discover its (309) meaning." The universally accepted principle is that what the statute fails to prohibit may be done. *Pain v. Shainwald,* 169 N. Y., 246; 21 Cyc., 442. If defendant's contention is correct, that they could not be compelled to attend on 10 May, the statute provides that they would have been entitled to file exceptions and have a hearing on the next succeeding day. They failed to attend on either day. We find nothing in the statute prohibiting the opening of depositions on legal holidays, and we would not be justified in writing it therein. It is well known that the courts of this State frequently sit and transact business on the several public holidays.

It appears that defendant's counsel were present and cross-examined the witnesses. Again, *Judge Justice,* in passing upon the appeal from the clerk, gave the defendants time and opportunity to file exceptions. We are of the opinion that his Honor properly allowed the depositions to be read.

The defendants noted an exception to the order of *Judge Allen* permitting the Electric and Power Company to file an answer. This answer was filed at September Term, 1904. It seems that Colonel Barbour

was the owner of a majority of the stock of the Electric and Power Company, and that A. R. Turner, Jr., was elected its president, succeeding W. J. Hooper. The corporation was made party defendant in this action, and, if it had any existence, we can see no good reason why it should not file an answer. Of course, its answer did not affect defendants' rights.

The case was brought and tried upon the theory that the Catawba Electric and Power Company was a going concern—an existing corporate entity. If this is correct, it is not easy to see how Alcæus Hooper and the other defendants were in a position to litigate the counterclaim. If Hooper, as president, had fraudulently disposed of the property of the corporation to Barbour, it was the duty of the officers of the corporation to sue for and recover it for the benefit of its creditors. If they refused to do so, the creditors might, upon proper allegation
(310) and proof, have had a receiver appointed, who would sue for the property and bring it into court, to be applied to the debts.

It is evident, from the answer of Turner, president, that new and antagonistic forces had come into control of the corporation. The Hooper interest was supplanted. We think, by virtue of sections 697 and 698 of The Code of 1883, then in force, the sale of the property, franchises, etc., of the Catawba Electric and Power Company under the decree of the court dissolved the corporation. If, during its existence, its officers had fraudulently or unlawfully disposed of any of its property, the creditors were entitled to have a receiver appointed to sue for and recover such property. *Coal and Ice Co. v. R. R.*, 144 N. C., 732. The parties having litigated all of the questions which would be open to a receiver, and the cause having, at much expense, been tried upon its merits, we have discussed and decided the questions presented upon the record, and only call attention to the effect of the statute to show that we have not overlooked it. It is evident that the controversy involves valuable property rights, upon which industrial development is dependent.

After a careful examination of the record, aided by full and exhaustive briefs, we find

No error.

(311)

ASHEVILLE LAND COMPANY AND L. BLOMBERG v. J. H. LANG ET AL.

(Filed 11 December, 1907.)

1. Deeds and Conveyances—Calls—Beginning Point—Branch—Evidence.

When the first call of a deed is given as "Beginning at a stake on the south bank" of a named branch, and there was evidence tending to show that the branch had changed its bed 18 feet since the date of the deed, and, also, that it had not changed at all, it is proper for the jury to consider the location of the branch as a means to locate the beginning point in connection with other evidence; and a prayer for instruction that in no aspect of the case can the jury consider the run or thread of the stream as it formerly existed, or as it now exists, was properly refused.

2. Same—Calls—Beginning Point—Evidence—Map, Corroborative.

When there was evidence that when the sale of the *locus in quo* was made there was a survey run for the boundaries set out in the deed, and that the beginning stake was 170 feet from the angle in Depot Street; that, subsequently, where this stake was located the land had been filled in, and afterwards, in paving the street, a stake, apparently a surveyor's stake, was unearthed, answering the location as testified to, and was at once noted down by the city engineer, who made a map and identified it on the trial, on which, at the time, he marked the location of the stake, the map was competent evidence to corroborate the testimony of the city engineer.

3. Same—Calls—Beginning Point—Evidence—Calls Reversed.

When one, at least, of the subsequent calls in a deed was identified, or the jury could properly so find, and the beginning point was the one sought to be established, it was error in the court below to instruct the jury that they could not locate the beginning corner by commencing at the identified call and running back the first two lines according to their courses and distances, the courses reversed, when such would tend to do so.

APPEAL from *Cooke, J.*, at March Term, 1907, of BUNCOMBE.

Action of ejectment, over the boundary of a town lot. Both parties claimed under the same source of title. The controversy turned upon the true location of the beginning corner called for in the Hallyburton deed, as follows: "Beginning at a stake on the south (312) bank of Town Branch, in the eastern edge of Depot Street, said stake being 209 feet east of the Western North Carolina Railroad bridge over said Town Branch." There was evidence offered by plaintiffs to show that at the date of said Hallyburton deed the said stake was placed at the edge of the south bank of Town Branch, and that by actual measurement at that time this stake was 170 feet from the angle in Depot Street, the end of the first call in said deed; also, that Town Branch had changed its bed 18 feet since the date of the Hallyburton deed by reason of freshets and the filling in of the lot with stone and

dirt by the adjacent proprietor and by the city government. The defendants offered evidence that the location of said branch had not been perceptibly changed. A witness for plaintiffs testified that he made the sale to Hallyburton and saw the survey made for the boundaries set out in said deed; that the beginning stake was set 170 feet from the angle in Depot Street. The plaintiffs also offered evidence that when Depot Street was paved in 1893, in digging down in the made earth 170 feet from said angle, a stake was found at that point which had the appearance of being a surveyor's stake, and the fact was then and there noted down by the city engineer, who made the map identified by said surveyor at this trial, on which, at the time, he marked the location of said stake. This map was offered to corroborate the surveyor, but was rejected on objection by the defendants, and plaintiffs excepted. The evidence was uncontradicted that, after the date of the Hallyburton deed, the lot at the beginning point was filled in several feet deep with stone and dirt. Verdict and judgment for defendants. Appeal by plaintiffs.

Frank Carter, H. C. Chedester, and Davidson, Bourne & Parker for plaintiffs.

Merrimon & Merrimon for defendants.

(313) CLARK, C. J. The plaintiffs excepted for the refusal of the following prayer for instruction: "That in no aspect of the case can you consider the run or thread of the stream as it existed in 1889 (at the date of the Hallyburton deed), or as it now exists, at its intersection with the eastern margin of Depot Street, as defining the beginning corner." It not having been found or admitted that the stream had changed its location, this prayer could not have been given, though it is true that the doctrine of accretion has no application here. That applies where a stream is a boundary. In such cases the slow, gradual, imperceptible accretion to the bank from the shifting of the stream belongs to the proprietor on the gaining side, and the stream remains the boundary. But here the stream is not the boundary. It is mentioned as one of the means to locate the beginning point of the survey of a town lot whose boundaries were actually run out and marked on the ground, said beginning being further measured at that time as being 170 feet from a certain angle in the road. The change in said road or location of said angle would not shift the location of the beginning point in the survey of said lot. No more would the shifting of the bed of the stream change the location and boundaries of the lot. But as there was evidence tending to show that the bed of the stream had not changed, in that event (should the jury so find) its location would be a factor, and the prayer that "in no aspect of the

case" should the run of the stream, as it existed at date of the deed or as it exists now, be considered, was properly refused. Even where the doctrine of accretion applies, if the beginning corner is on the bank of a stream, in running the other lines measurement must be made from "X," where the beginning corner stood at date of deed, else the whole tract would move with the bank of the stream. But the court erred in excluding the map made by the city surveyor in 1893, whereon at the time he entered the finding of the stake resembling a surveyor's stake at the point where the evidence of the plaintiff tended to locate the beginning corner or stake. This evidence was offered to corroborate the testimony of the city engineer and was competent (314) for that purpose.

"After the jury had retired and had been out several hours considering the issues in this case, they came back, and at about 11 o'clock at night asked for further instructions. In reply to their interrogatory as to whether or not they could locate the beginning corner by commencing on the alley and by running back the first two lines according to their courses and distances, the courses reversed, the court replied that they could not." The plaintiffs excepted.

This instruction, taken in connection with the circumstances under which it was given, must have misled the jury into the belief that they could not, under any circumstances nor for any purpose, reverse the two first courses of the Hallyburton deed; whereas, in certain aspects of the case, it was entirely proper for them to have done so. The rule laid down in our authorities is that the survey, where practicable, must be run out in the same order in which the surveyor, at the time of the deed, made it. But when there is, as here, the search for a lost corner or line, if corners or lines further on are located, the courses and distances may be reversed and run backward to find the lost corner or beginning. In *Harry v. Graham,* 18 N. C., 77, *Ruffin, C. J.,* says: "For example, if this deed had said that the line from the corner chestnut and red oak ran to a black oak near the patentee's other line, and gave neither course nor distance, or only one, and *thence* N. 45 E. 220 poles to a post oak, his own and Beard's corner, the line might be reversed from the post oak to ascertain the corner of that and the next preceding line, because that affords *the only evidence* (the black oak not being found or its locality otherwise identified) of the point at which the one line terminated and the other began." In *Dobson v. Finley,* 53 N. C., 498, *Pearson, C. J.,* says: "Supposing the pine to be established as the second corner, could the first, a beginning corner, be located by reversing the course and measuring the distance called for from the pine back—that is, on the reversed course? His Honor ruled that the beginning corner could be (315)

fixed in this way. We agree with him. If the second corner is fixed, it is clear to a mathematical certainty that by reversing the course and measuring the distance you reach the first corner." Both these cases are cited, approved, and followed in *Lindsey v. Austin,* 139 N. C., 467, 468, in which case the authorities are reviewed and the principles applicable are clearly stated by *Mr. Justice Brown,* who also points out that "there is nothing in *Norwood v. Crawford,* 114 N. C., 518, which militates against the position that this is a proper method of determining the beginning corner." The same principle, that reversing the line may be resorted to when a lost corner or line cannot be located by proceeding in the regular course, is laid down in *Duncan v. Hall,* 117 N. C., 446. Here, one at least of the subsequent calls, the alleyway, was identified, or the jury could so find, and, if they did so, the courses and distances could be reversed to locate the beginning.

It is not necessary to consider the other exceptions, as there must be a new trial, since in the above particulars there is found reversible error.

Error.

Cited: *Gunter v. Mfg. Co.,* 166 N. C., 166.

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(316)

J. F. McCULLOCK ET AL. v. NORTH CAROLINA RAILROAD COMPANY ET AL.

PLAINTIFFS' APPEAL.

(Filed 11 December, 1907.)

1. Pleadings—Relief Prayed for—Facts Alleged Proven—Remedy.

The plaintiffs (appellants) are entitled, irrespective of the prayer for relief, to any remedy to which the facts alleged and proven entitle them.

2. Same—Amendments After Judgment—Power of Court.

When a cause of action is defectively stated, the judge or the court below may, "in furtherance of justice and on such terms as may be proper, amend any pleading," etc., and such may be done after judgment and when the case goes back after appeal to the Supreme Court. Revisal, section 507.

3. Railroads—Lessor and Lessee—Easements—Rights Acquired.

The defendant railroad company, lessee of another railroad company which had acquired an easement over plaintiff's lands, does not acquire the right to use more of the land thus acquired than is necessary to handle the increased business appertaining to the lessee road, and is liable to the plaintiffs for compensation for the additional or alien burden put upon the easement for its use by other roads leased or operated by the defendant.

4. Same—Lessor and Lessee—Easements—Limitation of Actions.

When it becomes necessary to the business of a railroad company to occupy more of the right of way than formerly used, it cannot be barred by the statute of limitation of actions; but otherwise when its lessee road takes more thereof than is required for the use of the business of the lessor road, for such use is wrongful.

5. Same—Lessor and Lessee—Easements—Rights Acquired—Issues.

In an action to recover permanent damages for the alleged wrongful use by the defendant of more of plaintiff's land than embraced by an easement therein of its lessee road, and by which right defendant claims such use, and when such questions arise from the pleadings and evidence, the following are the proper issues, and their refusal, when not substantially adopted, is a ground for a new trial: (1) Was the land so taken by the defendant necessary for the proper handling of the exclusive business of the lessor railroad company? (2) Has the land in controversy, since it was taken by the defendant, been used by it to handle freights belonging to roads other than the lessor road, and which would not directly pass over said lessor road, or any part thereof, in transmission from the point of shipment to that of destination? (3) What damages have the plaintiffs sustained by reason of the alleged trespass?

APPEAL from *Justice, J.*, at June Term, 1907, of GUILFORD.

The facts sufficiently appear in the opinion of the Court. (317)

Scott & McLean, R. D. Douglas, R. M. Douglas, and E. J. Justice for plaintiffs.

King & Kimball for defendants.

CLARK, C. J. The action of the plaintiffs is in the nature of an action of ejectment and also for wrongful entry and trespass. But they are entitled, irrespective of the prayer for relief, to any remedy to which the facts alleged and proven entitle them. *Gillam v. Ins. Co.*, 121 N. C., 372, and numerous cases there cited.

Succinctly stated, those facts are: The North Carolina Railroad Company acquired, in 1850, by deed, an easement in the lot in question, which is now used by the Southern Railway Company for trackage and similar purposes. The Southern Railway Company, the defendant, as lessee of the North Carolina Railroad Company, is entitled to use said lot as fully as its lessor could have done (so far as this action is concerned), including any increased burden on the lot by reason of the increased business of said North Carolina Railroad Company's part in the business of the "Southern," whether the said business originates along the line of the North Carolina Railroad Company, or, originating elsewhere, is shipped to any point over the line of the North Carolina Railroad.

But at Greensboro, where the lot is located, the Southern Railway Company has four railroad lines other than that of the North Caro-

lina Railroad Company, to wit, one coming in from Danville, another from Mount Airy, another from Wilkesboro and Winston, an-
(318) other still from the direction of Sanford. So far as business coming over these four lines is concerned, which stops at Greensboro, or which at that point is carried further, not upon the North Carolina Railroad, but upon one of these other four lines, there is no warrant for the use of said lot for trackage or warehouse purposes for the convenience of the Southern Railway Company, as to this business in which the North Carolina Railroad has no part or interest. The North Carolina Railroad Company would have had no right to use the lot for such purely alien purposes if it had not been leased, and it could not confer upon its lessee greater rights than it held itself.

The plaintiffs are entitled in this action to have permanent damages assessed, in the nature of condemnation, for the additional burden placed upon the lot by its use for purposes other than those for which defendant uses the lot purely as lessee of the North Carolina Railroad Company. *Hodges v. Telegraph Co.*, 133 N. C., 225, in which case this proposition is so clearly and fully reasoned out by *Connor, J.*, with full citation of authorities, that further discussion here would be idle repetition.

The plaintiffs, in their brief, submit that this is all they wish—*i. e.*, compensation for the alien and additional burden—and tersely say: "Take and pay." If this cause of action is defectively stated, when the case goes back the pleadings can be amended. Indeed, if the case had gone in favor of plaintiffs, they could have amended, even after judgment, to conform to the proof. Revisal, sec. 507.

The use of the roadbed, and up to the ditches on each side thereof at that point, by the Southern Railway or its lessor for more than twenty-one years was admitted; but, on the other hand, it was admitted by the defendants that the land outside of the ditches, but within 100 feet on each side of the center of the track, was first taken by it for trackage purposes in 1903. So far as that trackage is used by the railway for other purposes than to accommodate its business
(319) as lessee of the North Carolina Railroad Company, it is an additional servitude. Whether the Southern Railway Company, not being a North Carolina corporation, can take the property for this additional servitude, under the right of eminent domain, except so far as it may do so as lessee of those of its other lines which possess that right conferred by a charter from this State, is a matter not now before us.

It is a fact agreed in the case that the plaintiffs are owners of the 45-acre tract of land described in the complaint, subject to the right of way through the same conveyed to the North Carolina Railroad Com-

pany by deed from Hiatt, under whom plaintiffs claim, which deed was executed in 1850. The said North Carolina Railroad Company held only an easement, a right to use so much of the right of way as was necessary for its purposes. *R. R. v. Sturgeon,* 120 N. C., 225. But when it becomes necessary for the North Carolina Railroad Company itself, or through its lessee, to occupy more of the right of way, it cannot be barred by the statute of limitations. *R. R. v. Olive,* 142 N. C., 257.

The taking possession of the right of way beyond the roadbed and ditches by the Southern Railway Company was only a few days before this action was begun, and, so far as it was taken to be used for trackage or other uses alien to its rights as lessee of the North Carolina Railroad Company, it was wrongful and is not protected by any statute of limitations.

The plaintiffs tendered, among others, the following issues, and excepted to their refusal:

"Was the land so taken by the Southern Railway Company necessary for the proper handling of the exclusive business of the North Carolina Railroad Company?

"Has the land in controversy, since it was taken by the Southern Railway Company, been used by said company to handle freights belonging to roads other than the North Carolina Railroad and which would not directly pass over said North Carolina Railroad or any part thereof in transmission from the point of shipment to that of (320) destination?

"What damages have the plaintiffs sustained by reason of the alleged trespass?"

These issues arose upon the pleadings and were essential to the decision of this controversy. Their refusal was error, necessitating a new trial.

Error.

Cited: *S. c.,* 149 N. C., 306; *Earnhardt v. R. R.,* 157 N. C., 366; *Land Co. v. Traction Co.,* 162 N. C., 504; *Gardiner v. May,* 172 N. C., 202; *Elliott v. Brady, ib.,* 830.

DEFENDANTS' APPEAL IN SAME CASE.

Appeal and Error—Both Parties Appeal—Records, How Considered—Improvident Appeal.

When the plaintiff and defendant appeal in the same case, the record in the one appeal cannot be looked into in considering the other. Therefore, when in such cases the appellant does not desire a modification of the judgment appealed from, the same being entirely in his favor, his appeal is improvidently taken.

CLARK, C. J. The judgment below was in favor of the defendants, and the case has been discussed in the opinion in the plaintiffs' appeal.

During the course of the trial the defendants excepted to the submission of the issue, to overruling the motion for nonsuit, and to the instruction to answer the issue "Yes." There are cases in which the judgment is only partly in favor of the party obtaining it, or less favorable than he thinks that he is entitled to. In such cases he can appeal if he wishes to correct the judgment or to obtain a more favorable verdict and judgment on a new trial. But here the judgment is entirely in favor of the defendants. They do not desire a new trial or any modification of the judgment. Therefore, the sole question is, whether there was error committed in any of the matters excepted to in the plaintiffs' appeal. If there was, there must be a new trial; if there was not, then the judgment in favor of defendants must be affirmed.

The record in the defendants' appeal cannot be looked into (321) in considering the plaintiffs' appeal, and the decision of the Court in that appeal must determine whether there shall be a new trial or not. The defendants' appeal was, therefore, improvidently taken, and must be dismissed.

Appeal dismissed.

LAMBERT-MURRAY COMPANY v. SOUTHERN EXPRESS COMPANY.

(Filed 11 December, 1907.)

Express Companies — Contracts — Negligence—Measure of Damages—Rule, Hadley v. Baxendale.

An express company, from the nature of its business, guarantees prompt delivery; and when, through its own negligence, an express box is delayed in its delivery, so as to cause a loss of the value of its contents, owing to a limited use and demand, it is liable for its value, though in ignorance of its contents and their character.

ACTION, heard upon facts agreed by *Cooke, J.*, at April Term, 1907, of BUNCOMBE.

The action began before a justice of the peace, and on appeal in the Superior Court the following facts were agreed: The plaintiff company delivered to the defendant, at Asheville, North Carolina, on 21 February, 1906, a plain, closed box for shipment to New Orleans, Louisiana. The box had no writing upon it except the address, "A. I. Hirsch, New Orleans, La.," and the defendant was not told what the box contained, nor that any loss would result from delay. The box arrived in New Orleans 24 February, 1906, but was not delivered to

the consignee, the defendant being guilty of negligence in this respect. On 31 March, 1906, after four days notice to the defendant of its intention to do so, the plaintiff sent a duplicate shipment to Hirsch. Claim was made to the defendant by the plaintiff for damages; liability was denied, and the suit was begun 30 April, 1906. On the hearing before a justice of the peace, 30 April, 1906, the original ship- (322) ment was tendered to the plaintiff by the defendant, and refused by it. The box contained rhododendron souvenirs, marked "New Orleans" and suitable for sale only in that city, being made to order. The goods, when shipped, were worth $12.60, which is the amount sued for, but on the day suit was brought, 30 April, 1906, they had no market value, and have since had none, although they have sustained no physical injury, having suffered their loss of value on account of failure on the part of the defendant to deliver within a reasonable time.

The court rendered judgment for $12.60, with interest from 21 February, 1906. Defendant appealed.

No counsel for plaintiff.
Julius C. Martin and George H. Wright for defendant.

CLARK, C. J. The negligence is admitted. The only controversy is as to the measure of damages. The defendant, at the trial, tendered to the plaintiff the return of the original box and contents, but admits that at that time they had "no market value and have since had none, although they have sustained no physical injury, having suffered their loss of value on account of failure on the part of the defendant to deliver within a reasonable time."

As the defendant admits that the loss of value was caused by its own negligence, it is difficult to conceive any reason why it should not be responsible for the damage caused by its own wrong. It undertook, for a consideration, to carry the goods speedily and safely to their destination. It did not do so. It has offered no excuse; indeed, it frankly says that it has none. If it had been important to know the contents of the box to spur it to diligence, it does not appear that it inquired. The very nature of its business and the application for its services were notice that prompt delivery was of the essence of the contract.

The defendant relies upon the well-known doctrine of *Hadley* (323) *v. Baxendale,* 9 Exch., 341, that the damages for breach of contract should be "such as may fairly and reasonably be considered either as arising naturally—*i. e.,* according to the usual course of things from such breach of contract itself—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of it."

The defendant did not inquire as to the contents of the box, but, when it received the box for quick transportation, what may more reasonably be supposed to have been in the contemplation of both parties than that, if by reason of the negligence of the defendant the package was so delayed in transmission as to become wholly or partially worthless, for any reason, the carrier who for a price had stipulated for prompt and safe delivery should be liable for any damage or loss caused by such negligence? A carrier by ordinary freight train is insurer of safe delivery and within reasonable time. An express company guarantees the promptest possible delivery, and is liable for any deterioration in the value of the goods caused by failure to fill that contract.

Affirmed.

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(324)

PEARL AIKEN v. RHODHISS MANUFACTURING COMPANY.

(Filed 11 December, 1907.)

1. Negligence—Employer and Employee—Safe Place to Work—Instructions.

Action for personal injuries received by plaintiff in falling a distance of 18 feet from a platform 6 by 14 feet, whereon he was required to help move some skids, with the defendant's man in charge. While holding one end of the skid and walking backwards, the plaintiff's feet slipped on the platform, wet with a rain that had just fallen, and he fell, thus causing the injury. There was evidence that the platform was too narrow for the height and had no banisters—that it was not built right: *Held*, there was sufficient evidence that the defendant employer had failed to provide a reasonably safe way for the plaintiff to perform the service required of him, and it was proper for the court below to refuse to allow the defendant's motion as of nonsuit.

2. Same—Safe Place to Work—Employer and Employee—Assumption of Risk—Knowledge of Employer.

Under proper evidence, it was not error in the court below to charge the jury "that the plaintiff will not be deemed to have assumed the risk growing out of the failure of defendant, his employer, to provide railings for a platform from which plaintiff was injured in falling, unless the danger arising from such defect was obvious and so imminent that no man of ordinary prudence, and acting with such prudence, would have incurred the risk of doing the work," when the evidence disclosed that, though the work was dangerous, the plaintiff had not for any appreciable length of time known of the platform or used it without the railings.

3. Same—Assumption of Risk—Evidence—Employer and Employee—Age of Employee.

When the evidence shows that the plaintiff was about 16 years of age and was required to do certain work in such manner as to make the danger obvious in so doing, and the plaintiff had not known of or used the dangerous place for any appreciable length of time, it was proper for

the judge to charge the jury to consider any evidence tending to show that he was a youth and inexperienced, and to answer the issue as to the assumption of risk in the negative.

4. Same—Evidence—Safe Place to Work—Subsequent Construction.

In an action for damages arising out of the negligent failure of defendant to provide railings for a platform from which plaintiff fell and was injured while working in the course of his employment, it was error in the court below to admit evidence that, since the injury, the defendant had caused the railing to be provided for the platform, when the complaint alleges that the platform "was constructed" and negligently left without the railing.

APPEAL from *Guion, J.*, at June Term, 1907, of BURKE. (325)

Action for damages for personal injury sustained by plaintiff while in the employment of defendant corporation. Plaintiff, about 16 years of age, while in the discharge of his duties as employee of defendant company, fell from a platform 6 feet wide, 14 feet long, and about 18 feet from the ground. The platform extended from a door in the cloth room, leading to a side-track of the railroad at a point opposite a short platform of similar width extending from the cloth or store room by skids or pieces of plank or lumber laid across from one to the other, and then taken up, so as to leave the side-track clear. The alleged negligence consisted in the failure of defendant to furnish a safe way to plaintiff, in that there was no railing or banister on the side of the platform to protect employees and prevent them from falling. Plaintiff testified that he was in the employment of defendant a week before the injury; that he was away from the mill a week and returned to work. The door was made by cutting down a window and building a platform or gangway therefrom. This was done while plaintiff was at home. He was hurt the first day he returned to work. When he returned to the mill the morning he was injured he passed over the gangway and went into the door. It was then dry; it rained after he got to the mill. He thus describes the manner in which he was injured: "Mr. Christopher Rhodes was in charge. He called me out to lay some skids back. It had rained after I had gone into the room. He called me to move skids. The platform was wet. He went to end towards warehouse and told us to move skids; so we picked up one and Rhodes the other. We moved it back towards the mill; my back was towards the mill; I was walking backwards towards the mill, (326) about midway of gangway. My feet slipped and I fell off; nothing to make my feet slip, only it was wet; planks were wet. When my feet slipped I went off gangway 15 or 20 feet to the ground. I was unconscious for a few minutes." The remainder of his testimony related to the manner and extent of the injury.

Doc Aiken, a witness for plaintiff, testified that he helped to build the platform. "It was not built right. I built it the way they told me. It was too narrow for the height and had no banisters. . . . They haul cloth over it—not cotton." He was asked by plaintiff whether or not a railing had been built around the platform since the accident. The court admitted the question and answer over defendant's objection. Exception. Witness said there was a railing around the platform, which he described. The same question was asked another witness and admitted over defendant's objection. He said: "There has been a change—a railing put around each side." Defendant excepted.

Defendant introduced evidence tending to show that the injury was caused by plaintiff's own negligence. It also pleaded assumption of risk.

The court submitted the following issues:

"1. Was plaintiff, Pearl Aiken, injured by the negligence of defendant, as alleged?

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

"3. Was there an assumption of risk on the part of the plaintiff?

"4. What damage has plaintiff sustained?"

At the close of the entire evidence defendant moved for judgment of nonsuit. Motion denied and defendant excepted. Defendant requested the court to instruct the jury that there was no evidence showing actionable negligence. The court refused, and defendant excepted.

The court, at plaintiff's request, instructed the jury: "It was (327) the duty of the defendant company to furnish a safe place or platform for Pearl Aiken where it required him to work, and if the defendant required him to move planks or skids along an uncovered platform, it was its duty to so construct it as to render it reasonably safe for said Pearl Aiken to perform any labor which it or its vice-principal commanded and required him to perform on said platform." Defendant excepted.

The court, at the request of the plaintiff, instructed the jury: "The plaintiff, Pearl Aiken, will not be deemed to have assumed the risk growing out of the failure of the defendant to provide such railing and safeguards as described above along the margin of said platform, unless the danger arising from such defect was obvious and so imminent that no man of ordinary prudence, and acting with such prudence, would have incurred the risk of assisting Christopher Rhodes to remove the skids or planks along said platform, and the burden is upon the defendant to show that Pearl Aiken voluntarily assumed the risk incident to the conditions surrounding him; and it is not enough to make good this defense to show merely that he worked on, knowing the danger; but it is necessary for such purpose for the defendant to show that the construction of said platform was so grossly and clearly defective that the

employee, Pearl Aiken, must have known of the extra risk and have voluntarily and knowingly assumed it; [and it is the duty of the jury, in passing upon the question whether Pearl Aiken voluntarily and knowingly incurred an imminent risk of injury growing out of the condition of the platform when he was working upon it, to consider any evidence tending to show that he was a youth and inexperienced, and the jury would find accordingly in passing upon the issue submitted, and would respond to the third issue 'No.']" To so much of the foregoing instruction as is embraced in brackets the defendant excepted.

There were several instructions in regard to the alleged con- (328) tributory negligence of plaintiff. They are noted in the opinion. There was a verdict for plaintiff. Judgment and appeal.

Avery & Avery and Self & Whitener for plaintiff.
Avery & Ervin for defendant.

CONNOR, J., after stating the case: We concur in his Honor's ruling on the motion for judgment of nonsuit. There was ample evidence of negligence on the part of defendant in failing to provide a reasonably safe way for plaintiff to perform the service required of him. The failure to provide the platform or gangway with a railing approaches very closely to negligence *per se;* it clearly justified the jury in finding that it was dangerous. We also concur with the instruction given in regard to the alleged assumption of risk. If the plaintiff had for any appreciable length of time used the platform without the railing, the danger was so obvious that we would be compelled to hold that he was barred of recovery. In view of the peculiar circumstances under which the injury was sustained, the age and inexperience of plaintiff, we are of the opinion that his Honor correctly instructed the jury in that respect. We are constrained, however, in view of the decisions of this Court and the almost uniform opinion of text-writers based upon decisions of other courts, to order a new trial, by reason of the error committed in admitting the evidence of the change made in the platform after the injury was sustained by plaintiff. In *Lowe v. Elliott,* 109 N. C., 581, it is plainly held that such evidence is incompetent, and the reasons therefor stated by *Shepherd, J.* This case was cited and approved in *Myers v. Lumber Co.,* 129 N. C., 252. While it is said in *Lowe v. Elliott, supra,* that there may be peculiar cases in which such testimony is admissible, we find nothing in this record taking the case out of the general rule. It was suggested that the testimony was competent to show that the platform was unfinished at the time of the injury, thereby making the negligence of defendant con- (329) sist in directing the plaintiff to work on it in an incomplete, unfinished condition. A careful examination of the pleadings and the evidence fails to sustain the suggestion. The complaint alleges that the

platform "was constructed," etc., and that defendant had negligently and carelessly left the said gangway without banisters. The plaintiff's witness, Doc Aiken, built the platform and testified in regard to its construction. He made no suggestion that it was unfinished. It is impossible for us to conjecture how much weight the jury attached to the fact that the railing was placed on the sides after plaintiff was injured, and in this condition of the case we have no other course open to us than to direct a

New trial.

Cited: *West v. Tanning Co.*, 154 N. C., 49; *Shaw v. Public Service Co.*, 168 N. C., 620; *Lynch v. Veneer Co.*, 169 N. C., 172; *Yarborough v. Geer*, 171 N. C., 336, 337; *McMillan v. R. R.*, 172 N. C., 856; *Taylor v. Lumber Co.*, 173 N. C., 117.

L. S. HENDERSON v. J. C. McLAIN.

(Filed 11 December, 1907.)

1. Evidence—Referee's Report—Findings—Appeal and Error—Conclusive.

When there is evidence upon which the findings of fact of the referee, affirmed by the judge below, were made, the rulings of the judge are conclusive on appeal.

2. Courts—Newly Discovered Evidence—Discretion—Appeal and Error.

The refusal of the judge below to set aside the report of the referee on the ground of newly discovered evidence is not reviewable in the Supreme Court.

3. Evidence — Transactions with Dead Persons—Party in Interest—Competency.

The interest in the result of an action to disqualify a witness, under Revisal, sec. 1631 (The Code, sec. 590), must be legal and not merely sentimental. Therefore, the daughter of the plaintiff and granddaughter of the defendant's intestate is a competent witness to testify in behalf of her father in matters not concerning her own interest as distributee and heir at law of the estate of defendant's intestate, her grandmother.

4. Executors and Administrators—Living as a Member of Family—Board.

The estate of the deceased grandmother is not chargeable with board, in the absence of contract, while she resided in the family of her deceased daughter as one of them, rendering such services as a grandmother would naturally render to her grandchildren.

5. Executors and Administrators—Living as a Member of Family—Helpless—Contract Implied.

When the grandmother residing in the family of her deceased daughter as one of them became helpless, unable to render any service and altogether a charge, it is the policy of the law that she shall be provided for and properly taken care of, and a promise to pay the necessary cost thereof is implied and is a proper charge against her estate.

APPEAL from *Moore, J.*, at March Term, 1907, of IREDELL. (330)

Action for recovery for services rendered defendant's intestate.

The cause was referred, by consent, to Dorman Thompson, Esq., as referee, who found as facts that, prior to 1886, the defendant's intestate, Mrs. E. J. Wilson, was living with her daughter, Mrs. J. F. McLain, in Mooresville, N. C. In that year Mr. McLain failed in business and removed to the mountains of North Carolina, and Mrs. Wilson moved, with her trunk, bureau, and personal property, to the home of her son-in-law, the plaintiff, and resided there continuously till her death, in January, 1905. Her daughter, the plaintiff's wife, was then living but in poor health, and died soon after, leaving several small children. Mrs. Wilson continued to live at the home of the plaintiff after the death of her daughter, engaged, until the last eighteen months of her life, with such care of the children "as a grandmother would in a house where there were children." She sat in the room with the family and ate at the table with them. She said: "They are kind and good to me, and I want to help them all I can, and do as much for them as I can, and help manage the children." At the time Mrs. Wilson went to live in the home of the plaintiff she was over 60 years of age, and she died at the age of 82. For the last eighteen months prior to (331) the death of the said Mrs. E. J. Wilson she was practically helpless, being confined to her chair; it was necessary to provide her with a rolling chair, and by reason of this her only means of locomotion was to have her chair rolled around the house by some one. She had to be helped from her chair to the bed; her feet and arms were much swollen, causing her much pain; and, by reason of her condition, it was necessary for the plaintiff or some member of the family, during a great part of the time, to sit up at night with her. The plaintiff slept in an adjoining room to that occupied by the defendant's intestate, with the door open, so that "all she would have to do was to call him and she would have no trouble to get him up." During the time preceding the last eighteen months of her life the condition of the defendant's intestate was better than at any time during said eighteen months. During a part of said time she was in very good health, considering her advanced age of life.

For the last eighteen months prior to the death of the defendant's intestate the food, lodging, care, and attention rendered her by the plaintiff and the members of his family were reasonably worth the sum of $1 per day. For the time preceding the last eighteen months of the life of the defendant's intestate the board, lodging, and care furnished and provided for her by the plaintiff and the members of his family were reasonably worth the sum of $10 per month.

The house in the town of Mooresville, North Carolina, in which the said I. S. Henderson resided with his family, and in which he was residing at the time of this hearing, was given to the wife of the said I. S. Henderson by Mrs. E. J. Wilson. The said Mrs. E. J. Wilson at the same time gave a house and lot in the town of Mooresville, North Carolina, to her daughter, Mrs. J. F. McLain, stating that she wanted
(332) "both daughters to have an equal share." As to whether these gifts were made before or after the time that the said Mrs. E. J. Wilson went to live in the home of I. S. Henderson is not shown in the evidence.

At the time the said Mrs. E. J. Wilson went to live in the home of her son-in-law, I. S. Henderson, there was no express contract entered into between the plaintiff and the defendant's intestate under which the plaintiff was to be compensated for board, lodging, and services rendered to the said Mrs. E. J. Wilson by the said I. S. Henderson and his family, nor was there ever at any time any such contract made and entered into with the plaintiff.

The defendant's intestate never paid the plaintiff anything during her life for board, lodging, care, and attention, but on one occasion some corn and hay, which was worth $25, was turned over to plaintff by Mrs. Wilson's tenant in 1903.

The plaintiff's counsel, upon the hearing, admitted that that part of the claim of the plaintiff for board, lodging, care, and attention provided and furnished for the said Mrs. Wilson arising prior to 1 April, 1903, was barred by the statute of limitations, as contended in the answer of the defendant, and announced that such claim was waived by the plaintiff.

Upon the foregoing finding of facts by the referee the following were his conclusions of law:

That, upon the facts above found, the law implied a contract between the plaintiff and the defendant's intestate, by reason of which the plaintiff was entitled to charge the defendant, as administrator of Mrs. E. J. Wilson, the reasonable value of the board, lodging, care, and attention furnished by said plaintiff to the defendant's intestate; that the plaintiff was entitled to charge the defendant, as administrator of Mrs. E. J. Wilson, the sum of $572, and such charge was allowed, subject to a credit of $25, the account being stated as follows:

(333) DEBITS.

To eighteen months board, lodging, care, and attention, at $1 per day	$547.00
To board, lodging, care, etc., from 1 April, 1903, to 15 June, 1903, at $10 per month	25.00
Total	$572.00

CREDITS.

Three loads of hay and 16 bushels of corn	$ 25.00
Balance due	$547.00

The court overruled all exceptions to the referee's report and rendered judgment for $547 and costs. The defendant appealed.

Armfield & Turner for plaintiff.
McLaughlin & Nicholson and Z. V. Turlington for defendant.

CLARK, C. J. The rulings of the judge below upon the exceptions to findings of fact are conclusive, there being evidence upon such findings. *Dunavant v. R. R.*, 122 N. C., 1001, and cases there cited.

The refusal of the Superior Court to set aside the report of a referee on the ground of newly discovered evidence is not reviewable. *Vest v. Cooper*, 68 N. C., 131; *Faison v. Williams*, 121 N. C., 153.

The exceptions to the overruling by the judge of the exceptions of law present two main questions: First. The competency of the evidence of the daughter of the plaintiff and granddaughter of the defendant's intestate, under Revisal, sec. 1631 (The Code, sec. 590). She is not interested, in a legal sense, in the event of the verdict in behalf of her father, and was competent as a witness for him. She was testifying against (not in behalf of) her own interest, which, as heir at law (334) and distributee of the estate of her grandmother, the defendant's intestate, was that it should not be diminished. *Bunn v. Todd*, 107 N. C., 266, where this section is analyzed. As was said in *Jones v. Emory*, 115 N. C., 158, "Unless the witness bear such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action, he is not disqualified to testify." The interest in the result of an action to disqualify a witness must be legal and not merely sentimental. *Sutton v. Walters*, 118 N. C., 495. The same principle applies to the exception to the testimony of R. H. Neely, also a witness for plaintiff, who was guardian of plaintiff's other children, who are distributees and heirs at law of defendant's intestate.

The other point presented by several exceptions is as to the law applicable to the state of facts found by the referee and confirmed by the court. As it is found that there was no contract for compensation for board and lodging, but that Mrs. Wilson entered the family, became one of them, supervising the children in the place of her deceased daughter, and acting "as a grandmother would in a house where there were children," the law raises no implied contract that she should pay board. Indeed, it is impliedly negatived, as the relation existed for over twenty years, during all which time there was no agreement nor any payment.

The $25 credited in 1903 seems to have been merely for some produce turned over by Mrs. Wilson's tenant to the plaintiff, for which he is accountable, but there is no evidence that it was paid in consideration of board. Most of the claim for board during the time Mrs. Wilson was acting in supervision of the children was conceded by plaintiff to be barred by the statute of limitations, which is pleaded, and the claim was disallowed by the referee, but he has erroneously allowed $25 for board from 1 April, 1903, to 15 June, 1903, which is not barred by the statute. This must be struck out of the account.

(335) As to the board, lodging, and attention during the last eighteen months of her life, during which time Mrs. Wilson was practically helpless and in the condition and requiring the attention found by the referee, there is nothing in the relation of the parties from which it can be justly inferred that such services and attention were to be rendered gratuitously where the party had an estate out of which the plaintiff could reasonably have expected compensation. As long as she was residing in the family as one of them, rendering such services as a grandmother would naturally render to the children of her deceased daughter, the implication, in the absence of contract, is that she was, *pro hac vice,* a member of the family, and that as her company and counsel were not to be charged for, neither was she chargeable with board.

But when she becomes helpless, unable to render any service, and altogether a charge, it is the policy of the law that she shall be provided for and properly taken care of, and for this reason the necessary cost thereof is properly a charge against her estate, if she have one. There is no presumption that such care was gratuitous, but there is an implied contract to pay for it. The burden of her last sickness should not fall upon her son-in-law, at whose house she happened to be, to the total exoneration of the other members of her family, who, as her heirs at law and next of kin, will share in her estate. This is a claim for expense incurred for benefit of the decedent, not for labor and services rendered her, and hence the authorities cited, most of which are reviewed in *Winkler v. Killian,* 141 N. C., 575, are not in point.

The $25 charged for board from 1 April to 15 June, 1903, will be struck out. The judgment will be thus

Modified and affirmed.

Cited: Baggett v. Wilson, 152 N. C., 182; *Bailey v. Hopkins, ib.,* 750; *Mirror Co. v. Casualty Co.,* 153 N. C., 374; *Simmons v. Groom,* 167 N. C., 275; *McGeorge v. Nicola,* 173 N. C., 710.

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JAMES A. AUSTIN v. CITY OF CHARLOTTE.

(Filed 11 December, 1907.)

Negligence—Contributory Negligence—Streets—Safe Condition—City's Liability.

Plaintiff knew that a certain street had been excavated in front of a house he was attempting to visit on a dark night, without a lantern, by going across adjoining lots near the street, and was injured, while feeling his way along in the dark, by the embankment giving way and his falling into the street. At the time of his fall he was endeavoring to go around the end of a hedge and holding to it. In an action against the city for damages, owing to alleged negligence in not keeping its streets in proper or safe condition: *Held*, (1) that the defendant was not required to see that it was safe for plaintiff to traverse a private lot, and was not liable; (2) that the acts of plaintiff amount to such contributory negligence as to bar recovery.

APPEAL from *Ferguson, J.*, at September Term, 1907, of MECKLENBURG.

The plaintiff is a physician, and on the night he was injured he had started to the house of his patient, at No. 1006 North Brevard Street, in the city of Charlotte. Brevard Street had been excavated, and the houses on the east side, including the house of his patient, were left standing from 10 to 12 feet above the level of Brevard Street. The doctor got off the street car at the intersection of Brevard and Thirteenth streets, there left Brevard Street and ascended some steps cut out of the bank, crossed Thirteenth Street and started to his patient's house across the intervening yards. After crossing Thirteenth Street and passing into Yandle's yard, which was the first yard after leaving Thirteenth Street, he struck a hedge of evergreen about midway between the house and the street. It was a dark night and the plaintiff could not see. He knew that Brevard Street, in front of Yandle's yard, had been excavated, and he knew that the bank on the east was very steep, if not perpendicular. When he struck the hedge, he moved along the hedge, not towards the house, where there could have been no (337) danger, but towards the street, which, he knew, had been excavated. When he fell he was sliding his feet along so as to feel his way and not fall into the excavation, and at the same time he was holding onto the hedge as a protection and trying to pull himself around the hedge and get into the sidewalk, which he thought was there. At this point the ground gave way under the plaintiff and he fell into Brevard Street.

At the close of plaintiff's evidence the court granted the defendant's motion for nonsuit, and plaintiff appealed.

Tillett & Guthrie and R. E. Austin for plaintiff.
Pharr & Bell and Hugh W. Harris for defendant.

CLARK, C. J. The plaintiff was not injured by traveling along the street or sidewalk, nor by any defect in the street or so near the street, as to make it dangerous for travel. In fact, the plaintiff was not traveling the street at all. The trouble was, not that Brevard Street was dangerous to travel, but that Yandle's lot was. The city was not responsible for injury sustained by one not traveling its streets. It was not required to see that it was safe for plaintiff to traverse a private lot.

In *Scranton v. Hill,* 102 Pa. St., 378, the plaintiff was passing over a bridge along a public highway and, supposing that he was clear of the bridge (it being in the night-time), turned aside to enter a path which left the highway, and, unfortunately, he turned from the highway before he had reached the path and fell over the edge of the bridge. The Court in that case decided that the following instructions should have been given: "It being the undisputed testimony in this case that the plaintiff elected to leave the traveled street for the purpose of passing over an adjacent lot without the limit of the highway; that, though the right to pass over such adjacent lot may exist so far as to protect the
(338) plaintiff from trespass, yet the safety of the way in which he passed to such adjacent lot is at his own peril; that the defendant is not under any legal obligation to keep such passage to an adjacent lot in safe condition, and therefore the plaintiff cannot recover."

In *Bunch v. Edenton,* 90 N. C., 431, cited by plaintiff, the person was traveling along the sidewalk and fell into an adjacent pit. Here, plaintiff was traveling through a private lot and fell into the street. Besides, the plaintiff was injured by his own negligence. He says that he knew that Brevard Street had been excavated, that he had passed there a short time before, and the work was then going on; that on this night he inquired of a street-car conductor if there were steps up the bank at Starnes' house; that when he got off the car he went up the bank, 12 or 15 feet high, out of Brevard Street, at the railroad; that when he struck the hedge in Yandle's lot he turned toward the street and went along the hedge, feeling his way with his feet. Evidently, at that moment he was aware of the presence of the danger. Thus the plaintiff, on a dark night, without a light, was feeling his way toward the point of danger and taking his chances on being able to get around the dangerous point without harm. Even though the sidewalk had been there—and as to this he says he did not know, but supposed it was there—yet, even then, he knew he was taking chances with danger, because, even with the sidewalk, he was dangerously near the excavation, and he was aware of this, because he says he was sliding his foot along the ground,

and says that he hoped to pull himself around the hedge by holding onto the hedge, and this statement is borne out by the natural fact that he pulled down a part of the hedge with him when he fell. It was a case of the plaintiff knowing of the danger and taking his chances to escape. It would hardly be contended that if this had occurred in the daytime the plaintiff would not have been guilty of negligence. Much more was it negligence for him to take such chances in the nighttime, when he could not see. (339)

In *Walker v. Reidsville,* 96 N. C., 382, the town of Reidsville had made an excavation within about 15 feet of the grounds around the market house, which grounds were used as a public thoroughfare. There were no lights or barriers around this pit or excavation. The plaintiff started to his home in the night, and the grounds around the market place being crowded with people, he started across the lot where the pit was, and fell in and was injured. He stated that, while he knew the pit was there, he was thinking of something else at the time and forgot about the pit. The Court said: "In that case the party injured, in his own wrong, helped to bring the injury upon himself. In a just sense, he injured himself." The Court said, further: "It seems to us that there can be no reasonable question that the plaintiff himself negligently contributed to the severe injury of which he complains, and that his negligence was the direct, helping cause of it. He well knew of the pit, its dangerous character, where it was, and of the passway, 15 feet broad, between it and the market house, out of which he passed. He did not need to go near it at all; he went out of his usual way in doing so. He did not, by mere accident, fall into it as he passed along by it; he unnecessarily and carelessly walked into it. Although he no doubt suffered greatly, he is not excusable for forgetting it. A reasonably prudent and careful man would not forget the presence of such danger in his immediate neighborhood—one that he had seen and observed every day for more than a fortnight and but a few hours before he received the hurt. He was bound to act upon his information and use ordinary care and prudence in shielding and protecting himself from what he knew to be a menacing danger to every one who passed near it. He forgot, and failed to be careful, at his peril and in his own wrong. *Parker v. R. R.,* 86 N. C., 221; *R. R. v. Houston,* 95 U. S., 697; Dillon Mun. Corp., sec. 789; Beach Cont. Neg., 40." In this case (340) the plaintiff knew of the condition of the street, but, by a mistake, went towards it instead of towards the house. He trusted to finding his way at night over a private lot.

The judgment of nonsuit is

Affirmed.

Cited: Darden v. Plymouth, 166 N. C., 494.

ALICE L. WHITE, ADMINISTRATRIX, v. SOUTHERN RAILWAY COMPANY.

(Filed 11 December, 1907.)

Removal of Causes—Joint Tort Feasors—Pleadings—Plaintiff's Election.

When the plaintiff elects to sue two or more joint tort feasors jointly, he has the right to have the case tried for a joint tort, and a separable controversy is not presented, within the meaning of the Federal removal act.

MOTION to remove to the Federal Court, heard by *Cooke, J.*, at April Term, 1907, of BUNCOMBE.

The plaintiff brings this action and alleges that her intestate was killed by the negligence of the defendant Southern Railway Company and its codefendants, D. H. Biddix and S. E. Berry; that it was the duty of the defendant Southern Railway Company to keep its track and right of way in reasonably safe condition, by the exercise of proper care, and this it failed to do, and that by reason thereof the plaintiff's intestate, who was at the time of his death in the employ of the defendant as flagman, and in the careful discharge of his duties on one of the passenger trains of the defendant railway company, was struck by a "post or pole," commonly called a "tunnel warner," which was standing at the west end of Point Tunnel, near the town of Old Fort, and which, by the negligence of the defendants, had been placed too near the track, so that it was dangerous to the plaitniff's intestate and other employees of the said company while in the proper per-
(341) formance of their duties; that the defendants D. H. Biddix and S. E. Berry were section masters, in the employ of the defendant railroad company, and had charge, at the time of the intestate's death, of the section within which the said pole was placed, and they were, as such section masters, charged with the duty of placing and keeping the pole in proper position, which duty they neglected. It is charged that the joint negligence of the defendants caused the intestate's death.

The defendant Southern Railway Company filed a petition for the removal of the case into the Circuit Court of the United States for the Western District of North Carolina, and filed a sufficient bond for that purpose. The petitioner, after making the formal allegation as to diverse citizenship as between it and the plaintiff, alleges that the defendants D. H. Biddix and S. E. Berry were improperly joined as defendants, as they are not necessary or proper parties to the action; that it is perfectly solvent and fully able to pay any judgment recovered in the action, and that its codefendants were wrongfully and unlawfully joined with it as defendants, for the fraudulent purpose of preventing a removal by it of the cause to the Federal court; and it further alleges

that, even if its codefendants are necessary or proper parties, there is a separable controversy as between the plaintiff and the petitioner, which entitles it to the removal. No answer was filed. It appears that the petition for a removal of the case to the Federal court was filed before the complaint. The court, upon the complaint and petition, ordered the cause to be removed into the Circuit Court of the United States. The plaintiff excepted and appealed.

Frank Carter and H. C. Chedester for plaintiff.
Moore & Rollins for defendants.

WALKER, J., after stating the case: This case is governed by the principles stated in *Hough v. R. R.*, 144 N. C., 692. The only difference between the two cases is to be found in the fact that the (342) complaint in this case states with clearness and precision a cause of action against the defendants for a joint tort, and specifically alleges in what the negligence which caused the death of the intestate consists. A plaintiff, as we decided in that case, may sue tort feasors jointly or severally, at his election, and if he elects to sue them jointly, he has the right to have the case tried as for a joint tort, and no separable controversy is presented within the meaning of the removal act. In *Pirie v. Tvedt*, 115 U. S., 41, the Court said: "There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants, acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only does not divide a joint action in tort into separate parts any more than it does a joint action on contract." The cases sustaining this view are all cited in *Hough v. R. R., supra,* and it is not necessary to prolong the discussion of the question. The order of his Honor was made on 24 April, 1907, and the decision in *Hough v. R. R.,* was not published until 27 May, 1907. The court did not, therefore, have that case before it when the order in this case was made. We then decided that a case of joint tort was not removable.

Reversed.

Cited: Tyler v. Lumber Co., 165 N. C., 165.

T. T. LOFTIS, RECEIVER, v. W. B. DUCKWORTH.

(Filed 11 December, 1907.)

Deeds and Conveyances—Interpretation—Trustee—Commissions.

All the relevant provisions of a deed must be construed to ascertain the true meaning of the parties. When the provisions of a trust deed read, "the commissions of the trustee on the amount herein due and payable," etc., and he shall apply the proceeds of sale to the discharge of the debt, etc., "and to the expense of the trust, including 5 per cent commissions to the trustee, and of any other moneys owing from the said parties of the first part, and secured by this deed in trust, and surplus to be paid to the parties of the first part," the trustee is entitled to receive commissions only on the amount of the debt secured.

(343) APPEAL from *Guion, J.*, at August Term, 1907, of TRANSYLVANIA.

This is a controversy submitted without action. As stated in the brief of appellant's counsel, the only point in the case is whether the trustee who sold under the power given to him in the deed of trust from W. J. Wilson is entitled to commissions on the full amount realized at the sale or only on the amount of the debt secured by the deed of trust and the actual expenses of the sale. The deed provides as follows: "When the advertisement herein provided for is begun, the commissions of the trustee on the amount herein secured shall be deemed to be due and payable, and may be collected by him in the same way and manner as other moneys secured by this trust, and he shall convey said land to the purchaser and heirs in fee simple, and apply the proceeds of said sale to the discharge of said debt and interest on the same, and to the payment of the expenses of this trust, including 5 per cent commissions to the trustee, and of any other moneys then owing from the said parties of the first part to the said party of the third part and secured by this deed in trust, any surplus to be paid to the said parties of the first part."

The court held that the trustee was entitled to receive commis-
(344) sions only on the amount of the debt secured ($568), the commissions thereon being $28.40, and directed him to retain the latter amount and the amount of the debt, and to pay the balance to the plaintiff, who owned the land described in the deed of trust. The defendant excepted and appealed.

Welch Galloway for plaintiff.
George A. Shuford for defendant.

WALKER, J., after stating the case: The ruling of the court was clearly right. It is not necessary that we should review the cases decided by this Court in regard to the question of commissions allowable to a trustee acting under a power of sale. Those cases were cited to us, but

they involved questions different from the one presented in this record. They are collated and discussed by *Clark, J.*, for the Court, in *Turner v. Boger,* 126 N. C., 300. The trustee accepted the trust, and is, therefore, bound by the terms of the deed. Although the expression, "the commission of the trustee on the amount herein secured shall be deemed to be due and payable," is found in that part of the deed which relates to an advertised sale which is not made, it was evidently the intention of the parties to fix thereby the amount of the commissions in any event, whether the sale should be made or not. The subsequent expression, when providing for the distribution of the purchase money, namely, "and apply the proceeds of sale to the discharge of said debt and interest on the same, and to the payment of the expenses of this trust, *including 5 per cent commissions to the trustee,*" necessarily refers to the clause immediately preceding it and which we have already quoted. We must construe the deed as a whole, not omitting any one of its provisions, and with a view of ascertaining the true meaning of the parties. So considering it, we are convinced that there was no error in the judgment of the court. There was no point made as to the defendant's right to retain the actual expenses of the sale, though no provision is made for their retention in the judgment. If necessary, the lat- (345) ter may be modified to include them in the amount to be retained by the defendant. We think the rate of commissions was reasonable.

Affirmed.

Cited: Banking Co. v. Leach, 169 N. C., 710.

R. J. HALL, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY.

(Filed 11 December, 1907.)

1. Executors and Administrators—Death by Wrongful Act—Damages—Foreign Administrators.

The cause of action given by Revisal, sec. 59, to executors or administrators of the person whose death is caused by the wrongful act, etc., of another, etc., is given to an administrator, as such, who has duly qualified under the laws of the State of North Carolina.

2. Same—Nonresidents—State Courts.

A nonresident cannot be appointed an administrator, under the laws of our State (Revisal, sec. 5, subsec. 2); and a nonresident administrator appointed in the State of his intestate's residence and domicile cannot, as such, sue in the courts of our State, under the provisions of Revisal, sec. 59.

3. Pleadings—Evidence—Statute of Another State—Judicial Notice.

Statutes of another State will have to be pleaded and proven in this State, for they will not be taken judicial notice of here.

APPEAL from *Councill, J.*, at August Term, 1907, of PERSON.

The plaintiff alleges in his complaint that his intestate, who was a flagman in the defendant's employ, was killed by the negligence of the defendant, on 11 November, 1905, in the county of Caswell, which is in this State, and that at the time of his death he was resident and domiciled in Danville, State of Virginia; that he was appointed administrator of the intestate in Virginia. This action was brought in the Superior Court of the county of Person. The plaintiff is now, and was at the time of his appointment as administrator, resident and (346) domiciled in the State of Virginia. The defendant, in its answer, denied the material allegations of the complaint. At the trial the defendant moved to dismiss the action and demurred, *ore tenus,* upon the grounds, (1) that the plaintiff could not sue in the courts of this State: (2) that he had no right to maintain this action. The court, upon consideration, overruled the motion and demurrer *ore tenus,* and the defendant appealed.

B. S. Royster and E. P. Buford for plaintiff.
F. H. Busbee, W. D. Merritt, and P. H. Busbee for defendant.

WALKER, J., after stating the case: The statute of this State (Revisal, sec. 5, subsec. 2) positively forbids letters of administration to be issued to a nonresident of the State, and it is to be inferred from this enactment, as well as from the course of decisions in this Court, that the policy of the law is well established to the effect that a nonresident administrator cannot sue in the courts of this State. *Butts v. Price,* 1 N. C., 201; *Anon.,* 2 N. C., 355; *Helme v. Sanders,* 10 N. C., 563; *Leak v. Gilchrist,* 13 N. C., 73; *Smith v. Munroe,* 23 N. C., 345; *Moorefield v. Harris,* 126 N. C., 626; *Scott v. Lumber Co.,* 144 N. C., 44. A nonresident who happens also to be an administrator appointed by a court in the State of his and his intestate's residence and domicile may sometimes maintain an action in his own name in another State—as, for instance, to recover property, possession of which he had acquired as administrator and which had afterwards been taken from him; but he sues, not as administrator, but in his individual capacity, upon his own right of possession. *Leak v. Gilchrist, supra.* There are, perhaps, other examples of a like kind. We have held, for instance, that when services are rendered by an attorney at law to an administrator or executor, the latter is liable upon a *quantum meruit,* in his individual and not in his official capacity. *McKay v. Royal,* 52 N. C., 426. See, also, (347) *Tryon v. Walston,* 83 N. C., 90; *Hailey v. Wheeler,* 49 N. C., 159; *Beaty v. Gingles,* 53 N. C., 302; *Keesler v. Hall,* 64 N. C., 60; *Kerchner v. McRae,* 80 N. C., 219. Where he must sue in his representative capacity and recover only by virtue of his office, a foreign ad-

ministrator cannot sue in our courts. Original or ancillary letters of administration must be taken out here. The distinction between his right to sue *as* administrator, when the cause of action belongs to him only in his representative capacity, and his right to sue when it belongs to him as his own, though acquired originally by reason of his being administrator, runs clearly through all the authorities.

The plaintiff contends that he has the right to sue here upon the cause of action alleged in his complaint, because, while he qualified as administrator in Virginia, he is, under our statute, but a trustee of an express trust, and must hold the proceeds of his recovery in trust for those designed in the statute as the beneficiaries of the fund. We cannot agree with the learned counsel who so ably and ingeniously argued for the plaintiff in this view of our statute. We think it was manifestly intended by the statute that the administrator designated by it to sue for the damages in case of a death caused by negligence or other wrongful act should be one appointed by a court of this State, in the proper county. The act provides as follows: "Whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors, or successors, shall be liable to an action for damages, to be brought, within one year after such death, by the executor, administrator, or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect, or default causing the death amount in law to a felony. The amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be (348) disposed of as provided in this chapter for the distribution of personal property in case of intestacy." Revisal, sec. 59. Can any one read that section and conclude that the Legislature intended that the action which is authorized by it could be brought by a foreign administrator? The fair presumption would be that, when the act refers to an administrator, it means, nothing else appearing, a domestic administrator, especially when the decisions of the highest Court of the State have uniformly established that a nonresident administrator cannot sue in the courts of this State. The statute requires the suit to be brought by the administrator in his official and not in his private or individual capacity. He must sue *as* administrator. Can words convey that idea any more distinctly and clearly than those used in the section quoted? We have virtually held in two cases that this is the true construction of the act. *Hartness v. Pharr,* 133 N. C., 566, and *Vance v. R. R.,* 138 N. C., 460. In the case last cited we said: "When it was provided that the action should be brought by the administrator, it was intended that he should

be appointed by the clerk of the county where the death occurred, if the decedent was a nonresident, domiciled in another State and without assets situated here." But in *Vance v. R. R., supra,* we also cited with approval from *Brown v. R. R.,* 97 Ky., 348, as follows: "Within the line of the general statutes on this subject, defining when, under what circumstances, and what courts shall have power to appoint an administrator for a nonresident decedent, it may be that the matter sued for in this action is not a debt or demand belonging to or owned by the decedent at the time of his death. Neither is it strictly personal estate of the decedent. But, beyond these general statutes, we think the particular statute applicable to cases of this kind, wherein the right of action is expressly given to an administrator, necessarily implies the right to have an administrator appointed by the local courts for
(349) this purpose alone, if there be no other necessity or right or authority for such an appointment. And we deem the court of the county where the injury was done and where the man died the proper court to entertain such jurisdiction." *In re Estate of Mayo,* 60 S. C., 415, was cited with approval, as follows: "The statute is remedial and should be liberally construed, so as to accomplish its object. We, therefore, hold that the statute creating a right of action which cannot be enforced except by an administrator, and providing for a special distribution by said administrator of the proceeds, will warrant the probate court of the county where the intestate was killed in granting administration for the purpose of enforcing such right of action. This view is well supported by authority in other jurisdictions." But we think that the decision in *Hartness v. Pharr, supra,* is more to the point. We held in that case than an administrator appointed in this State should bring the action and distribute the funds, according to the laws of this State, where the death occurred, although there had been a prior administration in South Carolina, where the intestate was domiciled at the time of his death. The contest there was distinctly between the administrator appointed in South Carolina and the plaintiff in the suit, who was afterwards appointed administrator in this State. *McDonald v. McDonald,* 96 Ky., 209, was cited and approved as an authority supporting our decision. Further considering the question (at p. 573), we said: "In no possible view, as we have said, can this fund be regarded as a part of the assets of the estate of the deceased. The cause of action never accrued to him and never came into existence until his death, and the recovery thereon cannot be considered or treated as any part of his estate. The doctrine that the succession to personal property is determined by the law of the intestate's domicile, as laid down in *Leak v. Gilchrist,* 13 N. C., 75, which was cited in the brief of the defend-
(350) ant's counsel in support of his position, has no application to this

case. The personal representative in South Carolina, in right of the next of kin, succeeded to no property, because his intestate died leaving none, unless he had effects other than money now claimed as a part of his estate. To require the defendant Pharr (the administrator appointed in this State) to pay the money to the South Carolina administrator would be in direct contravention of our statute."

This suit is of the first impression in our courts. We were cited to several cases decided in other jurisdictions which apparently give some color to the plaintiff's contention. We have examined them carefully and find none which is supported by any reasoning or argument cogent enough to induce us to depart from the principle established by this Court for many years, and we think that one of the cases cited (*Boulden v. R. R.,* 205 Pa. St., 264) would seem, in principle at least, to conflict with the plaintiff's contention. In that case the Court held that, as the administrator was appointed in New Jersey and the cause of action, to wit, the negligent killing, occurred in that State, the action might well be brought in Pennsylvania without an ancillary administrator. But the decision is expressly based upon the fact that the administrator had qualified in the State where the cause of action arose. That is not the fact in this case, and the reasoning of the Court, which is predicated solely upon the existence of the fact in that case, would seem to be direct authority against the plaintiff. This Court, as we have shown, has for many years held, contrary to the last proposition mentioned in that case, that ancillary administration in this State is necessary. We find that the authorities in the other States are very conflicting, and those in favor of the defendant's contention are much better reasoned than those seeming to hold a contrary doctrine. In *R. R. v. Brantley,* 96 Ky., 297, a Court of exceptional ability and learning has considered the question at length and presented convincing reasons for the conclusion reached, that an administrator appointed in one State cannot sue (351) in another to recover damages for a death caused by negligence, unless specially authorized by statute so to do; that the plaintiff not only has no capacity to sue in such a case, but has no cause or right of action. The opinion in that case is not only well considered, but is in perfect harmony with what this Court has held to be the law for many years in regard to the right of an administrator appointed in one State to sue in the courts of another.

It was said by counsel for the plaintiff that the law of Virginia was similar in its provisions to our statute, but there is nothing in the record to show what the law of that State is. We do not take judicial notice of the statutes of another State. They must be pleaded and proven. *Hooper v. Moore,* 50 N. C., 130; *Knight v. Wall,* 19 N. C., 125; *Moore v. Gwynn,* 27 N. C., 187; *S. v. Jackson,* 13 N. C., 564; *Hilliard v. Out-*

law, 92 N. C., 266. "If not pleaded and proven, the presumption, under the authorities, is that the unwritten or common law of another State is the same as the unwritten or common law in this State." *Lassiter v. R. R.,* 136 N. C., 89; *Griffin v. Carter,* 40 N. C., 413; *Brown v. Pratt,* 56 N. C., 202. But not so as to a statute. This suit, though, is brought upon *our* statute, and the statement that the statutes of the two States upon the same subject are alike was made in order to show that the distribution of the fund recovered would necessarily be made according to our law. Our statute would control the distribution of the fund, whether the statutes of the two States are alike or not (*Hartness v. Pharr, supra*); so that it is immaterial to consider the similarity of the two enactments, even if there were evidence of it. We have held in the last cited case that the fund must not only be distributed according to the law of this State, but by an administrator appointed here, and that is conclusive against the plaintiff's right to recover in this action. Would it be right to permit the plaintiff to recover and take the fund out of the State and compel the distributees resident in the State, or (352) the University if there are no distributees, to go to Virginia to litigate their rights with the foreign administrator, if he should refuse to pay over the fund upon demand? The State looks after and safeguards the interests of its own citizens in such cases, and will retain property here in *custodia legis,* in order that they may be protected in the assertion of their rights. This is but simple justice to them, and a duty, therefore, that rests upon the State. *Holshouser v. Copper Co.,* 138 N. C., 248; *Hartness v. Pharr, supra; Vance v. R. R., supra.*

Every argument based upon right and justice, as well as the best considered authorities, are opposed alike to the plaintiff's contention that he can sue or recover in the courts of this State. We have discussed the plaintiff's right to sue, as we were asked to do by counsel, in order to put an end to the litigation, if he has no such right; but, as the ruling of the court upon the motion to dismiss was not appealable, and in the then state of the case the demurrer *ore tenus* was equivalent to such a motion, we must dismiss the appeal. Clark's Code (3 Ed.), p. 738, and cases cited.

Appeal dismissed.

Cited: S. c., 149 N. C., 109; *Fann v. R. R.,* 155 N. C., 140; *Carriage Co. v. Dowd, ib.,* 317; *Batchelor v. Overton,* 158 N. C., 398; *Bennett v. R. R.,* 159 N. C., 347; *Hartis v. Electric Co.,* 162 N. C., 242; *Renn v. R. R.,* 170 N. C., 146; *Dowell v. Raleigh,* 173 N. C., 200.

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LUMBERTON IMPROVEMENT COMPANY v. BOARD OF COMMISSIONERS OF ROBESON COUNTY.

(Filed 12 December, 1907.)

1. Legislature—Records—Error—County Bond Issue Act—Constitutional Requirements.

An act of the Legislature authorizing Robeson County to issue bonds, passed in accordance with Article II, section 14, of the State Constitution, except it was recorded in one branch of the Legislature as Washington instead of Robeson County, under circumstances to clearly prove that Robeson County was intended, is valid.

2. Same—County Bond Issue — Constitutional Question—Taxation—Exemption.

A legislative enactment authorizing a county to issue bonds, exempting them from taxation, is not void on that account. The question of their being exempt can only be tested when the owner thereof refuses to list and pay taxes on them.

APPEAL from *Jones, J.*, at Chambers, ROBESON, on 2 December, 1907.

This is a controversy without action to test the validity of certain bonds issued by defendant for the purpose of building a courthouse in the county-seat of said county. From the judgment rendered plaintiff and defendant appealed.

The facts sufficiently appear in the opinion of the Court.

E. M. Britt for plaintiff.
McIntyre, Lawrence & Proctor for defendant.

BROWN, J. As the matters excepted to by plaintiff and defendant in their respective appeals are so closely connected, we will consider the entire case in this opinion.

1. The plaintiff contends that the act of the General Assembly authorizing the issue of the bonds was not passed in accordance with Article II, section 14, of the Constitution.

It is admitted that the bill passed the Senate under its proper title and in strict accord with the constitutional requirements. But it is averred that on one of its readings in the House it is not (354) recorded under its proper title, although the "ayes" and "noes" were duly recorded. The record of its passage through the House of Representatives is as follows:

HOUSE OF REPRESENTATIVES,
23 February, 1907.

Bills and resolutions are introduced, read the first time and disposed of as follows:

By Mr. McRae: H. B. 1483, a bill to be entitled An act to authorize the commissioners of Robeson County to issue bonds to build a courthouse. Placed on the calendar.

HOUSE OF REPRESENTATIVES,
25 February, 1907.

Bills and resolutions on the calendar are taken up and disposed of as follows:

H. B. 1483, a bill to be entitled An act to authorize the commissioners of Robeson County to issue bonds to build a courthouse. Passes its second reading by the following vote and takes its place on the calendar. Those voting in the affirmative are: [Here follow the names of seventy-two members voting "Aye".] Those voting in the negative, none.

HOUSE OF REPRESENTATIVES,
27 February, 1907.

Bills and resolutions on the calendar are taken up and disposed of as follows:

H. B. 1483, a bill to be entitled An act to authorize the commissioners of Washington County to issue bonds to build a courthouse. Passes its third reading by the following vote and is ordered sent to the Senate without engrossment. Those voting in the affirmative are: [Here follow the names of sixty-seven members who voted "Aye".] Those voting in the negative, none.

(355) HOUSE OF REPRESENTATIVES,
4 March, 1907.

Mr. Byrd, from the Committee on Enrolled Bills, reports the following bills and resolutions properly enrolled, and they are duly ratified and sent to the office of the Secretary of State:

H. B. 1483, S. B. 1316, An act to authorize the commissioners of Robeson to issue bonds to build a courthouse.

It is apparent that the words "Washington County" were intended for Robeson County, and are mere clerical errors. The number of the bill in its passage through the House, and the fact that the same bill, bearing House number 1483, passed the Senate under its proper title and was duly enrolled under said title and its proper House and Senate numbers, clearly proves that the words "Washington County" were intended for Robeson County. In addition, it is admitted that no bill whatever was introduced during that session of the General Assembly providing for the issue of bonds for Washington County.

2. It is contended by defendant that his Honor erred in declaring the act void because the bonds are exempted from taxation. In this

view we fully concur. The act is not void on that account, and the bonds are not thereby invalidated. On the contrary, they are perfectly valid. Whether they can be exempted from taxation can only be tested when some portion of them may be found in the possession and ownership of some citizen of this State who refuses to list and pay taxes on them. The judgment of the Superior Court upon the plaintiff's appeal is affirmed, and the costs of that appeal are to be taxed against the plaintiff.

The judgment of the Superior Court upon the defendant's appeal is reversed, and the costs of that appeal shall be taxed against plaintiff.

In plaintiff's appeal judgment affirmed.

In defendant's appeal, reversed.

Cited: Tyson v. Salisbury, 151 N. C., 472; *S. v. Perry, ib.,* 664; *Murphy v. Webb,* 156 N. C., 409.

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H. W. WHARTON v. CITY OF GREENSBORO.

(Filed 14 December, 1907.)

1. Statutes—Interpretation—Cities—Credit—Bond Issue—Special Purpose.

When two statutes are consistent they should be construed together. An amendment to a city charter, made by the Legislature in 1907, conferring upon the city the power to issue bonds in a certain prescribed manner, providing, among other things, "that nothing herein contained shall be so construed as to prevent or forbid said board of aldermen to incur reasonable liabilities by way of contract, which may be paid off and discharged out of the current revenues to accrue during the term of office of said board, or to borrow reasonable sums of money when necessary to anticipate the collection of taxes or revenues to accrue during said term of office," is not repugnant to and does not repeal, by implication, so far as an indebtedness contracted for a special purpose is concerned, the provisions of Revisal, sec. 2977, making it unlawful for any city, etc., "to contract any debt, pledge its faith, or loan its credit," etc., "for any special purpose, to an extent exceeding in the aggregate 10 per cent of the real property," etc.

2. Same — Interpretation—Constitutional Law—Cities—Credit—Special Purpose.

Revisal, sec. 2977, limiting the power of any city, etc., in contracting debt, is not in conflict with Article VII, section 7, of the State Constitution, and is valid. The interpretation of the words "special purpose," as contained in the statute, embraces all forms of debt not within the legitimate necessary expenses of the municipality.

3. Same—Interpretation—Cities—Debt—Necessary Expenses—Bonds.

A bond issue to pay the floating debt of a city, incurred for the legitimate necessary expenses of the city government, is valid and not within the meaning of the prohibitive words of Revisal, sec. 2977, as to an issuance thereof for a special purpose.

ACTION heard before *Long, J.*, and a jury, 8 November, 1907, in GUILFORD, brought by plaintiff in behalf of himself and of all other taxpayers, against the city of Greensboro, to enjoin the city, its officers and agents from issuing and selling certain bonds, amounting in the aggregate to $155,000, and from levying any tax to pay any of
(357) such indebtedness.

His Honor heard the application for an injunction, declined to grant same, and gave judgment against plaintiff, who thereupon appealed to the Supreme Court.

A. M. Scales for plaintiff.
Thomas J. Shaw for defendant.

BROWN, J. The allegations of fact set out in the complaint are all admitted by the answer, and from these it appears that the bonded indebtedness of the city of Greensboro exclusive of the proposed issue, is $700,000, in addition to a floating indebtedness of $125,000; that the present assessed tax valuation of all real and personal property within said city is $7,736,490; that at the time of the election authorizing the issue of bonds the total tax valuation was $6,500,000.

It appears that the board of aldermen, on 28 December, 1906, passed an ordinance, in the manner required by the city charter, authorizing the issue of $30,000 of bonds for the special purpose of "equipping, altering, and furnishing a school building or buildings for the city." This bond issue was duly approved by a majority of the qualified voters at an election held 12 March, 1907. On 13 July, 1907, the board duly adopted an ordinance authorizing the issue of $125,000 in bonds, which issue was duly approved at an election held according to law on 8 October, 1907. It is admitted that the purpose of issuing the $125,000 in bonds is to pay off the floating debt of the city. This floating debt, it is admitted, is evidenced by notes issued by the board, without an election, for the building of streets, improvement of waterworks already owned by the city, and other actually necessary expenses of running the municipal government.

It is admitted that the proposed issue of bonds exceeds the
(358) limit fixed by law upon the cities and towns of the State, as embodied in the Revisal of 1905, which reads as follows:

"SECTION 2977. *Limited to 10 per cent of assessed value.* It shall be unlawful for any city or town to contract any debt, pledge its faith,

or loan its credit for the construction of railroads, the support or maintenance of internal improvements, or for any special purpose whatsoever, to an extent exceeding in the aggregate 10 per cent of the assessed valuation of the real and personal property situated in such city or town."

The defendant contends that its amended charter enacted by the General Assembly of 1907 repeals, by implication, the above restriction upon its power to contract debts, and the following clauses in said charter are cited as sustaining defendant's contention:

"SECTION 100. That among the powers hereby conferred on the board of aldermen, they may issue bonds only after they have passed an ordinance by a three-fourths vote of the entire board at two separate regular meetings, submitting the question of issuing the bonds to a vote of the people, and a majority of the qualified registered voters have voted in favor thereof. Thirty days notice shall be given of such election in some newspaper published in Greensboro, at which election those who favor creating the debt shall vote 'Approved,' and those who oppose it shall vote 'Not Approved.'"

The above section was amended at the same session by adding the following:

"The said board shall not have power to create any indebtedness unless authorized to do so by an election called and held in the manner hereinbefore specified: *Provided,* that nothing herein contained shall be so construed as to prevent or forbid said board to incur reasonable liabilities by way of contract which may be paid off and discharged out of the current revenues to accrue during the term of office of said board, or to borrow reasonable sums of money when necessary to anticipate the collection of taxes or the revenues to accrue during the (359) said term of office, as aforesaid."

1. We will consider first the $30,000 bond issue to be devoted to a special purpose, admittedly not a necessary municipal expense.

We are unable to agree with the learned counsel for the defendant that the sections of the defendant's charter quoted herein, and enacted two years after the Revisal, repeal the latter so far as the defendant is concerned. It is not contended that it does so in express terms, but only by implication. We fail to find any repugnancy between the general law and the defendant's charter. The two statutes are entirely consistent and may easily stand together. *Simonton v. Lanier,* 71 N. C., 498; *S. v. R. R.,* 141 N. C., 853.

Section 2977 of the Revisal is a general law, of great wisdom, intended to prevent municipal corporations from plunging headlong into debt. The sections quoted from the charter do not confer an unlimited power to contract debts upon the defendant, but prescribe the method to be

pursued. The limitation imposed by the general law is still binding upon the defendant, so far as indebtedness contracted for a special purpose is concerned. A special purpose, within the meaning of the act, embraces all forms of debt not within the legitimate necessary expenses of the municipality. There can be no doubt that the General Assembly may thus restrict the powers of municipal corporations to contract debts. They are but instrumentalities of the State for the administration of local government, and their powers may be enlarged, abridged, or withdrawn entirely at the pleasure of the Legislature. *Lilly v. Taylor,* 88 N. C., 490; *Jones v. Comrs.,* 137 N. C., 592. In the well considered opinion of *Mr. Justice Hoke* in the latter case the authorities are collated and the powers and duties of municipal corporations fully discussed.

Article VII, section 7, of the Constitution does not conflict with the limitation imposed by section 2977 of the Revisal. The former (360) is itself in the nature of a limitation upon the powers of municipal corporations to contract debts except for necessary expenses, and does not confer upon them the right to contract debts *ad libitum,* independent of the supervisory power and control of the General Assembly. *Brodnax v. Groom,* 64 N. C., 249; *Jones v. Comrs., supra.*

2. As to the issue of bonds to pay the floating debt of the city, a different question is presented. It is admitted that the floating debt was contracted for the legitimate necessary expenses of the city government. Issuing bonds to pay it is but exchanging one form of indebtedness for another, and is but an extension of the indebtedness at possibly a lower rate of interest. These bonds are not issued for a special purpose, within the meaning of section 2977 of the Revisal, but to pay off and discharge a present valid indebtedness of the city, contracted to pay its necessary expenses, as the board was empowered to do by section 7, Article VII of the Constitution. *Brodnax v. Groom, supra; Faucett v. Mount Airy,* 134 N. C., 125; *Wilson v. Comrs.,* 74 N. C., 748; *Tucker v. Raleigh,* 75 N. C., 274. We are of opinion that this issue is valid.

The cause is remanded, that an injunction may be granted enjoining the issue of the $30,000 in bonds mentioned in the first section of this opinion. Let the costs be equally divided between the appellant and appellee.

Error.

Cited: Cottrell v. Lenoir, 148 N. C., 138; *Hollowell v. Borden, ib.,* 258; *Wharton v. Greensboro,* 149 N. C., 62; *Hendersonville v. Jordan,* 150 N. C., 37; *Burgin v. Smith,* 151 N. C., 569; *Underwood v. Ashboro,* 152 N. C., 642; *Murphy v. Webb,* 156 N. C., 406; *Charlotte v. Trust Co.,* 159 N. C., 392; *Bain v. Goldsboro,* 164 N. C., 104, 105; *Swindell v. Belhaven,* 173 N. C., 3.

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JAMES B. LEE ET AL. v. JOHN R. BAIRD ET AL.

(Filed 14 December, 1907.)

1. Supreme Court Rules—Constitutional Law.

The Supreme Court has the sole right to prescribe rules of practice and procedure therein. Article I, section 8, Constitution of North Carolina.

2. Same.

The rules of practice in the Supreme Court prescribed by the Court are mandatory and not directory; and if Rules 19 (2) and 21, relating to the duty of appellant in stating the exceptions, etc., relied on, etc., are not complied with, the appeal will be dismissed, except in rare instances and unless cogent excuse is shown.

(The necessity of these rules discussed by HOKE, J., showing that such are necessary for an understanding of the case on appeal and the administration of justice among the parties.)

EXCEPTIONS to report of referee, heard by *Cooke, J.*, at March Term, 1907, of BUNCOMBE.

There were a large number of exceptions to the report and to the rulings on questions of evidence by both parties, and on the hearing some of them were sustained, some overruled, and others modified; and thereupon the court gave judgment that defendants go without day and recover costs, and plaintiffs appealed.

In apt time and proper form defendants moved to dismiss plaintiffs' appeal, assigning causes, among others, as follows:

"(1) The exceptions are not 'briefly and clearly stated and numbered,' as required by the statute (Revisal, sec. 591, and Rule 27 of this Court).

"(2) The errors alleged are not stated 'separately in articles numbered,' as required by the statute (Revisal, sec. 591).

"(3) The exceptions relied on are not grouped and numbered immediately after the end of the case on appeal, as required by Rules 19 (2) and 21 (140 N. C., 660).

"(4) Appellants did not file their exceptions in the office of (362) the clerk of the court below within ten days after the end of the term at which the judgment appealed from was rendered."

Merrimon & Merrimon for plaintiffs.

Merrick & Barnard, F. A. Sondley, and D. R. Millard for defendants.

HOKE, J. For the reasons above stated, the Court is of opinion that the plaintiffs' appeal should be dismissed, and it is so ordered.

These rules, published in 140 N. C., 660, have been adopted after extended and careful reflection, and because they were found necessary

to a proper performance of the public business of the Court, not alone with reference to its reasonable dispatch, but in giving the Court a more accurate understanding of causes on appeal, thereby greatly aiding us to an intelligent consideration of the questions presented, and to a determination of controversies on their real merits. Furthermore, a proper compliance with the rules here in question (Rule 19, subdiv. 2, and Rule 21) is fair and just to opposing counsel, giving them, as it does, an opportunity to know the positions they will be required to discuss, to the end that they will be better prepared to aid the Court in making true deliverance on the rights of parties, the purpose which we all have most earnestly at heart. And it may be well here to note that in many instances it would be no fair observance of Rule 19, subdivision 2, simply to make excerpts from a stenographer's notes of any and every exception taken in the hurry and excitement of a *nisi prius* trial; but counsel for appellant, in "grouping and stating" the exceptions relied on by him, should give the matter his earnest consideration, that the Court may also have the benefit of his judgment and fuller information as to the real questions involved in the controversy. It is not our desire or purpose to be unreasonable or exacting in respect to this last (363) suggestion. It is made, rather, with the view of impressing upon counsel our deep sense of the importance and value of their giving to the Court, in its decisions of these causes on appeal, the benefit of their reflection and careful preparation.

There is no doubt of the power of the Court to establish the rules in question, and in numbers of decisions we have expressed an opinion both of their necessity and binding force. Thus, in *Walker v. Scott,* 102 N. C., 490, *Merrimon, J.,* for the Court, said: "The impression seems to prevail, to some extent, that the rules of practice prescribed by this Court are merely directory—that they may be ignored, disregarded, and suspended almost as of course. This is a serious mistake. The Court has ample authority to make them. Const., Art. IV, sec. 12; The Code, sec. 691; *Rencher v. Anderson,* 93 N. C., 105; *Barnes v. Easton,* 98 N. C., 116. They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the Court will certainly see that they have effect and are duly observed whenever they properly apply." And in *Horton v. Green,* 104 N. C., 403, the present *Chief Justice,* in speaking of one of our rules of practice, said: "We have stated this much to show the reasonableness and necessity of the rule, for the power of the Court to make it is as clear as that it is our duty to rigidly adhere to it after it is adopted, and enforce it impartially as to all cases coming under its operation. The late *Chief Justice Pearson* was accustomed to say of the rules of Court: 'There is no use in having a scribe unless you cut up to it.'" And the

same judge, in *Calvert v. Carstarphen,* 133 N. C., 27, 28, on this subject, said: "The rules of this Court are mandatory, not directory." *Walker v. Scott,* 102 N. C., 487; *Wiseman v. Comrs.,* 104 N. C., 330; *Edwards v. Henderson,* 109 N. C., 83. As the Constitution, Art. I, sec. 8, provides that "The legislative, executive, and supreme judicial powers of the Government ought to be forever separate and distinct from one another," the General Assembly can enact no rules of prac- (364) tice and procedure for this Court, which are prescribed solely by our rules of Court. *Herndon v. Ins. Co.,* 111 N. C., 384; 18 L. R. A., 547; *Horton v. Green* 104 N. C., 400; *Rencher v. Anderson,* 93 N. C., 105. The practice and procedure in the courts below the Supreme Court are prescribed by the Legislature, as authorized by the Constitution, Art. IV, sec. 12 (*S. v. Edwards,* 110 N. C., 511), except that, as to such lower courts, when the Legislature fails to provide the practice and procedure in any particular, this Court can do so. The Code, sec. 961; *Barnes v. Easton,* 98 N. C., 116; *Cheek v. Watson,* 90 N. C., 302. In England, when Parliament abolished the forms of action and the entire former system of pleading, practice, and procedure, it did not itself enact a code of procedure and practice, but empowered the judges of the higher courts to do this for all the courts. Consequently, the entire practice and procedure, civil and criminal (including all forms), in the mother country are formulated in "rules of practice" prescribed by the judges, and England has the simplest and most advanced system of practice of all English-speaking countries. In this State the rules of Court are the sole code of practice of this Court, and are to be observed as strictly as the legislative provisions as to practice in the lower courts.

The rules, as they now stand, have been formulated for more than two years. For more than eighteen months they have been published in our reports (140 N. C.) and in several decisions, notably in *Davis v. Wall,* 142 N. C., 451, and *Marable v. R. R.,* 142 N. C., 564, the Court has given decided intimation that if they are not complied with the appeal would be dismissed, except in rare instances and unless cogent excuse were shown.

There could not well be a case that better illustrates the necessity of the rule we are discussing than the one now before us. The action was commenced in 1898, and the record, including the case on appeal, contains 177 pages of printed matter. In 1902 a reference was (365) had, and, after an appeal to the Supreme Court, the order was proceeded with and an account was taken and report made. The report, containing forty-two findings of fact and forty-four conclusions of law, was heard by the judge on numerous exceptions filed by both of the parties, and on the hearing, as stated, many of these exceptions were overruled, some sustained, and others modified, and final judgment was

entered that defendants go without day. In the case on appeal, containing 79 pages, the court, at the instance of plaintiffs, and as required to present their objections, embodies a large amount of the testimony taken before the referee, and throughtout this testimony appear many objections to the rulings of the referee on questions of evidence. It is well-nigh impossible to gather from the record and case on appeal the questions which the parties regarded as material or important. Certainly it could only be done, if at all, as the result of much labor and an amount of time that would seriously interfere with the proper consideration of other causes that demand and are entitled to consideration.

We are of opinion, as stated, that the motion to dismiss should be allowed, and it is so ordered.

Appeal dismissed.

Cited: Burnett v. Kuykendall, post, 597; *Thompson v. R. R.,* 147 N. C., 416; *Ullery v. Guthrie,* 148 N. C., 418; *Smith v. Mfg. Co.,* 151 N. C., 262; *Pegram v. Hester,* 152 N. C., 766; *Jones v. R. R.,* 153 N. C., 421; *Keller v. Fiber Co.,* 157 N. C., 576; *Wheeler v. Cole,* 164 N. C., 380; *Porter v. Lumber Co., ib.,* 396; *Register v. Power Co.,* 165 N. C., 235; *Carter v. Reaves,* 167 N. C., 132; *Taylor v. Hayes,* 172 N. C., 665.

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(366)

J. D. HOLSTEIN AND WIFE v. PHILLIPS & SIMS.

(Filed 14 December, 1907.)

1. Public Inn—Hotel—Definition.

A public inn or hotel is a public house of entertainment for all who choose to visit it, and where all transient persons who may choose to come will be received as guests, for compensation; and it does not lose its character as such by reason of its being located at a summer resort or watering place, or by taking some as boarders by a special contract or for a definite time.

2. Guest—Boarder—Definition.

When one is received at a public inn or hotel and entered as a guest, without any prearrangement as to terms or time, but on the implied invitation held out to the public generally, he is a transient only—a guest and not a boarder—and entitled to recover of the defendant innkeeper as such.

3. Innkeeper—Public Inn—Hotel—Liability—Insurers.

The keeper of a public inn or hotel is responsible to his guest for the safety of the latter's goods, chattels, and money which he has with him for the purposes of the journey, when placed *infra hospitium,* and he is an insurer to the extent that he must make good all loss or damage, from

any cause, except the act of God or the public enemy, or the fault of the guest himself, or his agents or servants, unless such keeper shall comply with the statute (Revisal, ch. 42, secs. 1909 *et seq.*) by keeping posted in every room of his house occupied by guests, and in the office, a printed copy of this chapter and of all regulations relating to the conduct of the guests.

APPEAL from a justice's court, before *Guion, J.*, at May Term, 1907, of HENDERSON.

A jury trial having been formally waived, the facts were agreed upon, and it was made to appear that, in 1905, the defendants were the proprietors of the Imperial Hotel, where they were running a general public hotel business during the summer as a summer resort, under the firm name of Phillips & Sims. While they were so engaged the *feme* plaintiff stopped at said hotel, under the facts, circumstances, and conditions as set out in her testimony and in the testimony of her husband, and it is agreed that the entire facts in controversy, as they are (367) set out in the following deposition, are admitted by the defendants to be true:

"That on or about 9 August last I was stopping at the Imperial Hotel, in the town of Hendersonville, North Carolina, in Room No. 63. I had been, previous to that time, in Room No. 106, but a few days before the robbery occurred I moved to Room No. 63. On the evening of 9 August, 1905, just before supper-time, I put my purse in my hand satchel, the said purse containing $6 in money, being a $5 bill and a silver dollar. There was also in the purse New York exchange for $30, payable to my order. There was nothing else in the purse of any value. After placing the purse in the hand satchel, I placed the hand satchel in the tray of my trunk, in Room No. 63, in the Imperial Hotel, at Hendersonville, North Carolina. There was also a jewelry case in the tray of the trunk by the hand satchel, then and there, and the jewelry case contained several valuable pieces of jewelry, and, among others, one diamond ring, consisting of a cluster of thirteen diamonds, arranged in the shape of a diamond. With these things in the trunk, I shut the trunk, locked it, then went out of the room, No. 63, and locked the door to it, taking the room key and the trunk key, which I had attached together on a key ring and chain; went downstairs and went to the office of the hotel and delivered the said keys, ring and chain to Mr. H. G. Lawrence, the night clerk then and there in charge of the office of the said hotel, who took charge of the keys. I then went into the dining-room, ate supper, stayed in the dining-room about one-half an hour, and went from there to the front porch, stayed out there until about 9 o'clock, then went to the office and called for my keys, which were delivered to me by the said Mr. H. G. Lawrence. I then went back to my room on a small errand, and came back downstairs, locking the door after me

and bringing the same keys, including the trunk and door keys, in my hand, down into the ballroom, where I remained until about
(368) 10:30 o'clock, holding the keys in my hand all the time. I did not participate in the dancing, but remained in my seat as a spectator, and never for one moment parting with the possession of my keys since receiving them from the clerk. After leaving the ballroom, I went back to my room, about 10:30 o'clock, to retire. I unlocked the door which I found locked. I then undressed, after having taken the keys from out the door on the outside and putting the door key in the lock on the inside of my room, locking the same. Just before retiring I opened my trunk, which I found locked just as I had left it locked, in order to get the valuables to put under my pillow. I then discovered that my purse had been stolen from the trunk, containing the $6 and the New York exchange. I then looked into the jewelry case and found the said diamond ring above described had been stolen and taken away form said trunk and room. I never received any notice from any source and saw no notice for me to place my valuables in the safe or elsewhere for safekeeping, until after the loss of my property, when Mr. Phillips informed me of the existence of such notice on the register, when I had informed him of his liability, which was some time after I had informed him of the loss."

On cross-examination the witness said that when she first reached the hotel Mr. Phillips, one of the defendants, agreed to board her at $10 per week, and she was to stay two or three weeks, but that no agreement was made for any particular time, and after the robbery the witness moved to another place; that witness never deposited any money or valuables in the office of the hotel before the robbery, and was not aware of the fact that it was her duty to do so, and witness never saw any card in the room or elsewhere giving notice that this was required, and never said so to defendants or any other persons. It was not shown that any copy of the statute regulating the liability of innkeepers was posted in the plaintiff's room or elsewhere in the hotel (Revisal,
(369) ch. 42).

There was an agreement to the effect that, in case defendants were liable for plaintiff's loss, judgment should be entered for $141, with interest from 15 September, 1905.

On the facts stated, the court, being of opinion with plaintiffs, rendered judgment for the amount agreed upon, and defendants excepted and appealed.

Smith & Schenck for plaintiffs.
Charles French Toms for defendants.

HOKE, J. The decisions of this State are to the effect that, in the absence of statutory regulation, the keeper of a public inn, or hotel, which is the modern and more frequently used term, is responsible to his guest for the safety of the latter's goods, chattels, and money, when placed *infra hospitium* and which he has with him for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause except the act of God or the public enemy, or the fault of the guest himself or his agents or servants. *Quinton v. Courtney,* 2 N. C., 40; *Neal v. Wilcox,* 49 N. C., 146. This exacting requirement of the common law, established in a ruder time, from reasons of public policy, in many instances and under modern conditions may operate with great harshness, and the matter has been very generally made the subject of legislation by which the landlord's obligations have been limited, both in kind and amount It is so with us. Revisal, ch. 42, secs. 1909 *et seq.* The statute, however (section 1913), itself provides as follows: "Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this chapter and of all regulations relating to the conduct of guests. This chapter shall not apply to innkeepers or their guests where the innkeeper fails to keep such notices posted." This provision not having been complied (370) with by defendants, the principle of the common law obtains; and if, on the facts agreed, the relation between these parties was that of guest and proprietors of a public inn or hotel, defendants are responsible for the loss of the goods.

The counsel for defendants, in his learned argument, contends that the principle stated does not apply to the facts presented here, because, as he insists, they show that his clients were not at the time proprietors of a public inn, but were the keepers of a boarding-house at a summer resort; second, that if this were not true, the plaintiff's position at the time of the loss was not that of guest, but of boarder. And he argues that in either case defendants could only be held responsible for the loss of goods occasioned by the negligence of defendants or their employees, and, no such negligence having been shown or suggested, the recovery had by plaintiff cannot be sustained. The doctrine is sound. The keeper of a boarding-house—that is, one who reserves the right to select and choose his patrons and takes them in only by special arrangement, and usually for a definite time—is not responsible as an insurer, and, even at a public inn or hotel, one who holds the position as a regular boarder or lodger can only hold the proprietor to the exercise of ordinary care on the part of himself and his employees. But we are of opinion that the facts do not bring the present case within the principle. An inn or hotel has been properly defined as a public house of enter-

tainment for all who choose to visit it. It is this publicly holding a place out as one where all transient persons who may choose to come will be received as guests for compensation that is made the principal distinction between a hotel and a boarding-house in many well considered decisions, and the above definition is given with approval in *Pinkerton v. Woodard,* 33 Cal., 557; *Walling v. Porter,* 35 Conn., 183, both cases citing the decision of *Wintermunte v. Clark,* 5 Saunders, 247.

(371) We think the facts in the case agreed bring the defendants' house clearly within the definition. It is so stated in express terms, "that defendants were proprietors of the Imperial Hotel, where they were running a general hotel business during the summer as a summer resort," and the attendant circumstances support this statement, and show, too, that, being a hotel for the general reception and entertainment of all who might choose to come, the position of plaintiff at the time was that of guest, giving her the right, unless the statute on the subject had been complied with, to hold defendants as insurers. A guest is defined as a "transient person who resorts to and is received at an inn for the purpose of obtaining the accommodations which it purports to afford"; whereas a boarder, in reference to the distinction we are discussing, is one who abides at a place. The term carries with it the idea of residence, partaking to some extent of the nature of one's home for the time being. The relation arises by special contract, and usually for a definite time. Thus, in 16 A. & E. Enc. (2 Ed.), it is said: "The essential difference between a boarder and a guest at an inn lies in the character in which the party comes—that is, whether he is a transient person or not, and, accordingly, one who stops at an inn as a transient or a guest, with all rights, privileges, and liberties incident to that station. On the other hand, one who seeks accommodation with a view to permanency, as to make the place his home for the time being, is not a guest, but a boarder. The length of his stay, however, is not of itself ordinarily decisive, for he will continue to be a guest as long as he remains in the transitory condition of that relation." An application of these definitions to the facts will clearly establish, as heretofore stated, that the position of *feme* plaintiff on this occasion was that of guest. She came to the hotel from her home in South Carolina for a short stay; she was a stranger to the parties defendant, and entered as a guest, so far as appears, without any pre-

(372) arrangement as to terms or time, but on the implied invitation held out to the public generally. She was there for no definite time, and, in our opinion, she was transient in every sense of the term and within every reason that gave her the right to the protection on which she insists. And where this is true, all the authorities—cer-

tainly those having the better reason—are to the effect that the mere fact that she was to pay board by the week, or even at a reduced rate, does not alter her position as guest or deprive her of the right to hold defendants as insurers. *Fay v. Improvement Co.,* 93 Cal., 253; *Beale v. Posey,* 72 Ala., 323.

These facts are entirely different from those which appear in *Meacham v. Galloway,* 102 Tenn., 415, an authority much relied upon by defendants. In that case *McAllester, J.,* delivering the opinion of the Court, thus stated the facts regarded as essential, upon which the ruling was predicated: "(1) Plaintiff was a neighbor. (2) He came at a fixed rate. (3) He came for a definite time," and specified that he should be located with the families who were regular boarders, and not as transient. And, further on in the opinion, the judge quoted with approval from *Horner v. Harvey,* 3 New Mex., 197: "When he ceases to be a traveler, or a transient, or a wayfaring man, and takes up a *permanent* abode, even in an inn, he ceases to be an object of the law's special solicitude, and is no longer a guest, but a boarder; no longer a traveler, but a citizen." As we interpret this authority, it is not in conflict with the decision we make in the case before us. And the same may be said in regard to the case in our own Court of *Neal v. Wilcox, supra,* some citations from which case are made by counsel as militating against plaintiff's right to recover. That decision involved the question as to whether mules in a drove could be considered as goods and chattels of a guest *infra hospitium,* and so entitled to the protection belonging to such property. The eminent judge placed his decision on correct grounds, and the comments in his opinion cited by counsel are not relevant to any facts existent here. And as to the doc- (373) trine sometimes stated in general terms and referred to by defendants in support of their position that the common-law obligation of landlord does not apply to keepers of hotels at summer resorts and watering places, this general statement is a deduction from decisions on facts widely varying from those presented here.

In *Bonner v. Welborn,* 7 Ga., 307, this being one of the decisions relied on to support the position, *Nesbitt, J.,* delivering the opinion, after defining an inn, thus refers to the facts of the case before the Court: "Now, under this (it is submitted) correct legal view of innkeepers, was the plaintiff in this case an innkeeper? Was that his business? His business was to rent his houses to families or persons who might contract with him for their occupancy. They are not his guests; they are, beyond dispute, his tenants, and he their landlord. His business was to furnish board, lodging, and attention. But to whom? To the wayfaring world? No. But to persons who might resort to his healthful fountains and salubrious locality for a season—that is, for

the fall and summer months. They were not his guests for a day, or night, or week, but his lodgers or boarders for a season." Thus it will be seen that this doctrine, insisted on by defendants in reference to keepers of hotels at summer resorts and watering places, applies only to boarding-houses proper at such places, and exists by reason of the fact that the persons received were taken by express arrangements for entertainment and at a certain rate, and usually for a protracted stay, and does not and was never intended to apply to one who conducted, as in this instance, a general hotel business. Such a house of public entertainment does not lose its character as such by reason of its being located either at a summer resort or a watering place. The views we have expressed, and which we hold to be controlling, will be found approved and sustained in well considered decisions of other courts of supreme jurisdiction. *Washington v. Johnston,* 4 Wash., 393; *Beale v.* (374) *Posey,* 72 Ala., *supra; Pinkerton v. Pike,* 100 Mass., 495; *Norcross v. Norcross,* 53 Me., 163; *Hancock v. Rand,* 94 N. Y., 1; *Palace Car Co. v. Lowe,* 28 Neb., 239, reported also in 6 L. R. A., 809, and generally in 16 A. & E. Enc., *supra;* 22 Cyc., 1069 *et seq.;* Beale on Hotels and Innkeepers, etc. These authorities are decisive against the defendants' position and establish that the judge below made a correct ruling in holding that defendants were responsible for plaintiff's loss.

There is no error, and the judgment of the court below for the amount agreed is

Affirmed.

Cited: S. v. McRae, 170 N. C., 713.

J. C. TISE v. WHITAKER-HARVEY COMPANY.

(Filed 14 December, 1907.)

1. Public Way—Alley—Adverse User—Dedication.

The right to a public way cannot be acquired by adverse user, and by that alone, for a period short of twenty years. When it is dedicated to the public, the time of user becomes immaterial.

2. Same—Alley—Dedication—Intent, Implied.

A dedication of a public way, and the intent to do so, may be either in express terms or implied from the conduct on the part of the owner, though an actual intent to dedicate may not exist, and, when once accepted by the public, the owner cannot recall the appropriation.

3. Same — Alley—Dedication—Intent—Acceptance—Evidence—Questions for Jury.

The evidence tended to show, with other evidence conflicting, that the owner of the land sought to be established as a public alley moved back

his fence so that the land could be and was used by the public generally as an alley. His acts and conversation tended to show that he regarded it as such. An abutting owner made improvements of such nature as to so indicate it, and it was used by the public both in passing and working it, all with the knowledge of the defendant or its grantor: *Held*, evidence sufficient to go to the jury upon the questions of dedication and acceptance.

APPEAL from *Moore, J.*, and a jury, at September Term, 1907, (375) of FORSYTH.

At the close of plaintiff's evidence in chief, and again at the close of the entire evidence, there was a motion for nonsuit, under the statute. The latter motion was allowed by the court, and plaintiff excepted and appealed.

A. H. Eller and Lindsay Patterson for plaintiff.
Watson, Buxton & Watson and Manly & Hendren for defendant.

HOKE, J. This is an action by plaintiff to obtain a permanent injunction restraining defendant from obstructing an alley, alleged to be a public way, and thereby causing special damage to plaintiff as an abutting owner. The case was before us at the last term, on an appeal by defendant from refusal of the court below to discharge a preliminary restraining order which had been issued in the cause, and it was sent back on a ruling that there were serious questions raised as to the existence of facts making for plaintiff's recovery, and evidence tending to show that the alley in question was a public way and that its obstruction, as intended and undertaken by defendant, if allowed to go on, would cause special damage to plaintiff as one of the abutting owners. The cause coming on for hearing below, on the issues indicated as material in the former opinion, on motion by defendant, entered regularly under the statute, the action was dismissed, the court holding that there was not sufficient testimony to carry the case to the jury, and in this we think there was error.

It is well understood with us that the right to a public way cannot be acquired by adverse user, and by that alone, for any period short of twenty years. It is also established that if there is a dedication by the owner, completed by acceptance on the part of the public, or by persons in a position to act for them, the right at once arises, and the time of user is no longer material. The dedication may be either in express terms or it may be implied from conduct on the part of (376) the owner; and, while an intent to dedicate on the part of the owner is usually required, it is also held that the conduct of the owner may, under certain circumstances, work a dedication of a right of way on his part, though an actual intent to dedicate may not exist. These principles are very generally recognized and have been applied with us

in numerous and well considered decisions. *Milliken v. Denny,* 141 N. C., 224; *S. v. Fisher,* 117 N. C., 733; *Kennedy v. Williams,* 87 N. C., 6; *Boyden v. Achenbach,* 79 N. C., 539; *Crump v. Mims,* 64 N. C., 767; *S. v. Marble,* 26 N. C., 318; Elliott on Roads and Streets (2 Ed.), secs. 121, 122, 123 *et seq.* In treating of this subject this last author says: "An implied dedication is one arising by operation of law from the acts of the owner. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written." And further, on the question of intent, in section 124: "It is essential that the donor should intend to set the land apart for the benefit of the public, for it is held, without contrariety of opinion, that there can be no dedication unless there is present the intent to appropriate the land to the public use. If the intent to dedicate is absent, then there is no valid dedication. The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose." And again in section 126: "A misconception of the true meaning of the rule that the intent to dedicate
(377) must be clearly shown has, it seems to us, carried some courts to erroneous conclusions. While it is true that this intent must always appear to exist, it is not true that it must always in fact exist in the mind of the owner. . . . These familiar examples serve to show that in many instances it is the apparent and not the real intent that the law regards. In one of the familiar maxims of the law is expressed a principle that should be applied in cases of dedication, and that is, that a man is presumed to intend the usual and natural consequences of his acts. There is no reason why sound general principles, found to be wise and salutary in other instances, should not apply to dedications."

It is not considered desirable in an appeal of this character to dwell upon the testimony relevant to the issue which makes for plaintiff's position, nor to state it in detail; but, speaking in general terms, we are of the opinion that a proper application of the principles stated to the facts and attendant circumstances requires that the question of dedication in this case should be determined by the jury; and on this question the moving back of the fence and throwing out of this alley, so that it could be and was used by the public generally, the conversation and acts of the owners in respect to it, the nature and extent of the improve-

ments being made by Tise at the time, and the kind of access likely to be required for their reasonable and proper enjoyment, the use of the alley by the public, both in passing and in working same, if there was such working, to the knowledge of the Ogburns, or under circumstances where such user must have come under their observation, these and other considerations may be submitted as relevant to the inquiry; for if the intent on the part of the Ogburns in moving back the fence and making place for this alley was to appropriate the same to the public, such an intent would be allowed its proper and pertinent force, though the motive may have been to oblige and accommodate Tise.

As stated in the former opinion, there is much evidence on (378) the part of defendant contradicting that of plaintiff and tending to show that there has never been any dedication of this alley to the public, and that any and all user of the same, either by individuals or the public, has been permissive and never adverse. And it is especially urged upon the Court that the written paper under which Tise makes his present claim gives clear indication that no dedication to the public was understood or intended by either party. This and other pertinent matters tending to sustain defendant's claim should be submitted for the consideration of the jury on some issue determinative of the rights of the parties litigant; but they do not justify the action of the court in dismissing plaintiff's case, under the statute. For this error there will be a new trial, and it is so ordered.

New trial.

Cited: *Moore v. Meroney,* 154 N. C., 163; *S. v. Haynie,* 169 N. C., 280; *Supervisors v. Comrs,* 169 N. C., 549; *Wheeler v. Construction Co.,* 170 N. C., 429; *Board of Health v. Comrs,* 173 N. C., 254.

W. C. PENLAND v. J. E. BARNARD ET AL.

(Filed 14 December, 1907.)

1. Deeds and Conveyances—Probate in Another State Defective—Validating Statutes.

When no vested rights are impaired, a deed dated in 1869 is not incompetent evidence upon the ground of a defective probate, showing the acknowledgment of the grantor and his wife, and her privy examination, taken before the clerk of a certain county court of Tennessee, with the seal of that court affixed thereto, apparently the seal of his office, the same being validated by Laws 1883, ch. 129; Laws 1885, ch. 11; The Code, sec. 1262; Revisal, sec. 1022.

2. Same—Probate, Defective—Validating Statutes—Constitutional Law.

The Legislature has the constitutional right to enact statutes making valid deeds theretofore invalid by reason of defective probate, when no vested rights are impaired.

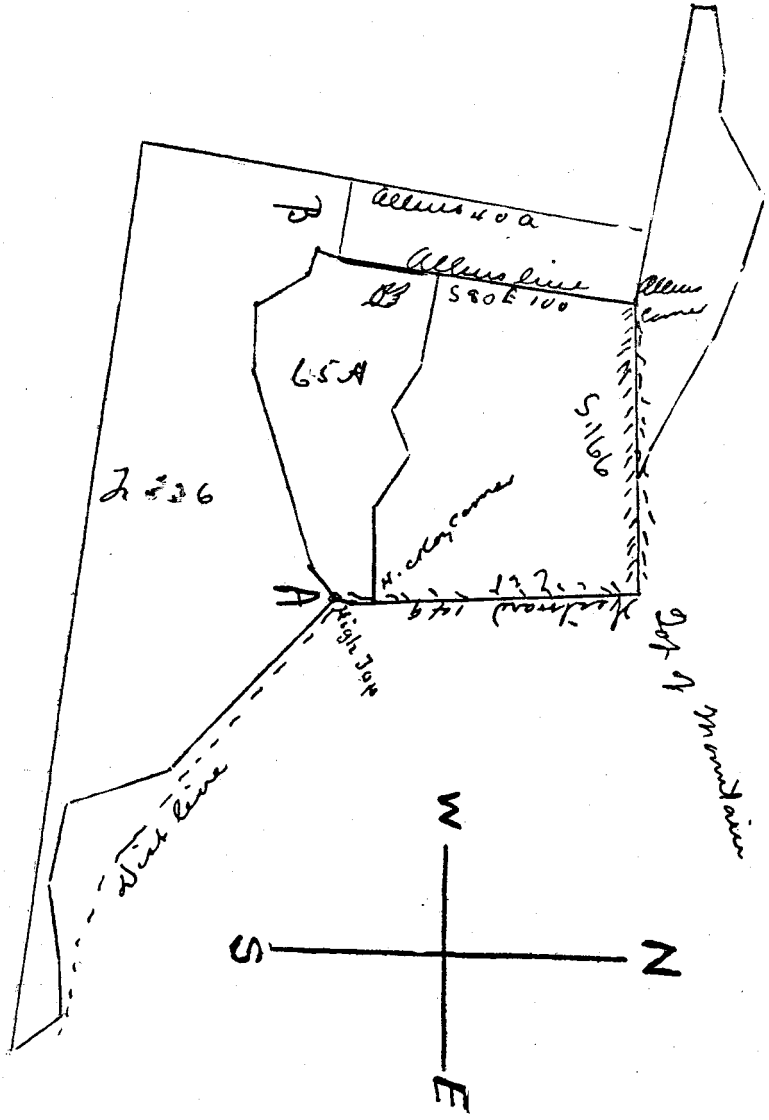
(379) APPEAL from *Moore, J.*, at September Term, 1907, of FORSYTH.

The facts sufficiently appear in the opinion.

Axley & Axley, Ben. Posey, and E. B. Norvell for plaintiff
Dillard & Bell for defendants.

WALKER, J. This is an action in the nature of trespass *quare clausum* for cutting timber. The solution of the controversy depends upon the true location of the tract of land containing 100 acres which was excepted from the deed of Wilkerson to Eaves, dated 3 August, 1869, for the land which had theretofore been conveyed to S. P. Wilson; and the location of that tract of 100 acres depends, in its turn, upon whether its southern boundary line is at A B, as indicated on the map and as contended by the defendants, or at C D, as contended by the plaintiff. There was evidence upon which the jury were well warranted in deciding, as they did, that the line was at C D, the timber having been cut below that line, if the verdict was correct in fact and in law.

The defendants objected to the introduction of the deed from Wilkerson to Eaves, upon the ground of a defective probate. The acknowledgment of Wilkerson and his wife, and her privy examination, were taken before Samuel Hunt, clerk of the county court of Cleveland, Tennessee, and the seal of that court, which appears to be the seal of his office, is affixed thereto. This probate would be insufficient to authorize the registration of the deed, and the objection would have been good but for the several acts of the Legislature relating to such probates and validating the same. Laws 1883, ch. 129; Laws 1885, ch. 11; The Code, sec. 1262; Rev., 1022. The original act of 1883 allowed probates to be taken by a notary or a clerk of a Superior Court in another State and certified under the official seal of such notary or Superior Court. By the act of 1885 the words "Superior Court" are stricken out and the words "court of record" substituted, so that it will read, as amended, "a clerk of a court of record." The act, as originally enacted and amended
(381) and as inserted in The Code and in the Revisal, further provided that a deed so proved and certified, "with the certificate of its having been registered" in the proper county, should be a sufficient registration of the same, "and such proof and registration shall be adjudged good and valid in law." That such legislation is constitutional where it does not affect vested rights cannot now be questioned. The able and learned opinion of the present *Chief Justice* in *Barrett v. Barrett,* 120 N. C., 127, which is well sustained by authority, fully demonstrates the power of the Legislature to enact it, and clearly defines the limitations upon that power. See, also, *Anderson v. Wilkins,* 142 N. C., 154. We do not understand how the defendants are in a position, with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respect to the title conveyed by the Wilkerson deed, to challenge the vadidity of the act. The deed was properly admitted in evidence. This seems to have been the main contention of the defendants. We have examined very carefully the other exceptions of the defendants and have found them to be without merit. The rulings as to evidence, even if not correct in themselves, did the defendants no harm. There must not only be error in order to reverse a judgment in this Court, but prejudicial error. We do not mean to imply that any of those rulings were not correct. We think they were right. Besides, the finding of the jury has rendered some of them immaterial.

The charge of the court was substantially responsive to the defendant's prayers for instruction, and covered the material points of the case. The defendants, in our opinion, have no just or legal ground to complain of the proceedings below. The pivotal question was the location of the true dividing line between the land of the parties, and that was largely a question of fact. Under a correct charge from the court, the jury have found that it is the "black" line and not the "red" line, and, this being so, the plaintiff has established the trespass.

No error.

Cited: Bullock v. Oil Co., 165 N. C., 68.

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(382)

ERNEST S. BURNS v. JOHN F. McFARLAND.

(Filed 14 December, 1907.)

1. Appeal and Error—Injunction—Findings of Fact—Review.

The Supreme Court may review the findings of fact made by the court below, on appeal from an order refusing or continuing an injunction to the hearing, and is not concluded by reason there given by the court for its decision.

2. Contracts—Specific Performance—Abandonment.

Specific performance will not be enforced under a contract respecting the sale of hotel furniture and the assignment of a lease on the hotel, when it appears that the lease was only assignable with the written consent of the owner, that the plaintiff has never applied to him for such consent, and in other ways, by his conduct, has clearly indicated the purpose of abandonment.

3. Same—Specific Performance—Abandonment—Injunction—Receiver—Damages.

When it appears that the defendant had contracted to sell to plaintiff certain hotel furniture and assign a lease on the hotel, that the plaintiff had, by his conduct, clearly indicated the purpose of abandonment of his right, and that defendant had sold a part interest to another, who, with

him, was conducting the hotel in question, specific performance will not be decreed, and an interlocutory order refusing to continue an injunction to the hearing and appoint a receiver will be affirmed; but plaintiff will not be estopped from proceeding to recover damages in proper instances.

MOTION to show cause, etc., heard by *Moore, J.*, on 6 August, 1907, at chambers in Asheville, BUNCOMBE County.

Judgment for defendant. Plaintiff appealed.

The facts sufficiently appear in the opinion.

Merrimon & Merrimon for plaintiff.

Glenn & Sale for defendant.

WALKER, J. The plaintiff alleged in his complaint that the defendant agreed to sell him certain furniture in the Stoner Hotel, situated in Asheville, the price to be ascertained as soon as an inventory could be taken and the invoices examined, and that when this was done the defendant would assign to him an unexpired lease he then had of (383) said hotel and a new lease which the defendant would get from Stoner, the owner of the hotel, for the next year. On 10 June, 1907, the defendant gave the plaintiff a receipt for $1 "on account of the sale of the Stoner Hotel." Without setting out the evidence, it appears to us therefrom that the plaintiff failed to comply with his part of the contract and clearly abandoned the same, and that thereafter the defendant sold a one-third interest in the furniture to one J. L. Page for a valuable consideration, Page having no notice of the prior contract between the defendant and the plaintiff. The latter applied for an injunction to restrain the defendant from exercising any control over the premises and from conducting the business of a hotel thereon, and also prayed for a specific performance of the contract. The defendant and Page are now partners, engaged in conducting the hotel business in the Stoner building. The lease by Stoner to the defendant contained a stipulation that it should not be assigned or transferred without the written consent of Stoner, and he has never consented in writing to any assignment or transfer of the same, nor has the plaintiff ever applied to him for one. The motion, upon the pleadings and affidavits, was denied, and plaintiff appealed.

This Court, on appeal from an order refusing or continuing an injunction to the hearing, can review the findings of fact made by the court below. *Jones v. Boyd,* 80 N. C., 258; *Evans v. R. R.,* 96 N. C., 47; *Roberts v. Lewald,* 107 N. C., 305. His Honor held that Page was a purchaser for value and without notice, and, therefore, acquired a good title as against the plaintiff, and that, consequently, the defendant could not be compelled to specifically perform his contract, as he could not convey the title (*Sprinkle v. Wellborn,* 140 N. C., 163), and that the plain-

(384) tiff's remedy was by an action for damages for a breach of his contract. *Winders v. Hill,* 141 N. C., 694; *Sprinkle v. Wellborn, supra.* Without reciting the facts in detail, we are convinced by the clear weight of the evidence that the plaintiff not only failed to comply with his contract, if he had one, but that he abandoned and intended to abandon the same. Rights acquired by contract may be relinquished or abandoned either by agreement or by conduct clearly indicating such a purpose. *Falls v. Carpenter,* 21 N. C., 237; *Faw v. Whittington,* 72 N. C., 321; see, also, *Redding v. Vogt,* 140 N. C., at p. 567, and cases there cited. We are not concluded here by the reason given in the court below for its decision. If there is any valid and sufficient ground supporting the judgment and appearing in the record, we will adopt it and affirm the judgment. The order of the court below was right, upon the facts of the case, and we approve it. The plaintiff is not estopped by this decision from proceeding against the defendant to recover damages for any breach of the contract, if he can show that he made one and has not disabled himself from performing it, or otherwise committed a breach of it. We are only passing on the facts ascertained from *ex parte* affidavits, for the purpose of reviewing the interlocutory order of the judge upon the motion of the plaintiff to continue the injunction to the hearing and to appoint a receiver. *Carter v. White,* 134 N. C., 466; *Solomon v. Sewerage Co.,* 142 N. C., 439. It is not necessary to examine the reason assigned by the learned judge who presided at the hearing for the purpose of passing upon its correctness, as we find abundant reasons, apart from it, for approving the ruling.

Affirmed.

Cited: Faust v. Rohr, 166 N. C., 201.

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(385)

J. O. BOWEN v. J. C. KING AND C. J. HARRIS.

(Filed 14 December, 1907.)

1. Claim and Delivery—Possession—Pleadings—Damages.

While an action of claim and delivery for the possession of personal property cannot be maintained unless the defendant had the possession at the time of the commencement of the action, such is not necessary for the recovery of damages when, from the perusal of the entire pleadings, it is evident that the demand was not intended to be for the possession, but to recover damages caused by reason of the wrongful seizure and detention of the property.

2. Same—Procedure—Former Action—Damages—Different Action.

While plaintiff could have had his damages assessed in a former action of claim and delivery, brought by him for the wrongful seizure and detention of his property under an attachment in a suit brought by defendant against another (Revisal, sec. 570), he was not required to take this course, but, after regaining possession, could, in another action, recover damages for the injury done thereby.

3. Same — Attachment — Wrongful Seizure—Mortgagor—Possession—Procedure.

When, under an attachment in an action brought by defendant against another who was his debtor, plaintiff's personal property was seized and wrongfully detained, it is no defense that the plaintiff was a mortgage debtor of the other person in possession, whose property was the subject of the levy. The right of the mortgagee in the property was simply that of a creditor, and his interests as a creditor could only be levied on in the hands of the mortgagor in possession, as directed by provisions of Revisal, sec. 767, to be collected and applied under the direction and supervision of the court.

4. Measure of Damages—Pure Tort—Consequential Damages.

When, under a levy upon the goods of the debtor of defendant, the plaintiff's property has been wrongfully seized and detained, to his damage, the wrongful act is a "pure tort," and the wrongdoer is responsible for all the damages directly caused by his misconduct, and for all indirect and consequential damages which are the natural and probable effect of the wrong, under the facts as they existed at the time the same was committed, and which can be ascertained with a reasonable degree of certainty.

5. Measure of Damages, Consequential—Duty of Plaintiff—Reducing Damages.

In an action for the recovery of damages, owing to the wrongful seizure and detention of plaintiff's property, it is incumbent upon the injured party to do what he can in the exercise of due diligence to avoid or lessen the consequences of the wrong; and for any part of the loss incident to such failure no recovery can be had.

6. Same.

In an action for damages, brought by plaintiff for the wrongful seizure and detention of his teams, by which he claims a loss of profits under a contract he had with another, the damages awarded by the jury may be on the basis of profits he could have made during the time his work was necessarily interrupted; and, if this is allowed, he should not have, in addition, the direct damages arising from a fair value for the loss of the use of the team otherwise.

7. Same—Wrongful Seizure—Replevin—Claim and Delivery.

When there was evidence that replevin was allowable to plaintiff after his property had been wrongfully seized as that of another, and there is no claim and no testimony tending to show that this course could not have been at once taken, and thereby all the property replevied and almost the

entire loss claimed by the plaintiff prevented, the defendants are entitled to have this view presented to the jury upon the question of the measure of damages.

8. Same—Evidence—Consequential Damages, Remote.

When, in an action for damages for the wrongful seizure and detention of plaintiff's teams for eighteen days, when such were claimed to be necessary for hauling logs, which were on that account carried away by a flood, it appeared that this was done some thirty days after the seizure and some twelve days after the possession of the teams had been restored to him, the loss could not have been reasonably or naturally connected with the seizure, and consideration thereof should have been excluded from the jury.

9. Evidence — Instructions — Conflicting Charge—Jury—Prejudice—Reversible Error.

When the court properly charged the jury upon a phase of the evidence in accordance with defendants' contention, but it appears that another part of his charge conflicted therewith, to defendants' prejudice, it is reversible error.

10. Measure of Damages—Evidence—Consequential Damages, When Recoverable.

Action to recover damages for the wrongful seizure and detention for eighteen days of plaintiff's teams, when they were returned to him uninjured. Evidence tended to show that, at the time of the seizure, etc., defendant was under contract to deliver and was delivering logs for another at a mill, and had, depending upon the teams seized, other teams and hands, for which hauling feed, etc., were necessary, and by reason of the seizure the hands became demoralized: *Held*, that in order to recover it was necessary for plaintiff to show that his business was necessarily and wrongfully interrupted for a definite time and to an extent which he could not have lessened by reasonable effort, and during such time he could, with the means at his disposal, have delivered a definite amount of lumber at a certain profit, and that such loss was sufficiently certain as a basis of consequential damages.

(387) APPEAL from *Allen, J.*, at November Term, 1906, of TRANSYLVANIA.

The cause of action, and orders made therein in reference to amendment of pleadings, are stated in the case on appeal as follows: The action was originally brought by the plaintiff against defendants, alleging that he was the owner of one team of mules, one team of horses, one four-horse wagon, four sets of harness, one car-load of cotton-seed meal and hulls, and about three hundred poplar logs of the value of $700. During the progress of the trial the plaintiff asked to be allowed to amend the first paragraph of his complaint by striking out the words "three hundred" and inserting in lieu thereof the words "eight hundred and forty," making the said paragraph read "eight hundred and forty

poplar logs" instead of "three hundred poplar logs." The court, in the exercise of its discretion, allowed the amendment, to which order the defendants objected and excepted.

There was evidence tending to show that defendants, having an account against the Benedict Love Company, sued out an attachment and had same levied on two mules, two horses, a four-horse wagon, some harness, and a lot of feed, as the property of said company, (388) and held same for eighteen days; that plaintiff, claiming to own the property, had obtained possession of same before this action was brought. How this was done does not distinctly appear, but by fair intendment it was brought about under order of the court in some former action of claim and delivery against the officer having charge and control of the property. On the issue as to damages, and over the defendants' objection, pointed by exceptions duly noted throughout, there was evidence offered tending to show that at the time of the seizure plaintiff had a contract to deliver logs at the mill of the Benedict Love Company, at the rate of 500,000 feet per month, and was engaged in proper performance of his contract; that he had sixty-five steers and seventy-five or a hundred hands at a logging camp some miles distant from a railroad station, and the feed was a part of his necessary supplies, and the teams were engaged in hauling the feed to his camp, and he was unable to procure other teams or feed within the period of eighteen days specified, and as a result of the seizure his hands became demoralized and left. His steers were necessarily idle during the time and unemployed, and if his work had not been so interrupted he could have delivered at the mill during this period as much as 300,000 feet of lumber, at a profit of $2 per thousand, and that he had the lumber accessible for the purpose of the contract. Plaintiff was further allowed to state, over defendants' objection and with exceptions duly noted, that he was engaged in building a splash dam to carry the logs to defendants' mill, some distance below, on the river, and had deposited seven or eight hundred logs on the river, ready to be moved, and that the building of the dam was likewise interrupted, and in about thirty days thereafter, owing to a flood in the river, the logs which had been put in position were washed away and lost, to the value of $700 or $800.

Issues were submitted, and responded to by the jury, as follows: (389)

First. "Was the plaintiff, Bowen, the owner of the personal property described in his complaint, and entitled to the possession thereof?" Answer: "Yes."

Second. "Was the property wrongfully taken from the plaintiff's possession by the defendants and wrongfully detained by them?" Answer: "Yes."

Third. "What damage has the plaintiff sustained by reason of the wrongful taking and detention of the said property by the defendants?" Answer: "$1,250."

Exceptions to the charge were also noted, and are referred to in the opinion. There was judgment on the verdict for plaintiff, and defendants excepted and appealed.

Welch Galloway and George A. Shuford for plaintiff.
W. W. Zachary for defendants.

HOKE, J., after stating the case: The court was asked to hold that, unless defendants had possession of the property at the time the present action was commenced, plaintiff could not recover. The position is correct, as applied to actions brought to recover the possession of the property itself. Such action only lies against the one who has possession of the property at the time the same is instituted. *Webb v. Taylor,* 80 N. C., 305; *Haughton v. Newberry,* 69 N. C., 456. While the allegation of the complaint may be broad enough to constitute a demand for the possession, it is evident, from a perusal of the entire pleadings, that the demand was not intended to be for the possession, which the plaintiff undoubtedly had when the action was commenced, but was to recover damages caused by reason of the wrongful seizure and detention of the property. As heretofore stated, it does not definitely appear how plaintiff reacquired possession of the property; but, assuming—and there are statements from some of the witnesses tending to show this—that
(390) the possession was restored by means of a former action of claim and delivery, while plaintiff could have had his damages assessed in the former action (Revisal, sec. 570), the authorities seem to be to the effect that he was not required to take this course, but, after obtaining possession, could, in another action, recover damages for the injury done by the wrongful seizure and detention of his property. *Woody v. Jordan,* 69 N. C., 189; *Asher v. Reizenstein,* 105 N. C., 213.

Again, the court was requested to charge that defendants could not be held liable in the present case because of the existence, at the time of the seizure, of an unsatisfied mortgage in favor of their debtor, the Benedict Love Company, and against which the attachment had been issued. This prayer for instructions was correctly refused by the court. In the absence of statutory provision, the interest of a mortgagee in personal property while the mortgagor remains in possession, having also an interest therein, is not the subject of levy by direct seizure, either under attachment or execution. Freeman on Executions, secs. 118-184; 20 A. & E. Enc., 974. The right of the mortgagee in the property, on the facts presented, was simply that of a creditor, and his interest as creditor

could only be levied on as directed by provisions of Revisal, sec. 767, to be collected and applied under the direction and supervision of the court.

On the issue as to damages we think there was error. It is well established that, in a "pure tort," the case presented here, the wrongdoer is responsible for all damages directly caused by his misconduct, and for all indirect or consequential damages which are the natural and probable effect of the wrong, under the facts as they exist at the time the same is committed and which can be ascertained with a reasonable degree of certainty. *Johnson v. R. R.*, 140 N. C., 574; *Sharpe v. Powell*, 7 L. R., 1892, 253; 8 A. & E. Enc., 598; Hale on Damages, 34, 35, *et seq.*

This last author, in substance, says that a wrongdoer is liable for all damages which are the proximate effect of his wrong, and (391) not for those which are remote; "that direct losses are necessarily proximate, and compensation, therefore, is always recoverable; that consequential losses are proximate when the natural and probable effect of the wrong." A well recognized restriction, applying in cases of tort and contract, and as to both elements of damages, is to the effect that the injured party must do what he can in the exercise of reasonable care and diligence to avoid or lessen the consequences of the wrong, and for any part of the loss incident to such failure no recovery can be had. This limitation was approved by us in a case of contract, in *Tillinghast v. Cotton Mills*, 143 N. C., 268, and directly applied to a case of tort, in *R. R. v. Hardware Co.*, 143 N. C., 54. A full consideration of the facts and the charge of the court leads us to the conclusion that the defendants have not had the benefit of this limitation in the trial of the present case. A verdict of $1,250 damages for the detention of two mules, two horses, a wagon, and a lot of feed for a period of eighteen days, when they were all restored to the owner, uninjured, so far as the facts show, is an unusual amount of consequential damages, and to be sustained, if at all, only under very exceptional circumstances. We are inclined to the opinion that if plaintiff should establish that the seizure of his teams had the necessary effect of interrupting his operations in getting out lumber for a definite time, and he should show that, the lumber being obtainable and accessible, he could, during the time he was wrongfully deprived of his property, have delivered as much as 300,000 feet of lumber at a profit of $2 per thousand, this profit is the most definite and satisfactory rule for estimating his loss that could be adopted, on the facts presented, the evidence being to the effect that no other employment was open to him; but such an interruption would only be natural and probable if it should be established as the necessary result of the defendants' wrong, under exceptional conditions existing at the time, and then only to the extent that it could not have been (392) avoided or diminished by reasonable diligence on the part of

plaintiff. There is evidence tending to show that some of the property—the teams and wagons—was replevied from the officer under court proceedings. This was allowable to plaintiff when his property had been wrongfully seized as that of another. *Mitchell v. Sims,* 124 N. C., 411. And there is no claim, and no testimony tending to show, that this course could not have been at once taken, all the property replevied, and almost the entire loss claimed by the plaintiff prevented. This was held to be incumbent on the party injured, if same could have been done by reasonable effort, in *R. R. v. Hardware Co., supra,* and we think the defendants were entitled to have this view presented to the jury. Or, if the plaintiff, under the circumstances and in a shorter time, and in the exercise of reasonable effort, could have procured other feed and have had it hauled by ox carts and other means, he should have taken this, if a reasonable and prudent course by which his loss could have been reduced. And it may be well here to note that if the jury should award plaintiff damages on the basis of the profit he could have made during the time his work was necessarily interrupted, he should not have, in addition, the direct damages arising from a fair value for the loss of the use of the teams, because, in the event suggested, the use of the teams would be required in making the alleged profit. He can recover for the value of the use of the teams—this is direct damages; but both should not be allowed. And as to the logs which had been placed on the river preparatory to being floated down by the completion and operation of the splash dam, the loss occurred more than thirty days after the seizure and more than twelve days after the teams had been recovered and the plaintiff had resumed business. There is no testimony or suggestion that the logs could not have been secured and saved by proper effort on the part of plaintiff and his employees, and we are of opinion that, on the facts presented,
(393) this loss had no reasonable or natural connection with the seizure of plaintiff's teams, and all consideration of it should have been excluded from the jury. The court did do this in one part of the charge, but in another he charged the jury as follows: "If plaintiff was prevented from floating lumber, which was his, during the eighteen days, by reason of not having a team to prepare it, etc., and that was the direct cause of damage, and the logs lost in the meantime by flood, which would have been prevented, then the jury will give actual damages resulting from such loss." There was no evidence whatever of such loss during the eighteen days when plaintiff claims his teams were wrongfully withheld from him. And in another part of the charge the court, in substance, told the jury that the loss by reason of logs carried away by the flood was too remote for recovery. This conflict in the charge has, however, evidently operated to defendants' prejudice, for it is only by allowing for the loss that the jury could have awarded the sum given in the verdict.

We are referred by defendants to *Sledge v. Reed,* 73 N. C., 440, as authority for the position that, on the facts in this case, only direct damage should be allowed—that is, a fair price for the use of the teams while wrongfully withheld. But consequential damages were refused in *Sledge's case* because there was no evidence that plaintiff could not have procured another horse, by reasonable effort, with which to make his crop; and there was intimation, too, that the result of any given crop year was too uncertain to be regarded as the proximate result of plaintiff's wrong. It is the general rule that damages which cannot be established with reasonable certainty, or which are contingent or speculative, cannot be allowed, and anticipated profits, in the ordinary sense of that term, are usually within the prohibition. As said in Hale on Damages, however (p. 70), "Absolute certainty is not required, but both the cause and probable amount of the loss must be shown with reasonable certainty." And, accordingly, it is held "that profits which would (394) certainly be realized but for defendant's default are recoverable."

A good illustration of this distinction will be found in *Johnson's case, supra,* where, in negligent destruction of plaintiff's factory for the manufacturing of baskets, crates, etc., it was held that profits on sales already made, and which plaintiff would have had the present ability to complete but for the wrong done him, were allowed as proximate, but anticipated profits which might otherwise arise from continuance of the business, on the facts there presented, were regarded as speculative and contingent, and, therefore, too remote for recovery.

We think, in the present case, that if it should be properly shown that plaintiff's business was necessarily and wrongfully interrupted for a definite time, and to an extent which plaintiff could not have lessened by reasonable effort, and that during such time plaintiff could with the means at his disposal have delivered a definite amount of lumber at a certain profit, under the principle of *Johnson's case,* such a loss would be sufficiently certain for consideration and could be properly made the basis of the jury's award of consequential damages.

For the error pointed out there will be a new trial on all of the issues, and it is so ordered.

New trial.

Cited: Hocutt v. Tel. Co., 147 N. C., 193; *R. R. v. R. R., ib.,* 384; *Wilkinson v. Dunbar,* 149 N. C., 23; *Harper v. Lenoir,* 152 N. C., 728, 730; *Harvey v. R. R.,* 153 N. C., 575; *Carmichael v. Telephone Co.,* 157 N. C., 27; *Ludwick v. Penny,* 158 N. C., 113; *Fields v. Brown,* 160 N. C., 297; *Wilson v. Scarboro,* 169 N. C., 657; *Weeks v. Tel. Co., ib.,* 704; *Cotton Oil Co. v. Tel. Co.,* 171 N. C., 708; *Hardware Co. v. Lewis,* 173 N. C., 293; *Conrad v. Shuford,* 174 N. C., 721.

(395)

C. B. ALVEY ET AL. v. CITY OF ASHEVILLE.

(Filed 14 December, 1907.)

Cities and Towns—Paving—Abutting Owners—Assessments.

Where a city street 125 feet wide had a park 65 feet wide down its center, found to be a part of the street and kept up by private parties for patriotic purposes, leaving 60 feet in all to be paved, and where the cost of paving the streets was to be borne, one-third each, by the abutting owners on each side of the street, and the remaining third by the city, it was reasonable and valid for the city to assess each abutting owner on each side of the street for the expense of paving one-third of the remaining 60 feet, and for the city to pay for the other one-third.

APPEAL from *O. H. Allen, J.*, at September Term, 1906, of BUNCOMBE.

By consent, a jury trial was waived and the facts found by the judge. Judgment for defendant. Plaintiffs appealed.

The facts sufficiently appear in the opinion.

Tucker & Murphy and Moore & Rollins for plaintiffs.
Davidson, Bourne & Parker for defendant.

CLARK, C. J. The judge found that Market Square, or Market Street, was one of the streets in Asheville, and that in the middle of the street, which is a wide one, there is an uninclosed area, or parallelogram, known as Pack Square. This parallelogram has been paved, or otherwise adorned, by private munificence, without any expense to the plaintiffs or to the city, and is held and "dedicated to free and unobstructed public use" in connection with a monument there placed in honor of one of the State's greatest citizens—Zebulon B. Vance. There is a 12-foot walkway for foot passengers through the center of said strip, and crosswalks. The court finds as a fact that Pack Square is a part of Market Street. That part of Market Street which was left to be paved by the city and the abutting property holders is only so much thereof
(396) as is still left for street use by wheeled vehicles, to wit, 60 feet, of which one part lies between the curb on the north side of Market Street and the reserved area known as Pack Square, and the other part lies between Pack Square and the southern curb of Market Street. Pack Square itself, which the judge finds is a part of Market Street, has not been paved at public expense. Of this 60 feet of Market Street which have been paved for public use, the cost of one-third thereof has been charged against the abutting property on the north side of Market Street, one-third against the abutting property on the south

side of Market Street, and the cost of the other third has been charged up to the city treasury—the usual apportionment of the cost in street paving.

Market Street is a wide street—over 125 feet wide—and if one-third of paving its whole width had been assessed upon the abutting property on each side, it would have been much heavier than now; but by reserving the strip in the middle, known as Pack Square, for the patriotic purposes aforesaid, there is no cost assessed for paving that part of the street. The plaintiffs, who are assessed for one-third of the paving of that 60 feet of the street which is still kept for roadway, are called on to pay only $5.35 per front foot, or about $160 on a lot of 30 feet front in the heart of the progressive and growing city of Asheville, such lots being worth, as stated in the argument, over $10,000 each. This would seem sufficiently moderate and reasonable.

The sole contention of the plaintiffs is that that part of Market Street lying on the north side of the reserved area should be treated as one street, and the property abutting thereon should pay one-third the cost of paving that only, and the city one-third, and that the city should pay another one-third, on the theory that the reserved area is the unoccupied south side of this narrow street; and the same contention is made as to that part of Market Street on the south side of the reserved area; that is, if Market Street is 125 feet wide, instead of the abutting property holders on each side paying for paving one- (397) third of said 125 feet and the city one-third, the plaintiffs contend that they are exempted from paving 65 feet in the center of the street, which are reserved for purposes aforesaid; that the remaining 60 feet should be divided into two very narrow streets, leaving the abutting owners to pay one-third for paving those narrow streets—say for 10 feet each (if the two narrow streets were of equal width)—and the city to pay for two-thirds, or 40 feet.

The court, however, has found as a fact that there is but one street; that the reserved area known as Pack Square (which is used by the public, except for wheel purposes) is a part of Market Street; that the cost of paving the 60 feet of the street outside of this strip which is reserved for pedestrains is to be paid, one-third (or 20 feet) by the property on the north side of Market Street, one-third by the property on the south side of Market Street, and the remaining one-third by the city. In this judgment we find no error, and it is

Affirmed.

Cited: *Schank v. Asheville,* 154 N. C., 41.

C. S. KINSLAND v. C. GRIMSHAWE.

(Filed 14 December, 1907.)

Principal and Agent—Termination of Agency—Double Agency—Option—Extension—Commissions.

Plaintiff was agent for defendant for the sale of timber lands upon an agreed commission, at a certain price. In pursuance thereof he introduced to defendant one B., representing G., who was engaged in the business of buying and selling land. Plaintiff gave to B., for G. and his assigns, a thirty-day cash option at the price stipulated, which was extended from time to time. G. sold his interest to one W., who bought under the option thus extended: *Held*, (1) it was not error for the judge below to instruct the jury that, if they believed the evidence, the defendant was liable to the plaintiff for his commissions; (2) that the plaintiff, by aiding G. to sell to W. and receiving a commission therefrom, was not acting antagonistically to the interests of the defendant, and that, while the negotiations under the option were going on, the defendant could not terminate the agency of the plaintiff.

(398) APPEAL from *Guion, J.*, at August Term, 1907, of TRANSYLVANIA.

The defendant, during April, 1903, entered into an agreement with plaintiff, by the terms of which plaintiff was to find a purchaser for a large body of land belonging to defendant, at the price of $3.50 per acre. For his services, if a sale was made to a purchaser who should be found by plaintiff, he was to receive a commission of 10 per cent on the cash payment and 5 per cent on deferred payments. Plaintiff introduced to defendant one Bourne, representing H. E. & S. T. Graves, who were engaged in the business of buying and selling land. After some negotiation, defendant on 27 May, 1903, gave to Bourne, for Graves, a cash option for thirty days. Later on the defendant extended the option to 20 August, 1903. On 21 August, 1903, defendant again extended the option two months. On 16 December, 1903, defendant executed a contract with Graves, reciting the former option and extensions, again extending the time to complete the trade to 20 February, 1904. At this time Graves accepted the option and contracted to comply with its terms. He agreed to deposit in the Battery Park Bank at Asheville $5,000 as a guaranty that he would comply with the contract. It was agreed that a survey of the land was to be made and the title investigated, all of which was to be completed by 20 February, 1904. It was further stipulated that if any providential hindrance should prevent the completion of the trade, further time was to be given. On 19 February, 1904, another contract was entered into, referring to the option of 27 May, 1903, reciting the contract of 16 December, 1903, and

further reciting that "providential hindrances had intervened." The time was again extended to 20 April, 1904, when the transaction should be closed. Graves transferred his interest to one Wood, who paid defendant $12,000 cash and gave him a short-time note for (399) $8,000, which he afterwards paid, and defendant executed a deed for the land to Wood. While these negotiations and extensions were being made, plaintiff entered into a contract with Graves, the terms of which are set forth in a paper-writing: "This is to certify that for and in consideration of your having rendered us certain services in the sale of the Grimshawe lands, we, H. E. & S. T. Graves, agree and bind ourselves to pay you, C. S. Kinsland, 10 per cent of all net profits and commissions received from said sale, and the same to be paid you as we receive our payments." Dated 14 January, 1904. By an arrangement made with one Aiken, with the consent of defendant, plaintiff agreed to divide the commission with Aiken. This agreement was made at the time the original contract was entered into. It is not material to the decision of this appeal, and is only noticed to explain the amount of plaintiff's recovery. The defendant resists payment of the commissions upon four grounds:

1. That plaintiff abandoned defendant's employment.

2. That he failed to find a purchaser within the limitations of his contract.

3. That on 16 December, 1903, plaintiff revoked his contract with defendant.

4. That by entering into the contract with Graves he assumed antagonistic relations towards the defendant and undertook to serve two masters.

To meet these contentions the following issues were submitted to the jury, his Honor instructing them, if they believed all of the evidence, to answer as set out in the record:

"1. Did the defendant contract with the plaintiff to sell the defendant's land for the commission, as alleged?" Answer: "Yes."

"2. Was the option or contract, originally entered into by the defendant with H. E. & S. T. Graves for a valuable consideration, continued in force by the defendant and a sale of the said lands (400) made pursuant thereto?" Answer: "Yes."

"3. In what amount, if any, is the defendant indebted to the plaintiff?" Answer: "Eight hundred dollars, with interest from 1 June, 1904."

"4. Did the plaintiff, by treachery and double dealing, prevent the defendant from making a more advantageous sale of his said lands than that actually made?" Answer: "No."

"5. Was the extension of the option by the defendant an extension of the agency?" Answer: "Yes."

Defendant excepted. There was a judgment upon the verdict, and defendant appealed.

George A. Shuford and Womack, Hayes & Pace for plaintiff.
Gash & Galloway for defendant.

CONNOR, J., after stating the case: His Honor could not have directed judgment of nonsuit. The testimony presented questions for the jury. There was ample evidence to show the contract as found by the jury. This is not seriously controverted by defendant, his defense resting upon other grounds. In regard to the second issue, the defendant says that he extended the option of 27 May, 1903, to 20 August, 1903. He says that on 21 August, 1903, plaintiff and Bourne asked for an extension of two months, "which I made it." It is true that at the expiration of that time, 20 October, 1903, Graves failed to take the land, and, unless renewed by defendant, the option was at an end and defendant was under no further liability to Graves and plaintiff; but on 16 December he entered into a written contract of sale with Graves, expressly referring to the option of 27 May, 1903, and its extension, which Graves accepted. This contract was made as an acceptance of the option, and Graves deposited in the bank $5,000 as a guaranty of his performance of the same. He was given until 20 February, 1904—not to accept the
(401) option, but to have survey made and title investigated. Graves thus became a purchaser at the price and in accordance with the terms of the option of 27 May. The contract provides for further time if, for "providential reasons," it should not be consummated. On 19 February, 1904, another contract was entered into, referring to the option of 27 May, 1903, and the time was again extended, on account of "providential reasons," to April 20, 1904. This contract, after reciting several stipulations, concludes: "The same shall be conveyed to H. E. & S. T. Graves, or their assigns, at the price and in accordance with the terms of 27 May, 1903." The written evidence clearly sustains his Honor's instruction in respect to the second issue. The transaction was finally closed upon the terms of the option of 27 May, 1903, which was the result of the contract made between plaintiff and defendant in April, 1904. The defendant, however, insists that plaintiff lost his right to commissions because the agency was terminated in December, 1903. Defendant says that plaintiff asked him if he was going to pay him the commissions, and that he said he was not, because defendant had become Graves' agent.

It is not contended that plaintiff released defendant by any express terms, or assented to the termination of the agency otherwise than by the contract which he made with Graves.

Did this contract place plaintiff in a position antagonistic to defendant? It seems that Graves was buying for the purpose of selling at a profit. The terms of the contract between Graves and defendant were fixed at the beginning of the negotiation. There was never any question as to the price which Graves was to pay or which defendant was to take. The only effect of the agreement between Graves and the plaintiff was to stimulate Graves to take the land by aiding him in selling at a profit. This was in no sense antagonistic to defendant's interest. If plaintiff succeeded in selling the option for Graves, it secured to defendant its acceptance and a sale of the land. (402) We are unable to see how there was any treachery or double dealing which was calculated to prevent defendant from making a more advantageous sale. He had contracted to sell to Graves at his price, and, it seems, was at all times willing to do so. This is shown by the several extensions of the option. Instead of plaintiff's contract with Graves preventing a sale, it was conducive to it. He was, in a certain sense, "serving two masters," but both were working to a common end—defendant wished to sell to Graves at a price agreed upon; Graves wanted to buy if he could sell at a profit. Plaintiff's interest was to bring about both results—and it seems that this was done.

Defendant insists that his contract was to pay plaintiff a commission if he made a sale within thirty days. It is true that defendant had the right to put an end to the option and the relation of agent at the expiration of the thirty days from 27 May, 1903, if he had chosen to do so. It may be that if, on 11 June, 1903, when plaintiff and Bourne went to see him to get the extension, defendant had not consented to it, Graves would have raised the money and taken the land by 27 June, 1903—the day upon which the option expired, in which case plaintiff would have been entitled to his commission. By extending the option and retaining the opportunity to sell upon the terms of the original option, and finally selling and receiving the money, we think that the defendant acted in such a way as to justify the finding of the jury that the agency was continued.

It is undoubtedly true, as contended by defendant, that a person cannot act as agent for both buyer and seller, when their interests are antagonistic, or when the terms of the purchase are unsettled. The authorities cited in the excellent brief of defendant's counsel fully sustain this position. The answer to the contention is, that plaintiff, having brought Graves and defendant together and made a sale for an agreed price, had a perfect right to accept a commission from (403)

Graves, to aid him, not in buying, but in selling, the same property. That defendant recognized plaintiff was entitled to compensation for his services is shown by his testimony that when he completed the sale and got the money he left $500 with Graves "as a present to Kinsland." This amount plaintiff never took.

Upon a careful examination of the whole evidence, we think that there is no substantial controversy about the facts. His Honor correctly charged the jury that if they found the facts to be as testified by all the witnesses they would answer the issues as set out in the record. This was not directing a verdict, but instructing the jury in regard to the law, leaving to them the decision of the facts upon all of the testimony. As plaintiff had agreed, with the consent of defendant, to give one-half his commissions to Aiken, he was entitled to only $800, the amount awarded him by the jury. There is

No error.

M. R. RUDISILL v. A. A. WHITENER.

(Filed 14 December, 1907.)

1. Contract—Specific Performance—Fraud in Factum—Fraudulent Representation—Defenses.

There is a distinction between the defense to an action to enforce specific performance of a contract, and to rescind and set it aside for fraud in the *factum* or treaty. Hence, when the pleading and evidence show that the former defense is being made, it is error for the court below to restrict the issue to the second defense.

2. Contract—Specific Performance—Fraudulent Representations—Intent.

Evidence tending to show that the defendant was induced to make and execute a contract to convey land, the subject of the suit for specific performance, by the false representations of plaintiff that, as a part of the consideration therefor, he would transfer to defendant an option he held on another lot of land which defendant desired, if he concluded not to buy it, when he had already concluded to buy it, is available as a defense.

3. Same—Specific Performance—Defense—Consideration—Option—Promise.

In an action to enforce specific performance of a contract to convey land the defendant may show by parol that the words and acts of plaintiff were such as to reasonably induce him to believe that, as a part of the consideration for the contract, he would transfer to him an option he had on a different lot of land which he desired. Actual fraud is unnecessary to be shown.

4. Actions—Form, Legal and Equitable—Issues—Courts—Administration.

The abolition, by the Constitution, of the distinction between actions at law and suits in equity does not destroy equitable rights and remedies;

and the issues should be so framed as to clearly present the matters in controversy, so that, upon the verdict, the court, subject to review upon appeal, can apply equitable rules and principles.

APPEAL from *Guion, J.*, at June Term, 1907, of BURKE. (404)

This was an action to compel specific performance of a contract to sell land. The plaintiff alleged that on 6 October, 1905, the defendant executed and delivered to him the following paper-writing: "Received of M. R. Rudisill $10, part payment on my farm, which I agree to sell him for $2,000, and to make him a good and lawful deed, on or before 1 January, 1906, upon payment of balance of $2,000. This 6 October, 1905. A. A. Whitener." Plaintiff alleged that he had tendered the balance of the purchase money within the time named, and demanded a deed for the land. The defendant declined to accept the money or execute the deed. He demands judgment, etc.

Defendant admits the execution of the receipt, and alleges that he was induced to execute the same by the promise of plaintiff to transfer and deliver to him an option, which plaintiff then held, to buy a tract of land known as the Sigmon land; that plaintiff at the time, and in consideration of the execution of said receipt, executed and (405) delivered to him the following paper-writing: "I hereby agree to turn over to Dolph Whitener the option I have on the Sigmon land before the twenty days run out, if I decide to have nothing to do with the buying it; and in case I turn over the option, then Dolph Whitener agrees to let M. R. Rudisill have the roughness on my place free of charge; otherwise, the roughness is not turned over to Rudisill. This 6 October, 1905. M. R. Rudisill." Defendant alleges that "he is a man of considerable age and cannot read writing at all without the use of glasses, and, being an illiterate man, cannot read well even with the aid of glasses; that the paper was not read correctly to him, but was so read as to induce him to believe that it was an absolute and unconditional agreement to transfer to him the option on the Sigmon land; that he accepted the sum of $10, and signed the receipt by reason of the positive agreement with plaintiff that he would transfer to him the Sigmon option. Defendant testified that he agreed to sell his land to plaintiff only with the understanding that plaintiff would surrender to him the option on the Sigmon land; that plaintiff said he would send the defendant the option in a few days—"in plenty of time for me to get my deed from Sigmon." Defendant was corroborated by his wife. He said that he was willing to convey the land if plaintiff would transfer the Sigmon land to him.

Plaintiff testified that he had an option to buy the Sigmon land at the price of $2,500. He said that defendant wanted the Sigmon land if he sold his own. "On the day the papers were signed I said 'I will

tell you what I will do: I will turn it over unless I conclude to buy.' He said: 'No; then you want to take my place and not let me have the Sigmon place.' I said: 'Well, the best I can do is to agree that, if I don't decide to buy, I will turn it over to you.' And we then had the papers drawn up and signed. He took one and I the other. He
(406) seemed satisfied when he got the agreement. He seemed to think I would not take the Sigmon land, and I would take $100 for the option. I rather thought I would buy, but I had not made up my mind. We had never fully decided to take the Sigmon land that day. I think it was understood we should take it."

Mr. Aderholt, witness for plaintiff, who wrote and witnessed both papers, testified that he read them correctly to defendant. "At the time the papers were signed we all knew that Whitener wanted the Sigmon land, and that he would give $100 for the option." He further testified: "It was understood between plaintiff, M. E Rudisill, and me that if plaintiff bought both Sigmon and Whitener tracts, M. E. Rudisill and myself would become partners with him in the trade, as he said he could not buy both places without help. This (was) understood before the papers were signed."

There was other testimony, but the foregoing is sufficient for the purpose of passing upon the single exception in the record.

His Honor submitted the following issues:

"1. Did defendant, in violation of his contract, fail to execute and deliver to plaintiff a deed for the lands described in the complaint?" Answer: "Yes."

"2. If so, what damage has plaintiff sustained by reason thereof?" Answer: "None."

"3. Did plaintiff wrongfully fail to transfer to defendant the option on the Sigmon land, referred to in the answer?" Answer: "No."

"4. If so, what damage has defendant sustained by reason thereof?" Answer: "None."

Defendant, in apt time, requested his Honor to charge the jury that "if they should be fully satisfied from the evidence that when the defendant signed the agreement to convey he was reasonably induced by the words and acts of the plaintiff to believe that the plaintiff was going to transfer to defendant the Sigmon option, and on account of
(407) such belief signed the contract sued on, they should answer the first issue 'No.'"

The court declined to give this instruction, holding that the inquiry was limited to whether or not Aderholt read the papers to defendant as they were written, as testified by him, or otherwise, as alleged in the answer and testified by the defendant.

Defendant excepted. There was judgment upon the verdict that defendant execute a deed to plaintiff for the land upon the payment of the balance of the purchase money. Defendant appealed.

Avery & Ervin and M. H. Yount for plaintiff.
Self & Whitener and S. J. Ervin for defendant.

CONNOR, J., after stating the facts: His Honor inadvertently failed to note the distinction between a suit brought to rescind and set aside a contract on the ground of alleged fraud in the *factum*, or in the treaty, and one in which defendant is resisting a bill for specific performance, without drawing into question the validity of the contract. He unduly narrowed the scope of the defense. If, for instance, Whitener had sued plaintiff to rescind the contract for that his signature was obtained by fraud, in that it was read to him incorrectly and its true contents suppressed, the instruction asked could not have been given. The defendant, it is true, makes that charge, but in one aspect of his answer his defense is based upon the contention that, taking the contract as written, he was induced to sign the receipt and the agreement to sell his land upon the express promise and assurance by the plaintiff that he would, in consideration and as a part of the transaction, transfer to him the option which plaintiff held on the Sigmon land. The two papers constituted but one transaction, or agreement, and should be read together. They were written, signed, and delivered simultaneously. Thus read, they constitute mutual covenants. The defendant agrees to sell his land, and the plaintiff agrees to transfer the Sigmon option, if he decides not to buy himself. The paper-writing, (408) read in the light of the treaty, clearly represents that plaintiff is uncertain whether he will buy the Sigmon land—that, in good faith, he is considering the question. If in truth he had, at the time he signed the paper, determined in his own mind that he would buy the land, and did not intend to let defendant have it, and he induced defendant to believe that he was considering the question of buying, certainly a court administering equitable relief, upon well settled equitable principles, would not interfere, but would leave plaintiff to his action for damages. While it is true that a provision to do something in the future is not a misrepresentation of a fact, it is equally true, both in morals and equity, that if one make a promise which he knows at the time he will not perform and has no intention of making good, he acquires no enforcible right against another who honestly relies upon the promise. This is true when the contract is partially executed. If one, being insolvent, conceals his condition and promises to pay for goods with a preconceived purpose not to do so, no title will pass to him. *Wilson v. White*, 80 N. C., 280. In *Des Farges v. Pugh*, 93 N. C.,

31, *Ashe, J.*, says: "It matters not by what means the deception is practiced—whether by signs, by words, by silence, or by acts—provided that it actually produce a false and injurious impression of such a nature that it may reasonably be supposed that but for such deception the vendor might never have entered into the contract." While it is difficult to show the state of a man's mind, if by his acts and conduct it can be ascertained, it is as much a fact as the state of his digestion. *Hill v. Gettys,* 135 N. C., 373. If, therefore, at the time plaintiff signed the paper by which he agreed to transfer the option on the Sigmon land to defendant if he concluded not to buy it himself, he had determined to buy it, or, as he says, "it was understood" that he would buy it, we think that, whether or not it was sufficient to rescind an executed contract, such fact is available to defendant in this action, wherein
(409) the plaintiff is invoking specific performance. The defendant is not driven to the proof of actual fraud, but may, by parol, show that he was induced by the words and acts of the plaintiff to believe that he would transfer to him the Sigmon option. This was a question for the jury. It is well settled—and we have no disposition to trespass upon the principle—that, "when the contract is in writing, is certain in its terms, for a valuable consideration, is fair and just in all its parts, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award damages for its breach." 4 Pom. Eq., sec. 1404. "This right, however, is controlled by other equities." Bispham Eq., sec. 364. It will not be enforced "where the complainant does not come with clean hands or when equities exist on the other side which would render it unjust to grant the relief" (*ib.,* 376), "or it is not clear that the minds of the parties have come together. The contract must be free from any fraud or *misrepresentation, even though not fraudulent,* mistake or illegality. The contract must be perfectly fair, equal, and just in its terms *and in its circumstances.*" Pom., sec. 1405. That actual fraud need not be shown to resist a decree for specific performance is established by abundant authority. *Romilly, M. R.,* in *Baskcomb v. Beckwith,* 8 L. R. Eq. Cas., 100, said: "Specific performance of a contract will not be enforced when defendant has contracted under a mistake, to which plaintiff has by his acts, even unintentionally, contributed." The learned judge says: "It is of the greatest importance that it should be understood that the most perfect truth and the fullest disclosure should take place in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the court will grant relief to the man who has been thereby deceived, provided he has acted reasonably and openly."

Professor Eaton says: "When the aid of a court of equity (410) is sought by way of specific performance, the principles of ethics have a more extensive sway than when a contract is sought to be rescinded. When a party calls for specific performance, he must, at every stage of the transaction, be free from imputation of fraud or deceit and show that his conduct has been honorable and fair." Eq., 270. In *Woolam v. Hearn,* 7 Ves., 211 (2 White & Tudor L. C., 491), *Sir William Grant* says: "When equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed, and there are many cases in which parol evidence of such circumstances has been admitted. . . . Where terms of a written agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the plaintiff did not contemplate, the court has, upon that ground only, refused to enforce the contract." *Calverley v. Williams,* 1 Vesey, Jr., 201. "Nor will a court of equity enforce a contract according to its terms when to do so would violate the real object of the contract in the minds of the parties when the contract was made, and produce a result not contemplated at the time of the execution of the agreement." 26 A. & E. Enc., 68. The decisions of this Court are in harmony with the doctrines of equity in this respect. In *Leigh v. Crump,* 36 N. C., 299, *Gaston, J.,* discussing a bill for specific performance, says: "We entirely acquit the plaintiff of intentional misrepresentation. And we hold that defendant has not shown that the plaintiff made any representation . . . variant from that which is set forth in the written contract." He further says that there is nothing in the evidence which would bar an action for damages, where the actual damage could be recovered: "But he has preferred to ask the aid of a court of equity to carry the contract into execution. The specific execution of a contract in equity is not a matter of absolute right in the party, but of sound discretion in the court. An (411) agreement, to be carried into execution there, must be certain, fair, and just in all its parts. Although it be valid at law, and if it had been executed by all the parties, it 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 to his legal remedy." In *Loyd v. Wheatly,* 55 N. C., 267, *Battle, J.,* citing *Leigh v. Crump,* says: "Even the mere fact that the contract is a hard one, and would press heavily on the defendant, will induce the court to withhold its aid and leave the plaintiff to his remedy at law. . . . We do not declare that it was obtained from the defendant by fraud. . . . The agreement is

not, in our opinion, certain, fair, and just in all its parts, and we cannot, therefore, declare its enforcement in this Court." In *Cannady v. Shepard,* 55 N. C., 224, *Nash, C. J.,* discussing a bill for specific performance, says: "The contract was not fair. The defendant was made to believe that the agreement as to the purchase of the land was binding upon him. The contract was hard and oppressive on the defendant. There is no equity in the claim of the plaintiff." *Love v. Welch,* 97 N. C., 200; *Ramsey v. Gheen,* 99 N. C., 215.

Numerous cases may be found in the reports in which relief has been denied upon the ground that the contract is harsh, uncertain, unjust, oppressive, regardless of actual fraud. An examination of the testimony of both plaintiff and defendant discovers ample evidence that Whitener never intended to sell his home unless he got the Sigmon land, near by.

Mr. Aderholt, plaintiff's witness, who wrote the papers and witnessed them, and who, although not told to Whitener, was to have an interest in the land, says: "We knew that day that if Whitener sold his tract, he wanted the Sigmon land and the option, but I do not know that he understood that day that he would get it; that Rudisill told him
(412) that he would have to go home and decide before he could tell him if he would turn over the option." Plaintiff says: "We had never fully decided to take the Sigmon land that day. I think it was understood we should take it. They (M. E. Rudisill and Aderholt) said *that day* they would help me buy it, and I thought *that day* we would buy it." M. E. Rudisill, who was present and heard the conversation, said that plaintiff positively refused to sell the option: "Brother, Aderholt, and myself own one-third each in the Sigmon land and are to be equally interested in the Whitener land." Defendant says: "They knew that day that I wasn't going to sell my place unless I could get the Sigmon place, and the agreement was that I was to have the option. They knew I wouldn't trade unless I got the Sigmon place. . . . I told them afterwards that I was still willing to sell if I could get the Sigmon land." His wife says that she heard her husband say: " 'You have got your hands on the only land my wife will go to.' Then Aderholt said, 'What will you give us for the option on the Sigmon land?' My husband answered, 'One hundred dollars, or the roughness on my place.' Aderholt was drawing the papers, and then it was my husband came in and said we were to get the Sigmon land. 'I am willing to stand by the agreement if they will.' " There is evidence on the part of the plaintiff tending to show that plaintiff, his brother, M. E. Rudisill, and Mr. Aderholt, his brother-in-law, had, at the time the papers were signed, an understanding that they were to buy both the Sigmon and Whitener lands. We do not hold that in order to make a valid contract

they were under any legal obligation to tell this to Whitener, but it is manifest that they knew that if they did tell him the exact state of their minds, their understanding and purpose, he would not enter into the agreement.

It is not necessary to suggest that the paper was not correctly read to defendant. The evidence does not create the impression on our minds that it was incorrectly read, but the entire evidence (413) strongly tends to show that defendant was induced by the acts and declarations of plaintiff to believe that he was to get the Sigmon option, and thereby secure another home, if he parted with the one which he then had. If upon an appropriate issue the jury so find, he should not be compelled to convey his home to plaintiff. The jury may well say, as was said by *Judge Gaston,* "We acquit the plaintiff of actual misrepresentation," but we find that the contract, in the light of the status of the parties, their acts and declarations, was not "certain, fair, and just in all its parts." If they so find, the court, administering equity in accordance with an enlightened standard of morals applied to the daily transactions of men, will not compel performance on one part and permit the plaintiff to refuse to transfer the Sigmon land. The true principle is well stated by defendant's wife when she says: "I am willing to stand by the agreement if they will." The jury find that no damage is sustained by the refusal of defendant to execute the deed. An impression has prevailed to some extent that because "The distinction between actions at law and suits in equity is abolished" by the Constitution, equitable rights and remedies are thereby destroyed. This Court has uniformly held that no such result follows the change in the forms of procedure, *Ely v. Early,* 94 N. C., 1; *Boles v. Caudle,* 133 N. C., 528, and many other cases.

It is sometimes difficult to so frame issues for the jury that equitable rights and principles are presented. The purpose of the reformed procedure certainly was not to destroy or impair those rights and remedies which the experience of the ages had shown to be essential to a system of enlightened jurisprudence. Professor Pomeroy, in his admirable work on "Code Remedies," says that the difficulty of administering legal and equitable remedies in one form of action has been experienced in the "Code States," and that "The same difficulty presented itself to the advocates of the new procedure in England while the measure was pending in Parliament; it was obviated by inserting in the (414) 'Supreme Court of Judicature Act' the following clause: 'Generally, in all matters in which there is any conflict between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.'" In this case the issues do not very clearly present the matters of fact in controversy and upon

which the judgment of the court should rest. It cannot be that the question whether the contract is one which a court of equity will enforce specifically is to be decided by the jury. The ultimate decision of the case is to express, not the arbitrary discretion of the judge, but the sound judicial discretion, guided by the principles and rules which have heretofore been adopted and applied by chancellors in similar cases. The judgment is, of course, subject to review by this Court. We would suggest that, upon another trial of this cause, the question presented by defendant's prayer for instruction be submitted in the form of an issue, or question of fact.

There must be a

New trial.

Cited: *S. c.,* 149 N. C., 440; *Combs v. Adams,* 150 N. C., 68; *Hardware Co. v. Lewis,* 173 N. C., 300.

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(415)

W. T. WEAVER ET AL. v. I. R. LOVE ET AL.

(Filed 14 December, 1907.)

1. State's Lands—Junior Grant—Color of Title—Revisal, Sec. 1699.

Revisal, sec. 1699, providing that a junior grant shall not be color of title, so far as it covers land previously granted, applies by express terms only to grants issued since 6 March, 1893.

2. Same—Protestant—Plaintiff—Burden of Proof.

The burden of proof is upon the plaintiff, to attack the defendant's grant to vacant and unappropriated State's lands for any cause not appearing upon its face.

3. Same—Evidence—Nonresident.

Evidence that the defendant now lives in Tennessee is not evidence that, at the time of the issuance of his grant to the State's vacant and unappropriated lands, he was a "nonresident," so that the court could thereunder so charge the jury.

4. Same — Grantees, Tenants in Common — Nonresident—Resident—Possession.

Where there are two grantees of the State's vacant and unappropriated land, they are tenants in common, and both hold possession by those in possession of the land put there by one of them, whether the tenant in common be a resident or nonresident of the State.

5. Same—Evidence—Nonresident—Possession—Color of Title—Instructions.

When it appears that defendant's grant, under which he claims by adverse possession, was issued 3 February, 1891; that he now lives in Tennessee and comes here and stays on the land several months at the time, and gets timber; that he has built houses thereon, kept them continuously

rented for the past ten or fifteen years, and has used the land as his own for the purposes it was good for, it is proper for the court below to refuse to instruct the jury that, according to the undisputed evidence, the defendant has been a resident of the State of Tennessee ever since his grant issued, and that the seven-year statute of limitations has not run in his favor against the plaintiff claiming under a senior grant.

WALKER and CONNOR, JJ., dissenting.

APPEAL from *Guion, J.*, at June Term, 1907, of YANCEY.
Judgment for defendants. Plaintiffs appealed.
The facts sufficiently appear in the opinion.

H. B. Carter and W. R. Whitson for plaintiffs.
Adams & Adams, E. F. Watson, and G. E. Gardner for defendants.

CLARK, C. J. Action to remove cloud on title and for damages for trespass in cutting timber, and asking an injunction. The defendants plead seizin and title in themselves. The plaintiffs claim under a grant issued in 1796 and a chain of title from that source. The defendants J. W. Higgins and I. R. Love claim under a grant to themselves, 3 February, 1891, and continuous adverse possession thereunder for seven years, by building houses thereon and cutting timber, and also by tenants occupying the houses and cultivating land. (416)

The court instructed the jury, at plaintiff's request, that the cutting of timber from time to time would not constitute possession to ripen title, and that the statute would not bar minors and those under the disability of coverture. This action was begun 5 January, 1906—less than seven years after the repeal or the suspension of the statute as to married women (ch. 78, Laws 1899). Besides, the defendants are not appealing.

The court properly refused the plaintiffs' prayer, "that, according to the undisputed evidence, . . . the defendant Love has been a resident of the State of Tennessee (ever since the grant issued to defendants), and, therefore, the statute of limitations has never run against the plaintiffs in favor of the defendant Love, and he is not the owner of any land mentioned in the answer." The burden was on the plaintiffs to attack the grant for anything not appearing upon its face. *Dosh v. Lumber Co.*, 128 N. C., 87. The only evidence of Love's nonresidence is his own evidence that he lives now in Tennessee, and that when he came over to cut he has stayed on the land several months at a time and gotten timber. He testifies to having houses built and his keeping them continuously rented, and says that for the past ten, twelve, or fifteen years he has used the land as his own, and for the only purpose it is good for; that he has had tenants on the land continuously for ten years, etc. There is no "undisputed evidence" that Love was a "non-

resident" at the time when the grant issued in 1891, and the court could not so charge. Besides, there is no evidence whatever that Higgins is a nonresident, and the possession of one tenant in common is the possession of both. Tenants put there by Love held possession equally for Higgins. Furthermore, the evidence, if believed, is that from 1891 there has been an unbroken succession of tenants living on the land. The plaintiffs could have taken action to turn these out, whether (417) Love was a resident or not, and his claim of adverse possession could not have ripened into title. The grant of 1891, if covered by the grant of 1796, conveyed no title, but it was color of title, and the title being out of the State by plaintiff's grant (*Gilchrist v. Middleton,* 107 N. C., 679), the seven years notorious, open, and adverse possession by the defendants ripened their color of title, except as to those of plaintiffs protected by coverture or infancy. *Asbury v. Fair,* 111 N. C., 251.

The defendants cannot be deprived of the protection of adverse possession and statute of limitation by the plaintiffs simply styling the proceeding an action to remove a cloud on title.

Revisal, sec. 1699, providing that a junior grant shall not be color of title so far as it covers land previously granted, applies, by the terms of that section, only to grants issued since 6 March, 1893. The defendants' grant was issued 3 February, 1891.

No error.

WALKER, J., dissenting: I am of the opinion that, upon the facts of this case, as I understand them, it being an action to remove a cloud from the title, the plaintiffs' cause of action is not defeated by the statute of limitations or by any adverse possession not sufficient to bar their right of entry.

JUSTICE CONNOR concurs in this dissent.

Cited: *McFarland v. Cornwell,* 151 N. C., 432.

S. P. DAVIS v. C. H. REXFORD ET AL.

(Filed 16 December, 1907.)

1. Removal of Cause—Grounds for Removal—Complaint—Facts Considered.

The right of foreign defendants to remove a cause to the Federal court is dependent upon whether the pleadings and record, at the time the petition is filed, disclose a removable cause of action; and controverted facts are improperly considered.

2. Same—Defendants, Resident and Nonresident—Separate Defenses—Joinder.

To remove a cause from the State to the Feneral court it is not sufficient that the defendants have separate defenses and that one is a resident and the other a nonresident of the State, if the cause of action set out is one in which all may properly be joined.

3. Same — Defendants, Resident and Nonresident — Contract—Common Purpose—Joinder.

A joint cause of action is stated if it is alleged that the plaintiff was under contract with the defendants, who were to mutually contribute to a common scheme or venture for a prospective benefit for all, and that they failed to fulfill the same, to the plaintiff's injury.

4. Same—Defendants, Resident and Nonresident—Unnecessary Averments.

When a joint cause of action is alleged under a breach of contract of the resident and nonresident defendants with the plaintiff, and it is further averred that the resident defendant "was *particeps*" in the breach thereof, such averment, though stating a severable controversy, was unnecessary, and the motion to remove the cause to the Federal court should not be allowed.

BROWN, J., dissenting.

PETITION to remove to the Federal Court, heard by *Guion, J.*, at September Term, 1907, of BUNCOMBE.

Plaintiff alleges that on 10 December, 1903, the defendant J. H. Tucker was, and for a long time prior thereto had been, a duly licensed atttorney at law, residing and practicing his said profession at Asheville, N. C.; that on the beforementioned date the defendants C. H. Rexford and W. A. Rexford were capitalists, trading and (419) seeking investments in mineral and timber lands in North Carolina and other States, as the plaintiff is informed and believes; that on and before 10 December, 1903, the plaintiff controlled by options certain kaolin properties in Swain County, N. C.; that on or about 10 December, 1903, the plaintiff and the defendants entered into a contract between themselves, by which the plaintiff was to undertake to purchase said properties and certain other koalin properties which the parties deemed necessary to complete the mining boundary which they desire to control, and that so soon as the plaintiff secured the necessary deeds and contracts for the purchase of said properties the defendant J. H. Tucker should investigate the title to all said properties and should do and perform all other legal services necessary in the premises, and that upon the approval of the titles to said properties by the said Tucker, the said defendants C. H. Rexford and W. A. Rexford should furnish and pay all such sums of money as might be required to complete the purchase of said properties, and that thereupon the titles to all said properties should be vested in the plaintiff, who should hold the same for the use, profit, and advantage of all said parties in equal shares

—that is to say, one-fourth for each of said parties. Thereupon the said defendant J. H. Tucker prepared a brief and informal written memorandum of said contract, which was duly executed by the plaintiff, and which was then and there delivered to and retained by said Tucker, and which, as the plaintiff is informed and believes, is still in the possession or under the control of the said Tucker or his codefendants. The plaintiff was not furnished with and did not retain a copy of said memorandum of contract, but on or about the....day of ....., 1907, said Tucker furnished the plaintiff what purported to be a copy of said memorandum of contract, and which the plaintiff, upon the information so furnished him by the said Tucker, alleges
(420) to be a substantially correct copy of said memorandum of contract, and which is, in words and figures, as follows: "It is agreed that S. P. Davis shall act as agent of C. H. Rexford, J. H. Tucker, W. A. Rexford, and himself in the purchase and option of kaolin properties on Larkey Creek and between that and the Tuckaseigee River, in Swain County. The said Rexfords agree to furnish the money necessary to buy all the said property necessary to complete the mining boundary, and, when the same is completed, the said Davis shall execute a deed in fee simple, as follows: One fourth to C. H. Rexford, one-fourth to W. A. Rexford, one-fourth to J. H. Tucker, and one-fourth to himself. This 10 December, 1903. S. P. Davis. (Seal)"

That very shortly after the making of the contract set out in the preceding paragraph hereof, towit, on or about the....day of December, 1903, and pending the completion of the purchase of said kaolin property, the scope of said contract was, by mutual parol agreement of all said parties, enlarged and extended so as to include the purchase of timber lands in the western part of North Carolina and the northern part of Georgia, at the then prevailing prices of such lands, approximately to the amount or area of not less than 25,000 acres, and as much more than said amount or area as the plaintiff might be able to secure at the prices aforesaid; and with the further provision that the said C. H. Rexford and W. A. Rexford, in addition to paying all the purchase price of said lands, should advance and pay all expenses proper and necessary to be incurred by the plaintiff in and about the option and purchase of said lands, including monthly payments to the plaintiff of $100 for the support of himself and family while he was engaged in said work, and that all amounts so advanced and paid by them should be added to and deemed a part of the purchase price of said lands; and that, in consideration of such advancements and of the enlarged scope of the enterprise, the said C. H. Rexford and W. A. Rexford should be entitled to be reimbursed from the proceeds of the sale of such
(421) timber lands or of the timber on said lands all moneys advanced

by them for expenses, as aforesaid, and for the purchase money of said lands, and that the profits arising from the purchase of said timber lands, whether by resale of such lands or by marketing the timber thereon, should be divided in the proportions named in said contract, to wit, one-fourth to each of said parties; so that the contract between the plaintiff and the defendants, after the same was amended as aforesaid, was in substance as follows, towit: That the plaintiff should act for C. H. Rexford, J. H. Tucker, W. A. Rexford, and himself in exercising the options and purchasing the kaolin properties on Larkey Creek and between that and Tuckaseigee River, in Swain County, and in securing options on and purchasing timber lands in the western part of North Carolina and the northern part of Georgia, to the amount or area of not less than 25,000 acres, and as much more than said amount as he might be able to secure at the then prevailing prices for such lands, approximately; that the said J. H. Tucker should examine the titles and do all necessary legal work in connection with the purchase and conveyance of said kaolin properties and timber lands; that the defendants C. H. Rexford and W. A. Rexford should pay all the purchase price of said kaolin properties and should advance and pay all expenses proper and necessary to be incurred by the plaintiff in securing options on and purchasing said timber lands, including $100 a month for the support of the plaintiff and his family while the plaintiff was so engaged, and should further pay all the purchase price of said timber lands; that the titles to said kaolin properties should be taken in the name of the plaintiff, and should be by him conveyed to said parties in fee simple, as follows: one-fourth to C. H. Rexford, one-fourth to W. A. Rexford, one fourth to J. H. Tucker, and one-fourth to himself; that the title to all said timber lands should be taken in the name of the plaintiff, and he should hold the same for the joint account, benefit and profit of all the parties, and that the same should be (422) held for a reasonable time, and thereafter realized upon to the best advantage of all parties in interest, either by a resale or by marketing the timber on said lands, as the parties might deem most advantageous; and, after reimbursing the said C. H. Rexford and W. A. Rexford for all moneys advanced by them for expenses, as aforesaid, and for the purchase price of said lands, the balance remaining, whether in lands or timber, or in the proceeds thereof, should belong to said parties, as follows: one-fourth to C. H. Rexford, one-fourth to W. A. Rexford, one-fourth to J. H. Tucker, and one-fourth to the plaintiff; that the contract set out in the fourth paragraph hereof was superseded by and merged into the amended contract set out in this paragraph; that immediately after the making of the contract set out in the fourth paragraph of this complaint, towit, on or about 10 December, 1903, and

acting under said contract and in full compliance therewith, the plaintiff secured deeds in his own name to all said kaolin properties; that the said deeds were delivered to the plaintiff in advance of the payment of the purchase money for the properties conveyed thereby; that immediately following the making of the amended contract set out in the second paragraph hereof, towit, on or about.....December, 1903, and upon the faith thereof, the plaintiff gave up his said position and regular and permanent employment as a traveling salesman for Slayden, Fakes & Co., and devoted his entire time and attention faithfully and industriously to the discharge of the duties devolving upon him by said contract, and continued so to do for the period of five months, or thereabouts, and until he was prevented from the further performance of said contract by the breach thereof by said defendants, as hereinafter alleged; that, acting under said contract and in full compliance therewith, the plaintiff secured options and contracts for the purchase of such timber lands to an amount or area in excess of 25,000 acres, towit,

(423) 26,022 acres or thereabouts, as nearly as the plaintiff can ascertain the same, at prices not exceeding the then prevailing prices of such lands, and was successfully prosecuting the work of securing other such lands to a large amount and area, and was faithfully, fully, and in all respects carrying out and performing his part of said contract, when he was compelled to discontinue work thereunder and to abandon further performance of said contract by the breach thereof by the defendants, as hereinafter alleged; that the defendants, and each and every of them, failed and refused to carry out and perform said contract, and on or about....May, 1904, the defendant W. A. Rexford notified the plaintiff to discontinue work under said contract, and that defendants had abandoned and would not further comply with said contract; and the plaintiff believes, upon information received by him since the filing of the complaint in the former action between the same parties, hereinafter referred to, and avers the fact to be, that in the giving of said notice to the plaintiff said W. A. Rexford was acting for and on the behalf of all the defendants, and with the full knowledge, acquiescence, and approval of his codefendants, J. H. Tucker and C. H. Rexford.

Plaintiff set out a second cause of action, which it is not necessary to set forth herein. Defendant J. H. Tucker filed a demurrer. Defendants C. H. and W. A. Rexford filed a petition for the removal of the cause into the Federal court, upon the ground of diverse citizenship. The petition complies with the statute. It is conceded that defendant J. H. Tucker is a resident of this State and that petitioners are nonresidents. The petition alleges that if any cause of action is set out against defendant Tucker, it is separable from that set out against petitioners. The

petition further alleges that the defendant Tucker is fraudulently joined as party defendant, for the sole purpose of defeating petitioners' right to remove the case into the Federal court. Plaintiff filed an answer to the petition. His Honor, *Judge Guion,* ordered that the cause be removed in accordance with the prayer of the petitioner. Plaintiff excepted and appealed. (424)

Frank Carter and H. C. Chedester for plaintiff.
Merrimon & Merrimon and Moore & Rollins for defendants.

CONNOR, J., after stating the case: It is well settled by uniform decisions that the motion for removal is to be decided upon the pleadings and record as they are when the petition is filed. Does the complaint disclose a removable cause of action? *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352, and cases cited. The only question, therefore, open to us is whether the plaintiff has in his complaint stated a cause of action against the resident and nonresident defendants disclosing a joint liability. That he may have sued them separately is not material in disposing of the petition for removal. Plaintiff is entitled to pursue his remedy in his own way, provided he does so in accordance with the rules of pleading and practice. That defendants have separate defenses does not affect the right of the plaintiff to sue them jointly, if he has a cause of action against them in which they may properly be joined. The complaint sets forth a joint agreement on the part of defendants to further a common purpose to the accomplishment of a common end. The defendants Rexford agreed to furnish the money; defendant Tucker was to investigate and pass upon titles, and plaintiff was to give his time and service in purchasing the properties, and these mutual contributions to the scheme, or venture, were to result in the common and equal benefit and profit of the parties to it. The promises were mutual, each constituting a consideration for the other. This being true, the cause of action is stated: "That the defendants and each and every of them failed and refused to carry out and perform said contract, and on or about.... May, 1904, the defendant W. A. Rexford notified plaintiff to discontinue work under said contract, and that defendants had abandoned and would not further comply with said contract." This (425) is a clear allegation of a breach of the joint contract by all of the defendants. It is true that the plaintiff, it would seem unnecessarily, specifies that the petitioning defendants did certain acts, etc., and that defendant Tucker "was *particeps* in said *last mentioned* breach by having sanctioned, approved, and actively aided in said breach." We are not quite sure that we correctly understand this portion of the complaint. If it is correctly construed by defendants' counsel, we concur with him that the defendants cannot be joined. It would seem that the

plaintiff seeks to charge defendants Rexford with breaking *their* contract, and defendant Tucker with actively aiding them in doing so. It is clear that these causes of action are in every respect separate and distinct One is for breach of contract, the other for a tort. However this may be, eliminating this portion of the complaint, there is left a cause of action against all the defendants for a joint breach of the contract. The authorities are cited in *Hough v. R. R.,* 144 N. C., 692, and *Tobacco Co. v. Tobacco Co., supra.* The suggestion that the contract set out is void by reason of the statute of frauds is not open to defendants on the motion for removal. We do not understand that his Honor passed upon the allegation of fraudulent joinder of the defendant to prevent the removal, nor do we do so. As we construe the decisions, this is a matter for the Federal court. In no event would our finding be binding upon that court. *Wicker v. Enameling Co.,* 204 U. S., 176. It does not follow that we are compelled to take the charge as true. Our ruling is confined to the facts as they appear in the complaint.

Reversed.

BROWN, J., dissented, on the ground that he was of opinion that no cause of action is set out against defendant J. H. Tucker, and that the cause of action is separable.

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(426)

S. J. SHELTON v. C. F. MOODY.

(Filed 17 December, 1907.)

1. County Commissioners—Penalty Statutes—Revisal, Sec. 1388—Statement—Motion to Dismiss—Practice.

A motion to dismiss an action brought for the recovery of a penalty, under Revisal, sec. 1388, against a county commissioner for failure of the board to publish, within five days after a regular December meeting, the statements as therein required, should be allowed when it is admitted that the defendant had ceased to be such commissioner before the time complained of.

2. Same—Revisal, Sec. 1388—Penalty Statutes—Interpretation.

The statement required to be published by Revisal, sec. 1388, "within five days after each regular December meeting," is for the incoming board, and the statute imposing the penalty, under the strict construction required, is not applicable to members of the outgoing board.

APPEAL from *Moore, J.,* at July (Special) Term, 1907, of HAYWOOD.

This action was instituted by plaintiff, a citizen and resident of Haywood County, against defendant for the recovery of a penalty. It originated in a justice's court and was brought by appeal to the Superior Court. The plaintiff alleged "that the defendant above named was a member of the board of county commissioners for said county for the

two years immediately preceding the first Monday of December, 1904; that the defendant, together with the other members of the board of county commissioners, failed and neglected to make and publish a statement of the county revenue, the disbursements of the same, the permanent debt of the county, showing when the same was contracted, and the interest paid or remaining unpaid thereon, together with the name of every individual whose account had been audited, showing the amount claimed and the amount allowed, for the year next preceding the first Monday of December, 1904, as required by section 752 of The Code of North Carolina.

When the cause was called for trial the defendant lodged a (427) motion to dismiss the action for that the plaintiff's complaint failed to set forth facts sufficient to constitute a cause of action, and upon the further ground that the defendant and others composing the board of commissioners of Haywood County for the two years next preceding the first Monday of December, 1904, were not required, under the law (The Code, sec. 752; Revisal, sec. 1388), to publish any statement for the year ending first Monday in December, 1904, and that such duty devolved upon the successors of the defendant and his associates, who qualified as the board of county commissioners on the first Monday in December, 1904, and that, therefore, the defendant is not liable for the penalty sued for, the plaintiff admitting in open court that the defendant went out of office as a member of the board of county commissioners on the first Monday of December, 1904, and that the other members of the old board likewise went out of office on the same day. This motion was overruled by the court, and the defendant excepted. Under the instructions of the court, there was a verdict for the plaintiff Defendant excepted and appealed, assigning as error the court's refusal to dismiss the action for the causes set out in the motion.

Smathers & Morgan and Norwood & Norwood for plaintiff.
H. R. Ferguson, W. B. Ferguson, and W. T. Crawford for defendant.

CONNOR, J., after stating the facts: The statute (Revisal, sec. 1388) provides "that the board shall cause to be posted at the courthouse, within five days after each regular December meeting and for at least four successive weeks," certain statements fully set forth in the statute. It being conceded that the term of the board of which defendant was a member expired on the first Monday of December, 1904, the question is presented whether the failure to publish the statement required by the statute within five days after the expiration of his term subjects the defendant to the penalty. It would seem to be too clear for (428) discussion that after the expiration of the term of the board of commissioners the members thereof cease to constitute the corporate

entity known as "The Board of Commissioners." Their corporate capacity came to an end at the expiration of their term, and the corporation known as "The Board of Commissioners" is composed of their successors. How, then, is it possible for the defendant to be liable for the penalty for failing to discharge a duty imposed upon the board of commissioners after he ceases to be a member of such board? Is it not manifest that the duty to publish a statement is imposed upon the board in its corporate capacity—that is, upon those persons who constitute the board during the five days after the regular December meeting?

The plaintiff relies upon *Roberts v. Southern Pines,* 125 N. C., 172. It will be observed that the facts in that case are different from those presented upon this record. The statute there required the board of town commissioners to publish annually—fixing no time subsequent to any monthly meeting—a statement of the amount expended by them. Hence, there was no reason why, at the last meeting on the first Monday in May, they should not have made the publication, and their failure to do so could not be thereby shifted to their successors; whereas the statute under which defendant is sued prescribes that they shall have five days after the regular December meeting within which to publish the statement. The distinction between the two cases is obvious.

It is suggested that the purpose of the Legislature was to require each board to make publication of its own official acts in connection with the public revenues. However that may be, we have no power to read into the statute any other meaning than that which is clearly ascertained form its language. This being a penal statute, it is elementary that it must be construed strictly, or, at least, so construed as to give effect to all of its terms, and not to extend them by implication or sug-
(429) gestions as to the legislative intention. The policy of the law is to require the publication of the receipts and disbursements of the public revenues. This is secured by imposing the duty upon the incoming board, to whom the record made by their predecessors is turned over, as effectively as upon the outgoing board, who have no further control of the records, or duties in connection therewith. It may be suggested that the policy of the law would be best met by requiring a new board to make the publication, as its members could have no possible motive for suppressing any facts or making other than a truthful statement. However this may be, the language of the act is perfectly plain that the board shall make its statement "within five days after each regular December meeting." This can only be done by the board which shall be in existence during the time within which the statement is to be published.

We are of the opinion that the defendant was entitled to have his motion allowed, and in refusing to do so there was

Error.

(430)

H. H. HARTON, ADMINISTRATOR, v. THE FOREST CITY TELEPHONE COMPANY.

(Filed 17 December, 1907.)

1. Negligence—Telephone and Telegraph Lines—Construction—Maintenance—Care Required.

In the construction and maintenance of its lines, a telephone company is held to the exercise of a high degree of care in regard to safety of the public using the highway along which its poles are placed, in the selection of the material and its placing, with reference to weather and other conditions which may reasonably be anticipated.

2. Same—Telephone and Telegraph Lines—Maintenance—Inspection.

It cannot be generally stated as a legal proposition how frequently a telephone line should be inspected, such duty depending upon the character of the soil in which the poles are placed, weather and other conditions which would affect the security thereof, with reference to the safety of the traveling public.

3. Same—Telephone and Telegraph Lines—Danger—Menace—Notice—Evidence—Question for Court.

In an action to recover damages for failure of a telephone company to make its poles secure, after notice given of their dangerous condition owing to certain weather conditions, evidence that such notice was given, without stating when, is not sufficiently definite for the court to say whether it was negligence to fail to secure them before the accident resulting in injury.

4. Instructions—Evidence—Verdict, Directing—Nonsuit.

A prayer for special instruction to the jury that, upon the evidence, if found by them to be true, the plaintiff was not entitled to recover, includes the whole evidence, that of both parties.

5. Same—Intervening Negligence—Causal Connection.

The defendant cannot escape liability upon its original negligence because of an intervening cause which would naturally and ordinarily have followed, or could by ordinary foresight have been anticipated therefrom and guarded against.

6. Same—Intervening Negligence—Causal Connection—Independent Acts—Proximate Cause.

When it was shown by the evidence that the defendant's telephone pole had fallen upon a public road, and that intelligent third persons, not agents of the defendant and acting without its knowledge, or its knowledge of the conditions, replaced the pole in the hole in such manner as to make it insecure and unsafe for travelers along the road, and that the plaintiff's intestate, free from negligence, was injured about half an hour thereafter by the falling of the pole, the question of the defendant's negligence, if any, was eliminated by the intervening acts of third persons, constituting the proximate cause; and it was error in the court below to refuse to instruct the jury that, if they found the evidence to be true, the plaintiff could not recover.

APPEAL from *Ward, J.*, at Spring Term, 1907, of CLEVELAND.

Action by plaintiff administrator for damages sustained by the death of his intestate, which, he avers, was caused by the negligence of the defendant corporation.

It is alleged and admitted that defendant, pursuant to authority conferred by its charter, erected and, prior to 1 March, 1903, maintained a telephone line, consisting of poles and wires strung thereupon,
(431) along the public road from Forest City to Caroleen, in the county of Rutherford.

It was in evidence, without controversy, that some eight or ten days prior to 8 March, 1903, the overseer of the public road plowed along the side of the road within 8 or 10 inches of one of defendant's poles, "leaving it in a dangerous condition"; that before this time the pole was in a secure condition—that it was "all right"; that the overseer notified defendant's lineman of the condition in which the pole was left after he had plowed near it. There is no evidence showing when the notice was given. That on Saturday night, 7 March, 1903, a heavy rain fell, washing the earth away from the pole, and by reason thereof it fell across the road.

One J. C. Carpenter, a witness for defendant, says that he passed along the road on Sunday, 8 March, 1903, at about 2 o'clock in the afternoon; that the pole was "flat down across the road." He was in a hack, with two other persons. Two poles were down. That they were the first persons who passed after the pole fell—this was shown by the wheel tracks; that he, with the assistance of those with him, lifted one pole and passed under it; the other pole they straightened up—set it in the ground, "right back in the old hole," and propped it up with a pine stick from 6 to 8 feet long; the lower end of the prop was in the edge of the road, extending into the road about 4 feet. They got the prop from Mr. Morrow's woodpile. Four persons propped the pole. "We could have driven under it like we did the other one. It could not have been removed without breaking the wire." The prop could have been struck by a buggy passing. The road hands had worked close up to the pole. The witness met plaintiff and his daughter between the pole and Forest City; they were going towards the pole. We propped it up to get it out of the way."

One witness testified that he drove by the pole and saw that it was propped. "The prop was sticking out in the edge of the road.
(432) I drove around it. I had to do so to keep from hitting against it. If I had kept straight in the road I would have hit the prop. The pole was right at the edge of the road, and the lower end of the prop was sticking out in the road. The prop was out where, if any one went along in the usual driving place, he would hit it."

Mr. Morrow, for plaintiff, testified that he went to the pole just after the accident; found the pole on the side of the road and a prop lying with it. "The prop was between 5 and 7 feet long. I noticed where the buggy was driven. The prop was not long enough to reach into the rut."

On Sunday, 8 March, 1903, between 2 and 3 o'clock in the afternoon, plaintiff, in a buggy with his daughter, passed along the road from Forest City to Caroleen. He says: "She (my daughter) was sitting on the side next to the pole. She had a bank statement in her hand. I was not looking. The pole fell and struck her on the head and hurt her. There was one pole back of us, 10 or 20 steps from us; it fell at the same time. The base of the pole was from 6 to 8 feet from the rut of the wheels. Our buggy was in the center of the road when the pole fell. The wheels were in the current or middle of the road. When the pole fell the mule ran 40 or 50 yards. I then went back to the place and found the pole across the road, and also a prop by the side of the road. The prop was 4 or 5 or 6 feet long and as large as my arm. There was a place where the end of the pole stuck, 3 or 4 feet from the rut. I was just driving along the road, and my daughter was looking at a bank statement when the pole fell."

There was other testimony, but in the view taken by the court the foregoing only is material. The court submitted the following issue: "Was the death of the plaintiff's intestate caused by the negligence of defendant, as alleged?"

Defendant requested the court to instruct the jury that if they believed the evidence of the witnesses, both for the plaintiff and the defendant, they should answer the issue "No." The request was denied. Defendant excepted. There was a verdict and judgment (433) for plaintiff. Defendant appealed.

Pless & Winborne and Ryburn & Hoey for plaintiff.
Webb & Mull and O. Max Gardner for defendant.

CONNOR, J., after stating the case: Before discussing the principal question involved in this appeal, it is important to note a difference, in an important respect, between the testimony certified to us in this and the former appeal (141 N. C., 455). In that appeal Alexander Mayes, a witness for plaintiff, after testifying in regard to the condition in which the pole was left by the overseer of the road, eight or ten days before the accident, says: "I told the lineman about the dangerous condition of the pole two or three days after we had worked the road. I told him it was the pole near Morrow's stable. In a few days I noticed a stob had been driven by the pole, but that did not appear to make it any safer." (Record, p. 13) In this record the same witness says:

"I made report to the lineman of defendant company. I told him the pole was dangerous, and if it rained and the ground got wet, that it would fall. I told him which one it was."

The first testimony, if true, showed negligence, either in failing to repair the dangerous condition in which the road overseer left the pole or in doing so negligently. If the lineman was told of its dangerous condition "two or three days" after the work on the road, it was at least six or seven days before the injury was sustained by plaintiff's intestate. To fail to repair the condition and make it secure, after six or seven days notice, was manifest negligence. His Honor, *Judge Allen,* so regarded it. From the testimony in this appeal it does not appear how long prior to the accident notice was given the lineman. It is clearly the duty of a telephone company to exercise reasonable care—and (434) reasonable care is, in this respect, a high degree of care—to select sound poles and to place them securely in the earth to prevent them falling, under ordinary and usual conditions, having due regard to the effect of rain and frost in loosening the earth, and prevailing winds blowing them down. The duty of reasonably careful construction is followed by like care in maintenance and inspection. Joyce Elec. Law, 605. The duty of inspection, in regard to its frequency, cannot be made definite, but regard must be had to the character of the soil, the condition of the weather, the season of the year, and such other conditions as may affect the security of the poles and the safety of the traveling public.

It is conceded that the defendant had discharged its duty in regard to construction of its line. Plaintiff's witnesses say that before the road overseer plowed near to it the pole was secure—"all right." We cannot say that a failure to inspect for eight or ten days, in the absence of any notice of trouble, was negligence. In the absence, therefore, of evidence of the time the lineman was notified of the dangerous condition of the pole, we think there was no evidence of negligence. The mere fact that the pole fell on Sunday, following a heavy rain the night previous, would not constitute evidence of a failure to repair within a reasonable time after notice, there being no evidence when notice was given.

In view of the fact that this case has been twice tried and a new trial upon this point would prolong an expensive litigation, and in view of the further fact that the cause was tried below and argued in this Court upon its merits, we deem it our duty to express the opinion to which we have arrived. When the case was here upon a former appeal a majority of the Court thought that plaintiff should have gone to the jury, under *Judge Allen's* instructions. The case as now presented enables us to pass upon the right of plaintiff to recover upon his own and such portions of defendant's evidence as are not contradicted and which the jury

may find to be true. Defendant requested his Honor to instruct (435) the jury that if they found the entire evidence to be true, plaintiff was not entitled to recover. This request assumes the truth of plaintiff's evidence, and that, taking the defendant's evidence to be true, it entitles the defendant to a verdict. In this respect it differs from a motion for judgment of *nonsuit*.

Before stating the case thus presented, we will eliminate the question whether plaintiff's buggy wheel struck the prop placed by Carpenter to support the pole and thereby caused it to fall. More than one conclusion may be drawn from the testimony upon this point. Hence we must, in discussing the request for instructions, assume that the wheel did not strike the prop. We do not think that there is any evidence of negligence on the part of plaintiff. We also assume, for this purpose, that defendant's lineman was guilty of negligence in failing to repair the condition of the pole, and that it fell by reason of such negligence, thus eliminating the heavy rainfall on Saturday night.

Thus considered, the case comes to this: The pole, having fallen by reason of defendant's negligence, was lying on the ground, across the road, on Sunday. Carpenter and several others came along and put the pole back in the hole from which it had fallen by reason of the support being removed by the overseer of the road, and the rain. He and those with him, for the purpose of making it secure, went to a woodpile near by and got a pine stick or pole, of the size and length described by them, and propped the pole in the manner described. They propped it up to get it out of the way. They could have held it up and driven under it, as they did another pole not far away. Carpenter had no connection with and did not act in behalf of defendant. In less than an hour after Carpenter put the pole up, the plaintiff and his daughter, riding in a buggy and driving a mule, came along the road, and, just as they passed, without any suggestion of the immediate cause, other than inherent weakness in the support which it had, the pole fell, the mule ran and, in some way, immaterial in this connection, but difficult to (436) understand, the daughter received a severe concussion of the brain, without being hit by the pole, became unconscious and, in six weeks, died.

The question is thus presented, whether the act of Carpenter or the original negligence of defendant, in legal contemplation, was the proximate cause of the injury sustained by plaintiff's intestate. We think it manifest that Carpenter negligently—that is, insecurely—placed the pole in the hole from which it had recently fallen. The dangerous condition in which it was left by the overseer was the result of plowing near to it, removing or loosening the earth by which it was suppported. This, followed by the heavy rain, caused the pole to fall. This was manifest

to Carpenter. All of the evidence is to this effect. Carpenter and those aiding him recognized it by going to a woodpile and getting the pine stick with which to prop it. That it fell within a short time—less than an hour—shows that it was left by Carpenter in an insecure and dangerous condition. His motive—purpose—was doubtless to restore the pole and serve the defendant and its patrons, but the act was unauthorized. He could not impose upon defendant any new or different duty or liability from that which it assumed by its original negligence. If the pole had struck plaintiff's intestate when it fell the first time, or if, after being down across the road, she had, without contributory negligence, driven against it and been injured, the defendant would have been liable. It was liable for all such damages as resulted or flowed in ordinary natural sequence from the negligent omission to repair the dangerous condition of the pole after a reasonable opportunity to do so; the reason being, as said by Pollock, probably the most accurate writer on the subject, "that a person is expected to anticipate and guard against all reasonable consequences of his negligence, but that he is not expected to anticipate and guard against that which no reasonable man (437) would expect to occur." Torts, 40, citing *Greenland v. Chaplin,* 5 Ex., 248; *Ramsbottom v. R. R.,* 138 N. C., 38. Discussing this question, *Mr. Justice Walker,* in *Drum v. Miller,* 135 N. C., 204, quotes with approval the language of Judge Cooley: "When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through consequences resulting therefrom, this consequence must not only be shown, but it must be so connected, by averment and evidence, with the act, or omission, as to appear to have resulted therefrom, according to the ordinary course of events, as a proximate result of a sufficient cause." Cooley on Torts, p. 74. This principle would have been illustrated and applied if plaintiff's intestate had been injured by the first falling of the pole or by driving against it while down across the road. Carpenter's act introduces a new element in the case and renders it necessary for us to seek another principle by which to determine defendant's liability. It is manifest that, but for Carpenter's act, the pole could never have fallen upon plaintiff's intestate. So far as the dangerous condition of the pole, which imposed upon defendant the duty of securing it, was concerned, when it fell its power to injure by falling was exhausted. No one having been injured in the falling, the case was *damnum absque injuria.* The duty thus imposed upon the defendant was to remove the obstruction from the highway, and a failure to do this promptly, under the circumstances, rendered it liable for injuries sustained by any person traveling the highway. The pole was down across the highway by reason of defendant's negligence, because, for the purpose of this dis-

cussion, we eliminate the heavy rain as a causal element in producing the condition. Assuming that defendant knew the pole was in a dangerous condition and liable to fall, either with or without the heavy rain, it was fixed with notice that it had fallen—that is, that the probable result of its negligence had occurred. In this condition of the case we find a satisfactory statement of the law in Wharton on Neg., 138. He says: "Suppose that, if it had not been for the inter- (438) vention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff: is the defendant liable to plaintiff? This question must be answered in the negative, for the general reason that causal connection between the negligence and damage is broken by the interposition of defendant's responsible human action. I am negligent on a particular subject-matter. Another person, moving independently, comes in and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable."

The rule, as announced by *Justice Strong,* in *R. R. v. Kellogg,* 94 U. S., 469 (p. 475), is usually regarded as sound in principle and workable in practice. He says: "The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

In many of the cases found in the reports, in which it is claimed that intervening agencies have broken the causal connection between the wrong and the injury, it will be noted that the intervening agencies are either natural or conventional conditions, as when a house is negligently burned, whereby the fire is communicated to other houses more or less remote from the original, and winds or other natural (439) causes have changed or controlled the course of the flames. Here the intervening agency is free, intelligent, and independent, in the sense of a self-controlled person who interposes and changes the conditions which he finds existing when he enters upon the scene. The liability, if any exist, for his conduct is vicarious. Adopting either view of causation as the basis of liability—that of "natural and prob-

able consequences," or "what ought reasonably to have been anticipated and guarded against"—we think the same conclusion follows in this case. Dr. Wharton says: "Reserving for another point the consideration of consequences resulting from the indefinite extension of vicarious liabilities, we may now ask whether, on elementary principles, the action of an independent, free agent, taking hold, *unasked,* of an impulse started by us and giving it a new course, productive of injury to others, does not make him the juridical starting point of the force so applied by him, so far as concerns the person injured. For the spontaneous action of an independent will is neither the subject of regular, natural sequence, nor of accurate precalculation by us. In other words, so far as concerns my fellow-beings, their acts cannot be said to have been *caused* by me, unless they are imbeciles or act under compulsion or under circumstances produced by me which gave them no opportunity for volition." This language excludes nonliability for the acts of one under compulsion by reason of conditions produced by the original wrongdoer, as, in the *Squib case,* the throwing of the squib by the intervening persons was for their protection from danger to which the defendant gave the first impulse. They were not "free agents." *Scott v. Shepherd,* 2 Black, 892; 1 Smith L. C., 549. Of course, if Carpenter had been defendant's servant, acting within the scope of his employment, the liability would have attached, upon the doctrine of *qui facit per alium,* etc.

(440) When the cause was before us on the other appeal, the majority of the Court conceded that Carpenter's act "intervened and was the efficient cause of the injury" (141 N. C., 462), but the doubt was expressed whether it was a "new and independent cause." Citing the language of Barrows on Negligense, it is said "If, however, the cause—the intervening cause—be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damages resulting solely from the intervention." Conceding this to be true, we have in the evidence a striking illustration of the dividing line between liability and nonliability. Defendant knew that the pole was in a dangerous condition—that the probability of its falling was increased by rain. That it might rain was reasonably probable. Therefore, although the pole may not have fallen if it had not rained—and in a certain sense the "heavy rain" caused the pole to fall—yet, because it was an intervening cause which would naturally and ordinarily have occurred, and one which ordinary foresight ought to have "anticipated and guarded against," the defendant, by reason of its original negligence, is not permitted to escape liability upon the suggestion of broken causal connection between the "wrong and the injury." But can it be said that, in addition to this,

it could have reasonably anticipated that Carpenter and his associates—a free, intelligent agent—coming along and seeing two poles down across the road, would lift up one and pass under it, and would undertake to put the other back in the hole from which it had just fallen, and, further, would go to a woodpile near by and get a pine stick with which to prop the pole? Can it be that all of this on the part of Carpenter was a natural, orderly, unusual sequence from the original negligence, or that his action was a subject of ordinary precalculation or foreknowledge? "Can we regard the independent action of intelligent strangers as something that is in conformity with ordinary natural law, or as something that can be foreseen or preascertained?" The fact that Carpenter disposed of the two poles in the same situation (441) in an entirely different manner—lifting one up and passing under, and putting the other back in the hole—is a practical demonstration of the difficulty of following the argument of prevision to the length claimed by plaintiff. Assuming that defendant knew that the pole had fallen, is it reasonably probable that it would or could foresee that some one would come and negligently put it back in the hole, in plain view of its condition? It is an entirely reasonable conclusion that the first traveler along the road would either push, pull, or lift it out of his way, and if in doing so he left it in a dangerous condition, whereby plaintiff was injured, the case would come within the principle of *Clark v. Chambers,* 3 Q. B. D., 327; 47 L. J. Q. B., 427; 19 Eng. Rul. Cas., 28, relied upon by plaintiff. In that case defendant had obstructed the highway with a hurdle and two wooden barriers armed with spikes. Some one came along and removed one of the *chevaux-de-frise* hurdles from the place where it stood, and placed it across the footpath. Plaintiff, passing there in the dark, ran against it and was injured. The Court held that defendant was liable. Pollock on Torts, 49, says that the decision, or at least the ground upon which it is put, is not in harmony with other cases. He says: "However, their conclusion may be supported, and may have been to some extent determined by the special rule imposing the duty of what is called 'consummate caution' on persons dealing with dangerous instruments."

In *Sharpe v. Powell,* 7 L. R. (1872), 253, *Bovill, C. J.,* says: "No doubt, one who commits a wrongful act is responsible for the ordinary consequences which are liable to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person." Pollock says: "Whether *Chambers v. Clark* can stand with it or not, (442)

both principle and the current of authority concur to maintain the law as declared in *Sharpe v. Powell.*" We have examined a number of decided cases in which the doctrine involved here is discussed. It is uniformly conceded that, while the principle is clear, the application is difficult, and variant combinations of fact render decided cases of but little value as authorities. When the facts are in controversy, or more than one conclusion of fact may be drawn, the question is submitted to the jury. When the facts are admitted, or found by the jury, and the conclusion is clear and certain, it is a question for the court.

After more than usual reflection and investigation, with the aid of exhaustive argument by able counsel, we are of the opinion that the defendant was entitled to have the court instruct the jury that if they believed the evidence they should answer the first issue "No."

We have not discussed the several instructions given by his Honor, because our opinion renders it unnecessary to do so. It is but just, however, to say that his Honor followed the rule laid down in the opinion of the Court. There was some difference in the testimony, to which sufficient weight was not given.

For the error pointed out, there must be a

New trial.

HOKE, J., concurring: My opinion as to the general principles applicable to a case of this character was stated at some length on a former appeal, and will be found reported in 141 N. C., 455. I think, too, the judge below conducted the present trial according to the general views expressed in that opinion. The case, even then, was a source of much perplexity, and the fuller statement of the conduct of Carpenter, as it appears in the present record, has led me to the conclu-
(443) sion that his acts on the occasion were those of an independent agent, which intervened and so broke the sequence of events as to "insulate" the original negligence of defendant and prevent it from being correctly considered as a proximate cause of intestate's death.

I therefore concur in the opinion of the Court.

Cited: McGhee v. R. R., 147 N. C., 154; *Fanning v. White,* 148 N. C., 544; *Penny v. R. R.,* 153 N. C., 301, 308; *Terrell v. Washington,* 158 N. C., 290; *Ward v. R. R.,* 161 N. C., 183, 184; *Chancey v. R. R.,* 174 N. C., 353.

J. L. OGDEN ET AL. v. THE APPALACHIAN LAND AND LUMBER COMPANY ET AL.

(Filed 18 December, 1907.)

Compulsory Reference—Trial by Jury—Demand—Waiver.

A party who may have reserved his right to a trial by jury by proper exceptions in apt time to a compulsory reference will be deemed to have abandoned this right by not pointing out, at the time when the exceptions were filed, the questions or issues upon his exceptions to the report of the referee, and by not presenting such issues as he deems necessary to present the controverted facts.

ACTION, heard by *O. H. Allen, J.*, upon the report of the referee therein, at Spring (April) Term, 1907, of CHEROKEE.

Judgment for plaintiffs. Defendants appealed.

The facts sufficiently appear in the opinion.

Merrimon & Merrimon, E. B. Norvell, and Axley & Axley for plaintiffs.

Dillard & Bell for defendants.

WALKER, J. This appeal embraces several creditors' bills, filed for the purpose of winding up the affairs of the defendant company. The actions were consolidated by order of the court, and then referred to Mr. Dewees, clerk of the court, to find and state the facts and his conclusions of law. We have read that report with great care, and, in the light of the evidence upon which the findings of fact and the conclusions of law are based, it has impressed us most favorably (444) as having been prepared after a thorough and painstaking investigation of all the evidence, and as being the result of an intelligent and impartial consideration of the case. Its conciseness and yet its comprehensiveness are its prominent merits. The defendants, when the reference was ordered by *Judge Justice*, entered a general exception to the same, in the following words: "Defendants' counsel except to the above order of reference." We are of the opinion that this exception, while very general in its terms, is sufficient to save the right of the defendants to a trial by jury. What could an objection to an order of reference mean, unless it was a challenge of the power of the court to take away from the objector his right to a trial by jury? In *Driller Co. v. Worth*, 117 N. C., 515 (at p. 520), the leading case upon this subject, the Court says: "Where a party omits at an opportune moment to declare his purpose to claim his constitutional protection, and thereby so misleads his adversary as that to insist upon it at a later stage of the proceeding would place the opposing party at a dis-

advantage by delaying the adjudication of his rights, it is competent for the courts to so far restrict and regulate the right as to prevent needless or wanton infringement upon the rights of others. Therefore, though it is error to order a compulsory reference until a trial is first had and a finding adverse to the pleader returned upon an issue raised by a plea in bar, the failure to object when the order is made is deemed a waiver of the right. Silence, under such circumstances, is inconsistent with the purpose to insist upon the settlement of an issue decisive of the whole controversy by any other tribunal than the referee, and to allow a party to do so would be to give him the chance of prevailing by a second mode of trial, after his adversary had been induced by his silence to incur costs, often very heavy, in meeting him in another forum, to which he had not objected. *Clements v. Rogers,* 95 N. C., 248; *Grant v. Hughes,* 96 N. C., 177." And again, and for the (445) purpose of showing how the right to a jury trial, once reserved by a mere exception to the order of reference, may be lost, the Court proceeds to decide how it must be preserved, as follows: "For a like reason, where a party promptly insists upon reserving his right, and causes his objection to be entered of record, when the compulsory order of reference is made he may still waive by failing to assert it in his exceptions to the referee's report. *Harris v. Shaffer,* 92 N. C., 30; *Yelverton v. Coley,* 101 N. C., 248. The law implies that the party objecting will give timely notice of the specific points upon which he elects to demand a trial by jury instead of submitting to the findings of the referee, in order that the opposing party may know how to prepare to meet him, by summoning the material witnesses, if necessary. Any other ruling would authorize the perversion of a provision of the organic law to the purpose of subjecting others to delay and needless expense. It is the duty of the courts, on demand properly made, to enforce a constitutional guarantee of right, but not in such a manner and to such an extent as to unnecessarily inflict injury on others."

In this case there are thirty-one exceptions to the referee's report, and, as each exception was made, the defendants merely stated that, "as to the matters and issues embraced in said finding, they and each of them demand a jury trial." The defendants do not specify the particular fact controverted upon which they think an issue should be submitted to the jury, nor do they formally tender an issue upon each finding of fact against them to which they excepted. A party is entitled to the right of trial by jury, under the Constitution, but he may waive his right if he chooses so to do; and this may be done, not only by express agreement, entered of record, as required by the statute, but by such conduct on his part as indicates that he does not intend to avail himself of it, and as is inconsistent with his right to assert it. We

are not quite sure if the better practice would not be for a party (446) excepting to a reference to expressly reserve his right of trial by jury. But we will not decide this now to be essential to the preservation of his right, as it is not necessary to do so, for if the defendants formally asserted their right to have the issues thus tried, they clearly waived it afterwards by not pointing out the questions or issues of fact they raised by the exceptions, and presenting such issues as they deemed necessary to cover all of the controverted facts. The law provides that the issues arising upon the pleadings, material to be tried, shall be made up by the attorneys appearing in the action, and reduced to writing, or by the judge presiding, upon or during the trial. The attorney must take the initiative; and when issues have thus been framed, they are, of course, subject to revision by the judge, and subject also, afterwards, to exception by the party who may allege that he is aggrieved by the ruling. In *Yelverton v. Coley,* 101 N. C., at p. 249, the Court says: "The issues of fact thus joined by the pleadings, report, and exceptions shall be submitted if demanded in apt time." And at p. 230, that "the exceptions must be definite and present distinctly each finding of fact by the referee to which exception is taken." This is a safe and sound rule, and, moreover, can be easily complied with. Apt time means sufficient time to enable the parties to prepare for the trial, and in cases like this one it is the time at which the exceptions are filed. We think this was contemplated by the Court in *Driller Co. v. Worth* and the cases which have followed it: *Yelverton v. Coley, supra; Wilson v. Featherstone,* 120 N. C., 446, and *Roughton v. Sawyer,* 144 N. C., 766. The easiest and most practical way of stating the particular controverted fact which the party desires to have submitted to a jury is by formulating an issue upon each exception, embodying the fact itself. His Honor was right in his ruling upon the demand of the defendants, and we think that in other respects there was no error in the ruling and judgment of the court. Indeed, the point we have decided was the one upon which Mr. Bell laid all the stress of his very able argument. (447)

No error.

Cited: Simpson v. Scronce, 152 N. C., 594; *Pritchett v. Supply Co.,* 153 N. C., 346; *Mirror Co. v. Casualty Co., ib.,* 374; *Keerl v. Hayes,* 166 N. C., 556; *Bradshaw v. Lumber Co.,* 172 N. C., 220; *Ziblin v. Long,* 173 N. C., 236; *Drug Co. v. Drug Co., ib.,* 514; *Godwin v. Jernigan,* 174 N. C., 76; *Robinson v. Johnson, ib.,* 234.

E. J. WHITE v. CITY OF NEW BERN.

(Filed 18 December, 1907.)

1. Negligence—Cities—Sidewalks—Obstructions.

Where an obstruction by the projection of steps to a residence upon the sidewalk of a city is of a wrongful character, a city government can neither validate it by grant nor sanction it by acquiescence; and, having the power, in the exercise of its ministerial functions, of summary abatement, the city is responsible to an individual who is injured by its existence, when the injured person is himself in the exercise of due care.

2. Same—Cities—Sidewalks—Obstructions—Acquiescence.

It is no defense to an action against a city for personal injury received without fault of plaintiff, occasioned by the improper projection of steps to a residence upon the sidewalk, whereon plaintiff, on a dark, drizzly night, struck his foot and was injured, to attempt to show that such projection had been sanctioned by a long, continuous custom for thirty years.

3. Same—Cities—Sidewalks—Obstruction—Knowledge.

When a wrongful obstruction of a sidewalk of a city, by the projection of steps to residences along it, has been shown to exist for thirty years, the city is presumed to have knowledge thereof.

4. Same—Cities—Sidewalks—Obstructions—Lights.

Temporary obstructions or permanent conditions may be such, in the absence of light at a particular locality, as would import negligence; but when the streets of a municipality are otherwise reasonably safe, neither the absence of lights nor defective lights is in itself negligence, but is only evidence on the principal question, whether at the time and place where an injury occurs the streets were in a reasonably safe condition.

5. Same—Cities—Sidewalks—Obstructions—Duties—Instructions.

When there was evidence to support it, it was error in the court below to refuse to instruct the jury that the city was not liable, absolutely, for the defects in its streets or sidewalks, and, therefore, the mere existence of such defects was not sufficient to constitute a cause of action. The city is not held to guarantee safety, but is only held to provide a reasonably safe way of travel, and the ground of liability to a private party for injury while passing over the sidewalks or streets is only for negligence or neglect, and the mere existence of an obstruction or defect is insufficient. To constitute negligence it must be shown that the authorities of the city had notice of the defect or obstruction and had the power to remedy the same, but failed to do so.

(448) APPEAL from *Neal, J.*, at May Term, 1907, of CRAVEN.

There was evidence tending to show that on the night of 23 June, 1906, plaintiff, going along Middle Street, one of the public streets of the city of New Bern, struck his right foot against some steps which projected in front of a residence and into the sidewalk of said

street. These steps extended about 4 feet onto the sidewalk, leaving something like 5 or 6 feet of passway between the bottom step and the driveway of the street, and they had existed so in this and other portions of the city for as much as thirty years; that it was a dark and drizzly night on this occasion, and the public lights were out at the time. Plaintiff testified that the lights were out on the night of the injury, and had been frequently going out for several months prior to that time; that the city owned the light plant and sold light to private persons for gain. There was no testimony that the streets were not reasonably safe, except as to the existence of the steps and the absence of, or defective, lighting.

On issues submitted, and under the charge of the court, the jury rendered a verdict that defendant was guilty of actionable negligence; that plaintiff was at the time in the exercise of proper care, and awarded substantial damages for the injury.

Judgment on the verdict for plaintiff, and defendant excepted and appealed, and assigned for error:

"(4) That the court erred in its refusal to give the first prayer for instructions of defendant, as follows: That a municipal corporation is not bound to light the streets at night; that while its (449) charter may confer the power, this power is of a governmental and discretionary nature, and for the exercise of the same the city would not be liable.

"(5) That the court erred in its refusal to give the fourth prayer for instructions, as follows: That the city is not liable absolutely for defects in its streets and sidewalks, and that the mere existence of such defects, therefore, is not sufficient to constitute a cause of action; that the city is not held to guarantee safety, but is only held to provide a reasonably safe way of travel, and the ground of liability to private parties for injury while passing over the sidewalks or streets is only a liability for negligence or neglect, and the mere existence of an obstruction or defect is not in itself sufficient; but to constitute negligence it must be shown that the authorities of the city had notice of the defect or obstruction and had power to remedy the same and neglected to do so.

"(6) That the court erred in its refusal to give the fifth prayer for instructions, as follows: That if the jury shall find that, from its early days, steps and porches have been allowed upon the sidewalks of the streets, and that they have been used by the property holders from ancient times, the city should not be held liable for failure to compel the removal of the same."

D. L. Ward for plaintiff.

W. D. McIver for defendant.

HOKE, J., after stating the case: Considering the defendant's assignments of error in reverse order, the position taken, that the projection of the steps upon the sidewalk was sanctioned by the continuous existence of such a condition for twenty-five or more years, cannot be sustained. If this projection of the steps was such an obstruction of the street that it amounted to an actionable wrong, it cannot be rendered lawful by lapse of time, however great. As said in Elliott on
(450) Roads and Streets (2 Ed.), p. 706: "No length of time will render a public nuisance, such as the obstruction of a highway, legal, or give the person guilty of maintaining it any right to continue it, to the detriment of the public. Each day's continuance of such a nuisance is an indictable offense." Where an obstruction is a wrong of this character, a city government can neither validate it by grant nor saction it by acquiescence; and, having the power, in the exercise of its ministerial functions, of summary abatement, the city is responsible to an individual who is injured by its existence, when the injured person is himself in the exercise of due care. *S. v. R. R.*, 141 N. C., p. 736; Elliott on Streets and Roads, pp. 700, 705, 965.

As to the second position, we have held in *Fitzgerald v. Concord,* 140 N. C., 110: "(*a*) The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so, to the extent that this can be accomplished by proper and reasonable care and continuing supervision. (*b*) The town does not warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and to establish such responsibility it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town 'knew, or by ordinary diligence might have discovered the defect,' and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated." And the same doctrine has been announced in several other decisions of the Court. As to the city's knowledge of these steps, the authorities must have had knowledge of them, or such knowledge will be imputed, for they had existed in like condition for as much as thirty years, and in the present case this portion of the prayer is not material; but we think that the principle of these decisions is
(451) embodied in the prayer as a whole, and there was error to defendant's prejudice in not giving the same or some substantially similar instructions.

Again, we think that the prayer indicated in defendant's fourth assignment of error is sound, as a general proposition, and is correct

as applied to the facts of the case. In the absence of statutory requirement, a city is under no legal obligation to light its streets and such obligation does not arise or exist from the fact that the city has been given the power to light them. And where a city or town has undertaken the duty, the placing and character of the lights must be allowed to rest very largely in the discretion of the authorities. *Brown v. Durham,* 141 N. C., 249; *Columbus v. Simms,* 94 Ga., 483; *Carravan v. Oil City,* 183 Pa. St., 611; *Macomber v. Taunton,* 100 Mass., 255; *Randall v. R. R.,* 106 Mass., 327; *Freeport v. Isbell,* 83 Ill., 440; Elliott on Roads and Streets, sec. 623. Undoubtedly, temporary obstructions and hindrances on a highway, or permanent conditions, may be such that an absence of lights at the particular locality would import negligence, and to this principle possibly may be referred the decision in *Chicago v. Powers,* 42 Ill., 169. But when the streets of a municipality are otherwise reasonably safe, the weight of authority and the better reason are to the effect that neither the absence of lights nor defective lights is in itself negligence, but is only evidence on the principal question, whether at the time and place where an injury occurred the streets were in a reasonably safe condition. As said by *Mr. Justice Dean,* delivering the opinion in *Carravan v. Oil City, supra:* "As to whether sufficient light was provided by the city on the night of the accident, we may briefly say that there is no legal obligation on a municipality to light its streets, when their construction is reasonably safe for travel. That is solely a question for the municipal legislature. It may do many things not enjoined by law to promote the general well-being and comfort of a citizen; but in not doing that which no (452) statute commands, negligence cannot be imputed to it. This, however, in no sense relieves it from the duty of that ordinary care which requires that temporary excavation for building purposes should be exposed by proper light, or that temporary obstructions of the streets by building material should be made conspicuous in the same way."

There is nothing in our present decision which in any way conflicts with *Fisher v. New Bern,* 140 N. C., 506. That was an action for an injury caused directly by the negligence of defendant in the operation and management of its plant. A live wire had fallen and was negligently permitted to remain in a menacing condition, whereby one on the highway was hurt. The city was held responsible, chiefly because it appeared that the plant was being operated not only in the public lighting of the streets, but in selling lights to private persons for gain. The opinion, in express terms, excludes all consideration of the question as to how far the city could be held responsible for negligence when engaged solely in supplying lights to the public. As a matter of fact, that decision is not an apposite authority in the present

case at all, for the primary and controlling question here is whether the streets were in such a dangerous condition as to import negligence against the municipality, and whether such negligence was the proximate cause of plaintiff's injury; and the presence or absence of lights, or the condition of lights at the time, is only evidential on the issue.

For the errors indicated, the defendant is entitled to a new trial of the cause, and it is so ordered.

New trial.

Cited: Johnson v. Raleigh, 156 N. C., 271; *Brady v. Randleman,* 159 N. C., 436; *Smith v. Winston,* 162 N. C., 51; *Alexander v. Statesville,* 165 N. C., 533; *S. v. R. R.,* 168 N. C., 111.

(453)

COWAN, McCLUNG & CO. v. CUNNINGHAM & WARD.

(Filed 18 December, 1907.)

1. Notes—Partnership—Signatures—Seals—Surplusage.

The seals after the signatures to a note, "C. & Co. (Seal), per J. T. C. (Seal)," are surplusage, and the obligation is the simple contract of the firm.

2. Judgment by Default Set Aside—Legal Discretion—Prejudice—Reasonable Time.

When a judgment by default final is allowed for a defect amounting only to an irregularity, it is not set aside as a matter of right in the party affected, but in the sound legal discretion of the court. The party injured should show that some substantial right has been prejudiced, and he must proceed with proper diligence and within a reasonable time.

MOTION to set aside judgment, tried before *Cooke, J.,* at August Special Term, 1907, of SWAIN.

The motion was denied, and defendants excepted and appealed.

E. R. Hampton and A. M. Fry for plaintiffs.

F. C. Fisher for defendants.

PER CURIAM. The judgment in this case was rendered against John T. Cunningham and D. A. C. Ward, as partners, at Spring Term, 1901, of SWAIN, on a note for $537.30, signed "J. T. Cunningham & Co. (Seal), per J. T. Cunningham (Seal)," with an allegation that the company was composed of defendants J. T. Cunningham and D. A. C. Ward. The complaint was filed in due course of the court, at Fall Term, 1900, and at Spring Term, 1901, defendants having filed no answer, judgment by default final was rendered against defendants for

the amount of the note and interest. Some time after the judgment, one of the defendants (Ward) having died, his representative and widow and heirs at law, at Spring Term, 1907, moved to set aside the judgment, on the ground that judgment by default final had been (454) taken on an unverified complaint.

Under the authorities, and on the face of the papers, the obligation is the simple contract of the firm, regarding the seal as surplusage. *Pipe Co. v. Woltham,* 114 N. C., 178; *Burwell v. Linthicum,* 100 N. C., 145; Bates on Partnership, sec. 418. If it should be conceded in such case that a judgment by default final is not allowable on an unverified complaint, the defect only amounts to an irregularity, and such judgments are not set aside as a matter of right in the party affected, but in the sound legal discretion of the court. As said in *Becton v. Dunn,* 137 N. C., 562: "Such judgments are not set aside as a matter of right in the party litigant, but rest 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."

We are of opinion, in the present case, that the applicants have not brought their cause within either of these requirements. They did not move within a reasonable time, and there is no satisfactory evidence given that a good defense exists against the demand; and for these reasons their motion was properly refused.

Affirmed.

Cited: *Miller v. Curl,* 162 N. C., 4.

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(455)

H. H. BECK v. SOUTHERN RAILWAY COMPANY.

(Filed 18 December, 1907.)

1. Railroads—Negligence—Crossings—Reasonably Safe Place—Employees.

There was sufficient evidence to go to the jury upon the question of defendant's negligence in not providing a reasonably safe way, by a subway, overhead bridge, or other appropriate method, for its employees who have to cross its track, forty in number, when they, numbering several hundred, were permitted by custom to pass daily for ten years over and back at certain places thereon, going to and from their work, and in such manner that serious accidents must necessarily occur.

2. Same—Negligence—Crossings—Employees—Contributory Negligence.

In crossing defendant's tracks in accordance with a permitted custom for ten years, the plaintiff's intestate found a string of dead cars, without engine, standing still on one of the tracks, the rear car being directly

across his usual road home. Plaintiff's intestate, in attempting to pass between two cars attached by a chain, a distance of several feet apart, and in accordance with the established custom, was caught and injured by the sudden attachment, without lookouts, signals, or warnings, of an engine, unseen by him, and in a manner which he could not reasonably have anticipated: *Held*, (1) the negligence of the defendant was the proximate cause of the injury; (2) that if the question of contributory negligence should arise upon the facts, it is one for the jury.

CONNOR, J., concurring *arguendo;* WALKER, J., concurring in concurring opinion. BROWN, J., dissenting *arguendo.*

APPEAL from *Moore, J.,* and a jury, at February Term, 1907, of ROWAN.

The plaintiff sued to recover damages of defendant for the negligent killing of his intestate, who was an employee of defendant in the capacity of tool carrier in its machine shops at Spencer, N. C. Said intestate was a boy about 16 years old, and worked for defendant, at night, in the capacity aforementioned. Defendant's shops and about forty tracks are between the two towns—Spencer and East Spencer—and several thousand people live on each side of these tracks, and about
(456) 1,300 people work for defendant in its shops and on its yards.

It was the custom for the people (with the knowledge and by permission of defendant) working for the defendant, and those living in said towns, to pass over these tracks at their pleasure and in the performance of their duties. Defendant provided two walkways, or crossings, over its tracks for said persons to cross, and for the past ten years permitted people to cross thereover in large numbers—several hundred per day; and when these crossings or openings were closed or blockaded by trains or cars, defendant permitted them to cross said tracks by climbing over, under, or between cars, and this has been the custom since the shops were built, in 1896. Said intestate lived in East Spencer, and his usual and customary way home, together with all persons living in East Spencer, was to cross over these tracks. The night employees got off duty about 7 o'clock a. m., and if the tracks were blockaded with cars and the crossings were blockaded, intestate and others went to their homes by passing between, over, and under cars across said openings or crossings. The morning in question, when said intestate was injured, a string of cars was standing on one of these tracks, known as the "lead track," and had been standing there for several hours, and to this string of cars other cars were attached by a chain, which left a space of several feet. The first car which was chained to the string of cars was one over one of said crossings, which made it necessary for the intestate—carrying out the usual custom—to pass under, between, or over it, in order to go his usual way home. This string of cars did not have any engine attached to it, as it was

standing still, and there was no watchman or sentinel at said crossing, or at any place on said cars or near there, to give warning or notice of the cars being put in motion; and as said intestate was attempting to pass between the two cars that were chained together, without warning or signal, defendant caused one of its engines to be suddenly and violently shoved back against said cars and intestate to be caught between them and injured and mashed, from which injuries he (457) died. The car that was chained to the string of cars had no bumper or drawhead, so that when the string of cars was shoved back against it there was no space left between said cars where intestate was attempting to pass through.

At the close of the evidence the motion of defendant to dismiss was granted, and the plaintiff appealed.

R. Lee Wright and P. S. Carlton for plaintiff.
T. C. Linn for defendant.

CLARK, C. J. The plaintiff was entitled to have this cause submitted to a jury.

There are thirty to forty tracks in Spencer, which are almost continuously filled with cars, more or less. The railroad company has 1,300 operatives working in its shops and yards and living on both sides of the railroad, many of whom have to cross these tracks daily in going from their homes to their work, and returning. The defendant's operatives and their families and attendant population constitute several thousand people. These operatives and people, or many of them, have to cross these tracks, necessarily, very often. The witnesses, whose evidence must be taken as true in this motion, says that several hundred people cross these tracks daily, and for ten years the custom has always been to go through, under, or between the cars, or over them, whenever the tracks are blocked. The defendant, knowing this fact, was guilty of gross negligence, in that it did not provide either a subway or overhead bridges, or, at least, lifting bars, with a guard at each passway. The latter course was ordered (*Brown, J.*, in *Hickory v. R. R.*, 143 N. C., 451) where there was only one track. Here there are forty. This is a necessary precaution, and, no precaution of any kind being provided, accidents such as this must necessarily occur.

It was also negligence, as this Court has over and again (458) declared, to attach the engine to this dead string of cars and suddenly run them backwards, without warning or signal or any one on the rear of the train to give notice. *Ray v. R. R.*, 141 N. C., 84; *Hudson v. R. R.*, 142 N. C., 202. There being no bumper or drawhead, when the plaintiff's intestate was caught between the cars by the sudden pushing back of the dead string of cars, he could not possibly escape.

This being a nonsuit, it is not necessary to set out all the testimony, but only so much as will show, "with the most favorable inferences which a jury would be authorized to draw from it," that there was enough evidence to entitle the plaintiff to his constitutional privilege of a trial by jury. The following are *verbatim* extracts from the testimony:

The plaintiff testified, in part: "There are two towns at Spencer—one on the east and one on the west side of the railroad tracks—and the shops are between the two towns. I worked at the shops. About 1,300 people are employed there. I guess 400 or 500 of the employees live on the east side of the railroad tracks; about 800 live on the west side. The population of East Spencer is about 5,000. The custom of those who live on the east side of the railroad, in going to the shops, is to cross the tracks to get to the shops to work. There are between thirty and forty tracks there. I have seen people going to and coming from their work across these tracks in great numbers. I know about where Grubb was injured. There is an opening leading from the carpenters' shop as far as the shed goes. There is a plank walkway that leads to the carpenters' shop; it is used by people to walk across and to roll hand cars across the tracks. The opening runs north and south. If cars are on the tracks across this opening, people have to climb over, or under, or through, or go around the cars."

Lee Ketchie testified, in part: "I lived on the east side of the railroad during the three years and eleven months preceding 25 November, 1905. I had to cross the lower end of freight yard, and also
(459) the shop yard, in order to get to my work. I know what the custom of the defendant's employees in going to and from their work was. This custom had existed ever since the shops were built, in the spring of 1896. The custom was to cross the freight yard and to go through, under, or between the cars or over the top of them. As a general thing, people going from East to West Spencer go across the yard. This custom has prevailed since the shops were built. Several hundred people went backward and forward daily at the time the intestate was hurt, and before. The defendant's employees have to cross through, between the cars, or over them, to get to their work. My duties often required me to work in the yard; others were required to work in the yard. We had to go from the carpenter shop to the yard, down through the opening to the carpenter shop. There was another opening south of the opening to the carpenter shop; it led from the car shops across the other tracks. The tracks of the opening are laid the same distance apart as the railroad tracks. Both of these openings run east and west, through the sheds. The railroad tracks cross these openings and run north and south. When the openings are filled with

cars or trains, the workmen go to their work by crossing under the cars or going over or between them. This is so, to a great extent. The crossings are constantly blocked. mornings and evenings and several times a day. They were usually blocked in the mornings, when we went to work. They were frequently blocked about quitting time in the afternoon. The men, to get to their homes, had to cross the line of cars or go a considerable distance around them. Those who went home to dinner had to cross these tracks and go out across the freight yard. People could not have gone around and gotten their dinners and gotten back in time to work. I have seen the foremen crawl through cars, and under cars, numbers of times. On 25 November, 1905, I was at the shops, right near where the intestate was injured. It would not exceed 50 or 60 feet from where I was to where the intestate was injured. He was between two of the cars standing on the shop lead track; (460) he was going toward East Spencer—east from the carpenter shop. The intestate was injured on track No. 8, called the shop lead track. Before he started to cross, going east, there *was a string of cars on this track; they were there that morning as I went to work at 7 o'clock. He was injured just a little after 8 o'clock. Between 7 o'clock and the time the intestate was injured, the cars stood still. If there was an engine to the cars I did not see it. An engine was finally attached to the north end of the string of cars.* The string of cars stood across the opening; about four of the cars were south of the opening. The opening was shut up and impassable, unless you went between the cars or under them. The middle of the car was on the crossing (opening); cars were attached to each end of that car. The intestate was caught between the cars about one-half car-length north of the opening. I suppose he went to the nearest place to go between the cars. The place where he was caught was 15 or 20 feet from the crossing (opening). I saw where the cars were when the engine was attached to them. I was on track No. 9, two car-lengths from where Grubb was hurt; it was about 60 feet from where he was hurt. I was about 40 feet nearer the engine than he was. *I could not see the engine when it was attached to the cars.* It was down in the lower (north) part of the yard, around a curve. The tracks east of the lead track, which run into the lead track, were filled with cars; they went out to within a short distance of the lead track. They could not see the engine from their side. It was impossible for Grubb to see the engine from where he stood. I saw the cars he was caught between; one of them had the drawhead out and they were chained together. The one farthest north had the drawhead and bumpers out. It was chained to car behind it. There were *between 2 and 3 feet between the cars* as they were chained together. *The cars came together when the engine pushed cars back.* (461)

Grubb was between two cars, passing over, and was caught. The cars could not have come together if the car had had a drawhead. They would have been about 2 feet apart. *There was no flagman on the rear of the train before the cars were shoved back together. There was no flagman or sentinel on the ground to give signals. There was no watchman or sentinel at either of these openings or crossings. No signal was given, that I heard. If the bell of the engine had been ringing as it was attached to the cars, it could have been heard where Grubb was.*"

As this witness stated that this "string of cars" had been on the track since 7 o'clock; that "if there was an engine to the cars I did not see it"; and, further, "An engine was *finally* attached to the north end of the string of cars"; that "I (witness) was about 40 feet nearer the engine than he (the deceased) was"; that "I could not see the engine when it was attached to the cars," it is an inference the jury might have reasonably drawn (and is, therefore, to be considered on a nonsuit) that this string of cars, which had been standing on the track since 7 o'clock, and to which he did not see any engine, was a dead string of cars, and that the sudden attachment of the engine and its being run back, without notice or signal, was the *causa causans* of the death of plaintiff's intestate.

The plaintiff's intestate was a boy, working on the night shift in the defendant's shops on the west side of these forty tracks. His tour of work ended at 7 a. m. He then had to return over these numerous tracks, as he lived on the east side. He had to wash up, and possibly may have remained to breakfast or for other purposes, so that it was after 8 o'clock when he started home across these tracks, as he and others residing on the east side were accustomed to do. There is no evidence that this delay made it any more dangerous than if he had crossed sooner after 7 o'clock. He found a string of "dead" cars
(462) standing still on one of the tracks, the rear car of which was exactly across his usual road home. Between the end of this car and a disabled car, attached to the rear car by a chain, there was an interval of several feet. The intestate attempted to pass through this interval. He thus went probably a third of one car's length out of the direct road (one witness says 15 feet) to clear the car standing in the road. The string of cars was made up of "dead" cars, we take it, with no engine attached. The sudden attachment of the engine, which was done around a curve, so that the intestate did not see it attached, and the pushing back of the cars, without signal or any one on the rear to give notice, it would seem, were the proximate cause, and not the conduct of the boy, who was getting across these numerous tracks in the best way he could, as he and so many others were daily required to do. If there was any contributory negligence, whether that

or the negligence of the defendant was the proximate cause of the death of the boy was a matter which should be passed on by the jury, not by the court.

This renders it unnecessary to consider the other exceptions for exclusion of evidence. The judgment dismissing the action is set aside.

New trial.

CONNOR, J., concurring: I concur in the opinion of the Court that this case should have gone to the jury. While there are some portions of the evidence not entirely clear, in respect to the several tracks and the different uses to which they were put, I think it appears with sufficient certainty that for ten years the custom had prevailed for the employees, who lived on either side of the system of tracks at Spencer, to pass under, over, and between the cars in going to and returning from their homes. While some provision seems to have been made for walkways, it appears that they were usually, and on this occasion, blocked by cars standing on and across them, and that the employees were accustomed to go under or between the cars. It (463) was the duty of defendant to provide a sufficient number of safe and clear walkways for the use of its employees. If it was impracticable to keep them at all times open, guards should have been provided to protect persons passing under or between the cars, and to flag engines and see that no one was passing before they moved. In failing to make some safe way, thus endangering the lives of more than a thousand people whose duty and employment subjected them to danger, there was negligence, or at least evidence thereof fit for the consideration of the jury. I, of course, concede that ordinarily it is gross negligence to go between cars with an engine attached, and, in the absence of some satisfactory explanation, such conduct will bar a recovery; but the evidence here tends to show that the plaintiff's intestate, a young boy, in going between the cars, did as all others similarly situated, and that he was acting in accordance with a general custom which had existed for ten years. I do not think, under the circumstances, it can be said that as a conclusion of law, he was negligent. The question is for the jury. I forbear discussing the evidence, for the reason that, as the case goes back for a new trial, other evidence may be produced. I would not care, with my limited knowledge and observation, to express an opinion in regard to the manner in which a safe way should be provided for the employees to pass over the tracks in the defendant's yard at Spencer. It is to be regretted that more attention is not given by both employer and employee to securing, in the largest practicable degree, the lives and limbs of employees in the service of railroads. Both humanity and interest demand that the danger to which men engaged

in this useful and, in a large sense, public service shall be reduced to the lowest possible point. Necessarily, there are dangers incident to work upon a large train yard like this, but it would seem that if hundreds of men are to continue to pass under, over and between cars in the discharge of their duties, some precautionary method should be found to protect them from the danger of the cars being sud-
(464) denly moved without warning.

WALKER, J., concurs in this opinion.

BROWN, J., dissenting: Being fully convinced that his Honor, *Judge Moore,* who tried this case below, committed no error in granting the motion to nonsuit, I feel it my duty to withhold my consent to the judgment of the majority in overruling him. As the facts are not fully stated in the opinion of the Court, I will state them by quoting from the testimony of plaintiff himself and his witnesses. The plaintiff's intestate was a tool boy, 17 years of age, employed at night in defendant's shops at Spencer. He came off duty at 7 o'clock a. m., 25 November, 1905, and, a little after 8 o'clock, started across defendant's repair yards. Finding a train of crippled cars in his way, he attempted to climp over the connecting chains which fastened one car to another, and just then the engine backed, and he was crushed and killed.

The repair shops at Spencer, according to the map filed in the record, consist of a very long building, constructed parallel with the tracks laid through the yard. There are some thirty or forty railway tracks in front of this building, between it and East Spencer. There are two towns at Spencer—one on the east and one on the west side of the tracks—and they are called "East Spencer" and "West Spencer." The shops, as the long building and its appurtenant buildings are called, are between the two towns and on the west side of the tracks. There are 1,300 employees in the shops. About 500 of them live in East Spencer and 800 in West Spencer. The custom of those living in East Spencer is to cross the tracks at the nearest place, to get to the shops to work. The plaintiff testifies: "I have seen people, going to and coming from their work, cross these tracks in great numbers." He further says: "I know about where Grubb was injured. There is an opening leading from the carpenters' shop as far as the shed
(465) goes. There is a plank walkway that leads to the carpenters' shop; it is used by people to walk across and to roll hand cars across the tracks. The opening runs north and south. If cars are on the tracks across this opening, people have to climb over, or under, or through, or go around the cars." In reference to this custom of crossing the yard tracks, another of plaintiff's witnesses testifies: "People

crossed the yard at most any place where they got to it. The car men crossed in front of the carpenter shop, and others at other places. People who were not employed by defendant crossed the yard wherever they came to it. I don't know what the plaintiff's intestate was doing there that morning. The night men got off at 7 o'clock in the morning." The witnesses all concur in the statement, overlooked in the majority opinion, that defendant has constructed a good plank walk all around the repair yard, for the use of its operatives, by which it is perfectly safe, although a very little farther in distance, to go from East Spencer to West Spencer, and to and from the shops. The evidence also shows that the employees who live in East Spencer will not take the extra trouble to use this walk, but cross the yards at no particular place, but wherever they happen to come to them, regardless of walks or openings. Witness Rufty says: "It is a customary rule—and has been for a long time—for people who work for the defendant, also for employees of the defendant, to cross the tracks there. They go the nearest way to their work. I suppose 200 people cross the tracks daily." The same witness further says: "There is a perfectly safe way to go to the depot, and to cross, outside of the fence." It seems that the railroad depot is in East Spencer.

1. As the entire evidence, as I shall attempt to show, presents a "bald case" of contributory negligence, it is unnecessary to discuss the alleged negligence of the defendant in not ringing the engine bell and in not having a man on the end of the train or a guard at the crossing. The boy was not killed by the end of the train backing (466) on him on the crossing, but by climbing in between two crippled cars of the train which were coupled together by chains, some four or five cars from the end, rather than walk the short distance around the rear of the train. Had a watchman been at the crossing he could have done no more than tell the intestate exactly what was before his eyes, viz., that a train of cars blocked the crossing and that it was dangerous to climb between them. The watchman was not required, nor had he the legal authority, to catch the intestate and hold him to prevent his crossing. The evidence shows that he was an intelligent, smart boy. He was not on duty at the time, nor going to or returning from his work; but assuming that he was, I can see no reason why the defendant's other servants should have been on the lookout for him or been required to anticipate so dangerous an act. As to the custom of the employees to go to and from their homes by crossing the tracks wherever they came to them, I fail to see by what means the defendant can break it up or guard against injury, or any evidence that defendant assented to it. We should bear in mind that these tracks are not crossed by public crossings nor traversed by regularly passing trains. They are

the multitudinous switch tracks of the defendant's repair yards. The crossings must necessarily be blocked by crippled cars and those cars just out of the shops, and when they are so blocked the employees can easily see it, and it is their plain duty to take the somewhat longer plank walk around the yard, provided by the company for just such conditions, and which is not intersected by these numerous but necessary tracks, and which is admittedly free from all danger. The evidence shows that the workmen do not cross the yard tracks at any particular places, but wherever they happen to come to them, and, as witness Rufty says, "They go the nearest way to their work." This is human nature, and others besides the plaintiff's intestate have unfortunately come to grief by taking short cuts in order to save a
(467) few minutes time. I do not see what the company could do to break up this imprudent habit of 500 employees, unless it could put each one under guard and force him to follow the "safe and narrow way" that leads to safety, and this it has no power to do. Crossing the repair yard of a great railway system at any point, with its network of tracks and labyrinth of cars and engines, is a dangerous venture at best, and no one knows it better than its employees. The trouble is, they become so habituated to their hazardous but necessary work that they become indifferent to danger and sometimes incur needless risks, which no one else would think of taking. My observation is that railway men, as a class, are a very fine type of our race, gifted with as much good sense and natural prudence as most of us; but from constant familiarity with danger the best of men become inured to and careless of it. The railway company cannot correct this tendency, and, under the ruling in this case, it has to pay for the consequences, however unable to prevent them.

2. The conduct of plaintiff's intestate, as proven by plaintiff's own witnesses, shows such a reckless disregard for his own safety that, under the well settled principles of law, he ought not to recover on his own showing. There are cases where the court must, as matter of law, declare that an act constitutes negligence. When the facts are undisputed and lead to but one inference, the question whether there was or was not negligence is one of law. This is such a case. According to witness Ketchie, the plaintiff's intestate was injured on track No. 8, called the "shop lead track," while he was going east. There was a string of cars on this track and some of the cars were across the opening, rendering it impassable, unless by going between, under, or around the cars. An engine was attached to the north end of the cars. When the boy (Grubbs) came along he did not look for any opening and would not take the trouble to walk 100 feet around the end
(468) of the train, which, all the evidence shows, he could easily

have done, but instead of doing what was so obviously his duty, with any sort of regard for his own safety, he went to the nearest place to go between the cars, without seeking to ascertain if an engine was attached to the train. Ketchie testifies: "I suppose he went to the nearest place to go between the cars. The place where he was caught was 15 or 20 feet from the crossing (opening). I saw where the cars were when the engine was attached to them." Again: "The string of cars stood across the opening; about four of the cars were south of the opening." Ketchie further states that the yards and tracks were frequently crowded with cars about "quitting time," and "The employees had to cross the line of cars or take the longer route home by the plank walk."

There is a cinder path, made for the use of workmen, alongside of this "lead track," in crossing which Grubb was hurt, and in reference to which plaintiff, who was himself a workman at the shops, testifies: "I don't know whether the intestate was going in or coming out when he was hurt. It is not safe to cross the railroad anywhere. It would have been safer for Grubb to have walked down the cinder path than to have crawled between or climbed over the cars. There was a safer way for him to get out of the yard than to crawl between or under the cars. I don't know whether Grubb worked during the day or during the night. He was a tool carrier in the machine shop. There are two walkways; I don't know the distance apart. If the walkways were not blocked with cars, it would have been safer to go by them. People do go under and between the cars. It would have been safer to go around them." On redirect examination this witness testified as follows: "The opening that crosses the track is the width of the railroad tracks. There is a plank walkway there for people to walk on going to and from work, across the lead and other tracks. People use this." The intestate, being a workman, was fixed with knowledge of the dangers attending crossing this lead track, espcially, for Ketchie testifies: "They are constantly shifting cars on the lead tracks, and defendant will not (469) allow cars to be flagged on the lead track. They flag cars on the other tracks to indicate that they are not to be moved." Again: "They run crippled cars in on the lead track for the purpose of shifting them to the other tracks to be repaired. They are usually loaded cars. The drawhead was pulled out of the car, and when the cars came together the drawhead on the other car went between the draft timbers of the crippled car and the cars came close together. Any one could see that they would come close together. Grubb could see this." Again: "I suppose it would have been safer for Grubb to have crossed over the top of a car. It was not as dangerous to go over the top as between the cars." I quote these extracts from the testimony to show that it was

perfectly obvious to the intestate that he was incurring an extra and extremely dangerous risk in attempting to cross between crippled cars, connected by chains only, without bumpers to keep them apart, and on a track where necessary shifting was constantly going on. He knowingly took his life in his hands when he did it, and rushed on danger with his eyes open. To show that Grubb had a perfectly safe way, which a rational being of ordinary prudence should have taken, I quote again from Ketchie: "There was a plank walk all around the yard. It would have been safer to go around the yard than through it. . . . Grubb would have had to walk 100 feet around this string of cars to have gone a perfectly safe way." Again: "If Grubb had gone to the rear (south) of the line of cars and around them, he would have had a perfectly safe way to go." Again: "If Grubb had gone around the rear of the string of cars, there were no cars between the sheds which he would have had to go between." Again, same witness reiterates, "There was a perfectly safe way for Grubb to have gone." The only witnesses examined in the case, except one character witness, were the witnesses whose testimony I have quoted from. The defendant (470) offered no evidence. It is manifest that the plaintiff's intestate had two safe ways to get to his home—one by the plank walk leading around the end of the yard tracks, provided by defendant for his use and used by many workmen, and the other by taking the trouble to walk 100 feet around the south end of the train of cars then standing across the lead track. At common law the master is required and impliedly agrees to provide reasonably safe premises and places in and about which the servant is required to work, and reasonably safe and suitable machinery and tools to work with, but it is equally well settled, as said by *Justice Connor* for this Court, unanimously, that, *"Where there is a safe and a dangerous method available for the performance of the work in hand, and the servant selects the latter method with actual knowledge of the fact that it is dangerous, he cannot recover." Covington v. Furniture Co.,* 138 N. C., 378; *Horne v. Power Co.,* 141 N. C., 50. And, as again said by the same learned judge, "He should not have taken chances, in the presence of an obvious, apparent, and well-known danger; if he did so, and was hurt, he cannot cast upon his employer the blame or responsibility." *Elmore v. R. R.,* 132 N. C., 865. In *Whitson v. Wrenn,* 134 N. C., at p. 86, *Justice Walker* states the law to the same effect. The master is, of course, required only to provide means and premises as reasonably safe as the nature of the employment will permit. One who works in railroad shops, repairing yards, or in a powder mill, cannot be made as safe as he who clerks in a store or works on a farm. The evidence shows that the defendant met all the requirements, so far as providing a safe way of ingress and egress,

which the intestate deliberately declined to use, but pursued a course of the most obvious danger. It is said that such was the custom. I answer that no reasonable person is ever justified in following a custom which is attended with such imminent danger to life and limb, and it ought not to protect him from the consequences of his own act. It is a custom the defendant cannot justly be said to countenance, because it had no means to stop it. And, again, there is no evi- (471) dence that any other employee ever went between two crippled cars on this lead track which were chained together, without bumpers, the absence of such bumpers rendering him liable to be crushed in an instant; much less that there is such a custom in vogue among all the servants of defendant. We have held that where a servant chooses to do his work by a dangerous method, contrary to the directions of his master, the master is not liable for injury sustained, whether the danger be obvious or not. *Whitson v. Wrenn,* 134 N. C., 86. With how much greater force should that rule apply to a case like this, where the danger of the act stared the servant in the face. In a similar case to this, where the injured party passed between the cars of a train at the direction of a brakeman, the Supreme Court of Indiana declared it to be an act attended with such obvious and extreme danger as to bar a recovery. The Court says: "It will not avail the plaintiff that he was not fully aware of his danger, for a plaintiff is bound to know the extent of the danger in cases like this, where the hazard is apparent to a reasonably prudent man. A man must use his senses, and is not excused when he fails to discover the danger, if he has made no attempt to employ the faculties nature has given him." *R. R. v. Pinchin,* 112 Ind., 595. The principle is laid down in innumerable cases, with undeviating uniformity, that one who attempts to cross the track between the cars of a train which he either knows or might know by observation and use of his natural faculties is likely to move at any moment is guilty of such gross negligence (if not recklessness) that he cannot recover, if injured. *R. R. v. Pinchin, supra; R. R. v. Henderson,* 43 Pa. St., 449; *R. R. v. Kendrick,* 40 Mass., 374; Beach Cont. Neg., 40, 258. "It is a danger so immediate and so great that he must not incur it." *Ranch v. Lloyd,* 31 Pa. St., 358; *R. R. v. Copeland,* 61 Ala., 376; *Stilson v. R. R.,* 67 Mo., 671; *Lewis v. R. R.,* 38 Md., 588; *Haldan v. R. R.,* 30 U. C. C. P., 89. *Rumpel v. R. R.,* 22 L. R. A., 730, is so very (472) pertinent that I quote from the opinion: "There was nothing to hinder the plaintiff passing around the cars at either end at any time, except that it was inconvenient and took too much time. He could have passed around the train by walking 100 to 185 yards and back. Plaintiff was an adult and in possession of all his faculties."

The Supreme Court of Georgia, in an opinion by that eminent jurist, *Chief Justice Bleckley,* holds that, though a train be an unauthorized obstruction of a public highway, a person attempting to pass between the cars, if injured, is barred from recovery. The Court says: "Nevertheless, instead of waiting for the train to get out of the way, *or attempting to go around it,* he voluntarily and without warning any one of his intention, exposed himself between the cars," etc.

In *Lewis v. R. R., supra,* the Supreme Court of Maryland declares an act somewhat similar to the one we are considering "such a glaring act of carelessness as to amount in law to contributory negligence."

It is urged that the train of cars had been backed across the crossing, and, therefore, plaintiff's intestate was excusable for his attempt to pass. We must remember that the crossing was in the private switching yards of the depot and across the main lead track, where switching was constantly going on, day and night, so much so that "flagged cars," intended to remain stationary for a while, were not allowed on that track. Under such conditions, blocking the crossings is inevitable. But suppose it had been a public crossing: the act of plaintiff's intestate was unwarranted. In a case almost identical, the Supreme Court of Iowa says: "The actual use by a railroad company of its tracks, so long as in use, is a suspension of the right of the public to cross; and one injured in attempting to cross during such occupancy cannot recover." *Wagner v. R. R.,* 122 Iowa, 360.

(473) In *R. R. v. Ryler,* 87 Ga., 491, the Supreme Court of that State says: "The placing of stationary cars in its yards, on the tracks where people are accustomed to pass, is notice to them not to attempt to pass while the cars remain, and if a person undertakes to pass under the cars he does it at his peril." Again: "In a railroad yard, in which there are several tracks in continuous use for the purpose of storing and switching cars and making up trains and the like, and where the dangerous character of the place is manifest and obvious, there can be no implied license to cross the tracks, either through open spaces casually left between the cars or under or above the cars."

In *R. R. v. Copeland,* 61 Ala., 376, *Chief Justice Stone* characterizes the attempt to pass between cars of a train coupled together as "negligence bordering on recklessness," which bars recovery for injuries received.

There are some discrepancies between the facts stated in the opinion and the record, as I read it, which I will note.

It is stated that the injury occurred "on one of these tracks known as the dead track." All the evidence shows it occurred on the lead track, a "live track," in constant use for switching, day and night, where no dead or flagged cars were allowed.

It is further stated that the first car which was chained to the string of cars was immediately over the crossing, which made it necessary for the intestate to pass between them. The testimony of Ketchie and the other witnesses distinctly declares that four cars were south of the crossing and all the others north of it, and that the intestate did not cross at the crossing, but 20 feet from it, and that by walking 100 feet he could easily have gone around the end of the train. It is said that no engine was attached to the cars, and that they were dead cars—that is, "flagged cars," forbidden to be moved. The evidence shows they were disabled loaded cars, recently run in the yards for repairs, with no flags on them, and on the lead or live track, in constant use, and that the engine was attached, but around the curve and not visible to deceased. (474)

The ruling of this Court that it was negligence to have no bumper or drawheads on these cars to keep them apart, on account of which plaintiff was crushed, entirely ignores the fact that the drawheads had recently pulled out and the cars were then brought in the yards for repairs. It is a proposition somewhat novel, to say the least, that the defendant is negligent for bringing its crippled cars, without drawheads, into its repair yards to have them replaced, and that if the absence of drawheads causes injury to a workman on the yards the company is liable. It is not contended that the engineer saw the deceased as he backed his engine, or that he could have seen him. The deceased attempted to cross at a place where he knew the engineer could not see him and where he could not see the engineer. He made no effort to ascertain whether an engine was attached to the train or not. Instead of looking to see, or waiting for the train to be moved, or going around it, he voluntarily, blindly, and needlessly exposed himself between the cars, where the danger was open, visible, and threatening, with full knowledge that the bumpers were gone and that the connecting chains could not keep the cars apart.

To sum up the matter, the undisputed evidence is that the injury occurred, not at a station where passengers were received or discharged, but in the shifting yard of defendant—a place filled with tracks and cars and a place not for visitors or the public, and on a track in constant and continuous use for shifting purposes. The track was also used to place crippled cars, so as to shift them to other tracks to be repaired, and cars were never allowed to be flagged on this track, showing that defendant intended this track to be open for constant use. A safe and secure way was provided to go from one side of the yard to the other. Cinder paths were on each side of the tracks; a plank walk had been built all the way around the yard, affording an absolutely safe passway for employees—a fact entirely ignored in the opinion of the Court. In addition, by walking 100 feet around the end of the (475)

string of cars, deceased would have had a perfectly safe way to cross the yard; but, instead of taking a safe course, he attempted to cross between two cars chained together, where any one could see that the least movement from either end of the train would cause the cars to come together and crush him. The dangerous character of the place was manifest and obvious to any one.

The unwavering line of authorities declares such conduct to bar recovery for injury sustained. As the majority of this Court think otherwise, it is to be regretted that no authority is cited to sustain their view.

Cited: *Meroney v. R. R.*, 165 N. C., 613; *Ward v. R. R.*, 167 N. C., 163; *Hinson v. R. R.*, 172 N. C., 651.

PATRICK McINTYRE v. CITY OF ASHEVILLE.

(Filed 18 December, 1907.)

Cities and Towns—Prohibition—Revisal, Sec. 2073—Stock on Hand—License—Aldermen.

After the town has voted prohibition, and after the expiration of the license of the applicant, the board of aldermen is without authority to issue a license for six months for the applicant "to close out his stock on hand." Revisal, sec. 2073. The proviso of the statute allowing time for such purpose is only given when the license is in force.

APPLICATION by plaintiff for *mandamus* to compel defendant to issue him license to sell spirituous liquors, etc., in Asheville.

The writ was refused, and the plaintiff appealed.

The pertinent facts sufficiently appear in the opinion.

Merrick & Bernard (*Jones & Williams, Adams & Adams, and Thomas Settle on the brief*) *for plaintiff.*

Tucker & Murphy and H. B. Carter for defendant.

(476) CLARK, C. J. At a local option election held in Asheville 8 October, 1907, the city voted for the prohibition of the sale of spirituous, vinous, or malt liquors. The plaintiff is the holder of a license to sell liquor in said city, issued 1 July, 1907, to continue till 31 December, 1907. He applied to the board of aldermen for renewal of his license to 7 April, 1908, on the ground that, under the statute, he was entitled to six months after the adoption of prohibition before closing up. The board refused an extension of his license after 31 December, 1907, on the ground that it had no power to grant it. The plaintiff brings this action to obtain a *mandamus* to compel a renewal of his license after its expiration on 31 December, 1907.

Revisal, sec. 2073, makes it unlawful for the county commissioners of any county or the governing body of any town in which prohibition of the sale of spiritous, vinous, or malt liquors has been adopted to grant license to sell them. The plaintiff rests his case upon the proviso to said section 2073, that "Liquor dealers in such cities or towns, holding license at the time of the election, shall be allowed six months after such election in which to close out their stock in hand at the time of such election, *if their license remain so long in force.*"

It will be noted that there is no exception to the provision making it unlawful to issue license after the vote in favor of prohibition is adopted. The proviso merely allows the liquor seller six months in which "to close out his stock in hand," if his license remain so long in force. Here the license expires in less than six months, *i. e.*, on 31 December, 1907, and it was rightly held that the board of alderman had no power to renew it. The judgment is

Affirmed.

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(477)

W. W. FRAZIER v. EASTERN BAND OF CHEROKEE INDIANS.*

(Filed 18 December, 1907.)

1. State's Lands—Cherokee Indians—Incorporating Act—Deeds and Conveyances—Grant.

Where a deed has been executed to the Eastern Band of Cherokee Indians prior to the enactment of chapter 211, Private Laws 1889, the provisions of section 4 thereof have the full effect of a legislative grant.

2. State's Lands—Enterer—Vendor and Vendee—Limitation of Actions.

An enterer upon the State's vacant and unappropriated lands has an equity by virtue thereof, and, by the payment of the purchase money, the right to call for a grant to perfect his claim of legal title; and the relation of vendor and vendee, with all the incident rights and equities, is thereby established; but a failure of the enterer, or those claiming under him, to call for the grant within ten years after entry, would presume an abandonment in favor of those claiming under and by virtue of a junior grant. Revisal, sec. 399.

3. Same—Enterer—Equities—Grant—Abandonment—Unreasonable Delay.

Deed was made to defendant corporation, under which it claimed, and registered 8 July, 1880; title was confirmed by chapter 211, Private Laws 1889. Plaintiff, claiming under a senior grant, took no step to recover or assert title to the land in question, embraced in defendant's deed, for more than twenty-three years after his equity had been acquired, for nearly twenty years after payment of purchase price, for more than four-

*Note by CLARK, C. J., upon history of Indians in this State.

teen years after the enactment of chapter 211, Private Laws 1889, and for more than eleven years after he had taken out his grant: *Held*, his right was barred by unreasonable delay.

HOKE, J., concurring in result; BROWN, J., dissenting.

APPEAL from *O. H. Allen, J.*, at March Term, 1907, of SWAIN.
Judgment for defendant. Plaintiff appealed.
The facts sufficiently appear in the opinion.

A. M. Fry and Shepherd & Shepherd for plaintiff.
Bryson & Black and George H. Smathers for defendant.

(478) CLARK, C. J. Action for recovery of land of the defendant, the "Eastern Band of Cherokee Indians." Besides other claim of title (the controversy as to which we do not find it neccessary to consider), the defendant set up a deed from William Johnson, 9 October, 1876, to the Eastern Band of Cherokee Indians for the Qualla boundary of land, which, it is admitted, covers the land in controversy, which deed was executed in pursuance of a decree of the United States Circuit Court for the Western District of North Carolina, entered at November Term, 1874, in a cause therein pending, entitled *"Eastern Band of Cherokee Indians v. W. H. Thomas and others."*

Section 4, chapter 211, Private Laws 1889, entitled "An act incorporating the Eastern Band of Cherokee Indians," reads as follows:

"In all cases where titles or deeds have been executed to the said 'Eastern Band of Cherokee Indians,' or any person or persons in any capacity in trust for them under that name and style, by person or persons, either collectively, individually, officially, or in any capacity whatever, such deeds or titles are hereby declared valid against the State, and all persons or any person claiming by, through, or under the State by virtue of any grant dated or issued subsequently to the aforesaid deeds or titles to the said 'Eastern Band of Cherokee Indians.'"

The plaintiff claims title under eight grants issued to D. Lester, assignee of S. Everett, 4 November, 1891, based on entries made 15 March, 1880, surveyed 18 May, 1880, and purchase money paid 27 June, 1883. The grants under which plaintiff claims were issued subsequently to the above act, which was, in effect, a legislative grant, passing to the defendant the legal title as fully as the State could have conveyed it if the statute had directed the Secretary of State to issue a grant to defendant and this had been done.

This act did not impair, it is true, any rights of Lester, under whom the plaintiff claims. He had an equity, by virtue of his entry and payment of the purchase money, to call for a grant to perfect (479) his claim by the legal title. The relation was that of "vendor and

vendee, with all the rights and equities incident thereto." *Frasier v. Gibson,* 140 N. C., 278, in which it is further held by *Connor, J.,* that a delay to call for the grant within ten years after the entry would presume an abandonment. As the entry under which the plaintiff claims was made 15 March, 1880, and the grant was not issued till 4 November, 1891, it would seem that the plaintiff's assignor was then barred of the right to call for a grant, especially in view of the legislative grant by chapter 211, Private Laws 1889, of the land to the defendant.

But, however that may be, the Johnson deed to the defendant was registered in Swain County, where the land lies, 8 July, 1880, the title thereto was confirmed by the aforesaid act, 11 March, 1889, and the plaintiff took no steps to recover the land or otherwise assert his equity till the summons was issued in this action, 13 July, 1903, more than twenty-three years after his equity had been acquired by the entry made by Everett, 15 March, 1880, nearly twenty years after the payment of the purchase money, 27 June, 1883, more than fourteen years after the legislative grant of the land, 11 March, 1889, and even more than eleven years after the plaintiff took out his grant, 4 November, 1891.

The plaintiff has the junior grant and not the legal title. In no view has he had any other right than an equity to call for the title, and, in any aspect, he is barred from now asserting this, by unreasonable delay, as well as by the lapse of ten years. Revisal, sec. 399, which statute is duly pleaded. *Leges subveniunt vigilantibus non dormientibus.*

What good reason caused the plaintiff, and those whose rights he has acquired, not to take steps to assert them during all those years, we know not. The law conclusively presumes that they were good and sufficient, and that those reasons could have been shown by the defendant, if the plaintiff had taken action in the reasonable time contemplated by the law, for men are not usually slow to assert claim to prop- (480) erty, if well founded. In the lapse of time witnesses die or move away, evidence is lost, facts are forgotten, documents are destroyed or mislaid. Therefore the law places time itself in place of that which it has destroyed. If time carries in one hand the scythe to destroy the muniments of our titles, he carries in the other the hour-glass to measure out the period of our protection.

In *McAden v. Palmer,* 140 N. C., 258, the defendant not only made the senior entry, but had the land surveyed and paid the purchase price before the plaintiff even made his entry; but as the latter obtained his grant and registered it first, it was held by *Brown, J.,* that the delay of the defendant to assert his equitable right to have plaintiff declared a trustee for his benefit, for ten years after the registration of plaintiff's grant had vested the legal title in him, was a complete bar, by virtue of The Code sec. 158 (now Revisal, sec. 399), to the assertion of such

equity, citing *Ritchie v. Fowler,* 132 N. C., 790. To the same effect, *Johnson v. Lumber Co.,* 144 N. C., 717.

The defendant's deed from Johnson, covering the *locus in quo,* was registered in Swain County, 8 July, 1880, and was validated by the act of the General Assembly, 11 March, 1889, and the plaintiff is barred by failure to assert his rights within ten years from the latter date. The plaintiff has at no time been in possession of the premises.

No error.

NOTE.—As a matter of both legal and historical interest as well, it may not be amiss to note here the uniform kindly treatment by this State of the Cherokees in her borders, of which the above act of 11 March, 1889, in confirming their titles, is in keeping. Long before the treaty-making power was surrendered by the States to the General Gov-
(481) ernment by the Constitution of the United States, North Carolina set apart to the Indians a large territory as a hunting ground, and forbade the entry and grant of the same. In 1777 the Blue Ridge was made their boundary line.

Then, in 1783, the territory described in the act, brought forward as section 2346 of The Code of 1883, was set apart to the Cherokees. This territory originally included a very large part of what is now the State of Tennessee. The next section of the act of 1783 forbade the entry and grant of these lands. Section 2347, Code of 1883. The courts held this reservation sacred to the Indians until the Indian title was extinguished by treaty with the United States. *Strother v. Cathey,* 5 N. C., 162. In *Eu-che-lah v. Welsh,* 10 N. C., 155, it was held that Indians in possession under treaty need not take out any grant from the State. In *Belk v. Love,* 18 N. C., 65, it was held that the treaty of 1819 did not require perpetual residence by the Indians on the lands reserved to them.

Under the terms of the treaty of New Echota, of 29 December, 1835, purporting to have been made between commissioners appointed by the United States and the chiefs and head men of the Cherokee Nation (though it is now generally believed that, in fact, there was no treaty at all, but it was enforced by the United States to avert war between the State of Georgia and the Cherokees in Georgia), the bulk of the Cherokee Indians east of the Mississippi were forced to move west, under display of arms made by Gen. Winfield Scott. The history of this treaty is given by John W. Powell, director of Smithsonian Institution, in a volume issued by the Government.

There was a remnant of the Cherokees, however, left in North Carolina without any organization. North Carolina, realizing the helpless and dependent condition of this remnant of a once powerful tribe, enacted legislation for their benefit.

Among others was the enactment which avoided all contracts (482) made since 18 May, 1838, for an amount equal to $10 or more, between Indians and white persons, unless reduced to writing and signed in the presence of two witnesses. This is now Revisal, sec. 975, and was cited in *Rollins v. Cherokees,* 87 N. C., 248. The North Carolina Cherokees were entitled to certain moneys, after the war, which the United States refused to pay over to them unless they moved to the Indian Territory, or secured an act of the Legislature of North Carolina allowing them to remain permanently in this State.

Such act was promptly passed by the Legislature. Laws 1866, ch. 54. During 1868 the North Carolina Cherokees endeavored to effect a tribal organization or constitution to live under. This was held invalid by the decision of the Supreme Court of the United States, in *Eastern Band of Cherokee Indians v. United States and Cherokee Nation, West,* 117 U. S., 288. The Court held in this case that the North Carolina Cherokees who refused to go west with the tribe were not a nation, in whole or in part, and could not have a tribal organization, as they were citizens of North Carolina and bound by her laws. *S. v. Ta-cha-na-tah,* 64 N. C., 614. This has been cited in *S. v. Wolf,* 145 N. C., 440.

About that time it was found that a great many of the title papers of the Indians to the Qualla boundary and other lands had been lost or destroyed, without having been recorded. Under the decision of the United States Supreme Court, *supra,* it was doubtful whether these Indians had any capacity as an organization to sue and be sued or to hold lands conveyed to them as such. The Legislature of North Carolina again came to their relief and passed the act (Private Laws 1889, ch. 211) above quoted. See, also, chapter 166, Private Laws 1895, and chapter 207, Private Laws 1897, amendatory of chapter 211, Private Laws 1889, *supra.*

There is much in the history of the Cherokee Indians and (483) their conduct since their treaties with this State which deserves preservation. *Junaluskah,* the great Cherokee warrior, distinguished himself at the battle of the "Horseshoe," and General Jackson attributed largely to him the victory. In recognition, the Legislature of North Carolina bestowed on him the beautiful tract of land adjoining Robbinsville, in Graham County, now the property of George Walker, Esq. The Legislature has in recent years directed a monument to be erected over his grave.

It will also be recalled that when *Tecumseh* came south to organize a general confederacy of the Indians, he had swept the Cherokees into the movement had not *Yeonaguskeh,* by his earnest eloquence, recalled the warriors to fidelity to their treaty obligations with the whites.

CLARK, C. J.

HOKE, J., concurring in the result: I concur in the disposition made of this case, and for the reason that, in a trial free from error, both in the charge of the court and its rulings on questions of evidence, it has evidently been shown that, at the time the plaintiff's entries were made and his grants issued, there were older grants of the State outstanding, covering the land in controversy and rendering same no longer the subject of entry.

As the opinion of the Court decides the case on other grounds in defendant's favor, I do not care to make further statement concerning it, and concur in the result.

BROWN, J., dissenting.

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L. H. TUTTLE ET AL. v. R. M. TUTTLE ET AL.

(Filed 18 December, 1907.)

1. Issues, Form of—Issues Tendered—Issues Submitted.

The true test of issues is, Did they afford the parties opportunity to introduce all pertinent evidence and apply it fairly? And when such is done by the trial judge it is not error to refuse to submit issues tendered in a different form; and in an action to set aside a deed for fraud it is not reversible error to refuse to submit a separate issue as to whether certain of defendants were *bona fide* purchasers for value and without notice, when the judge properly and fairly submitted the question to the jury under a different issue.

2. Partition—Commissioner—Purchaser at Sale.

A commissioner appointed to sell land for partition cannot lawfully, directly or indirectly, purchase at his own sale or speculate in the land for his own benefit, or do any other act detrimental to the interests of those whom he has undertaken to serve.

3. Same—Commissioner—Vendee—Fraud—Constructive Fraud.

Others with knowledge of the fiduciary relationship of the commissioner to tenants in common, appointed by the court to sell lands for partition, aiding and abetting him in purchasing the lands with a view to personal speculation, would be guilty of constructive fraud, could not become innocent purchasers, etc., and could occupy no better position than the commissioner himself.

4. Same—Purchaser at Sale—Fraud—Constructive Fraud—Evidence—Question for Jury.

Evidence that the commissioner had been a tenant in charge of the lands for his cotenants; that he knew the value thereof and designed to acquire them at an inadequate price; that, without consulting some of the owners, he caused proceedings for partition to be instituted, had himself appointed commissioner, whose duty it was to pass upon the reasonableness of the price the lands brought, so that he could control

the sale and procure its confirmation; that he had another to bid in the lands for him and for his personal benefit, is sufficient evidence to go to the jury upon the question of fraud, in an action brought to set aside his deed as commissioner.

5. Same—Commissioner—Vendee—Fraud—Constructive Fraud—Evidence—Question for Jury.

Evidence that codefendants of the commissioner to sell in partition proceedings knew of his fiduciary relationship with the owners of the land; that he was in position to act, and did act, in making the sale to his own personal advantage, received from them certain gifts or favors in consideration of their part in the profits derived, withheld certain deeds to the chain of title to the land with a view of shutting off suit; that the land brought a price totally inadequate, is sufficient to go to the jury upon the question of fraud, in an action to set aside the commissioner's deed made to them.

6. Same—Commissioner—Deeds and Conveyances—Fraud—Burden of Proof—Preponderance of Evidence.

In an action to set aside a deed made by the defendant, commissioner appointed to sell land for partition, made to his codefendants, the burden of proof is upon plaintiff to show fraud by a preponderance of the evidence only.

7. Same — Procedure — Deeds and Conveyances—Fraud—Remedy—Another Action—Set Aside Deed.

The proper remedy to impeach proceedings of partition of lands for fraud of the commissioner in collusion with the purchasers at the sale is by a civil action to set aside the deed, and not by motion in the cause.

8. Same—Pleadings—Practice—Deeds and Conveyances—Fraud—Discovery—Limitation of Actions.

It is error in the court below to charge the jury that if the vendees under a deed made by a commissioner in partition proceedings procured by fraud "took as trustees, the statute of limitations would not bar the plaintiffs from bringing an action until ten years after the rendition of the decree in the special proceedings." The statute having been pleaded, the plaintiffs should reply, setting out by way of avoidance the time when they aver the fraud was discovered, the burden of proof being upon them to repel the bar of the statute to show three years had elapsed therefrom.

9. Deeds and Conveyances—Registration—Notice—Fraud.

A registered deed would not put parties upon inquiry of matters of fraud not appearing upon its face, and would not fix them with notice of fraud.

10. Sunday Verdict—Judgment Valid.

The rendition by the jury of a verdict on Sunday is not invalid for that cause.

ACTION tried at September Term, 1906, of TRANSYLVANIA, (486) before *O. H. Allen, J.*, and a jury, brought by the plaintiffs against the defendants to set aside, upon the ground of fraud, the decree

of sale and orders entered in a special proceeding for partition of certain lands, in which the plaintiffs and the defendant R. M. Tuttle were tenants in common.

The court submitted the following issues affecting the apellants:

"1. Was there an arrangement and understanding, at or before the time of executing the deed to L. E. and C. E. Corpening, between the grantor and grantees, that the bid of Welch Galloway was to be assigned and the land conveyed to said L. E. and C. E. Corpening, and that defendant R. M. Tuttle was to share with them in the profits of any future sale or was to receive any compensation individually for its execution?" Answer: "Yes."

"4. Is this action barred by the statute of limitations, as to the plaintiffs or any of them; if so, as to which of them?" Answer: "No."

From the judgement rendered upon these issues the defendants R. M. Tuttle, C. E. Corpening, and L. E. Corpening appealed.

Avery & Avery, Zachary & Breese, W. A. Smith, and Robert Gash for plaintiffs.

George A. Shuford and Shepherd & Shepherd for defendants.

BROWN, J. The plaintiffs and the defendant R. M. Tuttle were tenants in common of five tracts of land in Transylvania County, containing some 3,200 acres. R. M. Tuttle owned an interest of one twenty-seventh and was the general agent of his cotenants, his brothers and other near relatives, in the management and control of the land. In April, 1901, R. M. Tuttle caused a special proceeding to be commenced in the Superior Court of Transylvania County for the purpose
(487) of selling said lands for partition, to which his cotenants were made copetitioners and parties of record. A decree of sale was duly entered, and R. M. Tuttle was appointed commissioner to make the sale. On 7 August, 1901, the lands were sold, and bid off by Welch Galloway, Esq., for the sum of $2,100, and, upon recommendation of the commissioner, the sale was confirmed. On 10 September, 1901, said Galloway assigned his bid to E. H. and S. L. Tuttle, sons of R. M. Tuttle, who, in turn, transferred the bid to C. E. and L. E. Corpening, to whom the commissioner, R. M. Tuttle, executed a deed, in consideration of $2,100 purchase money, on 22 December, 1902. On 22 February, 1906, the plaintiffs commenced this action to set aside said special proceeding and the sale and deed made in pursuance thereof, upon the ground of fraud, and to convert the defendants Corpening into trustees for their benefit.

1. On the trial the defendants tendered certain issues and duly excepted to those submitted. We think the issues submitted fully present every phase of the controversy. The exact form of the issues is

immaterial, if, under them, each party has an opportunity to present evidence of the facts relied upon. The issues submitted in this case arise upon the pleadings and intelligently present to the jury the contentions of the parties. *Shoe Co. v. Hughes,* 122 N. C., 296. The true test is, Did the issues afford the parties opportunity to introduce all pertinent evidence and apply it fairly? *Black v. Black,* 110 N. C., 398; *Pretzfelder v. Ins. Co.,* 123 N. C., 164. Measured by that test, the issues are sufficient. The form of the first issue rendered it unnecessary to submit the separate issue tendered by the defendants Corpening, as to whether they were *bona fide* purchasers for value, and without notice of the alleged fraud. Under the first issue his Honor submitted that contention clearly to the jury, when he charged them that, "If the bid was assigned to the Corpenings in good faith on their part, and they had no notice of the fact of the bid being by Galloway for R. M. (488) Tuttle, then their title is good.

The theory upon which the plaintiffs rest their case against the Corpenings, as embodied in that issue, is that they were participants in a legal fraud, perpetrated upon his cotenants, these plaintiffs, by R. M. Tuttle. Failing to establish that, they would not be entitled to recover.

It is not necessary, in order to set aside the deed and decrees of sale herein impeached, that the Corpenings should be convicted of a crime, or of a dishonorable transaction, as such terms are commonly understood. R. M. Tuttle occupied a fiduciary relation to his cotenants, both as their general agent in the control and management of the land and also as a commissioner appointed by the court to make sale of it. It is elementary that he could not lawfully purchase at his own sale, nor procure any one else to do it for him. He could not lawfully speculate in the land for his own benefit, nor do any other act detrimental to the interest of those whom he had undertaken to serve. His duty was to make the land bring the best price obtainable, and to act for plaintiffs and advance their interests. If the Corpenings, knowing the relation which Tuttle, as commissioner in the special proceeding, bore to the parties thereto, aided and abetted him in purchasing the land for himself and his sons, and for their joint benefit, with a view to speculate in it on joint account, they would be *particeps criminis* in a legal wrong, however ignorant they may have been of the unlawful character of such transaction. If such facts are true, they could not possibly be classed as "innocent purchasers," under any known definition of the term. They would be guilty, at least, of constructive fraud, such as the law infers from certain circumstances, regardless of actual dishonesty of purpose. In aiding and abetting the commissioner trustee in committing such fraud upon his fiduciaries, they could not occupy any better position than the commissioner himself.

(489) That brings us, naturally, to the consideration of the sufficiency of the evidence, a point raised by the motion to nonsuit and argued with much earnestness by the learned counsel for defendants.

The nature of fraud is such that it can seldom be established by direct or positive proof. In the nature of things, resort must be had to the evidence of circumstances. It is now well settled that such evidence will support the finding of fraud, if it is sufficient to reasonably satisfy the mind of the judge or jury, as the case may be. *Rea v. Missouri,* 17 Wallace, 532; *Reed v. Noxon,* 48 Ill., 323; *Sears v. Shafer,* 6 N. Y., 268.

As to the evidence against the defendant R. M. Tuttle, there can hardly be a serious controversy as to its sufficiency. It is most plenary. It tends to prove that he was the trusted agent of his cotenants, in charge of these lands and fully acquainted with their character and value, and that, taking advantage of his position, he formed the design to acquire these lands for his own benefit, at much less than their real value; that, without consulting some of the owners, he caused the special proceeding to sell for partition to be instituted, and that he kept them in ignorance of the pending sale. He had himself appointed commissioner, although a party to the proceeding, so that he could control the sale and easily secure its confirmation, if desirable in his own interest to do so. He procured Galloway (who in this matter appears to be innocent of any wrongful purpose) to bid off the land for his (Tuttle's) benefit, and he negotiated the transfer of the bid, through his two sons, to the Corpenings, in order that he and his sons might take advantage of a "good thing" and share in the profits, and, as a part thereof, he and his sons received a lot of machinery and the surrender of a thousand-dollar note due by the father. The evidence offered by plaintiffs tends, we think, to establish such facts.

(490) While the evidence competent as against the Corpenings is not of the same probative force as that against Tuttle, it is fully sufficient to have warranted his Honor in submitting the question to the jury as to their wrongful complicity with Tuttle, the commissioner. There is evidence tending to prove that they are nearly related by marriage, and that the two sons of R. M. Tuttle are the nephews of the Corpenings. That they knew of the fiduciary relation which R. M. Tuttle occupied towards plaintiffs can scarcely be denied, for they took their title deed from him as commissioner and paid him the sum for which the land was bid off. There are facts and circumstances in evidence from which a jury might well infer that Galloway had bid off the land for R. M. Tuttle's benefit and at his request, and that the Corpenings must have been aware of it. From these facts and circumstances a more important inference is warranted, to the effect that an understanding existed between the Corpenings and their two nephews,

looking to a division of profits, in which they and their father were to share. There is evidence tending to prove that on account of this venture the Tuttles received from the Corpenings a lot of machinery and the note of R. M. Tuttle, which he owed, for $1,000. Declarations of one of the Corpenings to M. H. Tuttle tend to show that R. M. Tuttle was believed by them to be guilty of some breach of trust in this matter, which might necessitate his leaving for Canada. The Corpenings employed to represent them the same attorney who bid off the land for Tuttle; and, in addition, there is some evidence of the withholding of certain deeds belonging to plaintiffs, and necessary to their chain of title, with a view to shutting off suit, indicating a purpose, if possible, to prevent investigation. There is evidence tending to prove that $2,100 is a very inadequate price for the land; that there is some 3,200 acres of it, worth, in the estimate of some witnesses, from $6,000 to $15,000, and that the Corpenings were acquainted with its true value. (491)

There was much evidence submitted by defendants in rebuttal and tending to prove that the Corpenings acted in good faith in the purchase of the land.

The charge of his Honor appears to us to have put the issues before the jury fairly and clearly, and while it may not be entirely free from error, it is of such a character as is evidently harmless, and does not constitute reversible error so as to warrant us in granting a new trial upon the first issue.

In charging that the burden of proof was on the plaintiffs to satisfy the jury by a preponderance of the evidence, the judge committed no error. This is not an action to convert the defendants into trustees because they purchased the legal title in trust for plaintiffs, or to correct a mistake in a deed, or like the cases where the law requires much more than a preponderance of evidence. The plaintiffs seek to set aside the sale, deed, and decrees, upon the ground that they are fraudulent and were made at the instance of R. M. Tuttle, the commissioner, with purpose and intent to defraud plaintiffs of their property. "It is not, however, necessary, in order to establish the fraud, that direct, affirmative, or positive proof of fraud be given. In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be expected or required. Like much of human knowledge on all subjects, fraud may be inferred from facts that are established." Kerr on Fraud and Mistake, p. 384. The distinction between that class of cases wherein clear, cogent, and convincing proof is required and that class where a preponderance of the evidence is sufficient is clearly drawn in the learned opinion of *Mr. Justice Avery* in *Harding v. Long,* 103 N. C., 1. The Encyclopedia states that, according to the overwhelming weight of authority, fraud need not be established beyond a reasonable

doubt, but that "a preponderance of the evidence, as in any other civil case, is sufficient, provided the proof is clear and strong enough to preponderate over the general presumption that men are honest and do not ordinarily commit frauds, and reasonable enough to satisfy
(492) the understanding and conscience of the judge or jury." If it does, then it is sufficient, both at law and in equity.

2. The remedy of the plaintiffs is the one they have pursued, and not by motion in the cause, as contended by defendants. The Corpenings are not parties to the special proceeding, and if they were, the proper method to impeach judicial proceedings for fraud is by a civil action, and not by motion. *Peterson v. Vann,* 83 N. C., 118; *McLaurin v. McLaurin,* 106 N. C., 334.

3. His Honor charged the jury that, "If the said Corpenings took as trustees, the statute of limitations would not bar the plaintiffs from bringing action until ten years after the rendition of said decree in said special proceeding." In this we think his Honor mistook the character of the action and the relation of the Corpenings to the plaintiffs. There was never any contractual relation between them, and the Corpenings have never voluntarily assumed any relation of trust or confidence toward plaintiffs. The legal title has never vested in them by the voluntary act of the plaintiffs, but solely in consequence of the defendant commissioner's own wrongful and tortious acts. They are trustees *ex maleficio,* not *ex contractu.* The legal title which vested in the Corpenings by virtue of the sale, deed, and decree of confirmation has been destroyed and made void, *ab initio,* by the finding of the jury and the decree of the court. Consequently, there is no legal title to attach a trust to, because, unless this action is barred by the statute, all those proceedings are void and the title never vested. The case therein differs materially from that class of cases where a trustee or mortgagee, holding the legal title, buys at his own sale, has the title conveyed through another to himself, and takes possession. In such cases the legal title has never been out of him and he has continued to hold it in trust during his occupancy, and a mortgagor or
(493) *cestui que trust* may bring him to account within ten years. *Bruner v. Threadgill,* 88 N. C., 366; *Jones v. Pullen,* 115 N. C., 471.

The gravamen of the complaint is that the sale, decree, and the deed were made by reason of a fraudulent agreement to deprive the plaintiffs of their property, and are, therefore, void. It follows that the action must be instituted within three years after actual discovery of the fraud by plaintiffs. Revisal, sec. 395, subsec. 9; *Day v. Day,* 84 N. C., 408. This section originally applied to cases of fraud, cognizable only in a court of equity under the former system, which would embrace

this case. By amendment, the scope of the section has been extended to all cases of fraud cognizable at law or in equity. The statute only runs against those not under disability, and as to those only from the date of the discovery of the fraud.

The fact that the commissioner made a deed to the Corpenings on 22 December, 1902, if registered, would not even put the plaintiffs upon inquiry, much less fix them with notice that a fraud had been committed, as there is no evidence of that upon the face of the deed. The statute having been pleaded, the plaintiffs should reply, setting out, by way of avoidance, the time when they aver the fraud was discovered, the burden being upon them to prove the facts necessary to repel the statute. *Stubbs v. Moltz,* 113 N. C., 458. The plaintiffs will be allowed to file such replication, to the end that proper issues may be submitted to the jury bearing upon the plea of the statute of limitations.

4. The verdict in this case was rendered on Sunday morning, in open court, and recorded. By consent of counsel, the court continued the motion for judgment, to be heard at Asheville on 14 September, 1906, when and where judgment was signed. Defendants excepted. There is no merit in the exception. The rendition of the verdict on Sunday was valid. *Rodman v. Robinson,* 134 N. C., 507.

We have examined with care all the other assignments of error (494) not herein commented on, and think that they are without merit.

As the two issues are distinct and not at all connected, we award a new trial on the one issue which relates to the statute of limitations.

Let the costs of this Court be equally divided between the plaintiffs and defendants.

Partial new trial.

Cited: Spruill v. Columbia, 153 N. C., 48; *Gallimore v. Grubb,* 156 N. C., 577; *Lumber Co. v. Mfg. Co.,* 162 N. C., 397; *Hardware Co. v. Buggy Co.,* 170 N. C., 301; *Ewbank v. Lyman, ib.,* 508, 509; *Sanderlin v. Cross,* 172 N. C., 243.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SPRING TERM, 1908

H. T. GREENLEAF v. JOHN A. BARTLETT ET AL.

(Filed 19 February, 1908.)

1. Deeds and Conveyances—Tax Deeds—Color of Title.

A tax deed regular upon its face is "color" of title, and, when describing the land with sufficient certainty, does not lose its efficiency as such from the fact that the sheriff failed to bid in the land sold for taxes for the county when no one would pay the tax for "less number of acres than the whole," as required by Laws 1881, ch. 117, sec. 36.

2. Same—Entry—Ouster—Limitation of Action.

When the entry and possession under a tax deed are "under known and visible lines and boundaries," the entry amounts to an ouster, and seven years adverse possession ripens the title.

3. Deeds and Conveyances—Tax Deeds—Validity of Assessment.

When it is shown that F., the owner of the land, did not list it for taxes, but the entry appears, "The F.-D. swamp to be listed by the register," it is sufficient to sustain an assessment of the tax upon "unlisted lands."

4. Deeds and Conveyances—Tax Deeds—Unrecorded Receipt—"Color."

The failure to record the receipt, as required by the statute, goes to invalidate the deed, but does not affect the question of color.

5. Evidence—Lands—Plats—Subsequent Testimony.

When objection is made to the introduction of a plat of the land in controversy under Revisal 1905, upon the ground there was no evidence that it was correct, the objection is removed by the subsequent testimony of the surveyor to that effect.

APPEAL from *O. H. Allen, J.*, and a jury, at Fall Term, 1907, (496) of CAMDEN.

This is an action brought by plaintiff to recover damages for an alleged trespass on the lands described in the complaint. Plaintiff alleged title and possession at date of trespass. Defendants denied plaintiff's title, and alleged ownership of the land, possession, etc. The jury found the issues for defendants. It appears that, prior to August, 1882, the lands in controversy were the property of one Henry Foreman. Plaintiff introduced a deed from the heirs of Foreman, who died during 1896. The date of this deed does not appear from the record and is not material. He next introduced a witness who testified that defendants had entered upon the land and cut timber subsequently to the date of his deed. It was admitted that both parties claimed title under Henry Foreman.

Defendants introduced a deed, bearing date 3 August, 1884, from Sawyer, sheriff of Camden County, containing the following recital: "Whereas the taxes assessed for the year 1882 on the following lands and tenements in Camden County, towit, 150 acres of swamp land, bounded by the Pasquotank River, the lands belonging to the county of Camden, known as the Poorhouse land, and other lands (for further description of said land see deeds from G. W. Charles and wife, Fanny, and Edwin Ferebee to Henry Foreman in Book DD, pages 78 and 79), remained unpaid after the time limited by law, M. N. Sawyer, sheriff of Camden County, levied on said lands and returned his levies to the clerk of the Superior Court of said county; and the said sheriff, after advertising and giving notice according to law, sold said lands, to pay said taxes and costs, at public auction at the courthouse in Camden, on 2 July, 1883, when and where John A. Bartlett became the purchaser at the sum of $11.25, and has paid the said sum; and the owner of the lands and tenements having failed to redeem the same." (497) Following this recital is the usual clause conveying the land.

The deed was duly recorded 27 December, 1884. Plaintiff objected and excepted to the admission of this deed. Defendants introduced the record of Camden County, showing (1896) a survey of lands, pursuant to Revisal, sec. 1505. Plaintiff objected and excepted. The tax list of 1882 was introduced, showing that no lands were listed for taxation by Henry Foreman. There was evidence tending to show that the survey covered the lands in controversy, and that defendant Bartlett was in possession after the date of the sheriff's deed; that plaintiff offered to buy the land of defendant Bartlett in 1904. Plaintiff showed by records that no receipt was recorded from the sheriff to defendant Bartlett. A number of exceptions are set out in the record to his Honor's charge, etc. Judgment for defendants, and appeal by plaintiff.

Aydlett & Ehringhaus for plaintiff.
W. M. Bond, H. A. Worth, and C. E. Thompson for defendants.

CONNOR, J., after stating the case: Conceding that the deed executed by the sheriff to defendant, pursuant to his purchase at the sale of the land for nonpayment of the tax due thereon, is invalid and conveys no title, because of the statutory duty of the sheriff to bid it in for the county, where no person is willing to pay the tax for some portion less than the entire tract, the question is presented whether it does not constitute color of title, within the meaning of the statute of limitations. Revisal, sec. 382. There was evidence tending to show, and we must assume that the jury found, under his Honor's instruction, that defendant Bartlett entered into possession of the land claiming title thereto under the deed, and remained in possession adversely to the owner, Foreman, more than seven years prior to his death. The plaintiff's claim, based upon the deed from Foreman's heirs at law, assumes that the deed was void on its face, and, for that reason, was not (498) color of title. He presents this view by objecting to the introduction of the deed in evidence and by exceptions to his Honor's intruction to the jury. If his position is correct, of course the deed was inadmissible for any purpose. His Honor admitted it as color of title. The correctness of this ruling depends upon the question whether, in any point of view, it was color of title, and whether the seven years possession under it barred the entry of Foreman or his heirs. In *Tate v. Southard,* 10 N. C., 119, this Court said: "Color of title is a writing upon its face *professing* to pass title, but which does not do it, either from the want of title in the person making it or the defective mode of conveyance that is used. . . . It must not be plainly and obviously defective—so much so that no man of ordinary capacity could be misled by it." This definition was considered with unusual care by the Court in *Dobson v. Murphy,* 18 N. C., 586, because of a slight divergence of opinion between the judges. While *Ruffin, C. J.* thought that the definition should be more comprehensive, he yielded to his associates, "not pressing his opinion to a dissent." In a carefully considered opinion by *Rodman, J.,* in *McConnell v. McConnell,* 64 N. C., 342, all of the decisions to that time were reviewed and approved, the Court holding that a will having but one witness was color of title. It had formerly been held, in *Pearce v. Owens,* 3 N. C., 234, that a deed conveying the real estate of a married woman, without private examination, was color of title. The same ruling was made in *Perry v. Perry,* 99 N. C., 270. In both instances the statute was explicit and peremptory in requiring two witnesses in one case and the private examination in the other. It was conceded that both instruments were

void as muniments of title. In *Avent v. Arrington,* 105 N. C., 377, *Avery, J.,* reviews the decisions and holds that a deed sufficient in form to convey title, signed, but not sealed, was color of title. Nothing is better settled than that a seal is essential to the valid execution (499) of a deed to pass title. In *Neal v. Nelson,* 117 N. C., 393 (404), *Mr. Justice Avery* again reviews the decisions, and concludes, adopting the view of *Ruffin, C. J.,* in *Dobson v. Murphy, supra,* that a levy upon land sufficiently described, followed by sale and payment of the money, is color of title sufficient to ripen into title, after an adverse possession of seven years, without any deed by the sheriff. After a careful examination of the decisions, he says: "These authorities, and many others which might be added, show that the trend of judicial opinion is towards the reasonable view that a purchaser who has paid the price for which he bought, whether from a public officer at auction sale or from an individual contractor, if he is in the occupation of the land bought, holds it adversely to all the world, under any writing that describes the land and defines the nature of his claim." In *Williams v. Scott,* 122 N. C., 545, the Court says that it is not willing to follow the application of the doctrine, made in *Neal's case,* adhering strictly, however, to the principle announced in *Tate v. Southard, supra.* This in no way militates against the general trend of the decisions of this Court. The policy upon which the statute (1715) is based is well settled by the Court in *Grant v. Wilborne,* 3 N. C., 220. After stating the conditions existing in regard to titles in the early settlement of the State, it is said: "The Legislature, therefore, provided by the act of limitations to obviate these mischiefs; and it was the intent of the act that when a man settled upon and improved lands upon supposition that they were his own, and continued in the occupation for seven years, he should not be subject to be turned out of possession; hence arises the necessity for a color of title; for if he has no such color or pretense of title, he cannot suppose the lands are his own, and he settles upon them in his own wrong." This Court has uniformly recognized this wise policy in construing the statute and applying it to the cases as they have arisen. It is conceded that the question presented (500) by this record has not been before decided by us. In *Hayes v. Hunt,* 85 N. C., 303, the defendant was relying upon his tax title; the question of color of title was not presented. We think that the language of *Ruffin, J.,* in the opinion in that case establishes the invalidity of the defendant's deed to convey title, leaving the only defense open to him that the deed is color of title, followed by an ouster and seven years adverse possession. Is the deed so obviously defective that a man of ordinary capacity could not be misled by it? It has been said: "An instrument having a grantor, a grantee, and contain-

ing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described." The deed recites that the land was liable to the tax, and that same had been duly assessed against it; that it had been duly levied upon, advertised according to law, sold at public auction, and bid in by defendant on 2 July, 1883; that the owner had failed to redeem within the time prescribed by law. Following these recitals are appropriate words of conveyance. It bears date 3 August, 1884—more than twelve months after the sale. The land is well described. The statute (Laws 1881, ch. 117, sec. 36) directs the sheriff to bid in the land sold for taxes for the county, if no one will pay the tax for "less number of acres than the whole." Would a man of ordinary capacity be misled by the sheriff's failure to do his duty? It must be observed, as said by *Rodman, J.*, in *McConnell's case, supra:* "In endeavoring to apply the rule and to ascertain whether this will was so obviously defective for the purpose of passing land as to come within it, we are to exclude the presumption, generally applicable, that every man is supposed to know the law, for the statute upon which the whole doctrine of color of title is founded recites as the evil to be remedied that many persons have gone into possession of land upon titles having patent defects, which, on the supposition that all men know the law, could have deceived no one and would not have deserved protection." The language of *Taney, C. J.*, in his dissenting opinion in *Moore v. Brown,* 11 (501) How., 414, in this connection, impresses us as wise and in harmony with the law as declared by this Court: "If every legal defect in the title papers of a purchaser in possession, as they appear on the record, may be used against him after the lapse of seven years, the law itself is a nullity and protects nobody. To a person not well skilled in all the tax laws of the State the deed, upon the face of it, appears to be good. It was made by a public officer authorized to sell for taxes. From his official station and duties he would be presumed to be familiar with the tax laws in all their minute details; and he recites what he has done, states the notice given, as if it was the notice required by law, and professes to convey to the purchaser a valid title in due form. Almost every one not perfectly acquainted with the different tax laws which have been passed would rely upon it. And I think it is one of those defective conveyances by a public officer which the law intended to protect after a possession of seven years." *Judge Catron* said: "The statute has no reference to titles good in themselves, but was intended to protect apparent titles void in law, and supply a defense where none existed without its aid. Its object is repose. It operates inflexibly and on principle, regardless of particular cases of hardship. The condition of society and the protection of ignorance as to what the law was

required the adoption of this rule. The law should be liberally construed." In that case a majority of the Court held (*Taney, C. J., Catron and Grier, JJ.*, dissenting) that a tax deed void upon its face was not color of title. The decision was adhered to in *Redfield v. Parks,* 132 U. S., 239. In *Wilson v. Atkinson,* 77 Cal., 485 (11 Am. St., 299), the law was held to be in accordance with the dissenting opinion in *Moore v. Brown, supra.* The Court said: "The deed we are now considering, although it contains a recital showing that the assessment under which the tax sale was made was invalid, contains all (502) the requisites of a good and valid deed, including a sufficient description of the land claimed under it. It was just as effective, as notice of the extent of the defendant's possession and claim, as if the objectionable recitals had been omitted." The same view is held in *Pugh v. Youngblood,* 69 Ala., 296; *Edgerton v. Bird,* 6 Wis., 527; *Douglas v. Tollock,* 34 Iowa, 262; *Pharis v. Bayless,* 122 Mo., 116 (1 Cyc., 1087); 26 Am. Law Reg., 409, in which the subject is discussed, the decisions reviewed, and the conclusion reached that the weight of authority is with the dissenting opinion in *Brown v. Moore, supra.*

We have not neglected to note the cases cited by plaintiff. In *Dickens v. Barnes,* 79 N. C., 490, the description was so indefinite that the entry under the deed gave no notice of the extent of the claim, or possession. The statute is express in the requirement that the entry and possession must be "under known and visible lines and boundaries." The opinion of *Faircloth, J.,* expressly recognizes the principle involved. Without further extending this discussion by the citation of other decisions, we are of the opinion that, both upon the reason of the thing and the trend of judicial thought, the deed from the sheriff to defendant was color of title; that his entry was an ouster, and that at the end of seven years, the defendant being in the exclusive adverse possession, Foreman and those claiming under him were barred. The plaintiff introduced evidence showing that the land was not listed by Foreman for taxation in 1881. This entry does appear: "The Foreman-Douglas swamp to be listed by the register." We think this sufficient to sustain the assessment of the tax upon "unlisted lands." The failure to record the receipt, as required by the statute, goes to invalidate the deed, but does not affect the question of color. The defendant offered in evidence a plat, pursuant to a survey made in accordance with the provisions of Revisal, sec. 1505. The case on appeal states that the survey was recorded in the office of the register of deeds in May, 1896. The (503) plaintiff objected to its admission, stating no ground therefor.

He insists in his brief that there was no evidence at the time of its introduction that it was correct, etc. After its introduction the surveyor who made the plat testified that it was correct. Without dis-

cussing the original exception, it is manifest that any objection to its introduction was removed by the testimony of the surveyor. We think that, in view of the character of the land, the purpose for which it was capable of being used, etc., his Honor correctly instructed the jury in regard to the acts which constitute possession. It seems that the plaintiff, before purchasing from the heirs of Foreman, recognized the defendant's possession.

Upon a careful examination of the entire record, we find no error in his Honor's rulings to which exceptions are taken. The judgment must be

Affirmed.

Cited: Burns v. Stewart, 162 N. C., 366; *Lumber Co. v. Cedar Works,* 165 N. C., 87; *Lumber Co. v. Pearce,* 166 N. C., 590; *Norwood v. Totten, ib.,* 650; *Gann v. Spencer,* 167 N. C., 430; *Knight v. Lumber Co.,* 168 N. C., 454; *Kivett v. Gardner,* 169 N. C., 80.

JOHN OLIN HEPTINSTALL v. M. E. NEWSOM ET AL.

(Filed 19 February, 1908.)

Courts—Wills—Jurisdiction—Equity—Adverse Interests.

The advisory jurisdiction of courts of equity does not extend to the mere construction of a will to ascertain the rights thereunder of devisees or legatees. Such is not sustained under Revisal, 1589, when not brought by the plaintiff against some person claiming an adverse estate or interest.

PROCEEDING commenced in the Superior Court of HALIFAX, before *W. R. Allen, J.,* at Fall Term, 1907, for the construction of the will of John W. Heptinstall, who died domiciled in said county and seized and possessed of an estate consisting of both real and personal property.

From judgment for plaintiff the defendants appealed.

E. L. Travis and W. E. Daniel for plaintiff. (504)

Manning & Foushee, J. P. Pippin, and R. O. Everett for defendants.

BROWN, J. This appears to be an action brought by the plaintiff, one of the devisees of the testator, against such of the other devisees as are in *esse,* for the purpose of obtaining a construction of the will as to the devisees of real estate, and to determine what estates some of the devisees take. While we readily concur in the correctness of the decree of the learned judge construing the will in all its parts, we cannot

recognize the regularity of this proceeding nor the jurisdiction of the court to entertain it. It seems to be predicated upon the idea that a court of equity has a sweeping jurisdiction in reference to the construction of a will, which, under the authorities, is an erroneous one. *Tyson v. Tyson,* 100 N. C., 368; *Cozart v. Lyon,* 91 N. C., 282. The jurisdiction in matters of construction is limited to such as are necessary to the present action of the court. The court will not undertake to construe a devise in a proceeding of this character, for the rights of devisees are purely legal and must be adjudged when a cause of action arises. The advisory jurisdiction of courts of equity is primarily confined to trusts and trustees, which include executors, as far as their rights, powers, and duties under the will are concerned. *Alsbrook v. Reid,* 89 N. C., 151; *Little v. Thorne,* 93 N. C., 69. As said by *Judge Pearson,* in *Tayloe v. Bond,* 45 N. C., 16: "We can see no ground upon which to base a jurisdiction to allow executors to ask the opinion of the Court as to the future rights of a legatee: for instance, 'Who will be entitled when a life estate expires?' 'When property is given to one for life, with a limitation over, does the first taker have the entire interest by the rule in *Shelley's case?*' or, 'What would be the consequence of a supposed state of facts that may hereafter arise?' True,
these are matters of construction, but the questions cannot now
(505) be presented so as to be settled by a decree. A declaration of
opinion would be merely in the abstract until existing rights come in conflict, so as to give the Court a subject to act on." We were inclined to think that the jurisdiction might be founded upon a liberal construction of the act of 1893 (Revisal, sec. 1589), but, upon consideration, we find it cannot. It is not an action brought by the plaintiff, John O. Heptinstall, against some person claiming an estate or interest in the tract devised to him, but is evidently a proceeding brought in the interest of the several devisees of parcels of land to settle and determine all their respective rights arising under the will *in presenti* and *in futuro,* in which the executors, as such, have no interest. The action and the appeal are

Dismissed.

Cited: Campbell v. Cronly, 150 N. C., 472; *Reid v. Alexander,* 170 N. C., 303.

H. T. GREENLEAF v. LAND AND LUMBER COMPANY ET AL.

(Filed 19 February, 1908.)

1. Corporations—Parties—Receivers, Courts of Equity Appoint, When.

While it is more orderly to proceed under Revisal, sec. 1196, to appoint a receiver for a corporation, such may be done in a court of equity, wherein, under the decree, all parties are before the court or thereunder will be brought in, and the same relief awarded as if the provision of the statute had been complied with.

2. Corporations—Receivers—Application of Funds.

In proceedings in equity to administer upon the assets of an insolvent corporation, it is competent for the courts in proper instances to appoint a receiver, and instruct him to sell the property, after ascertaining the names of creditors, the amounts due them and the interest of stockholders, and before final judgment declare a dissolution and direct the funds to be administered in accordance with the rights of the parties.

3. Corporations—Deed by President to Himself—Uses and Trusts—Consideration.

A conveyance of land, made by one to himself as president of a corporation, reciting that he had purchased it as agent for said company, is ineffectual to convey the title, but is a valid declaration of an express trust in favor of the corporation, upon a valuable consideration.

4. Uses and Trusts—Express Trusts—Statute of Limitations, Accrues When—No Adverse Holding.

The statute of limitations does not begin to run against an express trust except from the time the right or cause of action accrues; and when such is impressed upon lands and there is no holding adverse thereto as expressed in the deed, the statute cannot successfully be pleaded in bar.

APPEAL from *W. R. Allen, J.*, at September Term, 1907, of (506) PASQUOTANK.

By consent, the court passed upon the facts and law.

Judgment for plaintiff. Defendant Underwood appealed.

The admissions in the pleadings and recitals in the judgment disclose this case: Prior to 25 September, 1869, the Land and Lumber Company was chartered and organized with William Underwood as its president. On said 25 September, 1869, said William Underwood, together with Joseph Underwood, executed a deed containing the following language, material to a decision of this appeal: "This indenture, made and entered into by and between William Underwood and Lorane J., his wife, and Joseph Underwood and Ann Ada, his wife, as parties of the first part, and the Land and Lumber Company of North Carolina, party of the second part: Witnesseth, that whereas the said William and Joseph Underwood have at various times pur-

chased, as agents for the said Land and Lumber Company, certain real estate, which they wish to convey to said company: Now, therefore, for and in consideration of the premises, and the further consideration of $10. . . . we, the parties of the first part, have given, granted, bargained and sold . . . unto him, the said William Underwood, president of the Land and Lumber Company of North Carolina, and his successors in office, the following tracts of land: . . . To have and to hold all the above-bounded land, . . . to him, the (507) said William Underwood, president of the Land and Lumber Company of North Carolina, and his successors in office, to hold the same for the use and benefit of said company in fee simple, forever." It is conceded that the land described in the deed is the same as that referred to in the complaint. The Land and Lumber Company ceased to do business about twenty-five years ago. William Underwood is dead, and the defendants are his heirs at law. The land in controversy is woodland, and no person was in the actual possession prior to 1900, when defendant Zimmerman went into possession pursuant to a tax deed. William Underwood acquired title under one Hinton. Plaintiff owns shares of stock in said corporation. There are no officers of said corporation in existence and no organization is maintained. Plaintiff avers that there are no debts outstanding. His Honor was of the opinion "that the deed of 25 September, 1869, is a declaration that the title to said land is held in trust for the Land and Lumber Company, making it the equitable owner thereof." He rendered judgment, appointing a receiver of said company, directed said receiver to advertise for creditors and stockholders, etc., and to report to the next term of the court, retaining the cause for further orders. Defendants excepted and appealed.

Aydlett & Ehringhaus for plaintiff.

Pruden & Pruden, Shepherd & Shepherd and W. M. Bond for defendants.

CONNOR, J., after stating the case: Defendants insist that the plaintiff cannot maintain the action, for that the corporation, the Land and Lumber Company, has not been dissolved in accordance with the provisions of the statute (Rev., 1196). It must be conceded that a proceeding instituted and prosecuted pursuant to the statute would have been more orderly. We can perceive no good reason, however, for dismissing this action, wherein all parties in interest are now or, under his Honor's order, will be brought into court and the same relief (508) awarded as if the provisions of the statute had been complied with. His Honor's order is in strict accord with that which would have been made in the statutory proceeding. The receiver will, under

the orders of the court, sell the property, after ascertaining the names of the creditors, if there be any, and the amounts due them, and the interest of the sockholders. The title to the property of the corporation is vested in it upon these trusts. Before any final judgment is rendered, a dissolution will be declared and the fund administered in accordance with the rights of the parties. This is an equitable proceeding, and it is competent for the court, under its jurisdiction, to administer trust funds and mould its decrees so that the rights of all beneficial owners are protected.

The defendants insist that the deed or paper-writing executed by William and Joseph Underwood on 25 September, 1869, is ineffectual to convey the title, because Underwood could not be the grantor and grantee in the same deed. His Honor concurred in that view and held that the deed was a valid declaration of a trust, thereby attaching to the legal title, which remained in Underwood, an express trust for the corporation. We concur with his Honor's opinion. The recitals in the deed show that the property was purchased by Underwood as agent for the corporation. The declaration of trust is sustained by these recitals and a recited valuable consideration. The learned counsel for defendants insists that no express trust is declared, but that the paper-writing is only evidence upon which the court may declare a trust; that the plaintiff, claiming through the corporation, is barred from enforcing this equity by lapse of time. It is conceded that if the premises be correct, the conclusion follows. The statute never runs against the enforcement of an express trust until by some declaration or act of the trustee an end is put to the relation of trustee and *cestui que trust,* and the latter is put to his action. If the equity consists of a right on the part of the plaintiff to call upon the court to declare the holder of the legal title a trustee for any of the causes recognized by (509) courts of equity, the statute runs from the time the right or cause of action accrues. The distinction is universally recognized and enforced; it is conceded by the learned counsel for defendants. He seeks to bring the case within the class of trusts created by operation of law or the decree of the court. We concur with his Honor that the language of the deed executed by Underwood is a declaration of an express trust, and that no act has been done by Underwood or his representatives to put an end to the relationship. They never took actual possession of the land or asserted any ownership inconsistent with the declaration in the deed. It seems that, some seven years ago, the land was purchased by defendant Zimmerman for taxes, and he entered into possession. Judgment was rendered adversely to his claim, and he does not appeal. The interlocutory judgment of his Honor must be affirmed. The receiver will proceed as directed.

Affirmed.

JOHN L. GAY ET AL. v. JAMES S. MITCHELL ET AL.

(Filed 19 February, 1908.)

1. Sheriff—Seizure—Negligence—Actionable Wrong.

When the jury finds upon the evidence that the plaintiffs owned and were in possession of a certain mill and machinery, which were wrongfully seized by the sheriff and while in his possession were damaged by freezing and rusting of pipes and tubes and other parts of the machinery, and which could readily have been prevented by ordinary care and attention, an actionable wrong is established entitling plaintiffs to damages as the natural, probable, and direct result of defendants' wrong.

2. Instructions—General Terms.

When the judge's charge to the jury was correct, but in general terms, it was not objectionable, unless the defendant had tendered correct prayers for instruction of a more specific nature.

3. Supreme Court—New Trial—Newly Discovered Evidence, Cumulative—Diligence.

An application in the Supreme Court for a new trial upon newly discovered evidence will not be granted when the affidavits only set out cumulative evidence, or if they do not show that the applicant used due diligence in procuring it.

(510) APPEAL from *W. R. Allen, J.*, at Fall Term, 1907, of HERTFORD.

On the issues submitted, and verdict thereon, there was judgment for plaintiffs against defendant James S. Mitchell, and defendants excepted and appealed.

Winborne & Lawrence for plaintiffs.
D. C. Barnes for defendants.

HOKE, J. After giving the matter most careful consideration, the Court is unable to find any error in the proceedings below which entitles appellant to a new trial.

The evidence tended to show that plaintiffs owned and were in possession of a mill and machinery; that on 25 January, 1899, the defendant, as sheriff, wrongfully seized said property under an attachment process issued against other persons, and held same until about the middle of February following; that the said mill and machinery were in good order when seized by defendant, and while said defendant had charge of same the property was much damaged by "freezing and rusting of pipes and tubes and other parts of the machinery," and that this damage could have been readily prevented by ordinary care and attention on the part of defendant. On this testimony, if believed, an actionable wrong was undoubtedly established, and under the charge of

the court the jury properly awarded the actual damages, which were the "natural, probable, and direct result of defendant's wrong." We do not well see how any other verdict could have been rendered; and while the charge of the court was somewhat general in its terms, it was a correct charge, and if the defendant desired that it should be more specific, he should have indicated this requirement by cor- (511) rect prayers for instructions, properly preferred. *Simmons v. Davenport,* 140 N. C., 407. The special prayer which was made, and refused by the court, was not permissible on the facts as they appear in the case on appeal. Nor does the defendant's application for a new trial for newly discovered evidence commend itself to the favorable consideration of the Court. At best, the evidence, as indicated in the affidavits filed, is only cumulative, and the defendant fails to show that he used the diligence in procuring the evidence which is required by the decisions of the Court in applications of this character. *Wilkie v. R. R.,* 127 N. C., 213; *Turner v. Davis,* 132 N. C., 187-190.

No error.

Cited: Myatt v. Myatt, 149 N. C., 142; *Hardy v. Lumber Co.,* 160 N. C., 123; *Coal Co. v. Fain,* 171 N. C., 648; *Webb v. Rosemond,* 172 N. C., 851.

H. A. CHESSON v. WALKER & MYERS.

(Filed 19 February, 1908.)

1. Employer and Employee—Fellow-servant—Test.

The test of whether one is the fellow-servant of another is whether, in the employment of a common master, such other person is subject to his orders.

2. Employer and Employee—Respondeat Superior—Casual Connection—Evidence.

The superior cannot escape liability under the defense that the injury was caused by a fellow-servant, without connecting the alleged fellow-servant with the cause of the injury.

3. Same—Questions for Jury.

There is sufficient evidence of negligence to support a verdict for damages, when it appears that the master's duly authorized agent ordered an inexperienced youth, employed to perform duties comparatively without danger, to do a dangerous act, without instructing him how to do it, and informing him it was without danger.

ACTION to recover damages for an injury received by plaintiff (512) in putting a belt on the driving wheel at defendant's mill, tried at Spring Term, 1907, of WASHINGTON, before *W. R. Allen, J.,* and a jury.

The usual issues of negligence, contributory negligence, and damage were submitted, which were found against defendants. From the judgment rendered the defendants appealed.

W. M. Bond and S. B. Spruill for plaintiff.
A. O. Gaylord for defendants.

BROWN, J. The evidence tends to prove that plaintiff, a minor, about 19 years of age, was employed at defendants' sawmill to "run on the tail end of a log carriage, to steady the log on the carriage and to set the dogs"; that he was totally inexperienced in adjusting or operating machinery, and that the only mill work he had ever done was to run on the log carriage. He was ordered by Hall, the sawyer, to go below and place the belt on the driving wheel, as it had become displaced. Hall gave plaintiff no instructions how to proceed, and told him there was no danger. The plaintiff was entirely inexperienced and had never adjusted a belt. In readjusting the belt the plaintiff's hand was badly hurt by the small pulley.

At the close of the evidence defendants moved to nonsuit, and the motion was overruled.

1. Was plaintiff hurt by the negligence of a fellow-servant? The uncontradicted evidence proves that Hall was not a fellow-servant of plaintiff, but that plaintiff was placed under Hall and was subject to his orders. It therefore follows that, so far as plaintiff is concerned, the defendants are liable for Hall's negligence in not instructing him, an inexperienced youth, in the work he was directed to do. The test is not Hall's right to hire or discharge plaintiff, but whether Hall was intrusted by defendants with the discharge of duties they owed plaintiff. *Tanner v. Lumber Co.*, 140 N. C., 479.

Nor does the evidence show that plaintiff was injured by the negligence of Towe, admittedly a fellow-servant. The latter was
(513) directed to clean out the chain, not for the purpose of aiding plaintiff in putting on the belt, but to prevent the belt running off again after it was put on the driving pulley. The belt was on the little pulley and had slipped off the big pulley. Plaintiff's hand was caught in the lap of the belt before he could get it on the big pulley, and he was thrown to the little pulley and his hand hurt there.

2. The position that there is no evidence of negligence is untenable. The plaintiff was an inexperienced youth, employed to sit on the log carriage and hold the log steady, and then to set up the dogs to hold it in place—an occupation attended with little danger. He had never placed a belt upon the running pulley—a dangerous performance, evidently requiring some experience or instruction to do it with compara-

tive safety. He was sent to do this work on the floor below, without previous instruction, and informed there was no danger in it, by the man whose orders he was required to obey. This was evidence of negligence to be submitted to the jury. *Jones v. Warehouse Co.*, 138 N. C., 546, and cases cited.

We find nothing in the record warranting another trial.

No error.

Cited: Craven v. Mfg. Co., 151 N. C., 353; *Holton v. Lumber Co.*, 152 N. C., 69; *Horne v. R. R.*, 153 N. C., 240; *Dunn v. Lumber Co.*, 172 N. C., 136; *Sumner v. Telephone Co.*, 173 N. C., 31.

A. D. WILKIE v. NEW YORK MUTUAL LIFE INSURANCE COMPANY.

(Filed 19 February, 1908.)

1. Insurance—Notices—Premiums—Insurance Year—Date of Insurance.

When it appears upon the face of a policy of life insurance, and from the notices to insured, that the pay day for premiums was fixed as 22 November, and that the policy was delivered on 2 December, the insurance begins at the date fixed in the policy as the pay day, or 22 November.

2. Same—Term—Commencement—Premiums—Payment—Delivery of Policy—Automatically Continued.

When the insured has ceased to pay the premiums upon his policy of life insurance, but which, under its terms and conditions applicable, automatically continued in force for two years and two months, and specifies the pay day for premiums as 22 November, and the policy was delivered to the insured on 2 December following, the time for which the policy will be automatically continued should be computed from the date specified in the policy, and not from the date of its delivery.

3. Same—Policies—Premiums—Date of Payment—Construction.

The annual premiums stipulated in the face of a policy of life insurance, to be paid by the insured at a day certain to give the benefits thereunder, are but parts of a fixed total, and are not to be considered strictly as made for a full year, but as payments to be made on a particular day of the year.

4. Same—Automatically Continued—Time Computed.

When the insured, under a policy of life insurance, dies within the period for which his policy was automatically continued in force, reckoning from the date of its delivery, but after such time has expired, reckoning from the pay day for the premiums specified in the policy, it would be a variance of the contract to permit a recovery of the benefits set out in the policy.

5. Same—Delivery—Premiums—Date of Payment—Contract—Evidence.

When the policy sued on was delivered subsequently to the day mentioned therein for the payment of premiums, and provided for the pay-

ment of twenty annual premiums, from the date mentioned, to regard the day of its delivery as that from which the policy was to run would extend the time beyond that fixed in the face thereof, and would be a variance of the insurance contract.

6. Same—Days of Grace—Forfeiture—Term of Insurance.

The thirty days grace allowed in an insurance policy merely provides against a forfeiture, and cannot be construed to extend the term of insurance limited in the face thereof.

(514) APPEAL from *Guion, J.*, at February Term, 1907, of RUTHERFORD.

During the trial the counsel for the parties agreed upon the facts, and judgment was entered thereon for defendant. Plaintiff appealed.

The plaintiff brought this action to recover $2,000, the amount of an insurance policy issued by the defendant upon the life of (515) her intestate for her benefit. The policy contains the following provisions:

"1. This policy participates in the profits of the company as herein provided. If the insured is living on 22 November, 1921, which is the end of the twenty-year accumulation period of this policy, and if the premiums have been duly paid to that date, and not otherwise, the company will then apportion to this policy its share of the accumulated profits, and the insured shall then have the option of one of the following five accumulation benefits." Then follow the five options given to the beneficiary for the settlement of the policy, all of which are based, in part, upon a participation in the profits.

"2. At the end of the accumulation period the company will send to the insured a written statement of the results under the five accumulation benefits. If a selection by the insured of one of these benefits is not received by the company within three months thereafter, it will be assumed that the insured desires to continue this policy under the first benefit, and the cash profits apportioned to this policy will be held as a credit, with interest at such rate per annum as the company may declare on such funds, and shall be payable as the insured may direct—in one sum or in not more than ten installments.

"The company guarantees that the entire cash value of this policy at the end of the accumulation period shall consist of (first) $1,008; (second) the cash profits then apportioned by the company.

"3. The insured may change the payment of the proceeds of this policy from payment in one sum, as provided on the first page hereof, to payment by annual installments, as provided on the fourth page hereof.

"This policy is automatically nonforfeitable from date of issue, as follows:

"If any premium is not duly paid, and if there is no indebtedness to the company, this policy will be indorsed for the amount of paid-up insurance specified in column two of the table on the second (516) page hereof, on written request therefor within six months *from the date to which premiums were duly paid.* If no such request is made, the insurance will automatically continue from *said date* for the amount stated at the head of column three of said table ($2,000) for the term specified therein (two years and two months), and no longer.

"4. If this policy is continued beyond the accumulation period, profits shall be apportioned at the end of every five years thereafter, during the continuance of this policy, if all premiums have been duly paid to end of accumulation period.

"5. If any premium is not paid on or before the day when due, or within the month of grace, the liability of the company shall be only as hereinbefore provided for such case.

"6. Any indebtedness to the company, including any balance of the premium for the insurance year remaining unpaid, will be deducted in any settlement of this policy, or of any benefit thereunder.

"7. This policy is incontestable from date of issue.

"8. This agreement is made in consideration of the sum of $63.66, the receipt of which is hereby acknowledged, and of the payment of a like sum on 22 November thereafter, in every year during the continuance of this policy, until twenty full years premiums shall have been paid."

The policy is dated 2 December, 1901. There is indorsed on the policy a notice to the insured and the beneficiary that the insurance under the policy may be collected by direct application to the home office of the company, 346 Broadway, New York City, together with the name of the insured, a statement of the number of the policy, the amount thereof ($2,000), the annual premium, and then the following: "Insurance year begins on November 22d."

The parties waived a trial by jury and agreed upon the following facts:

"1. The policy sued on in this case was issued upon the life of (517) Clarence D. Wilkie.

"2. The premiums due for the first two full years of said policy were paid, but no further premium payments were made upon said policy.

"3. The insured, Clarence D. Wilkie, died on 26 January, 1906.

"If the court is of the opinion that the plaintiff is entitled to recover, then judgment shall be rendered in favor of the plaintiff for $2,000, less the sum of $150.74 unpaid premiums; otherwise, for the defendant."

Proofs of intestate's death were duly made and payment of the insurance demanded of the defendant and refused by it.

The court, being of opinion with the defendant, rendered judgment in accordance with the agreement. The plaintiff excepted and appealed.

McBrayer, McBrayer & McRorie for plaintiff.
Gallert & Carson for defendant.

WALKER, J., after stating the case: The original policy was filed in this Court for our inspection, and the decision of the case turns upon its true construction. The plaintiff contends that as the policy was issued on 2 December, 1901, and as the two full premiums for two years had been paid, this carried the insurance to 2 December, 1903, and that by the terms of the contract the insurance was automatically continued from the latter date for two years and two months, which would carry it to 2 February, 1906, and, as the insured died on 26 January, 1906, the policy was in full force and effect at the time of his death. The defendant, on the contrary, insists that the date from which the count of time must be made is 22 November, 1901, according to the stipulations of the contract and the notice to the insured, at the time of the delivery of the policy to him, that the insurance year would
(518) begin 22 November, which date, in 1901, was the beginning of the first insurance year; and that, this being so, the insurance, when extended according to the contract, expired 22 January, 1906—just four days before the death of the insured. As between these two contentions, we are with the defendant, and we think, therefore, that the judge was right in his decision upon the case agreed.

The policy provides that if no request for paid-up insurance is made, the policy will automatically continue in force for two years and two months from the date to which premiums are duly paid. The question, then, is presented, To what date had premiums been fully paid, under the terms of this policy? Manifestly, as we read the contract, and in view of the law applicable to such cases, to 22 November, 1903.

The premiums were payable in advance, and they had been paid, according to the facts agreed upon, for two full years. In view of the plain language of the policy, it can make no difference that the policy was not issued until 2 December, 1901. We find this provision in the policy: "This agreement is made in consideration of the sum of $63.66, the receipt of which is hereby acknowledged, and of the payment of a like sum on 22 November thereafter, in every year during the continuance of this policy, until twenty full years premiums shall have been paid." It is made perfectly clear that the parties intended to make 22 November the beginning of each insurance year and the date to which the advance premiums should be paid, when the clause just quoted is read in connection with a prior one in the policy, which is as follows: "This policy participates in the profits of the company as herein pro-

vided. If the insured is living on 22 November, 1921, which is the end of the twenty-year accumulation period of this policy, and if the premiums have been duly paid to that date, and not otherwise, the company will then apportion to this policy its share of the accumulated profits, and the insured shall then have the option of one of the (519) following five accumulation benefits." It therefore appears that twenty annual premiums were required to be paid for the full time, and 22 November was expressly designated as the day of payment; that date, in the year 1921, was fixed as the end of the "twenty-year accumulation period of the policy"; and it is stipulated that, "if the premiums have been fully paid *to that date,* and not otherwise," the company will *then* apportion to the policy its share of the accumulated profits, with any other benefit to which the insured is entitled. If we accept the contention of the plaintiff that 2 December is the beginning of the insurance year, within the meaning of the parties to this contract, we are met by the positive and clearly inconsistent provision that the full term of the insurance will end 22 November, and that her share of the profits and the benefits under the policy shall then accrue to her as the beneficiary, if the premiums have been paid to that date. This provision is, of course, in conflict with the plaintiff's contention, because, if the insurance became effective 2 December, 1901, and the insurance year was therefore to commence on that date and end on the corresponding date of each and every year thereafter, the full term would thereby be extended, contrary to the express provision of the policy, nine days, at least, beyond the date fixed for its termination. A construction of the policy which will produce such a result is, of course, not admissible. Payment being required in advance, the premium paid when the policy was actually issued would run until the next pay day should come—that is, until 22 November, 1902. The fact that this would be ten days short of a full year from the date of the policy cannot be allowed to affect the case, since payments of premiums, being but parts of a fixed total, are not to be considered strictly as made for a full year, but as payments due on a particular day of the year. This question was directly presented in an action upon a policy worded substantially like the one now being construed, and the Court held that the fact of the (520) policy having been issued and the first premium paid on a day subsequent to the pay day did not change the due date of premiums as fixed by the express words of the contract. *Bryan v. Ins. Co.,* 21 R. I., 149. The same point was similarly decided in *Frazier v. Mfg. Co.,* 98 Minn., 484. And so it is said, in May on Insurance (4 Ed.), sec. 400, at page 920: "When the policy itself covers a period antecedent to its date, and does not specify the contingency upon which it shall take effect, the date of the policy, or of its actual delivery, becomes of little

or no importance in determining when the insurance takes effect." The intention of the parties to make such a contract as is described in the passage just quoted seems to be apparent in every part of the written policy now under construction.

There is another permissible view of this case, which leads us to the same conclusion we have already reached. The final clause in the policy recites that the insurance contract is made in consideration of the receipt of the first premium ($66.23), "and of the payment of a like sum on 22 November *thereafter*, in every year during the continuance of the policy, until twenty full years premiums shall have been paid." What does the expression, "in every year during the continuance of the policy," mean? Does it refer to the current year, commencing 2 December, the date of the policy, and the years succeeding, with the same date as their beginning, or does it refer to the succeeding calendar years—that is, to the year 1902 and the calendar years thereafter? Plainly, to the latter, for, if not, and the first construction should prevail, the second premium would fall due, not on 22 November, 1902, but on 22 November, 1903, that being the first day of that date after the full year beginning with 2 December, 1901, had expired, if the latter date is to be taken as the first day of the insurance year and the policy is kept in force, or the premium is in effect paid for a full year thereafter, or to 2 Decem-
(521) ber, 1902, there being no doubt that the premiums were payable 22 November, for it is so expressly stated in the policy. This would produce a direct conflict with the other explicit terms of the policy, and especially with the one which requires that the term or life of the policy shall expire when twenty full years premiums shall have been paid, or on 22 November, 1921, as specified in the policy, for then only nineteen premiums would be paid to the latter date. If 2 December is to be taken as the first day of the insurance year, the "twenty-year accumulation period" of the policy would not expire until 2 December, 1921, or ten days after the time so clearly designated in the contract.

But the policy further provides that the insurance will continue automatically for two years and two months from the date to which premiums have been duly paid. This necessarily means the date when the premium which has not been paid falls due by the terms of the contract of insurance. The policy designates 22 November as the day of payment. There can be no mistake as to this being the fact. By what rule of construction applicable to any kind of instrument—will, deed, or contract—can we change that date and substitute another later in the year, simply because the policy was delivered and the premium paid on the latter date? That would be making a contract for the parties, which we are forbidden to do, and not merely construing one they have made for themselves. "The intention of the parties must be collected from the

whole instrument and not from any detached portion of it, and greater regard is to be paid to their clear intent than to any particular form of words or to the phraseology by which they have undertaken to express it." Clark on Contracts (2 Ed.), pp. 402, 403, *et seq.* It is true that words in a contract are to be construed against the party using them, if there is any ambiguity, and this rule applies with special force to insurance policies, which will receive that interpretation, in cases of doubt, which is most favorable to the assured. *Bray v. Ins. Co.,* 139 N. C., 390. But all instruments should be construed reasonably, (522) and where the intention of the parties clearly appears, a contract will be interpreted so as to effectuate it. We are of the opinion, after a careful examination of the terms of this policy, that it was intended that the second premium should be paid on 22 November, 1902, and the others in succession on the same date of each year thereafter, until the full accumulation period of twenty years had expired. Any other construction would annul the plainly expressed provisions of the contract, subvert the leading idea of the parties in making the agreement, and destroy the computation adopted for adjusting and settling the rights and benefits accruing to the assured at the time unmistakably fixed by the policy. We find that there are many decisions sustaining our view, a few of which we will cite: *Tibbitts v. Ins. Co.,* 159 Ind., 671; *Thomas v. Ins. Co.,* 142 Cal., 79; *Johnson v. Ins. Co.,* 143 Fed., 950; *Frazier v. Mfg. Co.,* 98 Minn., 484; *Methvin v. Life Assn.,* 129 Cal., 251; *McConnell v. Providence Savings Society,* 92 Fed., 769; *Ins. Co. v. Patterson,* 28 Ind., 17.

We have not referred to the fact that the insured, Clarence Wilkie, accepted the policy with notice from the defendant of the initial day of each insurance year, because we have not found it necessary to do so in order to arrive at a conclusion as to the proper meaning of the contract. If he was thus notified, it would seem to have been nothing but right to return the policy if it was the wrong date, and refuse to accept another unless it conformed to the terms of the application made to the company.

Passing to another point, it is true that thirty days of grace are allowed for the payment of any premium, if it should not be paid the day it is due. In *Ins. Co. v. Meinert,* 199 U. S., at p. 179, *Justice Peckham,* for the Court, says: "There can be no doubt that the premium did become due on 5 March, and the thirty days extension simply permitted a payment within that time to save a forfeiture." It (523) did not change the due date of the premium, but was no more than an act of grace or favor on the part of the company to the insured. When a premium is paid, the date to which it is paid, within the meaning of the policy, is the day on which the next premium will be due, as

fixed by the terms of the contract, and this was 22 November, as we have said. The clause allowing days of grace was inserted merely to prevent a forfeiture by extending the time of payment, and the additional period, or the time of the extension, is not covered by the last premium paid, If there had been a default in payment on the day named in the contract, and the premium should thereafter have been paid within the thirty days of grace, it would have saved the insurance; but if the days of grace should be given the effect of adding thirty days to the insurance year, instead of merely preventing a forfeiture, there would necessarily follow a disarrangement of the entire scheme of insurance, as evidenced by the policy. This is made clear, too, by the very terms of this policy, distinguishing between the due date and the day upon which the extension of credit or time of grace expires, and requiring interest to be paid for the time of extension. The distinction is also recognized in the following clause of the policy: "If any premium is not paid on or before the day when due, or within the month of grace, the liability of the company shall be only as hereinbefore provided for such a case." Each premium, therefore, is paid to the next due date, and not to the day on which the month of grace may end.

The plaintiff relied mainly on *McMaster v. Ins. Co.*, 183 U. S., 25, but that case will be found, upon examination, to be materially different from the case at bar in several respects. One essential difference is that the company alleged that the policies of McMaster were dated 12 December, 1893, which was the day he agreed should be the first of the
(524) insurance year, when, in fact, they were dated 18 December, 1893, the day on which they were actually issued, and the application of McMaster for the insurance expressly stated that they should not be in force until actual payment and acceptance of the premiums; and it further appeared that it had been orally agreed between the company's agent and McMaster that the premiums should be payable annually—that is, at the end of each insurance year, which by the terms of the application, commenced with 18 December, 1893. The Court held that McMaster was not estopped to show these facts by reason, even, of the explicit requirement of the policy that the premiums should be paid 12 December of each year, as the day of payment had been antedated by the fraud of the company's agent, and in violation of the agreement. It further appeared that the agent represented to McMaster that the payment of a year's premium in full would secure to him a contract of insurance for thirteen months from the payment of the premium. The Court, in discussing this feature of the case, said, by *Chief Justice Fuller:* "We are dealing purely with the question of forfeitures," and it was accordingly held that, as the payment of the first premiums insured McMaster for thirteen months by virtue of his agreement with the agent,

by which the company was bound, the next premium was not due until 18 December, 1894, and, as McMaster died 18 January, 1895, within the month of grace, the policies were in force at the time of his death, and the plaintiff was entitled to recover. The two cases are radically different. One involved simply the question of forfeiture, and was dependent for its decision upon the alleged agreement and fraud of the company's agent in connection with the terms of the application, all of the facts upon these controverted matters having been found in favor of the plaintiff; while in our case the application was not in evidence, and there was no agreement established between the agent and the insured which altered the contract as expressed in the policy. There are other differences, more or less important, but which need not be (525) noticed. Indeed, we think that the reasoning of the learned *Chief Justice* in that case clearly sustains our construction of the policy upon which this suit was brought.

Besides the cases we have cited in support of our rulings, a recent decision upon facts substantially identical with those in this case sustains our view of the law. *Ins. Co. v. Stegall,* 1 Ga. App., 611.

The policy of the plaintiff's intestate was not in force at the time of his death, and the court below, therefore, rendered the proper judgment upon the case agreed.

Affirmed.

Cited: *Potato Co. v. Janette,* 172 N. C., 5.

B. W. MOTT ET AL. v. CAROLINA LAND AND LUMBER COMPANY.

(Filed 19 February, 1908.)

1. Executors and Administrators—Tenants in Common—Possession.

The husband of one of the heirs at law having qualified as administrator and entered upon the lands of his intestate, legally holds possession as agent for the heirs at law, though there is evidence that he entered thereupon in the right of his wife as a cotenant.

2. Same—Tenants in Common—Adverse Possession—Burden of Proof.

The burden of proof is upon defendants relying thereupon to show that they, or those under whom they claim title, have been in adverse possession of the lands in controversy for twenty years; and when such possession of an administrator, or cotenant in common, is relied upon, they must show an actual ouster by him, or a presumption thereof from a holding adverse to the heirs at law, or a nonrecognition of the rights of the other cotenants.

PARTITION, brought before the clerk and transferred upon issues to the Superior Court of CURRITUCK, and heard before *O. H. Allen, J.*, and a jury, at Fall Term, 1907.

Judgment for petitioners, and defendant appealed.

(526) The facts sufficiently appear in the opinion of the Court.

Aydlett & Ehringhaus and J. B. Leigh for plaintiffs.

Pruden & Pruden, Shepherd & Shepherd, and J. Heywood Sawyer for defendant.

CLARK, C. J. This was a special proceeding for partition. The defendant pleaded sole seizin, and the cause was transferred to the Superior Court at term for trial. John Cox died, in 1853, owner of the land in controversy, which descended to his five children as heirs at law. The land consisted of nine tracts, mostly woodland, there being some clearing on two tracts only. W. C. Mercer, who was the husband of one of the heirs, entered into possession and qualified as administrator. There was evidence that he entered in right of his wife, and also that he rented out the land as administrator, though strictly legally this must be construed as an agency for the heirs at law. In 1868, in 1874, in 1882, and in 1883 said Mercer bought successively the shares of four of the heirs at law, who had increased in numbers, taking deeds therefor, thus recognizing the cotenancy. His possession up to 1883 was therefore the possession of his cotenants. *Bullin v. Hancock,* 138 N. C., 198; *Whitaker v. Jenkins, ib.,* 476; *Dobbins v. Dobbins,* 141 N. C., 217. In 1890 W. C. Mercer and wife conveyed the entire tract of Hathaway, who reconveyed to Mercer in 1894. In 1897 Mercer conveyed to Snider, under whom, through *mesne* conveyances, the defendant claims. Mercer being in possession, acknowledging the cotenancy by taking conveyances of four of the heirs, there was no ouster or disavowal of the cotenancy presumed, and there was no evidence thereof till his deed to Hathaway, in 1890. As this action was begun in 1906, there is adverse possession for only sixteen years. If there had been an ouster and adverse possession from 1883 to 1890, it would have ripened defendant's title. Rev., 384; *Covington v. Stewart,* 77 N. C., 148. But there was no evidence

(527) to show this, and the court properly told the jury that the burden to make out twenty years adverse possession was upon the defendant. This is true, whether an actual ouster is relied on or a presumption from nonpayment of rent or nonrecognition of the cotenant as such.

No error.

T. M. SMALL ET AL. v. COUNCILMEN OF EDENTON.

(Filed 19 February, 1908.)

1. Ordinance—Malice or Bad Faith—Reasonableness—Questions for Court.

When there is no evidence of malice or bad faith, the reasonableness of a city ordinance is a question of law for the court.

2. Ordinances—Stationary Awnings—Reasonableness.

An ordinance is reasonable and valid which requires all stationary awnings (with posts resting upon the sidewalks) in the town to be removed by a certain day fixed, and imposes a fine of $50 upon the owners failing to so remove them, and provides for their removal by the town constable.

S. v. Higgs, 126 N. C., 1026, overruled.

APPEAL from *O. H. Allen, J.*, at Fall Term, 1907, of CHOWAN.

From judgment for defendants, plaintiffs appealed.

The facts sufficiently appear in the opinion of the Court.

C. S. Vann, Aydlett & Ehringhaus, and W. M. Bond for plaintiffs.

Pruden & Pruden and Shepherd & Shepherd for defendants.

CLARK, C. J. The councilmen of the town of Edenton, after full notice and full public discussion, and after hearing petitions for and against it, adopted the following ordinance: "That all stationary awnings (that is, awnings with posts resting on the sidewalk) in the town of Edenton be removed by 1 February, 1907. Any person, (528) firm, or corporation owning such awning who fails to comply with said ordinance shall be fined $50, and the constable of Edenton shall remove such awning." The plaintiffs were a firm who had a stationary awning in front of their store, extending over the sidewalk. This is an action seeking a perpetual injunction against the town to restrain it from removing plaintiffs' awning under the authority of said ordinance.

It was contended here that the posts upon which the awning rested were placed beyond the edge of the sidewalk, but the testimony of Mr. Bond, one of the plaintiffs, was that the sidewalk was 15 or 16 feet wide, and that the posts were set in the ground 14 feet from the wall of the plaintiffs' store, and it is admitted in the record by plaintiffs that Mr. Bond's testimony on this matter is correct. The plaintiffs asked no instructions based on a contrary state of facts. Besides, it would not be a material circumstance, for the ordinance is clearly intended to require the removal of "stationary awnings" extending over the side-

walk, because of their obstruction to putting out fires, of the often dilapidated condition and unsightliness of many of them, and for other reasons; and whether the posts were placed just inside or just outside the edge of the sidewalk does not affect the scope and purpose of the ordinance or its application.

The ordinance was within the powers of the governing board of the town, and was properly held by his Honor to be reasonable. If it does not meet the approval of the citizens of the town, they can secure its repeal by instructing their town council to that effect, or by electing a new board. Such local matters are properly left to the people of a self-governing community, to be decided and determined by them for themselves, and not by a judge or court for them.

The true rule is well stated by *Burwell, J.*, in *Tate v. Greensboro,* 114 N. C., 399: "It is not for a court and jury to review the (529) conduct of the proper municipal authorities in such a matter as that now under consideration." In *Barnes v. District of Columbia,* 91 U. S., 540, it is said: "The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys, and highways, the regulation of grades and the opening of new and the closing of old streets are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done. The wisdom of this rule is well illustrated by this action. Complaints were made, it seems, by citizens that these trees were injurious to the public way and, in their effects, perhaps, to the public health. The proper authorities of the city, clothed with the power to repair the streets and protect the public health, listened to these complaints, and, in the exercise of their best judgment, so far as it appears, decided that the interest of the community required their removal. The proposition of the plaintiffs is that a jury shall judge of the correctness of this conclusion, and if they find that the officials committed what they think was an error they and the city shall be mulcted in damages. The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality, but transfer it, not to be exercised directly and finally, but indirectly and partially by the retroactive effect of punitive verdicts upon special complaints." Cooley Const. Lim. (6 Ed.), 255.

Suppose another owner on this street, with similar awnings, were to bring suit and it was left to a jury. The jury in each case might decide differently, and here would, indeed, be an anomaly in government. Revisal, sec. 2930, provides that the town council "shall provide for keeping in proper repair the streets and bridges in the town, *in the manner and to the extent they may deem best.*"

The reasonableness of an ordinance is for the court, the jury (530) only being called in to find the facts, when in dispute. Abbott Mun. Corp., sec. 545; Smith Mun. Corp., sec. 1133.

Upon the whole testimony in this case, the court properly instructed the jury that this ordinance was reasonable. As there was not the slightest evidence of malice or bad faith, the reasonableness of the ordinance was purely a matter for the court. The town authorities are vested with large discretionary powers, especially in respect to streets; and if every ordinance were subject to approval by the verdict of a jury, it would be impossible to regulate the streets and sidewalks so as to secure uniformity, convenience, protection from fire, proportion and sightliness and other necessary things incident to the growth and development of modern municipalities. These views are distinctly declared in *Tate v. Greensboro,* 114 N. C., 399, which case is really decisive of this. That authority has often been cited, and we adhere to it. *S. v. Higgs,* 126 N. C., 1026, relied on by plaintiff, is in conflict with it and is overruled. The latter case was based, as this is, upon the assumption that the removal of the sign projecting into the street was dependent on its being a nuisance. If so, the conclusion would have followed that the issue of nuisance should have been found by the jury. But the real question was as to the power of the city authorities to pass such ordinance, and its reasonableness. These were matters for the court, and, under *Tate v. Greensboro,* the authorities of the town were within their rights. The only fact was whether the defendant had violated the ordinance, which was not disputed.

No error.

Cited: Dorsey v. Henderson, 148 N. C., 425, 428; *Rosenthal v. Goldsboro,* 149 N. C., 134; *S. v. Whitlock, ib.,* 545; *Barger v. Smith,* 156 N. C., 325; *S. v. Staples,* 157 N. C., 639; *Newton v. School Committee,* 158 N. C., 188; *Hoyle v. Hickory,* 164 N. C., 82; *Wood v. Land Co.,* 165 N. C., 370; *Hoyle v. Hickory,* 167 N. C., 620; *Munday v. Newton, ib.,* 657; *Bennett v. R. R.,* 170 N. C., 392; *S. v. Bass.* 171 N. C., 783.

(531)

J. N. LAMB AND C. H. WHITE v. MAJOR & LOOMIS COMPANY.

(Filed 19 February, 1908.)

1. Judgments—Construction.

Whether a decree of the court should be considered as a contract, or otherwise, it should be so construed as to give effect to each and every part, and bring all the different parts into harmony, as far as this can be done by fair and reasonable intendment.

2. Same—Estate in Fee—Restrictive Hereditable Qualifications.

A decree declaring certain defined lands to be "the absolute lands of J. N. L., to have and to hold unto him and his heirs in fee simple forever," etc., providing "That a portion of said land, equal in valuation to $1,000 upon the death of J. N. L. without lawful children surviving him, shall descend to those persons who would have taken by descent, in such event, the land descended to him from his mother, and that the remainder of said tract shall descend to those persons upon whom the law shall cast it at his death," should be construed to confer upon J. N. L. the land in fee, with absolute power of disposition; and the proviso simply annexed to the land a restrictive hereditable quality, that in case he should die without having made disposition of the same, and without children him surviving, it should, to the amount indicated, descend to his heirs *ex parte materna.*

CASE AGREED, heard by *O. H. Allen, J.,* at Fall Term, 1907, of PERQUIMANS.

There was judgment for plaintiffs, and defendants excepted and appealed.

Aydlett & Ehringhaus for plaintiffs.

W. M. Bond and Charles Whedbee for defendants.

HOKE, J. Plaintiffs sued to recover $350 and interest, as the purchase price of standing timber on a certain tract of land in Perquimans County. Defendants admitted having entered into an obligation to pay plaintiffs that amount for the timber, provided a good title thereto could be made by plaintiffs, and resisted recovery on the ground that no such title was forthcoming. Plaintiffs, having made formal tender
(532) of a deed conveying the timber to defendants, instituted the present action and recovered judgment.

The facts relevant to the inquiry, as set out in the case agreed, are as follows: "John N. Lamb, one of the plaintiffs and the owner by inheritance of several tracts of land, being of 'weak understanding and not expecting children to himself,' desired and intended that these lands, or a part of them, should go to the children of his brother, Benjamin F. Lamb, for 'their setting out and support in life,' and executed several

conveyances in the endeavor to carry out this intent. It was afterwards ascertained that those deeds did not accomplish the purpose desired, and thereupon the parties interested brought the matter before the court, and, in an action regularly and properly constituted in the Superior Court of Perquimans County, at Spring Term, 1884, a decree was rendered, by which the rights and interests of the parties were established and declared, the portion of said decree referring especially to the tract of land now in question being expressed as follows: 'It is therefore considered and adjudged by the court that the tract of land named in the pleadings as containing 105 acres—bounded as follows, viz., for boundaries, see the original survey made, according to agreement, under directions of Thomas E. Winslow, which is hereto annexed, marked "B," and which is to be registered as hereafter directed—be and is hereby declared to be the absolute property of the said John N. Lamb, to have and to hold unto him and his heirs in fee simple, forever. It is further considered and adjudged that, as appurtenant to and running with said land, the said John N. Lamb shall have right of drainage, where necessary, through the lands of the defendants, their heirs and assigns, forever. It is further considered and adjudged that a portion of said land, equal in valuation to $1,000, upon the death of the said John N. Lamb without lawful children him surviving, shall descend to those persons who would have taken by descent, in such event, the land that descended to him from his mother, and that the remainder of said tract of land shall descend to those persons upon whom the law shall cast (533) it at his death.' "

Afterwards, to wit, in February, 1901, John N. Lamb conveyed this piece of property to his coplaintiff, C. H. White, reserving a life estate therein to himself, and reciting that said White is to care for and maintain said Lamb during his natural life. Both John N. Lamb, the grantor, and C. H. White, the grantee, in the last-mentioned deed, joined in this suit and in the deed for the timber tendered to defendants before instituting the same. The title of plaintiffs rests upon the decree as above set out, and defendants object to its validity on the ground that, by proper construction, the second clause of the decree, "That a portion of land equal in valuation to $1,000, on the death of said Lamb without children him surviving, shall descend to those persons who would have taken by descent, in such event, the land devised to him from his mother, and the remainder," etc., so qualifies the first, which gave to said Lamb the absolute ownership, that he has only a life estate in the property, or holds the same impressed with a trust to the amount of $1,000 in favor of "those persons who would take at his death the land inherited from his mother." But we are of the opinion that this position cannot be sustained.

Whether the decree should be considered as a contract, as plaintiffs contend, or otherwise, it should be so construed as to give effect to each and every part of it, and bring all the different parts into harmony, as far as this can be done by fair and reasonable interpretation. *Modlin v. R. R.*, 145 N. C., 218; 23 Cyc., 1101. And, applying this rule, we have no hesitation in holding that, by the terms and correct interpretation of this decree, John N. Lamb became and was the owner in fee of the property, with absolute power of disposition, and that the subsequent clause placed no restriction on this power, but simply (534) annexed to the land this restricted hereditable quality, that in case he should die without having made disposition of the same, and without children him surviving, it should, to the amount indicated, descend to his heirs *ex parte materna*, this being, no doubt, for the reason that lands to some amount had come to him in that line of descent. Our conclusion finds support in a later clause of the decree, referring to the same property, as follows: "It is further considered and adjudged that the said Benjamin F. Lamb make and execute to the said John N. Lamb a deed in fee simple to said tract of land; that the infant defendants execute a like deed upon their arriving at full age and as they reach their majority," showing that, as to this, J. N. Lamb was to be the absolute owner. The effect of this decree, then, being to place the title in John N. Lamb, with absolute power of disposition, and all the holders of that title having joined in tendering defendants a deed for the timber, and being parties plaintiff, there is no valid objection shown to the demand of plaintiffs, and the judgment rendered in their favor must be

Affirmed.

H. S. WARD v. COMMISSIONERS OF BEAUFORT COUNTY.*

(Filed 19 February, 1908.)

1. Mandamus—Statute—Specific Act—County Commissioners—Courthouse.

A *mandamus* lies only to compel the performance of a specific act pointed out by the statute, and not to the county commissioners to "provide a sufficient courthouse and keep it in good repair."

2. County Commissioners—Courthouse, Repair—Breach of Duty—Indictment—Questions for Jury.

When the county commissioners do not keep and maintain in good and sufficient repair the courthouse in their county, and do not offer or propose to do so, they are indictable for a breach of duty by the grand jury, but they are entitled to have the issue found by the jury.

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*BROWN, J., took no part in the decision of this appeal.

3. County Commissioners—Courthouse, Repair—Ministerial Duty—Supervision of Court.

The building and keeping in proper repair the courthouse of a county is a part of the ministerial duties of the county commissioners, subject to indictment for willful failure, and not subject to the supervision of the courts.

MANDAMUS, heard by *O. H. Allen, J.*, at chambers in Washing- (535) ton, BEAUFORT County, November, 1907.

The court found the facts and rendered judgment for plaintiff. Defendant appealed.

The facts sufficiently appear in the opinion of the Court.

Ward & Grimes for plaintiff.
H. C. Carter, Jr., for defendants.

CLARK, C. J. This was a *mandamus* issued to county commissioners to "provide a sufficient courthouse for the county of Beaufort, and in good and sufficient repair." Whether the order thus given by the court is to be construed as an order to build a new courthouse, or to rent a building for that purpose, or to repair the old one, the court was without authority to make the order. The facts found by the court are that the defendants "have not kept and maintained in good and sufficient repair the courthouse in their county, and do not offer or propose to do so." If this is so, the defendants are indictable for a breach of duty. They are individually responsible, but they are entitled to set up their defenses and have the facts as to the charge and the defense found by a jury, and not, as here, by the court. As individuals, they may be called on to answer criminally for breach of duty, on the charge of the grand jury, which speaks for the whole people, but not to a civil action by one or more citizens.

A *mandamus* will not lie to compel the county commissioners (536) to repair or build a courthouse. The duty of providing a sufficient and proper courthouse is to be discharged by the county commissioners, subject to indictment, if there is a willful failure, and to supervision by the people of the county in the election of another board of commissioners, should the voters see fit. It is not a duty resting for enforcement with the judge of the Superior Court, nor subject to supervision by this Court. The plaintiff has no specific legal right for the enforcement of which he can invoke an order of the judicial branch of the Government to supervise and control the administrative branch. The building a new courthouse or repairing an old one is not a mere ministerial matter, admitting of no debate, but is one of discretion, committed to the county commissioners, in regard to which their judgment and discretion must prevail, and not the opinion of a judge.

Only when a grand jury and jury have found a criminal abuse of duty can the court intervene, and then only to punish the individuals, not to compel them as officials, to do any specific act not required by statute to be done in a specific way or to a prescribed extent.

In *Brodnax v. Groom,* 64 N. C., 244, *Pearson, C. J.,* discussed this subject and said: "The case before us is within the *power* of the county commissioners. How can this Court undertake to control its *exercise?* Can we say such a bridge does not need repairs, or that, in building a new bridge near the site of an old bridge, it should be erected, as heretofore, *upon posts,* so as to be cheap, but warranted to last some years, or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have *stone pillars,* at a heavier outlay at the start, but such as will insure permanence and be cheaper in the long run?

"In short," the Court continued, "this Court is not capable of controlling the *exercise* of power on the part of the General Assembly or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the General Assembly as to the
(537) county authorities and *erecting a despotism of five men,* which is opposed to the fundamental principles of our Government and the usages of all times past. For the exercise of powers conferred by the Constitution the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties. This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the Government or upon the county authorities."

We can add nothing to the discussion and the decision in that case, which has been repeatedly followed. See cases cited in the annotated reprint of 64 N. C., 250. One of the latest of these sustaining cases is *Glenn v. Comrs.,* 139 N. C., 412, which held that a *mandamus* could not issue commanding county commissioners to repair a bridge.

It is certain, upon the facts admitted and found, that some improvement is much needed in the courthouse of Beaufort County. But the power to order such improvement, under the statute, rests with the county commissioners and not with the courts.

Indeed, it may well be that a large, commodious, up-to-date courthouse, even one costing possibly $100,000, would not be too good for the prosperous, progressive county of Beaufort, with its intelligent population. It may be that such a building, aside from its usefulness, would be such a proof of public spirit as would attract a large influx of population and wealth. In Texas and other progressive States there are counties no larger than Beaufort which have county courthouses

larger and more commodious, and more costly, some of them, than the Capitol of this State, which was built seventy-five years ago. It may also be that it is good judgment and just to issue bonds for erecting suitable, even costly, public buildings, since posterity, which will use such buildings, will be far more numerous and wealthy, and hence far better able to pay off the bonds, payment of the interest on (538) which may be a sufficient return to be made by the present generation for the use by it of the buildings. It may also be wisdom to issue bonds to put up permanent iron bridges instead of wooden ones, and to build better public roads, and to install other improvements of a public nature; but all these matters rest with the people of each county, acting through their authorities chosen by themselves to administer their county affairs, subject to such authorization as they may obtain from the Legislature, when required by the Constitution.

The courts possess no function to command or control the exercise of such power, when any discretion in regard thereto is reposed by the statute in the county authorities. A *mandamus* lies only to compel the performance of a specific act pointed out by the statute, as in *Tate v. Comrs.*, 122 N. C., 812.

It is much to the credit of the plaintiff that he possessed the public spirit to wish to procure courthouse facilities more suitable and more creditable to his county. But the remedy (other than by indictment of county commissioners for neglect of duty) must be sought in an appeal to the better judgment of the county authorities or by arousing the sound public opinion of a self-governing people, and not by application to the courts.

No cause of action being stated in the complaint, we must order

Action dismissed.

Cited: *S. v. Leeper, post,* 661; *Dorsey v. Henderson,* 148 N. C., 425; *Board of Education v. Comrs.,* 150 N. C., 122; *Jones v. North Wilkesboro, ib.,* 653; *Burgin v. Smith,* 151 N. C., 566, 567; *Howell v. Howell, ib.,* 581; *Vineberg v. Day,* 152 N. C., 358; *Comrs. v. Bonner,* 153 N. C., 69; *Newton v. School Committee,* 158 N. C., 188; *Hoyle v. Hickory,* 164 N. C., 82; *Hoyle v. Hickory,* 167 N. C., 620; *Key v. Board of Education,* 170 N. C., 125.

(539)

THE CORPORATION OF ELIZABETH CITY v. COMMISSIONERS OF PASQUOTANK.

(Filed 19 February, 1908.)

1. Statutes—Construction—Effect, Prospective.

Statutes are construed to take effect prospectively, unless it is otherwise therein declared expressly or by clear implication.

2. Same—Road Tax, Elizabeth City.

Laws 1905, ch. 596, sec. 15, provides that "moneys raised in the county (Pasquotank) shall constitute a general fund for the common good of the roads in the county: *Provided*, that two-thirds of the road tax collected in Elizabeth City Township be turned over to the board of aldermen of Elizabeth City for the purpose of improving the streets and bridges of the town." Chapter 342, Laws 1907, amends the law of 1905 so that "All moneys raised in the county shall constitute a general fund for the common good of the roads of the county and the streets of Elizabeth City." In a suit by the town to recover its proportionate part of the money, under the act of 1905, collected prior to the enactment of the law of 1907: *Held*, the law of 1907 can only have a prospective effect, and the town should recover for the moneys collected prior thereto, in accordance with the act of 1905.

APPEAL from *Ward, J.*, at January Term, 1907, of PASQUOTANK.

This action was brought for the purpose of recovering $3,155.84, being two-thirds of the amount collected by taxation ($4,733.76) in Pasquotank County for improving and keeping in repair the public roads of the county. Three issues were submitted to the jury, which, with the answers thereto, are as follows:

"1. Under the provisions of the act of 1907, what work did the convict force of Pasquotank County do during the year 1907?" Answer: "They worked from 1 April to 16 April, inclusive."

"2. Was said work done in July, August, and September by agreement with the governing authorities of Elizabeth City?" Answer: "Yes."

(540) "3. On motion, the following resolution was adopted, and the mayor appointed a committee of one to petition the next Legislature as follows: 'That the mayor be required to petition our Legislature to change the present road law so as to give us three months work in our town with the chain-gang, instead of what money we get from the road tax, and that these three months be April, May, and September of each year.' Was the foregoing resolution duly passed by the board of aldermen of Elizabeth City?" Answer: "Yes."

The parties agreed on certain facts, which are as follows: Prior to 28 February, 1905, the public roads of Pasquotank County were worked according to the old method of convict labor, and the streets of Eliza-

beth City were kept in repair according to the provisions of its charter as they existed prior to the aforesaid date. On 28 February, 1905, the Legislature ratified chapter 596, Public Laws 1905, and among other provisions enacted therein was section 15, with its proviso therein contained; that while said act was in force, and prior to 25 February, 1907, the commissioners of Pasquotank County levied the tax as provided in said act, together with other taxes, and on 1 September, 1906, placed the same in the hands of the sheriff of Pasquotank County for collection, said taxes amounting to $4,733.76, two-thirds of which amounted to $3,155.84.

Before 25 February the sheriff of said county had collected a large part of said taxes and had paid the same to the treasurer of Pasquotank County, and by 1 May, 1907, said sheriff had collected all of the taxes and paid them to the treasurer and accounted for the same. The commissioners of said county made no order, either before 25 February or afterwards, to pay the said taxes to the plaintiff, nor had the treasurer of said county paid them to it. The amount of the taxes which were collected by the sheriff and paid to the treasurer before 25 February has not been ascertained. Prior to 25 February, 1907, no part of said road tax levied or collected for the year 1906 had been turned over to the board of aldermen of Elizabeth City, and no part of the (541) same has since been turned over.

Section 15, chapter 596, Laws 1905, is as follows: "All moneys raised in the county shall constitute a general fund for the common good of the roads of the county: *Provided,* that two-thirds of the road tax collected in Elizabeth City Township under this act be turned over to the board of aldermen of Elizabeth City for the purpose of improving the streets and bridges of said town."

On 25 February, 1907, the Legislature of North Carolina ratified chapter 342, Laws 1907, and the same went into full force and effect from and after its ratification.

Chapter 596, section 15, Laws 1905, was amended by chapter 342, section 7, Laws 1907, as follows: "That all of section 15 after the word 'county,' in line two thereof, be stricken out and the following inserted in lieu thereof: 'and the streets of Elizabeth City.'" (This amendment, then, strikes out the proviso to section 15 of chapter 596, Laws 1905.)

Here the court submitted the three issues tendered by the defendants. The plaintiff excepted to the submission of said issues and objected to any evidence offered by the defendants tending to prove the same.

The court charged the jury that if they found the facts to be in accordance with the evidence, they should answer the issues as above set forth.

Upon the facts admitted and the verdict of the jury, the court rendered judgment for the plaintiff for the amount demanded, with interest and costs. Defendants appealed.

Pruden & Pruden, Shepherd & Shepherd, and George J. Spence for plaintiff.

Aydlett & Ehringhaus and J. Heywood Sawyer for defendants.

(542) WALKER, J., after stating the case: There is no repugnancy between the act of 1905, by which Elizabeth City is entitled to receive two-thirds of the road tax collected in the township by that name, and chapter 342, Laws 1907, which amends section 15, chapter 596, Laws 1905, by inserting there the words "and the streets of Elizabeth City" after the word "county," and striking out the proviso in that section, so that it will now read: "That all moneys raised in the county shall constitute a general fund for the common good of the roads of the county and the streets of Elizabeth City." The act of 1907 can only have effect prospectively, as the intention that it shall so operate is clearly manifested by the Legislature in the phraseology used to express it. It is an elementary rule of construction that a statute will not be declared to be retroactive unless it was clearly intended so to be, and especially where such a construction would take away rights acquired under a former law, even though the Legislature would have the constitutional power thus to divest them. *S. v. Littlefield,* 93 N. C., 614. It is a sound general principle that no statute takes effect as of a time prior to its ratification or has effect by any fiction or relation before it was actually passed, unless it is so declared in the staute, either expressly or by clear implication. Even remedial statutes are sometimes declared prospective in their operation and are not applied retrospectively, unless a contrary intent in some way appears. Potter's Dwarris on Statutes, p. 162, note 9. In Black's Interpretation of Laws, p. 250, we find the principle stated as follows: "Courts will not give to a law a retrospective operation, even where they might do so without violation of the Constitution, unless the intention of the Legislature is clearly expressed in favor of such retrospective operation. Except in the case of remedial statutes and those which relate to procedure in the courts, it is a general rule that acts of the Legislature will not be so construed as to make them operate retrospectively unless the Legislature has explicitly declared its intention that they should so operate, or (543) unless such intention appears by necessary implication from the nature and words of the act so clearly as to leave no room for a reasonable doubt on the subject." In 1 Desty on Taxation, 104 and 105, the rule is declared to be that statutes are not construed retrospectively: "Presumptively, tax laws are to have a prospective operation

only, and the remedies they provide for collection will not be applied to taxes previously laid, unless an intent that they shall be is clearly manifested. Provisions in a statute which make radical changes in the rights of parties should be treated as prospective."

Under the principle established by the authorities for the construction of statutes, which we have just stated, it becomes unnecessary to decide whether Elizabeth City had any vested right to the fund in controversy which could not be taken away by subsequent legislation. It is quite sufficient, for the purpose of deciding this case, that by applying that principle to the facts as set forth in the record, the act of 1907 can only have a prospective operation, as it refers very clearly to "money" thereafter "raised" by taxation, and not to the taxes which had been previously levied for road purposes. We can discover no intent on the part of the Legislature to give the act of 1907 a retrospective effect, so as to deprive the plaintiff of its share of the fund in dispute. The other amendments of the act of 1907, and even the amendment of section 15, standing alone, convince us that the contrary was the real purpose of the Legislature. We attach no importance to the issues and verdict in forming our conclusion, but decide the case upon the admitted facts and a consideration of the act of 1905 as amended by the act of 1907. It follows that there was no error in the judgment of the court.

Affirmed.

Cited: *S. v. Haynie,* 169 N. C., 282; *Waddill v. Masten,* 172 N. C., 548.

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(544)

J. D. ODOM, TRUSTEE, ET AL. v. W. H. CLARK, F. J. NEVILLE, AND P. V. RANDOLPH, TRUSTEE.

(Filed 26 February, 1908.)

1. Conditional Sale—Chattel Mortgage—Form—Verbal Agreement.

A chattel mortgage is a sale of personal property on condition, as security for the payment of a debt, is now (since 1792) effective between the parties when verbally made, requires no seal, writing, or special form of words, and the question is one of agreement between the parties.

2. Same—Burden of Proof.

The burden of proof, by the greater weight of evidence, is upon the party relying upon the establishment of a verbal chattel mortgage, when the effect is not to change or alter a written instrument.

3. Same—Evidence—Questions for Jury.

Evidence is sufficient to sustain the verdict of the jury upon whether a verbal chattel mortgage had been given, which tends to show an agreement that until the mortgage contemplated was written the plaintiff should have a verbal mortgage on the property, and that he advanced

credit on the strength thereof; that defendant afterwards promised that the papers would be executed and assured plaintiff that "everything would be all right."

4. Same—By One Partner—Partnership.

One partner may give a verbal agreement, in effect a chattel mortgage, on partnership goods to secure a partnership debt.

5. Same—Growing Crops—Between Parties—Revisal, 2052.

Parties, as between themselves, may by contract constitute and deal with growing crops as personalty; hence, except as it may affect creditors and third persons, a verbal mortgage on growing crops is valid between the parties when it does not extend for a second or greater number of years. Revisal, 2052, relating to the priorities of agricultural liens, has no application in the absence of claim for its especial priorities.

6. Purchasers for Value—Pre-existing Debts—Deeds and Conveyances—Registration.

Holders of property to secure preëxisting debts are purchasers for value within the meaning of Revisal, 982, and it requires prior registration of other deeds of trust or mortgages to affect their interests as such.

7. Uses and Trusts—Mortgages—Assignments.

A deed of trust conveying practically all of grantor's property to secure existing debts will be considered an assignment, subject to the regulations of the statutes addressed to that question, and this result will not be changed because some small portion of his property was omitted, or because the instrument was drawn in the form of a mortgage, having a defeasance clause.

8. Assignments—Statutory Provisions—Compliance.

An assignment for benefit of creditors is void unless the formalities of Revisal, sec. 967 *et seq.*, are complied with as to filing schedules of preferred debts, or inventory of property, etc., and will be set aside at the suit of a creditor whose debt is not therein provided for.

9. Statutes—Repealing Statute Repealed.

The repeal of a statute repealing a former statute leaves the latter in force.

(545) APPEAL from *W. R. Allen, J.*, at August Term, 1907, of HALIFAX.

There was evidence tending to show that in January, 1903, defendants Clark and Neville executed to plaintiffs an agricultural lien, under The Code, sec. 1799 (Revisal, sec. 2052), for advances in making a crop that year on certain lands specified and described in the instrument, and to secure an amount for such supplies, not to exceed $3,500, with certain other indebtedness secured by said instrument; that said supplies were regularly and properly furnished by plaintiffs, as required by the contract, until the specified limit was reached; that on or about 1 May, defendants needing and desiring further supplies for their operations during the current year, the parties bargained together

for further advances, to be secured by an additional agricultural lien, and while this instrument was being prepared and its terms agreed upon, it was agreed between the parties that plaintiffs should continue to make advances and have a verbal mortgage on all the property embraced in the original lien and on some other property which had been advanced by plaintiffs under the same; that under this verbal agreement plaintiffs made further advances, to the amount of (546) $2,600, which sum is due and unpaid; that this arrangement continued, the defendants Clark and Neville giving assurances that the additional written lien would be formally executed, until 28 September, 1903, when plaintiffs ascertained that Clark and Neville had executed to Joseph C. Randolph two deeds of trust—one to secure a debt of $161.67 to Randolph Supply Company and for advances to be made by it for the current year 1903 to an amount not to exceed $800, and the second to secure a large amount of preëxisting debts due from Clark and Neville to parties other than plaintiffs; that these deeds were duly acknowledged and registered in the proper county on 29 September, 1903, and included all the property named in the written and alleged verbal mortgage to plaintiffs, and also other property of Clark and Neville—all that they owned, so far as appears—reserving from same the personal property exemptions to each of the grantors.

There was allegation, with evidence on the part of plaintiffs tending to show, that the deeds of trust to Joseph Randolph were executed with actual intent on the part of the grantors to hinder, delay, and defraud plaintiffs of their claim, and it was in that connection admitted that neither the trustee in said deeds nor the beneficiaries thereunder had any knowledge or notice of such fraudulent intent. There was evidence on the part of the defendants tending to show that no verbal mortgage was ever given to plaintiffs for further advances, and also, in explanation of their delay in executing the additional written lien, to the effect that plaintiffs had made overcharges in their accounts and insisted in exacting an unreasonable stipulation in reference to the second lien demanded. There was further evidence tending to show that the instruments executed to Joseph Randolph, trustee, were made in good faith on the part of the grantors; that the debts due therein were *bona fide,* and that the Randolph Supply Company had made necessary advances to defendants Clark and Neville to aid them in making (547) their crop.

From the verdict of the jury and admissions of the parties it was established that the debt remaining due and unpaid to plaintiffs by reason of advancements under the original written agricultural lien was $900; that a verbal mortgage was given plaintiffs by defendants Clark and Neville on all the property included in the written lien and on

some additional property, and that the amount advanced and secured by said mortgage, and still due thereon, was $2,600; that the value of the property included in the mortgage and wrongfully withheld by defendants was $4,192.97. It was admitted that the Randolph Supply Company had made advances to the amount of $727.18, and it was found by the jury that the Randolph deeds were executed with intent to defraud plaintiffs on the part of Neville and Clark, and it was admitted, as stated, that neither the trustee nor the beneficiaries had any notice of such intent.

It was also established that no schedule of perferred debts, or inventory of property, or other formalities required by Laws 1893, ch, 453 (Revisal, sec. 967 *et seq.*), in reference to assignments for the benefit of creditors, had been complied with by the trustees of the Randolph deeds.

On the facts admitted and established by the verdict the court gave judgment in favor of plaintiffs against Clark and Neville for $3,500 and interest, the amount shown to be due, and adjudged that they should recover the property withheld, towit, $4,192.97, less $727.18, the amount admitted to have been advanced by the Randolph Supply Company, retaining the cause for further investigation in case the property was shown to have deteriorated in value while held by defendants under a replevy bond. Defendants excepted and appealed.

W. E. Daniel and Claude Kitchin for plaintiffs.
Day, Bell & Dunn, Murray Allen, and E. L. Travis for defendants.

(548) HOKE, J., after stating the case: The Court is of opinion that this cause has been correctly tried, and that the merits of the controversy have prevailed. It was urged against the validity of plaintiffs' claim, or that portion of it which must rest for its security upon the alleged verbal mortgage:

1. That no such mortgage was, in fact, given as an executed contract.
2. That if there was such contract, it was established under an erroneous charge as to the *quantum* of proof, which defendants contend should be "clear, strong, and convincing."

But neither objection can be sustained.

A chattel mortgage is properly defined as a conditional sale of personal property as security for the payment of a debt or the performance of some other obligation. And in the third issue his Honor properly charged the jury: "No special form of words is necessary for a verbal mortgage. The question of fact for you to decide is, Was there an agreement between Clark and Neville, or either of them, with Odom, that the property and crops included in the deed of trust of 1 January, 1903, to Odom, should be security for advances to be made by the Rocky

Mount Supply Company in excess of the amount specified in said deed? Have plaintiffs satisfied you, by the greater weight of evidence, that there was such agreement?" etc. And further: "As I have instructed you, the burden is on the plaintiffs to satisfy you, by the greater weight of evidence, that the defendants did give the Rocky Mount Supply Company the verbal mortgage, as alleged."

The jury were thus directed to inquire and determine as to the existence of an executed verbal mortgage, and the evidence of plaintiffs tended to support the charge as given. Thus, the witness Odom, after saying that he notified defendants that the amount specified in the written lien had been reached, and that they would have to execute another written one, testified: "And they agreed to do this, and told me to fix the papers to that effect and send to them, and they would execute. It was agreed between us that, until the papers were fixed, we were to have a verbal mortgage on all the property, (549) crops, etc." And again, on a later occasion: "Clark again at that time promised me that the papers would be executed and that everything would be all right, and said I needn't feel any uneasiness, as I had a verbal mortgage on everything. He assured me that we would be all right, as we had a verbal mortgage on everything, and kept on ordering (supplies) and we kept on shipping." According to this evidence, the parties were, as to the verbal mortgage, clearly speaking of it as an executed agreement, and the jury, in response to the third issue, has so established it. Nor is there any reason that occurs to us why such a contract should be required to be established by clear, strong, and convincing proof, rather than by the greater weight of testimony, the rule as stated in the charge.

The authority relied upon by defendants (*Shelburne v. Selsinger,* 52 Ala., 92) seems to have been as to an executory agreement to make a chattel mortgage. It is termed an equitable mortgage by the reporter, and the decision has been interpreted as a ruling on an executory agreement in a text-book of recognized authority. Jones Chattel Mortgages (4 Ed.), sec. 3. But in either event there seems to be no good reason for such a requirement as to the *quantum* of proof contended for by defendants in cases of this character, and we do not think it comes within the principle established by the weight of authority. When a claimant is seeking to engraft a trust on a written instrument, or to annex a condition to one, or establish a mistake therein he is required to make good his allegation by clear, strong, and convincing proof. In such case the effect of his position is to alter or change a written instrument, which should be upheld, unless clearly impeached, as shown in *Harding v. Long,* 103 N. C., 1, and other like cases; and a similar ruling

obtains in written certificates of officers as to their official action, as in *Leonard v. Lumber Co.,* 145 N. C., 339. But no such conditions exist in the case we are considering. A chattel mortgage is not (550) required to be under seal. It is not, as we shall endeavor to show, required to be in writing. There is no effort here to impeach or change any written paper, or to challenge any official action. It is just an open question, to be determined by testimony, and to our minds, under ordinary circumstances, it is proper that it should be determined, as such questions in civil suits usually are, by the greater weight of evidence.

Again, it is insisted that if the verbal mortage should be properly established, the same is not a valid lien—first, because it was executed by only one of the partners; second, because it was not in writing. But the authorities are against defendants on both of these positions. As a matter of fact, while Clark chiefly attended to the business, and there is evidence of several declarations made by him alone admitting the existence of a verbal mortgage, the testimony of Odom (record, p. 24) seems to indicate that when this mortgage was made both parties were present and assented; and if it were otherwise the objection would not avail defendants for it is accepted doctrine that one partner may execute a chattel mortgage on partnership goods to secure a partnership debt. Jones Chattel Mortgages (4 Ed.), sec. 46. And this principle has been approved by express adjudication with us. *Pipe Co. v. Woltman,* 114 N. C., 178-185. And the second objection, that the mortgage is not in writing, is equally untenable. There are decisions which hold that a chattel mortgage must be in writing, but these cases will, we apprehend, be found to rest on the inhibitive provisions of 17th section, 29 Charles II, the English statute of frauds, by which sales of goods to the value of £10, or upwards, are required to be in writing, unless a part of the goods are delivered, or earnest given to bind the bargain. But while this statute was at one time declared to be the law of this State *in toto* (Laws of North Carolina, 1749, published in 23 State Records, 324), it has not been in force here since 1792, except (551) to the extent that its different provisions have been especially reënacted. See Martin's Collection of British Statutes in force in the State in 1792, and 1 Potter's Revisal, 85. This section referred to (section 17 of the English statute) never having been reënacted, the principles of the common law are applicable and controlling (*Foy v. Foy,* 3 N. C., p. 131 [296]; *Pittman v. Pittman,* 107 N. C., 159-163), and are to the effect that a valid mortgage of personalty can be made without writing. Jones on Chattel Mortgages, sec. 2. Accordingly, it has been held with us that a chattel mortgage in parol is good between

the parties without writing. *McCoy v. Lassiter,* 95 N. C., 88. Nor is it required that this lien asserted by plaintiffs should be in writing, by the statute providing for agricultural liens. Revisal, sec. 2052. True, the statute requires that a lien executed and to be effective under its provisions should be in writing and registered, but this is only required in order to make the claim good as against creditors and third persons, and to entitle the holder to the superiority given by the statute over all other liens, except those of the landlord and laborer. The statute, however, being only affirmative in terms, does not and was not intended to prohibit agreements otherwise valid and binding as between the parties. Nor is writing required to make the lien binding on growing crops. While we have held that such contracts as to crops for a second or greater number of years are void from reason of public policy, "because," as said by the present *Chief Justice* in *Loftin v. Hines,* 107 N. C., 360, "they may operate to oppress labor and to diminish production and the general prosperity dependent upon it," our decisions uphold them as to the next succeeding or current year. *Hahn v. Heath,* 127 N. C., 27; *Loftin v. Hines, supra.* And it is also a generally recognized doctrine that parties, as between themselves, may by contract constitute and deal with growing crops as personalty. Ewell on Fixtures (2 Ed.), pp. 370, 371, 372. The plaintiffs, then having established in (552) their favor a valid lien as against defendants Clark and Neville, are entitled to the property, unless the claimants under the two deeds of trust to J. C. Randolph have a superior right.

It will be noted that the advancements of supplies made to these grantors by the Randolph Supply Company have all been paid, or a payment is directed and provided for in the judgment as rendered, and the claimants, who now object to the judgment, are holders of pre-existing debts provided for in these deeds. It has been held with us that such debts are sufficient to constitute the holders purchasers for value, within the meaning of our registration laws. *Brem v. Lockhart,* 93 N. C., 191, cited with approval in *Moore v. Sugg,* 114 N. C., 292. And under these laws (Revisal, sec. 982) defendants would hold the property, if the deeds themselves are good.

The jury have found that they were made with intent to defraud plaintiffs, this intent, however, being confined to the grantors, and there are many exceptions appearing in the record as tending to impeach the verdict on these issues. We find, however, that it is not necessary to consider or determine them, because we are of opinion that these deeds are avoided by decisions of the Court construing the statute of 1893 (chapter 453) touching assignments. Revisal, sec. 969 *et seq.; Brown v. Nimocks,* 124 N. C., 417; *Bank v. Gilmer,* 116 N. C., 684; *same case* reaffirmed, 117 N. C., 416.

In these last cases it was, in substance, held that where an insolvent man makes an assignment of practically all of his property to secure one or more preëxisting debts, such an instrument will be considered an assignment, subject to the regulations of the statutes addressed to that question, and that this result will not be changed because some small portion of his property shall have been omitted or because the instrument may have been drawn in the form of a mortgage having a
(553) defeasance clause. In the first of these cases it is held: "While the act of 1893 (chapter 453) does not prohibit *bona fide* mortgages to secure one or more preëxisting debts, yet where a mortgage is made of the entirety of a large estate for a preëxisting debt (omitting only an insignificant remnant of property), the mortgage is in effect an assignment for the benefit of creditors secured therein, and is subject to the regulations prescribed in said act of 1893" (sixth headnote, 116 N. C., 685); "and to hold otherwise," said *Avery, J.*, "would be to nullify the act." On a petition to rehear, the decision was reaffirmed and announced in the same terms.

It is insisted for the defendants that these decisions should not be held as controlling here, because in them the debts named amounted to more than $49,000, while the property was only $25,000, thus making the clause of defeasance in the instrument of no significance. But while this large difference between the debts and the value of the property conveyed is referred to by *Justice Furches* in his opinion, the difference, or the amount of it is not made of itself a controlling fact in the case, and the principle announced in these decisions will extend to and include the deeds under which defendants claim. The grantors were insolvent. They conveyed all of their property, so far as appears, to secure a large number of preëxisting debts, omitting the debt due plaintiffs, and the interest of the grantors in the property conveyed was insufficient to pay the claims and their other indebtedness. Under these decisions, therefore, the deeds in question are subject, as stated, to the regulations established by the law in reference to assignments, and these not having been complied with, the deeds are void.

The objection made, that the statute (chapter 453, Laws 1893) was repealed by chapter 466, Laws 1895, and this condition remained until the former statute was reënacted by Revisal, is without force. The second statute did not repeal the former law, except as to a certain class of assignments, and the repealing statute was itself repealed
(554) at the following session (chapter 14, Laws 1897), from which time the original act has been in force. *Brinkley v. Swicegood,* 65 N. C., 626; *Hughes v. Boone,* 102 N. C., 137; *S. v. Goulding,* 131 N. C., 715.

There is no error in the proceedings below, and the judgment as rendered is affirmed.

No error.

Cited: *Powell v. Lumber Co.*, 153 N. C., 57; *Stone Co. v. McLamb, ib.*, 383; *Williamson v. Bitting*, 159 N. C., 327; *Wooten v. Taylor, ib.*, 609; *Brown v. Mitchell*, 168 N. C., 315; *Glenn v. Glenn*, 169 N. C., 731; *Bank v. Cox*, 171 N. C., 81; *Johnson v. Johnson*, 172 N. C., 531; *Jones v. McCormick*, 174 N. C., 87.

J. S. TROTTER v. TOWN OF FRANKLIN.

(Filed 26 February, 1908.)

Cities and Towns—Streets—Ministerial Duties—Suit by Taxpayer—Power of Court.

Matters relating to closing by-streets of a town are of a ministerial character, exclusively within the proper action of the town authorities, and not subject to regulation by the court at the suit of one upon the ground that he is a taxpayer.

APPEAL by plaintiff from an order dissolving a restraining order against the town of Franklin, Macon County, heard by *W. R. Allen, J.*, at chambers in Murphy, 13 August, 1906.

The facts sufficiently appear in the opinion of the Court.

Robertson & Benbow and Busbee & Busbee for plaintiff.

Jones & Johnston and A. W. Horn for defendant.

CLARK, C. J. The governing body of the town of Franklin consists of a mayor and five aldermen. The plaintiff was one of the aldermen. At a meeting of that body, held 30 April, 1906, it was ordered that Main Street be extended and the extension graded, and that a short by-street which led from the end of Main Street (before it was extended into Palmer Street) be discontinued. It appears from the plat sent up that the extension of Main Street leads into Palmer Street, thus making, apparently, the former by-street no longer useful. (555) To the passage of this order the only negative vote was cast by the plaintiff. The other aldermen present and the mayor voted in the affirmative. Another resolution, as to certain grading, received one additional negative vote.

The plaintiff, thereupon, in his capacity as taxpayer, brought a proceeding for an injunction against the town of Franklin, naming its mayor and aldermen, including (doubtless by inadvertence) himself, as codefendants, to prevent the execution of the aforesaid resolution of

the town board. The temporary restraining order was dissolved; upon the complaint and answer, after hearing affidavits filed on both sides, and the plaintiff appealed.

From the pleadings and affidavits it does not appear that the plaintiff has any property upon either the discontinued by-street or upon the extension of Main Street, but to the contrary, and the whole controversy turns upon the advisability of the resolution, which the plaintiff denies, considering the expense, and that the town has heretofore gotten along without the improvement. The opposite view, however, obtained with the majority of the board, as we have seen, and this is, in effect, an effort by the plaintiff to reverse its action by order of the court. In this Court he withdrew his opposition to opening and extending Main Street, restricting his opposition to the closing up of the by-street. But such matters as this are for regulation by the town authorities. It may or may not be that the plaintiff is right as to the best policy for the town, but that may be safely left to its people. The plaintiff neither avers nor shows that his right will be infringed, otherwise than in the general way that all taxpayers will be affected by the cost of a public measure that he believes unnecessary and injudicious. His remedy is by an appeal to the citizens to elect a new board that will be in accord with his own views, and not by an appeal to the courts, who are not charged with the supervision of such matters. *Stratford v. Greensboro,* 124 (556) N. C., 132. As it is more than probable that the resolution has now, after the lapse of nearly two years, been long since put into effect by extending Main Street and discontinuing the by-street, it is not clear that the plaintiff could save any expense to the town if he could now secure the rescinding of the resolution and a reversion of the streets in question to their former status.

Affirmed.

Cited: *Moore v. Meroney,* 154 N. C., 162.

S. W. ISLER v. GOLDSBORO LUMBER COMPANY.

(Filed 26 February, 1908.)

1. Contracts—Timber—Measurement—When Cut—Evidence—Contradictory—Uncertain.

When a timber conveyance specifies that the trees shall measure 12 inches "when cut," it was error in the court below to hold that the defendant could cut trees upon the land described that would grow to 12 inches within the time limit of the contract: (1) as being contradictory of the express terms of the contract; (2) as being too uncertain of proof.

2. Same—Measurement—Test.

The test as to timber being 12 inches "when cut" is to ascertain the correct measurement of the stump.

3. Appeal and Error—New Trial as to One Issue.

When error in the trial of a cause affects only one issue and a new trial is ordered, it will be granted only as to that issue.

APPEAL from *Lyon, J.*, at November Term, 1907, of JONES.

From judgment for defendant, plaintiff appealed.

The facts sufficiently appear in the opinion of the Court.

Rouse & Land and H. E. Shaw for plaintiff.

Thomas D. Warren and Simmons, Ward & Allen for defendant.

CLARK, C. J. This action is for damages for the wrongful cutting of timber. The defendant's contract permitted the cutting of timber not less than 12 inches in diameter 24 inches above the (557) ground, *when cut,* and the right to cut was to continue for ten years from the date of the contract, 21 October, 1899. The evidence of plaintiff tended to show that the defendant had cut and removed trees under the specified size of 12 inches in diameter.

The exception of the plaintiff is to the charge of the court, that the plaintiff could not recover damages for cutting such trees as would have grown to the size of 12 inches in diameter by the end of the defendant's term, on 21 October, 1909. This was erroneous, for two reasons: (1) it was contrary to the express terms of the contract, which conferred the right to cut only as to trees 12 inches in diameter "when cut"; (2) it would be speculative to endeavor to show by evidence what trees less than 12 inches in diameter when cut would or would not have reached that diameter before the expiration of the lease. The only valid test is to lay a rule across the stump to show whether or not the tree measured 12 inches in diameter "when cut."

When the contract for sale of standing timber did not specify when the diameter should be measured, the purchaser, it was held, could cut only such trees as had attained the prescribed diameter at the date of the contract. *Warren v. Short,* 119 N. C., 39. The difficulty of showing diameter at date of contract as to trees barely over the prescribed size when cut was such a burden on vendees that, as a protection to them, contracts now usually specify that the diameter of the trees shall be as prescribed, "when cut." The vendor is entitled to the same protection of certainty which has been given to the vendee by the insertion of the words "when cut."

The vendee had a right to cut any trees which, at any time during its term, should have actually reached the stipulated size, but not before. *Hardison v. Lumber Co.,* 136 N. C., 176; *Lumber Co. v. Corey,* 140 N. C., 470.

(558) As this error affects only the fourth issue, a new trial is granted only as to that issue. *Benton v. Collins,* 125 N. C., 90, and cases cited.

Partial new trial.

JOSEPH MORING ET AL. v. H. C. PRIVOTT ET AL.

(Filed 26 February, 1908.)

1. Deeds and Conveyances—First and Second Mortgage—Purchaser—Release by First Mortgagee—Sale by Second Mortgagee—Bid by Purchaser Under Mistake—Equities.

Plaintiffs, at an adequate price, bought a portion of a tract of land, subject to a first and second mortgage lien, held by different persons, paid the purchase price, sufficient only as part payment, to the holder of the first lien, and had a release executed by him to the land embraced in the deed. The defendant, the holder of the second lien, foreclosed upon the whole tract, including that embraced in plaintiffs' deed, and it brought sufficient to pay the amount of the first lien. Plaintiff Joseph Moring was an ignorant man, and, acting under advice honestly given, bid and paid $650 for the purpose of protecting his title, and afterwards brought suit to recover it: *Held,* a court of equity will decree that the plaintiffs were subrogated to the rights of the holder of the first lien *pro tanto,* and entitled to recover.

2. Mortgagor and Mortgagee—First and Second Mortgagee—Purchaser—Release by First Mortgagee—Subrogation.

Subrogation is of an equitable character, not dependent upon contract, and will not operate to produce injustice. Hence, when it appears that the security of the holder of a second mortgage is not impaired by the release by the first mortgagee of a part of his security for an adequate consideration, and that a further payment made to the second mortgagee, in ignorance and by mistake, would be inequitable to the purchaser, he may recover it from the second mortgagee.

3. Same—Discharge or Assignment.

A mortgage debt, when paid by one in subrogation of the rights of the creditor, will operate either as a discharge or in the nature of an assignment, as the equities between the parties may demand.

4. Mortgagor and Mortgagee—Sale Under Second Mortgage—Application of Proceeds.

A sale under a second mortgage can only convey the equity of redemption of the mortgagor, and, as a general rule, the proceeds should be applied to the payment of his debt; except when there is a conveyance of additional land in the second mortgage, with the provision that the first mortgage debt should be paid with the proceeds of sale of the land subject to both mortgages, before the land covered only by the second mortgage should be sold and the proceeds applied to its satisfaction.

APPEAL from *O. H. Allen, J.*, at Fall Term, 1907, of CHOWAN. (559)

This case was submitted to the court upon the following case agreed:

1. On 13 March, 1891, J. H. Piland executed to J. H. Blount, trustee, a certain deed of trust, duly recorded on its day of date in Chowan County, on certain lands of said Piland, therein described, to secure the payment to M. H. White of a certain note given by said Piland for the purchase money of said land.

2. On 22 December, 1904, said Piland and wife executed to W. S. Privott, trustee, a second deed in trust to secure a certain note to H. C. Privott upon a portion of the lands aforesaid. This deed in trust was duly recorded on its day of execution.

3. On 9 January, 1906, in consideration of the $1,500 paid to M. H. White, said Piland, his wife being dead, executed to the plaintiffs a deed for a portion of the land conveyed to Blount and Privott, as aforesaid; and the money, $1,500, same being the purchase price, and a fair and full price for the land conveyed in said deed, was paid to M. H. White and credited on the J. H. Piland note, being less than the sum due upon the said note; and in consideration of said amount said White executed the following paper-writing, viz.:

This is to certify that I hereby release all of the claims I hold (560) against the lands deeded by J. H. Piland to J. R. Moring, of date 10 December, 1895, and also lands contained in deed from J. H. Piland to Jules and Joseph Moring, dated this day.

This 9 January, 1906. M. H. WHITE.

The execution of the deed, etc., and of the paper-writing, and the payment of the money, were all parts of the same transaction. At the time of this transaction said defendants in no wise assented or became parties to the same, nor had they knowledge of the same at the time. Jules and Joseph Moring are the plaintiffs, and the deed of Piland to them and the release of White to them were duly and respectively recorded.

4. At the time of this transaction it was mutually understood and agreed, without any knowledge or assent of defendants, that the plaintiffs were to take and hold, in consideration of the said $1,500 paid, all the right, title, and interest of said White and of said Piland in and to the land then conveyed and released to them. The said plaintiffs immediately entered into possession of said land.

5. On 23 April, 1906, Privott, trustee, after due advertisement, sold at public auction, first, the J. H. Piland land, in the deed of trust to him conveyed, other than the land conveyed and released aforesaid unto plaintiffs, for the sum of $2,100, with which said trustee discharged and paid upon the note of Piland to M. H. White what remained due thereon,

to wit, $2,100, after the credit given of the $1,500 paid by plaintiffs. Said trustee then proceeded to sell the land conveyed and released by Piland and White to plaintiffs; whereupon the plaintiffs, colored men, in ignorance of their rights in law and fact as now contended for, and honestly believing in and relying upon representations to them by H. C. Privott and others, honestly made, that the lands so conveyed and released to them had to be sold to satisfy the H. C. Privott note,
(561) secured by Privott's deed of trust, represented to be a valid lien upon the land, appeared and bid, and paid to H. C. Privott, for said trustee, the sum of $650 for the lands previously conveyed and released to them by White and Piland.

6. It is agreed that such representations of H. C. Privott and others were honestly made, in the honest belief that said Privott, trustee, had the right, legal and equitable, to sell the land, to convey and release it to plaintiffs, and to pay the said H. C. Privott note.

7. It is agreed that there was due on the H. C. Privott note the sum of $650, and that the land conveyed and released to plaintiffs, as aforesaid, was responsible in that amount, if, upon the facts as herein agreed, it was responsible at all.

8. It is further agreed that if, upon the foregoing statement of facts, the court should be of the opinion that W. S. Privott, trustee, under his deed of trust and to discharge the H. C. Privott note, had the legal and equitable right to sell, as aforesaid, the lands conveyed and released by White and Piland unto the plaintiffs, and that the plaintiffs, upon their $650 bid, became liable unto said trustee for payment of said sum for the benefit of the H. C. Privott note, then the plaintiffs should recover nothing; otherwise, the plaintiffs are entitled to recover the sum of $650, with interest from 23 April, 1906, and that judgment should be entered for that amount.

His Honor, being of opinion that plaintiffs were entitled to recover, rendered judgment accordingly. Defendants appealed.

J. H. McMullan, Jr., for plaintiffs.
W. S. Privott for defendants.

CONNOR, J., after stating the case: Eliminating immaterial matter, the record presents the following case: White sold to Piland a
(562) tract of land for some $3,500. For the purpose of securing the payment of the purchase money, Piland executed to Blount a deed in trust for the land. Thereafter Piland executed to defendant W. S. Privott a deed in trust on the same land, also a tract belonging to his wife, to secure a note of $650 due defendant H. C. Privott. Both deeds were duly recorded. Subsequent to their execution, Piland sold

to plaintiffs a portion of the land for $1,500, which was a full and fair price therefor. Pursuant to an arrangement between White, Piland, and the plaintiffs, the purchase money was paid to White on account of his note, and he executed to plaintiffs the release set out in the record. Thereafter the defendant W. S. Privott, pursuant to the power of sale in the deed in trust executed to him, sold the portion of the land which had not been sold to plaintiffs for the sum of $2,100, which he applied to the payment of the balance due on White's note. He thereupon advertised and sold the portion of said tract conveyed by Piland to plaintiffs for the sum of $650. Plaintiffs, supposing that he had the right to sell, purchased and paid the amount. The question is, To whom does the $650 belong? If, upon these facts, the court be of the opinion that the defendant W. S. Privott was empowered to sell the land, plaintiffs cannot recover; otherwise, they are to have judgment. Defendant W. S. Privott was not a party to the arrangement between White, Piland, and plaintiffs, and did not assent thereto. It is conceded that his rights could not be prejudiced by the arrangement between Piland, White, and plaintiffs. The real question is whether he could take any benefit therefrom. It is manifest that, as matters stood before Piland sold to plaintiffs, the defendant W. S. Privott's deed in trust was of no value. The proceeds of the land sold to plaintiffs for $1,500, and the remainder, sold for $2,100, were absorbed in paying White's note. It is equally manifest that Privott's power of sale was not affected by the arrangement, unless the admission that the amount paid by plaintiffs for the portion of land purchased by them was a full and fair price therefor has (563) the effect of preventing him from selling it under the power contained in his deed. White was entitled to have the proceeds of the sale to plaintiffs applied to his note. It is clear, upon the admissions in the case agreed, that defendants have suffered no prejudice by the sale of the land to plaintiffs. They are in the same position as if Blount, trustee, had sold the land under the power in his deed and applied the proceeds to White's note. If defendant W. S. Privott be permitted to sell the plaintiffs' land and apply the proceeds to H. C. Privott's note, a tract of land conceded to be worth $3,600 is made to pay $4,250 of Piland's debt, and plaintiffs are required to pay $2,150 for land conceded to be worth but $1,500. If, instead of selling under the power in his deed in trust, defendant W. S. Privott had brought suit for foreclosure, having all of the parties before the court, and the facts as set out in the record had, by appropriate pleadings, been brought to the attention of the court, what decree would have been rendered? Plaintiffs insist that, upon payment to White of the $1,500, they became subrogated to the rights of White, and that, *pro tanto,* they were, by substitution, the owners of the White note and entitled to the same security which he held therefor;

that, as defendants admit they paid full value for the portion of the land conveyed to them, equity will not permit defendants to sell the land.

It is not very material to the determination of this appeal whether the plaintiffs' equity be to enjoin a sale or, sale having been made, to demand the application of the proceeds to the discharge of the amount paid by them in reduction of White's note. The equity upon which their claim is founded is defined to be "the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt," . . . or "that change by which another person is put into the place of a creditor, so that the rights and securities of the creditor pass to the person
(564) who, by being subrogated to him, enters into his right. It is a legal fiction, by force of which an obligation extinguished by a payment by a third person is treated as still subsisting for the benefit of this third person who is thus substituted to the rights, remedies, and securities of another. The party who is subrogated is regarded as entitled to the same rights, and, indeed, as constituting one and the same person with the creditor whom he succeeds." Sheldon Sub., 2; 27 A. & E. Enc., 206; *Davidson v. Gregory,* 132 N. C., 389. Subrogation is of equitable origin, not dependent upon contract, and is always invoked to prevent injustice. It will never be permitted to work to the prejudice of the rights of others or produce injustice. Its limitations are well marked and illustrated in numerous cases found in the reports. *Carter v. Jones,* 40 N. C., 196; *Springs v. Harver,* 56 N. C., 96.

Are the plaintiffs, upon the facts set out in the record, entitled to invoke this equity? It is manifest that all parties have acted in good faith, plaintiffs paying full value for the land and applying the purchase money to the first lien. If they had taken an assignment of White's debt *pro tanto* they would have "stood in his shoes" in respect to the security which he held. The rights of the defendants would not have been disturbed. Nothing was taken from them, nor was their security reduced in value.

It would be a manifest hardship to compel the plaintiffs to pay a second time for the land. *Smith, C. J.,* thus disposes of a somewhat analogous case: "The plaintiff occupies the place of the trustee, so far as the mortgagor is concerned, and he has paid the money into the trust fund in the hands of the mortgagees, which, if the purchase were upheld, would go in diminution of the indebtedness, and, if not, must be restored to the plaintiff, and this would be a self-adjustment *pro tanto,* should the plaintiff again become the purchaser." *Gibson v. Barbour,* 100 N. C., 192; *Johnston v. Lemond,* 109 N. C., 643.

It appears that it was mutually understood and agreed that the
(565) plaintiffs were to take and hold all the right and interest of White

and of Piland in the land; that the plaintiffs are colored men, ignorant of their rights in law and fact. Their case comes clearly within the principle announced in *Robinson v. Leavitt,* 7 N. H., 99: "There are cases in which a party who has paid money due upon a mortgage is entitled, for the purpose of effecting the substantial justice of the case, to be substituted in the place of the encumbrance and treated as assignee of the mortgage, and is enabled to hold the land as assignee, notwithstanding the mortgage itself has been canceled and the debt discharged. The true principle is that when money due upon a mortgage is paid it shall operate as a discharge of the mortgage or in the nature of an assignment of it, as may best serve the purpose of justice and the just intent of the parties. Many cases state the rule to be that the encumbrance shall be kept on foot or considered extinguished or merged, according to the intent or interest of the party paying the money. . . . And it makes no difference . . . whether the party, on payment of the money, took an assignment of the mortgage or a release, or whether a discharge was made and the evidence of the debt canceled. The debt itself may be still held to subsist in him who paid the money, as assignee, so far as it ought to subsist, in the nature of a lien upon the land, and the mortgage be considered in force for his benefit, so far as he ought in justice to hold the land under it, as if it had been actually assigned to him." That a purchaser of mortgaged lands who pays off the prior encumbrance comes within the class of those entitled to subrogation is established by abundant authority. We find in our investigation the exact question presented in *Walker v. King,* 45 Vermont, 525. Plaintiff held a mortgage executed by one Cyrus Safford upon land subject to prior mortgages. Safford sold the land to defendants upon the consideration that they would discharge the prior mortgages. This being done, the defendants went into possession. Plaintiff filed (566) his bill for foreclosure of his mortgage. *Wheeler, J.,* said: "When defendants paid off the first two mortgages and $800 of the third, they, by subrogation, acquired all the rights which the respective mortgagees had by virtue of their mortgages, to the extent to which they paid off the mortgages. . . . The mortgages, to the extent to which they were paid off by the defendants, constituted a part of their title to the premises, and the orator was always bound to respect those mortgages to that extent. These defendants, as between their vendor and themselves, were not bound to pay the orator's mortgage, but were to have the premises for what they were to pay on the others; and should they be compelled now to either redeem the orator's mortgage or permit him to redeem the premises upon payment of what they paid at the time of their purchase, without interest, it would be compelling them to pay the amount of his mortgage more than they were to pay for the premises. The principle

upon which the plaintiffs' right to recover rests cannot be stated more forcibly or clearly. Sheldon Sub., sec. 28; *Gans v. Theim,* 93 N. Y., 225. The equity for subrogation has been applied by us in cases where judicial sales have been vacated for fatal defects, and the purchaser who has paid the purchase money which has been applied to the discharge of debts or liens for which the land was liable has been subrogated to the rights of the creditors whose debts were paid.

The learned counsel for plaintiffs further insists that, independent of the equity for subrogation, when defendant W. S. Privott first sold under his power, the proceeds should have been applied to the debt secured by his deed; that the sale was subject to the deed to Blount, or, in other words, he sold what he had—the equity of redemption. We concur in this view, as a general rule. *Bobbitt v. Stanton,* 120 N. C., 253. It appears, however, that there is a provision in the defendant W. S. Privott's deed in trust requiring him to discharge the
(567) White note from the proceeds of the sale of Piland's land before resorting to the tract belonging to his wife. This takes the case out of the general rule. We can see no reason why, having applied the $2,100 to the discharge of White's note, defendant trustee is not entitled to sell the other tract in his deed. Unless there be some reason to the contrary not appearing upon the record, both debts may be paid and the plaintiffs protected. In other words, equity regarding that as done which ought to be done, the rights of all parties will be preserved and enforced in strict accordance with their original intention and agreement, thus illustrating the wisdom and practical value of those maxims and principles of equity which have been evolved from the labors of the great chancellors who have adorned the equity jurisprudence of England and this country.

We have considered the case upon the facts agreed and the form in which they are submitted to us. We think that, independent of this agreement, the admission that the plaintiffs were ignorant colored men, not knowing their rights, and being advised by the defendant W. S. Privott, who was honestly mistaken, entitles them to relief. Equity disregards mere forms and looks at the substance of things.

The judgment must be

Affirmed.

Cited: Bank v. Bank, 158 N. C., 248.

(568)

STATE EX REL. J. P. McCULLEN v. SEABOARD AIR LINE RAILWAY.

(Filed 26 February, 1908.)

1. Penalty Statutes—Revisal, Sec. 420—Venue.

An action for the recovery of a statutory penalty must be brought in the county where the cause of action, or some part thereof, arose. Revisal, sec. 420.

2. Courts—Judicial Notice—System of Railroads.

The Court will take judicial notice of the location of an important system of railroads with reference to the counties of the State through which it passes.

3. Venue—Wrong County—When Removed.

When the *venue* of a suit is to the wrong county, it may be tried therein, unless the defendant, before the time of answering expires, demands in writing that trial be had in the proper county.

4. Jurisdiction—Demurrer—Wrong Venue, How Taken Advantage of.

While the question of jurisdiction can be raised by demurrer (Revisal, sec. 474), the question of *venue* is different, and cannot thus be taken advantage of.

APPEAL from *Lyon, J.*, at November Term, 1907, of CRAVEN, upon demurrer to the complaint.

Plaintiff sued upon two causes of action.

1. For special damages, caused by unreasonable delay in transporting goods from Raleigh, Wake County, to Laurinburg, in Scotland County.

2. For penalty imposed for unreasonable delay, by Revisal, sec. 2632.

Suit was brought in Craven Superior Court, the residence of plaintiff. Defendant demurred and assigned several causes of demurrer, but relied, in this Court, only upon the third ground: "The defendant demurs to the jurisdiction of this court over the action for penalty for delay in transportation of freight, because it does not appear that the cause of action, or any part thereof, arose in Craven County." His Honor overruled the demurrer. Defendant appealed.

R. A. Nunn for plaintiff. (569)

Day, Bell & Allen and W. W. Clark for defendant.

CONNOR, J. While it does not so appear upon the face of the complaint, we take judicial notice of the fact that the Seaboard Air Line Railway Company does not pass through the county of Craven; hence no delay could have occurred in transporting plaintiff's goods in that county. Revisal, sec. 420, prescribes that an action for a penalty imposed by statute must be brought in the county where the cause of action, or some part thereof, arose. Defendant concedes that, if the

action is brought in the wrong county, the court, upon motion, will not dismiss, but remove the action to the proper county. The statute (Rev., 425) provides that if the county named in the summons be not the proper county, it may be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be had in the proper county, etc.

It is manifest that the question of *venue* is different from that of jurisdiction, which can be raised only by demurrer. Rev., 474. The demand for removal is in no proper sense equivalent to a demurrer for that the court has no jurisdiction.

In *Rankin v. Allison,* 64 N. C., 673, it is said the Court "might consider the answer" an application for removal. It did not do so, and we are not disposed to consider the remark of the Court as an authority requiring us to dispense with an express statutory provision. The Code of Civil Procedure had but lately been adopted, and this Court frequently overlooked a failure to comply strictly with its provisions.

In *Cloman v. Staton,* 78 N. C., 235, it is said that a motion to dismiss because the action is brought in the wrong county will be treated as a motion to remove. In that case the court below dismissed the action.

These two cases are not decisive of the question presented here. It is the manifest purpose of the law to require the defendant to make the motion for removal at the earliest opportunity, to the end that the objection be either waived or disposed of, so that the parties may (570) not be delayed in coming to an issue upon the merits. The statute is explicit, and we find no authority in the court to make it "of none effect." Departures from well-settled rules prescribed for judicial procedure produce delay in the trial of causes, too often resulting in denial of justice. His Honor properly overruled the demurrer.

It would seem that, as the action in respect to the first cause was properly brought in Craven County, and the two causes of action arose out of the same transaction, both the letter and spirit of the law would be met by permitting them to be tried in that county, otherwise, the court would be compelled to separate the two causes of action and direct the removal of one to another county, retaining the other. The two causes of action are permitted to be joined because they arise out of the same transaction. It is manifest that practically the same evidence will be relevant in the trial of both causes of action.

Our attention is called to the decision in *Edgerton v. Games,* 142 N. C., 223. It will be observed that, while there were three causes of action set forth in the complaint, each of them involved title to the horse, which was the real subject-matter of the controversy. If plaintiff recovered upon either cause of action, he claimed the horse. The distinction between that case and the one before us is obvious. Here no

property is claimed; only a money judgment can be rendered in any aspect of the case. His Honor was right in refusing to remove the cause. The judgment must be

Affirmed.

Cited: *Perry v. R. R.*, 153 N. C., 120.

(571)

ROSA B. CHAPPELL v. E. B. WHITE.

(Filed 26 February, 1908.)

1. Evidence, Parol—Land—Implied Trust—Incompetent.

Since 1844 (Revisal, sec. 3118) parol evidence is incompetent to fasten upon a devise of land a constructive or implied trust in favor of another. (*Wood v. Cherry*, 73 N. C., 199, discussed and applied.)

2. Statutes—Interpretation—Rule of Property.

A construction of a statute or the organic law of the State by the Supreme Court, recognized and acted upon for years, becomes a rule of property and should not readily be disturbed.

WALKER and CONNOR, JJ., dissenting.

ACTION to recover a tract of land, tried at CHOWAN, Fall Term, 1907, before *O. H. Allen, J.*, and a jury.

From a judgment of nonsuit the plaintiff appealed.

On 16 April, 1868, Elisha J. Burk executed his will, devising all of his estate, real and personal, to his wife, Elizabeth, in fee, and died in 1889. Mrs. Burk remained in possession until 1904, when she died, devising the landed estate to Elisha Burk White, the namesake and near relative of her husband. A codicil was duly executed by the testator, Elisha Burk, on 19 February, 1889, three months before his death, reaffirming his will, in these words: "I am of the same opinion that I was when I wrote this will"; and also devising other lands and property to his wife in fee. On the trial the plaintiff offered the testimony of John Howell, that he heard a conversation concerning this land some six weeks after the execution of the codicil. The witness testified: "Mr. Burk did not come out but once after this conversation, and stayed about one-half hour. The conversation I heard was in his bedroom. Only he and Mrs. Burk were in the room when I went in. They were speaking about the lands named in the complaint, and it was about six weeks after the codicil was executed. I went in the room to hang up the keys, and they were engaged in conversation about the will, and I heard Mr. Burk say he was not satisfied with the will and wanted to write a new one. She asked him what he wanted to (572)

write a new will for. He said he wanted his nearest blood kin to have the property that was his father's. She asked him if he meant Rosa Thach, the plaintiff. He said 'Yes.' She said: 'Let it stay as it is, and I will make a will and will the property to Rosa.' He said: 'If you will promise me to do that, I will let it stand as it is,' and she said she would. She said something about her objection to changing it being that Ben. Thach (father of Rosa) might get hold of it and worry her." To the introduction of this conversation the defendant in apt time objected, under Revisal, sec. 3118. Witness further stated that he was familiar with the land described in the complaint, and that it was the land he was talking about. Witness further said that testator said he did not care what Mrs. Burk did with the balance of the property. The court excluded this testimony, and plaintiff excepted.

W. M. Bond, Charles Whedbee, and H. S. Ward for plaintiff.

Pruden & Pruden, Shepherd & Shepherd, Aydlett & Ehringhaus, and W. J. Leary, Sr., for defendant.

BROWN, J., after stating the facts: The purpose of the parol evidence is to fasten upon the devisee of Mrs. Burk a constructive or implied trust in this land. It is undoubtedly true that equity constructs and enforces such trusts by reason of acts or purposes of parties which are in violation of good faith. Therefore, within the scope of that doctrine, it is very generally held, in this country and in England, that when the testator has made a devise to a certain person, and, being about to alter that devise, such devisee induces the testator to abstain from making such alteration by a verbal agreement or by conduct leading the testator to believe that the devisee will use the property in the manner intended by the testator, equity will enforce the trust. This doctrine is (573) generally supported upon the theory that the trust does not act directly opon the will by modifying the gift, but that it acts upon the gift itself, after it has reached the possession of the legatee. It is contended that the written will has been given full effect, as required by the statute, by passing the absolute legacy, and that the equity to prevent fraud raises a trust in favor of those intended to be benefited, and compels the devisee or legatee, as a trustee *ex maleficio,* to turn over the gift to them. This doctrine of the courts of equity very generally prevails and is supported by eminent text writers. In fact, it at one time prevailed in this State. We need not examine the soundness of the reasoning in support of it, nor consider whether such doctrine does not give opportunity for more frauds than it serves to prevent.

Our statute (Revisal, sec. 3118), enacted in 1844, as construed and expounded by this Court, forbids the recognition of such doctrine any

longer in this State and the following of such precedents, even if our judgment approved them. This statute was evidently enacted in view of the decision of this Court, in 1843, in *Cook v. Redman,* 37 N. C., 623, in which a trust of this kind was upheld. It reads as follows: "No conveyance *or other act* made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

This statute was construed in 1875 by an exceptionally able Court, and the opinion delivered by *Chief Justice Pearson* in a notable case, which has been since repeatedly cited and approved. *Wood v. Cherry,* 73 N. C., 110, cited and approved in *Avery v. Stewart,* 136 N. C., 426; *Sykes v. Boone,* 132 N. C., 199; *Cobb v. Edwards,* 117 N. C., 245; *Herring v. Sutton,* 129 N. C., 107; *Pitman v. Pitman,* 107 N. C., (574) 159, and many other adjudications of this Court.

His Honor below based his ruling upon this leading case, and, as it was earnestly contended upon the argument that it has no controlling application here, we will notice it at length.

James C. Johnston, of Chowan County, owned a tract of land at Collins' Point, called his "Point Plantation." On 12 March, 1863, he executed to one Cherry a so-called lease, whereby he indicated his intention that the lessee should have the land for an indefinite period. This lease was ineffectual to convey any estate, as was afterwards determined by this Court. In April, 1863, James C. Johnston, by will duly executed, devised that property and all other lands in Chowan County to Edward Wood, and constituted him one of his executors. After executing his will, evidently fearing his so-called lease to Cherry was valueless, Mr. Johnston procured said Wood to write the following paper:

G. J. CHERRY, ESQ.

MY DEAR SIR:—I address you this note to say to you that it is my desire that, after my death, you shall continue to occupy your present residence at my Point Plantation, retaining possession of the negroes now on the farm, named Jacob, George, and Maggie, during your natural life, fulfilling with my executor in Chowan County the same conditions and terms of rent as agreed upon and understood between you and myself heretofore. I further desire that, should you leave a wife at your death, she shall retain possession of said place during her widowhood and occupancy of, upon the same terms.

Very truly, your friend, JA. C. JOHNSTON.

It is to be noted that this paper was written by Edward Wood, the devisee and executor of Johnston, and presumably delivered by him to Cherry for Mr. Johnston. It is contended that the distinction between that case and the one at bar is that there was no promise upon
(575) the part of Wood, the devisee, to give effect to the expressed wish of the testator, and, therefore, no trust could be implied. The answer to this argument is twofold:

First, an express promise is not essential. Wherever the doctrine contended for obtains, it is held that the trust will be implied from conduct leading the testator to believe that the legatee or devisee will use the property in the manner intended by the testator. *Amherst College v. Ritch,* 151 N. Y., 317, is a leading case, where the authorities are collected. This doctrine was held in this State prior to the statute of 1844, and has even been applied to wills executed prior to that time. It was then held that "in such case it is not necessary that a promise be made in express terms; silent assent to such a proposed undertaking will raise the trust." *Cook v. Redman, supra; Thompson v. Newlin* (1844), 38 N. C., 338. The wills in those cases were executed prior to the act of 1844. In view of such decisions, it can scarcely be doubted that, had the statute not been in the way, the Court would have fastened upon the devisee, Wood, an implied trust for Cherry's benefit. The conduct of Wood in writing the letter and silently acquiescing in it was ample assurance to Johnston that the former would respect and carry out his wishes.

Secondly, the Court so regarded it, and in plain language assumed in that case a *promise* upon the part of Wood, and decided the case upon that theory, and, nevertheless, held that implied trusts in the matter of devises are expressly excluded by the statute. To demonstrate it, we quote at length from the opinion of the Court: "The *promise* of Wood cannot be enforced on the ground of its creating a trust, for a trust can only be created in one of four modes: (1) By transmission of the legal estate, when a simple declaration will raise the use or trust. (2) A contract based upon valuable consideration, to stand seized to the use of or in trust for another. (3) A covenant to stand seized to the use of or in trust for another, upon good consideration. (4) When the court
(576) by its decree converts a party into a trustee, on the ground of fraud. If we can sustain the defendant, it must be upon this point—that is to say, the fraud in writing the letter (referred to in the pleadings) at the dictation of the testator, and the promise to carry out his wishes in respect thereto, as understood between them; whereas the present action runs counter to the letter and violates the promise. This is met by the fact that the will had been executed several years before, and an implied trust is expressly excluded by statute. Bat. Rev., ch.

119, sec. 44. 'No conveyance or act done after the execution of a will shall affect its provisions, except it is so executed as to amount to a revocation.' The letter and the promise are both excluded by the words of this statute. The suggestion that the time of the execution of a will is the time it takes effect, to wit, the death of the tesator, calls for no remark, but it is all that the idea of a trust can rest on; so that ground fails."

That the doctrine of implied and secret trusts, as applicable to devises prior to the act of 1844, should be recognized and followed by this Court in the cases we have quoted (one of which was tried by *Judge Pearson* himself in the Superior Court), and then repudiated in *Wood v. Cherry* as contrary to our statute, is conclusive to our minds that the Court intended to give effect to what it regarded as the manifest will of the General Assembly, and to prohibit entirely the attaching to devises of secret trusts by means of parol evidence, or any act of the testator not amounting in law to a revocation of the will. This decision construing the statute of 1844 has stood unchallenged for a third of a century, and it has now become an established rule governing the transmission of property. It is one of those decisions which ought not now to be brought in question. "A former adjudication of this Court in construing a statute or the organic law should stand when it has been recognized for years, and in such case the principle settled or the meaning given to the statute becomes a rule for guidance in making contracts, and also a rule of property." *Walker, J.*, in *Hill v. R. R.*, 143 N. C., (577) 541. It is suggested that statutes somewhat similar to ours have been construed differently in England and possibly some other jurisdictions. That may be true, but the wisdom of the judgment pronounced in *Wood v. Cherry* cannot be better exemplified than in its application to this case.

We have here a will made in 1868 and reaffirmed by a codicil executed three months before the testator's death, in 1889, devising this and other property to his wife in fee. The codicil indicates that he had been constantly of the same disposing mind for eleven years, and there is nothing in the record indicating any reason why the testator should have changed his mind three weeks after its execution. That he made a most natural disposition of his property no one will deny. The entire testimony relied upon to establish the trust was received by the court and then excluded, and is sent up in full in the record. The testimony of Howell has been set out fully in this opinion. He undertakes to testify to a conversation which he says he heard between Elisha Burk and his wife eighteen years ago. This alleged conversation the witness mentioned to no one during Mrs. Burk's lifetime, and only after her death, in 1904, he thought to mention it to plaintiff's husband. How many of us are willing to nar-

rate with any sort of accuracy a conversation between others heard casually eighteen years ago, and what reliance is there to be placed upon such evidence? The only other evidence offered are some alleged declarations of Mrs. Burk testified to by plaintiff's husband and father, witnesses necessarily deeply interested in plaintiff's recovery, and whose testimony must be taken with some grains of allowance. The evidence of these witnesses may be true. We do not mean to intimate that it is not. But it must occur to any one that such evidence is easy to manufacture and extremely hard to controvert after the lapse (578) of years, when the testator and devisee have passed away. It seems to us in line with a sound public policy and conducive to the stability of written testaments that the provisions of a will made in 1868 with all the formalities of law, and reaffirmed with equal solemnity in 1889, three months before the testator's death, should not be subjected to the possibility of change upon the mere recollection of witnesses, however upright.

We think the construction of the statute made in *Wood v. Cherry* gives much needed security to titles, and if we felt at liberty to disturb it we should hesitate long before doing so.

No error.

WALKER and CONNOR, JJ., dissenting.

Cited: *Newkirk v. Stevens,* 152 N. C., 502.

WEALTHY BRADDY ET AL. v. JOHN D. ELLIOTT.

(Filed 26 February, 1908.)

1. Estates—Condition Precedent—Right of Re-entry—Reservation.

An agreement between plaintiffs and defendant that, in consideration of an exchange of real property, defendant was to build certain specified houses on that conveyed by him for the plaintiffs to live in, does not create an estate upon condition precedent, there being no express reservation of the right of reëntry upon failure of defendant to perform his agreement.

2. Estates—Consideration, Failure of—Absence of Fraud—Adequate Compensation—Damages.

Where the plaintiffs and defendant exchanged certain lands, under an agreement and for the consideration that the latter should build for the former certain houses, which he failed to do, as specified, in the absence of fraud on defendant's part in procuring the contract, the plaintiffs are left to their remedy for damages, when they afford adequate compensation.

3. Estates—Contracts—Consideration, Failure of—Fraud—Evidence.

The mere failure on defendant's part to build certain houses as a part of the consideration promised for mutual conveyances of land does not, of itself, establish such fraud as will rescind the contract, but is some evidence to be considered by the jury, in connection with other circumstances, upon the question of fraudulent intent at the time the promise was made.

4. Estates—Contracts—Consideration, Failure of—Absence of Fraud—Measure of Damages.

When, in the absence of fraud, the verdict of the jury establishes the fact that plaintiffs conveyed certain lands to defendant in consideration of a conveyance by defendant of his lands under promise to build certain specified houses thereon at a cost of $550, which he failed to do, the plaintiffs are entitled to recover $550 as a part of the purchase price, and interest thereon from the date of the deed.

5. Same—Offset—Evidence.

When it is established by the verdict of the jury that there was an interchange of real property between plaintiffs and defendant upon condition that the latter should erect certain houses on the land he conveyed, at a cost of $550, and that there was a failure on defendant's part to perform this condition, evidence is inadmissible on the part of the defendant tending to show, as an offset to plaintiffs' damages, a debt due by plaintiffs to him.

6. Appeal and Error—Verdict Set Aside—Inadequate Damages—Reversible Error—Power of Court.

While it is in the discretion of the court below to set aside as inadequate a verdict of damages upon an appropriate issue, it is reversible error to entirely disregard the issue, when plaintiffs are thereunder entitled to damages.

ACTION to cancel and rescind the sale or exchange of a certain (579) lot and lands, tried before *O. H. Allen, J.*, and a jury, at December Term, 1907, of BEAUFORT.

The court submitted these issues:

"1. Was the lot in Washington conveyed for the land in Bath Township upon condition that defendant erect on said land two dwellings and necessary outhouses, worth $550?" Answer: "Yes."

"2. Has defendant failed to erect said buildings in accordance with the terms of such exchange, as alleged?" Answer: "Yes."

"3. If so, what balance is due thereon by defendant to plaintiffs?" Answer: "$150."

After the rendition of the verdict his Honor set aside the third issue entirely, together with the findings thereon, and rendered a judgment canceling the deeds which had been made and granting an entire rescission of the contract of exchange and sale. From the judgment rendered the defendant appealed.

Small, McLean & McLean for plaintiffs. (580)

Nicholson & Daniels for defendants.

BROWN, J. The plaintiffs owned a lot in Washington, two persons named Lee owning the reversion. The parties agreed to sell to defendant for $800, taking in payment a tract of land in the country, upon which the defendant agreed to erect two dwellings suitable for plaintiffs to live in, and also necessary and proper outhouses, which, according to the pleadings and evidence, were not to exceed $550 in cost. Under proper proceedings, the interests of a minor, as well as of the other plaintiffs, were duly conveyed to the defendant. The jury have practically found that the defendant has failed to erect the buildings in accordance with the terms of the exchange. His Honor set aside the third issue and gave judgment canceling the contract between the parties and restoring them to their original properties.

It is contended, first, that the defendant took an estate upon condition subsequent, and, having failed to perform it, the plaintiffs have a right of reëntry and stand seized of their original estate in the town lot. This position is hardly tenable. An estate upon condition may be created by deed, but only where the terms of the instrument admit plainly of such construction. 2 Washburn (5 Ed), 5. It is a qualification annexed to an estate whereby it is to arise or is to be defeated. Bacon Ab., *Conditions,* 2 Th. Co. Lit., 32. When the condition is relied upon to work a forfeiture, it must appear plainly in the deed or arise by clear implication. Construing the decree in the special proceeding and the deed from plaintiffs to defendant together as one instrument, we find none of the requisites of an estate upon condition. The recitals therein, that (581) the terms of the contract are that the defendant is to convey to plaintiffs the tract of land and build thereon two dwellings and suitable outhouses as a consideration for the conveyance of the town lot, will not serve to create an estate upon condition in the defendant, in the absence of an express reservation in the deed of a right of reëntry in favor of the plaintiffs. Such recitals are only an expression of the consideration for the deed, and could only create an estate upon condition by express reservation of the right of reëntry upon failure to perform the agreement. Shep. Touchstone, 123; *Rawson v. Uxbridge,* 7 Allen (Mass.), 125; 2 Washburn, p. 5.

It is contended, secondly, that the plaintiffs are entitled, upon the findings of the first and second issues, to a rescission or cancellation of the entire transaction, and that the judgment of his Honor can be supported upon that ground. The rulings on this subject are very numerous and not at all harmonious, as few cases turn on greater niceties than those which involve the question as to whether a contract ought to be delivered up to be canceled or whether the parties should be left to their legal remedies. In England the jurisdiction exists in all cases of fraud generally, without much regard to the adequacy or inadequacy of any legal

remedy, and the courts are largely governed by the particular circumstances of each case. 6 Pom. Eq., sec. 685, note. In the absence of fraud in procuring the execution of a contract, the parties are generally left to pursue their remedy for damages for its breach, where, in the nature of the transaction, they afford adequate compensation. 6 Pom. Eq. Jur., sec. 685; 2 Beach Mod. Eq., 636. The underlying principle is the practicability or impracticability of a sufficient and adequate legal remedy. Tested by this general rule, the findings on the first and second issues do not, standing alone, warrant the decree rendered. The plaintiffs, in their complaint, allege fraud upon the part of defendant in procuring the execution of the contract of exchange, but no issue was submitted embodying such allegation. If the jury should find, (582) in addition to their findings on the first and second issues, that the defendant fraudulently induced plaintiffs to agree to the exchange by falsely representing and pretending that he would build two suitable dwellings and necessary outhouses on the tract of land, such finding would be an ample basis for the decree canceling the entire transaction. The principle is clearly stated by *Mr. Justice Connor* in *Hill v. Gettys*, 135 N. C., 375: "A false and fraudulent representation or promise we understand to be one made with the intention in the mind of the promisor not to perform the promise." Under such circumstances, equity will relieve the promisee. If a jury should find that this defendant took advantage of the plaintiffs by making promises which he did not intend fully and faithfully to perform, it is such fraud in law as entitles plaintiffs to cancel the contract and deeds, to recover their original property and the rents and profits of the same, together with the interest thereon. The subsequent acts and conduct of a party may be submitted to the jury as some evidence of his original intent and purpose, when they tend to indicate it. In the absence of such finding of fraud, and letting the first and second issues and the responses thereto stand as they are, the plaintiffs are entitled to recover as damages the balance of the purchase money, to wit, $550, and the interest thereon, in case the defendant has failed to erect the two dwelling-houses and necessary outhouses, as required by the terms of the exchange and as embodied in the special proceeding, and to have the sum awarded charged upon the town lot.

There is no evidence that the plaintiffs have ever accepted the structures placed on the land as a compliance with the terms of the exchange. The defendant has had more than a reasonable time within which to erect the two dwelling-houses and necessary outhouses called for by the contract, and if he has failed or refused to do so the plaintiffs are entitled to recover the $550 due on the purchase price of their town lot, together with interest thereon from the date of their (583) deed.

If the character of the structures is such as is testified to by some of the witnesses for the plaintiffs, and they are not fit for dwellings even when completed, they cannot be regarded as even a partial compliance with the terms of the agreement.

In excluding evidence as to personal advances made by defendant to his sister, Wealthy, his Honor did not err. Such evidence is irrelevant to any issue that arises on the pleadings.

The decree in the special proceedings by which defendant acquired the title of the minor, Edward Lee, requires the construction of both dwellings and the necessary outhouses. To permit the defendant to use any personal account he may have against his sister as a set-off or discharge of his obligation is not permissible.

While his Honor had an irreviewable discretion to set aside the finding of the third issue as inadequate, we think he erred in disregarding the issue entirely. The character of the controversy is such that it is unnecessary to disturb the first and second issues. The cause is remanded, to the end that the third issue be submitted to the jury, and, also, if desired, that the issue of fraud be submitted.

Let the costs of this Court be paid, one-half by plaintiffs and one-half by defendant, each party paying his own cost of printing.

Partial new trial.

Cited: Herndon v. R. R., 161 N. C., 656, 657; *Massey v. Elliott*, 173 N. C., 222.

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(584)

A. D. COX ET AL. v. COMMISSIONERS OF PITT COUNTY.

(Filed 26 February, 1908.)

1. Statutes—Thirty Days Notice—Presumption—Constitutional Law.

The courts will conclusively presume, from the ratification of a legislative act authorizing a county to issue bonds, that the notice of thirty days required by section 12, Article II of the Constitution, has been given.

2. Statutes—"Aye and No" Vote—Evidence—Legislative Journals—Constitutional Law.

When it appears, from the inspection of the journals of both branches of the Legislature, that the "aye and no" votes were recorded on the second and third readings of a bill to authorize a county to issue bonds, the objection to the validity of the issue upon the ground that section 14, Article II of the Constitution, in that respect, has not been complied with, will not be sustained.

3. Bond Issue—Legislative Powers—Municipal Corporations—Voters—Qualifications—New Registration—Constitutional Law.

The suffrage amendment of 1900 fixed a new qualification for voters, but left the matter of their registration to legislation as before. An act

authorizing a bond issue by a county is not objectionable as violating Article VI of the Constitution, secs. 2, 3, and 4, upon the ground that it empowered the county commissioners to order a new registration.

4. Bond Issue—Training School—Public Benefit—Constitutional Law—Municipal Corporations.

A bond issue by a county to aid in the establishment of a teachers' training school is not for a private purpose, such as is inhibited by the State Constitution, but for the general benefit of the county wherein it is to be established, and, therefore, not objectionable on the ground that it is not within the scope and purpose of the powers of municipal corporations.

ACTION brought by plaintiffs, as citizens and taxpayers of the county of Pitt, to enjoin the issue of certain bonds, not exceeding $50,000, which defendants are about to issue to aid in establishing a training school at or near the town of Greenville, in said county, in pursuance of an act of the General Assembly ratified 6 March, 1907. An application was made to *Lyon, J.,* in the Superior Court of PITT, to enjoin the issuing of the bonds. From this order refusing the injunction plaintiffs appealed.

No counsel for plaintiffs. (585)
Jarvis & Blow and J. L. Fleming for defendants.

BROWN, J. The objections to the validity of the bonds and the legality of the issue are fully set out in the complaint, and we deem it necessary to notice four only of the contentions urged by plaintiffs.

It is insisted, first, that the bond act is unconstitutional and void, for the reason that said act is a private act and that thirty days notice was not given, as required in section 12, Article II of the Constitution. It is immaterial whether the act be a public-local law, as defined in *S. v. Chambers,* 93 N. C., 601, and similar cases, or purely a private act, as contended by plaintiffs. The courts will not go behind the ratification of the act to ascertain whether notice has been given in accordance with section 12, Article II of the Constitution of this State. While that section is binding upon the conscience of the General Assembly, and doubtless is intended to be observed by that body, the courts will not undertake to review the action in that respect of a coördinate department of the State Government, and will conclusively presume from ratification that the notice has been given. *Gatlin v. Tarboro,* 78 N. C., 119; *Broadnax v. Groom,* 64 N. C., 244; *Worth v. R. R.,* 89 N. C., 291; *Puitt v. Comrs.,* 94 N. C., 709; *S. v. Powell,* 100 N. C., 525.

Second, that said act is unconstitutional and void because it was not passed in the manner required by section 14, Article II of the Constitution, in that the yeas and nays were not recorded on the second and third readings, as required by said section. An inspection of the jour-

nals of both houses of the General Assembly shows that this contention is without foundation. *Comrs. v. Trust Co.,* 143 N. C., 100.

(586) Third, that the act violates Article VI, sections 2, 3, and 4, of the Constitution, in that it empowers defendants to order a new registration. This position is untenable. The suffrage amendment of 1900 fixed a new qualification for voters, but left the matter of their registration to the Legislature, as before. When and how the registration of voters shall be had is left to the wisdom of the Legislature, and that body may leave it to the local authorities, such as boards of county commissioners, to order a new registration, if such body deems it proper. *R. R. v. Comrs.,* 116 N. C., 566; *McCormac v. Comrs.,* 90 N. C., 441; *White v. Comrs.,* 90 N. C., 437; *Clark v. Statesville,* 139 N. C., 490.

Fourth, that the bonds are to be issued and the tax levied for a purpose that is not corporate in its character, viz., not within the scope and purpose of a municipal corporation, and, therefore, violative of the State Constitution.

This position seems to find support in the decision of the Supreme Court of Ohio in *Hubbard v. Fitzsimmons,* 57 Ohio, 436, but is contrary to our own rulings. *Wood v. Oxford,* 97 N. C., 230, and cases cited. We regard municipal corporations as instrumentalities of the State Government, and public in their nature. The General Assembly has control over them, and may enlarge, modify, or curtail their powers as it deems proper, within the limits of our Constitution. It may authorize such corporate bodies to apply their revenues and credit to legitimate purposes tending to the general good and upbuilding of the community, although every individual taxpayer may not be directly benefited thereby.

While such corporations cannot donate their funds to strictly private enterprises, there is nothing in our Constitution which prohibits them, with legislative sanction, from assisting undertakings of a public or semipublic character, which are expected and intended to promote the prosperity and general welfare of the community. The purpose in issuing these bonds is to secure the establishment within the

(587) county of Pitt of the Eastern Carolina Teachers Training School, in accordance with the terms of the act establishing it. Chapter 820, Laws 1907. That such donation is not for a private purpose, but intended to assist a great public institution, which will be of inestimable local as well as general benefit cannot be doubted.

The principle indorsed by the Supreme Court of the United States is that if the donation is for a public purpose, viz., for the benefit of the inhabitants of the municipality, then it will be for a corporate purpose. *R. R. v. Smith,* 62 Ill., 268, cited and quoted from by *Mr.*

Justice Harlan in his elaborate opinion in *Livingston v. Darlington,* 101 U. S., 413. In this latter case the Court had under consideration the act of the General Assembly of Illinois, approved 5 March, 1867, establishing the State Reform School. The provision authorizing municipal corporations to donate money to secure the location of the school within their limits was sustained, there being nothing in the Constitution of Illinois, as construed by its highest Court, in conflict with it. The authorities are collected and reviewed in the opinion, and support fully our own views. We are of opinion that the bond issue contemplated is valid, and that his Honor properly refused to enjoin it.

Affirmed.

Cited: *Comrs. v. McDonald,* 148 N. C., 126.

(588)

B. M. WHITEHURST v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 March, 1908.)

1. Evidence—Depositions—Agreement of Parties—Deponent in Same Town—Harmless Error.

When by agreement depositions were read upon the trial of an action, and it was testified that the deponent was at the time sick at home, for the purpose of showing she could not be present, the error, if any, was harmless.

2. Evidence—Negligence—Sparks from Engine—Whole Evidence—Harmless Error.

In an action for damages for the burning of plaintiff's house, etc., by reason of hot cinders negligently emitted from the smokestack of the defendant's locomotives, it was not error in the court below, in identifying a certain engine which had passed immediately preceding the time of the fire, to permit plaintiff to testify that "the whistle he knew as Captain Taylor's" was the one on the engine, when, under the whole evidence, the locomotive in question was clearly identified, and the jury could not have been misled.

3. Evidence, Corroborative—Testimony of Declarations of Third Persons.

Testimony of one who was on the premises of the plaintiff with another person, immediately preceding the burning of his house, etc., thereon, that the other person "said something like hot pebbles had fallen on his hands and burnt him," in the presence of the plaintiff, is corroborative evidence when such other person has testified to the fact.

4. Evidence—Defective Spark Arrester—Other Fires—Same Train—Time.

When the damages are claimed to have been caused by the burning of plaintiff's house by reason of a defective smokestack, or spark arrester,

on defendant's engine, it is competent to prove that the same train had set fire to property adjoining that of plaintiff, or near thereto, near or about the time in question.

5. Evidence — Defective Spark Arrester — Corroborative Evidence — Other Fires—Time.

When it appears from the entire evidence that a witness was permitted to testify as to fires caused by the same engine on the day of the week immediately preceding the injury complained of, it is competent evidence, and within the rule. (*Cheek v. Lumber Co.*, 134 N. C., 225, cited and approved.)

6. Same.

Taken in connection with other evidence, it was competent, to identify the train, for a witness to testify that he saw smoke in his own woods, immediately after seeing that arising from plaintiff's premises.

7. Evidence, Expert—Contradiction—Actual Observations.

It was competent, to contradict the evidence of defendant's expert witness as to the distance hot cinders could have been thrown from its engine, to show by witnesses how far they had been thus thrown, according to their own knowledge and observation.

8. Evidence—Defective Spark Arresters—Nonsuit—Evidence Sufficient.

In an action for damages arising from the imperfect construction of the smokestack of defendant's engine, from which hot cinders were thrown upon plaintiff's property, causing it to take fire, a motion as of nonsuit, upon the evidence, will not be sustained, when there is evidence tending to show that the sparks or cinders from one of defendant's engines caused the fire, and defendant's expert witnesses testified that, if this was the case, the engine was not properly equipped or the spark arrester was not in good condition.

(589) APPEAL from *Lyon, J.*, at August Term, 1907, of PITT.

The facts sufficiently appear in the opinion of the Court.

J. L. Fleming and L. I. Moore for plaintiff.

Skinner & Whedbee for defendant.

WALKER, J. This action was brought to recover damages for burning plaintiff's residence, stables, barn, and other property, which he alleged was caused by the negligence of the defendant, in allowing hot cinders to be emitted from the smokestack of its engine. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Numerous exceptions were taken by the defendant to the rulings and charge of the court, and we will consider them in the order in which they are stated in the assignment of errors.

1. The parties had agreed that the deposition of the plaintiff's wife might be read as evidence by the plaintiff, and the court sub-
(590) sequently permitted the plaintiff to prove that his wife was sick

at his home, for the sole purpose of showing that she was unable to be present at the trial and testify in person. This evidence was objected to by the defendant, but we do not see why the error, if any, was not harmless. It certainly should not have prejudiced the defendant, and we must assume that it did not. We do not mean to imply that there was any error.

2. The plaintiff testified that "the whistle he knew as Captain Taylor's" was the one which was on the engine that passed his premises the day his property was burned. The defendant objected to the evidence upon the ground that it was too indefinite, "as it did not necessarily relate to the train which was alleged to have passed just before the fire." When we consider the whole of plaintiff's own testimony, and especially when we take into consideration also the other testimony in the cause, the engine to which the plaintiff referred as the one from which the live cinders had been emitted which caused the conflagration was clearly identified, and the jury could not have been misled as to the engine which caused the fire, and to which the plaintiff had referred in his testimony.

3. It was competent and relevant to prove by the witness Stanley Hopkins that he and Blount Wichard were working at a bench on the plaintiff's premises on the day of the fire, and that Wichard had said that something like hot pebbles had fallen on his hands and burnt him, as Wichard had already himself given testimony of the same nature; and it can make no difference that, at the time Hopkins heard Wichard make the statement, the latter was talking to the plaintiff. It was corroborative of Wichard's testimony. It was also competent to prove that the same train had set fire to the woods adjoining the premises of the plaintiff, or near thereto. It was a fact tending to show the defective condition of the engine, either that it had no spark arrester or an insufficient one. *Johnson v. R. R.*, 140 N. C., 581; *Knott v. R. R.*, 142 N. C., 238; *Aycock v. R. R.*, 89 N. C., 321. The tes- (591) timony of the witness Cleve Moore, to which exceptions 5, 6, and 7 were taken, was properly admitted, for the same reason as that just given. It is clear, when his entire statement is considered in connection with the defendant's preliminary examination to test the competency of his testimony, that the witness, when speaking of having seen the same engine emitting sparks on a previous day, was referring to a day of the week immediately preceding the time of the fire. The testimony is not, therefore, within the rule laid down in *Cheek v. Lumber Co.*, 134 N. C., 225, excluding such evidence when relating to the emission of sparks by the same engine a year after the fire which had destroyed the plaintiff's property.

The evidence of the witness Briley, to the effect that immediately after the southbound train passed he saw smoke in his own woods, was sufficiently definite to identify the train, from the locomotive of which the sparks had been emitted which caused the fire in his woods, as he stated that he saw the smoke rising from the plaintiff's premises just before he saw the smoke in his woods. In passing upon the competency of this testimony, we cannot detach it from the other evidence in the case, but must consider it with reference to the testimony as already given by this witness, and also by the other witnesses.

The testimony of B. B. Briley and the other witnesses, relating to other fires caused by the passing engines of the defendant, was admitted for the purpose of showing at what distance from the right of way sparks or cinders emitted from the engines had fallen, and it was competent for this purpose, in order to contradict the testimony of experts introduced by the defendant to show that it was impossible for cinders from the smokestack of the engine to have fallen so far from the track as to have caused the fire on plaintiff's premises.

This brings us to the defendant's motion to nonsuit the plaintiff, which was overruled by the court. It is contended by the defend-
(592) ant that there was no evidence that the engine was not properly equipped with a spark arrester, and none that the fire was actually started by a spark emitted from the engine. We have examined the evidence carefully and find that there was plenary proof as to both facts. There certainly was evidence that sparks or cinders emitted from one of the defendant's engines caused the fire, and the expert witnesses of the defendant testified that, if this was the case, the engine was not properly equipped, or, to use the language of one of them, "the spark arrester was not in good condition." The motion to nonsuit was, therefore, properly overruled. *Craft v. Lumber Co.*, 132 N. C., 151; *Williams v. R. R.*, 140 N. C., 623; *Lumber Co. v. R. R.*, 143 N. C., 324; *McMillan v. R. R.*, 126 N. C., 726; *Aycock v. R. R., supra.*

Under the charge of the court, which was clear and concise, the case was fairly submitted to the jury, and the defendant has no reason, in law, to complain of the result.

No error.

Cited: Armfield v. R. R., 162 N. C., 28; *Meares v. Lumber Co.*, 172 N. C., 293, 295.

J. S. AVERY v. WEST LUMBER COMPANY ET AL.

(Filed 4 March, 1908.)

1. Employer and Employee—Negligence—Evidence—Safe Appliances.

Evidence is sufficient upon the question of negligence which tends to show that plaintiff was unused to sawmilling machinery, and, under the direction of one having authority, and whom he felt compelled to obey, while attempting to oil a running saw with a bottle, which was customarily used for the purpose, fell, so that his arm was cut off.

2. Same—Duty of Employer.

The master owes a duty to his employees to furnish proper tools and appliances; and where, in the discharge of his duties, the plaintiff was compelled to use a bottle in oiling the saw machinery at defendant's lumber mill, the defendant having failed to furnish an oil can with which this could have been safely done under the circumstances, and, in doing so, fell upon the saw, resulting in the loss of his arm without fault on his part, the defendant is liable in damages.

3. Employer and Employee—Respondeat Superior—Damages.

The defendant is responsible in damages for an actionable wrong committed upon a fellow employee by one under whose direction he was employed to work.

4. Same—Safe Appliances—Questions for Jury.

When the court below has correctly charged upon the question of contributory negligence in the plaintiff's assuming, under the direction of one having authority, to get upon the machine and oil a running saw at defendant's mill, and as to his using a bottle for the purpose when an oil can was the safe and correct implement, the verdict of the jury awarding damages as the result of defendant's actionable negligence will not be disturbed.

ACTION tried before *Lyon, J.*, and a jury, at Fall Term, 1907, (593) of CRAVEN, to recover damages for personal injuries sustained by the plaintiff through the negligence of the defendant, at Dover, N. C., whereby the plaintiff lost an arm.

The court submitted these issues:

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

"2. Was the plaintiff guilty of contributory negligence?" Answer: "No."

"3. What damage is plaintiff entitled to recover?" Answer: "Two thousand dollars."

From the judgment rendered the defendant appealed.

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

Davis & Davis and W. D. McIver for defendants.

BROWN, J. We have considered the several exceptions and assignments of error set out in the record, and are of the opinion that no error has been committed which warrants us in directing another trial. Neither do we think that an extended discussion of exceptions would be of special value as a precedent. His Honor seems to have care-
(594) fully followed the well-settled principles of law applicable in cases of this character. The matters in dispute are largely those of fact, and the jury appear to have been impressed with the laintiff's version of them. He offered evidence tending to prove that he was employed by the defendant to work in its lumber mill at Dover. He had been working around the mill about a year, on the outside, hauling slabs, and was an ordinary, green hand, with no knowledge of machinery. He was ordered to help Kennedy around the edger, inside the mill, and had been working there for about two days when his arm was cut off by the saws of the edger. He was ordered to work under Kennedy, who was boss of the machine. Kennedy told him to oil the machine, or that the machine needed oiling, and he testified that he felt compelled to obey, or lose his job. There was no oil can, commonly called "squirt can," at the edger, and the only thing he could find to oil the machine with was a half-gallon bottle. He could not oil the edger with this bottle without climbing up on the machine and leaning over it, as the mouth of the bottle was large, and he had to get close to the edger. The opposite side of the machine was blocked up with slabs, and he could not get up on that side. Kennedy was standing within 3 feet of him and saw him get the bottle and climb up on the machine, and did not warn him, although he knew Avery was a green hand and had only worked on the machine about two days. Kennedy had oiled the edger with the same bottle that morning and had used it repeatedly before that time, in the presence of the plaintiff, for a similar purpose. Plaintiff also offered evidence to the effect that a person could not stand on the side of the machine and lean over and hold a bottle in his hands and pour oil in the proper place; that he could safely stand on the ground and oil the machine with the usual "squirt can," but not with a bottle; that the only way he could oil with the bottle was to get on the machine; that when he got on the machine he slipped, and his arm was cut off.

(595) There was evidence tending to prove that plaintiff had been put under Kennedy, who also testified, in part, that he was standing about 3 feet from the plaintiff at the time of the injury, saw him get up on the table of the edger with the bottle in his hands, and that there was no oil can at the edger; that he did not warn plaintiff of his danger; that he had oiled the edger that same morning with the bottle, and had also oiled it the day before with the same bottle, in the

presence of Avery, and that he had oiled the planer, which was next to the edger, with this same bottle, in the presence of plaintiff, while the planer was running; that he had charge of the edger, and plaintiff was working there with him and did what he asked him to do.

The specific negligence of which plaintiff complains is that the defendant failed to furnish a safe and suitable appliance with which to oil the edger, and one in general use for such purpose. *Phillips v. Iron Works, ante,* 209. It has become elementary in the doctrine of negligence that the master owes a duty, which he cannot safely neglect, to furnish proper tools and appliances to his servant. *Shaw v. Mfg. Co., ante,* 235; *Phillips v. Iron Works, supra; Ward v. Mfg. Co.,* 123 N. C., 248.

While the evidence may be conflicting, there is abundant proof to go to the jury that the defendant failed to furnish the necessary oil squirt can in common use for oiling such machinery, and that such negligence caused the injury to plaintiff. We do not mean to hold that it was defendant's duty to have squirt cans all over the mill, or that under ordinary circumstances a workman should not hunt for one, rather than use a bottle. That feature of the defense was submitted to the jury, under proper instruction. But the plaintiff's evidence tends to prove that he was a "green hand," placed under Kennedy's direction in operating the edger, and that he had seen the latter repeatedly use the same bottle in oiling the machine. The plaintiff had a right, therefore, to suppose that the bottle was the appliance furnished by defendant for the purpose of oiling the edger, and that it was (596) in common use for such purpose. It is immaterial to determine whether, strictly speaking, Kennedy stood in the relation of vice-principal to the plaintiff or not. Kennedy was his immediate "boss," in charge of the machine, where plaintiff was working under Kennedy's direction, and Kennedy had the right to direct him to oil the machine. He did not oil it officiously, but in the line of duty, if his evidence is to be believed. We think his Honor, therefore, very properly overruled the motion to nonsuit.

Among other instructions, the court charged the jury that if the injury was accidental and not caused by defendant's negligence, the plaintiff could not recover. Upon the issue of contributory negligence, among other instructions, the court charged that "It was plaintiff's duty to be careful and guard against accidents, and if the jury find from the evidence that plaintiff knew the manner in which the edger machine ought to be oiled, or ought to have known that it was dangerous to get on top of the machine and pour oil down on the collars, and that by looking and by using ordinary care—that is, such care as a reasonably prudent man would use under like circumstances—he

could have seen this danger, and failed to do so, then he was guilty of negligence, and the jury would answer the second issue 'Yes.'"

The charge of the court upon the issues, especially those as to negligence and contributory negligence, was unusually full and clear. It presented correctly and intelligently to the jury every phase of the case. To review it would be only to reiterate what has been so often stated in the opinions of this Court, which seem to have been carefully followed and applied. Upon an examination of the entire record, we find

No error.

Cited: Barkley v. Waste Co., 147 N. C., 587; *Cotton v. R. R.,* 149 N. C., 230; *Craven v. Mfg. Co.,* 151 N. C., 353; *Noble v. Lumber Co., ib.,* 78; *Holton v. Lumber Co.,* 152 N. C., 69; *Horne v. R. R.,* 153 N. C., 240; *West v. Tanning Co.,* 154 N. C., 48; *Mercer v. R. R., ib.,* 401; *Reid v. Rees,* 155 N. C., 233; *Walker v. Mfg. Co.,* 157 N. C., 135; *Terrell v. Washington,* 158 N. C., 291; *Young v. Fiber Co.,* 159 N. C., 381, 382; *Pigford v. R. R.,* 160 N. C., 98; *Mincey v. R. R.,* 161 N. C., 471; *Lynch v. R. R.,* 164 N. C., 251; *Lloyd v. R. R.,* 166 N. C., 32; *Steele v. Grant, ib.,* 645; *Klunk v. Granite Co.,* 170 N. C., 70; *Deligny v. Furniture Co.,* 170 N. C., 201, 203; *Yarborough v. Geer,* 171 N. C., 337; *Vogh v. Geer, ib.,* 679; *Dunn v. Lumber Co.,* 172 N. C., 136.

BURNETT v. KUYKENDALL ET AL.

APPEAL from *Cooke, J.,* at March Term, 1907, of BUNCOMBE.

Verdict and judgment for plaintiff, and defendants appealed.

Motion in apt time by appellees to dismiss appeal for noncompliance with Rules 19 (subdiv. 2), 20, and 21.

Frank Carter for plaintiff.
Tucker & Murphy for defendants.

PER CURIAM. On authority of decision *Lee v. Baird, ante,* 361, and for reasons there given, appeal is dismissed for noncompliance with rule.

STATE v. MONROE SAUNDERS.

(Filed 4 March, 1908.)

Officers—Solicitor's Fees.

Under Revisal, sec. 1283, enumerating the officers whose fees are provided for (excepting New Hanover County), the county is liable for the payment of full fees where the defendant is convicted and serves out a sentence on the public roads. Under this section the solicitor's fees are omitted, but, under section 2768, when the party convicted is insolvent, the solicitor shall receive fees.

APPEAL from *Lyon, J.*, at July Term, 1907, of McDOWELL.

The defendant was convicted of crime and sentenced by the court to confinement in the county jail for a term of three years, "to be worked on the public roads of Marion Township, McDowell County." The court further adjudged that the county pay the cost of said prosecution in full. From so much of the judgment as directed that the county pay full costs the county commissioners appealed.

Assistant Attorney-General for the State. (598)
J. C. L. Bird for defendant.

CONNOR, J. The appeal brings into controversy the alleged power of the judge, upon conviction of a defendant and sentence to imprisonment in the county jail with direction that he be worked on the county road, to adjudge full costs against the county. It is conceded that the power to impose costs, either upon the county or the defendant, is of statutory origin and regulation. *S. v. Massey,* 104 N. C., 877. The liability of the county for costs in criminal cases is now regulated by section 1283 of the Revisal, wherein the several statutes in force prior to 1 July, 1905, the date at which the Revisal became the statute law of the State, are codified. As applicable to this case, the county is made liable: "If . . . the defendant . . . be convicted and unable to pay the costs, . . . the county shall pay the clerks, sheriffs, constables, justices, and witnesses one-half their lawful fees only." In capital felonies and other cases named in the section full fees are to be paid. It will be noted that in the enumeration of the officers whose fees are provided for, the solicitor is omitted. By reference to Rev., 2768, it will be seen that where the party convicted is insolvent the solicitor shall receive one-half his usual fee. Section 1283 does not seem to provide for the payment of half fees by the county in any case where the defendant serves out a sentence on the public roads, except in New Hanover County. It would seem, therefore, that other counties are liable in case of conviction only "when the defendant is unable to pay

the cost." This fact is not found by the court in this case; but, as no point is made in respect thereto, we will assume that the judgment is based upon that fact. It will be observed by reference to section 1355 that when any county has made provision for working (599) convicts upon the public roads, it is made the duty of the judge holding court in such counties to sentence to imprisonment at hard labor on the public roads for such terms as are prescribed by law for imprisonment in the county jail. No provision is made in this section for cost, except where persons are imprisoned for nonpayment of cost, and in these they are to be detained only until they repay the county to the extent of the "half fees charged up against it," thus showing that the Legislature recognized the liability of the county in such cases only for half fees. We find nothing in the statutes authorizing judgment against the county in criminal cases, except those specially named, for more than half fees. The judgment of his Honor must be modified in that respect. The county will pay half fees, unless the commissioners shall wish to raise the question of defendant's insolvency, which they may do when motion is made to modify the judgment in the Superior Court.

Modified.

STATE v. WADE CLAYTON.

(Filed 19 February, 1908.)

1. Public Roads—Failure to Work—Justice's Court—Jurisdiction.

Under Revisal, 3779, the punishment for failure to work the roads is cognizable only in courts of justices of the peace, and the Superior Court can acquire jurisdiction only by appeal.

2. Same—Appeal—Proceedings Quashed.

Where the justice of the peace has exclusive jurisdiction of the offense and binds the defendant over to the Superior Court, the latter court having jurisdiction upon appeal only, the proceedings must be quashed.

3. Public Roads—Summons to Work—Adjournment.

The overseer of public roads must comply with the statutory provisions in having the roads worked, causing those summoned to work either two days or one, as the occasion requires, allowing an interval of at least fifteen days, and adjourn only on account of rain, sickness, or other unavoidable cause, and not merely for his own convenience.

4. Same—Overseer—Reasonable Discretion—Burden of Proof.

Under an indictment for failure to work the public roads, where there is a controversy as to an adjournment by the overseer, the burden is on the State to show the overseer therein exercised a sound and reasonable discretion.

STATE *v.* CLAYTON.

CRIMINAL ACTION for refusing to work the public roads, tried (600) before *O. H. Allen, J.*, and a jury, at October Term, 1907, of BEAUFORT.

From a verdict of guilty and the judgment rendered, the defendant appealed.

Assistant Attorney-General for the State.
Nicholson & Daniel for defendant.

BROWN, J. This proceeding must be quashed, as the Superior Court acquired no jurisdiction. The only jurisdiction it could exercise is appellate, and the record shows that no judgment was rendered by the justice of the peace, or sentence imposed, but that he acted only as a committing magistrate and bound the defendant over to the Superior Court. In that court no indictment was sent, and very properly so, as that court had only appellate and not original jurisdiction. Under section 3779, Revisal 1905, a failure to work the road is made a misdemeanor, punishable by fine of not less than $2 nor more than $5, or by imprisonment not exceeding five days. This gives the justices of the peace final jurisdiction, with the right of appeal by defendants. As the point presented upon this appeal may arise again, we will decide it. The defendant was summoned to work the public roads on a Saturday, and worked until noon, when he was discharged. The overseer summoned him again to work the following Friday and Saturday. This was illegal. Section 2721 of the Revisal is explicit: "The overseer of the road shall, as often as the road shall require it, not more than six days in any one year, summon the hands of his section to work on the road, but the said hands shall not be required to work continuously for a longer time at any one time than two days, and (601) at least fifteen days shall intervene between workings, except in case of special damage to the road resulting from storm." The same section further provides "that no hands shall be required to work for a less time than seven hours or a longer time than ten hours in any one day."

We cannot concur in the contention that the maxim that the law does not recognize parts of a day applies to the working of the public roads. When the overseer "calls out the road hands" it is his duty to work them a full day, from seven to ten hours each day, for two days if necessary. If not necessary to work two days, then for one day. After that working, then fifteen days must intervene before another, and the total days must not exceed six in any one year. The overseer may, on account of rain, sickness, or other unavoidable cause, adjourn a working from one day to the next, or to some other day, and then finish the requisite number of hours to complete one day's work, but

his discretion is not an arbitrary one and must be exercised upon reasonable cause. In the event of a controversy, the burden would be on the State to show that the overseer exercised a sound and reasonable discretion. The statute does not contemplate that the overseer may call out the road force and work the roads a few hours, and then, without reason or necessity, but for his own convenience, adjourn to the next or some subsequent day, and then complete the seven to ten hours which constitute one day's work.

Let the costs of this Court be paid by the county of Beaufort.

Proceeding dismissed.

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(602)

STATE v. J. M. ARNOLD.

(Filed 26 February, 1908.)

1. Rape—Assault with Intent—Character Prosecutrix—Issues.

Under an indictment for an assault with intent to commit rape, the character of the prosecutrix is not an issue in itself, but is incidental and collateral, and evidence of specific charges of adultery or corrupt acts is incompetent.

2. Same—Instructions.

Instructions requested, "that the evidence was not sufficient to convict, and the jury should find the defendant not guilty," are properly refused on a trial for an assault with intent to commit rape, when there is evidence sufficient for the jury to consider either upon the question of simple assault or of the offense charged.

3. Appeal and Error—Verdict Set Aside—Discretion.

The refusal of the court below to set aside, in his discretion, the verdict of the jury is not reviewable on appeal. Affidavits used for the purpose of influencing this discretion do not influence the Supreme Court, and they are not considered.

ASSAULT with intent to commit rape, tried before *Lyon, J.*, and a jury, at September Term, 1907, of CRAVEN.

The defendant was convicted of an assault with intent to commit rape, and from the judgment imposed appealed.

Assistant Attorney-General, T. D. Warren, and Simmons, Ward & Allen for the State.

Moore & Dunn, W. D. McIver, and D. L. Ward for defendant.

BROWN, J. There was evidence introduced tending to prove that the prosecutrix is a woman of bad character, and evidence that she is a

woman of good character. The defendant offered to prove specific acts of adultery upon the part of the prosecutrix with others than himself, and that on one occasion she exhibited to a male companion a photograph of herself in the nude. Such testimony is incompetent. It is almost universally held that proof of particular facts is in- (603) admissible in impeaching a witness, because such proof tends to a number of collateral issues, and neither the witness nor the party producing such witness can be prepared to meet them.

The character of a witness is not an issue in itself. It comes in question incidentally and collaterally, and, therefore, specific charges of corrupt acts are not to be heard to impeach it. *S. v. Henry,* 50 N. C., 70; *S. v. Hairston,* 121 N. C., 582; *Barton v. Morphes,* 13 N. C., 521; *S. v. Bullard,* 100 N. C., 486; *Nixon v. McKinney,* 105 N. C., 23.

The defendant requested the court to charge the jury "that the evidence was not sufficient to convict, and that they should find the defendant not guilty." In framing this prayer, the learned counsel for the defendant were inadvertent that the defendant, under this indictment, could be convicted of a simple assault, as well as of the more serious offense. We consider the prayer, however, as bearing on the latter. It is only necessary to quote a portion of the evidence of the prosecutrix in considering this exception: "I was gaing to halloo for Cæsar to take him out. He said: 'If you don't consent to my wishes I will kill you.' I told him I would suffer to die before I would submit. He then got up in the floor and took his knife out of his pocket, and said: 'The day I was married my happiness and pleasure were buried.' I said: 'Julius, get out of here! If you don't, I will halloo for Cæsar.' He said: 'If you do, I will cut your damned throat.' He then grabbed me by the hand and tried to force me into the other room, and he saw I was not going to be forced in there. He then knelt down by my chair, with his left arm around my neck and his knife in his left hand and his right hand was under my clothes to my knees. My little girl waked up, and immediately he loosed me and took his chair, and I left the room for help. He started out behind me. I was afraid to go around the wall, and I went under my porch." There was evidence corroborating the prosecutrix and also contradicting her statements and tending to impeach her credibility. It is plain his Honor properly submit- (604) ted the question to the jury.

It appears in the record that certain petitions were presented to his Honor, signed by jurors and citizens, in the endeavor to induce him to exercise his discretion and set aside the verdict, which he declined to do. We have held in numerous cases that we will not review the exercise of such discretion. Those papers and petitions have been improperly and inadvertently, we suppose, incorporated in the record and case

on appeal sent to this Court. Consequently, they have figured largely in the eloquent and earnest addresses made to us by the defendant's counsel.

As we cannot consider them and are not influenced by them in passing upon the errors of law assigned, they should never be sent up to this Court.

No error.

STATE v. H. A. PARAMORE AND J. A. RICKS.

(Filed 26 February, 1908.)

1. Jurors—Improperly Drawn—Grand Jury—Improperly Constituted.

While, generally, the provisions of the statute for drawing and summoning jurors are directory, the grand jury is illegally constituted when one whose name was not drawn from the boxes was summoned by mistake, and served by mistake.

2. Jurors—Grand Jury—Improperly Constituted—Motion to Quash—Plea in Abatement.

A motion to quash a bill of indictment upon the ground that the grand jury was illegally constituted is substantially a plea in abatement, and in such instances is proper and regular.

3. Jury—Grand Jury—Improperly Constituted—Motion to Quash—Apt Time.

A motion to quash an indictment, made upon arraignment and before pleading, for that the grand jury was improperly constituted, is in apt time. Revisal, 1970.

(605) EMBEZZLEMENT, heard by *Lyon, J.*, at April Term, 1907, of PITT.

Defendants were indicted for embezzlement, and moved to quash the indictment, upon the ground that the grand jury had been improperly constituted. With reference to this matter, the judge found the following facts:

1. William McLawhorn was summoned as a juror for April Term, 1907, and his name was returned to the court by the sheriff as a juror, with thirty-five other names, making thirty-six in all on the jury list. When the court convened, William McLawhorn was one of the first eighteen persons drawn and selected as grand jurors, and he served on the grand jury for the term at which the bill of indictment was found against the defendants.

2. The name of William McLawhorn was not in the jury box when the commissioners of the county drew the jurors to serve at the April term, and his name was not, therefore, drawn from the jury box, but the name Woodie McLawhorn was drawn by the commissioners as a juror to serve at the said term, and the sheriff confusing the two

names, placed the name of William McLawhorn, instead of that of Woodie McLawhorn, on the jury list, and summoned William McLawhorn in the place of Woodie McLawhorn to serve as a juror, and the said William McLawhorn appeared in answer to the summons and served as a juror. Woodie McLawhorn, whose name was drawn from the jury box by the commissioners, was not summoned as a juror and did not serve.

Upon the facts so found by the court, the indictment was quashed. The State excepted to the ruling of the court, and appealed.

Assistant Attorney-General for the State.
Moore & Long for defendants.

WALKER, J., after stating the facts: The defendants upon (606) their arraignment, and before pleading, moved to quash the indictment, and supported their motion by affidavits. This was substantially a plea in abatement, which is the proper and regular method of attacking the bill upon the ground stated in the record. *S. v. Haywood,* 73 N. C., 437. Provision is made by the law for drawing and summoning jurors. Revisal, secs. 1964, 1965, 1966, and 1976. The requirements of the law, with very rare exceptions, have been held by this Court to be directory. *S. v. Daniels,* 134 N. C., 646; *S. v. Haywood, supra.* The statute provides that the board of commissioners of each county shall draw the jurors who are to serve at a term of the Superior Court from box No. 1, which contains the scrolls containing the names of those who are qualified to serve as jurors, and who are, therefore, subject to jury duty. When the jurors are thus drawn, the scrolls are deposited in box No. 2. The clerk of the board is required to prepare a list of the jurors so drawn and to deliver the same to the sheriff of the county, who summons the jurors whose names are on the list to attend at such court. In this case it appears that the sheriff substituted the name of William McLawhorn for that of Woodie McLawhorn. The name of the former was not on any scroll in box No. 1, and he was not drawn as a juror by the commissioners. The sheriff, under the circumstances of this case, had no authority of law for substituting the one person for the other as a juror, and his act in doing so was, of course, utterly void. William McLawhorn was not a duly qualified juror for the term of the court at which the bill of indictment was returned by the grand jury, and, as he was selected and served as a grand juror for that term, and, at least presumably, took part in finding the bill, the grand jury was not properly constituted.

This is an exception to the general and almost universal rule that the provisions of the law for drawing and summoning jurors are direc-

(607) tory. Here, there was what has been called a positive disqualification of one of the jurors; indeed, William McLawhorn was not and could not be a grand juror, and the grand jury was, for that reason, illegally impaneled to serve as the accusing body at that court. In *S. v. Seaborn,* 15 N. C., at p. 309, *Chief Justice Ruffin* refers to the subject thus: "It is insisted that the grand jury must be composed only of those summoned, and that if one be impaneled on it by a different name from all those summoned, he must be taken to be a different person, and the bill is not well found. This objection, if founded in fact and taken in due season, would, in the Superior Court, have been unanswerable, and had it then been overruled it would have been error." It is true that he was there speaking for himself, but a *dictum* emanating from him is of itself entitled to the greatest consideration and is at least very persuasive authority, but it has more recently been approved and adopted as a correct statement of the law. *S. v. Haywood supra; S. v. Daniels, supra; S. v. Griffice,* 74 N. C., 316; *S. v. Sharp,* 110 N. C., 604; *S. v. Watson,* 86 N. C., 624; *S. v. Baldwin,* 80 N. C., 390; *S. v. Smith, ib.,* 410. In this case the motion of the defendants was made in apt time. Rev., 1970, and cases *supra.*

For the reason we have given, the bill was not well found and was properly quashed by the court.

No error.

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(608)

STATE v. JAMES WHITE.

(Filed 26 February, 1908.)

1. Burden of Proof—Defenses—"Former Acquittal"—Identical Offense.

The burden of proof is upon the defendant, under plea of former acquittal, to show that he had been formerly acquitted for the identical offense, in law and in fact.

2. Power of Court—"Former Acquittal"—Collateral Inquiry.

The plea of former acquittal is a collateral civil inquiry as to the former action of the court, and the verdict on such an issue may be set aside in the discretion of the court.

3. Witnesses—Indictment—"Former Acquittal"—Civil Action—Criminal Action.

The defendant, under plea of former acquittal of the offense charged in the bill of indictment, may become a witness in his own behalf, and may not be forced upon the stand as a witness in relation to the criminal charge.

4. Witnesses—"Former Acquittal"—Evidence—Proof.

The indictment and judgment in a former action, introduced in evidence under plea of former acquittal, are sufficient to show the nature of the offense charged therein; but the defendant must prove that the two charges are for the same offense.

5. Indictment—Date of Offense—Immaterial Charge—Evidence.

The date of the offense charged in the bill of indictment is immaterial, and is no evidence, upon a trial under a separate indictment, that defendant had been acquitted for the same offense.

APPEAL from *W. R. Allen, J.*, at February Term, 1908, of CRAVEN.
Judgment of guilty, and defendant appealed.
The facts sufficiently appear in the opinion of the Court.

Assistant Attorney-General for the State.
Simmons, Ward & Allen, and R. A. Nunn for defendant.

CLARK, C. J. The defendant was acquitted of carrying a concealed weapon, the offense being charged in the bill as committed on 24 December, 1907. At the same term he was indicted for carry- (609) ing a concealed weapon, on 5 January, 1908. To this indictment the defendant pleaded the acquittal in the first-named case as a bar, and also not guilty. The evidence was that the second offense occurred on 5 January, 1908, and was a distinct occurrence, and, indeed, at a different place from that for which the defendant was acquitted in the first indictment, which had occurred, according to the State's evidence offered in the trial of that case, on 24 December, 1907.

His Honor properly refused to instruct the jury, "If they believed the evidence, that the defendant had been heretofore acquitted of this offense."

In *S. v. Hankins*, 136 N. C., 623, *Walker, J.*, fully and clearly discusses the whole subject, and says that, to support a plea of former acquittal, both prosecutions "must be for the same offense, both in law and in fact," citing *S. v. Jesse*, 20 N. C., 98; *S. v. Nash*, 86 N. C., 656; *S. v. Williams*, 94 N. C., 891. To same purport, *Connor, J.*, in *S. v. Taylor*, 133 N. C., 759.

It is true that the date charged in the bill is immaterial. Revisal, sec. 3255. The two indictments did not charge the offense on the same day. The defendant, on whom rests the burden of this plea, cannot be either prejudiced or protected by the allegation of the date in the bill. He must show that, in fact, the evidence which had been offered to prove the first offense indicated the same offense, *i. e.*, the same transaction, therefore occurring at same time and place as that put in evidence on this trial.

The defendant's counsel contends, and correctly, that a defendant may be tried, regardless of the date charged in the bill, for the offense

described therein, upon proof of any commission of that offense at any time prior thereto, not barred by the statute of limitations; and it is also true, as contended, that he cannot be tried more than once for the same offense. But this does not mean that one convicted of
(610) carrying concealed weapons, or of larceny, or of any other crime, is immune thenceforth as to any other charge of the same nature, if the crime was committed prior to return of that indictment. The burden is on the defendant to plead and to prove that the former conviction or acquittal was for the identical offense. This plea is not of a criminal nature, touching defendant's conduct, but is a collateral civil inquiry as to the former action of the court, and, therefore, the verdict on such issue, whether in favor of or against the defendant, may be set aside by the judge in his discretion, or if against the weight of the evidence. *S. v. Ellsworth,* 131 N. C., 774; 92 Am. St., 790. The production of the indictment and judgment in the former action is sufficient to show the nature of the offense charged therein (but not the date or place, which are immaterial under our statute), and the defendant must by parol show that the two charges are for the same transaction. This can never be difficult to do. Indeed, the defendant is a competent witness, and his going on the stand in this civil issue will not compel him to go on the stand in the criminal issue. The two issues can be tried separately. *S. v. Winchester,* 113 N. C., 641; *S. v. Ellsworth, supra.*

If this were not so, no one could be indicted and tried for carrying concealed weapons more than once in two years, though he should violate the law in that respect every day of that period; or, if acquitted on one single charge of retailing without license, the defendant would be law proof for the period of two years prior to finding a bill as to all other charges of that nature. The same would be true as to other offenses.

No error.

Cited: *S. v. Cole,* 150 N. C., 807; *S. v. Freeman,* 162 N. C., 598, 602; *S. v. Smith,* 170 N. C., 744.

(611)

STATE v. BUD TILLMAN.

(Filed 18 March, 1908.)

Murder—Evidence—Question for Jury.

Evidence is insufficient, upon which to base a verdict of guilty against the defendant, which tended only to show that defendant, shortly before the time of the murder of the deceased, was seen with the other two defendants, and that he went with them in the direction of the place where the murder was committed, the defendant in front; one of the other defendants had an open knife under her apron and threatened to cut the deceased; witness left them and met deceased about 5 or 6 yards distant and going in their direction. No evidence of an eyewitness to the murder, but deceased was soon thereafter seen with a knife wound in his breast. Soon after the time fixed as that of the murder, and after it was known that deceased had been killed, defendant was seen, and was nervous and somewhat excited.

THE three defendants were indicted for the murder of one Jeff. Armstrong, and the cause was tried before *Long, J.*, and a jury, at December Term, 1907, of JOHNSTON.

At the conclusion of the testimony the defendant Bud Tillman prayed the court to instruct the jury that there was not sufficient evidence upon which a verdict of guilty could be based as to him. The prayer was declined, and defendant excepted. There was a verdict of guilty of murder in the second degree as against all of the three defendants, with a recommendation of mercy in behalf of defendant Tillman. Judgment on the verdict, and defendant Bud Tillman again excepted and appealed.

Assistant Attorney-General for the State.
Pou & Brooks and L. H. Allred for defendant.

HOKE, J. The Court is of opinion that there is no sufficient evidence to justify a verdict of guilty against the defendant Bud Tillman, and that his prayer for instruction to that effect should have been given by the court. The declarations and admissions of the defendant Lula Jones, made after the homicide, having been properly re- (612) stricted by the court to the question of her own guilt or innocence, there is no conclusive evidence that Bud Tillman was actually present at the precise time of the occurrence, and none at all, as it seems to us, that he took part in or in any way aided or encouraged the murder.

There was evidence on the part of the State to the effect that, on the night of 29 September, 1907, in the town of Selma, Jeff. Armstrong

was killed by being stabbed in the breast with a knife. Tom Durham, witness for the State, testified as follows: "Between Wall's and Burgess's store I met the defendants; they were standing between the two stores, near 9 p. m.; raining. Lou called me and asked me to go home with her. I told her I didn't have time. She caught my arm. I went as far as the railroad; I turned back at railroad. I was on one side of Lou Jones and Hubert Jones on the other; Tillman in front. She (Lou) had an open knife under her apron. She said she was going to cut 'Dummy' (Bud Armstrong). I turned back, and went to Vick's store and bought some socks; two blocks; then I went to Wall's store, two blocks; got at Wall's store, I learned that Bud Armstrong was dead. She had the knife in her hand, under her apron, and open, when she said she was going to cut Armstrong. The other defendants said nothing. When I left them at railroad I met Armstrong and he was 5 or 6 yards from defendants and going toward the railroad, and the defendants were at the railroad. Armstrong was coming towards the defendants. It was up by railroad. Lula said she would cut Armstrong. Lula had been drinking. Deceased was deaf; couldn't hear anything at all; you had to motion at him. Me and Jim O'Neal went to dead body, lying in front of Lile's store. He was stabbed in right breast. We went as soon as we heard he was killed, at Wall's store." Cross-examination: "It was dark night. It is a barlow knife; saw (613) in light of Wall's store; it was open knife. It was raining hard. I didn't speak to Bud Armstrong; didn't tell him what Lula said. Hubert was with Lula when I left. I didn't tell Lula, 'Here comes Bud Armstrong now'; he was coming; could be seen from the light of Wall's store. I didn't hear fuss after I went back to store. *Feme* defendant lives in house with my mother. Hubert Jones, a married man; Lula Jones, a married woman." Cross-examination by Tillman: "Don't know that Bud Tillman had anything to do with it." Redirect: "When I turned to go back, I went fast. Light shone from the store and depot. Didn't see the cutting. All three standing together when I left them. Can't tell length of blade."

Tom Wiggins, for the State, testified that on the night of the occurrence, about 9 or 9:10, defendant Lula Jones came to his house, knocked at his door and came in; that her clothes were torn in front; she had stepped through them and they were dragging behind her. She said: "Mr. Tom, please don't give me away. I stabbed a man down the street, and I expect he is dead. Won't you go and see?" The witness testified to further statements of this defendant, Lula Jones, but to no further statements which were relevant or competent against defendant Bud Tillman.

N. R. Batten, a witness for the State, testified that defendant Bud Tillman had a talk with witness after the homicide; that witness made no threats or promises to induce any statements, and that defendant Tillman told witness that "Hubert Jones gave Lula Jones the knife and she stabbed the deceased."

J. L. Gurley testified as follows: "Know Hubert Jones; he worked for me. Remember time of killing. Saw him often during day. Hubert Jones owned a knife, a long barlow; Jones owned one something like the knife exhibited in evidence."

D. B. Perkins: "I am foreman Virginia-Carolina Chemical (614) Department. Jones worked for us; saw him day of homicide. About week before homicide I saw Hubert Jones have a long barlow knife, something on order of the knife exhibited in evidence."

F. M. Cawthorne: "Live in Selma. Know defendant Jones; saw him with large barlow knife; I sharpened it once for him; it was a long barlow, on order of knife in evidence."

W. A. Edgerton: "Know Bud Tillman. I was in Selma, in my store, on night of homicide. Saw him all that day; he worked for us. A few minutes after I heard of homicide (about 9 p. m.), I saw Bud Tillman; he came in store for settlement. I heard that Bud Tillman had got killed. I remarked to him I heard he was killed. I said to him I was a little bit elated; thought if he had been killed I would have saved $5 from his work. Tillman made no reply; he appeared nervous; he was nervous; he looked excited, somewhat. He immediately went to the office and got his money and left."

J. W. Liles: "Do business in Selma. Width of street, about 120 feet from sidewalk to Liles' store to the center of Main Street; Smithfield Street crosses there, crossing to Smithfield; leaves warehouse to left. Miranda lives about 120 feet from middle of railroad. I had just come back from barber shop. I saw some one dash under shelter; then in comes the deceased at door and asked me to phone for Dr. Person; he had his shirt wide open, and the blood was gushing out at a cut place. I hollered at him to get back (I didn't know he was deaf). As I walked to phone, he dropped back, face foremost, throwing wound about the doorsill. I phoned for Dr. Person. He died. I saw the wound; it looked like a knife had gone into him. Doctor come and said he was cut; he ran his finger all around in wound. The man died in eight minutes."

This presents the entire testimony which in any way tends (615) to establish the guilt of the defendant Bud Tillman, and in no correct view of it, as the matter now appears, would it justify a verdict

of guilty against him. *S. v. Goodson,* 107 N. C., 798. On the testimony, as disclosed in the record, the prayer of the prisoner should have been given, and for the error in refusing it the prisoner is entitled to a New trial.

STATE v. GEORGE AND FRANK FREEMAN.

(Filed 25 March, 1908.)

1. Appeal and Error—Objections and Exceptions—Abandoned—Brief.

Exceptions taken at the trial and not relied on in the brief are deemed abandoned in the Supreme Court. Rule 34, 140 N. C., 666.

2. Evidence—Bloodhounds—Circumstance—Corroborative.

In following the tracks of defendant it was competent to show that a bloodhound of pure blood, trained from a pup to run the tracks of men only, and of proven reliability, which would only run upon the scent upon which he had been put, "went to the shoe (of defendant), referred to by another witness, smelt it and whined, then turned to defendant and started to go on him." Such acts are competent both as a circumstance and as corroborating evidence.

3. Evidence—Bloodhounds—Tracks—Finding of Stolen Goods—Sufficiency.

Upon the trial of defendants, charged with breaking into a store and stealing shoes, evidence that they were at the store Saturday evening, the store was broken into that night, bloodhounds, trained and tested, followed their tracks, empty shoe boxes were found along the route, three-quarters of a mile from the store where tracks were found, same man's tracks that had come from the store by the side of wheel tracks, which led to the house of one defendant and near to that of the other one, bloodhound whined when he smelt defendant's shoe and tried to attack him, and the shoe fitted into and corresponded with the tracks, and shoes of same stock as that stolen found between mattresses on the bed of the other defendant, is sufficient to sustain a verdict of guilty.

4. Evidence—Shoe Fitting Tracks—Competency.

Evidence that defendant's shoe fitted into and corresponded with tracks found at the place of the theft and followed to defendant's house, with other facts and circumstances indicating his guilt, is competent.

(616) APPEAL from *Long, J.*, at February Term, 1908, of COLUMBUS.

From judgment of conviction defendant appealed.

The facts sufficiently appear in the opinion of the Court.

Assistant Attorney-General for the State.

J. B. Schulken for defendants.

CLARK, C. J. Indictment for breaking into storehouse with intent to steal. Several exceptions were taken at the trial, but only two are relied on in defendants' brief. The others are taken to be abandoned. Rule 34, 140 N. C., 666.

The first exception is that it was error to permit the witness to state that "the dog carried us to the shoe," on the ground that it was making the act of the dog substantive testimony and not corroborative of any particular act, as the shoe was not upon any one. The same exception was taken to another witness, who said "the dog went to the shoe," referred to by the other witness. "She smelt the shoe and whined. She then turned to the defendant and scented him and started to go onto him, and I took her away." His Honor stated to the jury that the court allowed the foregoing evidence only as corroborative, and in his charge told them: "The evidence as to the dog is only admitted, and so explained to the jury, to corroborate other evidence as to tracks offered by the State, and after the dog had been shown to have been trained to follow only the tracks of mankind."

If there was error it was against the State, for it is not correct to say that such evidence is admissible only in corroboration. In *S. v. Moore,* 129 N. C., 498, it was held that it must be either "a circumstance which would tend to connect the defendants with the (617) larceny or that it in any way corroborated the testimony of the witness." As said in *S. v. Hunter,* 143 N. C., 609, and cases there cited, "The conduct of the dog is competent evidence." The safeguard is that the dog was shown to be a bloodhound of pure blood, trained from a pup to run the tracks of men only; that she had been tried and proved reliable, "trained and tested." *Pedigo v. Com.,* 103 Ky., 41. The witness testified: "After she is put on the scent of one man she will not run after another. She has trailed the track of one man 15 miles, and through where a thousand had been."

Where the training, character, and conduct of the dog make his acts evidence, such acts may be either a circumstance or corroborating evidence. Their admission as evidence is not restricted to cases in which the dog's acts are corroborative only. It is sufficient if the evidence of the conduct of the dog, taken with other facts and circumstances in evidence, should be enough to authorize a verdict.

The other exception is to the refusal of the court to charge that there was no evidence. It was in evidence that the two defendants were at the store Saturday afternoon; the store was broken into that night; shoes and other goods stolen. Next day at noon the bloodhound was put on the tracks; the tracks were found at the store; the dog followed the tracks; empty shoe boxes were found along the track. Three-quarters of a mile off, they found where a cart had turned around; followed cart

tracks to within 100 yards of George Freeman's house, and the same men's tracks that had come from store, by side of cart track, and then followed the mule track quarter of a mile further, to Frank Freeman's house; followed the man's track 100 yards from cart track to George Freeman's house. On entering his house, the dog found a shoe on floor, whined and tried to attack George. This shoe fitted the track leading from store, and it had tacks on it corresponding to those (618) in the track of one of the men, and was run down in same manner. Had followed this shoe track by side of cart track within 100 yards of defendant's house; found a pair of shoes between mattress and bed at George Freeman's house—white, low-quarter women's shoes, of same stock of goods that had been stolen. The witness could not swear positively they were his shoes. Then there was above evidence of the dog following the track, whining when she found and smelt the shoe, the dog then trying to attack the defendant, and the shoe fitting the track and corresponding with it in other respects. Tracks are competent evidence. *S. v. Morris,* 84 N. C., 756; *S. v. Reitz,* 83 N. C., 634. The evidence was properly submitted to the jury, together with the evidence offered by the defense.

No error.

Cited S. v. Spivey, 151 N. C., 678, 679; *S. v. Norman,* 153 N. C., 594; *S. v. Wiggins,* 171 N. C., 816; *S. v. Martin,* 173 N. C., 809.

STATE v. JAKE WILLIAMS.

(Filed 1 April, 1908.)

1. Constitutional Law—Property Rights—Due Process.

The Constitution is the law of the land, in the sense that no citizen can be deprived of his rights thereunder by any department of the Government.

2. Constitutional Law—Unconstitutional Statute Void—Duty of Courts.

An offense created by an unconstitutional statute is void, and cannot be a legal cause of imprisonment; and in suits involving this question it is the duty of the court to declare its judgment thereon.

3. Constitutional Law—Statutes—Interpretation—Presumption of Validity—Reasonable Doubt.

The validity of a legislative enactment is presumed, and the court should never declare a legislative enactment unconstitutional, except after careful deliberation and patient attention, and then only when, in its judgment, it is clearly so, or so beyond a reasonable doubt.

4. Spirituous Liquors—Indictment—Witnesses Not Named in Bill—Competency.

A defendant charged with a violation of a statute in bringing intoxicating liquors into a certain county may be convicted upon the testimony of other witnesses than those marked on the bill.

5. Spirituous Liquors—Indictment—Sufficiency of Bill—Separate Counts Suggested.

A bill of indictment charging a defendant with violating a statute by bringing into a certain county "on one certain day, more than one-half gallon, to wit, one gallon of spirituous, vinous, or malt liquors," is not fatally defective; but it would be in better keeping with the letter and spirit of the Constitution to more particularly specify, in separate counts, the kind of liquor constituting the offense.

6. Constitutional Law—Spirituous Liquors—Property—Due Process—Police Powers.

Spirituous, malt, or vinous liquors are property within the meaning of the Constitution, when its manufacture or sale is lawfully prohibited by statute; and when the Legislature makes it an indictable offense to carry more than a certain quantity into a specified county, within a limited time, prohibiting its sale and not prohibiting its use, but authorizing its use for certain purposes, it is unconstitutional, for that it is a taking of property without due process of law, and not within the police power of a State.

7. Evidence—Legislative Powers—Change of Rule—When Unconstitutional.

While legislatures may generally change the rule of evidence relating to the trial of causes, they cannot do so when the effect is to deprive the citizen of a property right guaranteed by the Constitution.

CLARK, C. J., and HOKE, J., dissenting.

MOTION to quash indictment, before *Peebles, J.,* at August (619) Term, 1907, of BURKE.

The defendant was called to plead to the following bill of indictment:

"The jurors for the State, upon their oaths, present: That Jake Williams, late of the county of Burke, on 10 July, 1907, with force and arms, at and in the county aforesaid, did unlawfully and willfully have and bring into said county of Burke, on one certain (620) day, more than one-half gallon, to wit, one gallon, of spirituous, vinous, and malt liquors, the same not being then and there brought by the said Jake Williams to a druggist, for medical purposes, nor for delivery at the State Hospital, nor the School for the Deaf, nor Broadoaks Sanatorium, nor to Grace Hospital, in said county, for medical purposes, against the form of the statute in such cases made and provided, and against the peace and dignity of the State."

Defendant moved to quash. Motion allowed. The solicitor for the State appealed.

Attorney-General for the State.

No counsel contra.

CONNOR, J. By chapter 24, Laws 1907, the Legislature enacted a statute declaring that it shall be unlawful for any person to "manufacture, sell, or otherwise dispose of for gain" spirituous, vinous, or malt liquors in the county of Burke. The act contains the usual exceptions in regard to sales by druggists. It is also provided that neither the manufacture of domestic wines "nor the sale of such wines at the place of manufacture in quantities not less than one gallon" is prohibited. The place of delivery of any liquors brought into the county is declared to be deemed the place of sale. Common carriers are prohibited from bringing liquors into the county, etc. The statute is amended by chapter 806, Laws 1907, by adding at the end of section 1 the following: "It shall be further unlawful for any person, except to a druggist, for medical purposes, as aforesaid, to bring into said county of Burke, in any one day, more than one-half gallon of such spirituous, vinous, or malt liquors, and every person so offending shall, upon conviction, be fined or imprisoned, in the discretion of the court." The motion to quash the bill of indictment involves the proposition that chapter
(621) 806 is an unwarranted interference with defendant's property and with his liberty; that it is violative of the Constitution, which declares that "Among the inalienable rights of all men are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness," of which they cannot be deprived but "by the law of the land." That the Constitution is "the law of the land," in the sense that no act of either department of the Government which violates its provisions or exceeds its powers can be enforced to deprive the citizen of his life, liberty, or property, is a fundamental truth. To deny it is to assert that constitutional government is a failure, and liberty, regulated by law, has no abiding place in our political system. The Constitution is, of necessity, as well as the declared will of the people, the supreme law, and in no proper, legal sense can any act of either department of the Government which violates its provisions or exceeds the powers delegated be the law. To state the same proposition affirmatively, an act of the Legislature which finds no support in the Constitution or is not an exercise of the power conferred therein, imposes no duty, deprives the citizen of no right, and subjects him to no penalty. This is a "first principle," the recognition of which is essential to the preservation of liberty.

"If the Constitution prescribes one rule, and the law another and a different rule, it is the duty of the courts to declare that the Constitution, and not the law, governs the case before them for judgment." *Curtis, J., Scott v. Sanford,* 19 How., 628.

"An unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous,

but is illegal and void, and cannot be a legal cause of imprisonment." *Bradley, J., Ex parte Siebold,* 100 U. S., 376.

"The limitations imposed by our constitutional law upon the action of the Governments, both State and National, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions." *Matthews,* (622) *J., Hurtado v. California,* 110 U. S., 356.

"An unconstitutional act is not a law; it binds no one and protects no one." *Field, J., Huntington v. Worthen,* 120 U. S., 101.

"No court is bound to enforce, nor is any one legally bound to obey, an act of Congress inconsistent with the Constitution. In this country the will of the people as expressed in the fundamental law must be the will of the courts and legislatures." *Harlan, J., Robertson v. Baldwin,* 165 U. S., 297.

"Whatever the people, framing their organic act, have declared to be the limits of legislative power, and the modes in which that power shall be exercised, must always be recognized by the courts, State and National, as obligatory." *Brewer, J., Stearns v. Minnesota,* 179 U. S., 241.

It is the right of the citizen, when called to the bar of the court, to appeal to the Constitution and demand that the court declare whether the statute which he is charged with violating be "the law of the land." To make this right of any value or protection to the citizen, it must be the duty of the court to declare its judgment thereon. To deny this is to keep the promise to the ear and break it to the hope—to make of none effect the declaration that ours is a government of law and not of men.

"It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this Court than to exert its full authority to prevent all violation of the principles of the Constitution." *Harlan, J., Downes v. Bidwell,* 182 U. S., 382.

Judge Iredell, in *Calder v. Bull,* 3 U. S., 399 (1798), referring to the omnipotence of the British Parliament and its unrestricted power, from which they had suffered so much, and against which they waged successful war, said: "In order, therefore, to guard against so great an evil, it has been the policy of the American States, which (623) have individually framed their State Constitutions since the Revolution, and of the people of the United States when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress or of the Legislature of the State violates those constitutional provisions, it is unquestionably void."

"It is axiomatic that the judicial department of the Government is charged with the solemn duty of enforcing the Constitution, and, therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the Constitution as against any legislation conflicting therewith, and it has become now an accepted fact in the judicial life of this Nation."

The people, in the exercise of their political sovereignty, established the Government, delegated to it certain enumerated powers, assigned to it appropriate functions, established departments and assigned to them appropriate powers and duties, imposed such limitations as experience had taught to be necessary for the preservation of liberty, and, to the end that the Government should not, by construction, implication, or otherwise, deprive them of unenumerated but "inalienable rights," declared: "This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people." Art. I, sec. 37. This Court, in *Bayard v. Singleton,* 3 N. C., 42 (1787), after most careful consideration "and with great deliberation and firmness," unanimously declared that no act which the Legislature could pass could by any means repeal or alter the Constitution. However much we may desire to sustain the acts of the Legislature as a coördinate department of the Government, we may not, without being recreant to the duty imposed upon us and the rights of the citizen, refuse to decide firmly and fearlessly
(624) the issue which he makes with the Government. In the discharge of the duty and the exercise of the power to pass upon the validity of the statute, we are admonished by the uniform decisions of the courts that we should "approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in our judgment, beyond reasonable doubt." *Shaw, C. J.,* in *Wellington, Petitioner,* 16 Pick., 95; Cooley Const. Lim., 182. Another great judge has said: "It is but a decent respect due to the wisdom, integrity, and patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt." *Washington, J., Ogden v. Saunders,* 12 Wheat., 270.

"Necessarily, the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so in a proper case cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question." *Fuller, C. J., Pollock v. Farmers L. and T. Co.,* 157 U. S., 554.

"It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case." *Waite, C. J., Sinking Fund Cases,* 99 U. S., 718.

The same principle has been announced and uniformly followed by this Court. Before, however, discussing the principal question, we deem it proper to call attention to the vague and uncertain terms in which the bill of indictment is drawn.

The defendant is charged with bringing into the county of Burke, "on one certain day, more than one-half gallon, to wit, one gallon of spirituous, vinous, or malt liquors." The names of two witnesses are marked on the bill. Under this indictment it is held, by fre- (625) quent rulings of this Court, that the defendant may be convicted, upon the testimony of witnesses other than those marked on the bill, of bringing into the county, on any day within two years prior to 10 July, 1907 (except for the fact in this case that the act was not passed until 8 March, 1907), of more than one-half gallon of either wine, whiskey, brandy, beer or other liquor. While de do not hold that the bill is fatally defective, we think that it barely corresponds to the letter or spirit of the constitutional provision that "in all criminal prosecutions every man has the right to be informed of the accusation against him." The courts have wisely given a liberal interpretation to statutes relaxing the rigid rules regarding the particularity required in the bill of indictment which formerly prevailed. It would seem that the grand jury could have made its presentment more specific by saying which of the prohibited kinds of liquors the defendant brought into the county. It is hardly probable that he brought all of them in "on one certain day." The disjunctive "or" would indicate that the grand jury could not ascertain from the witnesses which of them he "brought in." Indictments against citizens subjecting them to imprisonment in default of bail awaiting trial, annoyance, mortification, and expense, be they never so innocent, are serious matters. It is a vain thing to preserve in our Constitution guarantees of personal liberty, such as that general warrants shall not issue, persons shall not be put to answer any criminal charge except upon indictment by a grand jury, etc., if the substance of them may be explained away by legal fictions and expedients based upon real or imaginary necessity. We would not put unnecessary restrictions upon the Government in the prosecution of crime, but substantial rights are not to be sacrificed. It would be very easy to make the several allegations in separate counts in the bill, thus enabling the grand jury to ascertain from the witnesses the very truth of the charge which "upon their oaths" they make against the citizen. (626)

Under our statutes, all manner of counts, which are but separate bills, may be included and a "dragnet" thrown out to insure the conviction of guilty men.

Coming to the discussion of the question presented by the motion to quash the bill of indictment—*i. e.*, whether the carrying into the county of Burke, without any unlawful purpose, more than one-half gallon of wine, brandy, etc., is reasonably related to its sale—certain questions may be regarded as settled.

The Legislature, in the exercise of the police power, may, by appropriate enactments, regulate and, if they deem it conducive to the public health, morals, peace, or safety, entirely prohibit the manufacture and sale of intoxicating liquors. For the purpose of making effective such legislation, they may make it criminal for any person to have such liquors in his possession, within the territory wherein the sale or gift is prohibited, with intent to sell or give away. They may prescribe or change the rules of evidence by making such possession *prima facie* evidence of a guilty intent. This Court has uniformly sustained legislation of this character. *Paul v. Washington,* 134 N. C., 363; *S. v. Barrett,* 138 N. C., 630; *S. v. Patterson,* 134 N. C., 612.

In *S. v. Dowdy,* 145 N. C., 432, we held that a certified copy of the record kept by the collector of internal revenue was competent, not only as evidence, but sufficient to sustain a conviction for selling liquor in violation of the statute.

We have endeavored to give full force and effect to the legislation enacted in this State for the suppression of the liquor traffic, resolving, as was our duty, every reasonable doubt regarding its validity in favor of the enactment. This legislation finds its support in the police power vested in the State Government. It is exercised primarily by the Legislature, which may adopt any measure within the extent of the power appropriate and needful for the protection of the public morals,
(627) the public health, or the public safety. *Mugler v. Kansas,* 123 U. S., 623.

That there is a limit to the police power which the courts must, when called upon in a judicial proceeding, ascertain and declare, is as well settled as the existence of the power itself. In *Mugler v. Kansas, supra,* wherein the question underwent a most thorough investigation, *Mr. Justice Harlan* says: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police power of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to these objects, or is a palpable invasion of rights

secured by the fundamental law, it is the duty of the courts so to adjudge, and thereby give effect to the Constitution." *S. v. Redmon* (Wis.), 114 N. E. Rep., 137. Recognizing the difficulty of fixing any definite limitation upon the police power, the courts have refrained from doing more in cases which have arisen than inquiring whether "the real purpose of the statute under consideration has a reasonable connection with the public health, welfare, or safety." *People v. Havnor,* 149 N. Y., 195; 52 Am. St., 707, cited in *People v. Lochner,* 171 N. Y., 145; 101 Am. St., 973. The result of the decisions has been well stated in 22 A. & E. Enc., 938: "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals, or general welfare, and that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do, in some plain, appreciable, and appropriate manner, tend towards the accomplishment of the object for which the power is exercised."
In *S. v. Moore,* 113 N. C., 697, *Shepherd, C. J.,* says: While (628) it is for the Legislature to determine what regulations are needed to protect the public health and secure public comfort and safety (and its measures calculated and intended to accomplish these ends are generally within its discretion and not the subject of judicial review), it is, nevertheless, true that this extensive authority must be exercised in subordination to those great principles of fundamental law which are designed for the protection of the liberty and the property of the citizen." *S. v. Moore* 104 N. C., 714.

In the entire range of legislation in the exercise of the police power, no subject has received more consideration or found more varied forms of expression than the efforts to prevent the manufacture and sale of intoxicating liquor. Beginning with the Maine liquor law, the statutes and codes of every State in the Union abound with every conceivable variety of legislation having for its object the regulation, restriction, or prohibition of the liquor traffic. The courts, both State and Federal, have been called on to construe, interpret, and pass upon the validity of many of these statutes. They have, with remarkable uniformity, sustained them, and, when of doubtful meaning, given them such interpretation as would suppress the evil and advance the remedy. An unusually careful and diligent examination by the Assistant Attorney-General and ourselves fails to discover any statute, either in terms or scope, similar to the one under discussion. While the legislatures have resorted to many expedients to control, regulate, restrict, and prohibit the manufacture and sale, either in entire States or counties, towns,

cities, or districts, we do not anywhere find any suggestion that the possession of intoxicating liquor without any unlawful purpose, or carrying it into the territory wherein its sale is prohibited, with no unlawful purpose, is made indictable. While by no means decisive of the power to do so, the fact that no such attempt has been made is worthy of (629) note in seeking the basis of the asserted power. It will be well to note the unusual, if not unprecedented, terms of the statute—what it prohibits and the penalties imposed for its violation. Any person who shall bring into the county of Burke in any one day more than one-half gallon of spirituous, vinous, or malt liquor, except for the purpose of delivery to a druggist for medical purposes, is guilty of a misdemeanor. Unless we may read into the statute an exception to save it from interfering with religious liberty guaranteed by the Constitution, a minister, steward, deacon, or elder of any church bringing into the county more than the prohibited quantity of wine violates this law. A man who brings into the county more than one-half gallon of wine for domestic purposes, or of spirits, for his own use or for that of his family, for medical or for any other purpose, is guilty. If he would escape the penalty, he may bring it in *to a druggist* for medical purposes, but not otherwise. No possible intent, purpose, or occasion can avail as a defense. A person passing through the county on the cars or in a private conveyance, having in his trunk or baggage more than the prohibited quantity, without stopping on his journey or having the slightest intent to sell or give it away, is guilty. Upon conviction, he may be fined or imprisoned in the discretion of the court. No limit has ever been fixed by this Court to the amount of the fine which may be imposed. We have lately sustained as not excessive a sentence of two years in the county jail and hard labor on the public roads for violating the liquor law. *S. v. Dowdy, supra.* Surely, when we recall that, upon an indictment so vague in its terms, upon a trial in which the defendant may be convicted upon testimony of witnesses whose names he has never heard and whom he has never seen until confronted by them, and no definite time is required to be fixed in the bill, the citizen may be convicted for conduct which, but for this statute, has neither legal nor moral guilt, may be fined in the discretion of the court or imprisoned and, in felon's garb, in company with felons, worked upon the public roads for two (630) years—the courts should carefully examine the basis upon which the power to thus restrict the liberty of the citizen rests. If the statute is within the police power, it is not within our province to question its wisdom. It is ours to declare and enforce the law of the land—the Constitution—the law which the people, in the exercise of their sovereignty, have made for their protection and our guide. It is no answer to the contention that the law will be administered with justice

and mercy—that only those who are guilty will be convicted and punished. Experience taught those who founded this State, established government, and secured its limitations by written constitutions, that the liberty of freemen could not be safely intrusted to the unrestricted sense of justice and mercy of any man or set of men. The test of the constitutionality of a statute is what it *empowers* those in authority to do.

If the quantity of intoxicating liquor which any person, for any purpose, has in his possession, except those named in the act, is a public nuisance in Burke County, it is unquestionably within the power of the Legislature to make it criminal to carry it there. No person has any legal right to create or maintain a public nuisance. This is elementary. Can it be said that the act of carrying the prohibited article into the county is, or that when carried there it becomes, *per se* a public nuisance? This suggestion was made in support of certain provisions of the Maine statute. *Shepley, C. J.,* said: "There is nothing which can be regarded as a nuisance when considered by itself alone and separate from its use. It is the improper use or employment of a thing which causes it to be a nuisance. It would be not a little absurd to declare that to be a nuisance, and as such liable to be abated and destroyed, which the act allows to be sold and purchased as an article useful for medicinal and mechanical purposes." *Merrimon, J.,* in *S. v. Yopp,* 97 N. C., 477, says: "The exercise of the police power does not extend to the destruction of property under the form of regulat- (631) ing the use of it, unless in cases where the property, or the use of it, constitutes a nuisance. In such cases, if the owner of the property suffers injury, it is such as happens in the unlawful use of it, or because the property itself, in its nature or application, is unlawful." *S. v. Tenant,* 110 N. C., 610. Does spirituous, vinous, or malt liquor cease to be property when its manufacture and sale are prohibited? *Shepley, C. J.,* in *Preston v. Drew,* 33 Maine, 558 (54 Am. Dec., 639), says: "It is, however, insisted on the argument that a person, by the common law, can no more acquire property in spirituous and intoxicating liquors than he can in obscene publications and prints. There is a clear and marked distinction between them. Such liquors may be applied to useful purposes. This is admitted in the act by its authorizing their sale for medicinal or mechanical purposes. It is their abuse or misuse alone which occasions the mischief. Obscene publications and prints are in their very nature corrupting and productive only of evil. They are incapable of any use which is not corrupting and injurious to the moral sense." In *Lincoln v. Smith,* 27 Vermont, 328, in a well considered opinion, it was held that the Legislature had the power to prohibit the traffic in intoxicating liquor and subject it to seizure, forfeiture, and destruction *when kept for that purpose. Bennett, J.,* says:

"The act does not declare that they (the liquors) are not property, and there is no language which should receive a construction to forbid their being property. Though there is a prohibition to sell them, yet that cannot prevent a man from having a property in them for his own use, without any intention to sell them, and they may be transported through the State when there is no intention to violate the law." In *Austin v. Tennessee,* 179 U. S., 343, it is said: "Whatever produce has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must, we think, be recog-
(632) nized as a legitimate article of commerce, although it may to a certain extent be within the police power of the State." So *Taney, C. J.,* in the *License Cases,* 5 How.; 504, says: "But spirits and distilled liquor are universally admitteded to be subjects of ownership and property."

If, then, the spirits, wine, or beer, as the case may be, which the defendant had on 10 July, 1907, was his property, he was, by virtue of the constitutional guarantee that he shall enjoy the fruits of his own labor and pursue his own happiness, entitled to carry it with him whithersoever he went, and apply it to his own use such manner as he saw fit, unless prohibited by some law enacted in accordance with and in the exercise of the power conferred upon the Legislature. The Legislature had the power to prohibit him from selling this property in the county of Burke. This it has done. It had the further power to prohibit him from having it in his possession or carrying it into the county with intent to sell, and to make the possession *prima facie* evidence of the unlawful intent. *S. v. Barrett, supra.* It has not undertaken to prohibit him from using it for himself or from keeping it for domestic purposes in his family. It has not undertaken to prohibit him from giving it away in the county. The language of chapter 24, Laws 1907, is "to sell manufacture, or otherwise dispose of *for gain.*" Conceding the power of the Legislature to prohibit any person from using or drinking wine, spirits, or beer as a beverage, or to have it in his possession or carry it into the county for that purpose, the prohibition imposed by the statute is not so limited. Except to deliver to a druggist for medical purposes, or to certain State and health institutions named, the carrying it into the county for *any purpose* is made a misdemeanor. Assuming that the wine or spirits described in the bill of indictment was the defendant's property, the fruits of his labor, he was entitled to carry it with him whithersoever he went, unless in doing so he injuri-
(633) ously affected the public morals, health, or safety, or his doing so was so reasonably related to the sale of intoxicating liquor, which is the thing prohibited in Burke County, as to come within the

police power. It is no answer to his contention to say that, if spirits, he would probably drink it, or, if wine, permit his family to use it for domestic purposes, because the law does not prohibit him from doing either.

Viewed from any possible point of view, the sole question is, What, if any, relation has the act of carrying into the county of Burke, in any one day, more than one-half gallon of vinous, spirituous, or malt liquors, in said county, to the sale of such liquor? In view of the numerous uses to which that quantity of such liquor may be put, other than selling, and of the improbability of any reasonable person carrying into the county the prohibited quantity for sale, can it be insisted that any such real or substantial relation to the sale exists?

The only case in which a statute at all similar to the one before us has been before the Court is *S. v. Gillman,* 33 W. Va., 146 (6 L. R. A., 847). The defendant was indicted for violating a statute making it a misdemeanor "to keep in his possession for another" spirituous liquor. Upon a motion to quash the bill of indictment, the Court said: "The keeping of liquor in his possession by a person, whether for himself or another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and, therefore, the statute prohibiting such keeping in possession is not a legitimate exercise of the police power. It is an abridgment of the privileges and immunities of the citizen, without any legal justification, and, therefore, void. . . . It is simply an attempt to make the possession of liquor, for any purpose, a crime. A very different question would be presented if the act had made it unlawful for any person to keep intoxicating liquors in his possession, either for himself or for another, for the purpose of selling it."

It is unquestionably true that the Legislature may make the (634) mere possession of burglars' tools, counterfeiting outfits, gaming tables, etc., obscene pictures or prints, and probably other articles incapable of any lawful use, indictable. They are essentially injurious to the public welfare—incapable of any use consistent with the public welfare. Many articles, such as decaying animals or things emitting noisome, poisonous vapors or odors, may be summarily destroyed. They are either not the subject of property rights or are public nuisances. We find no statute or decision of any court treating vinous, spirituous, or malt liquors within this classification. In *Washington v. Ah-Lim,* 9 L. R. A., 395, it is held by a divided Court that a statute prohibiting the use of opium, by smoking and inhaling the fumes thereof through an "opium pipe," is a valid exercise of the police power. Two of the five judges dissented. In *Ex parte Mon Luck,* 29 Oregon, 421, a statute

prohibiting any person from having in his possession or offering for sale opium and other enumerated drugs made from opium, who has not obtained a license from certain officers, was held valid. *Bean, C. J.*, said: "Opium is an active poison and has no legitimate use except for medicinal purposes; but it is frequently used to produce a kind of intoxication by smoking or eating," etc. Noticing the case of *S. v. Gillman, supra,* he says: "But the principle of that case has no application here. It is a matter of common knowledge that intoxicating liquors are produced principally for beverages, and so common has been their manufacture that they are regarded by some courts as legitimate articles of property, the possession of which neither produces nor threatens any harm to the public. But the use of opium for any purpose, other than as permitted in this act, has no place in the common experience or habits of the people of this country," etc.

It is unnecessary to further discuss these cases. The distinction, as pointed out by the courts making them, is obvious.

We do not hold that common carriers may not be forbidden to transport liquor into prohibition territory. That question is not be-
(635) fore us. Nor do we undertake to express any opinion regarding the effect of the Fourteenth Amendment upon the power of the States to deal with the manufacture or sale of liquor, or the power of Congress to legislate upon the question of interstate transportation. Nor do we express any opinion in regard to the right of the State to prohibit liquor bought in nonprohibition territory with intent and for the purpose of bringing into prohibition territory in such quantities as are reasonably related to or indicate a purpose to sell. We decide nothing except the question raised upon the record. Chapter 806, Laws 1907, prohibiting any person from carrying into the county of Burke in any one day more than one-half gallon of vinous, spiritous, or malt liquor, is not a valid exercise of the police power, for that it unduly restricts the right of the citizen to the use of his property, without any intent to violate any prohibited act in relation to it; that the carrying into the county of Burke of the prohibited quantity has no reasonable, substantial relation to the sale of liquors, as prohibited by law. It may be well to repeat that we have expressly held valid the "anti-jug" law, which makes the place of delivery the place of sale, thus effectually prohibiting the sale of liquor in one place in the State for the purpose of delivering in another place. *S. v. Patterson, supra.*

It it suggested that the defendant might, by way of defense, show that he had no unlawful intent, or that he carried in into the county for a lawful purpose. That would be to write language into the statute which is not there, and do violence to the intention of the Legislature. If its terms were doubtful and open to interpretation, it would be our

duty to so interpret it as to make it correspond to the Constitution, because we would presume that the Legislature intended to comply with the Constitution. We have retained this appeal from the last term and given to the question our most careful and anxious consideration. We are constrained, both by reason and authority, to conclude that in quashing the indictment there was (636)

No error.

CLARK, C. J., dissenting: The statute of 1907 (chapter 24) forbids any one to "bring" any quantity of spirituous liquor, however small, into the county of Burke, for any purpose whatever, even for the owner's use (wine excepted), by making it in the county, even out of one's own grain or fruit. It has been held universally that nothing in the Constitution prevents the expression of the will of the people to that effect by their representatives in the Legislature. It would require much ingenuity to frame a constitutional provision that would enable the Legislature to forbid the "bringing in" liquor, in any quantity, for any purpose whatever, by its manufacture in the county, and would at the same time disable the people, speaking through their Legislature, from prohibiting the "bringing it in" across the county line, when manufactured perhaps in an adjoining county.

If there is such a constitutional provision, no one has been able to find it. Certainly it has not been referred to or pointed out in the opinion of the Court. There is no express power conferred by the Constitution to hold any statute unconstitutional, and such power has not been asserted by any court anywhere outside of the United States. Three centuries ago Sir Edward Coke, tentatively but not judicially, put such doctrine forward in England, and he was so completely overwhelmed by the contrary argument by my Lord Bacon that it has never since been recognized as sound doctrine in England, and has been ever denied since by all the courts of the English-speaking world (and by all others) save this. Here, soon after the Revolution, the courts assumed this power without any constitutional provision conferring it. It has now long been acquiesced in by the courts, but with this well recognized limitation, that there must be a constitutional provision and there must be a statute in conflict with it, and the statute must, "be- (637) yond reasonable doubt (*Ogden v. Sanders,* 12 Wheat., 213; *Sutton v. Phillips,* 116 N. C., 504; Cooley Const. Lim., 254 [7 Ed.]), conflict with the provision in the Constitution." A statute cannot be held unconstitutional "on general principles," nor because the lawyer or lawyers on a court may think that the larger number of lawyers and others in the Legislature have enacted a law unadvisedly or unwisely, or that

it is harsh or too comprehensive. If the lawmaking body has jurisdiction of the subject, how it shall legislate upon it is a matter for their discretion. The courts have no veto power.

If the Legislature has power to absolutely prohibit the manufacture of liquor, in any quantity, for any purpose, it must have the power to prohibit its importation from other points in the State. As to importations across the State line, that point is not before us, but it is notable that every bill now pending in Congress to prohibit the importation of intoxicating liquor into prohibition States is worded like the statute (1907, ch. 806) now before us, and does not restrict the prohibition to such liquor only when imported "with intent to sell."

Conceding that the provision of the statute before us, which restricts the importation of intoxicating liquor into Burke County in quantity of more than a half-gallon a day by any one person, would forbid the importation of a larger quantity per day by him, even though it might be for his own consumption, is not that as much as one could safely consume per day, and would not the importation of a larger quantity per person per day be prejudicial to the public health and, presumably at least, for the use of others? In limiting each person to a half-gallon per day for his own use (for the law permits no sale) the Legislature was not niggardly. Besides, if the manufacture, though exclusively for one's own use and out of one's own apples and peaches, in the county can be forbidden by statute without breaking the Constitution,
(638) why cannot the importation of the same article across the county line, in a greater quantity than a half-gallon per day, even for one's own use, be prohibited by the same power? The truth is that, the Legislature having jurisdiction of the subject, the limitations upon its exercise rest in the wisdom and sound judgment of the Legislature, subject only to review by the people, not by the courts.

The act contains exceptions allowing importations in unlimited quantity "by druggists for medical purposes" and for use by the hospitals and sanitariums in the county, and it is clear that, even at the limit of one-half gallon per day to each person, enough can be brought in for all necessary and proper purposes. Certainly the ministers can thus get enough for communion purposes, for they cannot buy it after it is brought in, sale being forbidden by the uncontested part of the act. The Legislature was not so liberal when it passed the admittedly valid act forbidding the manufacture of liquor in the county, even for one's own use, or its sale for the use of others.

The act prohibits the bringing "into" the county of more than one-half a gallon of liquor by any person on any one day. By no construction can that be held to forbid the carrying it "through" the county. The theological controversy over the form of baptism was subtle and critical,

but it never occurred to any one to assert that the Greek word *eis* (into) meant *dia* (through). Certainly the members of the Legislature must be credited with knowing the difference between two such common Anglo-Saxon words as "into" and "through," and that, when they forbade any person "bringing into" the county more liquor per day than he could be reasonably supposed to bring for his own use, to wit, a half-gallon, they did not intend to prohibit "carrying it through" the county. On the contrary, it was exactly what they wished—that, if it got in there in larger quantity, it should be carried on through and out of the county.

If this is a bad law, public opinion as formulated by the Legislature placed it on the statute book, and the same power (639) can repeal it. The courts should not do so. As General Grant, when President, well observed, "The best way to secure the repeal of a bad law is to enforce it." It does not make an act unconstitutional that no preceding act like it has been passed, for this must have been the case at some time of every kind of statute. Every declaration of the legislative will must, when first made, have been without a precedent. "The world moves, and we must move with it." There are, however, other statutes like this: Laws 1907, ch. 112, "To prohibit the manufacture, sale, and importation of liquor into Lincoln and Catawba counties," and Laws 1907, ch. 380, "To prevent. . . . the transportation or delivery of intoxicating liquors into Rutherford County" (secs. 2 and 7).

If the Legislature can make it illegal to manufacture liquor at all, it can make it illegal to import it at all. If it has power to make it unlawful to sell it, it can make it unlawful to buy it, for it is the same transaction. It is a vain thing to prohibit liquor being "manufactured" in a county if the Legislature is powerless to prohibit it being "imported" from another county. To "import" is to "bring in" across the county line, either by one's self or by an agent.

HOKE, J., also dissents from the opinion of the Court.

Cited: *S. v. Bailey,* 168 N. C., 171, 172; *Glenn v. Express Co.,* 170 N. C., 293; *S. v. Carpenter,* 173 N. C., 771.

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STATE v. B. S. CLINE.

(Filed 6 May, 1908.)

1. Indictment—Motion to Quash—Refused—Subsequently Allowed—Appeal and Error—Evidence Not Considered.

When a trial judge has refused to grant a motion to quash an indictment, made upon the ground of its insufficient averment, and subsequently permits defendant to renew the motion and sustains it, evidence introduced in the interim, for the purpose of proving the offense charged, will not be considered on appeal.

2. Indictment—Perjury—Form of—Statute—Sufficiency—Legislative Powers—Constitutional Law.

The Legislature had the constitutional power to prescribe a form for indictment for perjury (Revisal, secs. 3246, 3247), and a bill drawn in accordance with its language contains sufficient averments of the offense. (*S. v. Harris*, cited and approved.)

3. Same—Evidence—False Testimony—Material.

While the statute (Revisal, 3246-3247) simplified the form of an indictment for perjury, permitting the charge to be made in a more general way, the averment in a bill that defendant committed perjury includes the necessity for proving that the false testimony was material to the issue.

4. Indictment—Motion to Quash—Not Favored.

The quashing of indictments is not favored by the courts, and a motion to quash should not be allowed, except in a clear case and with proper caution.

APPEAL from *Ferguson, J.*, at February Term, 1908, of CATAWBA.

This is an indictment for perjury, the bill being in the following words:

"The jurors for the State, upon their oath, present: That B. S. Cline, of Catawba County, did willfully, unlawfully, and feloniously commit perjury upon the trial of an action in a justice of the peace's court, before J. H. McClelland, in Catawba County, wherein W. H. Marlow was plaintiff and B. S. Cline was defendant, by falsely and feloniously asserting, on oath, that he the said B. S. Cline, offered to

D. M. Boyd, a member of the board of county commissioners

(641) of Catawba County, the sum of $20 to influence his official action as a member of said board in procuring for and awarding to the said B. S. Cline the contract with the said board of county commissioners as keeper of the Home for the Aged and Infirm of Catawba County for two years, and subsequently paid to the said D. M. Boyd, commissioner as aforesaid, $10 on the said offer, after having been awarded the said contract for one year by said board, and that the said D. M. Boyd accepted the same—knowing said statement or statements to be false, or being ignorant whether or not said statement was true."

During the trial of the case, and after the State had introduced some of its evidence, the judge stated that "he had a serious doubt as to whether the statement in regard to B. S. Cline having offered and paid the prosecutor, D. M. Boyd, money in order to secure the appointment as keeper of the poor, even if corruptly false, would in law be perjury." A juror was then withdrawn and a mistrial ordered, and the court allowed the defendant to renew his motion to quash the bill, which motion was sustained, and the State appealed.

Assistant Attorney-General, W. C. Feimster and Witherspoon & Witherspoon for the State.

A. A. Whitener and W. A. Self for defendant.

WALKER, J., after stating the case: In the present state of the case we are not permitted to pass upon the sufficiency of the evidence to establish the crime of perjury. Our inquiry must necessarily be confined to the allegations of the bill. It cannot be that an indictment is defective and should be quashed merely because the State has failed, if it has done so, to make out its case. The evidence is not of that character which can be considered upon a motion to quash or a plea in abatement. Sometimes, and not infrequently, extrinsic evi-
dence is heard for the purpose of passing upon the validity of (642) an indictment upon a motion to quash, as for example, where there has been some irregularity in drawing the grand jury, or where the indictment was returned as "A true bill," when, in fact, the grand jury had ordered it to be indorsed "Not a true bill." *S. v. Horton,* 63 N. C., 595. If the court had "tried out" the case, we might consider the question raised by the defendant as to the materiality of the evidence given by Cline before the magistrate, but, having ordered a mistrial, the question is not now before us. We must look to the bill, and if that is sufficient in form to charge the crime of perjury, there was error in quashing it.

The Legislature has not only declared what shall constitute a sufficient averment of perjury in an indictment, but has actually prescribed the form of the bill. Revisal, secs. 3246 and 3247. We have held, in *S. v.* Harris, 145 N. C., 456, that it had the constitutional power to enact the law. The indictment in this case is drawn in accordance with the terms of the statute and the prescribed form, and also is, at least in substance, like the one approved by us in *S. v. Harris, supra.* We do not mean to say that it is not necessary that the alleged false testimony be material, for the materiality of the false oath is considered to be one of the essential elements of the crime of perjury. 4 Blk., 137; *S. v. Gates, infra.* But this bill avers that the defendant committed per-

jury, and this involves, necessarily, the charge that the false testimony was material to the issue in the suit before the justice, even though it is alleged in this very general way, as the statute permits that to be done. The following cases would seem to be directly in point: *S. v. Gates,* 107 N. C., 832; *S. v. Peters,* 107 N. C., 876; *S. v. Flowers,* 109 N. C., 841; *S. v. Thompson,* 113 N. C., 638. The statute has merely simplified the form of the indictment for perjury, and the constituent elements of the offense remain unchanged and require the same proof to establish the commission of the crime. *S. v. Peters, supra.*

(643) It may appear, when the evidence is before us, that the alleged false statement was not material to the inquiry, but we are not at liberty to decide that question now. The quashing of indictments is not favored. It releases recognizances and may set the defendant at large, when, it may be, he ought to be held to answer upon a better indictment; hence it is a general rule that no indictment which charges one of the higher offenses, as treason or felony, or one of those crimes which immediately affect the public at large, as perjury, forgery, and the like, should be thus summarily dealt with, except in a clear case and with proper caution. *S. v. Colbert,* 75 N. C., 368.

The court erred in quashing the bill.

Error.

Cited: S. v. Hyman, 164 N. C., 414.

STATE v. WILLIAM STITT.

(Filed 6 May, 1908.)

1. Murder—Intent—Imputed.

Before a conviction for murder can be had, an unlawful and intentional taking of another's life must be shown, or imputed, as is sometimes the case, by reason of the killing with a deadly weapon, or under circumstances which indicate a reckless indifference to human life.

2. Manslaughter—Pointing Gun—Statutory Misdemeanor.

Revisal, sec. 3622, makes it a misdemeanor for one to point a gun or pistol at another, whether it be loaded or unloaded; and when one causes the death of another by an unlawful act which amounts to an assault on the person, as pointing a gun under circumstances which would not excuse its discharge, he is guilty at least of manslaughter.

3. Same—Instructions—Evidence—Sufficient.

Under evidence tending to show that defendant and deceased were upon intimate terms, and the former, in playfulness, stepped back for a gun, which he thought unloaded, cocked it and pointed it at the deceased,

believing he was the last to have had the gun, and that he had left it unloaded; that it had been three or four weeks since he had had it; that his sister, also a witness, in corroboration, told him to put the gun down, it might be loaded, to which he replied it was not, that he would not point a loaded gun at the deceased; that the gun fired, resulting in the death, whereat the defendant expressed regret and surprise: *Held*, it was not error in the court below to instruct the jury, if they found from the evidence, beyond a reasonable doubt, that the defendant intentionally cocked and aimed the gun at deceased, when it discharged its load and killed him, to return a verdict of manslaughter.

INDICTMENT for the murder of Jim Pearce, tried before *Ward, J.*, and a jury, at April Term, 1907, of MECKLENBURG.

The State offered evidence tending to prove that defendant and (644) deceased were "playing" and "projecking" together, when defendant took down a gun and pointed it at deceased, when the gun was fired, killing deceased; that when the defendant took down the gun his sister told him to quit playing with the gun, and defendant replied that there was no shell in it, because he was the one that had the gun last, and there was no shell put in it, and said, further: "You know I would not point a loaded gun at my friend." When the gun fired and deceased fell, defendant said: "Goodness! I didn't know there was a shell in the gun," and said, further, if he had known there was a shell in the gun, or any danger of its killing him, he would not have pointed it at him.

Defendant, as a witness in his own behalf, testified as follows: "I knew the deceased, Jim Pearce, for about eight or nine years. About 16 February last he came over to my house to get his hair cut. I told him to come in. He said to me: 'Are you going to cut my hair?' He said he had 10 cents, but wanted it for something. He said: 'Say, Coz, are you going to cut my hair?' Then we began to play. He had hold of my hand and called me a good boy. I stepped back and got the gun and cocked it and pointed it toward him. My sister told me to put it down; it might be loaded. I told her it was not; I would not point a loaded gun at him. He (Pearce) stepped off, and I (645) picked up the gun and shot him. I got it behind the door. I was 'projecking' with it. I knew I was the last one who had it, and I had put it up empty. It had been three or four weeks since I had it last time. He threw his hands across his breast and fell. I said: 'I have shot Jim.' I said I would not have done it for anything. I told Mr. Caldwell about how it happened."

Defendant, in apt time, preferred a request that in no aspect of the case could the defendant be convicted of murder, and several other requests suggesting views of the evidence by which the jury might acquit defendant of any offense on the facts disclosed.

The court charged the jury as follows: That they should not convict the defendant of murder in the first degree or murder in the second degree, and charged the jury that the burden was on the State to satisfy them from the evidence, beyond a reasonable doubt, that the defendant was guilty of manslaughter. The court then defined to the jury what constituted manslaughter. To this there was no exception.

The court then charged the jury, among other things, that if they found from the evidence, beyond a reasonable doubt, that the defendant picked up the gun and intentionally pointed it at the deceased, and cocked it, aiming it at him; and if they further found, beyond a reasonable doubt, that the gun discharged its load and killed deceased, and this was done willfully and intentionally, the defendant would be guilty of manslaughter, and it would be the duty of the jury to return a verdict of guilty of manslaughter.

The jury found defendant guilty of manslaughter, and from judgment on the verdict defendant appealed.

Assistant Attorney-General for the State.
No counsel contra.

(646) HOKE, J. There is no error in the record which gives the defendant any just ground of complaint. The court correctly held that, on the testimony, defendant could not be convicted of murder. A conviction of murder should never be allowed unless there has been an unlawful and intentional taking of another's life. Sometimes this intent will be imputed by reason of the killing with a deadly weapon, or under circumstances which indicate a reckless indifference to human life, but it must always exist before a charge of murder can be sustained. And in the present case we think the testimony on the part of the State was of a kind to justify the position that no intentional killing of the deceased had been shown. In no aspect of the evidence, however, if believed, could the defendant be held entirely innocent, and his prayers for instructions based upon any such view of the facts were, therefore, properly rejected.

It is well established that if one causes the death of another by reason of culpable negligence, or by an unlawful act which amounts to an assault on the person, he is guilty at least of the crime of manslaughter. *S. v. Turnage,* 138 N. C., 566; *S. v. Vines,* 93 N. C., 493; *People v. Stubenvoll,* 62 Mich., 329; Wharton on Homicide (3 Ed.), p. 696. In *S. v. Turnage, supra,* it is held that if death ensues from the unjustifiable and reckless use of a gun, it is manslaughter, whether the gun was intentionally discharged by the prisoner or not. And, delivering the opinion, *Associate Justice Brown,* for the Court, said: "We do not controvert any of the legal propositions contended for by the State as to

what acts will constitute manslaughter, when death ensues from the reckless use of a deadly weapon, such as a pistol or gun. Pointing a gun at another, under such circumstances as would not excuse its intentional discharge, constitutes, in this and many other States, a statutory misdemeanor, and an accidental killing occasioned by it is manslaughter." True, a new trial was ordered in *Turnage's case,* but that was chiefly because the defendant had expressly testified that he did (647) not intentionally point the gun at any one.

In *S. v. Vines, supra,* it is held: "Where one is engaged in an unlawful and dangerous sport and kills another by accident, it is manslaughter." The pointing of a gun or pistol at another has come to be so generally recognized as an act importing negligence that "Didn't know it was loaded" has passed into a saying descriptive of the serious or fatal results that frequently attend such conduct, and with us the matter has been considered of such importance that our statute law (Revisal, sec. 3622) has made it a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court, for any one to point a gun or pistol at another, "in fun or otherwise, and whether the gun or pistol shall be loaded or unloaded."

According to defendant's statement, he intentionally pointed the gun at the deceased, and, while it is not a matter of controlling importance, he evidently snapped it, for his exclamation was: "Goodness! I did not know there was a shell in the gun." And this, too, when his testimony further shows that he had not handled or examined the gun in three or four weeks. His own version of the occurrence, therefore, brings his conduct within the condemnation of either principle announced and sustained by the authorities cited. He was culpably negligent, and was engaged at the time in an act which by our statute is made an unlawful assault on the deceased. There is nothing here said which militates in any way against the doctrine upheld by this Court in *S. v. Horton,* 139 N. C., 588. In that case the facts were presented to the Court in the form of a special verdict, by which, with other statements, it was made to appear "that said killing was wholly unintentional; that the shooting of the deceased was done while the defendant was under the impression and belief that he was shooting at a wild turkey; that the hunting engaged in was not in itself dangerous to human life, nor was he reckless in the manner of hunting and handling the firearm (648) with which the killing was done." A perusal of the opinion will disclose that these facts just mentioned were referred to throughout as controlling in the case, and were made the basis of the judgment on which the defendant's innocence was declared. In the opening sentence of the opinion the judge said: "It will be noted that the finding of the jury declares that the act of the defendant was not in itself dangerous to

human life, and excludes every element of criminal negligence." And on page 592: "The special verdict having found that the act in which the defendant was engaged was not in itself dangerous to human life, and negatived all idea of negligence, we hold that the case is one of excusable homicide."

The two cases are thus clearly distinguished, and in the case at bar the judge could well have charged that, if the jury was satisfied beyond a reasonable doubt that defendant intentionally pointed the gun at the deceased, and while so engaged the gun was discharged, killing the deceased, the defendant would be guilty of manslaughter.

There is no error to defendant's prejudice, and the judgment below is affirmed.

No error.

Cited: S. v. Limerick, post, 651; *S. v. Spivey,* 151 N. C., 685; *S. v. Trollinger,* 162 N. C., 621.

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(649)

STATE v. VIC. LIMERICK.

(Filed 13 May, 1908.)

Manslaughter—Accidental Shooting—Evidence—Instructions—Error.

The evidence tended to show that the prisoner and deceased, two young boys, were friends. A witness testified that at the time in question they came up to him, and that deceased had a gun; that they walked away from him and one said, "I will shoot you," the other said, "No, you won't; I will shoot you"; that he turned and saw the gun fire; that they were close together and only a few steps from him; that the boys were laughing when they spoke of shooting, and that witness did not know who then had the gun, but the prisoner had it when he looked around. There was also evidence tending to establish the firing of the gun as the cause of deceased's death, and evidence that before his death deceased said that he and prisoner "were fooling with the gun and it went off accidentally." There was no evidence that prisoner intentionally pointed the gun at deceased: *Held*, it was error in the trial judge to charge the jury that, if they believed the evidence, or considered it in its most favorable light to prisoner, he was guilty of manslaughter.

INDICTMENT for the murder of one D. Williams, tried before *Peebles, J.*, and a jury, at October Term, 1907, of RUTHERFORD.

Before the jury were selected, the solicitor for the State announced that he would not ask for a conviction of murder in the first degree, but would insist on a conviction of murder in the second degree or manslaughter. After hearing the testimony, the court among other things,

charged the jury that if they believed the evidence they should find the defendant guilty of manslaughter at least; that, taking all the evidence in its most favorable light to the defendant, he would be guilty of manslaughter. The jury returned a verdict of guilty of manslaughter, and from judgment on the verdict the defendant appealed.

Assistant Attorney-General for the State. (650)
McBrayer, McBrayer & McRorie for defendant.

HOKE, J. There was error in the charge of the court, above stated, and the question of the prisoner's guilt or innocence of the crime of manslaughter should have been submitted to the jury, with appropriate instructions.

There was evidence tending to show that the prisoner and the deceased, two young boys, were friends, had the warmest friendship for each other, as stated by one of the witnesses, and that they were both in good humor at the time. Speaking directly to the occurrence, Aden Lynch, a witness for the State, testified as follows: "I am 16 years old. Defendant is younger than I am. I knew deceased. He died on the 9th of last December, in this county. He was shot in the leg. Deceased and prisoner were scuffling over a gun. I saw them coming through the old field. Deceased had a gun, and one of them hallooed, and I stopped. They came up to me, and we talked a few minutes. I had my gun. Deceased handed me his gun and I gave him mine. I looked at his gun and set it down, and said: 'There is your gun; I must go.' They then started through a straw field. One of them said: 'I will shoot you.' I don't know which it was. The other said: 'No, you wont; I will shoot you.' They were laughing. I turned around and saw the gun fire, and deceased fell. Prisoner had gun when deceased fell. They were standing close together, eighteen steps from me. After I heard what was said about shooting, it was about a minute. They were walking, and took only a few steps. Don't know which one had the gun when they walked away from me. Don't know which had the gun when they were talking about shooting each other. Deceased was shot just above the left knee, and lived until the next day some time." On cross-examination, this witness said: "The deceased and prisoner seemed to be great friends. I was out hunting and came up with them. They seemed to be laughing. Neither one said how it happened when I got to them. Dr. Thompson asked deceased if they got out of something to shoot, (651) and deceased said 'Yes.'"

A doctor testified that deceased died from the effect of the gunshot wound. Several witnesses, without objection, testified that deceased, in speaking of the shooting, said it was an accident. Lee Nanney, a witness for the State, testified that he saw prisoner and deceased at the place of

the shooting, and deceased said: "I and Vic. were fooling with the gun and it went off accidentally." He gave the same account to his father on the way home, saying: "I and Vic. were fooling with the gun and it went off accidentally." Another witness said: "I asked deceased how it happened. 'Were you in a racket?'" and that deceased said: "'No; it was an accident.' This was on the way home. After we got home he told me there was no hardness between deceased and the defendant; they were scuffling with the gun and it went off." To other witnesses the deceased said the shooting was accidental.

Undoubtedly, if the prisoner intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of which he died, or if the prisoner was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, in either event the prisoner would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental. We have so held at the present term, in *S. v. Stitt, ante,* 643, and other authorities are to like effect. *S. v. Turnage,* 138 N. C., 566; *Commonwealth v. Matthews,* 89 Ky., 293. But neither of these positions necessarily or as a matter of law arises from the testimony, and the question of the prisoner's guilt or innocence must be left for the jury to determine on the facts as they shall find them. *S. v. Turnage, supra.*

In *S. v. Vines,* 93 N. C., 494, being one of the authorities relied on by the State, there was evidence tending to uphold the position that the killing was intentional, and, if not, the conduct of the prisoner at
(652) the time was both unlawful and so clearly reckless and culpable that the guilt of the prisoner was not open to question, and *Merrimon, J.,* delivering the opinion of the Court, said: "The court instructed the jury that if they should believe the evidence, the prisoner was guilty of manslaughter. They rendered a verdict of guilty of that offense, and it must be taken that they believed the evidence; and, if they did, it is manifest that the prisoner was at least guilty of manslaughter. If it be granted that he and Hines were in jest and rough sport—which is by no means certain—he was using a dangerous weapon, a loaded pistol, knowing that it was loaded—not only incautiously, but in a most reckless and unlawful manner. He had it pointed at Hines, who fell behind the deceased, saying, as he did so, 'shoot and be damned,' when at once he fired the fatal shot. If he did not intend to kill Hines, and the discharge of the pistol was unintentional, still the killing was manslaughter, because, in any view of his conduct, he used the dangerous weapon carelessly and unlawfully. It is clear that where one engaged in an unlawful or dangerous sport kills another by accident it is manslaughter."

That decision does not apply to the facts presented here, which require, as stated, that the cause shall be referred to the decision of a jury, and to that end a new trial is awarded.

Error.

Cited: S. v. Trollinger, 162 N. C., 620.

(653)

STATE v. PERRY MOORE, JR.

(Filed 13 May, 1908.)

1. Power of Court—Contempt—Interfering with Attendance of Witness.

It was an unlawful interfering with the process and proceedings of the Superior Court—Revisal, 944 (3)—and punishable as for contempt, for respondent to see and suggest to a material witness in an action for assault with the intent to commit rape upon her, that he was satisfied that the defendant therein would pay her $5 or $10 to settle and compromise the matter, and not attend court, when it appears that his intent was to prevent the attendance of the witness and that she failed to appear, except under a *capias ad testificandum.*

2. Power of Court—Contempt—Imprisonment in Jail—Worked on Roads—Judgment Amended.

A person sentenced to jail as for contempt of court cannot be worked on the roads, and a sentence for thirty days imprisonment in the common jail, *to be worked on the public roads,* will accordingly be amended on appeal.

PROCEEDING as for contempt, heard by *Peebles, J.,* at February Term, 1908, of RUTHERFORD.

His Honor found the facts and adjudged the respondent guilty, and sentenced him to be imprisoned in the common jail of Rutherford County for thirty days, to be worked on the public roads. From the judgment of the court the defendant appealed.

Assistant Attorney-General for the State.

McBrayer, McBrayer & McRorie for defendant.

BROWN, J. The facts as found by his Honor are:

"1. Till. Bright was bound over to said court upon the charge of committing an assault upon one Myra Gladden, with intent to commit rape. Myra Gladden had been recognized to appear as a witness against said Till. Bright upon said charge, and said Myra failed to appear as a witness and was brought to court under a *capais ad testificandum.*

(654) "2. That said Perry Moore, Jr., in company with Perry Moore, Sr., a cousin, went to the house of said Myra Gladden and suggested to her to settle and compromise the matter and not attend court, and told her that, if she would do this, he was satisfied that Till. Bright would pay her $5 or $10.

"3 I find that, in making this offer, said Perry Moore, Jr., intended to prevent said Myra Gladden from attending court as a witness against said Till. Bright, and thereby to unlawfully interfere with the trial of said Till. Bright, to the injury of the State.

"4. Myra Gladden was a necessary witness for the State."

This proceeding is identical with that of *In re Young,* 137 N. C., 553, and is fully authorized by the statute (subsection 3, section 944 of the Revisal), which provides that "The court shall have power to punish as for contempt any person unlawfully detaining any witness or party to any suit while going to, remaining at, or returning from the court where the same may be set for trial, or for the unlawful interference with the proceedings in any action.

It is clear, from the finding of facts, that the respondent was unlawfully interfering with the process and proceedings of the Superior Court. He was so successful in his interference that the State's witness responded only through the persuasive force of a *capias ad testificandum.*

That portion of the sentence which authorizes the commissioners to work the respondent on the roads is erroneous and must be stricken out. A person sentenced to jail in a proceeding as for contempt cannot be worked on the roads. *S. v. Morgan,* 141 N. C., 726.

The judgment as amended is

Affirmed.

(655)

STATE v. JOHN F. LEEPER ET ALS., COMMISSIONERS OF GASTON COUNTY.

(Filed 20 May, 1908.)

1. Indictment—County Commissioners—Erection and Repair of Courthouse —Cognate Duties—Motion to Quash Not Allowed.

An indictment against the county commissioners, charging them with unlawful and willful omission, neglect, and refusal "to erect and repair the necessary courthouse . . . and to raise by taxation the moneys therefor," particularizing the necessity, is sufficient, and may not be quashed on the ground that it charged different duties for which separate counts in the indictment should have been presented. Revisal, secs. 1318, 3590, 3592.

2. Same—Remedy—Evidence—Election.

When it is plain that county commissioners, under an indictment in conformity with the wording of Revisal, sec. 3592, are charged with neglect of duty in failing to provide a sufficient courthouse, the offense is sufficiently set out (Revisal, sec. 3254); and a motion to quash may not be granted for that the failure "to erect" and "to repair" were charged in the same bill, the remedy being to require the solicitor to elect at the close of the evidence.

3. Same—Corrupt Intent—Language of Statute—Sufficiency.

It is not necessary to allege corrupt intent in a bill of indictment against county commissioners for neglect of duty in providing a necessary courthouse, and it is sufficient if the words of the statute are followed.

4. Same—Bill of Particulars.

If a defendant desires further particulars, under an indictment for neglect of duty as a public officer, he should ask for a bill of particulars. Revisal, sec. 3244.

5. Same — County Commissioners — Sufficient Courthouse—Mandamus Will Not Lie.

A *mandamus* will not lie against county commissioners to compel them to provide a sufficient courthouse.

CONNOR, J., dissenting *arguendo;* WALKER, J., concurs in the dissenting opinion.

APPEAL from *Moore. J.,* upon a motion to quash the indictment, at March Term, 1908, of MECKLENBURG, the motion having been continued thereto, by consent, from Spring Term, 1908, of (656) GASTON.

The defendants, who are county commissioners of Gaston County, were indicted in the following bill:

The jurors for the State, upon their oaths, present: That John F. Leeper, J. W. Kendrick, O. G. Falls, A. R. Anders, J. C. Puett, and R. K. Davenport, commissioners of Gaston County, N. C., were duly elected commissioners of Gaston County at the general election held in the year 1906 for members of the General Assembly and other officers required by law to be elected at that time in Gaston County, N. C.; that they were elected for two years from the first Monday of December, 1906, and took the oath required by law for county commissioners, and entered upon the discharge of their duties as commissioners of Gaston County, N. C., and now are acting and were at the time hereinafter mentioned acting as the board of county commissioners of Gaston County, N. C.; that under the laws of North Carolina (Rev., 1318, subsec. 26) it is made the duty of the board of commissioners of Gaston County (naming them, as above) "to erect and repair the necessary county buildings and to raise by taxation the moneys therefor; that the

county courthouse is a necessary county building for Gaston County, N. C.; that the present county courthouse for Gaston County, N. C., was built about sixty years ago, when Gaston County had a population of about 7,228; that Gaston County now has a population of about 30,000 or more; that the present courthouse is not large enough to hold the records of Gaston County, N. C.; that it is not large enough to accommodate the public officers of Gaston, who are required to keep their offices in said building; that it is not large enough for the suitors, jurors, and witnesses who attend the courts of Gaston County, as by law they are required to do; that it is a small, incommodious building, inadequate and unsuitable to the present needs of the county of Gaston,

N. C., is not in good repair, and is in no sense a courthouse or (657) county building necessary to the present needs of the public; that

John F. Leeper and the others named above, commissioners as aforesaid, on the first day of November, 1907, unlawfully and willfully did omit, neglect, and refuse to discharge the duty of their office, in that they unlawfully and willfully omitted, neglected, and refused "to erect and repair the necessary courthouse for Gaston County, N. C., and to raise by taxation the moneys therefor," contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

HERIOT CLARKSON,
Solicitor.

On motion of the defendants, the indictment was quashed. Appeal by the State.

Assistant Attorney-General for the State.

Burwell & Cansler, A. G. Mangum, and Osborne, Lucas & Cocke for defendant.

CLARK, C. J. This is an indictment against the county commissioners for neglect of duty. Rev., 3592, provides that if any officer "shall willfully omit, neglect, or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor." And Revisal, sec. 3590, provides: "If any county commissioner shall neglect to perform any duty required of him by law as a member of the board, he shall be guilty of a misdemeanor," and also liable to a penalty. Rev., 1318, under the heading "Powers and Duties" (of county commissioners), places under subsection 26 thereof the words "to erect and repair the necessary county buildings, and to raise, by taxation, the moneys therefor."

This indictment alleges that the courthouse of Gaston County is insufficient, specifying the particulars wherein; also, that it is not

in good repair, and that the defendants "unlawfully and will- (658) fully did omit, neglect, and refuse to discharge the duty of their office, in that they unlawfully and willfully omitted, neglected, and refused 'to erect and repair the necessary courthouse for Gaston County, N. C., and to raise by taxation the moneys therefor.'" The indictment followed the words of the statute (Rev., 2592), and should not have been quashed. Rev., 3254; *S. v. Harrison,* 145 N. C., 417.

The statute made it, among other duties, the duty of the county commissioners to provide a sufficient courthouse and keep it in repair. It is their duty both to erect and keep in repair. They are cognate duties, and failure as to them can be charged in the same bill. The offense is "neglect of duty." The specifications are "failure to erect" and "failure to keep in repair." If either particular is proven, the offense is proven. It is like an allegation of an assault with a pistol and with a brickbat; proof of either sustains the charge; or like a charge of larceny of corn in the ear and of shelled corn, or of different articles of any kind, or other offenses alleged to have been committed in more than one way.

The offense charged being "neglect of duty" in not erecting and in not repairing, there is no duplicity in the bill in alleging both particulars. Indeed, the solicitor acted wisely in following the statute. If he had alleged neglect of duty in "not erecting" a hourthouse, the defendants could have set up that they should have "repaired"; and, if he had charged neglect of duty in "failing to repair" the courthouse, the defense could have set up that they should have "erected" a courthouse.

To prevent this "hide and seek"—this travesty in investigating the charge of neglect of duty as to the courthouse—the solicitor charged the neglect of duty, in the words of the statute, both in failing to erect and to repair. If the State can prove that either was the duty of defendants, under the circumstances, and that they have failed to discharge such duty, it is entitled to a verdict. If it shall make a difference (659) in imposing sentence (if there is a conviction), the judge can ask the jury, or the defense can have the jury polled, as to whether they find the neglect of duty as to the courthouse was in failing to "erect" or to "repair," just as, in cases above put, he can ask the jury whether they find the assault was made with a pistol, or with a brickbat, or without weapon; or, when larceny of several articles is charged, as to which the jury find the theft proven.

Revisal, secs. 3254 and 3255, were passed to forbid refinements and technicalities which, without being any aid to the innocent, brought the administration of justice into disrepute. This purpose of the lawmaking department has been approved in strong and striking terms by *Ruffin, C. J.,* in *S. v. Moses,* 13 N. C., 464, and by *Ashe, J.,* in *S. v. Parker,* 81 N. C., 531, and in yet other cases by other judges, from some of whom

extracts are given with approval in *S. v. Barnes,* 122 N. C., 1035, and many other cases, and they need not be again quoted. The recitals and charge in this bill are so explicit that the defendants could not pretend, and did not, that they did not know that they were charged with neglect of duty in failing to provide a sufficient courthouse for the county. Hence it was sufficiently charged. Revisal, sec. 3254.

Whether such "neglect of duty" (if shown at all) was in failing to repair or in failing to erect, was a matter to be shown in the proof and to be passed on by the jury, just as when different modes of assault and battery, or larceny of two or more articles, are charged.

If, however, failure "to erect" were one offense, and failure "to repair" were another, being cognate offenses, the remedy was not to quash, but to require the solicitor to elect at the close of the evidence. *S. v. Williams,* 117 N. C., 753; *S. v. Allen,* 107 N. C., 805; *S. v. Parrish,*
(660) 104 N. C., 679; *S. v. Morrison,* 85 N. C., 561; *S. v. Eason,* 70 N. C., 88.

In *S. v. Moses,* 13 N. C., 464, *Ruffin, C. J.,* speaking of the act of 1811 (now Revisal, sec. 3254), says, with his usual vigor and robust common sense: "This law was certainly designed to uphold the execution of public justice by freeing the courts from those fetters of *form, technicality,* and *refinement* which do not concern the substance of the charge and the proof to support it. Many sages of the law had before called nice objections of this sort a disease of the law and a reproach to the bench, and lamented that they were bound down to strict and precise precedents. . . . We think the Legislature meant to disallow the whole of them, and only require the *substance*—that is, a direct averment of those facts and circumstances which constitute the crime to be set forth." In *S. v. Smith,* 63 N. C., 234, the Court says: "The act of 1811 has the almost universal approval of the bench and bar. It needs no higher indorsement than that of the late *Chief Justice Ruffin,* in *S. v. Moses* (cited *supra*). . . . The act has received a very liberal construction, and its efficacy has reached and healed numerous defects in the substance as well as the form of indictments. . . . It is evident that the courts have looked with no favor on technical objections, and the Legislature has been moving in the same direction. The current is all one way, sweeping off by degrees 'formalities and refinements,' until, indeed, a plain, intelligible, and explicit charge is all that is now required." The above have often been cited and approved by this Court, and in other States which have similar statutes.

The defendants are explicitly charged with neglect of duty, and they well understood that the particulars were that they had not provided the county with a suitable courthouse, in that they had neither repaired the old one nor built a new one. They would have a complete defense by

showing that they had done either, or if the State failed to show (661) that a better courthouse was necessary. The object of the indictment is to give information of the charge. The defendants do not deny that they had this information, which is the sole object of the indictment, but they earnestly contend that the preservation of our liberties require that it should have been conveyed in two separate counts in the indictment instead of in one. The burden of proof is on the State to prove its charge against the defendants. Instead of meeting the evidence, their attitude recalls the language of Fox, in the English Parliament: "You may pull down the pillars of the temple, and nothing stirs; but touch a single cobweb in Westminister Hall, and the angry spider rushes forth." The defendants object to having witnesses prove that they have neglected their public duty to furnish a proper courthouse, in that they have neither repaired the present one nor built a new one (though they fully understand the charge), because the charge is not made in two counts. If made in two counts, it would be equally as sound logic to move to quash, because they were contradictory.

In indictments for neglect of duty by a public officer, corrupt intent need not be shown. *S. v. Hatch,* 116 N. C., 1003, which has been often cited since with approval. It cannot be necessary to charge what need not be proven. It is sufficient to follow the words of the statute. *S. v. George,* 93 N. C., 570; *Brown, J.,* in *S. v. Harrison,* 145 N. C., 417. The particulars are fully averred, but if the defendants had desired further information, the statute provides that they could have a bill of particulars. Rev., 3244; *S. v. Pickett,* 118 N. C., 1233. If corrupt intent were charged and proven, the judgment would include removal from office as part of the punishment. Rev., 3592.

For such neglect of duty a *mandamus* does not lie. *Ward v. Comrs., ante.,* 534, in which it is said: "The duty of providing a sufficient and proper courthouse is to be discharged by the county commissioners, subject to indictment if there be a *willful failure.*" The judgment quashing the indictment is (662)

Reversed.

CONNOR, J., dissenting: I make no apology, although I may be regarded as unduly sensitive about so trivial a matter as the form of an indictment, for expressing my dissent, with all possible respect, but with equally strong convictions, from the conclusion reached by the majority of the Court. It is true that the offense charged against these defendants is not a felony, but, under our statutes and the decisions of this Court, upon conviction, they may be fined for an amount the limit to which has not yet been fixed by the General Assembly or this Court, and imprisoned, with all of its incidents, for at least two years; how much

longer neither the Legislature nor this Court has yet said. I cannot bring my mind to the conclusion that a criminal prosecution which may bring upon the citizen destruction of his estate and the incarceration of his person is a trivial matter, or not deserving the most anxious consideration when he appeals to the courts of his State to be accorded the protection guaranteed by the "law of the land." It is no sufficient answer to say that he will probably not be so punished. It is his inalienable right to demand that he be not put in peril of such punishment otherwise than according to the law of the land. An indictment against a citizen is no trivial matter. The charge of unlawfully and willfully violating his official oath is a serious matter to a man who values his fair name and reputation, serving his county largely from a sense of duty. While this is true in respect to every citizen and in respect to every charge of violating the criminal law, it is peculiarly so when men who, by the citizens of their counties, have been chosen and called to discharge the most difficult, delicate, and often thankless duties, without more than a nominal compensation, are charged with violation of duty.

They have taken an oath to discharge these duties. They must, (663) in their faithful discharge, incur much criticism and give offense to many who differ from them and their judgment in the exercise of the discretion necessarily vested in them. They are to jealously guard the revenues of their county, secure an economical administration of its affairs, and at the same time provide for the numerous demands upon its resources, without increasing the burden of taxation. If they willfully fail and refuse to discharge these duties, it is conceded that they are indictable. Before they are called to answer a charge of neglect of duty, and thereby a violation of their official oaths, they are entitled, by the principles of the common law, by the Constitution of the State, and the decisions of this Court, to be informed of the respect in which such failure by them is alleged. This is not a matter of *form*, but of *substance*. If but an empty form, to be explained away by judicial construction or removed by legislative enactment, why did the fathers, fresh from their struggle against the intolerable tyranny of "writs of assistance" and "general warrants," so carefully and so wisely place in the seventh article of the Declaration of Rights, at Halifax, in 1776, amid the struggle for independence, these words, "That in all criminal prosecutions every man has the right to be informed of the accusation against him"? This guaranty of the right of the citizen has at all times been in our Constitution (Art. I, sec. 11). So jealous were these liberty-loving men of this safeguard of liberty that they refused to ratify the Federal Constitution until, by the Sixth Amendment, it was made a part of that instrument. Is it worth while to occasionally recur to these first "fundamental principles"? Are they not the beacon-lights by which the judi-

cial mariner shall avoid steering the ship into dangerous and perilous waters or permitting it to drift backwards into the conditions from which the fathers rescued it—to the days of the star chamber, when the indictment was drawn in a foreign tongue, and when the defendant was not permitted to see it before pleading, and, by pleading, without having it read to him, waived all defects? We ourselves are not (664) so far removed from days when passion controlled the makers of statutes having for their purpose our destruction that we may safely dispense with these safeguards, which were then our only shield and protection. Mr. Bishop, discussing the identical question before us, gives an interesting account of impeachment of Sacheverell (15 How. St. Tr.) and the trial of Rosedale (10 How. St. Tr.), and speaks of them as "admonishing us to beware how we take down the barriers which the common law erected during the struggle of liberty with despotism between the accusation and sentence. As in peace we should prepare for war, so, while liberty is in repose, we should make ready for the days of her conflict." He further says: "Some rules have grown up, particularly of pleading and as respects the indictment, too subtle to accord with the more enlightened judgment of the present day. Yet they are less in number and absurdity than is commonly supposed. Such of them as are without just reason are, in many of our courts, discarded judicially, and in most States they are largely legislated away, so that now little remains to condemn beyond a too close adherence to old technical words and forms of expression. Indeed, the present tendency is toward too loose a practice and allegations too indefinite. For, although the unthinking multitude, crying today for this reform and tomorrow for that, pursuing with hot blood one class of offenders today, another tomorrow, would almost remove the obstruction of a trial between the offense and the punishment, the wise see what may render slow the steps of real justice is the protection of innocence in its hour of peril and anguish."

Blackstone wisely observes that "Delays and little inconveniences, in the forms of justice, are the price that all free nations must pay for their liberties in more substantial matters." A wise judge says: "The safety of the community consists in a steadfast adherence to rule and principle, especially in criminal cases, even if at times a guilty (665) individual should escape thereby." *S. v. Jones,* 6 Halst., 289.

That the constitutional guaranty to the citizen that, when charged with crime, he is entitled to be informed of the accusation against him, was, in our early history, jealously guarded, is shown by many decided cases. In *S. v. Justices,* 11 N. C., 194, *Taylor, C. J.,* says: "There are some rules relative to indictments which it is indispensable to observe, notwithstanding the relaxation in point of form introduced by the act of

1811. The indictment must still contain a description of the crime and a statement of the facts by which it is formed, so as to identify the accusation; otherwise, the grand jury might find a bill for one offense and the defendant be put on trial in chief for another. The defendant ought also to know what crime he is called upon to answer, and the jury should appear to be warranted in their conclusion of 'guilty,' or 'not guilty,' upon the premises to be delivered to them. The courts should also be enabled to see on the record *such a specific crime* that they may apply the punishment which the law prescribes, and the defendant should be protected by the conviction, or acquittal, from any future prosecution. *These* are elementary rules, which must be substantially observed." *Henderson, J.,* in the same case, says: "But the indictment must be conformable to the fact; *it must charge which of these duties was omitted.*" In *S. v. Comrs.,* 15 N. C., 345 (p. 351), *Gaston, J.,* citing *S. v. Justices, supra,* says: "We feel ourselves bound by it as authority, and the more strongly as the principles which it upholds tend greatly to the certainty of criminal prosecutions, *and are, therefore, important safeguards of civil liberty.*" These cases are cited with approval by *Smith, C. J.* (quoting the language), in *S. v. Fishblate,* 83 N. C., 654, and *Davis, J.,* in *S. v. Comrs.,* 97 N. C., 388. They have been, until probably in some recent cases, adhered to as "sound law." I think that they are (666) not only "sound law," but controlling authorities, no less because of the satisfactory reasons upon which they are rested than because they are the result of the mature consideration of our wisest and most learned judges. When we look beyond our own State we find the same wholesome doctrine announced and adhered to. In *Murphy v. State,* 24 Miss., 590, *Yerger, J.,* says: "The constitutional provision that every man charged with crime has a right 'to demand the nature and cause of the accusation against him' was intended to secure to the citizen such a specific designation of the offense laid to his charge as would enable him to make every preparation for his trial necessary to his full and complete defense." The learned justice proceeds to state the reasons for his opinion in almost the exact language of *Taylor, C. J., supra,* concluding: "An instrument which does not contain this degree of certainty does not communicate to the accused 'the nature and cause of the accusation' against him in the manner contemplated by the Bill of Rights. Nor has the Legislature the power to dispense with such degree of certainty in indictments."

In *Bynum v. State,* 45 Ala., 86, *Peck, C. J.,* says: "When a statute creates a new offense, unknown to the common law, and describes the constituents necessary to constitute the offense, an indictment under the statute must conform to the description thus given." *Stofer v. State,* 3 W. Va., 689. In *S. v. Smith,* 20 N. H., 399, *Gilchrist, J.,* said: "The

Bill of Rights was intended to protect the citizen against the consequences of being held to answer to accusations not distinctly and seasonably made known to him, and requires that he shall not be held to answer any offense until the same is fully and plainly, substantially and formally described to him. . . . We therefore think that the varied respects in which the proceeding of these defendants (selectmen of the town of Exeter) is represented in the indictment are such as to render it difficult to determine what particular offense they are legally charged with, and that, therefore, that paper fails to describe to (667) them any offense so plainly and fully as is demanded by the Bill of Rights." In *Commonwealth v. McGoven,* 92 Mass., 163, *Gray, J.,* said: "The Declaration of Rights requires that no subject (citizen) shall be held to answer for any crime or offense until the same is *fully and plainly, substantially and formally* described to him." In *McLaughlin v. State,* 44 Ind., 338, *Downey, C. J.,* discussing the principle involved in this case, says: "How is he (the defendant) to prepare for his defense against such a charge? Or, if he shall be indicted a second time, how can it be made to appear that he has already been arraigned upon the same charge? There is no country, we presume, where the principles of the common law prevail and the liberty of the citizen is respected, where the State is not required, in bringing an alleged criminal into court to answer for a crime, to prefer against him, in the form of an affidavit, information, or indictment, a specific accusation of the crime charged. It is accordingly provided in the Constitution of the State (copying the provision similar to section 11, Article I of our Constitution). The constitutional guaranties which we have just quoted are of the utmost importance to a person accused of crime, and a disregard of them, or any of them, even in a prosecution designed to suppress a traffic so full of evil as that of retailing intoxicating liquors, cannot be tolerated with any regard to the proper and safe administration of the criminal laws." Decisions might be multiplied to the same effect, if necessary.

But it is said the indictment follows the language of the statute, and, therefore, no matter how obscure or duplex, how vague and uncertain, it is sufficient. Conceding that such is the general rule, it is equally well settled that the exception to it is, that if the language of the statute is indefinite, obscure, or fails to sufficiently define or describe the offense, the bill must, wherein the statute is defective, comply with the principles of the common law. To deny this is to give to the Legislature the power to nullify the Constitution. It is, of course, fully con- (668) ceded that, in so far as the fundamental principle embodied in the Constitution is not violated, the Legislature or the courts may and should relieve the administration of the criminal law of the odium which

has attached to it by retaining obsolete, useless, meaningless technicalities in indictments. I make no controversy in this respect. I concede the wisdom of the statutes of *jeofails and amendments;* also those removing the necessity for useless technical averments (Revisal, secs. 3254 and 3255); but they, I submit, have no bearing whatever upon the question presented in this bill. Section 3254 expressly protects a bill from a motion to quash, "if it express the charge in a *plain, intelligible, and explicit* manner." This act was passed in 1811, and several of the decisions which I have cited were made in the light of its provisions. *Judge Taylor,* in the first case (1828), expressly refers to it. The argument for the sufficiency of the bill finds no support in either statute. This Court has uniformly recognized that there are exceptions to the general rule in regard to the sufficiency of indictments following the words of the statute. *S. v. Stanton,* 23 N. C., 424. In *S. v. Simpson,* 73 N. C., 269, it was held that, although the statute made the killing of stock in an inclosure, etc., a misdemeanor, it was necessary to charge that the act was done "unlawfully and willfully." The judgment was arrested after verdict. *S. v. Parker,* 81 N. C., 548. In *S. v. Whitaker,* 85 N. C., 567, judgment was arrested on an indictment for entering upon land after being forbidden, because the words "unlawfully and willfully" were omitted, although the statute did not so require. So in *S. v. Allison,* 90 N. C., 733. The true rule is well stated by *Metcalf, J.,* in *Commonwealth v. Welsh,* 7 Gray (75 Mass.), 324: "A charge in an indictment may be made in the words of a statute, without a particular averment of facts and circumstances, when by using these words the
(669) act in which an offense consists is fully, directly, and expressly alleged, without any uncertainty or ambiguity." In *U. S. v. Simons,* 96 U. S., 360, *Harlan, J.,* after stating the general rule, as laid down by Bishop, says: "But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised *by the indictment* with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense." In *U. S. v. Carl,* 105 U. S., 611, *Mr. Justice Gray* says: "In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words *of themselves* fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. . . . The omission is matter of substance and not a 'defect or imperfection in point of form,' within the meaning of the statute." (Similar to ours.) In *Evans v. United States,* 153 U. S., 584, *Brown, J.,* refers to the rule, which at one time prevailed, that an indictment for a statutory misdemeanor is sufficient if the offense be charged

in the words of the statute, and says that it must, under more recent decisions, be limited to cases where the words of the statute themselves comply with the principle announced in *Carl's case." Bottelor v. United States,* 156 U. S., 426. This is the settled and uniformly adhered to rule in the Federal courts. In the light of these fundamental principles, I submit that the indictment against the defendants cannot be sustained, and was, therefore, properly quashed by his Honor.

Several grounds for the motion are set forth in the well considered brief of defendants' counsel. I will confine myself to the one regarding duplicity and uncertainty. The State makes it the duty of county commissioners to "erect and repair the necessary county buildings, and raise by taxation the moneys therefor." The indictment charges that the defendants, being county commissioners, did, on the day upon (670) which the inquisition was taken, unlawfully and willfully neglect, omit, and refuse *"to erect and repair"* the courthouse. Conceding, for the purpose of the argument, that such failure to erect is indictable, I submit that an indictment charging *generally* a failure to discharge a public duty cannot be sustained. The solicitor did not think so, because he undertook to specify the duty which he charges the defendants with having neglected to discharge—*to erect and repair a courthouse.* That a general charge of neglect to discharge an official duty is not sufficient is established by every case which has come before this Court. In *S. v. Justices, supra,* the bill was quashed. In *S. v. Comrs., supra, Gaston, J.,* says: "But there the indictment must set forth the criminal omission so that the defendants may know and the court see *what duty* has been neglected. It must not allege neglect generally." The reason and necessity for this are manifest: Commissioners have imposed upon them numerous duties. Revisal, sec. 1318, contains thirty-two subsections, multiplied into hundreds of specific duties by the conjunctive sentences. If, upon a sweeping charge of a general neglect of duty, they could be called upon to join issue with the State, they could easily be undone and utterly destroyed. The time, although required to be alleged, need not be proven as charged; hence for their entire term of office of two years they could, under a general charge, be convicted of any omission or neglect of duty which some one might choose to prefer against them, without notice in the indictment. The statute directs that commissioners shall *"erect and repair."* Thus, two well defined, distinct, and in every respect different duties are imposed. They can neither be performed at the same time, on the same object, nor neglected at the same time. Words, when used in statutes, having no relation to science or art, but in general use, are to be interpreted and given the meaning usually and generally given them. Thus: "Erect—to raise, as a building; to build; to construct, as to erect a house or fort; to set up; to (671)

put together the component parts, as of a machine." Webster's International Dictionary, 506. "Repair—restoration to a sound or good state after decay, waste, injury, as to repair a house." *Ib.*, 1219. Is it possible to conceive of two words more distinctly different in every respect? If I make a contract with a builder to erect a building, and sue him for not doing so, can he defend by saying that he repaired a building? Or, if upon a contract to repair, can I insist that he shall erect a building? Instead of being "cognate duties," they are antipodal—antagonistic. I concede that if in the first portion of their term the commissioners erect a courthouse, they may be liable for not repairing it, if necessary, during the term. It was evidently this thought in the legislative mind which is expressed in the statute. The two duties cannot, in any respect, be said to be so related that a sweeping charge of their violation at the same time, in respect to the same thing, may be sustained. It is undoubtedly true that two offenses may be charged in one count, as an assault upon A. and B., or larceny of the property of A. and B.; and, as said by *Pearson, C. J.*, the indictment will not be bad for duplicity *"if it was all one transaction."* (Italics ours.) *S. v. Simons,* 70 N. C., 336. On an indictment for an assault with a deadly weapon, or with intent to kill, the defendant may be convicted of a simple assault, because but one wrong is charged. On an indictment for burglary the defendant may be convicted of simple larceny, because one includes the other. Many illustrative cases could be cited, but in all of them there is the same underlying reason. The defendant cannot be misled. To defend against the graver crime necessarily involves a defense against the lesser. Here we have four distinct violations of the same number of statutory duties: the failure to erect a courthouse, the failure to raise money by taxation for that purpose; the fail-
(672) ure to repair a courthouse, the failure to raise money by taxation for that purpose. To defend each of these alleged offenses, different defenses, different evidence, are necessary. It is difficult to conceive how a more confused and inextricable mass of matter may be involved in one charge. With all possible respect, I submit that it is the sovereign State of North Carolina, and not these defendants, which is playing "hide and seek" at the bar of the court. It is at her door, and not theirs, that the charge should be laid of making a "travesty in investigating the charge of a neglect of duty." It cannot be that the State, whose duty it is to protect her citizens in their rights, and prosecute them in her courts openly and fairly, may lay "traps" or "dig pitfalls" with a view of preventing them from being informed of the accusation and entrapping them into a conviction. Of course, I do not mean to suggest that the learned and honorable solicitor who drew this bill *intended* any such result, or that my brethren would encourage or

approve such purpose. I speak only of the logical result of permitting such a bill to be preferred. For the State, through her judicial proceedings, to permit it is, I submit, to keep the promise to the ear and break it to the hope; to give a stone for bread, and draw the citizen into danger when he is entitled to safety; to confuse him in his day of trial, when he should be surrounded and protected by the guaranties of the "law of the land." In a civil action the complaint must "contain a plain and concise statement of the facts constituting a cause of action." Revisal, sec. 467. In a justice's court, of limited jurisdiction, the defendant is entitled to have the plaintiff state the facts constituting his cause of action "in a plain and direct manner." For the failure to comply with these simple provisions the defendant may demur, and, until the law is complied with, he is not called to answer. Can there be any doubt that if these defendants were being sued in a civil action the complaint, if in the terms of this bill, would be open to demurrer? But it is said "The recitals and charge in this bill are so explicit that the defendants could not pretend, and did not, that they (673) did not know they were charged with failing to provide a sufficient courthouse for the county." I assume and concede that the charge is explicit to my learned brethren, but I must confess that, if the charge is "neglect of duty in failing to provide a sufficient courthouse for the county," I find an additional reason for quashing the bill—the statute imposes no such duty. I look in vain for any language in the statute capable of such construction. It is this very vague, indefinite conception of the law which disturbs me. It was this which *Taylor, C. J.*, in *S. v. Justices, supra,* and *Gaston, C. J.*, in *S. v. Comrs., supra; Smith, C. J.*, in *S. v. Fishblate, supra,* and *Davis, J.*, in *S. v. Comrs., supra,* all writing for unanimous courts, assigned as fatal defects in the indictments in those cases. Again, I submit that by their motion to quash, under the advice of learned counsel, these defendants not only do pretend, but in evident good faith assert, that they do not know "what they are charged with." I am, unfortunately, in the same state of ignorance. Whether they are charged with the failure to erect or to repair, to raise thousands of dollars by taxation, without the special permission of the Legislature, for the erection, or hundreds for repair, I could never so much as conjecture from any and every word in the indictment. Again, it is said the judge can ask the jury as to whether they find the defendants guilty of failing to "erect" or "repair," or the defendants can have them polled. I submit that this exhibits a failure to apprehend either the reason for or the value of the constitutional guaranty to which I have referred. It is not for the purpose of having the jury explain why they convicted a defendant. It is of but little import to him, after being tried upon an indictment so vague,

uncertain, and duplex that he was unable to make his defense or to know the accusation against him, as a sheep brought to the
(674) slaughter, to be told that in some way the jury had wended their way through the labyrinth and found some path leading to his conviction. Again, it is elementary that a defendant, after joining issue, is entitled to a general verdict, unless the jury will of their own motion find a special verdict, and that upon such special verdict the court will direct them to find a verdict of guilty, or not guilty, as may be, in its opinion, according to law. This is settled by numerous decisions of this Court. *S. v. Moore,* 29 N. C., 228; *S. v. Holt,* 90 N. C., 749; *S. v. Nies,* 107 N. C., 820. Great abuses are recorded in criminal trials in the past by interference by the court with the verdict of the jury. It should be recorded as rendered, unless it is insensible, in which case they should be directed to retire and render a verdict of guilty or not guilty. That so dangerous a practice should be allowed, as suggested, is a strong argument against bills so uncertain as to require any other than a general verdict. This is not one of the cases in which the State may, by electing at the conclusion of the evidence, render certain that which was not so. If one be charged with selling liquor on a day named, and it be shown that he sold on several other days to the same or to different persons, the solicitor should elect for which sale he would ask a conviction. It is said that the bill is like one charging an assault with a pistol, a brickbat, etc., where proof of either will sustain the charge. I concede the law to be as stated, but the illustration indicates the fact that the opinion is based upon a misconception. In the illustration given, the offense charged is the assault, the brickbat or pistol the means. Here the charge is failing to erect or repair; these are the imposed duties; the failure to perform them the offense. It is, as I have said, a mistake to say that the offense is a "neglect of duty"; it is the failure "to erect and repair." This is the exact ground upon which the demurrer to the bill in *S. v. Justices, supra,* is based.

That case is, to my mind, controlling authority in this, as it
(675) was held to be in *S. v. Comrs., supra.* In that case *Gaston, J.,* said: "The *corpus delicti* is that the streets were permitted to be out of repair, and the indictment assumes that the defendants, as commissioners, were bound to prevent this public inconvenience." He further says: "But then the indictment must set forth the criminal omission, so that the defendant may know and the court may see what duty has been neglected. It must not allege generally, still less state merely the consequences of the neglect of duty, but specify the offense producing such consequences." That a general verdict upon this bill would not protect the defendant from a second prosecution is too obvious to admit of discussion. It is not deemed worthy of notice in the opinion of the Court.

It is suggested that if the defendants had desired further information, they could call for a bill of particulars. I am unable to see how a bill of particulars could remove the duplicity manifest in this indictment. Defective bills of indictment may not be cured by bills of particulars. *S. v. Van Pelt,* 136 N. C., 633. There are other particulars set forth in the brief which, I think, have merit.

I doubt very much whether, under the authorities relied upon, any criminal offense is charged. I concede that if the solicitor had been so disposed, he could have joined in separate counts the several matters charged in the bill. This is allowable and the proper practice. The defendant is put upon notice, and the jury may, under the instruction of the court, render a verdict upon either count—but certainly not, in this case, on both—or, at any time during the trial, the solicitor may take a *nol. pros.* upon any count.

It is far from my purpose to favor placing unreasonable restrictions around the State in the prosecution of crime. I am strongly impressed with the conviction that the safety of the citizen, the protection of the innocent by an adherence to constitutional provisions and settled rules of pleading and procedure, are not incompatible with the safety and welfare of the State. Loose pleading brings about loose procedure and loose modes of thought and action, resulting in con- (676) fusion, uncertainty, often the conviction of the innocent and escape of the guilty. I cannot better close this already too long opinion than by quoting the language of *Pearson, C. J.,* in a case wherein the same question is involved. He says: "It is safest to follow the beaten path. According to the established forms, this indictment would have contained two distinct counts. . . . This mode of allegation would have fit the proof," etc. *S. v. Simons,* 70 N. C., 336.

I note the fact that for nearly a century men occupying positions similar to these defendants have demanded the same protection which they do, and in every instance this Court has sustained their contention. The Legislature, during this long period, has not changed the law in this respect. Why, then, is it deemed necessary to approve and encourage laxity, uncertainty, and duplicity in indictments? Is it not, in the light of the history open before us, wise to "walk in the beaten path"?

I have expressed my views strongly, because I am impressed with what I think a dangerous tendency to take down the barriers which the common law and the framers of our Constitution have erected to guarantee to every one charged with crime that he shall be informed of the accusation against him. We live in a day when the people, to meet evils and conditions menacing their welfare, demand rigid laws, with severe pains and penalties, having but little patience with those "delays

and little inconveniences" which, Blackstone says, are the price which we pay for rights in more important respects. While the law should "work itself pure" and gradually wear away the bonds by which its adjustment to conditions has sometimes been retarded, the courts should adhere to "first principles" and not conceive themselves wiser than the law. This is especially true in criminal pleadings and procedure. That we live in times of peace and safety is due, in large measure,
(677) to the wisdom of our ancestors; that those who come after us may inherit and enjoy the same peace and safety depends in large measure upon the fidelity with which we preserve the inheritance they have left to us.

Cited: *S. v. Whedbee,* 152 N. C., 781; *S. v. Corbin,* 157 N. C., 620; *S. v. Arlington, ib.,* 646; *S. v. Hinton,* 158 N. C., 627; *Jackson v. Comrs.,* 171 N. C., 382.

STATE v. EUGENE OWNBY.

(Filed 25 May, 1908.)

Indictment—Evidence—Expression of Opinion—Questions for Jury.

Upon a trial under an indictment for embezzlement, it is reversible error for the trial judge to charge the jury that a witness, from whom the money is charged to have been embezzled, was not interested in the result, it being an expression of an opinion upon the evidence forbidden by statute.

APPEAL from *Peebles, J.,* at July-August Term, 1907, of BUNCOMBE.

From judgment defendant appealed.

The facts sufficiently appear in the opinion of the Court.

Attorney-General for the State.

Zeb F. Curtis and Craig, Martin & Winston for defendant.

WALKER, J. The defendant was indicted for embezzlement. The particular allegation in the indictment was that the defendant, while in the service of R. M. Ramsey, trading under the name of the Asheville Dray and Fuel Company, embezzled the sum of $100. The defendant was convicted and sentenced to be imprisoned four years in jail, "and assigned to the commissioners of the county for said term, to be worked on the public roads," and adjudged to pay the costs. From the judgment of the court he appealed. R. M. Ramsey and G. W. Davis, an employee of Ramsey, testified in the case to facts tending to show the defendant's guilt. The only exception we will consider is
(678) the following: "The court erred in charging the jury as follows:

'Ramsey and Davis are not interested one cent in the result of this suit. It makes no difference how it may go with them. I believe the defendant proved a good character, and when you consider his testimony it is your duty to take that into consideration.' "

It appeared that Ramsey had applied to a magistrate for a warrant against the defendant, and he was really the prosecutor in the case. But whether he was or not, we think the instruction of the court to which exception was taken was an expression of opinion by the court upon the facts, or, rather, upon the weight of the evidence. It was for the jury, and not for the court, to determine what, if any, interest the witnesses Ramsey and Davis had in the case. The jury might very well have found that Ramsey was very much interested in securing the defendant's conviction. He was not, technically speaking, a party to the record, but if the defendant had been acquitted and the judge should have found "that there was not reasonable ground for the prosecution, or that it was not required by the public interest" (Revisal, sec. 1295), Ramsey might have been adjudged to be the prosecutor and taxed with the costs, or if the prosecution was malicious and not founded on probable cause, he would be liable to an action by the defendant for damages. But, apart from all this, the jury may have believed that he had some interest in the case, though a general one, as the money was embezzled from him, and they may have considered this fact in weighing his testimony. We order a new trial, as the defendant has been materially prejudiced by the reference of the court to the witnesses Ramsey and Davis, within the rule we stated in *Withers v. Lane,* 144 N. C., 184; *Metal Co. v. R. R.,* 145 N. C., 293; *McRae v. Lawrence,* 75 N. C., 289.

The slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with a jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench (679) which is likely to prevent a fair and impartial trial. We know that his Honor unguardedly commented upon the testimony of the witnesses, but when the prejudicial remark is made inadvertently it invalidates the verdict as much so as if used intentionally. The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has thus been impaired is entitled to another trial. In this case we all think there was a clear expression of opinion upon the weight of the evidence, which is forbidden by the statute.

New trial.

Cited: S. v. Swink, 151 N. C., 728; *Herndon v. R. R.,* 162 N. C., 321, 324; *Bank v. McArthur,* 168 N. C., 53.

STATE v. CLAYTON STEVENS.

(Filed 25 May, 1908.)

Indictment—Sentence—Power of Court—Further Evidence—Final Judgment.

It is within the power of the trial court to hold the matter of punishment of defendant in a criminal action under consideration during the term, and to take further testimony before rendering final judgment; and the defendant cannot complain when this was done at his request after a sentence had been imposed.

INDICTMENT for carrying concealed weapon, heard by *Peebles, J.*, at February Term, 1908, of BUNCOMBE.

The defendant entered a plea of guilty on 18 February and was then sentenced to "be imprisoned in the jail of Buncombe County for the term of six months and be assigned to the commissioners of said county for such term, to be worked on the public roads, pay all costs, and be discharged according to law."

On 20 February, 1908, during the same term, the following proceedings were had: "The judgment heretofore entered in this case
(680) is now stricken out, and it is adjudged that this defendant be imprisoned in the jail of Buncombe County for the term of eight months, and after 3 April, 1908, he is assigned to the commissioners of Buncombe County for remainder of term, to be worked on the public roads, pay all costs, and be discharged according to law.

From the foregoing judgment defendant appealed to the Supreme Court, on the ground that the court cannot increase the sentence after defendant has started to serve same, and that the judgment is fragmentary. The court found as a fact that defendant came into court on his own motion, and, being examined by a physician, the physician said that, in his opinion, the defendant would suffer some pain from his wounds for a month or so, and then could work at hard labor.

The defendant's father came on the stand and asked to have the sentence changed to a fine, whereupon the court sentenced the defendant to eight months in jail.

The court further found that defendant "has not commenced to serve sentence on the roads, but is still in jail."

Assistant Attorney-General for the State.
Britt & Ford and V. S. Lusk for defendant.

BROWN, J. According to the findings of fact of the court below, it is needless to examine into the power of the judge of the Superior Court during the term at which sentence is imposed to recall a prisoner, after he has commenced to serve his sentence, and increase his punishment.

It is plain that when this defendant was sentenced, on the 18th, his Honor retained the matter of punishment *in fieri* at defendant's request, and that he was remanded to jail for safe-keeping until the defendant could secure the attendance of a witness. His Honor finds that, at the time the first sentence was announced from the bench "defendant's counsel asked the court to reserve its sentence and give the defendant an opportunity to get Dr. Millinder as a witness to show that defendant was not able to do hard labor. The court replied that (681) he would hear the doctor, and if, after hearing him, he saw fit, he would change the sentence. About two or three days afterwards the doctor's attendance was procured, and he testified that he had examined the defendant and was of opinion that if defendant was put at hard labor within two months he would probably experience some physical pain therefrom, but that after two months he thought hard labor would not cause any pain." Thereupon the court imposed the last and final sentence, from which defendant appealed.

The power of the judge to hold the matter of final punishment under consideration during the term, and to take further testimony, cannot be doubted. *S. v. Brittain,* 93 N. C., 588. In this instance it was done at the request of defendant's counsel. Under such circumstances the authorities cited in defendant's brief (*Lang case,* 18 Wallace, 163, and *S. v. Warren,* 92 N. C., 825) have no application.

The judgment of the Superior Court is

Affirmed.

PRESENTATION OF THE PORTRAIT

OF

EX-ASSOCIATE JUSTICE JAMES CAMERON MACRAE

TO THE SUPREME COURT

BY

EX-CHIEF JUSTICE JAMES E. SHEPHERD

TUESDAY MORNING, 17 MARCH, 1908.

In making the presentation, ex-Chief Justice SHEPHERD said:

May it please your Honors: In response to an invitation of the Court, I have the honor of presenting the portrait of the Honorable James Cameron MacRae, a former Associate Justice of this high tribunal.

It is characteristic of the modesty of this distinguished jurist that he has requested that no words of eulogy be pronounced on this occasion, as he is happily still with us and engaged in the discharge of the responsible duties of his important and dignified position. As, however, he has retired from the practice of the law, I trust he will pardon me in giving, at least, a brief outline of his useful and honorable career.

We are standing very near where the river and the ocean meet. Every day brings its sad reminder that our generation is passing away, and that those who were reared in the high and peculiar civilization of the past, and those who illustrated its virtues and courage in the days that tried men's souls, are rapidly crossing over the river and resting under the shade of the trees.

It is meet, therefore, that a few words be said of one who, though still living, began his career in that crucial period in the history of his State which reflects its greatest civic and military glories—a time indeed when "None was for the party and all were for the State"; when men bared their breasts to the iron hail of battle, not for conquest or glory, but in defense of their homes and firesides.

Justice MacRae was born in the historic town of Fayetteville, in 1838. His father, John MacRae, for many years occupied a prominent position in that place. His mother, Mary Shackleford, was from Marion, South Carolina. He was educated at old Ronaldson Academy, in Fayetteville, and taught school in Brunswick County, North Carolina, and Horry County, South Carolina. He was licensed to practice law in

the county court in 1859, and obtained his full license in 1860. He located in his native town and began the practice of his profession. But soon the tocsin of war was sounded, and, in common with thousands of chivalrous young men of the South, he went to the front to meet the invaders of his country. He first enlisted in Company H, First North Carolina Volunteers, but was soon promoted to the adjutancy of the Fifth North Carolina State Troops. This was a great compliment to the young soldier, but his advancement did not stop here, as he was soon afterwards appointed, as major, to the command of a battalion in Western North Carolina, and was afterwards appointed Assistant Adjutant-General to General Baker, in the eastern part of the State, and continued in that position until the end of the war. Among other actions, he participated in the brilliant battle of Kinston, under the distinguished General Hoke, where he was captured, but soon afterwards exchanged.

Having gallantly served his country during the four years of terrible war, he returned home to take up the broken thread of his chosen profession, and throughout the succeeding dark and trying period, in which the Southern people displayed a moral courage and heroism equal, if not greater, than on the field of battle, was ever ready to devote his services to the interests of his State. As a mark of appreciation of his character and services, he was elected in 1874 by the people of Cumberland County to represent them in the Legislature. There he was distinguished for his wise counsel and devotion to duty. In 1882 he was appointed a judge of the Superior Court, to fill an unexpired term, and in the fall of the same year was elected judge of the Fourth (now the Seventh) Judicial District. As illustrating his fearless adherence to convictions of duty, it is worthy of remark that, a short time before he was nominated, he presided over the Prohibition Convention, which met in Raleigh in 1881. At that time there was much and bitter opposition to the movement, and to give it such prominent support was thought to greatly endanger his nomination. Such consideration had no weight with him; and the result showed that, however much they differed with him, the people of North Carolina were capable of appreciating and rewarding such brave and unselfish devotion to principle.

Judge MacRae continued on the Superior Court bench until 1892, when he became an Associate Justice of the Supreme Court. His long and useful service on the Superior Court bench is known in every county in North Carolina. He was well equipped for the position, as he had not only legal learning and sound judgment, but a rare knowledge of human nature, combined with a quick perception of justice and equity. While of a warm and sympathetic nature, and often blending mercy with justice, he had too much regard for the "gladsome light of jurisprudence" and its proper administration to pretend to be better and wiser than

the law. He appreciated fully that the office of the judge was *jus dicere, non dare,* and he thoroughly realized that no system of laws could endure unless certainty and uniformitory were maintained as a rule of action. As a judge of the Supreme Court his memory will be cherished with pride and affection by the people of North Carolina. He was appointed by Governor Holt to fill the unexpired term of the pure and lamented Justice Davis, and was afterwards elected to fill the unexpired term. He was unanimously renominated for the full term, but shared the fate of his party in 1894. Although his service on this bench was short, the character of his work indicates the wise and conservative judge.

After leaving the bench, Justice MacRae resided in Raleigh and resumed the practice of the law, in connection with Capt. W. H. Day. Here he remained until 1899, when he became dean of the Law Department of the State University, succeeding that able law teacher and noble gentleman, the Honorable John S. Manning. Here, under the classic shades of the old University, respected by all and beloved by his students, we leave our distinguished friend, devoting the closing years of his life to the high calling of instructing those of our youth who aspire to a profession which has always exerted such great influence in shaping the destinies of the State.

REPLY OF CHIEF JUSTICE CLARK

The Court is gratified to receive the portrait of Mr. Justice MacRae, and to add it to those of the other learned and able men which look down upon us from these walls, and whose lives and labors reflect credit upon this Court and the State.

It cannot be said that Judge MacRae has ceased to be a member of the Court. The sitting members are only a part of that greater court which takes part, and whose views are potent, in the decision of controversies. The opinions of our predecessors are daily quoted to us at the bar as controlling. The long row of volumes before us is the repository of their views. In our deliberations and decisions they descend, as it were, from their frames, sit at our councils, throw light upon the path we should go, and point the way. They are

> *"The dead but scept'red sovereigns, who still rule*
> *Our spirits from their urns."*

In the courts of England, Coke and Hale, Camden, Hardwick, and Eldon, and others of the great of old are as really present and share in the decision of causes as the living judges who gather around the consultation table. At Washington, Marshall, Taney, Chase, Waite, are potentially still existing, the voice of either being more powerful than that of any living member of the Court.

With us, Taylor and Henderson, Gaston and Ruffin, Pearson, Smith, Ashe, and Merrimon still take their seats at the council board; their views are sought for and followed. In the illustrious company of our predecessors the recorded opinions of Mr. Justice MacRae, who is yet spared to us, make him still a part of the Court. His services were long enough to establish his fame, but too short for the full measure of the services he might have rendered the profession. Yet it may be doubted if, in his present position, he is not rendering greater service still, and more enduring, through his influence upon the future bar and judges of North Carolina.

To those who sat with him here the memory of his uniform courtesy, his great learning, and indefatigable labors is a benediction.

The Marshal will hang his portrait in an appropriate place on the walls of this chamber.

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EVIDENCE.

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2. *Libel—Postal Card.*—In an action to recover damages for publication of a libel concerning a robbery of public moneys from the plaintiff, the county treasurer, a postal card mailed by defendant is actionable libel, *per se*, whereon he had written: "Turn your searchlights on your treasurer and the man who boards with him, and the postmaster, and you will find where the money went." *Logan v. Hodges*, 38.

3. *Libel—Postal Card—Publication—Mail.*—The publication of the libel is shown when proved by the addressee that he had received a postal card in course of mail whereon the libelous matter was written by the defendant, as such is likely to be communicated to the postal clerks and employees through whose hands it may pass. *Ibid.*

4. *Libel—Postal Card—Pleadings—Good Faith—Malice.*—When, in an action for damages for the publication of a libel, justification is not pleaded, such defense is not open; and when all the evidence tends to show that the defendant published the libel by writing it on a postal card and mailing it, the judge below should charge the jury, if they find the evidence to be true, or to be the facts, some damages should be awarded. The defendant having pleaded good faith and lack of actual malice, it is open to him to offer evidence thereof in mitigation of damages. *Ibid.*

6. *Same—Options—Fraud—Parties.*—When defendant, under an agreement with plaintiff, secured an option on lands, taking it in his own (defendant's) name, and afterwards acquired an extension of the option, again in his own name, acknowledged orally that the option should have been taken in both of their names, and offered to give plaintiff a writing to that effect, the evidence as to the writing is corroborative of the original agreement, and, when so restricted by the trial judge, is competent in an action to declare the defendant a trustee for the plaintiff in the land acquired under the option of defendant in fraud of plaintiff's rights. *Russell v. Wade*, 116.

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LIBEL.

1. *Evidence—Postal Card.*—In an action to recover damages for publication of a libel concerning a robbery of public moneys from the plaintiff, the county treasurer, a postal card mailed by defendant is actionable libel *per se* whereupon he had written: "Turn your searchlights on your treasurer and the man who boards with him, and the postmaster, and you will find where the money went." *Logan v. Hodges*, 38.

2. *Evidence — Postal Card — Publication—Mail.*—The publication of the libel is shown when proved by the addressee that he had received a postal card in course of mail whereon the libelous matter was written by the defendant, as such is likely to be communicated to the postal clerks and employees through whose hands it may pass. *Ibid.*

3. *Postal Card—Absolute Privilege—Qualified Privilege.*—A postal card containing a libelous communication concerning a public official of a county, though written in the public interest, is not absolutely or qualifiedly privileged when not addressed to some person having jurisdiction to entertain the complaint, or power to redress the grievance, or some duty to perform or interest in connection with it. *Ibid.*

4. *Postal Card—Pleadings—Evidence—Good Faith—Malice.*—When, in an action for damages for the publication of a libel, justification is not pleaded, such defense is not open; and when all the evidence tends to show that the defendant published the libel by writing it on a postal card and mailing it, the judge below should charge the jury, if they find the evidence to be true, or to be the facts, some damages should be awarded. The defendant having pleaded good faith and lack of actual malice, it is open to him to offer evidence thereof in mitigation of damages. *Ibid.*

LIMITATION OF ACTIONS.

1. *Compromise—Payments.*—When a payment is made by defendant only in contemplation of an agreed compromise of a debt, such payment will not repel the bar of the statute of limitations as to the balance thereof. Revisal, sec. 371, provides that "This section shall not alter the effect of the payment of any principal or interest," and leaves in operation the rule of law that the circumstances under which payment was made must be such as to warrant the clear inference that the debtor recognized the debt, and his obligation to pay it. *Supply Co. v. Dowd*, 191.

2. *Same—Mutual Accounts—Knowledge—Concurrence—Compromise.*—An account of transactions between two persons, to be mutual, when kept by only one of them, must be with the knowledge and concurrence of the other, so as to make a credit given to such other repel the bar of the statute of limitations. *Ibid.*

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4. *Married Women.*—Chapter 78, Laws 1899, repealing, as to married women, sections 148 and 163 of The Code (1883) and suspending the

card and mailing it, the judge below should charge the jury, if they find the evidence to be true, or to be the facts, some damages should be awarded. The defendant having pleaded good faith and lack of actual malice, it is open to him to offer evidence thereof in mitigation of damages. *Logan v. Hodges*, 38.

3. *Amendments — Counterclaim — Motion — Judgment.*—Amendments to pleadings allowed by the trial judge in his discretion will not be reviewed by the Supreme Court on appeal. The counterclaim of defendant not having been denied by plaintiff, it was in the sound discretion of the judge below to permit plaintiff to reply, for the purpose of denial, and overrule defendant's motion for judgment thereon, when such is proper. *Bernhardt v. Dutton*, 206.

4. *Mortgage—Right of Possession—Parol Contract—After-acquired Property.*—When the complaint, in a suit for the recovery of a stock of goods embraced by a mortgage given by defendant, alleged the right of possession thereunder, and the answer denied the execution of the mortgage and alleged the consideration had failed, in that the goods covered by the mortgage had been sold, it was error for the court below to strike out, upon motion, a reply that had been filed for several terms of the court, and to exclude evidence thereupon, to the effect that the defendant agreed by parol, after the execution of the mortgage, that the lien thereof should apply to goods in defendant's store, afterwards acquired, as security for the payment for goods the defendant bought from the plaintiff from time to time. *White v. Carroll*, 230.

5. *Same.*—When plaintiff alleges that the defendant had mortgaged, as security for credits extended by the plaintiff, "all of the goods in said store at the time of the bringing of the action," by a liberal interpretation (Revisal, sec. 495) the averment will include a separate and independent agreement, apart from that contained in the original mortgage, to give a lien by parol on after-acquired stock in said store. *Ibid.*

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8. *Parties—Corporations—Insolvency.*—When a corporation is a party defendant in an action upon the theory that it is a going concern, it is not error in the court below to permit it to file an answer, under the objection of the other defendants, upon the ground that the corporation had fraudulently disposed of its property, and that they were large stockholders, when their interests are not thereby prejudiced,

POWER OF COURT.

1. *Amendments After Judgment.*—When a cause of action is defectively stated, the judge or the court below may, "in furtherance of justice and on such terms as may be proper, amend any pleading," etc., and such may be done after judgment and when the case goes back after appeal to the Supreme Court. Revisal, sec. 507. *McCullock v. R. R.*, 316.

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4. *Courts — Wills — Jurisdiction — Equity — Adverse Interests.*—The advisory jurisdiction of courts of equity does not extend to the mere construction of a will to ascertain the rights thereunder of devisees or legatees. Such is not sustained under Revisal, 1589, when not brought by the plaintiff against some person claiming an adverse estate or interest. *Heptinstall v. Newsome*, 503.

5. *Corporations—Parties—Receivers, Courts of Equity Appoint, When.*—While it is more orderly to proceed under Revisal, sec. 1196, to appoint a receiver for a corporation, such may be done in a court of equity wherein, under the decree, all parties are before the court or thereunder will be brought in, and the same relief awarded as if the provision of the statute had been complied with. *Greenleaf v. Land Co.*, 505.

6. *Corporations — Receivers — Application of Funds.*—In proceedings in equity to administer upon the assets of an insolvent corporation, it is competent for the courts in proper instances to appoint a receiver, and instruct him to sell the property, after ascertaining the names of creditors, the amounts due them, and the interest of stockholders, and before final judgment declare a dissolution and direct the funds to be administered in accordance with the rights of the parties. *Ibid.*

7. *County Commissioners—Courthouse, Repair—Ministerial Duty—Supervision of Court.*—The building and keeping in proper repair the courthouse of a county is a part of the ministerial duties of the county commissioners, subject to indictment for willful failure, and not subject to the supervision of the courts. *Ward v. Comrs.*, 534.

8. *Cities and Towns—Streets—Ministerial Duties—Suit by Taxpayer.*—Matters relating to closing by-streets of a town are of a ministerial character, exclusively within the proper action of the town authorities, and not subject to regulation by the court at the suit of one upon the ground that he is a taxpayer. *Trotter v. Franklin*, 554.

9. *Appeal and Error—Verdict Set Aside—Inadequate Damages—Reversible Error.*—While it is in the discretion of the court below to set