ANNOTATIONS INCLUDE 171 N. C.

NORTH CAROLINA REPORTS

VOL. 147

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1908

(IN PART)

BY

ROBERT C. STRONG

STATE REPORTER

ANNOTATED BY

WALTER CLARK

(2 ANNO. ED.)

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SPRING TERM, 1908

M. O. GEROCK ET AL. v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 4 March, 1908.)

1. Appeal and Error--Second Appeal—Rehearing of First Appeal.

Upon a second appeal in the same cause of action, the appellant may not have a rehearing of matters disposed of in the first appeal.

2. Telegraph Companies — Negligence — Evidence — Principal and Agent — Prior Negligence—Nominal Damages.

When there is evidence of negligence of a telegraph company prior to the time of the delivery of a telegram to the party in whose care it was sent, it is sufficient to support a verdict of at least nominal damages.

3. Telegraph Companies—Negligence—Damages—Instructions—Principal and Agent—Knowledge of Agent.

In an action to recover for the negligent failure of a telegraph company to deliver a telegram from a wife to her husband, informing him of her sickness, and in consequence of which she was caused mental anguish by his failure to come or to reply, it was not error in the court below to refuse to instruct the jury under the facts that there could be no recovery for mental suffering endured by the wife, for that at the time in question the husband telegraphed to his wife's father, inquiring about her condition, of which the father neglected to inform her.

4. Principal and Agent—Evidence—Agency—Principal—Imputed Knowledge.

Knowledge of any undisclosed fact or circumstance bearing upon matters in avoidance of the damages claimed, communicated to her father, is not imputed to plaintiff, in the absence of evidence of the father's agency.

5. Telegraph Companies—Messages—Care of Another—Delivery.

A delivery of a telegram to the person in whose care the sendee is addressed is, in law, a delivery to the sendee.

6. Telegraph Companies—Negligence—Evidence—Measure of Damages—Contributory Negligence—Proximate Cause.

When the evidence tends to show that the defendant telegraph company negligently delayed the delivery of a message to the one in whose care it was sent, relating to the sickness of plaintiff's wife, and requesting him to come to her, so that the addressee lost an opportunity of sooner being with her, and there was a further delay on the part of the one in whose care the message was sent in delivering it to the addressee, causing plaintiff to miss the next opportunity of going, the only question presented is upon the measure of damages, not one of contributory negligence or proximate cause; and it was not error in the court below to refuse to instruct the jury that plaintiff could not recover.

7. Telegraph Companies—Telegram, Care of Another—Notice of Importance.

It is not ordinarily the duty of a telegraph company to notify the one in whose care a telegram is sent of its importance.

8. Telegraph Companies—Prior Negligence—Care of Another—Notice of Importance—Questions for Jury.

When prior negligence on the part of the telegraph company is established, which may cause an injury, whether it is the duty of the telegraph company to notify the one in whose care a telegram is sent of its importance, or it should be left as an open question to the jury whether the employee acted as a man of ordinary prudence would have acted in not doing so, *quære*.

APPEAL from *W. R. Allen, J.*, at November Term, 1907, of BERTIE.

Action to recover damages for negligently delaying to deliver a telegram which was sent from Ahoskie, N. C., to Maysville, N. C., by the *feme* plaintiff, Mrs. Gerock, in the name of her father and agent,
(3) J. A. Copeland, to her husband, M. O. Gerock, in care of his brother, C. O. Gerock. The latter is a barber in Maysville, and his shop is about 150 yards from the defendant's office. His home was about 3 miles from Maysville, in the country, and his brother was visiting him at his home when the telegram was sent.

The court submitted the following issues to the jury:

1. Did defendant negligently delay the delivery of the telegram, as alleged in the complaint? Answer: "Yes."

2. Was plaintiff injured thereby? Answer: "Yes."

3. What damage is the plaintiff entitled to recover? Answer: "Six hundred dollars."

The evidence tended to show that the message was received at Maysville at 4:27 p. m. on Thursday, 2 February, 1905. C. O. Gerock was at his place of business in Maysville until 5:42 p. m. on that day. The

defendant's agent did not deliver the telegram until 9:30 a. m. on Friday, 3 February, 1905. It was in a sealed envelope. The agent did not inform C. O. Gerock of the importance of the message, but said to him at the time he delivered it: "Here is a telegram I received yesterday afternoon, in your care, for M. O. Gerock." If C. O. Gerock had known the nature of the message he would have sent it at once to his brother when he received it. He did not deliver it to him until 6 o'clock, 3 February, 1905, when he returned to his home at the usual hour. He would have given it to his brother Thursday evening if it had been received that evening from the defendant's agent. C. O. Gerock went to Maysville as early as 7 o'clock on Friday morning, but did not receive the message until 9:30 o'clock. The message was in the following words: "India is sick with grippe; not dangerous; wants you to come," and was dated 2 February, 1905. India is the wife of M. O. Gerock. The train leaves Maysville at 4:22 p. m. for Ahoskie and arrives there at 10:36 a. m. the next day. If C. O. Gerock had delivered the message to his brother, M. O. Gerock, at any time before 12 o'clock Friday, the latter could have reached Ahoskie by 10:36 a. m. Saturday. He (4) left Maysville Saturday at 4:22 p. m. and did not reach Ahoskie until Sunday afternoon about 5 o'clock. If he had received the message Thursday evening, he "would have driven to New Bern and arrived at Ahoskie the next day, Friday, 3 February, 1905," though he also testified that he "expected" he would have driven to New Bern Thursday night. He could not drive through the country to New Bern Friday night, owing to the bad weather, snow having fallen in the meantime. J. A. Copeland received a telegram from M. O. Gerock, Saturday morning about 10 o'clock, inquiring how his wife was. He did not tell Mrs. Gerock of the message until later in the day—after 12 o'clock—but wired M. O. Gerock that she was better. When he told Mrs. Gerock of her husband's message to him, he found her in bed and worse. She was nervous and troubled about her husband not coming. The defendant's agent in Maysville knew that M. O. Gerock was in the country, about 3 miles from Maysville. Her husband's failure to come Saturday morning caused Mrs. Gerock mental and "physical" suffering, and made her a great deal worse. She had a nervous chill, went to bed and did not get up again that day. Her "mental anguish was agonizing" and was caused by his not coming when she expected him. Her husband was frail and weak. She needed him during her sickness. Mrs. Gerock had the words "not dangerous" inserted in the message to allay her husband's fears, on account of his weak condition.

The defendant introduced no testimony. A motion to nonsuit the plaintiff was overruled, and the defendant excepted. The court read the

notes of the evidence to the jury and recited in full the contentions of each party, applying the facts to the law.

The defendant requested the court to give the following instructions to the jury:

(5) "1. That upon the testimony in the case the plaintiffs are not entitled to recover, and the jury will answer the issue as to negligence 'No.'

"2. There can be no recovery for mere disappointment—that is, at the husband not coming; nor can there be any recovery for mental suffering endured, if any, after M. O. Gerock's wife's father, J. A. Copeland, got a telegram from him on Saturday.

"3. It was not the duty of the company to send the message to M. O. Gerock, who was in the country and beyond its delivery limits."

The first instruction was refused, and the second and third were also refused, except as given in the charge. The defendant duly excepted.

The court gave the proper legal definition of negligence, and stated clearly to the jury the duty of the defendant to deliver the message, after its receipt in Maysville, to the person to whom it was addressed, within a reasonable time. There was no exception taken to the court's definition of negligence or to its charge as to the duty of the defendant.

The court proceeded to charge the jury on each issue separately. On the first issue the court charged as to the general law of negligence and as to the duty the defendant owed the plaintiff. On this issue the court arrayed all of the facts and circumstances applicable thereto. The court further charged as to this issue:

"1. It was the duty of the defendant to transmit and deliver the message within a reasonable time, and a failure to do so was negligence. Reasonable time is governed by the circumstances of the case. There was no negligence in transmitting the message to Maysville, as it reached there at 4:27 p. m. on Thursday, 2 February, 1905. The telegram was addressed in care of C. O. Gerock, and the delivery to him was, in law, a delivery to the husband."

The defendant had requested the court to charge the jury as follows:

(6) "That when the company delivered the telegram to C. O. Gerock, it was a delivery to M. O. Gerock." To the last instruction the defendant excepted.

The court charged on the second issue as follows:

"2. If the jury answer the first issue 'Yes,' and they further find from the evidence that M. O. Gerock would have reached his wife earlier if the telegram had been delivered within a reasonable time, they should answer the second issue 'Yes'; otherwise, 'No.'" The defendant excepted.

The court charged the jury that it was not the duty of the defendant

to disclose the contents of the message to C. O. Gerock when it was delivered to him. The facts were fully recited and the contention arrayed on the second issue, and the question as to who had the burden of proof was fully explained as to all the issues.

On the third issue the court charged the jury as follows:

"3. If you answer the first and second issues 'Yes,' then the plaintiff is entitled to a reasonable compensation for the mental and physical suffering which was the direct and proximate result of defendant's act." The defendant excepted.

The court further charged:

"4. You cannot allow anything for mere disappointment or regret; mental anguish means more than this; it means a high degree of mental suffering, and if there was not such suffering, you will allow nothing for mental anguish." The defendant excepted.

The other exceptions were substantially like those already taken by the defendant. Verdict for plaintiff and judgment thereon. The defendant appealed.

St. Leon Scull for plaintiff.

F. H. Busbee & Son, Winston & Mathews, and George Cowper for defendant.

WALKER, J., after stating the case: This case was before us at a former term (142 N. C., 22). We will not review any question which was then decided, as a party who loses in this Court cannot have the case reheard by a second appeal. *Holland v. R. R.*, 143 N. C., (7) 435. The Court held in that appeal, upon a motion to nonsuit, that there was evidence sufficient to be submitted to the jury upon the question of negligence.

It is now said by counsel that it did not appear in the former appeal that a train left Friday afternoon at 4:22 for Ahoskie *via* New Bern and Goldsboro. But this is a mistake; it does so appear in the original case on appeal, though not so stated in the opinion.

But we think the judgment should be affirmed on other grounds. There was no special instruction requested as to the duty of C. O. Gerock to deliver the message Friday morning in time for his brother, M. O. Gerock, to leave Maysville on the afternoon train, as will appear hereafter. We cannot sustain the motion to nonsuit, nor declare that there was any error in the refusal of the first prayer of the defendant for an instruction to the jury, to the effect that the plaintiff is not entitled to recover, and they should answer the first issue, as to negligence, "No," for the simple reason that we have before decided that there was evidence of negligence. Besides, there having been evidence of a negligent delay in not delivering the message until Friday morning, which was not

seriously controverted, the *feme* plaintiff was entitled to recover at least nominal damages.

The judge gave the first part of the second prayer, and charged the jury that they could not allow anything for mere disappointment or regret, and explained to the jury what constituted mental anguish for which damages could be awarded. As to the second part of the second prayer, we are unable to see how the receipt of the telegram by J. A. Copeland from M. O. Gerock, merely inquiring about the condition of his wife, can affect her right to recover damages for her mental anguish, if proximately caused by the defendant's negligence. Copeland was not her agent to receive such a message for her, and he did not receive it in any such capacity, and she cannot be prejudiced by any failure on his part to communicate its contents to her. It was a mere inquiry,
(8) addressed to Copeland, and if she had been informed of its nature it would not have tended to allay her anxiety, but might have increased it.

The judge virtually gave the third instruction requested by the defendant when he told the jury that a delivery to C. O. Gerock was, in law, a delivery to the husband of the *feme* plaintiff, M. O. Gerock. Besides, it is stated in the case that the judge gave the proper legal definition of negligence and explained clearly to the jury the duty of the defendant to deliver the message, after its receipt at Maysville, to the person to whom it was addressed, within a reasonable time, and no exception was taken to this part of the charge. It is also stated that the judge charged the jury upon each issue separately. On the first issue he explained the general law of negligence and the duty which the defendant owed the plaintiff, and he arrayed all of the facts and circumstances applicable thereto. No exception was taken to this part of the charge. What the judge did say to the jury is not fully set out, and we must assume in this Court that he charged correctly as to all the issues, in the absence of any showing to the contrary, as we do not perceive that there was error in the instructions of the court below, so far as they are set forth. The defendant did except to the first instruction of the court as to negligence, as indicated above in the statement of the case, but we can see no error therein, considering the former decision of this Court. The instruction that a delivery to C. O. Gerock was a delivery to M. O. Gerock, and that it was not the duty of the defendant to disclose the contents of the message to C. O. Gerock when it was delivered to him, was certainly not prejudicial to the defendant.

As the charge is not set out in full, we are not informed as to how the court specially instructed the jury with reference to the duty of C. O. Gerock as to the delivery of the telegram after he received it. The judge may have given very proper instructions upon this question, and we

must assume that he did. There was no special instruction (9) regarding that feature of the case requested by the defendant. The plaintiff was, in a legal sense, injured by the negligence of the defendant's agent in delaying the delivery of the message, and was entitled to nominal damages, and the charge of the court upon the second issue was, in that view, correct, apart from the other considerations we have mentioned. Whether the plaintiff was entitled to substantial damages, if there was any negligence on the part of C. O. Gerock, is another and different question. We must again assume that the court instructed the jury correctly as to this matter, as the charge is not all set out. The exceptions to the part of the charge relating to damages are not tenable. There was evidence of mental and physical suffering, and the instruction as to mental anguish was not erroneous.

As the defendant was guilty of negligence in postponing the delivery of the message until Friday morning, thereby preventing M. O. Gerock from leaving Thursday night, and as this was a breach of duty, entitling the plaintiff, at least, to nominal damages, the negligence of C. O. Gerock, if any, in not delivering the telegram to his brother in time for him to take the train that afternoon, related to the question of damages, and could be considered only under the third issue. But we are of the opinion that the delay on the part of C. O. Gerock in delivering the message was excused by the prior negligence of the defendant in delaying its delivery from the time it was received until Friday morning, which either imposed the duty upon it to notify C. O. Gerock of the importance of the message, which could have been done without disclosing its contents, or, at least, left it as an open question for the jury to decide whether he acted as a man of ordinary prudence would have done under the same circumstances. The defendant's operator knew the circumstances, and especially did he know the fact that C. O. Gerock would not return to his home until late in the afternoon. No instructions were asked upon this aspect of the case, and the defendant can- (10) not, therefore, complain of the result. *Simmons v. Davenport,* 140 N. C., 407. The uncontroverted facts of this case entitled the plaintiff to a favorable finding upon the first and second issues. The conduct of C. O. Gerock did not present a question of contributory negligence or of proximate cause, but of damages, as the plaintiff had already established a good cause of action by showing the prior negligence of the defendant.

This case is not like *Lefler v. Tel. Co.,* 131 N. C., 355. In that case there was no prior negligence of the company.

No error.

Cited: Hocutt v. Tel. Co., post, 190; *Floyd v. R. R.,* 167 N. C., 62.

J. W. SHERROD ET AL. v. M. J. BATTLE ET AL.

(Filed 4 March, 1908.)

Deeds and Conveyances—Title—"Good-Faith Contention"—Timber—Cutting Restrained—Hearing.

In an action to try title to timber lands and to restrain cutting the timber, it having been found as a fact by the judge below "that there is a good-faith contention on both sides, based upon evidence constituting a *prima facie* title," it was proper for him to forbid either party from cutting the timber until final determination of the suit.

APPEAL from *Neal, J.*, upon injunction proceedings, at September Term, 1907, of EDGECOMBE.

From an order continuing the injunction to the hearing defendants appealed.

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

PER CURIAM. This is an action brought by the plaintiffs to try the title to timber lands and to restrain the defendants from trespassing thereon by cutting the timber thereon. Upon the hearing all the
(11) affidavits and counter-affidavits for plaintiffs and defendants were considered by the judge, and he reached the conclusion, and so found as a fact, "that there is a good-faith contention on both sides, based upon evidence constituting a *prima facie* title." Having made this finding of fact, it became the duty of the judge to forbid either party to cut timber trees on the land in dispute until the final determination. Revisal, secs. 807, 808. We have carefully reviewed the record, as we have the power to do, and conclude that there is no just ground for reversing the judgment. Inasmuch as the title to the land is put in issue and is to be tried before a jury, when the facts will be fully developed, we content ourselves with simply affirming the order of the judge below.

Affirmed.

MARCELLUS SUTTON AND WIFE v. IRWIN JENKINS.

(Filed 4 March, 1908.)

1. Deeds and Conveyances—Reciprocal Conveyances—No Consideration—Title—Different Source—Estoppel.

Reciprocal conveyances of the same land between plaintiff and defendant, made at the instance and for the benefit of the former, without consideration, no money passing, vest but do not rest the title, and do not operate as an estoppel upon the defendant in claiming the lands under a different source of title.

2. Deeds and Conveyances—Mortgage Sale—Tenants in Common—Unity of Possession—Relationship Destroyed.

When the land upon which the plaintiff and defendant are tenants in common is sold, under the lien of a subsisting mortgage, to a third person, who acquires the title and possession, and conveys the remainder to one of them, the unity of possession, and thereby the relation of tenants in common, is destroyed.

3. Tenants in Common—Relationship Destroyed—Title—Different Source.

There is nothing in the policy of our law which prohibits the defendant, who held under a former deed from his father, with his sister, the lands in controversy as tenant in common, from taking under the deed from his father the same land, acquired by his father at a sale of the land under a prior subsisting mortgage.

4. Evidence—Judgment Roll Not Introduced—Presumption of Validity—Cannot be Attacked.

When the judgment roll under which defendant's grantor obtained title is referred to only by the title, and the judgment roll is not set out in the evidence, the proceedings will be presumed as valid, and may not be successfully attacked as void for the want of proper parties.

5. Deeds and Conveyances—Purchaser at Foreclosure Sale—Deed—Color—Limitation of Actions—Adverse Possession.

When the purchaser of lands at a foreclosure sale enters into possession under a deed of definite description, such is color of title in him and those claiming under him, and becomes indefeasible at the expiration of seven years adverse possession.

6. Deeds and Conveyances—Title Made to Husband—Trusts and Trustees—Limitation of Actions.

When it appears that the *feme* plaintiff, with her husband, conveyed her land and took a mortgage to secure the purchase money, and the mortgage was foreclosed and the title to the land was procured by the husband to be made to himself, he thus acquires as her trustee, and the statute of limitations will begin to run against her from the date of his deed.

7. Deeds and Conveyances—Tenants in Common—Unity of Possession Destroyed—Deeds—Evidence of Title.

The *feme* plaintiff claimed, as tenant in common with defendant, her part of the land in controversy, under a deed from a common grantor. Defendant denied cotenancy, and established the fact that the unity of possession had been destroyed by subsequent deeds: *Held*, that plaintiff can establish her title by showing seven years adverse possession under the conveyance, as color, through which she claimed as tenant in common.

ACTION to try title to land, at November Term, 1907, of PITT, before *Lyon, J.*

The issues submitted by the court, together with responses of the jury, are as follows:

1. Are the plaintiffs the owners and entitled to the possession of the 20 acres of land described in the complaint? Answer: "Yes."

(13) 2. If so, what is the rental value of said land per year? Answer: "Fifty dollars."

3. Does the defendant unlawfully withhold the said land from the plaintiff? Answer: "Yes."

4. Are the plaintiff Laura Sutton and the defendant tenants in common in the 40 acres of land described in the complaint? Answer: .....

5. If so, what is the rental value? Answer: .....

6. Is the plaintiffs' cause of action barred by the statute of limitations? Answer: "No."

From the judgment of the court upon the issues the defendant appealed. The facts sufficiently appear in the opinion of the Court.

L. I. Moore for plaintiffs.

F. G. James and Jarvis & Blow for defendant.

BROWN, J. This action was tried in the Superior Court upon the theory that the plaintiffs were the owners *in severalty* of the 20-acre tract in controversy, and the jury so found. There are many exceptions and assignments of error relating to the evidence and the charge of the court, which, for brevity's sake, we will not consider in detail. The record discloses that on 14 January, 1881, F. H. Dawson executed a deed in fee for 40 acres of land to the plaintiff Laura Sutton and to her brother, the defendant Irwin Jenkins, then called "junior." There is evidence tending to prove that they, with the assistance of their father, undertook to divide the tract into halves of 20 acres each by running a division line, and that they then entered into possession of their respective parts. As we understand the case, it is the part so assigned to Laura Sutton that is now in controversy. At the time of the above conveyance

there was an outstanding and prior mortgage on the 40-acre tract, executed 23 December, 1879, by F. H. Dawson to J. T. Dawson. It is claimed by plaintiffs that the debt secured in this mortgage was assigned to the father, Irwin Jenkins, Sr., and that they furnished some portion of the money. However that may be, the mortgage was (14) duly foreclosed by legal proceedings, entitled "Irwin Jenkins v. F. H. Dawson," and the land was purchased by Irwin Jenkins, Sr., and conveyed to him by the commissioner, F. G. James, by deed, dated 2 October, 1882. On 26 January, 1886, Irwin Jenkins, Sr., and wife conveyed the entire 40-acre tract to the defendant, reserving in the deed a life estate to the grantor and his wife. The life estate terminated four years prior to this suit by the death of the survivor of the life tenants, Irwin Jenkins, Sr. There is evidence tending to prove that Irwin Jenkins, Sr., entered into actual occupation of the land, and remained in exclusive possession of it from 1882 up to his death. There is no evidence or finding that Irwin Jenkins, Sr., purchased the land, or any part of it, in trust for the plaintiffs or either of them.

For the purpose of estopping defendant, the plaintiffs introduced a deed executed 6 December, 1884, by defendant to Marcellus Sutton, conveying the 20 acres in controversy, together with other lands. It appears that the plaintiffs, Sutton and wife, conveyed the land by deed to one Wilson, who executed a mortgage to Marcellus Sutton for the purchase money, which was foreclosed and the land purchased by defendant, to whom Marcellus Sutton conveyed it under power of sale, and then defendant immediately reconveyed it to Marcellus Sutton by the aforesaid deed. It is contended that defendant is estopped by his deed from now setting up title under the deed from his father. Marcellus Sutton testifies in respect to the transaction as follows: "The description in deed from Jenkins to me is same as described in complaint. This is the only piece of land my wife ever owned—this 20 acres. We sold the 20 acres and took mortgage, and afterwards sold it out under the mortgage, and defendant bought at sale for me and made me this deed that has been introduced. There was no money passed. His father and mother said he was 23 years old when he signed this deed. I did (15) not take possession under this deed, as there was a life estate outstanding. Defendant had possession of this land when he made me the deed, and has been in possession ever since. I have never been in possession of it. Defendant took possession under his father and mother, who had life estate."

In testifying concerning this transaction, the defendant says: "When I signed the deed to Sutton I did not know the 20 acres were in the deed. I was doing it for accommodation to Sutton. He made me a deed, and at same time I made him a deed. He had both prepared. No money

passed. I trusted it all to him." The execution of deeds from Marcellus Sutton to the defendant and from defendant to him are concurrent acts, and are to be considered as one act. The title may have *vested,* but did not *rest* in the defendant. The latter paid no money for the land and received no benefit from the transaction. The entire transaction was the act of Marcellus Sutton. The defendant was a mere conduit—a "man of straw," acting for Sutton, at his request. Had there been a judgment docketed at the time against the defendant, this land could not have been subjected to its payment under such conditions, nor could his wife dower upon it. *Whitehead v. Hellen,* 76 N. C., 99; *Bunting v. Jones,* 78 N. C., 243; *Moring v. Dickerson,* 85 N. C., 469. Upon the testimony of both plaintiff and defendant, the latter is not estopped by the deed of 6 December, 1884, from now claiming the land in controversy. Nor is the defendant estopped by reason of any common estate from claiming the reversion in the land given him by his father by the deed of 26 January, 1886. It is true that at one time the relation of tenants in common existed between the *feme* plaintiff and the defendant by reason of the conveyance to them by F. H. Dawson of 14 January, 1881; but this conveyance was made subject to a paramount outstanding title vested by mortgage in J. T. Dawson, which title, under fore-
(16) closure, was acquired, as this record discloses, by Irwin Jenkins, Sr., on 2 October, 1882, who, on 26 January, 1886, gave the land by deed to the defendant, reserving his life estate, which expired four years before the commencement of this action. When the true legal title to the entire tract of land was acquired by Irwin Jenkins, Sr., under judicial sale, and he entered upon it in right thereof in 1882, the unity of possession between Laura Sutton and the defendant was destroyed and their relationship as tenants in common was severed. Unity of possession being the only unity essential to such cotenancy, anything that operates to destroy this unity will dissolve the cotenancy. 17 A. and E. Enc., 711; *Baird v. Baird,* 21 N. C., 536, 538. There is nothing in the policy of our law which prohibits the defendant from taking under the deed from his father, made four years after the dissolution of the cotenancy. *Baird v. Baird, supra.* It is contended, however, that the foreclosure proceedings are void, and that Irwin Jenkins, Sr., acquired no title, inasmuch as the necessary parties were not made to give validity to the sale. However that may be in fact, it does not so appear in the record. The judgment roll of the foreclosure proceeding is not before us, and the action is referred to only by its title. Under the maxim, *Omnia presumuntur rite esse acta,* we must take the proceeding to be regular until it is shown to the contrary. In addition to the fact that the names of all the parties to an action are not generally set out in the title, there is a general presumption that legal proceedings are regular

and that all necessary parties have been made. *Hare v. Holleman,* 94 N. C., 14. But, assuming the irregularity or even the void character of the foreclosure proceedings, the deed from James, commissioner, to Jenkins, Sr., is color of title; and if the grantee entered under such color in 1882, and remained in actual possession of the entire tract up to his death, some six years ago, as the testimony of Marcellus Sutton, as well as that of the defendant, tends strongly to prove, he acquired an indefeasible title as against all persons not under disability. (17) *Mobley v. Griffin,* 104 N. C., 115.

This brings us to consider the charge of the court that in no view were plaintiffs barred by the statute of limitations because of the coverture of Laura Sutton. In this there was error. Whatever title the *feme* plaintiff had, she parted with by the deed to Wilson. The mortgage for the purchase money was executed to the husband, Marcellus Sutton, and whatever title Wilson had at the foreclosure in December, 1884, Sutton procured to be bought in for himself. It may be that he acquired it as trustee for his wife, or that, upon the facts, a court of equity would, at her instance, convert him into a trustee for her benefit. In either event the statute began to run against him from that date, whether he acquired Wilson's title for his own benefit or in trust for his wife, for it is well settled that if the trustee is barred, the *cestui que trust* is barred also. *Ervin v. Brooks,* 111 N. C., 358; *King v. Rhew,* 108 N. C., 696.

The original deed from F. H. Dawson, under which the *feme* plaintiff claimed title, is undoubtedly good color; and if it can be shown that she, or those claiming under her, have had the actual and exclusive possession of the 20 acres in controversy, under known boundaries, for seven years since the date of the foreclosure of the mortgage to J. T. Dawson and the deed of Commissioner James, her colorable title would have ripened into an indefeasible title as against Irwin Jenkins, Sr., and the defendant, who claims under him, and who does not claim to be a tenant in common. *Mobley v. Griffin, supra.*

Upon the evidence presented in the record upon this appeal we are of opinion that his Honor erred in refusing the defendant's first, second, and third prayers for instruction.

New trial.

Cited: Jackson v. Beard, 148 N. C., 31; *McLawhorn v. Harris,* 156 N. C., 111.

(18)

JULIUS MANNING AND J. D. WEBB v. L. E. FOUNTAIN.

(Filed 4 March, 1908.)

1. Contracts—Torts—Waiver—Money Had and Received to the Use of—Justice's Court—Jurisdiction.

W. became responsible for the payment for a horse purchased by M. of F., with the agreement that the horse was to be returned by M. if it proved unsatisfactory. The horse was accordingly returned, and F. represented to W. that the trade had been made, and induced him to give his promissory note for $175, the purchase price, which was negotiated by F.: *Held*, (1) the jurisdiction of the cause of action by W. against F. rested upon the failure of the consideration of the contract, for money had and received to the use of W.; (2) the plaintiff could waive the tort and sue upon the contract; (3) the cause of action was within the jurisdiction of the justice of the peace.

2. Contracts—Torts—Waiver—Suit Upon Contract.

When the breach of contract involves a tort, the plaintiff may waive the contract and recover damages for the tortious injury.

APPEAL from the court of a justice of the peace, tried by *Neal, J.*, at October Term, 1907, of EDGECOMBE.

The action was brought in the justice's court to recover the sum of $175, the proceeds of a negotiable note. At the trial in the Superior Court the judge ruled that the action was necessarily in tort and that the justice had no jurisdiction, and dismissed it. The plaintiff appealed.

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

Gilliam & Gilliam for plaintiffs.
G. M. T. Fountain for defendant.

BROWN, J. For jurisdictional purposes, the record discloses these facts: The plaintiff Webb agreed with his tenant, Manning, to become responsible for a horse which the tenant, for farm purposes, was to buy from one of the dealers in Tarboro. Manning opened negotiations with the defendant Fountain for the purchase of a horse, which negotiations did not result in a completed trade, but only in a trade on trial,
(19) and by which Manning had the right to return the horse in a reasonable time, if found to be unsatisfactory. The horse proved unsatisfactory and was returned by the said Manning to the defendant Fountain within a reasonable time, without plaintiff's knowledge. In the meantime, while the horse was in the possession of the said Manning, the defendant Fountain represented to the plaintiff Webb that he had made sale of the horse to Manning for $175, and procured Webb to

execute his promissory negotiable note, with interest, payable in the fall. The defendant negotiated the note, presumably for full value, before maturity, and the plaintiff has fully paid it. We think that his Honor erred in assuming that the action was in tort and that the justice had no jurisdiction. When the defendant solicited and accepted the negotiable note, he took it *as so much cash* and upon an implied contract that he would return it in case the trade with the tenant was not effected. The plaintiff does not allege a fraudulent intent or a knowingly false representation upon the part of the defendant. He sues for money had and received, upon the allegation that there has been an entire failure of consideration.

The plaintiff, even if a tort had been committed, growing out of a fraudulent and false representation, had a right to waive it and sue for money had and received. Such an action is *ex contractu* and not *ex delicto*. *Winslow v. White,* 66 N. C., 432; *Bullinger v. Marshall,* 70 N. C., 526. Upon this theory it has been held that where defendant wrongfully took into his possession timber logs of plaintiff and sold them and received the money, the plaintiff might waive the tort and sue for the money. *Timber Co. v. Brooks,* 109 N. C., 700. *E converso,* it has been held, when the breach of contract involves a tort, that the complaining party may waive the contract and recover damages for the tortious injury. *Bowers v. R. R.,* 107 N. C., 722.

The judgment of the Superior Court is reversed and the cause remanded for trial.

Error.

Cited: Stroud v. Ins. Co., 148 N. C., 56.

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(20)

W. T. CAHO v. NORFOLK AND SOUTHERN RAILWAY COMPANY ET AL.

(Filed 4 March, 1908.)

1. Pleadings—Joint Demurrer—Cause of Action Against One Defendant.

When two defendants join in a demurrer to the complaint, and a good cause of action is stated as to one of them, the demurrer will be overruled.

2. Corporations — Sued by Officer — Services — Quantum Meruit — Express Promise.

An officer of a corporation cannot sue his company upon *quantum meruit* for services rendered. In order to sustain an action he must prove an express promise.

3. Same—Resolution by Directors—Nudum Pactum.

A resolution of a board of directors authorizing payment to an officer of the corporation for past services, unsupported by a promise to pay for them before they were rendered, is *nudum pactum*, and will not support an action for recovery.

4. Corporations—Sued by Officer—Services—Promise of Stockholders Enforcible—Fraud.

The express promise of the stockholders to pay a stipulated price to one to perform services as president and attorney is valid, binding and enforcible upon the corporation, when not in fraud of the rights of creditors.

ACTION heard upon demurrer to complaint, by *Lyon, J.*, at Fall Term, 1907, *of* PAMLICO.

Plaintiff alleged the incorporation of the several defendants; that plaintiff, at request of the defendant Pamlico, Oriental and Western Railroad Company, procured a charter for said company and organized said company, and rendered services and expended money in said organization for said company, for which the said Pamlico, Oriental and Western Railroad Company promised to pay plaintiff the sum of $551.25; that said Pamlico, Oriental and Western Railroad Company has paid plaintiff on said account the sum of $485, leaving as balance due and owing to plaintiff on said account the sum of $66.25,
(21) which said defendant promised and agreed to pay to the plaintiff; that said defendant Pamlico, Oriental and Western Railroad Company has not paid the sum of $66.25, although often demanded by the plaintiff; that he rendered service to defendant Pamlico, Oriental and Western Railroad Company, as attorney and president, at request of said company, and expended money in advertising for said company to the amount of $8,855.25, which the said defendant Pamlico, Oriental and Western Railroad Company promised and agreed to pay to the plaintiff; that plaintiff has received on said account the sum of $165, leaving a balance due and unpaid and owing to plaintiff in the sum of $8,690.25, which defendants promised and agreed to pay; that the defendants have not paid the said account, although often demanded by the plaintiff; that on 27 February, 1906, the directors of the said Pamlico, Oriental and Western Railroad Company met at New Bern, N. C., pursuant to a regular call, and adopted a resolution approving and allowing said claim, as set out in plaintiff's cause of action, and promised to pay the same, a copy of which is hereunto annexed, marked "Exhibit A," and referred to and made a part of the complaint; that the defendant Virginia and Carolina Coast Railroad Company purchased all the rights, privileges, franchises, and assets of every nature of the said defendant Pamlico, Oriental and Western Railroad Company, and assumed all the

liabilities of the said defendant Pamlico, Oriental and Western Railroad Company, including the claim of the plaintiff, as above set forth; that on or about .... December, 1906, the defendant Norfolk and Southern Railway Company, by merger with its codefendant, Pamlico, Oriental and Western Railroad Company, and with the Virginia and Carolina Coast Railroad Company, assumed all the liabilities of said Pamlico, Oriental and Western Railroad Company and said Virginia and Carolina Coast Railroad Company, including the claims and demands of plaintiff, as above set forth, as plaintiff is informed and believes, as it appears from the letter hereunto annexed, marked "Exhibit (22) B," and made a part of the complaint.

For a second cause of action plaintiff complains and alleges "that he rendered services to defendant Pamlico, Oriental and Western Railroad Company as attorney and president, at request of said company, from 20 April, 1905, to 8 May, 1906, for which services the said company is indebted to the plaintiff in the sum of $1,069.50, which the said defendant, the Pamlico, Oriental and Western Railroad Company, promised and agreed to pay to the plaintiff; that the defendants have not paid the said account, although often demanded by the plaintiff."

Attached to the complaint is a copy of the proceedings of the board of directors of the Pamlico, Oriental and Western Railroad Company:

"27 February, 1906. Pursuant to the call of the president, the board, etc., met and was called to order by the president, W. T. Caho. The following directors were present: W. T. Caho, D. H. Hooker, etc. The president called D. H. Hooker to the chair and retired. W. T. Caho presented his account to the board and, on motion, the account was filed with the secretary. . . . On motion of C. M. Babbitt, the following account of W. T. Caho, president of the P., O. and W. R. R. Co., was allowed, to wit."

The account consists of a number of items, such as services rendered in procuring charter, 9 March, 1891, $500; credit by amount paid by charter members, $235; by shares of stock to be issued, at $10 a share, $250; to advertising meeting to organize, $350; other items for advertising meeting for organization, aggregating about $50. On 30 September, 1891, a balance was struck, showing amount due plaintiff, $66.25. It is stated that this amount is due "up to and including organization." On 18 June, 1892, a charge was made for "salary and fees as president from June, 1891, to June, 1892, $500." A similar charge was made on 18 June of each year, up to and including 18 June, 1901. On (23) 18 June, 1902, 1903, and 1904, was a charge of $900 annually for "salary and fees as president." On 20 April, 1905, a charge was made of $1,000 "for salary and fees as president, including incidental expenses

to date from 18 June, 1904." Two items were charged—18 June, 1903, and 18 June, 1904—"to advertising bond election in *Bayboro Sentinel,* $57.50 and $31.50." Credits were given in 1904 and 1905 for amounts paid by Cullen Construction Company and J. A. Bryan, aggregating $165, leaving a balance due of $8,690.25. This is in addition to the amount demanded on account of the second cause of action.

Defendants joined in a demurrer, the grounds of which are set forth in the opinion. Demurrer was overruled. Defendants excepted and appealed.

W. D. McIver and D. L. Ward for plaintiff.
L. I. Moore for defendants.

CONNOR, J., after stating the case: The defendants having joined in the demurrer, if the complaint states a cause of action against either of them, it must be overruled. *Conant v. Barnard,* 103 N. C., 315; *Blackmore v. Winders,* 144 N. C., 212. If, therefore, a cause of action is stated against the Pamlico, Oriental and Western Railroad Company, we may not inquire whether any is stated against its codefendants who joined in the demurrer, but must adjudge that they answer over. It is proper to say that no ground of demurrer is stated which does not apply to all of the defendants. Is any cause of action stated against the Pamlico, Oriental and Western Railroad Company? While a number of grounds of demurrer are set forth, they all involve the same objection—that no cause of action is stated, for that there is no averment that any salary was affixed to the office of president prior to 27 February, 1906. The authorities cited by counsel for defendants amply sustain his contention, that, in the absence of an express promise, made prior to
(24) the performance of the service, an officer of a corporation cannot maintain an action for compensation—that he cannot sue upon a *quantum meruit.* "An officer has no right to compensation for services except by express agreement preceding the services rendered." It is said: "Officers of modern business corporations are usually awarded a salary, either by express provision of the charter or by-laws of the corporation or by resolution of the board of directors. In such cases they are, of course, entitled to recover the compensation so fixed or agreed upon." 21 A. and E. Enc., 906. "An agreement by the board of directors to pay an officer or director for past services, where there was no prior agreement to that effect, is without consideration and is not binding on the corporation. But where there was a prior agreement for compensation, a vote of the directors, after the services were rendered, to pay for the same is valid and binding." *Ib.,* 908; 10 Cyc., 921.

"Where official or other services are rendered to the corporation upon the previous understanding that compensation is to be paid therefor, it may be recovered upon the implied promise; but, on the contrary, if there be no such previous promise made by the stockholders or directors at any authorized meeting, any undertaking of the directors or stockholders to pay for such past services is without consideration and void." 2 Beach Priv. Corp., sec. 722; *Martindale v. Wilson-Cass Co.*, 134 Pa. St., 348 (19 Am. St., 706); Womack Priv. Corp., 472. The authorities are uniform. If the law were otherwise, stockholders and creditors of corporations would have no protection against confiscation of the corporate property by reckless extravagance or corrupt combination of officers and directors to impose debts and liabilities for past services. A stockholder would never be able to know the value of his stock, or a creditor the amount of debts for which the corporation is liable. Where power is conferred by the charter upon directors to elect officers and fix their salaries, the power must be exercised at the same time and not left open for future adjustment. It is but just to all persons concerned (25) that the expense incident to operating the business of the corporation, so far as salaries are concerned, shall be fixed and made a matter of record. This complaint presents a striking illustration of the wisdom of the law.

Without questioning the motives of any one, it is manifest that the value of the corporate property will be greatly lessened by fixing upon it nearly $10,000 for "salary and fees" to the president, running through a period of fourteen years. The difficulty which confronts the defendants is that the plaintiff alleges that the services were rendered and the amounts expended at the request of the corporation, and that it expressly promised and agreed to pay the amount. The cause of action is upon an express contract and promise made, not by the directors, but by the corporation. If, as alleged, the company (the stockholders) requested the plaintiff to render the service as president and attorney, and promised to pay the specific amount named, we cannot see any good reason why he may not recover. The contract is not *ultra vires*. While it is true that an officer of a corporation cannot charge for extra services, except upon an express promise preceding their rendition, we can see no reason, unless a fraud upon creditors, why the stockholders, by a unanimous vote, may not make such a contract as plaintiff sets out. However imprudent it may be, if all of the parties interested make the contract, the court may not refuse to enforce it. The plaintiff's cause of action receives no force or validity from the action of the board of directors of 27 February, 1906. If the company was liable, as alleged, by reason of a previous request and express promise to pay, it required no action by the directors

to "approve and allow" the claim. If there was no such request and promise, the action of the board is without consideration and void.

The demurrer must be overruled and the defendants answer (26) over. The judgment of his Honor is

Affirmed.

Cited: Jones v. Henderson, post, 125; *Chiles v. Mfg. Co.,* 167 N. C., 575; *Hipp v. Farrell,* 169 N. C., 554; *Fountain v. Pitt,* 171 N. C., 115.

RENA YOUNG, BY HER NEXT FRIEND, v. THE FOSBURG LUMBER COMPANY.

(Filed 4 March, 1908.)

1. Contracts—Interpretation—No Ambiguity—Questions for Court.

The interpretation of a written contract, not ambiguous in its terms, is for the court, and should not be submitted to the jury.

2. Same—Independent Contractor—Terms of Contract—Questions for Jury.

When the language of a written contract establishes, as a matter of law, the relation of an independent contractor between the parties, the only question to be submitted to the jury, in an action against the owner of the land for damages sustained by a third person, by the act of the independent contractor, is whether at the time of the alleged injury such contractor was working under and pursuant to the terms of the contract, or whether he was in truth acting in the capacity of an employee of the owner.

3. Contracts — Independent Contractor — Negligence — No Control—No Liability.

In the absence of negligence in the selection of an independent contractor, or such inherent danger in the work to others as to impose the duty of absolute care, the owner of the premises is not liable for the acts of such independent contractor, he having no control over him or the selection of his servants, in the performance of the terms of the contract.

4. Same—Character of Work.

Cutting standing timber trees on one's own land, not immediately adjacent to any public highway or residence, but near to a private path leading to a spring, is not so inherently dangerous as to impose upon the owner the duty of absolute care for the safety of persons using the path.

5. Independent Contractor—Written Instrument—Pleadings—Evidence.

When the defense to an action to recover damages for personal injury is that the person who caused the injury complained of was an independent contractor, a written agreement tending to prove that fact may be introduced in evidence, though not set up in the answer.

CLARK, C. J., dissenting. HOKE, J., concurs in dissenting opinion.

APPEAL from *Lyon, J.*, at June Term, 1907, of HALIFAX. (27)

The defendant company, being the owner of standing timber on the lands described in the pleadings, entered into a contract in writing with W. T. Ferrell, by which he was to cut and remove the trees to the railroad. Defendant company agreed to furnish Ferrell one locomotive, logging cars, horses, harness, and such light rails as were necessary, and to pay him $3.50 per thousand for all timber "logged." The contract provided that Ferrell was "to begin cutting and getting out the said timber and loading it on Seaboard cars within thirty days; and the said W. T. Ferrell shall have the full and complete control over the cutting and getting out of said timber, and the loading, hauling, and shipping the same, and the Fosburg Lumber Company shall have no control whatever over the cutting, logging, hauling, shipping, and loading the said timber; and the said W. T. Ferrell shall do said work in a good and workmanlike manner as an independent contractor." It was further provided that when the timber was cut, or if the contract should sooner cease by consent, the property furnished by the company should be returned by Ferrell in good order, etc. The contract bears date 11 February, 1895. Ferrell began cutting the timber on a portion of the land a short time thereafter.

William Young, father of the plaintiff (who was a child about 9 years of age), lived with his family in a house situated in a small clearing on the land upon which the trees were being cut, on 8 August, 1905. Running from the house, a part of the way through the woods, was a small footpath, used by Young's family for going to a spring, about 150 yards distant, for the purpose of getting water for the use of the family. On the morning of 8 August, 1905, the mother of (28) plaintiff sent her, together with two other small children, to the spring for water. The hands were sawing trees in the woods near the path. As the children were returning from the spring, a pine tree, sawed by the hands, fell, the top or branches falling across the path and injuring the plaintiff. There was evidence tending to show the distance of the tree from the path, the character of the undergrowth, and opportunity for a person standing at the tree to see children along the path. There was also evidence tending to show that the hands knew of the location of the path, the spring, Young's house, and that his family got water from the spring. The testimony was in some respects conflicting. There was also evidence tending to show that the presence of the hands was known to the mother of plaintiff, etc.

Defendant introduced the contract, under objection by plaintiff. Ferrell had been in the employment of defendant company some two or three years prior to the date of the contract, engaged in cutting timber on other lands. Ferrell testified that he was cutting the timber "under

the contract," and that defendant company had no control over him. There was evidence on the part of plaintiff that at the end of each month the pay roll was made out and sent to defendant company, at Norfolk, and the money placed in envelopes for each employee and sent to Ferrell. Ferrell testified, in regard to this matter, that he sent the company, in Norfolk, the pay roll of his hands, together with the number and size of the logs; that the company sent the amount due him in envelopes containing the amounts due the hands, for his convenience. He said: "I got them to put it up (the money) in tickets for me. I asked them to do this as a matter of convenience. I did not have the time; there was only two of us there. I attended to the woods and Mr. Vaughan to the desk, and they could get the change down there and make it better than we could. They paid me in checks or money,
(29) whenever there was any balance due me, at $3.50 per thousand."

The commissary belonged to him, and the hands were employed by him. The team, cars, track, etc., belonged to defendant company and were used by Ferrell under the terms of the contract. The hands who were cutting in the woods at the time plaintiff was injured testified that they were hired by Ferrell. The plaintiff introduced Vaughan, who was helping Ferrell. He says that on 8 August, 1905, he was working for Ferrell and was paid by him; he was originally employed by defendant company. His testimony is not very clear as to the manner of his employment—that is, with whom he made the contract. He testified that the pay roll was made up, signed by Ferrell, and sent to defendant company, who sent the money in envelopes containing the amount due each hand.

Plaintiff sued by her next friend, alleging that defendant company, by its servants, was cutting the timber and negligently cut the tree which injured her, whereby she sustained damage, etc.

Defendant denied that it was engaged in cutting the timber, or that it was in any respect negligent, etc. The defendant contended that Ferrell was an independent contractor and was cutting the timber under the contract put in evidence.

The following issue was submitted to the jury: "Was plaintiff, Rena Young, injured by the negligence of defendant, as alleged?" The jury answered "Yes," and assessed her damage at $1,350.

Defendant, among other instructions, requested the court to instruct the jury: "That if they shall find from the evidence that the tree which fell upon and hurt the plaintiff was cut down by employees of W. T. Ferrell, and that said Ferrell was getting out the timber of the defendant company under the contract put in evidence ('Exhibit B'), then he would be an independent contractor, and the defendant company would

not be responsible for the acts of his employees, and you would, therefor, answer the first issue 'No.'"

His Honor refused to give said instruction as asked, but struck (30) out the words therein, "then he would be," and inserted in lieu thereof the word "as," and gave said instruction as so changed. To his refusal to give said instruction as asked, and to said alteration of same, the defendant excepted.

"That if the jury shall find from the evidence that W. T. Ferrell was getting out defendant's timber from the tract of land whereon plaintiff's father and mother lived at the time plaintiff was hurt, under the contract put in evidence ('Exhibit B'), they should answer the first issue 'No.'"

His Honor gave said instruction, with the following modification:

"Provided you find that he was an independent contractor and that defendant had no control or direction over him; and in passing on that question you will take into consideration the evidence bearing on this question, and . . . testimony."

The defendant excepted to the failure of his Honor to give said instruction as prayed, and to said qualification of same.

There are other exceptions in the record, not necessary, in view of the opinion of the Court, to be noted.

From a judgment upon the verdict defendant appealed.

S. G. Daniel, W. E. Daniel, and Claude Kitchin for plaintiff.

Day, Bell & Dunn, Murray Allen, Shepherd & Shepherd, and E. L. Travis for defendant.

CONNOR, J., after stating the case: Was Ferrell, by the terms of the written contract made between defendant and himself, a servant of defendant, employed to hire hands and superintend the work of cutting, hauling, and loading the trees, or was he an independent contractor? The answer to this question depends, primarily, upon the construction of the written contract. Defendant requested his Honor to construe the contract and instruct the jury, as a matter of law, that Ferrell was an independent contractor, submitting to them the question (31) whether he was working under the contract. His Honor left the question whether Ferrell was an independent contractor to the jury. In one aspect of the question this was error. The construction of the language of the contract, being free from ambiguity, was for the court. Assuming that the contract was made in good faith and was not a mere colorable device, resorted to for the purpose of avoiding responsibility for Ferrell's acts, we are of the opinion that it constituted Ferrell an independent contractor.

"An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified." Pollock Torts, 78; Barrows on Neg., 160. *Mr. Justice Walker,* in *Craft v. Lumber Co.,* 132 N. C., 151, says: "When the contract is for something that may be lawfully done, and it is proper in its terms, and there has been no negligence in selecting a suitable person in respect to it, and no general control is reserved, either in respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master."

In *Engel v. Eureka Club,* 137 N. Y., 100, *Andrews, C. J.,* says: "The exigencies of affairs frequently require that persons exercising independent employments should be intrusted by the owners of property with its improvement, and in various relations and under varying conditions they are employed, not as servants, but as independent contractors, to execute contracts which the person who secures their services is unable to execute himself, or the execution of which he prefers to commit to another." In *Knowlton v. Hoit,* 67 N. H., 155, it appeared that "The defendant
(32) bought the standing timber on a lot adjoining the plaintiff's land and made a contract with one Hazen to cut the standing trees into timber, at an agreed price per thousand feet. Hazen performed the contract, hiring and paying his men. Beyond making the contract and paying the price agreed, the defendant had nothing to do with cutting the timber. The defendant took the lumber from the lot. In felling the trees some of them fell upon and across plaintiff's fence and wall, breaking some of the boards. . . . The defendant did not own the land upon which the timber was cut." *Smith, J.,* said: "Hazen was a contractor, exercising an independent employment and selecting his own servants and workmen. He was not an ordinary laborer, engaged in cutting the trees, nor acting under the control of the defendant. The contract was to do an act lawful in itself, and the authority conferred upon Hazen was to do it in a lawful way. The maxim, *Respondeat superior,* does not apply."

It is not easy to find any essential difference between this and the case before us. Ferrell was to employ the hands, pay them, cut the timber in his own way, free from any control by defendant, and to receive $3.50 per thousand feet. We can perceive no difference in principle between this case and one in which the owner of wood contracts with a woodcutter to cut "cordwood" at so much per cord, or one wherein "a ditcher" is employed to dig ditches on his land at a fixed price per foot, or a car-

penter to build a house of fixed dimensions, or numerous other contracts made almost daily by our people. If the contract is made in good faith, we do not perceive how it can be said that the owner of the land is in either case liable for the acts, either contractual or tortious, of the person to whom he commits the execution of the work, without doing violence to the law which "has become the settled doctrine of our land." As is well said by an eminent *Chief Justice*, "There is no reason, founded on public policy or the relation between the parties to the contract, which should subject one party to the contract to liability to third (33) persons for negligence of another." We find nothing in the evidence which, as a matter of law, changes the relation established by the written contract. It is said, however, that, notwithstanding the language of the written contract, as a matter of fact Ferrell was the mere servant and employee of defendant, and that the writing is a device resorted to for the purpose of protecting defendant from liability. It is clear that Ferrell does not become an independent contractor simply because the writing so styles him. Whether he is one depends upon the terms upon which he, in truth, enters upon and cuts the defendant's timber. If, as a fact, notwithstanding the language of the writing, defendant exercises a control over him in the selection and employment of the laborers; if defendant pays them and directs the manner in which they perform the service; in other words, if the writing does not truthfully set forth the agreement between Ferrell and defendant, and the jury should so find, then he is not an independent contractor. If he was not acting under the written contract, but as the servant or employee of defendant, and the laborers who cut the trees are the servants of defendant, it would, of course, be liable for their negligence. Plaintiff insists that there is evidence fit to be submitted to the jury tending to establish this contention. As the case was not tried or submitted to the jury in this view, we forbear any discussion of the question, or whether there is any evidence bearing upon it. Plaintiff next insists that, conceding Ferrell is an independent contractor, the character of the work was so essentially dangerous that, under one of the exceptions to the rule of nonliability, defendant owed an absolute duty to third persons passing along the path over the land, which it cannot put away by committing the work to an independent contractor. It is conceded that, upon grounds of public policy, certain exceptions are made by the law to the general rule. The one upon which plaintiff relies is well stated by *Andrews, C. J.*: "Where the thing contracted to be done is necessarily attended (34) with danger, however skillfully and carefully performed, or is intrinsically dangerous, it is held that the party who lets the contract to do the act cannot thereby escape responsibility for any injury resulting from its execution, although the act to be performed may be lawful.

But if the act to be done may be safely done in the exercise of due care, although, in the absence of such care, injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care." *Engel v. Club, supra.* As illustrative of the principle, the language of the *Chief Justice* is appropriate: "The taking down the wall was not intrinsically dangerous. The only danger to be apprehended was in doing it carelessly or unskillfully. It was in the manner of doing it, and not in the thing itself." In *Knowlton v. Hoit, supra,* there is no suggestion that the felling timber trees in the forest is intrinsically dangerous. Blasting rock has been held to be so. 16 A. and E. Enc., 201; *Booth v. R. R.,* 140 N. Y., 207, where the question is discussed at length. It was held that blasing rock was not intrinsically dangerous, in *James v. McMinimy,* 93 Ky., 471. Burning brush is held not intrinsically dangerous. *Shute v. Princeton,* 58 Minn., 337; *Tibbetts v. R. R.,* 62 Me., 437; *Bibb v. R. R.,* 87 Va., 711; *Hilliard v. Richardson,* 69 Mass., 349. It has never been supposed that cutting down one's own trees in a forest was so intrinsically and essentially dangerous as to impose upon the owner of the land or the trees the absolute duty of looking out for persons who might be passing along a private footpath. The fact that there was such a path near the trees would impose the duty of a reasonably careful lookout for persons who might be passing over it. The measure of the duty would be affected by the frequency of its use, the knowledge of the persons cutting, etc.; but the duty is relative and not abso-
(35) lute. The principle upon which rest the rights and liabilities of the owners of property upon which work is being done by independent contractors is well settled and uniformly recognized. It is founded in wisdom and sound policy. The limitations which have been put upon the immunity from liability are also settled. The application of the exceptions has given rise to much discussion and frequently to some conflict in the views of courts. The testimony here shows that the timber trees belonging to defendant were in a pine forest; that William Young resided on the land, in a house surrounded by a clearing of about 12 acres. It does not appear that the cutting endangered his premises. The laborers had been cutting for several days in the neighborhood of the house. There is some conflict in the testimony in regard to the size, character, etc., of the undergrowth and its relation to the path. These were questions for the jury upon the question of negligence.

The plaintiff objected to the introduction of the written contract, on the ground that it was not set up in the answer. We concur with his Honor that it was not necessary to do so. It was admissible to show defendant's relation to the laborers engaged in cutting. It might be well to submit the question raised by the contention of defendant in this

respect to the jury in a separate issue or question. This, however, is in the discretion of the court. Revisal, 527. No suggestion is made in the record, or the briefs, that defendant was negligent in the selection of Ferrell for the work. It appears that he had been in the service of the company before entering into the written contract.

There is a number of other exceptions in the record bearing upon the question of negligence. As the case goes back for a new trial, we deem it best not to decide them; they may not arise upon a second trial. For the error in the charge pointed out, there must be a

New trial.

CLARK, C. J., dissenting: Not controverting in the least the (36) propositions of law set out in the opinion in chief, it would seem that the judge submitted and the jury passed upon the identical question which the case is now sent back to try, *i. e.*, whether the written contract (which, on its face, made Ferrell an independent contractor) was *bona fide* or in fact a pretext and an evasion. The court gave both prayers of the defendant, that if Ferrell was getting out timber under the written contract he was an independent contractor, and to answer the issue "No," adding, "provided you find that he was an independent contractor and that the defendant had no control or direction over him; and in passing on that question you will take into consideration the evidence bearing on this question." The jury found, under this charge, that, notwithstanding the written contract, as a matter of fact and in truth he was not an independent contractor. There was ample evidence to justify such finding. The pay rolls were sent to the lumber company, at Norfolk, Va., and then the money for that amount was sent Ferrell to pay off the hands. The teams belonged to said company; the right of way and the track belonged to the company; the logs were shipped by the lumber company. Ferrell had been their employee prior to this contract, and the contract does not seem in any way to have changed his method of dealing with the company. There was other evidence, *pro* and *con*, and the verdict of the jury, under the charge, can be understood only as a finding that Ferrell was not a *bona fide* independent contractor. It should not be necessary to try that question over again.

Cited: Gay v. R. R., 148 N. C., 343; *Midgette v. Mfg. Co.*, 150 N. C., 341; *Hunter v. R. R.*, 152 N. C., 687; *Thomas v. Lumber Co.*, 153 N. C., 355; *Beal v. Fiber Co.*, 154 N. C., 151; *Denny v. Burlington*, 155 N. C., 36, 37; *Johnson v. R. R.*, 157 N. C., 383; *Decker v. R. R.*, 167 N. C., 28; *Vogh v. Geer*, 171 N. C., 674.

(37)

OAKHALL CLOTHING COMPANY v. ANTHONY BAGLEY.

(Filed 4 March, 1908.)

1. Power of Court—Judgments Continued—Subsequent Term—Consent of Parties.

The judge below has no power to continue motions for judgments upon or to set aside verdicts to be passed upon by him at a subsequent term of court, without the consent of the parties litigant.

2. Same—Amendment of Record.

It is practically an amendment of the record at a subsequent term when the judge finds, at the succeeding term, that the parties litigant consented that motions respecting judgment at the former term should be continued.

3. Power of Court—Verdict Set Aside—Discretion.

When the judge below sets a verdict aside, in his discretion, as being against the weight of the evidence, his action is not the subject of review upon appeal.

4. Appeal and Error—Case on Appeal Not Served.

In the absence of case on appeal duly served, the Supreme Court cannot pass upon the correctness of the charge of the judge below, sent up with the judgment appealed from, continuing, without the consent of the parties litigant, the motions upon verdict rendered to a subsequent term.

ACTION for the recovery of a money demand, heard at March Term, 1907, of MARTIN, before *Biggs, J.*, and a jury.

The court submitted the following issues:

1. Is the defendant indebted to the plaintiff? If so, in what amount? Answer: "Three hundred and ninety-two dollars and eighteen cents, with interest on $362.18 from 3 September, 1895, and interest on $29 from 15 July, 1900."

2. Is the plaintiff's cause of action barred by the statute of limitations? Answer: "No."

The record contains the following entry at said term: "Plaintiff moves for judgment. Defendant moves to set aside verdict. Both motions continued until next term of court."

(38) At June Term, 1907, his Honor, *J. Crawford Biggs,* judge presiding, the following order was made, verbally:

Motion to set aside verdict at March Term, 1907. Motion allowed. Verdict set aside for errors made in the charge. New trial ordered.

The plaintiff appeals from this judgment.

MARTIN COUNTY.

In the Superior Court, June Term, 1907.

OAK HALL CLOTHING COMPANY *v.* ANTHONY BAGLEY.

In this cause the defendant's motion to set aside the verdict rendered at March Term, 1907, and the plaintiff's motion for judgment upon the verdict having been both continued by consent, to be heard at the June Term, 1907, the court, upon consideration of the motions, sets the verdict aside in the exercise of its discretion, upon the ground that the verdict was against the weight of the testimony, and upon the further ground of error in the instructions to the jury.

22 June, 1907. J. CRAWFORD BIGGS, *Judge.*

From this judgment the plaintiff appealed.

Winston & Everett for plaintiff.
Gilliam & Martin for defendant.

BROWN, J. The defendant moves to dismiss the appeal because no case on appeal has been served. The plaintiff contends that, without any case on appeal, there is error apparent upon the record, and that his Honor, *Judge Biggs,* should have rendered judgment in plaintiff's favor upon the issues, and assigns such refusal as error.

His Honor had no right to set aside the verdict at the succeeding June term, although the said judge held both terms, unless the parties to the action had consented to the continuance of such motion to the June term. At June term the judgs finds as a fact that such consent had been duly given at March term, and that finding, entered of record, is practically an amendment of the record at March term.

We cannot review the exercise of his Honor's discretion in granting a new trial upon the ground that the verdict is against the weight of the evidence. Nor can we review the correctness of his in- (39) struction to the jury, in the absence of a case on appeal duly served and settled. Upon the face of the record before us, we find no error in his Honor's denial of plaintiff's motion for judgment. Let the cost of this Court be taxed against the plaintiff.

No error.

Cited: Stilley v. Planing Mills, 161 N. C., 519.

GILLIKIN & GASKILL v. THE LAKE DRUMMOND CANAL COMPANY.

(Filed 4 March, 1908.)

1. Negligence—Mooring Barge in Canal.

It is actionable negligence on the part of the defendant to improperly moor a barge in its canal, so as to cause injury to plaintiff's vessel while it was being towed by defendant through its said canal.

2. Negligence—"Obstruction."

A large barge, negligently moored to the bank of a canal, so that thereby it is drawn or floats out into the canal, causing injury to plaintiff's vessel, inflicting serious damages, is within the meaning of the term "obstruction."

3. Pleadings—Allegations Sufficient.

A cause of action is sufficiently set out in the complaint when the facts alleged apprise the defendant fully of the grievance asserted against him and the injury for which redress is demanded.

4. Same—Allegations Specific—Motion.

When the facts alleged in the complaint sufficiently state a cause of action, the defendant should move to have them set out more specifically, should he so desire.

ACTION to recover for injury to vessel of plaintiffs, caused by alleged negligence on the part of defendant, tried before *Lyon, J.*, and a jury, at Fall Term, 1907, of CARTERET.

(40) Verdict and judgment for plaintiffs, and defendant excepted and appealed.

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

Abernethy & Davis for plaintiffs.
Moore & Dunn for defendant.

HOKE, J. We find no error in the record which entitles defendant to a new trial. There was ample evidence of negligence on the part of the defendant company.

The testimony tended to show that in June, 1904, the defendant undertook, for hire, to tow the plaintiffs' vessel through their canal, and was engaged in this undertaking when they passed a large barge of the defendant company moored to the bank of the canal; that the suction of the tug drew the barge away from the bank into the course of the plaintiffs' vessel, causing a collision and the damages complained of; that the barge, which was the property and under control of the company at that time, was improperly and negligently moored, and that the plaintiffs were free from fault.

The objection chiefly urged for error was that the complaint did not

charge or allege negligence in mooring the barge as the basis of plaintiffs' demand, but the objection is without merit. The complaint, after stating the contract, and that defendant was engaged in the undertaking at the time of the occurrence and was the owner and in control of the tug and the barge, continues as follows:

"SEC. 5. That defendant, at or near West Creek, about two-thirds of the distance from Wallacetown to Lynch's Wharf, in the said canal, negligently and wrongfully and carelessly obstructed its said canal by a large barge, and negligently and wrongfully and carelessly caused plaintiff's schooner, the *Ike G. Farren,* to be towed by said tug down and upon the said barge with great force, and caused said schooner to run foul of and strike against said barge.

"SEC. 6. That by reason of the obstruction of the canal, and (41) also by reason of said defendant's towing said schooner down and upon said barge, causing her to run foul of and strike same, said schooner was greatly damaged," etc.

A large barge, negligently moored to the bank of a canal, which, by reason of said negligence, is drawn or floats out into the channel of the canal, causing a collision with a passing vessel and inflicting serious damage, comes clearly within the meaning of the term "obstruction," defined by the books to be "An impediment, a hindrance, that which impedes progress." *Hart v. Albany,* 3 Paige, 213. The complaint, we think, contains a sufficient statement of facts to make out plaintiffs' cause of action and to apprise the defendant fully of the grievance asserted against him, and the injury for which redress is demanded. Assuredly, on the facts presented, if defendant desired that the complaint be made more specific, it should have made a motion to that effect. *Allen v. R. R.,* 120 N. C., 548.

No error.

LAKE DRUMMOND CANAL AND WATER COMPANY
v. T. M. BURNHAM ET AL.

(Filed 4 March, 1908.)

1. Water and Water-courses—Upper and Lower Proprietor—Rights—Temporary Structure.

When an upper proprietor of lands constructs and maintains for his own use and advantage an artificial waterway or structure affecting the flow of water, without invading the rights of the lower proprietor, for a temporary purpose or a specific purpose which he may at any time abandon, the upper proprietor comes under no obligation to maintain the structure, though the incidental effect has been to confer a benefit on the lower tenant.

2. Same—Drainage—Overflow Waters—Natural Drainage—Lower Tenant—Upper Tenant—Obstruction—Right to Remove Obstruction—Damages.

Plaintiff had the right of possessing and operating Dismal Swamp Canal, and of constructing a cross canal to draw the water of Lake Drummond into the main canal in aid of navigation. It ascertained that this water was no longer required for such purpose. In widening and deepening its main canal it closed the mouth of the cross canal, causing the overflow waters of the lake, which this canal had carried for forty years or more, to go to some extent onto defendant's land, causing injury thereto: *Held*, the defendants have no right of action for such injury when it appears that this was the natural direction of the waters of the lake, and the lands of defendants did not naturally drain into the cross canal; nor had the defendants acquired any right or privilege of such drainage, by user or otherwise.

3. Same—Lower Proprietor—Incidental Easement—Reciprocal Easement—Limitation of Action—Adverse Possession.

When the upper proprietor, in the exercise of his right, determined to abandon an artificial waterway or structure, which he had maintained on his own premises, without invading the rights of the lower proprietor, but from which the lower proprietor had been incidentally benefited, the lower proprietor can acquire no right of easement in the continuance of the waterway or structure by lapse of time, there being no reciprocal easement in his favor to support the plea of adverse possession, and therefore nothing upon which a grant can be presumed.

APPEAL from *W. R. Allen, J.*, at Special Term, 1907, of CAMDEN.

The action was instituted by plaintiff to restrain a number of defendants from alleged wrongful injury to plaintiff's canal, and there was evidence offered tending to show: "The plaintiff owns the canal formerly known as the 'Dismal Swamp Canal,' extending from the Elizabeth River, in Virginia, to the Pasquotank River, in North Carolina, and it is a highway of public travel for steamboats barges, tugs, and other craft plying between the waters of North Carolina and the waters of Virginia. There is another canal called the 'Cross Canal,' which runs at right angles from a point about 30 feet from the other canal
(43) westwardly into Gates County, about 20 miles. The defendants own, in severalty, valuable lands which lie from 3 to 7 miles below the said 'Cross Canal,' none of which drain in or towards the 'Cross Canal.' In 1897 the plaintiff company enlarged and deepened the 'Dismal Swamp Canal,' and, for the protection and improvement of the same, thus enlarged, the plaintiff widened and raised the banks of that canal and the banks, so raised and widened, remained as they were from 1897 to June 1906. In June, 1906, the defendants, claiming to be injured by the raising and broadening of the said banks at the 'Cross Canal,' cut through the same, between the head of the 'Cross Canal' and the 'Dismal Swamp Canal,' a distance of 30 feet or more, and turned the water from the said 'Cross Canal,' and the swamps which drain into

it, into the 'Dismal Swamp Canal,' and, as a result of such cutting, turned into it sand, mud, and dèbris to such an extent as, after twelve hours, to so fill it that one could walk out into the canal 43 feet from its banks, dry-shod, for a distance of about 72 feet along the banks. The plaintiff filled up the cut which had been made, and dredged out the said filling, but the defendants threatened at once to open the same again, and were about to do so when enjoined by the court."

Defendants answered, making denial of some of the material allegations of plaintiff, and, by way of counterclaim, made further answer as follows:

"1. That they are the owners and in possession of large quantities of land and growing crops lying on what is known as 'Corapeake' or 'Cross Canal,' which empties into the 'Dismal Swamp Canal' about 5 miles northwest of the town of South Mills in Camden County.

"2. That said 'Cross Canal' is 12 miles long and between 10 and 20 feet deep, and is the main and only drain for their said lands, and has been for the past seventy-five or one hundred years, long before the plaintiff herein acquired any interest whatever in the 'Dismal (44) Swamp Canal.'

"3. That during the latter part of March, or first of April, 1906, the Lake Drummond Canal and Water Company, by its agents and servants, went to the mouth of said 'Cross Canal' and, with a steam shovel, did willfully and unlawfully fill up the mouth of said 'Cross Canal,' thereby stopping all flow through said 'Cross Canal' and ponding the water on the lands and crops of the defendants herein, utterly and entirely destroying the crops of the defendants and greatly damaging the lands herein mentioned, paying nothing to the defendants by way of condemnation or otherwise.

"4. That defendants herein were preparing to reopen said 'Cross Canal,' when the general superintendent of the plaintiff, one J. B. Baxter, through the captain of the plaintiff's dredge, requested that they not reopen said 'Cross Canal'; that he would have his company do so immediately and place a culvert there; upon which promise defendants refrained from opening said 'Cross Canal,' and were later served with a restraining order forbidding them from reopening it at all.

"5. That plaintiff has never made any attempt whatever to put in said culvert or otherwise open said 'Cross Canal,' and that the lands and crops of the defendants are and have been for many weeks past entirely covered with water, because of the damming of said 'Cross Canal' by the plaintiff herein.

"6. That by reason of such unlawful damming of 'Cross Canal' by the plaintiff, and the consequent ponding of water on defendants' lands, the crops of the defendants have been injured to the extent of $15,000; that

the lands have already been greatly damaged, and that if said 'Cross Canal' is not opened immediately the ponding water on the defendants' lands will cause said lands to sour and to become absolutely worthless for any use whatever, which lands, before the ponding of the water thereon by the plaintiff, as herein set out, were worth not less than $37,000.

(45) "7. That the cause of action set out in this answer in the defendants' cross bill arose prior to the bringing of this action."

Plaintiff made formal reply, denying material allegations of the counterclaim. Various issues were submitted as determinative of the rights of the parties and as to the amount of damages suffered by defendants. The court set aside a verdict for defendants on the issue as to damages, and on the other issues gave judgment restraining defendants from further interference with plaintiff's canal, and restraining plaintiff from "maintaining the banks of its canal at the point between said 'Cross Canal,' and the canal of plaintiff at a greater height than in 1897, before same was increased." From this judgment plaintiff, having duly excepted, appealed.

Pruden & Pruden and Aydlett & Ehringhaus for plaintiff.
Ward & Grimes and W. A. Worth for defendants.

HOKE, J., after stating the case: The fifth issue and the response of the jury thereto are as follows:

"5. Have the defendants, or either of them, the right and easement to drain into the canal of plaintiff or into the 'Cross Canal'?" Answer: "No."

There is no fact or finding of the jury which in any way changes or impairs the force and effect of this verdict, and the Court is of opinion that it is thereby conclusively determined that the defendants are not entitled to the relief awarded them, and to this extent the judgment of the court below must be reversed. The company known as the Dismal Swamp Canal Company was chartered by act of the Legislature at the session of 1790, 2 Rev. Stat., 217. By section 12 of this act it was provided: "And whereas it is represented that the waters of the lake in the Dismal Swamp, commonly called 'Drummond Pond,' may be useful for a supply of water to the said canal: Be it enacted, that the said lake, so far as the water thereof shall be necessary for the purpose

(46) aforesaid, shall be and is hereby vested in the proprietors of said canal; and it shall and may be lawful for the said president and directors, or a majority of them, to open, if they shall find it expedient, a cross canal from the lake to the principal canal, for the purpose of drawing from thence a supply of water; and for executing this work they shall have the same powers which they are authorized to exercise in

opening the principal canal." It was, no doubt, under and by virtue of this section, and for the purposes therein indicated, that the "Cross Canal," referred to in the present proceedings, was constructed. The present owners of the main canal, having ascertained or concluded that the waters of the lake, heretofore conveyed by the "Cross Canal," are no longer required for purposes of navigation, determined to abandon it, and in widening and deepening the main canal they have thrown the sand and mud produced by their additional excavation on the bank, and so as to stop up the mouth of the "Cross Canal" and obstruct the flow of water therein; the result being that the waters of the lake, which by this canal have heretofore been drained into the main canal, now flow in their natural direction towards the river, and a portion of them affect the lands of defendants, causing the damage complained of. While, however, the evidence of defendants tends to show that these lands have been damaged by stopping up this "Cross Canal," and the verdict of the jury seems to have established it, it is an injury for which the law cannot afford redress.

It will be noticed that the canal is an artificial drain, made by the predecessors of plaintiff for their own convenience and advantage, and in the exercise of a right of property and an easement conferred upon them by the statute for a specific purpose. The lands of the defendants do not abut upon this "Cross Canal," and the verdict finds that the defendants had no right or privilege of drainage into either one of the canals. On the contrary, the testimony shows that they are situated several miles from the "Cross Canal," and their natural (47) drainage is in an entirely different direction, towards the Pasquotank River; and while this "Cross Canal" has existed for many years, forty or more, and has operated to some extent to protect the lands of defendants by diverting the overflow waters of the lake from their natural direction into the main canal, on the facts presented here there is no principle that requires that the plaintiff should keep this "Cross Canal" open for defendants' benefit, or that its conduct concerning it should subject it to an action. As to defendants, it is *damnum absque injuria.* If it should be conceded that defendants, as owners of lands which lie in the general direction that the overflow waters of the lake naturally take towards the river, are lower proprietors in reference to such waters—and this is the strongest position that can be taken in their behalf—their right to relief on this verdict cannot be sustained. The doctrine is—certainly it is the position supported by the great weight of authority—that where the proprietor of an upper tenement constructs and maintains on his own premises, and for his own convenience and advantage, an artificial waterway, or any artificial structure affecting the flow of water, and such structure invades no right of the lower pro-

prietor and gives indication that it is for a temporary purpose, or a specific purpose which may at any time be abandon,d, the upper proprietor comes under no obligation to maintain the structure and the conditions produced by it from lapse of time, though the incidental effect has been to confer a benefit on the lower tenant. Nor in such case does the lower proprietor acquire any right which rests only on prescription. An easement arising in that way can only be established by reason of adverse possession or continuous invasion of another's rights. Gould on Waters (3 Ed.), secs. 161, 340; 3 Fernman on Waters, 2400, 2435, 2436, 2437; *Arkwright v. Gell,* 5 M. & W., 202; *Mason*
(48) *v. R. R.,* 6 L. R., Q. B., 577, 586; *Greatrex v. Heyward,* 8 Exch., 290.

And the decisions of our own Court are to like effect. *Felton v. Simpson,* 33 N. C., 84; *Mebane v. Patrick,* 46 N. C., 23. In *Felton v. Simpson* the plaintiff owned land on a stream below defendant's dam, and the incidental effect of this dam was to protect the plaintiff's land from "sudden inundations in heavy falls of rain, by ponding the water until it could be drained off by ditches." The plaintiff had been in the uninterrupted enjoyment of the benefit of this protection for more than twenty years, when defendant cut through the dam to relieve it from a large body of water collected from recent rains, causing plaintiff's land to overflow and injure the crops. Recovery was denied, and it was held: "In order to raise the presumption of the grant of an easement, two things are necessary: There must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant." And *Pearson, J.,* delivering the opinion of the Court, said: "When one continues in the uninterrupted possession of land for thirty years, or enjoys the use of a franchise for twenty years, a grant is presumed. So, if one erects a dam and ponds back water upon the land of another, and is allowed to keep it there for twenty years, a grant of the easement or privilege of doing so is presumed; and so in many similar cases. But, to make this doctrine applicable, two things are necessary: there must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant; for it is the fact of his being thus exposed to an action, and the neglect of the opposite party to bring suit, that is seized upon as the ground for presuming a grant in favor of long possession and enjoyment, upon the idea that this adverse state of things would not have been submitted to if there had not been a grant. Where one
(49) erects a dam on his own land, and another who owns land below incidentally derives a benefit by availing himself of the protection which the dam enables him by means of ditches to give to his land, which

is our case, neither of these essentials for presuming a grant has an existence."

Speaking to this same question, in *Mason v. R. R., supra, Cockburn, C. J.,* concurring, said: "It is the essence of an easement (to divert a stream by an artificial way) that it exists for the benefit of a dominant tenement alone. Being in its very nature a right created for the benefit of a dominant owner, its exercise by him cannot operate to create a new right for the benefit of a servient owner. Like any other right, its exercise may be discontinued if it becomes onerous or ceases to be beneficial to the party entitled." The position is discussed at some length, and very satisfactorily, in Farnham on Waters and Water Rights, *supra,* under the doctrine of reciprocal easements; and the citation, after stating different methods by which such reciprocal easements may be established, continues as follows: "Having established the fact that there may be reciprocal easements existing in favor of adjoining property owners, the question arises as to how far such a condition may be established by prescription. Put in a concrete form, the question may be propounded thus: If the owner of a mill on a stream acquires, by prescription, the right to flow the water back upon the land of an upper proprietor, does the latter acquire a reciprocal right to have the flowage maintained, and can he compel the mill owner to maintain his dam for that purpose? To the question in this form the answer seems plain that there is no such reciprocal right. The equitable doctrine of prescription depends upon the presumption of a grant, and equity will only presume a grant when certain well-defined conditions are present, one of which is an adverse claim to the property out of which the right is alleged to have arisen. In the case supposed there is no adverse claim on the part of the owner of the submerged land to have the dam maintained, and, (50) therefore, nothing upon which a grant can be presumed." And further: "The doctrine applicable in case of the damming of the water back on the upper property is equally applicable in case of drainage over lower property. In *Greatrex v. Heyward,* the Court held that the flow of water from a drain made for the purpose of argiculture, for a period of twenty years, does not give a right to the lower proprietor to its continued flow, so as to prevent the alteration of the drain for the improvement of the upper estate. This is put upon the ground that the character of the water-course is temporary merely, depending upon the mode which the upper owner had adopted for draining his land; also, that the user by the lower owner had not been adverse." The author then proceeds to criticise a decision of the Minnesota Court (*Kray v. Muggli,* 77 Minn., 231), which asserts a position contrary to that upheld in the text, and also certain expressions of the chancellor to same effect in *Belknap v. Trimble,* 3 Paige, 577, and declares that the Minnesota decision, and

some others of like tendency, are not in accord with the weight of authority.

In what is here said we do not intend to question the decision of *Belknap v. Trimble,* and other cases of like import, to the effect that where an upper proprietor, by an artificial structure on his own premises, has caused a change of a stream in which they both had riparian right from the original to a new channel, under circumstances which give indication that the change is to be a permanent one, and the lower proprietor, accepting the change, has built mills and made improvements dependent on the flow of the stream in its new course, the enjoyment and user of these improvements will, under certain circumstances, be protected by injunctive relief or other efficient action of the courts. These decisions can well be upheld under the doctrines of dedication and estoppel, as in *Delaney v. Boston,* 2 Harr. (Del.), 489; Farnham, pp. 2437, 2438. But this principle has no application here. The former proprietors
(51) of the "Dismal Swamp Canal," acting under a charter from the State, in the exercise of proprietary rights and privileges therein granted, constructed this "Cross Canal," an artificial way, as a feeder to the main canal and as an aid to navigation. And the present owners, having concluded that this additional supply of water is no longer required for the purpose, and that its continued flow into the main canal, in its present condition, will cause damage to their property and act as a hindrance to their enterprise, have determined to abandon the "Cross Canal" and obstruct its further flow. It was originally constructed for the advantage and convenience of plaintiff's predecessors, and for a definite purpose, and defendants have acquired no right to enforce its maintenance for their protection.

The exact case is stated by Gould on Waters, *supra,* as follows: "When a canal company was authorized, but not required, by statute, to divert the waters of a stream, which they did for a period of forty years, it was held that riparian proprietors below on the stream had no right to insist that the diversion should be continued for their benefit."

The Court, being of the opinion that, on the facts presented, defendants are not entitled to any redress against the plaintiff, has deemed it best to place the decision on that ground, as it may serve to end the matter at issue. But we must not be understood as deciding that, if it were otherwise, defendants would be entitled to the injunctive relief awarded them by the judgment below. It appears that plaintiff is engaged in carrying on an enterprise for the benefit of the public, under a *quasi*-public charter, and it is ordinarily true that if an adjacent property owner suffers injury in his proprietary rights by reason of such an undertaking, he is restricted to an action for damages or some statutory method of redress.

There is error in the judgment below in so far as it enjoins plaintiff from obstructing the flow of the "Cross Canal," and to that extent the judgment below is

Reversed.

(52)

C. D. MAFFITT v. CAPTAIN HAMMERLAND AND A. S. HEIDE.

(Filed 11 March, 1908.)

Principal and Agent—Seamen—Procuring—Accommodation—United States Revised Statutes, Vol. VI, p. 909.

In an action to recover of defendant moneys advanced him in procuring seamen, no charge being made for services, the plaintiff being a ship broker, the defense will not be sustained that recovery cannot be had under 6 Revised Statutes of the United States, p. 909.

APPEAL from *Biggs, J.*, at December Term, 1907, of NEW HANOVER. Judgment for plaintiff. Defendant Heide appealed.

John D. Bellamy for plaintiff.
Herbert McClammy for defendants.

PER CURIAM. The defendants contend that, upon the evidence, the plaintiff cannot recover under 6 Revised Statutes of the United States, 909. The evidence for plaintiff tended to prove that Hudson Bros., of Norfolk, are not shipping commissioners, whose fees for enlisting seamen are fixed by the statute, but general ship brokers. The plaintiff's evidence tends also to prove that the defendant Hammerland, the captain of a Norweigan steamer, went to plaintiff and asked him to procure four sailors for his ship before he left port. Maffitt told defendant he could not furnish the men, but they might be obtained in Norfolk, and, *as a favor* to defendant, he would wire Hudson Bros., a firm of ship brokers in Norfolk, and probably get them there. Maffitt wired, and received a reply that he could get them for $20 a man and railroad fare. Plaintiff took the telegram to defendant, and the latter, after reading it, asked Maffitt to procure the men and advance the money necessary, stating that he would reimburse him. Plaintiff paid out for defendant $120, railroad fare, telegrams, shipping fees, etc., charging de- (53) fendant not a cent for his services, and paying the money simply as a favor to Hammerland. The defendant's only defense is that the money paid was paid in violation of the Revised Statutes of the United States.

We do not think that the defendants' contention is well founded.

No error.

HICKORY MARBLE AND GRANITE COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 11 March, 1908.)

1. Railroad Companies—Penalty Statutes—Transportation—Revisal, 2632—Constitutional Law—Commerce Clause.

Revisal, sec. 2632, by its language applies only to the transit of goods carried by railroad companies from and to points within the State, and therefore questions relating to its constitutionality respecting the commerce clause of the Federal Constitution are not pertinent to the inquiry thereunder.

2. Railroads — Evidence — Transportation — Revisal, 2632—Interstate Commerce—Action Dismissed.

When it does not appear from the evidence, in a suit for the recovery of a penalty against a railroad company, under Revisal 2632, concerning delays in transit of certain goods from a point in Georgia to a point in North Carolina, whether the alleged delay occurred in Georgia, South or North Carolina, the judgment in plaintiff's favor in the court below will be reversed and the action dismissed.

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

This is an action for the recovery of a penalty, under section 2632 of the Revisal, the plaintiff alleging an unreasonable delay in the transportation of a car-load of marble from Atlanta, in the State of Georgia, to Hickory, in this State. It did not appear from any evidence
(54) in the case whether the alleged delay was in the State of Georgia, in the State of South Carolina, or in this State. Defendant moved to nonsuit the plaintiff. The motion was overruled, and the defendant excepted. There was a verdict in favor of the plaintiff for the amount of the penalty given by the statute, and judgment was entered thereon. Defendant excepted and appealed.

M. H. Yount, W. C. Feimster, and D. Lester Russell for plaintiff.
S. J. Erwin for defendant.

WALKER, J., after stating the case: The section of the Revisal imposing the penalty which the plaintiff seeks to recover in this case is assailed by the defendant upon the ground that the Legislature has thereby attempted to regulate commerce between the States. Commerce between the States consists of intercourse between their citizens, and includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities, and the power to regulate that commerce

involves the right to prescribe rules by which it shall be governed—that is, the conditions upon which it shall be conducted. *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S., 196. We do not deem it necessary to decide the important question whether the statute in question is in conflict with the commerce clause of the Constitution of the United States. The construction of a statute involving the exercise even of a doubtful power will not readily be adopted, in the absence of direct words, where the language used reasonably admits of another which will exclude the question of constitutional authority to enact the particular law. Black on Interpretation of Laws, p. 89, sec. 42; *Mardre v. Felton,* 61 N. C., 279. Section 2632 purports to deal with the entire actual transit of the goods from the time they leave the initial station until they reach their final destination. It is a principle universally recognized that laws have no extraterritorial effect. Their operation is limited (55) to the territorial jurisdiction of the State or country that enacts them. Rorer on Interstate Law, pp. 12, 226, 227. We cannot think the Legislature intended by section 2632 to determine what should be the reasonable or ordinary time for transporting goods through another State, and to provide what allowance should be made for delays at the receiving station and at intermediate points in that State. Where there is a shipment from Atlanta to Hickory on a through bill of lading, the transit is a continuous one, and, in order to determine whether there has been an unreasonable delay which subjects the carrier to the payment of the penalty for the default, it would become necessary to consider the time that would reasonably be consumed in accomplishing the entire journey. If the Legislature of the State intended by section 2632 to include interstate shipments, it would reach beyond the territorial jurisdiction of this State and prescribe a rule for determining whether there has been an unreasonable delay there, and the law must operate in another State, where the carrier's duty and responsibility for delay in transportation may be fixed by a principle very different from—nay, in direct conflict with—that prescribed by our statute. It cannot be doubted that the Legislature intended by section 2632 to refer to the entire transit—that is, from the initial station to the terminal station—for this intent is clearly indicated by the very words of the section. The language is: "It shall be considered that such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight *between the receiving and the shipping stations.*" (Italics ours.) It contemplated, therefore, dealing with the carrier, in respect of delays in shipments, not merely within the limits of this State, but within the territory of another State, if we should hold that interstate shipments are within the meaning and intent of the law. Such a construction would raise a

(56) grave constitutional question. We would have to decide whether such control of the carrier in the transportation of goods is merely local in its nature and, while incidentally affecting commerce between the States, is in aid thereof, and such as falls within the police power of the State, or whether it is of a National character and requires uniformity throughout the entire journey—that is, from the station where the goods are received to the one where they are to be delivered. *Harrill v. R. R.*, 144 N. C., 532; *Morris v. Express Co.*, 146 N. C., 167.

This Court, in *McGwigan v. R. R.*, 95 N. C., 428, construed a statute somewhat similar in phraseology to section 2632 of the Revisal, and held that it did not apply to interstate shipments. It laid some stress upon the words in that statute, "any railroad corporation operating in this State." The corresponding words in section 2632 are "any railroad company doing business in this State." While the description of the carrier in the two statutes is expressed in different words, the meaning must be the same. But the intention of the Legislature to confine the operation of the law to shipments within the State is more apparent in section 2632 of the Revisal than was the same intention in section 1966 of The Code, which was construed in *McGwigan v. R. R.*, by reason of the fact that a different construction of section 2632 would impute to the Legislature the purpose of prescribing a positive rule for determining what shall constitute a proper transportation in a foreign State, where its own laws cannot operate, as the provision concerning the time allowed for delays, and as to what shall constitute an unreasonable delay, is not to be found in section 1966 of The Code.

It is not necessary, in the view we take of section 2632 of the Revisal, to consider the question, so ably and learnedly discussed before us by counsel, as to the constitutional power of the Legislature to prescribe a penalty for delay in the shipment of freight from another State into this State, provided the exercise of the power, or the legislation itself,

(57) is confined to delays occurring wholly within this State. If the section embraces any legislation which is not local in its nature, and, although in aid of commerce, is a regulation thereof, within the meaning of those terms as defined by the Court having final ultimate jurisdiction to decide such a question, the statute is void to the extent that it exceeds the proper limit of legislative power prescribed to the State by the Constitution of the United States, as construed by that Court. When the purpose of the legislation is of such a kind as to require uniformity, then, in order "to bring the transportation within the control of the State as part of its domestic commerce, the subject transported must be, within the entire voyage, under the exclusive jurisdiction of the State." This limitation of the power of the State to regulate commerce was stated in the words we have above quoted by *Justice*

Fields in *Steamship Co. v. R. R.*, 9 Sawyer, 253, and afterwards adopted by the Supreme Court of the United States as a concise and accurate statement of the principle governing such cases, in *Hanley v. R. R.*, 187 U. S., 617. See, also, *Lord v. Steamship Co.*, 102 U. S., 541. Even when State legislation has been considered as affecting interstate commerce only incidentally and as a proper exercise of the police power, it has been upheld only upon the ground that it was in furtherance of the purpose contemplated by the commerce clause of the Federal Constitution, and, therefore, not within its prohibitive terms as being a regulation of interstate traffic.

Instead of entering upon a consideration of the question whether section 2632 comes within the class of legislation permissible to the State as not being a regulation of commerce, we have preferred to construe the section, according to its plain meaning, as intended to apply only to intrastate shipments, or those which do not require any departure from the territory of the State in order to execute the contract (58) of carriage. This meaning conforms to the elementary rules of interpretation and avoids the decision of any doubtful constitutional question.

The court should have sustained the motion to nonsuit at the close of the evidence, and erred in refusing the same.

We do not decide, or even undertake to consider, in this case, the question as to what is the duty and liability of the carrier at each end of the transit, under the law imposing penalties for delays in shipping and delivering goods, but only the question as to whether section 2632 affects interstate commerce or was intended to apply solely to commerce within the borders of the State. What we have said, therefore, must be construed as referring only to the actual transit of the goods from the initial to the terminal station.

The judgment is reversed and

Action dismissed.

Cited: *Davis v. R. R., post,* 72; *Hardware Co. v. R. R.*, 170 N. C., 399.

S. L. WALLACE ET AL. v. R. H. SALISBURY ET AL.

(Filed 11 March, 1908.)

1. Appeal and Error—No Case—Motion to Dismiss—Motion to Affirm.

A motion to dismiss because there is no case on appeal must be denied. The proper motion is to affirm the judgment below.

2. Same—No Case—Motion to Dismiss—Supreme Court—Inspecting Record—Ex Mero Motu.

When there is no motion to affirm the judgment below, and the appeal is not properly constituted in the Supreme Court, it is the duty of the Court, *ex mero motu*, to inspect the record proper for errors.

3. Same—Injunction—Case on Appeal—Exception to Judgment Below.

On appeal from an order granting or refusing an injunction, the pleadings and the affidavits constitute the record proper, and no "case on appeal" is necessary, as the facts are reviewable by the Supreme Court, and the mere fact of appeal is itself an exception to the only action of the judge—the judgment.

4. County Commissioners—License to Sell Liquor—Elections—Presumption of Validity Conclusive—Trial by Jury.

There is a final and conclusive presumption in favor of the correctness of the result of an election as declared by the proper officials, until the issues raised by the pleadings have been tried and disposed of before the jury; and in the meanwhile an injunction will not lie against the county commissioners for the issuance of license to sell liquor, under allegations of defects and vital irregularities in an election held upon the question of prohibition, and denied by the answer.

(59) APPEAL from order of *Lyon, J.*, made at chambers in WILSON, 4 February, 1908, dissolving a restraining order of plaintiffs.

Plaintiffs appealed.

Winston & Everett for plaintiffs.

Stubbs, Gilliam & Martin for defendants.

CLARK, C. J. The motion to dismiss because there is no case on appeal must be denied, even in appeals in which there should be a case on appeal. *Non constat* but there may be errors on the face of the record proper; hence the proper motion is to affirm the judgment below; and if this motion is not made, it is the duty of the court, *ex mero motu*, to inspect the record proper for such errors. *Hicks v. Westbrook*, 121 N. C., 131; *Barrus v. R. R., ib.*, 505, and very numerous other cases collected in Clark's Code (3 Ed.), pp. 769, 770.

But, indeed, on appeal from an order granting or refusing an injunction, no "case on appeal" is necessary, as the pleadings and affidavits

constitute the record proper, since the facts are reviewable by this Court, and the appeal is itself an exception to the only action of the judge, *i. e.*, the judgment. *Hamilton v. Icard,* 112 N. C., 593. If any part of the affidavits or pleadings is not sent up, either party can always move for a *certiorari* to supply the missing part of the record. In equity proceedings the affidavits are a part of the record.

No "case on appeal" is necessary, and the appeal from the (60) judgment is a sufficient exception and assignment of error likewise, when the judgment below is rendered upon a case agreed or upon a demurrer, and for the same reason as when the judgment grants or refuses an injunction to the hearing, or a temporary injunction, *i. e.,* the judgment which is endered upon the record proper is the only error assignable or possible. *Chamblee v. Baker,* 95 N. C., 98; *Davenport v. Leary, ib.,* 203; *Greensboro v. McAdoo,* 112 N. C., 360; *Clark v. Peebles,* 120 N. C., 32; *R. R. v. Stewart,* 132 N. C., 249.

This is an action by certain citizens and residents of Jamesville against the commissioners of Martin County, alleging defects and vital irregularity in an election held in the town of Jamesville upon the question of prohibition, the result of which election had been declared and duly certified to be in favor of saloons, and that license had been issued to certain parties accordingly. The plaintiffs ask to have the election declared void and that the defendants be restrained in the meantime from issuing licenses. The answer squarely denies the allegations touching the validity and regularity of the election. The judge properly dissolved the temporary restraining order. The question as to the validity of the election is presented by this direct attack upon it, and is triable before a judge and jury. But in the meantime the presumption in favor of the correctness of the result of the election, as declared by the proper officials, is final and conclusive until reversed by the judgment of the court, after trial of the issues in this proceeding brought to impeach it. *Bynum v. Comrs.,* 101 N. C., 414, and cases there cited.

Affirmed.

Cited: Jones v. Flynt, 159 N. C., 97; *Fountain Co. v. Schell,* 160 N. C., 531.

(61)
SHELBY ICE AND FUEL COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 11 March, 1908.)

1. Railroads—Penalty Statutes—Actual Transit—Interstate Commerce.

An action to recover a penalty under Revisal, sec. 2632, for a delay alleged to have occurred in the actual transit of goods shipped by rail from a point within the State to a point without the State, cannot be sustained. (See *Davis v. R. R.*, 145 N. C., 207, and *Ice Co. v. R. R., post,* 66.)

2. Railroads—Penalty Statutes—Instructions—Transportation—Verdict, Directing.

It is error in the court below to charge the jury to find a certain sum for plaintiff, if they believe the evidence, in an action for the recovery of a penalty, under Revisal, 2632, for the alleged failure of a railroad company to transport goods. The question of delay and the ascertainment of the amount of the recovery were questions for the jury, under proper instructions.

APPEAL from a justice of the peace, tried before *Ward, J.,* at Spring Term, 1907, of CLEVELAND.

From judgment for plaintiff, defendant appealed.

The facts sufficiently appear in the opinion of the Court.

No counsel for plaintiff.

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

WALKER, J. This is an action to recover the penalty given by section 2632 of the Revisal for delay in transporting a car-load of brick from Grover, N. C., to Shelby, N. C., *via* Blacksburg, S. C. The issue submitted to the jury, with the answer thereto, was as follows: "What amount is the plaintiff entitled to recover of the defendant on account of penalty?" Answer: "Fifty-five dollars." The court charged the jury that if they believed the evidence they should answer the issue "Forty-five dollars." This is an interstate shipment, as we have held in *Davis v. R. R.,* 145 N. C., 207, and *Ice Co. v. R. R., post,* 66, and, there-
(62) fore, the case is governed by *Marble Co. v. R. R., ante,* 53, wherein we held that section 2632, so far as the actual transit is concerned, applies only to intrastate shipments. The charge was, therefore, erroneous for this reason, and also because the judge should have permitted the jury to pass upon the question of delay and to ascertain the amount of the recovery, under proper instructions, instead of directing a verdict for the plaintiff as matter of law, if the evidence was believed. *Davis v. R. R., supra,* and *Ice Co. v. R. R., supra.*

New trial.

Cited: Davis v. R. R., post, 72.

W. G. SMITH v. JOHN L. ROPER LUMBER COMPANY.

(Filed 11 March, 1908.)

Privileged Communications — Evidence — Statements to Physician—Competency.

At common law, communications between patients and their attending physicians were not regarded privileged. In an action to recover damages for physical injury alleged to have been inflicted on plaintiff by reason of a defective jackscrew furnished to him by defendant, evidence of the attending physician that plaintiff told him, upon his inquiry, that "he was raising the engine with a jackscrew, and he kicked it or wrung it out (he could not tell which), causing the engine to roll back and crush his arm," etc., is competent as a matter of right, and not excluded by Revisal, 1621, it having been admitted or clearly established by other testimony that plaintiff's arm had been crushed by the defendant's engine having fallen upon it.

APPEAL from *Lyon, J.*, at November Term, 1907, of CRAVEN.

There was evidence on the part of plaintiff tending to show that plaintiff, an employee of the defendant company, was engaged in moving a heavy engine of the defendant company from their mills to the cars, and, at the time of the injury, was raising the engine by means of a jackscrew, when the engine fell, catching plaintiff's arm between the engine and a brick wall near by and crushing same so that amputation was necessary; and that the injury was caused by reason of a defective (63) jackscrew negligently furnished by defendant company.

The defendant claimed, and offered evidence tending to show, that there was no defect in the screw, and, further, that the injury was caused by fault of plaintiff in negligently kicking or jerking the screw from its proper placing. In support of defendant's position they introduced one Dr. Jones, who testified that he was called to attend plaintiff, and, before treating him, asked him how he had received the injury, and plaintiff replied that he was raising the engine with a jackscrew and he kicked it or wrung it out—he could not tell which—causing the engine to roll back and crush his arm, etc.

Plaintiff in apt time objected to this testimony, but it was admitted, the court stating that it was admitted, not as a matter of discretion, but as a matter of law, and plaintiff excepted. There was a verdict for defendant, and plaintiff appealed, assigning for error the ruling of his Honor in admitting the testimony of Dr. Jones.

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

HOKE, J., after stating the case: At common law, communications between patients and attending physicians were not regarded as privi-

leged, and the matter has been very generally made the subject of statutory regulation. Our own statute, which substantially accords with the form more usually adopted in such legislation, provides as follows (Revisal, sec. 1621): "No person duly authorized to practice physic or surgery shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon: *Provided,* that
(64) the presiding judge of the Superior Court may compel such disclosure if, in his opinion, the same is necessary to a proper administration of justice." It is the accepted construction of this statute that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. *Gartside v. Ins. Co.,* 76 Mo., 446; *Dilleber v. Ins. Co.,* 69 N. Y., 256. And it is further held, uniformly, so far as we have examined, that the privilege established is for the benefit of the patient alone, and that same may be insisted on or waived by him in his discretion, subject to the limitations provided by the statute itself:

"1. That the matter is placed entirely in the control of the presiding judge, who may always direct an answer, when in his opinion same is necessary to a proper administration of justice.

"2. That the privilege only extends to information acquired while attending as physician in a professional capacity, and which information is necessary to enable him to prescribe for such patient as a physician." 14 Wigmore, sec. 2286c.

In the present instance, the court having declined to exercise the discretion conferred by the statute, and having admitted the answer of the witness as a matter of right in defendant, the correctness of the ruling will depend upon the interpretation put upon the second limitation stated: "That the privilege only exists as to information which is necessary to enable the physician to prescribe for such patient as a physician." Many of the courts have been very liberal in construing this statute in favor of the protection afforded the patient, some of them going to the extent of holding that whenever a question has been asked by an attending physician with a view of prescribing, the answer is privileged, however unimportant or irrelevant such answer may prove to be; but
(65) we do not think that such a position can be sustained.

It must be remembered that the privilege did not exist at all at common law. It only arose by reason of the statute, and, this statute having provided as a condition that the communication, to come within its terms, shall be necessary to enable the physician to prescribe, we think

this limitation must be given effect, and that it must rest in the legal discretion of the court to determine, from all the facts and attendant circumstances, including the answer itself, whether the information given was necessary for the purpose indicated. There are, no doubt, many occasions when an answer to the question usually asked by a physician, "How were you hurt?" could and should be regarded and held as necessary to intelligent treatment. And when this is true, both the substance of the answer and the incidental details would come within the protection provided by the law. But we do not think, by any fair or reasonable intendment, the statute could be construed as extending to the answer admitted in the present instance. There was no dispute between the parties that the plaintiff's arm had been crushed by reason of having been caught between the falling engine and the brick wall, and it could make no possible difference in the treatment whether this falling of the engine was occasioned by a defective jackscrew or by plaintiff's conduct in negligently kicking the screw out of place at an inopportune time.

We are of opinion that his Honor correctly ruled that defendant was entitled to have the answer of the witness admitted in evidence as a matter of right, and that his construction of the statute is in accord with the weight of authority. *Green v. R. R.,* 176 N. Y., 201; *People v. Cole,* 113 Mich., 83; *In re Will. Bruendl,* 102 Wis., 45; *R. R. v. Murray,* 55 Kan., 336. The decision of the Indiana courts relied upon by plaintiff (*Pennsylvania Co. v. Marion,* 123 Ind., 415) is based on an interpretation of an Indiana statute (Revised Statutes Indiana, sec. 497) which is much broader in its terms and permits a different (66) construction.

No error.

SHELBY ICE AND FUEL COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 11 March, 1908.)

1. Railroads — Penalty Statutes — Transportation — Points Within State — Through Another State.

A penalty under Revisal, 2632, cannot be recovered for the failure of a railroad company to transport freight within a reasonable time, when the initial and terminal points are within the State, but the shipment necessarily passes into another State *in transitu.* (App. *Marble and Granite Co. v. R. R., ante,* 53.)

2. Same—Delayed in State—Recovery—Quære.

As to whether a penalty is recoverable under Revisal, sec. 2632, for failure of a railroad company to transport freight from and to points within the State, necessarily passing through another State *in transitu,* when the delay is shown to have occurred here, at the initial or terminal point, *quœre.*

3. Railroads—Penalty Statutes—Length of Delay Admitted—Questions for Jury.

In an action to recover a penalty for failure of a railroad to transport freight under Revisal, 2632, it is for the jury, in proper instances, to ascertain the amount recoverable, and not a question of law for the court. (App. *Davis v. R. R.*, 145 N. C., 207.)

APPEAL from a justice of the peace, tried before *Ward, J.*, and a jury, at Spring Term, 1907, of CLEVELAND.

Judgment for plaintiff, and defendant appealed.

The facts sufficiently appear in the opinion of the Court.

(67) *O. F. Mason and W. B. Rodman for defendant.*
No counsel for plaintiff.

WALKER, J. This action was brought to recover the penalty given by section 2632 of the Revisal for delay in transporting a car-load of brick from Grover, N. C., to Shelby, N. C. There was a verdict and judgment for the plaintiff, and the defendant appealed. It appears, by implication, that a part of the transportation was through the State of South Carolina, though the evidence on that point is not of the most satisfactory character. The courts in some of the States have held that, in cases of railroad transportation like that we are considering in this appeal, if the initial and terminal points are in the same State, the transportation does not constitute interstate commerce, though part of the territory of another State may be traversed in making the journey. *Campbell v. R. R.*, 86 Iowa, 587; *Seawell v. R. R.*, 110 Mo., 222. But, in *Hanley v. R. R.*, 187 U. S., 617, the Supreme Court of the United States, whose decision we must follow in such cases, held that those cases were decided upon the authority of *R. R. v. Pennsylvania*, 145 U. S., 192, and in deference to conclusions drawn from that case, which involved only a question of taxation, and that the conclusions of the State courts had been carried too far. Referring to *R. R. v. Pennsylvania, Justice Holmes* said: "That was the case of a tax, and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S., 204. And although it was intimated that, for the purposes before the Court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes." The evidence not being very definite as to the character of the transportation, we will not decide whether, if the delay occurred in this State, the plaintiff can recover the penalty for failure to transport the car-load of brick within a reasonable time, as alleged in the case;
(68) but if it appears at the next trial that the transportation was

through South Carolina, the case would, under *Hanley v. R. R.*, seem to fall within the principle of our decision in *Marble Co. v. R. R., ante,* 53, the transportation not being wholly within this State.

The following issue was submitted to the jury: "What amount, if anything, is the plaintiff entitled to recover of the defendant on account of penalty?" Answer: "Forty-five dollars." The court charged the jury that if they believed the evidence they should answer the issue "Yes," as matter of law, and the defendant excepted. This instruction was erroneous. In this respect the case is governed by *Davis v. R. R.*, 145 N. C., 207, and it is not necessary for us to repeat here the reasons we assigned in that case for granting a new trial. The judge should have left the question as to the delay and the amount the plaintiff is entitled to recover to the jury, with proper instructions upon the law.

New trial.

Cited: *Ice Co. v. R. R., ante,* 61.

A. H. DAVIS v. SOUTHERN RAILWAY COMPANY.

(Filed 11 March, 1908.)

1. Railroads — Penalty Statutes — Transportation — Consignor — Party Aggrieved.

When the consignor had agreed with the consignee that the latter was only required to pay for the intrastate shipment when it reached its destination, the consignor may maintain his action for delay *in transitu* (Revisal, 2632), as the party aggrieved.

2. Railroads—Penalty Statutes—Transportation—Constitutional Law.

The provision of Revisal, 2632, imposing a penalty upon railroad companies for failure in their duty to transport goods, is constitutional and valid.

3. Railroads—Penalty Statutes—Transportation—Issues.

In an action against a railroad company under Revisal, 2632, for a penalty for failure in its duty to transport freight, an issue is objectionable when it is the only one and in the following language: "What amount, if any, is the plaintiff entitled to recover of the defendant on account of the failure to promptly ship the car-load of lumber?"

4. Same.

An issue which presupposes a failure on defendant's part in its duty to transport freight, in an action for penalty, Revisal, 2632, is objectionable. (Attention is called to the proper issues as suggested in *Hamrick v. R. R.*, 146 N. C., 185.)

5. Railroads — Penalty Statutes—Transportation—Ordinary Time—Verdict, Directing—Instructions—Evidence—Questions for Jury.

In an action for the recovery of a penalty under Revisal, 2632, it was for the jury to find what was "ordinary" time, under the surrounding circumstances, and whether the defendant transported freight within such time; also, the amount of recovery after allowing for the "lay days," etc., provided by the statute. Hence, it was error for the court below to instruct the jury, if they believed the evidence, to answer the issue in a certain way or in a sum certain.

(69) APPEAL from *Ward, J.*, at Spring Term, 1907, of CLEVELAND.

The facts sufficiently appear in the opinion of the Court.

Quinn & Hamrick for plaintiff.

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

WALKER, J. This is an action to recover the penalty given by section 2632 of the Revisal for delay in shipping lumber. The case is not governed by the principle of *Marble Co. v. R. R., ante,* 53, as argued by the defendant's counsel, for it does not appear that any part of the transportation was beyond the limits of the State. The lumber was shipped from Lattimore, or Washburn's Siding, to Gastonia, all being in this State. The agreement between the plaintiff, as consignor, and Henry & Bradley, the consignees at Gastonia, was that the latter should not be required to pay for the lumber until it arrived at Gastonia. The plaintiff was, therefore, the party aggrieved, within the meaning of section 2632, and can maintain this action for the penalty. *Summers v.*
(70) *R. R.*, 138 N. C., 295. The very question is considered and decided in *Cardwell v. R. R.*, 146 N. C., 218.

The constitutionality of section 2632, and similar provisions of law imposing penalties for a breach of duty in transporting goods by common carriers, is too firmly established to be now questioned. *Branch v. R. R.*, 77 N. C., 348; *Walker v. R. R.*, 137 N. C., 163; *Stone v. R. R.*, 144 N. C., 220; *Morris v. Express Co.*, 146 N. C., 167; *Cardwell v. R. R., supra.* So that the plaintiff might have a good cause of action for the penalty, nothing else appearing, if there was a failure in this case to transport the lumber within a reasonable time, and we would affirm the judgment but for the fact of error in the charge of the court. The issue submitted and the answer thereto were as follows: "What amount, if any, is the plaintiff entitled to recover of the defendant on account of the failure to promptly ship the car-load of lumber?" Answer: "Seventy dollars." The form of that issue is objectionable, as it presupposes that there had been a failure to perform its duty by the defendant as carrier, and merely required the jury to ascertain the amount of the penalty incurred for the default. *Denmark v. R. R.*, 107 N. C., 185. We sug-

gested in *Hamrick v. R. R.*, 146 N. C., 185, that two issues be submitted in cases of this kind: "(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," said *Justice Connor* for the Court, "the attention of the parties and the jury is drawn to the real questions in issue." But, waiving the defect in the issue, we think the charge of the court was erroneous. The jury were instructed that if they believed the evidence they should answer the issue "Yes," as a matter of law. This was all of the charge, and it was duly excepted to by the defendant. The charge and the issue do not correspond, and the response directed to be made would not be an appropriate one, in any view, to the issue as now framed. It only called for an assessment of the amount, and not for a simple affirmative or negative answer. But it was error (71) to direct a finding for the plaintiff "if the jury believed the evidence." It was for the jury to ascertain, first, if there had been an unreasonable delay, measured by the ordinary time required to make the transportation; and, second, how much delay there had been, after making due allowance to the defendant, as provided by the statute, and in this way the amount due the plaintiff would be determined. The judge cannot decide, as matter of law, what amount is due, even if the jury should believe the evidence, for the latter must go further and decide the time of the delay before the amount of the penalty imposed can be ascertained. *Hamrick v. R. R., supra.* In *Jenkins v. R. R.*, 146 N. C., 178, this Court, discussing the question involved in this case, said, by *Justice Connor,* that reasonable time for the transportation in any given case is to be determined by the ordinary time consumed as the standard, after making the proper deduction for "lay days," or those which the statute provides shall be omitted from the count. The Court further said that, under the statute, as interpreted in *Stone v. R. R.*, 144 N. C., 220, "A failure to transport within the 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 defendants 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 the carrier as unreasonable. The two days at the initial point and forty-eight hours at each intermediate point are not the standard 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 (72) standard of the common-law duty is lowered." The court erred in not allowing the jury to decide whether there had been any delay, and, if any, how much, under the rule we have stated, the plaintiff is entitled to receive for it.

If it appears at the next trial that any part of the transportation was outside the borders of the State, although the initial and terminal points of shipment may be in this State, the case will be controlled by *Marble Co. v. R. R., ante,* 53, and *Ice Co. v. R. R., ante,* 61, as such a transportation, under the rule laid down in the latter case, which follows *Hanley v. R. R.,* 187 U. S., 617, is interstate traffic, and will not, therefore, be within the provision of section 2632 of the Revisal as construed by us in *Marble Co. v. R. R., ante,* 53.

We again call attention to the form of the charge, as given in this case, in connection with the recent decision of this Court in *S. v. R. R.,* 145 N. C., 495. For the error in the charge of the court a new trial is awarded.

New trial.

CLARK, C. J., concurring in result: The form of the issue, "What damage (or what amount), if any, is the plaintiff entitled to recover?" has been so long used and in so many different kinds of actions, and its meaning is so well understood, that the advisability of now calling it in question is doubtful. It could only add to the number of issues, without any corresponding benefit.

When, as in this case, more than one inference can be drawn from the evidence, a charge to the jury, "If you believe the evidence, answer the issue 'Yes' (or 'No,' as the case may be)," is erroneous. But when only one inference can be drawn, such charge would be correct. The long settled practice is thus summed up by *Brown, J.,* in a recent case (*Clark v. Traction Co.,* 138 N. C., 80), where, speaking for a unanimous Court,

(73) he says: "His Honor instructed the jury, 'if they believed the evidence, to answer that issue "Yes."' *In this instruction we are unable to discover any error.* The evidence in the case was practically undisputed, and we do not see how any reasonable mind can draw more than one inference from it."

Cited: Box Factory v. R. R., 148 N. C., 422; *McRackan v. R. R.,* 150 N. C., 332; *Elliott v. R. R.,* 155 N. C., 238; *Carter v. McGill,* 168 N. C., 511.

ISAAC BROWN ET AL. v. D. W. HOBBS.

(Filed 11 March, 1908.)

Lands — Contract to Convey—Agreement as to Profits—Parol Evidence—Statute of Frauds.

Plaintiffs and defendant entered into a written contract that the former should convey to the latter certain lands for the sum of $1,500, with the further agreement by parol, not reduced to writing or intended so to be, that defendant, as a part of the consideration for the contract, was to sell the land at a profit beyond that sum and divide it. Defendant accordingly induced plaintiffs to convey the lands to him, and thereafter sold them at a profit: *Held*, (1) evidence of the oral agreement did not tend to contradict or vary the written instrument; (2) the oral agreement, if established, was enforcible as to the profits already made, did not affect a conveyance of lands, and was not within the provision of the statute of frauds.

APPEAL from *Biggs, J.*, at August Term, 1907, of DUPLIN.

The plaintiffs, Brown and wife, on 28 July, 1905, agreed in writing to sell and convey to the defendant a tract of land for $1,500, and at the same time, and for the purpose of inducing the plaintiffs to make the agreement, the defendant promised and agreed on his part, by parol, that he would pay to the plaintiffs, when he sold the land, one-half of the amount he received therefor in excess of the sum of $1,500, which was the consideration stated in the contract. On 31 August, 1905, the plaintiffs, at defendant's request, conveyed the land to him in accordance with the terms of the contract. There was full proof by the plaintiffs of the fact that there was an agreement to divide all that was received by the defendant for the land above $1,500. The land was afterwards sold by the defendant Hobbs for $2,275. The defendant objected to the evidence as to the agreement. His objection was overruled, and he excepted. He also moved to nonsuit the plaintiffs, and for an instruction that, if the jury believed the evidence, they should answer the issue "No." The issue and answer thereto were as follows: "Is the defendant, D. W. Hobbs, indebted to the plaintiffs, and, if so, in what amount?" Answer: "Yes; $387.50, with interest from 1 September, 1905." The motion and instruction were refused, and the defendant excepted. Judgment was entered upon the verdict, and the defendant appealed.

(74)

F. R. Cooper for plaintiffs.

Stevens, Beasley & Weeks for defendant.

WALKER, J., after stating the case: It is contended by the defendant's counsel that the parol agreement, which was permitted to be proven,

varied and contradicted the written contract between the parties, and that it is also within the statute of frauds, declaring void oral contracts for the sale of land. We do not think either position is tenable. Indeed, both questions have been conclusively determined the other way by our decisions, as will clearly appear by reference to a few of them.

In *Michael v. Foil,* 100 N. C., 178, it appeared that at the time of the delivery of a deed for land, and as a part of the inducement for its execution, it was orally agreed between the vendor and vendee that if the vendee should sell an interest in the land during the vendor's life, he would pay the vendor one-half of the amount received therefor, and, upon this state of facts, the Court held that such an agreement could be shown by oral evidence; that it did not vary or contradict the contract of sale or the deed, and that it was not within the statute of frauds.

Upon substantially the same state of facts, in *Sprague v. Bond,*
(75) 108 N. C., 382, this Court made the same ruling as in *Michael v. Foil. Justice Shepherd,* for the Court, said: "The enforcement of the alleged agreement, after the sale of the land, does not in any respect impinge upon the terms of the conveyance, but relates entirely to the payment of the consideration. It is true that the plaintiff could not have compelled the defendant to execute her agreement to sell the land, as there was no enforcible trust, and the agreement was within the statute of frauds; but this part of the agreement has been voluntarily performed, and the other part, not being within the statute, may now be enforced." The Court, in that case, refers with approval to *Hess v. Fox,* 10 Wendell, 436, in which *Savage, C. J.,* said: "No question can arise on the validity of the agreement to sell. That was performed, and the remaining part was to pay over money, supported by the consideration of land conveyed to the promisor." In *Trowbridge v. Wetherbee,* 93 Mass. (11 Allen), 364, the Court thus stated the law upon a state of facts similar to those we have in this case: "The defendant's promise was a part of the consideration for which he obtained his deed, and it does not follow as a matter of course that an agreement to pay a consideration for a conveyance of land is within the statute. In this case the defendant did not agree to convey any part of the land to the plaintiff, but to sell and convey it to some other person and pay the plaintiff his share of the net proceeds in money. The first part of this promise, namely, the promise of the defendant to sell the land, was within the statute, and if he had refused to sell, the plaintiff could not have maintained an action to enforce the promise to sell. But the promise to sell has been performed, and when a promise which was within the statute has been performed, the contract is no longer within the statute. If some of the stipulations in a contract are within the statute and others

are not, and those which are within it have been performed, an (76) action lies upon the other stipulations, if they are separate." See, also, *Stone v. Dennison,* 13 Pick., 1, and *Page v. Monks,* 5 Gray, 492. The same state of facts appeared in *Miller v. Kendig,* 55 Iowa, 174, wherein it was said: "But there is nothing in the agreement set out in this case from which it can be gathered, even by implication, that the defendant was obligated to sell the land. He had the fullest liberty to appropriate the land solely to his own use, or make a gift or devise of the same, or transmit it to his heirs. Such being the fact, it is impossible to say that the plaintiff retained an interest in the land. The agreement entered into between the parties pertained merely to the purchase price." But the identical question which is raised in this case was decided in *Bourne v. Sherrill,* 143 N. C., 381, in which *Justice Hoke* said: "The consideration arose at the time of the sale and as part of the inducement thereto. The conveyance, the purpose of which was to pass the title, is allowed its full operation, and is, therefore, in no wise contradicted. And the agreement enforced by this recovery attached to the proceeds from and after the sale, and was not, therefore, concerning land, or any interest therein, within the meaning of the statute of frauds." The cases cited seem to be direct authorities against the contention of the defendant.

The agreement between the parties that the defendant would pay to the plaintiff one-half of the excess received by him if the property was resold, while an inducement to the execution of the contract and deed, was collateral to and independent of them, and was not intended by the parties to be reduced to writing, and, not being such an agreement as the statute of frauds requires to be in writing, the case would seem also to fall within the principle established in the following cases: *Log Co. v. Coffin,* 130 N. C., 432; *Deaver v. Deaver,* 137 N. C., 246; *Evans v. Freeman,* 142 N. C., 61; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97. It was said by *Justice Burwell,* for the Court, in *Colgate v. Latta,* 115 N. C., 127, that "A written instrument, although it be a contract within the meaning of the rule on this point, does not exclude (77) evidence tending to show the actual transaction in the following case: Where it appears that the instrument was not intended to be a complete and final statement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement in the matter, as to which the instrument is silent, and which is not contrary to its terms nor to their legal effect," citing *Cumming v. Barber,* 99 N. C., 332, and Abbott Trial Evidence, 294. See, also, *Twidy v. Saunderson,* 31 N. C., 6; *Manning v. Jones,* 44 N. C., 368. The agreement is also within the general principle that a promise by the vendor is enforcible when

made at the time of the execution of a deed for the land which he has sold to the vendee; that if there should be a deficiency in the acreage the vendor will make a ratable reduction in the price and pay the difference to the vendee, which was decided in *Sherrill v. Hagan,* 92 N. C., 345; *McGee v. Craven,* 106 N. C., 351; *Currie v. Hawkins,* 118 N. C., 593.

We are of the opinion, both upon principle and authority, that the decision of the court below was correct.

No error.

Cited: Stern v. Benbow, 151 N. C., 462; *Rogers v. Lumber Co.,* 154 N. C., 112; *Buie v. Kennedy,* 164 N. C., 300; *Palmer v. Lumber Co.,* 167 N. C., 334.

E. F. ADAMS ET AL. v. W. T. JOYNER AND NANNIE M. HOSTETTER ET AL.

(Filed 11 March, 1908.)

1. Water and Water-courses—Drainage—Revisal, 4016—Judgment Not Set Aside—Motion.

In an action brought for the drainage of lands under Revisal, 4016 *et seq.*, the judgment upon motion thereafter made will not be set aside merely upon the ground that a similar proceeding had been prosecuted to judgment between several of the parties.

2. Water and Water-courses—Judgment—Motion to Set Aside—When Made—Estoppel.

If a former judgment in a similar proceeding has not been pleaded in an action for drainage of lands under Revisal, 4016, as an *estoppel* or *res adjudicata,* before final judgment, the party relying thereon must move the court within one year to set the judgment aside for excusable mistake or inadvertence. (Revisal, 513.)

3. Water and Water-courses—Drainage—Statutes—Interpretation.

While the various statutes for the drainage of swamp lands in Eastern North Carolina have not the same provisions in all respects, they have been collected and are to be found in Revisal, ch. 88, and should be construed to harmonize, and constitute, with such variations, a system of drainage laws for the State, and are constitutional.

4. Water and Water-courses—Drainage—Revisal, 4017—Commissioners' Report—Cost of Work Apportioned.

The cost of the work to be done in the drainage of lands under Revisal, 3996, is not required under section 4017, and cannot, for its uncertainty of amount, be set out in the report of the commissioners appointed. It is a compliance with the statutes when the portion of the work to be done by the landowners is set out.

5. Same—Notice Required.

Before any specific amount may be adjudged against a landowner as a lien on his land, under proceedings for the drainage of lands, he is entitled to be heard, after notice, as to whether the assessment made by the commissioners was unjust or oppressive.

6. Water and Water-courses—Drainage—Judgment—Oppressive Assessment.

As to whether the judgment could be modified to meet the ends of justice regarding an oppressive assessment of costs against lands in a proceeding for drainage, *quœre.*

APPEAL from *Guion, J.,* at chambers, in New Bern, 4 January, 1908.

This is a motion by Mrs. N. M. Hostetter, one of the defendants, to set aside and vacate the judgment herein, rendered by the clerk of the Superior Court of Craven County. The record discloses the following case: On 6 February, 1906, plaintiffs, E. F. Adams and others, began a special proceeding before the clerk of the Superior Court of Craven County against defendants, W. T. Joyner and others, for the purpose of having certain lands drained, the mode thereof ascertained, and the cost apportioned between the owners of the lands, etc. Summons was issued and served upon defendants 7 March, returnable 31 March, (79) 1906. On 9 March, 1906, the plaintiffs filed their petition in the Superior Court, alleging that they and defendants were the owners of certain lands, of which a general description was given; that a portion of the lands of plaintiffs and defendants are flat and "swampy" and the drainage thereof imperfect. They pointed out the manner in which they were at that time drained, and suggested the manner in which they should be drained. They say, among other things: "The ditch now known as the Big Cat Tail Ditch should be cleaned out and repaired, and extended 200 yards beyond its present mouth or lower end, and the upper part or head of the same extended further up and through the lands of the parties hereto, and to a point where it would be equal to the purpose of this proceeding; that the Little Cat Tail Ditch should be incorporated and cleaned out, and extended so as to drain the lands through which it runs; and that the 4-foot ditch, known as David Tripp's 4-foot ditch, be cleaned out and put in good order." They pray that commissioners be appointed, etc. On the return day of the summons, 31 March, 1906, the clerk made an order reciting that the summons had been duly served, and that no answer had been filed. Commissioners were appointed, with specific directions in respect to their duties, etc. They were directed to make report of their action, etc. On 17 May, 1906, the commissioners filed their report, stating that, after being duly sworn, they viewed the lands of plaintiffs and defendants, and found that they cannot be conveniently drained except through the lands of the defend-

ants and through Big Cat Tail and its tributaries. They proceed to direct the place at which the canal shall begin, and to what point it shall extend. They direct the manner in which the drainage shall be made, giving the names of the persons owning lands, the number of acres affected, and the value thereof per acre. In these respects the report is full and explicit, concluding: "All lands shall be responsible for
(80) all cost and expense of cleaning out and keeping said ditches and canal in good order. All parties shall keep the banks of said ditches and canal cleaned off on their farms, at their own expense." On 23 July, 1906, the clerk made an order reciting that no exceptions had been filed to the report.

"It is now considered by the court, and ordered and adjudged, that the said report be and it is hereby in all respects confirmed; that the parties to this proceeding, their executors, administrators, and assigns, shall contribute, in money or labor, to the expense of construction of the ditch or canal described in said report, and of keeping the same in good condition, in accordance with the provisions of said report and in the manner therein provided, in proportion to the valuation of the lands described in the petition and report owned by plaintiffs and defendants, respectively."

Provision is made for the payment of the cost and allowance to the commissioners.

On 15 November, 1906, the defendant Mrs. N. M. Hostetter, after notice to the other parties, moved the clerk to vacate and set aside the judgment. She filed the motion in writing, setting forth the grounds thereof in full.

A proceeding was had between some of the same parties for the drainage of a portion of the same lands during the year 1891. A copy of the proceeding is filed in the record. The effect of the present proceeding is to annul the former proceeding. She attacks the present proceeding for a number of reasons. The clerk denied the motion, and defendant appealed to the judge, who affirmed his judgment. Defendant appealed to this Court.

R. A. Nunn and W. D. McIver for plaintiffs.
George V. Cowper for defendants.

CONNOR, J., after stating the case: The first cause assigned by defendant for setting aside the judgment rests upon the fact that, during
(81) 1891, a proceeding similar to the one before us was brought and prosecuted to judgment between several of the parties to this proceeding, for the drainage of the same or a part of the same lands included in the present petition. A record of said proceeding is set forth and made a part of her petition or motion. If this proceeding and judgment

of 1891 covered and provided for the drainage of the lands now sought to be drained—in other words, if they included the subject-matter of this proceeding—they should have been pleaded as an *estoppel,* or *res judicata,* before the order appointing the commissioners was made, or certainly before the final judgment. If by excusable mistake or inadvertence this was not done, a motion within one year to set aside the judgment would have been in time. Revisal, 513. The court had no power to do so, for that reason, after the expiration of the time fixed by the statute. The clerk does not find as a fact that the record in the former proceeding includes the subject-matter of this proceeding. It does not so appear upon the face of the record. The defendant insists that this proceeding does not conform to either of the statutes providing for drainage, and that, from any point of view, the judgment is irregular. An examination of the record, in the light of Revisal, sec. 4016 *et seq.,* indicates that the proceeding is based upon that statute. It will be noted that this and the two succeeding sections are found in the act of 1889 (ch. 253), as amended by Laws 1891, ch. 73. The only change made by the Revisal is that the manner of enforcing the judgment is that prescribed by section 3993 of the Revisal. The defendant treats the proceeding as having been brought under section 3996 *et seq.* of the Revisal, and attacks the report because it does not conform to the provisions of section 3997. The petition indicates that the draughtsman had before him the act of 1889, ch. 253; Revisal, 4016. It substantially conforms to the language of that section. The summons was issued and order appointing commissioners made in strict compliance with the statute. The report of the commissioners finds that the lands of (82) plaintiffs and defendants cannot be drained except through the lands of the defendants and through Big Cat Tail and its tributaries. It fixes the point at which the canal shall begin and end, its width, depth, and fall. It then directs that the old drain shall be cleaned out. Several ditches are directed to be cleaned out. "All parties shall come on equal footing up to the mouth of David Tripp's 4-foot ditch." The report proceeds to find the number of acres of land belonging to each party, and the value thereof per acre, which shall contribute to the cost. Certain duties are imposed upon David Tripp, Sr., and David Tripp, Jr. "Then all the other parties shall continue said canal to the mouth of Little Cat Tail Ditch on equal footing."

Without pursuing the details of the report, it is evident that the commissioners were intelligent men and understood what they were doing. There is no suggestion that there is any obscurity in the report, or that the parties do not understand the manner in which their lands are to be drained and the extent of the burdens imposed upon them. We were

inclined to the opinion, at first, that the commissioners should have found and set out the cost of the work, so that a judgment could be drawn fixing the exact amount to be paid by each landowner. A careful examination of section 4017 shows that this is not required, and, upon reflection, it is manifest that it could not be done. The report of the commissioners complies with the statute. The portion of the work to be done by each landowner is set out. The work to be done and paid for in proportion to benefits received is to be ascertained by taking the cost of the work and apportioning it among the owners, upon the basis of the money value of the lands affected, the facts necessary for the calculation being set out. It would be impracticable to ascertain in advance just what the work will cost. The statute contemplates that the judg-
(83) ment shall fix the liability and the report furnish the basis for fixing the amount due, as prescribed by section 3993. Referring to section 3992, we find the procedure prescribed: "When the canals, or ditches, for the reparation of which more than one person shall be bound, . . . shall need to be repaired, any of the persons so bound may notify the others thereof, and of the time he proposes to repair the same; and thereupon each of the persons shall jointly work on the same and contribute his proportion of labor till the same be repaired or the work cease by consent."

"SEC. 3993. In case the person so notified shall make default, any of the others may perform his share of labor and recover against him the value thereof, on a notice to be issued for such default, in which shall be stated on oath the value of such labor, and, unless good cause to the contrary be shown on the return of the notice, the court shall render judgment for the same, with interest and cost." The judgment is declared to be a lien on the lands. While the several statutes, passed at different times, to provide for the drainage of the swamp lands of Eastern North Carolina have not in all respects the same provisions, they have been collected and are found in the Revisal of 1905, in chapter 88. They should, as far as practicable, be so construed as to harmonize, and constitute, with such variation as they contain, a system of drainage laws for the State. Their constitutionality has been settled by several decisions of this Court. We do not think that the defendant is entitled to have the judgment rendered upon the report of the commissioners set aside. Before any specific amount can be adjudged against her land, she is entitled to be heard. It may be that if, by reason of changed conditions, the assessment made by the commissioners becomes unjust or oppressive, a motion, after notice, could be entertained to have the judgment modified to meet the ends of justice. The purpose of the statutes is the promotion of agriculture, the increase of food for the people.

They should be so construed and so administered that this (84) purpose be accomplished. The commissioners who are appointed to view the land, ascertain the facts, and assess the amounts to be paid or labor to be performed are usually intelligent farmers, competent to do justice in the premises.

Upon a careful examination of the entire record, we concur with his Honor in denying the motion.

Affirmed.

Cited: *Sanderlin v. Luken,* 152 N. C., 741; *Forehand v. Taylor,* 155 N. C., 355; *Shelton v. White,* 163 N. C., 93; *Drainage Commissioners v. Mitchell,* 170 N. C., 325.

THAD JONES, ADMINISTRATOR, v. A. C. NORRIS ET AL.

(Filed 11 March, 1908.)

1. Deeds and Conveyances—Mortgagor and Mortgagee—Mistake of Draughtsman—Evidence.

When the defense to the foreclosure of a mortgage, in an action brought by the plaintiff's intestate, was that the mortgagee did not intend it to be operative after her death, and that through mistake of the draughtsman it did not therein so appear, the defendant's evidence fails to show such mistake when he testifies "that it was written in the terms directed by the mortgagee; that he read it over to her and she said it was as she wished."

2. Deeds and Conveyances—Ambiguities—Construction.

The use of the expression in a mortgage that it "is not collectible after my death" may, by parol, be shown to apply to the death of the mortgagee, as the word "my," taken in connection with the balance of the sentence, is ambiguous and incapable of a reasonable meaning.

3. Deeds and Conveyances—Evidence, Parol, Admissible When.

Parol evidence is competent, as not varying or contradicting the written instrument, to show that the words "my death" referred to the death of the mortgagee, when used in the following expression, contained in a mortgage: "If this mortgage is not settled before my death, afterwards it is not collectible."

4. Deeds and Conveyances—Mortgagor and Mortgagee—When Mortgage Becomes Unenforcible Under Its Terms—Note Secured—Evidence.

When it is conceded that a mortgage is no longer enforcible, owing to the happening of the contingency under which it was to be inoperative,

and it appears from a reasonable construction that the debt secured by it was included, the collection of the notes given as evidence of the mortgage debt is not enforcible between the parties.

(85) APPEAL from *Biggs, J.*, at November Term, 1907, of DUPLIN.

The defendant Norris, on 10 August, 1904, executed to Mrs. Susan E. Thigpen a mortgage on real estate to secure the payment of four notes, the consideration being the purchase money of the land mortgaged. Following the description of the land are the words: "It is expressly understood that if this mortgage is not settled before my death, afterwards it is not collectible; it is in force, though, until my death." The mortgagee died intestate before either of the notes was paid. Plaintiff, her administrator, brought this action for the purpose of foreclosing the mortgage. Defendants admitted the execution of the notes and mortgage, and by way of defense alleged that the words "my death" referred to the death of the mortgagee; that this was so understood by the parties at the time the mortgage was executed; that by mistake of the draughtsman the words "Susan E. Thigpen," between "my" and "death," were omitted from the mortgage. The court submitted to the jury two issues:

"1. Were the words 'Susan E. Thigpen,' between the words 'my' and 'death,' in the mortgage, omitted from the same by mistake and inadvertence of the draughtsman, as alleged?

"2. To whom does the word 'my,' before 'death,' in said mortgage, refer?"

There was evidence tending to show declarations made by the mortgagee at the time the mortgage was executed, that if she died before the notes were paid, she did not wish them collected. The draughtsman was introduced and testified: "She said she wanted them fixed so that, if they were not paid during her lifetime, they could never be collected; that she would rather give the land to defendants than any one else; that they had been very kind to her. In consequence of what intestate (86) said, I then inserted in the mortgage, after the description and before the *habendum,* the following: 'It is expressly understood that if this mortgage is not settled by my death, afterwards it is not collectible; it is in force, though, until my death.' After making this insertion, I then read it to her again as amended. She then said it suited her, and repeated what she had said before. Defendants then signed the mortgage and the notes, and I probated the same and handed them to intestate. By the words 'my death,' as I wrote them in the mortgage, I meant the death of Susan E. Thigpen, intestate of plaintiff. I intended that 'my death,' as written in the mortgage, should refer to Susan E. Thigpen, and no other person." Plaintiff objected to the admission

of this evidence, and excepted. The jury found the issues in accordance with defendant's contention. Plaintiff moved for judgment upon the pleadings and verdict. Motion denied, and plaintiff excepted. Judgment was rendered for defendant, to which plaintiff excepted and appealed.

H. D. Williams for plaintiff.
Stevens, Beasley & Weeks for defendants.

CONNOR, J., after stating the case: We are of the opinion that the defendants' evidence failed to show any mistake of the draughtsman in writing the mortgage. He testifies that it was written in the terms directed my the mortgagee, and that he read it over to her and she said it was as she wished. *Green v. Sherrod,* 105 N. C., 197. The expression was, however, ambiguous, and parol evidence was competent to explain its meaning. While it is true that it is the mortgagor who is speaking through the draughtsman, and usually the pronouns "I" or "my" refer to the actor or speaker, the connection in which they are used may sometimes make it doubtful to whom they refer. To interpret the word "my," as used in this mortgage, to refer to the mortgagor would give the entire sentence no reasonable meaning. A mortgagor could not impose upon the mortgagee such a condition. He owed the (87) debt unconditionally, and could not, without the consent of the mortgagee, make the payment of it dependent upon his living until it was paid. In any aspect of the case, the expression is ambiguous. Conceding that it is doubtful whether the contingency upon which the notes were to become noncollectible was the death of the mortgagor or mortgagee, "parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing." The testimony did not contradict, add to, or alter the writing.

In *Braswell v. Pope,* 80 N. C., 57, parol evidence was held admissible to show that at the time the note in controversy was signed there was an agreement between the parties that it should be surrendered upon certain contingencies. Here the parties agreed that if the mortgage debt was not paid during the lifetime of the creditor, it should not be collectible. This agreement was collateral to the notes—left them in full force and effect, but provided that upon the contingency of the creditor dying before their payment they were not to be collected. In reducing this agreement to writing the language used was ambiguous. We can perceive no good reason why the declarations of the parties, made at the time the mortgage was executed, cannot be shown to explain the ambiguity. The evidence is clear, reasonable, and uncontradicted. The

jury properly found that the word "my" referred to Mrs. Thigpen. Plaintiff says, conceding that by the clause in the mortgage the death of Mrs. Thigpen rendered it not enforcible, this agreement did not affect the personal liability of the defendants on the notes, and that he was entitled to a personal judgment on them. We are of the opinion that, construing the entire clause in the light of the declarations of the mortgagee, the words "afterwards it is not collectible" refer to and include the notes. The language used by the draughtsman is not that of
(88) a lawyer, and must be given a construction which will effectuate the manifest intention of the parties. We concur with the opinion of his Honor. There is no reversable error.

No error.

WILLIAM ST. GEORGE v. FRANK P. HARDIE.

(Filed 11 March, 1908.)

1. Pilots—Appointment—Existing Office—Constitutional Law.

The acts of the board of commissioners under chapter 625, Public Laws of 1907, regulating pilotage, fees, etc., are not invalid for reason that the statute directs the Governor to appoint them "on or before the 5th day of April, 1907," prescribes that the term of office shall begin 15 April, and the commissions were issued on 13 March, when it appears from the language of the statute that the office of commissioner had been created before the time of the appointment. (*Cook v. Meares*, 116 N. C., 582; *S. v. Shuford*, 128 N. C., 588, cited and distinguished.)

2. Same—Collateral Attack.

When an office has been duly constituted by statute and the person therein has duly qualified, his appointment, upon the ground that it was not made when the statute directed, though otherwise valid, cannot be collaterally attacked.

3. Pilots—Services Tendered—Fees—Constitutional Law.

The State has a right, looking to the safety of persons and property, to regulate pilotage, and to provide for the payment to the pilot, under given conditions, of the same fee for services tendered and refused as he would have earned had the service been accepted and performed.

4. Pilots—Statutory Regulation—Interpretation—Maritime Law.

The statutes respecting pilotage are not in derogation of a common-law right, but a part of the maritime law, or the law of nations, and should be liberally construed.

5. Pilots—Selection by Commission—Privileges and Monopolies—Constitutional Law.

The selection by a commission of persons qualified to act as pilots is not violative of Art. I, secs. 7 and 31, of the State Constitution, prohibiting exclusive emoluments or privileges and monopolies.

6. Pilots—Theretofore Commissioned, Continued—No Examination—Constitutional Law.

The provisions of chapter 625, Public Laws 1907, regulating the appointment of pilots, and, among other things, providing, in effect, that those theretofore commissioned should be continued as such and need not be examined, etc., is constitutional and valid.

7. Pilots—Statutory Regulation—Constitutional Law—No Rights Denied.

The defendant cannot set up as a defense to the payment of pilot's fees, sued for by plaintiff, that the statute limiting the number of pilots is unconstitutional, when no right of his is denied and he merely seeks to avoid the payment of such fees to any one.

8. Same—Appeal and Error.

When there is no provision in the statute for staying execution on appeal from a court of competent jurisdiction—in this case a justice of the peace—it is doubtful whether, under our present constitutional judicial system, the act is constitutional; but when it appears that the stay bond was actually given, the Supreme Court will not dismiss the suit, as no right of the defendant has been denied.

9. Statutes—Construction—Federal Constitution—Federal Powers—Silence of Congress—State Legislation.

The construction of a statute should be such as would give it validity respecting such of its subject-matters relegated to the Federal Government as are not prohibited by the Federal Constitution and laws; and when Congress has been silent on some matters of which the Federal Constitution has given it jurisdiction, but not on others, a legislative enactment upon all such matters will be construed to mean all such as to which congressional legislation is silent.

10. Same—Pilots.

When the Federal statute provides that nothing therein "shall be construed to annul or affect any regulation established by the law of any State requiring vessels entering or leaving port of any State . . . to take a pilot licensed or authorized by the laws of such State," etc., it is a recognition of the rights of a State to regulate pilots upon matters concerning which congressional legislation is silent, and as to such it is not prohibited by the Federal Constitution.

11. Pilots—Regulations as to Weather Conditions—Constitutional Law.

Section 15, chapter 625, Public Laws 1907, providing that vessels are not subject to pay pilotage inward from sea under certain weather conditions, is valid, when construed with the other sections of said chapter, being an incentive to render pilots vigilant.

APPEAL from a justice of the peace, tried before *Biggs, J.*, at (90) July Term, 1907, of NEW HANOVER.

Plaintiff sues defendant, master of schooner *H. E. Thompson,* for recovery of pilotage fees, pursuant to provisions of ch. 625, Laws 1907. The pleadings and admissions of record disclose this case:

The General Assembly, at its session of 1907 (ch. 625), enacted a

statute regulating pilotage in the Cape Fear River, etc. Pursuant to section 1, the Governor, on 13 March, 1907, commissioned five persons to constitute the board of navigation, etc. Plaintiff, being duly qualified therefor, was, on 18 May, 1907, granted a license by the board as a full pilot for vessels going in and out of the Cape Fear River, and filed his bond as required by law. On 29 May, 1907, while in the discharge of the duties of his office, he spoke the schooner *H. E. Thompson,* a sailing vessel of more than 68 tons, from Boston, then running in for said bar, and offered to serve defendant, master of said vessel, as pilot over the bar to Southport. Plaintiff was the first pilot to speak said vessel. Defendant declined to accept plaintiff as pilot, and went over the bar and into the river without a pilot. On 15 June, 1907, learning the said schooner would sail the following day, plaintiff offered himself to pilot the vessel over the bar going out to sea, but was refused by defendant. At the time of offering to pilot said vessel over the bar, into and out of the river, plaintiff was ready, able, and willing to serve said vessel as pilot. Said schooner drew 16½ feet of water. On both said days the weather was fair. There were at said time thirty-four pilots
(91) authorized to receive license and acting under the act of 1907. The amount of pilot fees fixed for said vessel by the provisions of the statute is $70.22, which plaintiff duly demanded of defendant, payment whereof was refused.

The action originated in a justice's court, and came by appeal to the Superior Court of New Hanover County. Judgment was rendered for plaintiff. Defendant excepted and appealed. The assignments of error are set out in the opinion.

E. S. Martin and Rountree & Carr for plaintiff.
Preston Cumming, Jr., and Russell & Goodman for defendant.

CONNOR, J., after stating the case: Plaintiff's cause of action is based upon the provisions of chapter 625, Laws 1907, entitled "An act to protect and promote the commerce of the port of Wilmington and the State of North Carolina," ratified 6 March, 1907.

The statute creates a board of commissioners of navigation of the Cape Fear River, consisting of five persons, to be appointed by the Governor on or before 5 April, 1907, and on the same day every four years thereafter, the terms of their office to begin on 15 April, 1907. This board is required and empowered to make rules and regulations in regard to pilots, for the purpose of compelling them to be on duty, etc., to examine such persons as may offer themselves to be pilots for the Cape Fear River and bar, and to give to such as are approved and found qualified branches or licenses. Such persons as were qualified to serve

as pilots prior to 1 January, 1905, are to receive branches without examination: *"Provided,* that no new branches shall be given until after the number of pilots commissioned shall have been reduced, by death, resignation, or otherwise, to the number of twenty; and there shall not be at any time thereafter a greater number than twenty nor a less number than fifteen commissioned by the board." Two classes of branches are to be issued, and to be renewed annually, with power (92) of removal by the board.

Section 13 provides that "All vessels, coastwise or foreign, over 60 gross tons, . . . shall take a State-licensed pilot from sea to Southport and from Southport to sea." Rates of fees are fixed by this section. The first pilot speaking a vessel shall be entitled to the pilotage fees over the bar to Southport and out to sea again, provided said pilot shall be ready and willing to serve as a pilot, etc. Other sections are referred to in defendant's assignments of error, which will be set out when we discuss the phases of the case applying to them.

The first assignment is directed to the finding that the Governor issued the commissions to the members of the board of commissioners on 13 March, 1907, whereas the statute directs that the term of office shall not begin until 15 April, 1907, and that the Governor is directed to appoint "on or before the 5th day of April, 1907." Defendant cites *Cook v. Meares,* 116 N. C., 582, to sustain this exception. In that case the Legislature elected the relator to an office not then in existence, but created by an act which was not ratified at the time of the election. Hence, as the Court held, no such office had been created at the time of the election. Here the act creates the office, or, in the language of the statute, "the board of commissioners of navigation is hereby constituted," etc. This was done 6 March, 1907. It is conceded that the commissioners duly qualified on 15 April, 1907, the day upon which their term commenced. If they had not been appointed prior to 15 April, it would hardly be contended that the date of their appointment was so essential that an appointment could not have been made after 15 April, 1907. The office existed without regard to the appointment. The purpose of the Legislature was to constitute a board of commissioners of navigation, the term of office beginning 15 April, 1907. The time of making the appointments is merely directory. The power to act, to discharge the duties of the office, is derived from the qualification, which was in (93) strict accordance with the statute.

In *S. v. Shuford,* 128 N. C., 588, the statute creating the district expressly provided that it should go into effect 30 June, 1901. The appointment was made before that day, and the judge was discharging the duties of the office prior thereto. As said by *Clark, J.,* "There can, therefore, be no Sixteenth District till 30 June, and consequently until

that date there can be no such office as judge of the Sixteenth District." The distinction between the cases is obvious. Again, an office having been duly constituted and the commissioners being duly qualified, they become, in any point of view, *de facto* officers. An appointment made by them pursuant to the duty prescribed by law cannot be drawn into question collaterally. It would seem that, even upon a *quo warranto* proceeding, the appointment by a *de facto* officer is valid. *Norfleet v. Staton,* 73 N. C., 546.

The learned counsel for defendant frankly concede the power of the State to regulate pilotage. We find, upon examining the statutes cited in the brief of plaintiff's counsel, that, prior to its separation from England and at all times since, statutes have been enacted by the Legislature of this State regulating pilotage, providing for licensing, and requiring vessels entering the ports to use them, prescribing their fees, etc. Laws 1786, ch. 27. The same is true of other States—in fact, of all nations having seaports. In *Cooley v. Wardens,* 12 How., 299, several of the objections made to this statute were pressed upon the Court. Counsel, in exhaustive briefs, sustaining the power, cite statutes of many of the States, including our own, showing that the States have asserted and exercised the power to regulate pilotage. *Judge Curtis,* in a learned and exhaustive opinion, says: "We think this particular regulation
(94) concerning half pilotage fees is an appropriate part of a general system of regulation of this subject. Testing it by the practice of commercial States and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned arguments of the counsel for the defendant in error, and their fitness as a part of a system of pilotage in many places may be inferred from their existence in so many different States and countries. Like other laws, they are framed to meet the most usual cases, *quæ frequentius accidunt;* they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation by taking on board a person peculiarly skilled to encounter or avoid them, upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places, and upon the expediency and even intrinsic justice of not suffering those who have incurred labor and expenses and danger to place themselves in a position to render important service, generally necessary, to go unrewarded because a particular vessel either rashly refuses their proffered assistance or, contrary to the general experience, does not need it. There are many cases in which an offer to perform is deemed by law equivalent to performance. The laws of commercial States and countries have made an offer of pilotage service one of these cases, and we cannot pronounce a law which does this to be so

far removed from the usual and fit scope of laws for the regulation of pilots and pilotage as to be denied, for this cause, as a covert attempt to legislate upon another subject under the appearance of legislating upon this one." This language was quoted with approvel by *Simonton, Circuit Judge,* in *The Carrie L. Tyler,* 106 Fed., 422. He also says: "Nor can any objection be made to the provision of the law giving a pilot the same fees for services tendered and refused as he would have earned if the service had been accepted and performed." This case involved a construction of the pilotage law of this State. 2 Code (95) (1883), ch. 46, is in many respects the same as the act of 1907 and the act of 1786, ch. 27. *Cooley v. Wardens, supra,* has been uniformly approved, and the law as therein laid down has been regarded as "long since settled." *Olsen v. Smith,* 195 U. S., 332. The defendant insists that, conceding this to be true, the statute contains provisions which violate the State and Federal Constitutions. It may be well to note the rule prescribed by a court distinguished for learning regarding the principle upon which statutes of this character should be construed. In *Smith v. Swift,* 49 Mass, 329, it is said, in reply to the suggestion that they should be strictly construed: "We think this is a mistaken view of the subject. The laws respecting pilotage are not in derogation or contravention of common-law rights. They are not, in our opinion, connected with nor do they proceed from the common law. They are rather to be classed under the head of the maritime law, which is not the particular law of England, but a part of the law of nations. This subordinate but highly useful branch of the marine law, regulating pilots and pilotage, has long been enforced by positive statute provisions; and, from the very nature of the subject, these provisions are entitled to a liberal construction, in order to give full efficiency to laws especially designed to promote the interests of commerce and to protect the lives and property of citizens engaged in it."

Defendant insists that the statute creates a monoply and thereby violates Article I, sections 7 and 31, of our Constitution, declaring "That no man or set of men are entitled to exclusive or separate emoluments or privileges," etc., and "That perpetuities and monopolies are contrary to the genius of a free State," etc. When it is conceded or established that the State has the right, under its police power, to prescribe the duties, fix the fees, and otherwise regulate pilots and pilotage, it would seem to follow logically that it has the power to prescribe the qualifications and establish methods of examining and licensing those who engage in the service. Whenever it is shown that pilotage is subject to (96) governmental control and the pilot is a *quasi*-public officer, the power and duty of the Legislature to prescribe rules for ascertaining and declaring who are competent, by reason of age, character, skill, experi-

ence, etc., follow. The power comes within the principle upon which the State prescribes the qualifications of those who are admitted to practice law, medicine, dentistry, and other callings and professions so related to the public. This Court, following the uniform current of thought, has sustained the legislation applied to physicians. *S. v. Van Doran,* 109 N. C., 864; *S. v. Call,* 121 N. C., 643, wherein *Clark, J.,* says: "It is not to be questioned that the lawmaking power has the right to require an examination and certificate as to the competency of persons desiring to practice law or medicine, to teach, to be druggists, *pilots,* engineers, or to exercise other callings, whether skilled trades or professions, affecting the public, and which require skill and efficiency. To require this is an exercise of the police power for the protection of the public against incompetents and impositors, and is in no sense the creation of a monopoly or special privileges." In that case the statute exempts physicians who had been engaged in practice prior to a period fixed by the act. The objection was urged that it discriminated against all others and granted a special privilege to the excepted class. This objection was held invalid. *S. v. Hicks,* 143 N. C., 689. This contention, in connection with the next in order, that the statute violates the Fourteenth Amendment to the Constitution, is disposed of by the opinion of *Mr. Justice White,* in *Olsen v. Smith, supra* (p. 344), wherein he says: "It only remains to consider the contention based upon the Fourteenth Amendment and the antitrust laws of Congress. The argument is that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the Fourteenth Amendment. But this proposition, in its essence, simply denies that
(97) pilotage is subject to government control, and, therefore, is foreclosed by the adjudications to which we have previously referred. The contention that, because commissioned pilots have a monopoly of the business and by combination among themselves exclude all others from rendering pilotage service, is also but a denial of the authority of the State to regulate, since, if the State has the power to regulate, and, in doing so, to appoint and commission those who are to perform pilotage services, it must follow that no monopoly or combination, in a legal sense, can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law." 22 A. & E. Enc., 816.

There is, however, another view by which this and two other exceptions may be disposed of. If it were conceded that the power of the State to limit the number of persons otherwise competent to serve as pilots was open to serious controversy by reason of the principle urged by defendant and illustrated in *S. v. Moore,* 113 N. C., 697, how is it open to defendant to urge this objection to the validity of the provision

of the statute in this respect? It is not clear how any constitutional right of his is impaired by limiting the number of pilots. He does not lose any right of selection out of a large number. He insists that he does not require any pilot, and refuses to accept any service whatever from them. Courts never pass upon the constitutionality of statutes, except in cases wherein the party raising the question alleges that he is deprived of some right guaranteed by the Constitution, or some burden is imposed upon him in violation of its protective provisions. Confusion is sometimes caused by speaking of an act as unconstitutional in a general sense. After discussing the duty of courts in this respect, Judge Cooley says: "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it." Const, Lim., (98) 232. This wise and salutary principle is abundantly sustained by the courts, both State and Federal. *Shaw, C. J.*, in *Willington et al., Petitioners,* 33 Mass., 87 (p. 96), says: "But whether or not a case can be imagined in which an act of the Legislature can be deemed absolutely void, we think it quite clear that when such an act is alleged to be void on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is to be deemed void only in respect to those particulars and as against those persons whose rights are thus affected. . . . It is only where some person attempts to resist its operation and calls in the aid of the judicial power to pronounce it void as to him, his property, his rights, that the objection of unconstitutionality can be presented and sustained." Only those persons can call the provision limiting the number of pilots to be commissioned into question who assert that some constitutional right of theirs is infringed. In this connection it will be convenient to dispose of the third and fourth assignments of error.

The owners of vessels against whom a judgment is rendered by a justice of the peace are prohibited from staying execution by giving bond pending appeal. Power is conferred upon the board of commissioners of navigation to hear and determine disputes between pilots and masters of vessels, etc. We find that these provisions are copied from the statute (chapter 46, The Code of 1883, secs, 3491, 3492), and were enacted as far back as 1802. It seems that jurisdiction to enforce pilotage regulations was formerly conferred upon admiralty courts. Doubtless these provisions found their way into our laws from ancient statutes confering jurisdiction upon these courts. It is very doubtful whether they can be sustained under our present constitutional judicial system. For the reasons given in regard to the provision limiting the number of pilots, the question of their validity does not arise upon this record. The defendant was permitted to make a deposit in lieu (99)

of a bond. The action was brought before a justice of the peace, whose jurisdiction is conceded; hence, in neither aspect of the case is any right denied defendant by the provisions of the sections referred to.

The defendant assigns as error that his Honor declined to hold that the statute was in contravention of the Constitution of the United States, in that it undertakes to regulate commerce between the States and foreign countries. This objection was made to a similar statute in *Cooley v. Wardens, etc., supra,* wherein *Judge Curtis* discusses the question and puts it at rest. That Congress has the power to regulate pilotage is conceded, but it is well settled that this is one of those powers exercised by the State at the adoption of the Constitution, which remained with them until Congress assumed control by legislation. At its first session Congress did legislate upon certain phases of the subject, providing "That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the State, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provisions shall be made by Congress." Referring to this section, *Judge Curtis* says: "It manifests the understanding of Congress, at the outset of the Government, that the nature of this subject is not to require exclusive legislation. The practice of the States and of the National Government has been in conformity with this declaration from the origin of the National Government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation drawn from local knowledge and experience and conformable to local wants. . . . It is the opinion of a majority of the Court that the mere grant to Congress of the power to regulate
(100) commerce did not deprive the State of the power to regulate pilots, and that, although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States." This has been the uniform ruling of the Supreme Court of the United States. *Steamship Co. v. Joliffe,* 49 U. S., 450. The exact question was raised and decided as late as 1904, in *Olsen v. Smith, supra.* It cannot be well said that a State statute regulating pilots and pilotage is unconstitutional; it is a legitimate subject of State regulation until congressional legislation occupies the field, and, in so far as it does so, the State statute does not operate or is suspended. This is illustrated by *Olsen v. Smith, supra.* The State of Texas passed certain pilotage acts containing discriminating provisions. The Supreme Court of Texas held that these provisions were void, but that they were separable from the other provisions, which were valid. The entire statute was attacked in the

Supreme Court. *Mr. Justice White* says: "Whether the illegal clauses granting discriminatory exemptions could be eliminated without destroying the other provisions of the State laws regulating pilotage is a State and not a Federal question. For the purpose of determining the validity of the statutes in the Federal aspect, this Court accepts the interpretation given to the statutes by the State courts, and tests their validity accordingly." The act in all other respects was sustained. This act provides that all vessels, coastwise or foreign, of "over 60 gross tons," etc. Section 4444, U. S. Rev. Stat., provides: "No State or municipal government shall impose upon pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United states, etc. . . . Nothing in this title shall be construed to annul or affect any regulation established by the law of any State requiring vessels entering or leaving a port of any such State, other than coastwise steam vessels, to take a pilot licensed or authorized by the laws of such State," etc. Here we find a clear legislative recognition of (101) the right of the State to regulate pilots, except in so far as Congress sees fit to do so. This statute is confined to steam coastwise vessels. Every statute is to be construed in the light cast upon the language by the Contitution and other legislation. Such construction must be given the language, if possible, that will give it operation consistent with the Constitution and other statutes. When, therefore, the Legislature used the words "all vessels," we should assume that it did so in the light of the Federal statute regulating the pilotage of steam vessels, and intended the language used to apply only to those vessels in regard to which it had the power to regulate pilotage. Thus construed, there can be no valid criticism of the statute. It is not only consistent with the legislative intention, but reconciles the statute with the Federal statute, preventing any possible confusion. The defendant, whose schooner, it is conceded, is not within the Federal statute, is not injured and has no cause to complain. Cooley Const. Lim., 252; *Lowery v. Trustees,* 140 N. C., 33.

The last assignment of error involves the construction of section 15 of the statute: "Any vessel coming into Southport from sea without the assistance of a pilot, the wind and weather being such that such assistance could have been reasonably given, shall not be liable for pilotage inward from sea, and shall be at liberty to depart without payment of any pilotage, unless the service of a pilot be secured." The meaning of the Legislature is not so clear as we would wish. To give it the construction suggested by defendant would be contradictory of other sections and to a large extent destructive of the general purpose of the act. It would seem, read in the light of other sections and to harmonize with the general purpose of the act, that if the wind and weather were such that the assistance of a pilot could have been reasonably given, but was

not offered, the vessel could not only proceed inward, but could go out without a pilot and without paying any fees, if she chose so to do. (102) Thus construed, it is an incentive to pilots to be on the lookout, ready to render assistance, or, upon failure to do so, lose the benefit of the statute. This is in harmony with the general purpose and scope of the entire statute.

The facts conceded upon this record show that the plaintiff has brought himself within the terms of the act, and, unless the entire statute is to be destroyed, is entitled to recover the fees prescribed. As we have seen, the sections of which complaint is made, if invalid, do not affect the general scheme which the Legislature has adopted to protect and promote commerce in the Cape Fear River. The power to do so being conceded, the plaintiff being duly licensed, the defendant's vessel being within the class of vessels subjected to pilotage regulation, the plaintiff having complied with the requirements of the law, his right to recover the fees is in no respect dependent upon the validity of the sections of which complaint is made. An examination of the recent legislation upon this subject and language found in the briefs indicates that there is a wide divergence of opinion respecting the wisdom of the statute and its effect upon the commerce of the chief commercial city of the State. These are questions for the consideration of the Legislature.

We have examined the entire record with care, and considered each exception in the light of the well prepared briefs. It is worthy of note that although, with the exception of the act of 1905, legislation in all essential respects similar to the act of 1907 is found in our statutes from the earliest period of our history, its validity has not before been called into question, or, at least, has not been before this Court. As we have seen, the questions discussed upon this record have received careful consideration in other courts, both State and Federal. In every instance they have been sustained.

No error.

Cited: *S. v. Mathis,* 149 N. C., 549; *Garrison v. R. R.,* 150 N. C., 588; *Morse v. Heide,* 152 N. C., 627.

(103)

W. C. NELSON v. ATLANTIC COAST LINE RAILROAD COMPANY RELIEF DEPARTMENT.

(Filed 11 March, 1908.)

Contracts—Principal and Agent—Suit—Real Party in Interest—Appeal and Error—Jurisdiction.

It is necessary for plaintiff, to sustain an action upon contract, to bring a potential, actually existent defendant into court by process; and when it is admitted that the suit was against, and that the summons was served upon, the relief department, unincorporated and a mere agency of the railroad company, and the railroad company itself was not served or sued, the action will be dismissed in the Supreme Court (Rule 27) for defect of jurisdiction, *ex mero motu.*

APPEAL from *Lyon, J.*, at November Term, 1907, of PITT.

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

J. L. Fleming for plaintiff.
Skinner & Whedbee for defendant.

CLARK, C. J. The defendant named in the summons is "The Atlantic Coast Line Railroad Company Relief Department." The process is returned as served on "Dr. G. G. Thomas, superintendent of the Atlantic Coast Line Relief Department." The complaint alleges a contract with said "relief department" and a breach thereof. The action is not against the railroad company, nor has the summons been served on that company, nor has it appeared in this action.

It is admitted here by counsel of both parties that said "Atlantic Coast Line Relief Department" has not been incorporated. It is neither a natural nor an artificial being. It appears fully in the documentary evidence filed as exhibits in the pleadings, *i. e.*, the alleged contract of insurance and the rules of said "relief department," that it is neither incorporated nor is it a separate entity, but that it is in fact a bureau or department of the Atlantic Coast Line Railroad Company. If the contract is valid, the liability is that of said railroad company, and the summons must be served on an officer of that company. (104) Even if the relief department could be treated as a natural person, acting as an agency for the railroad company, the agency was fully disclosed at the time of the alleged contract, and the action should be brought against the principal, the railroad company.

Even a State department, like the Insane Asylum (*Bain v. State,* 86 N. C., 49), or the Board of Education (*County Board v. State Board,* 106 N. C., 81), or the State Prison (*Moody v. State Prison,* 128 N. C.,

13), is so essentially a part of the State, notwithstanding these departments are created by statute, that they have no power to sue and have immunity from liability to suit, except when the statute creating them expressly grants permission that they may "sue and be sued." For a stronger reason this "relief department," which is not created a corporation under any general or special legislative authority, is a mere "agency" of the Atlantic Coast Line Railroad Company, and no liability can be adjudged upon any alleged contract except by action against the natural person making the contract, or against the railroad company as the principal, of which the "relief department" is a mere agancy.

The "relief department" is not a natural person. It is not a corporate body. It has no legal entity. It is, in the eye of the law, an "airy nothing." It has no power to contract. Any contract made in its name would be the contract of the individual assuming to act for it or the contract of the railroad company whose "agency" it was. A judgment against the "relief department" would have nothing to act on. The sheriff could find no one upon whom to levy his execution. It would glide from his grasp as the shade of Creusa eluding the embrace of Eneas.

> "Tenuesque recessit in auras.
> Ter frustra comprensa effugit imago.
> Par levibus ventis volucrique simillima somno."
> *Virg. En. 11, v. 791 et seq.*

(105) Under Rule 27 of this Court, if there is a defect of jurisdiction, the court should dismiss the action *ex mero motu*. Here there is such defect, both because it appears that the alleged contractor had no legal power to make a contract and because no defendant has been brought into court. Certainly the position of plaintiff is no better than if the summons had been served on an infant in an action on a contract, and the motion which was made at the close of the evidence for nonsuit should have been granted.

It is true, as in *Stanly v. R. R.*, 89 N. C., 331, that where, in an action against a corporation, there is an omission to allege the incorporation, this is immaterial if it is in fact a corporation, and if an issue on that point is desired, it should be raised by a denial in the answer. But here it is both admitted and appears that there is no corporation. In *S. v. Shaw*, 92 N. C., 768, it was held that, on an indictment for forgery, where an intent to defraud a corporation was charged, the indictment need not charge the incorporation; and the same was held in *S. v. Grant*, 104 N. C., 910, where the ownership of goods alleged to have been stolen was laid in a corporation. The reason given was that the fact of incorporation was "not a material part of the offense charged and is only required to identify the transaction," and hence it was necessary neither

to charge nor to prove incorporation, it being sufficient to show that by reputation such was the name of the owner of the stolen goods or of the body intended to be defrauded by the forgery. There are also cases where persons dealing as a firm are estopped to deny the partnership.

But here it is essential to an action on the alleged policy of insurance that there should be a natural or corporate body as a contractor, and that there should be a potential, actually existent defendant brought into court. If, as already said, the contractor pretended to be a corporation untruly, the action should be against the individuals or the principal. While it is not essential to allege incorporation if there is in fact a corporation, here it appears affirmatively, by the admission of (106) both counsel, by the exhibits in the pleadings and by the evidence, that there is no such legal entity as that named as defendant in the summons and in the complaint. The Court will not pass upon the validity of the contract, nor its construction, when it appears that there is no defendant before it. In both appeals,

Action dismissed.

Cited: Barden v. R. R., 152 N. C., 326.

STANDARD SUPPLY COMPANY v. FINCH & PERSON.

(Filed 16 March, 1908.)

1. Contracts—Guarantor of Payment—How Established.

The obligation of one as guarantor of payment must be evidenced and established by written agreement or some written note or memorandum signed by him, or some person duly authorized to sign for him. (Revisal, sec. 974.)

2. Contracts—Future Account.

Letters from an alleged guarantor are insufficient to establish a continuing guaranty of payment which declined payment of a future account, the alleged guarantor therein stating his rule to be that he only paid out such amounts as the debtor had placed sufficient funds to his credit in the bank to meet.

3. Contracts—Antecedent Account—Consideration.

A written promise by one to pay the debt of others, that "he would pay their bill as soon as the dry-kiln gets in operation," refers to an account stated and antecedent, and such is not enforcible for the lack of a valuable consideration.

APPEAL from *Biggs, J.*, at December Term, 1907, of NEW HANOVER.

The evidence tended to show that plaintiff sold and delivered to Finch & Person, a partnership composed of S. H. Finch and W. R. Person, goods and material on account from 2 February, 1906, to 14 June of the same year, to the amount, with accrued interest, of $611.45; that
(107) $159.70 of this amount, inclusive of interest, became due on 10 May, 1906, and the remainder, to wit, $451.75, accrued after that date. Other evidence was introduced which plaintiff insisted established the liability of J. E. Person for the debt as guarantor of payment. The action was brought against Finch & Person, to whom the goods were sold, and also against J. E. Person as guarantor of payment.

Two issues were submitted for the consideration of the jury:

"1. Are defendants, Finch & Person, indebted to plaintiff, and if so, in what amount?

"2. Is defendant J. E. Person liable for such indebtedness, and if so, what part thereof?"

The court charged the jury that if they believed the evidence they would answer the first issue "Yes, in the sum of $611.46, with interest on $600.94 from 1 September, 1906," and the second issue "Yes, in the sum of $451.75, with interest on same from 10 May, 1906."

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

Meares & Ruark for plaintiff.
Rountree & Carr for defendants.

HOKE, J., after stating the case: The Court does not take the view of this evidence which seems to have impressed the trial judge. The account for these goods being originally an obligation of Finch & Person, and for which that firm still remains liable, any obligation of defendant J. E. Person, as guarantor, must be evidenced and established by written agreement or some written note or memorandum of same signed by him or some person duly authorized to sign for him. Revisal, 974; *Jenkins v. Holly,* 140 N. C., 379; *Shepherd v. Newton,* 139 N. C., 533. The plaintiff recognizes this as the law governing the case, and claims to have met this requirement by reason of certain written correspondence put in evidence, as follows:

(108) PIKEVILLE, N. C., 3 May, 1906.

STANDARD SUPPLY COMPANY,
Wilmington, N. C.

GENTLEMEN:—Yours of May 1st to hand. I pay out the money Finch & Person have in my hands as they direct. That is, all their drafts and checks are sent to the bank at Fremont and placed to my credit, and

from that amount I pay out as they direct. So, if they draw a draft on me and do not have money enough to their credit to pay it, I do not pay until they do have. This is an arrangement of recent date. I have up to recently been paying their bills, regardless of whether they had anything to their credit or not. I find that, in order to make them more strict with their business, the responsibility of it must rest on their own shoulders from now on. With this explanation, I trust my refusal to accept draft will be satisfactory to you.

Respectfully, etc., J. E. PERSON.

DR. J. E. PERSON,
Pikeville, N. C.

4 May, 1906.

DEAR SIR:—Our extension of credit to Finch & Person has been on the basis of a letter received from you, in which you stated that you were supporting this firm with your finances. We have depended entirely upon your responsibility in making accounts with them, knowing that you are perfectly responsible for any amounts which they would probably make in their joint interest. We shall have to ask of you to reconsider your determination not to accept a paper from these parties, as we know nothing of their responsibility and should not have credited them to the extent we have unless we had felt authorized so to do from your letters. We would be glad to have you say whether you will accept a paper from them to sign and forward you, and which we are perfectly willing to make, on the basis of one-half and three months, if you so desire, or whether you are unwilling to do this. (109)

Yours very truly,

STANDARD SUPPLY COMPANY.

MAGNOLIA, N. C., 10 May, 1906.

STANDARD SUPPLY COMPANY,
Wilmington, N. C.

GENTLEMEN:—Your letter of May 4th has been received. I am here at the mill of Finch & Person to see what progress they are making with their work. I find that the dry-kiln is not completed, and when it is, which will be soon, I think you will get your money sooner than to sign a paper or papers for the time mentioned in your letter. Just as soon as the dry-kiln gets in operation I will see that your bill is paid.

Respectfully, etc., J. E. PERSON.

DR. J. E. PERSON,
Fremont, N. C.

11 May, 1906.

DEAR SIR:—Your letter of May 10th is before us, and entirely satisfactory. We presumed that the proposition to make a paper would

probably be a greater accommodation to Messrs. Finch & Person than to wait on them for an early settlement; but it would appear from your letter that your preference, which we presume is also theirs, is to have this paid in the ordinary way and after a short period. Thanking you for your kindness in this matter, we are,

Yours very truly, STANDARD SUPPLY COMPANY.

And plaintiff testified that the latter portion of the goods, to wit, the sum of $451.75, being the amount for which recovery was had against J. E. Person, was sold on the faith of these letters, more particularly that of 10 May.

But the Court is of opinion that there is nothing in this letter, or in any other portion of the correspondence, which in express terms
(110) or by fair intendment gives indication that the defendant J. E. Person guaranteed future sales, or that his letter was intended to be a continuing guaranty. On the contrary, this correspondence, by plain import, refers only to an account already made. The defendant's first communication, which appears in evidence, declined to pay the bill presented at all or to accept a draft for the amount, stating his rule to be that he only paid after the debtor firm had placed funds to the amount to the writer's credit in the bank at Fremont. Plaintiff then proposed that defendant accept a paper on the "basis of one-half and three months," when defendant replied, saying that he would pay their bill as soon as the dry-kiln got in operation. This is the promise relied upon, and in terms it refers to an account stated. The defendant is not responsible for the former portion of the account, for the lack of any valuable consideration for his promise (*Green v. Thornton,* 49 N. C., 230), nor for the latter portion, because, in our opinion, the written correspondence, relied upon for the purpose, contains no evidence of a continuing guaranty, but, by fair implication, refers to an account already made.

It has long been the policy and express provision of our statute law that obligations of this character shall be in writing, and, however, meritorious in a given instance we may consider a claim to be, we are not at liberty to disregard the plain requirement of the statute.

The case on appeal was made up by agreement of counsel, and we have expressed our opinion on the questions presented by the exceptions as they now appear, and which show that J. E. Person was held responsible for the goods sold after the letter of 10 May. There is some indication in the record and the testimony, not sufficiently definite, however, to justify the Court in acting on it, that by inadvertence counsel may have erroneously stated the rulings of the trial judge as to the portion of the account which, under the charge, was established as a valid claim
(111) against defendant J. E. Person. As the cause goes back, any

mistake of that kind which may have operated to plaintiff's prejudice can be corrected on the new hearing, and it is not desirable at this time to make further statement concerning it.

For the cause indicated, the defendant is entitled to a

New trial.

Cited: Peele v. Powell, 156 N. C., 558.

AMOS HARRELL ET AL. v. FRANK HAGAN ET AL.

(Filed 18 March, 1908.)

1. Wills—Estates, When Determinable—Dying Without Lawful Heirs.

Under a devise of an estate in fee to the daughters of the testator, after the life of the mother, determinable as to each daughter's share on her dying without leaving a "lawful heir," the event by which each interest is to be determined must be referred, not to the death of the devisor, but to that of the several takers of the estate in remainder, respectively, without leaving lawful issue.

2. Wills—Estates, When Determinable—For Life—Limitations Over.

A devise of an estate to the mother for life, and at her death or marriage to certain named daughters, and if either or all of said daughters die without leaving lawful heir, then to two sons, naming them, conveys an estate to the daughters after that to the mother has fallen in, which does not become absolute in the other daughters on the death of one of them without leaving such heir, but the determinable quality of each interest continues to affect such interest until the event occurs by which it is to be determined or the estate becomes absolute.

3. Wills—Devise—Heirs—Illegitimate Children.

Under a devise of lands by the testator to his daughter, with a limitation over, in the event she should die "without leaving a lawful heir," the illegitimate children of the daughter, born after the death of the testator, and surviving their mother, come within the descriptive words of the devise and take an absolute estate after her death. (Revisal, ch. 30; Rule 9.)

ACTION to recover land, tried on case agreed, before *Neal, J.,* (112) at October Term, 1907, of EDGECOMBE.

From the facts agreed it appeared that Elisha Harrell died domiciled and resident in Edgecombe County, seized and possessed of the land in controversy, and leaving him surviving his widow, Anne Eliza Harrell, and several sons and daughters; that item 2 of the will of Elisha Harrell, duly executed and admitted to probate in said county, contained the following devise: "I lend unto my wife, Anne Eliza Harrell, 290

acres of land during her natural life or widowhood; at the death or marriage of my said wife, I give and bequeath unto my four youngest children, Armitha Harrell, Opperlina Harrell, Rebecca Harrell, and Louisa Harrell, the above-named 290 acres of land, known as follows: . . . And if either or all of the above girls die without leaving a lawful heir, my will and desire is that the said lands be equally divided between my two sons, John Harrell and Jesse Harrell."

2. That during the life of the widow, Anne Eliza Harrell, the 290 acres of land were actually and equally parceled out among the four daughters mentioned in item 2 of the will, and each of said daughters was put in possession of her respective share.

3. That Anne Eliza Harrell, widow of Elisha, died on 5 March, 1903, not having remarried.

4. That Louisa Harrell, one of the four daughters mentioned in item 2 of the will, intermarried with one Richard Webb, in January, 1898, and died 12 September, 1902, intestate and without ever having had a child; that John and Jesse Harrell mentioned in item 2 of the will, are dead, and plaintiffs are their descendants and only heirs at law; that Opperlina Harrell died domiciled in said State and county, in October, 1906, leaving two illegitimate children, who are defendants; that said Opperlina Harrell was never married and had no children at her father's death.

The action is to recover that portion of the 290 acres of land
(113) devised by item 2 of Elisha Harrell's will which was set apart to Opperlina Harrell, the plaintiffs being, as stated, the descendants and only heirs at law of John and Jesse Harrell, and defendants the illegitimate children of Opperlina.

On the facts stated, the court being of the opinion that plaintiffs were the owners of the land in controversy, judgment was entered in their favor, and defendants excepted and appealed.

Kitchin & Allsbrook and G. M. T. Fountain for plaintiffs.
W. O. Howard for defendants.

HOKE, J., after stating the case: The clause of the will here in question conveyed to the four daughters named an estate of remainder in fee, after the life estate of their mother, and determinable as to each holder's share on her dying without leaving a lawful heir. *Sessoms v. Sessoms,* 144 N. C., 121; *Whitfield v. Garris,* 134 N. C., 24. Under several of the more recent decisions of the Court, the event by which the interest of each is to be determined must be referred, not to the death of the devisor, but to that of the several takers of the estate in remainder, respectively, without leaving a lawful heir. *Kornegay v. Morris,* 122 N. C., 199; *Williams v. Lewis,* 100 N. C., 142; *Buchanan v. Bu-*

chanan, 99 N. C., 308. And by reason of the terms in which the contingency is expressed, "that if each or all of the girls die without leaving a lawful heir, then the land," etc., and other indications which could be referred to, the estate does not become absolute in the other daughters on the death of one of them without leaving such heir, but the determinable quality of each interest continues to affect such interest until the event occurs by which it is to be determined or the estate becomes absolute. *Galloway v. Carter,* 100 N. C., 112; *Hilliard v. Kearney,* 45 N. C., 221. The application of these authorities and their effect on the terms of the devise are not more fully stated for the reason that, on the hearing below, the right of the respective parties to the share of (114) Opperlina Harrell, which is the subject-matter of the present suit, was properly made to depend on the question whether the death of this devisee, leaving two illegitimate children and without ever having been married, would terminate the contingent quality of her estate and cause the same to pass by descent in absolute ownership to these children, who are defendants and in present possession of the property.

Our statute on this subject (Revisal, ch. 30; Rule 9) provides: "That when there shall be no legitimate issue, every illegitimate child of the mother, and the descendants of such child deceased, shall be considered an heir, and as such shall inherit her estate." By the express words and plain import of the statute, therefore, these two children of the devisee fill the description required by the terms of the devise, "if she should die without leaving a lawful heir," and meet the condition on which their mother's estate should become absolute; and there is direct authority with us upholding this position. *Fairly v. Priest,* 56 N. C., 383. In that case it was held: "Where a testator by his will gave property to a son and three daughters, with a provision that, on the death of either of them intestate or without heirs of his or her body, his or her share should go over, it was held that the intention was not that it should go over on the death of the mother of an illegitimate child, but that the latter was entitled to his mother's share." And *Judge Battle,* delivering the opinion of the Court, speaking to this question, said: "The property given by the will to the testator's son and three daughters is given to them absolutely, but with an executory bequest over to the survivors upon the death of either intestate and without heirs of his or her own body. The expression, 'without heirs of their own body,' manifestly means without issue or children. Now, it is clear that if the plaintiff had been legitimate his mother's portion would not have been subject to the limitation over to the surviving brother and sister, but (115) would have remained her absolute property, and, of course, would have devolved upon her personal representative and then have gone to

the plaintiff as her next of kin. But, being illegitimate, he could not, at common law, have been regarded as the heir of her body—that is, her issue or child—and she would have been deemed to have died without any such heir, issue, or child. This rule of the common law has been altered by the section and chapter of the Revised Statutes to which we have referred, and which was taken from the act of 1799 (ch. 522, Rev. Code of 1820). The effect of that act has been to legitimate the plaintiff as to his mother, and to make him, in law, the heir of her own body, or her issue or child. See *Kimbrough v. Davis,* 16 N. C., 71; *Coor v. Starling,* 54 N. C., 243."

We do not understand that plaintiffs urgently insist that the Court should attach any great importance to the use of the word "lawful," prefixed to "heir" in the devise. In the absence of a contrary intent clearly indicated in the will, the term does not at all mean "legitimate," but simply the person designated by law to take by descent. It is more frequently used in wills without special meaning being intended, and as a rule should not be allowed any controlling significance. Thus, *Montgomery, J.,* in *Francks v. Whitaker, infra:* "The word 'lawful' may be stricken out as meaningless, for there is no such anomaly in law as an unlawful heir." And *Walker, J.,* in *Wool v. Fleetwood,* 136 N. C., 468, says: "There can be no such thing as an unlawful heir. The term 'lawful' heirs means the heirs designated by law to take from their ancestor." But the position of plaintiffs was made to rest chiefly on several decisions of this Court, notably *Rollins v. Keel,* 115 N. C., 68, and *Francks v. Whitaker,* 116 N. C., 518, in which the limitation over was expressed in terms not dissimilar to those of the present devise,
(116) and in which the words "lawful heirs," by reason of certain other provisions, were held to mean "issue" (this chiefly because the ulterior limitation was to persons who would be included among the heirs general of the first taker); and, assuming that this word "issue" is equivalent to children, the plaintiffs seek to apply to the present devise the principle, more rightly enforced in some former decisions of the Court, that under the term "children" illegitimate children do not take unless clear indication of such intent can be gathered from the will and the condition of the parties.

We do not think this is a permissible construction from the cases cited, and for the reason, among others, that the term "issue," in *Rollins v. Keel* and in *Francks v. Whitaker,* was not used in the sense of children simply, but in its primary and more usual meaning: "An indefinite succession of lineal descendants who are to take by inheritance, and hence 'heirs of the body.'" Cyc., 23, p. 359; 17 A. and E. Enc., 543; Underhill on Wills, sec. 669; *Abbot v. Essex Co.,* 59 U. S., 259. This being

the sense in which the words were used in the decisions referred to, they bring the children of the devisee within the clear meaning of the descriptive words of the devise. Even if the word "issue" was used in the sense of children in the authorities referred to, we doubt if it would aid the plaintiffs. While the general principle for which plaintiffs contend has prevailed with us, the strictness with which this "rigid rule" of the common law was applied in some of the older cases has been commented on in later decisions, and, while the older cases have not been expressly overruled, it seems that the courts will readily extend the term "children" to include illegitimate children where such an intent can be gathered from the words of the will and the condition of the parties, and more especially when, from the operation of the statute, the illegitimate children come clearly within the descriptive words of the devise. *Sullivan v. Parker,* 113 N. C., 301; *Howell v. Tyler,* 91 N. C., (117) 207; *Doggett v. Mosely,* 52 N. C., 592. If the word "child" should be required from the effect of other provisions of the will, it should be considered a child which most nearly fits the language and clear import of the devise. "If either die without lawful heir" is the language used, and if the word "child" is substituted it should be held to include any child capable of being an heir of the first taker in remainder.

It is earnestly contended by the learned counsel for plaintiffs that the decision of *Fairly v. Priest, supra,* is only authority where the illegitimate child was in existence at the making of the will, and where, from other portions of the will, it was clear that the devisor contemplated that the illegitimate child should take. But, while these facts existed in the case cited, and are referred to in the opinion, they are only given as supporting the conclusion, which was made to rest mainly on the fact that, by the operation of the statute making the illegitimate child an heir of the mother, the claimant filled the description of the devise and came within its terms.

The decision is, we think, a direct authority sustaining the position of defendants, and should control the construction of the devise upon which their title rests. There is error, and on the facts agreed judgment should be entered for defendants.

Reversed.

Cited: S. c., 150 N. C., 242; *Dawson v. Ennett,* 151 N. C., 545; *Perrett v. Bird,* 152 N. C., 221; *Elkins v. Seigler,* 154 N. C., 375; *Smith v. Lumber Co.,* 155 N. C., 391; *Vinson v. Wise,* 159 N. C., 656; *Rees v. Williams,* 164 N. C., 132; *s. c.,* 165 N. C., 208; *Burden v. Lipsitz,* 166 N. C., 525; *Hobgood v. Hobgood,* 169 N. C., 489, 490; *O'Neal v. Borders,* 170 N. C., 484; *Springs v. Hopkins,* 171 N. C., 491.

(118)

C. B. BRICKELL v. CAMP MANUFACTURING COMPANY.

(Filed 18 March, 1908.)

1. Principal and Agent—Agency Proved—Declarations.

When the agency has been proved without objection, declarations of the agent made while in the prosecution of the work are competent.

2. Same.

In an action wherein the defense was that the trespass sued on was committed by an independent contractor, declarations of the alleged independent contractor, made at the time, that "I am just carrying out the orders of the Camp Manufacturing Company (defendant), and nobody can stop me except orders" from that company, are competent, when testimony had been received, without objection, tending to establish the agency at that time.

APPEAL from *Lyon, J.*, at June Term, 1907, of HALIFAX.

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

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

CLARK, C. J. On 14 June, 1894, the plaintiff sold and conveyed to the defendant all the pine timber trees 12 inches in diameter across the tree stump and larger at the time of cutting on certain lands, with the right to erect buildings on said land, and to build, use, and operate railroads, tramways, or bogy roads across said lands for the purpose of removing said timber or anything else, and to use material from said lands along said roads to build and maintain the same, with the right to remove said buildings, railroads, tramways, etc., from said land within one year after ceasing to use them. Ten years time was given to remove the timber.

The plaintiff contended that, on or about 15 June, 1904, after the contract had expired, the defendant entered upon said land and cut
(119) and removed oak and other valuable timber and cordwood, constructed a spur track and also used the railroad track after 14 June, 1904, hauling logs, timber, and other things across the plaintiff's lands.

The defendant contends that it did nothing, and that the timber on said lands was cut by one P. J. Norfleet, and that, if any trespass was committed, which it expressly denies, it ought not to be held responsible therefor, for the reason that the said P. J. Norfleet was an independent contractor.

There are numerous exceptions, but practically there are but three questions involved:

1. Whether the trespass, after 14 June, 1904, was committed by the defendant or by P. J. Norfleet, an independent contractor. There was evidence *pro* and *con,* and, under a proper charge by the court, the jury found that the trespass was committed by the defendant.

2. The only exception to evidence that requires notice is the testimony that, when plaintiff objected to laying a bogy track, the man in charge, the alleged independent contractor, P. J. Norfleet, replied: "I am just carrying out the orders of the Camp Manufacturing Company, and nobody can stop me except orders from the Camp Manufacturing Company." This witness had already testified, without objection, that the bogy track had been built by "Norfleet, of the Camp Manufacturing Company." The agency having been proven without objection, it was competent to put in evidence his declarations while in prosecution of the work.

3. The measure of damages was the difference in the value of the land before and after the injury complained of. Cutting ditches and holes was incident to laying bogy tracks and cutting timber, and evidence as to such injury, which was sufficiently alleged in the complaint, was competent.

We find no reversible error.

No error.

Cited: Williams v. Lumber Co., 154 N. C., 310.

P. T. JONES v. TOWN OF HENDERSON.

(Filed 18 March, 1908.)

1. Pleadings—Construction—Substantial Judgment.

Pleadings should be construed liberally, so that their effect may be determined, to the end that substantial justice may be done. (Revisal, sec. 495.)

2. Lands—Ingress and Egress—Cities and Towns—Street Improvements.

The plaintiff's right of ingress and egress to and from his lot is subject to the right of the defendant town to grade and repair its streets in a reasonably careful manner.

3. Cities and Towns — Street Improvements — Negligence — Pleadings — Demurrer.

A complaint alleging that the defendant town negligently and unskillfully graded its street so as to injure the plaintiff's ingress and egress to and from his lot situated thereon sets out a cause of action good against a demurrer.

4. Pleadings—Sufficiency—Specific Information.

When by a liberal construction the complaint is sufficient, the defendant may proceed by motion, under Revisal, secs. 496 and 509, to require a more specific statement of the cause of action, so as to make his answer fully responsive.

(120) ACTION heard upon demurrer to complaint, by *Neal, J.*, at September Term, 1907, of Vance.

This action was brought to recover damages for injury to the plaintiff's premises, situated on Poplar (or Charles) Street, by the improper construction of a granolithic sidewalk in front of the same. The plaintiff, after alleging the incorporation of the defendant as a town, with the usual powers to open and improve its streets, avers that, "in the year 1890 the plaintiff, having due regard to the long established and existing grade of Charles (or Poplar) Street, erected upon his lot a residence, at great cost to himself, and at additional great cost constructed drain pipes, or conduits, for delivering the surface or rain water from his residence and lot into the side drain of said street; that said pipes,
(121) or conduits, were sufficient to keep his lot well drained and his home free from dampness." He further alleges, substantially, that the defendant constructed a sidewalk in front of his lot without exercising proper care or caution, and contrary to the plan, specifications, and recommendations of its own engineer, which it had formally adopted for grading and improving its streets, and against the plaintiff's protest, and without regard to the injurious effects which it was easily able to foresee, and that the defendant thereby impaired and obstructed the said drain pipes, or conduits, and his right of ingress and egress with respect to his said lot and his residence thereon, and that he was thus deprived of the free use and enjoyment of his property. The plaintiff more particularly alleges that the defendant "unlawfully, wantonly, carelessly, negligently, unskillfully, improperly, and incautiously caused earth to be piled in front of his property, the entire front of his said lot, to a depth of from 14 to 18 inches, upon which it unlawfully, wantonly, carelessly, negligently, unskillfully, improperly, and incautiously constructed a so-called sidewalk of cement and stone, called granolithic, which is 18 inches in height and forms an obstruction to his ingress to and egress from said dwelling-house and lot, and also left the mouth or place of discharge for said drain pipes 18 inches below said embankment, thereby causing said drainage or surface water to dam or pond upon plaintiff's yard, thus rendering plaintiff's lot less healthy and less desirable as a place of residence." And, further, that the defendant did, "arbitrarily and capriciously and unjustly, without notice to the plaintiff and in disregard of the law of the land, deprive and disseize the

plaintiff of his property by building said obstruction of earth, cement, and rock in front of his said lot, and prevent his free access to and egress from said house and lot, destroying his long established drainage." There are other allegations in the complaint of substantially the same nature, but it is unnecessary to set them forth. The plaintiff, having alleged that he had been damaged in the sum of $1,250, (122) prayed judgment for that amount.

The defendant filed a demurrer to the complaint, the material parts of which are as follows: That the plaintiff has failed to allege "(1) that he has any right or easement to discharge the surface or rain water from his premises through drain pipes, or conduits, to the street drain, or that it was the natural drainage of plaintiff's land; (2) that the defendant has done any act or thing except to raise the grade of the sidewalk on the street in front of plaintiff's residence and construct thereon (a pavement), a duty required to be performed by the defendant in such manner as it might deem best for the interest of the community, and that all the injuries of which plaintiff complains result from the fact of such grade being raised, and not from the manner of doing the work; (3) in what respect defendant was negligent, careless, wanton, or unskillful, or in what respect it improperly, incautiously, or unlawfully caused to be performed the work complained of; nor is there in the complaint any allegation of any injury resulting to plaintiff from any cause other than raising the grade of the sidewalk, which was a matter resting in the discretion of the defendant." The other grounds of demurrer are mentioned in the opinion of the Court.

From the judgment of the court overruling the demurrer the defendant appealed.

B. H. Perry, J. C. Kittrell and A. J. Harris for plaintiff.
T. T. Hicks, A. C. Zollicoffer and T. M. Pittman for defendant.

WALKER, J., after stating the case: The law requires that we shall construe a pleading liberally for the purpose of determining its effect, with a view to substantial justice between the parties. Revisal, sec. 495. The plaintiff has alleged that the defendant, by its commissioners, has raised the sidewalk in front of his house 18 inches, and that this was done in such a negligent and unskillful manner as to obstruct (123) access to his premises and egress therefrom, and, further, that it was done unlawfully and wantonly. The plaintiff has the right of ingress to and egress from his lot, subject to the right of the town to grade and repair the street, provided it is done in a careful manner. If, on the contrary, the town, in the exercise of its authority to grade the street, including the sidewalk, proceeded with the work in a negligent

and unskillful way, by reason of which the plaintiff's property was injured, he is entitled to recover damages for the injury, simply because the town did not act in pursuance of its rightful authority to change the grade of the street, but exceeded it when it did the work in a negligent and unskillful manner. The law, in conferring the power to alter or change the grade of the streets, impliedly annexed as a condition that it should be carefully done, so as not to injure the property of private owners of lots. Whatever may be the law in other jurisdictions, the principle we have just stated has been firmly established by numerous decisions of this Court. The very question was considered and decided in *Meares v. Wilmington,* 31 N. C., 73, in which it was intimated that if the defendant had caused the grading to be done with ordinary skill and caution by erecting retaining walls to prevent any caving in of the plaintiff's lot, so that the damage, if any, would have resulted, not from negligence, but merely from the fact that, by reason of the grading, the lot was left higher above the level of the street, and so was more difficult of access, and therefore less valuable, the plaintiff would have been without remedy; for, as it was lawful for the defendants to do the work, *if it was done in the proper manner,* although the plaintiff was damaged thereby, it would be *damnum absque injuria,* and consequently give no cause of action, as to hold the defendant liable for exercising in a proper manner lawful authority vested in it by the sovereign, for the convenience of the public, would seem to involve an absurdity. And
(124) so, if a lot is left too low by reason of grading the street, which is carefully done, the owner must submit to the inconvenience, under the elementary principle that individual interests must give way to the public convenience, which results from the ancient maxim that regard for the public welfare is the highest law, and, therefore, assent is implied on the part of every member of society that his own welfare shall, in cases of necessity, yield to that of the community in which he lives, and that any injury to his property committed lawfully in promotion of the public welfare is one of those incidental burdens to which all property in every civilized community is subject. Broom's Legal Maxims (6 Am. Ed.), p. 2 *et seq.* But this does not mean that he must make an unnecessary personal sacrifice for the public good. If any work of public improvement *can* be carefully done without detriment to the owner of property, and it is negligently performed, so as to injure the same, he is entitled to compensation, for then the local authorities have abused their power and committed a wrong as against them. They are protected by the law against suit only so far as they proceed in the discharge of their duty within the limits of the law. In this case the plaintiff alleges that the work was not carefully done, and that consequently his property was injured by obstructing his right of ingress and egress. This entitles him

to sue and recover damages for the tort. *Meares v. Wilmington, supra; Wright v. Wilmington,* 92 N. C., 156; *Wolf v. Pearson,* 114 N. C., 621; *Bunch v. Edenton,* 90 N. C., 431; Dillon Mun. Corp. (4 Ed.), secs. 966, 967, 968. In Jones on Negligence of Mun. Corporations, sec. 146, the doctrine is thus concisely stated: "While municipal corporations act in their judicial and governmental capacity in grading the public streets, they are yet bound, in the performance of their work, to exercise care not to injure others. They should consider the public interests upon the questions that come before them for decision as governmental bodies, and if any individual suffers damage because of their (125) decision or because of the lawful work that they do, he has no remedy, unless it be given him by statute. But his rights must be respected by the municipality, and if it trespasses upon his property, or if he is injured by its negligence in the doing of the work or by the negligent way in which the work is left, he may recover the damage he has suffered." A distinction between a duty which is legislative or discretionary and one which is ministerial, with respect to the liability of a municipality in case of a breach of either, was considered by us in *Hull v. Roxboro,* 142 N. C., 453. The duty to repair streets and keep them in good condition is ministerial, and when the servants of the corporation undertake to perform this duty they must exercise reasonable care, or the corporation will become liable for any injury to the owners of abutting property which is caused by their negligence. The subject is fully discussed and the conclusion of the courts stated in 2 Smith Mun. Corp., secs. 1206, 1207, and 1208. See, also, *Hitchcock v. Mayor,* 68 Md., 100; *Barton v. Syracuse,* 36 N. Y., 54; *Rowe v. Portsmouth,* 56 N. H., 291.

We think the allegations of negligence in this case are sufficient as against a demurrer. The general rule is that if there is any cause of action stated in the complaint, however inartificially expressed, the demurrer will be overruled. *Blackmore v. Winders,* 144 N. C., 212; *Caho v. R. R., ante,* 20. If the defendant desired a more certain and definite statement of the alleged negligence in order that it might know the precise nature of the charge, and so that its answer might be fully responsive to the complaint, the proper remedy was by motion, under Revisal, secs. 496, 509. See *Allen v. R. R.,* 120 N. C., 548; *R. R. v. Main,* 132 N. C., 445.

The other grounds of demurrer are not tenable. The corpo- (126) rate character of the defendant, its powers and its duties with reference to the opening, improvement, and repair of streets, appear from its charter, which is referred to in the complaint, and we think it is sufficiently alleged that the commissioners, although designated as "so-called," were acting under and by virtue of authority from the defendant.

We will not now consider the question as to the plaintiff's right to dis-

charge the surface water from his lot through drains, or conduits, into the side drains of the street, as the facts do not fully appear. Whether he has that right is too serious a question to be decided upon the meager statement of facts before us.

The judgment of the court overruling the demurrer is approved, and the defendant will be allowed to answer or to proceed as it may be advised.

Affirmed.

Cited: *Dorsey v. Henderson,* 148 N. C., 425; *Quantz v. Concord,* 150 N. C., 539; *Harper v. Lenoir,* 152 N. C., 726; *Jeffress v. Greenville,* 154 N. C., 500; *Earnhardt v. Comrs.,* 157 N. C., 236; *Hoyle v. Hickory,* 164 N. C., 82; *Wood v. Land Co.,* 165 N. C., 369; *Lyon v. R. R., ib.,* 148; *Hoyle v. Hickory,* 167 N. C., 621; *Bennett v. R. R.,* 170 N. C., 391.

E. A. EDWARDS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 18 March, 1908.)

1. Telegraph Companies—Negligence—Two Messages—Questions at Issue.

When the complaint alleges damages on account of plaintiff's being prevented by negligence of defendant from attending the funeral of his deceased father, and there were two messages, one announcing the dying condition and the other the death, place of burial, etc., the real question at issue turns upon the second message.

2. Telegraph Companies—Instructions, Incomplete—Special Delivery Charges.

When prayers for special instruction in a suit against a telegraph company for negligent delay in delivering a telegram, for which special delivery charges were claimed by defendant, state that the addressee lived 5 or 6 miles from the telegraph office, and the evidence disclosed that it was not more than 4, it was not error of the court below to refuse to give them.

3. Telegraph Companies—Instructions—Negligence—Office Hours.

The following instruction as to the office of a telegraph company being closed at night was properly refused: "The company is not bound either to deliver, send, or receive a message after office hours, unless by course of dealing or custom it has waived such hours, and a message so received may be held and delivered in a reasonable time after opening of office hours next day."

4. Telegraph Companies—Instructions—Abstractions.

When the prayer for instruction presents an abstraction, and not the material facts and legal conclusions therefrom involved in the proposition, its refusal is not reversible error.

5. Telegraph Companies — Office Hours—Terminal Office—Special Delivery Charges Required—Service Message—Duty of Terminal Office.

When it appears that the terminal office of transmission of a telegram received it after office hours, that a special delivery charge was necessary for delivery, and that the message could have been delivered the next morning had such charges been paid, it is the duty of the terminal office, when consistent with the office hours at the other points, to immediately wire back as to the extra charges, when that course would have secured such charges and enabled the defendant to deliver the message the following morning in time to avoid the injury.

6. Telegraph Companies—Negligence in Delivery—Proximate Cause.

When, notwithstanding the negligence of the defendant, the plaintiff could have taken a train and arrived in time for the funeral of his deceased father, and made no effort to do so, his negligence would be the proximate cause of the injury and would bar his recovery in a suit for the damages alleged on account of being prevented from attending the funeral.

APPEAL from *Neal, J.*, and a jury, at September Term, 1907, of MARTIN.

Judgment for plaintiff. Defendant appealed.

The facts sufficiently appear in the opinion of the Court.

Gilliam & Martin for plaintiff.
Harry W. Stubbs and Tillett & Guthrie for defendant.

CLARK, C. J. At 4:20 p. m. (by evidence for defendant), 12 January, 1906, the plaintiff's mother caused the following telegram to be delivered to defendant's agent at Lowell, N. C.

E. A. EDWARDS, (128)
Jamesville, N. C.

Your father is dying; come at once. ISABEL EDWARDS.

Later in that day, near 5 or 6 p. m., by witness for plaintiff, and 10:20 p. m., according to defendant's witness, a second message was sent plaintiff, as follows:

Your father will be buried at Cumberland Union, Sunday. We go *via* Greensboro to Fayetteville. ISABEL EDWARDS.

The defendant's operator at Lowell testified that the usual time for transmission of a message from Lowell to Jamesville is thirty to forty minutes. The operator at Jamesville says that he received the first message at 7:30 p. m. and the second one at 7:30 a. m. next day; that he

found a man that night who agreed to take the first message out to plaintiff early next morning, and he tied the message outside to the shutter, but the man did not take it, and the operator made no other effort to send it out to plaintiff, and no effort whatever to send out the second message. He says he knew where plaintiff lived. The evidence is that plaintiff lived 4 miles from Jamesville, and he says he was at home that night. He says he could have taken a freight train which left Jamesville about midday, 13 January, and have gotten to Fayetteville in time for the funeral, and would have gone if he had received the telegram in time, but he did not hear of the telegrams till 3 or 4 p. m., 13 January, when he was in Jamesville, whereupon he went to the depot, one-half mile away, and found the telegrams lying on the table and the operator laughing and talking with some young men; that to his inquiry, "Why did you treat me so?" the operator replied, "I don't know"; that the operator said he had directions to deliver at all hazards.

(129) J. W. Groves, who delivered the messages to the operator at Lowell, testifies that he told him to send them off "Paid; all charges guaranteed."

The operator at Lowell denies this. He says that his office was open all night, and that he received the second message at 10:20 p. m. The operator at Jamesville says his office hours were from 7 a. m. to 7. p. m., but that night he was open at 7:30, and took the first message.

Much stress was laid in the argument upon "office hours," but we cannot see that they have any bearing. The first message was handed in at Lowell at 4:20 p. m. and received at Jamesville at 7:30 without demur, and the operator says he made full effort to deliver it that night. Besides, as the plaintiff could not possibly have reached Gastonia before his father's death, and the cause of action stated in the complaint is for failure to reach Fayetteville in time for the funeral, the real question at issue turns upon the second telegram. If this second message was handed in at Lowell at 5 or 6 p. m., according to evidence for plaintiff, then it is negligence, unless cause were shown that it was not delivered at Jamesville before office hours closed, at 7 p. m. This point, however, seems not to have been pressed, doubtless because of the operator's testimony that he made every effort, but in vain, that night to send out the first message. The operator at Lowell further testified that he did not receive the second telegram till 10:20 p. m.

The exceptions of defendant are solely to refusals to charge and to the charge. Exceptions 1, 4, and 5 need not be discussed, as they are based on a recital in each that the plaintiff "lived some 5 or 6 miles from Jamesville." His evidence is uncontradicted that he lived "4 miles off" and the court was not required to correct the prayer. Exceptions 2 and 3 are to refusal to charge that "the company is not bound either

to deliver, send, or receive a message after office hours, unless by a course of dealing or custom it has waived such hours; and a message so received may be held and delivered in a reasonable time after (130) opening of office hours next day." This prayer is contrary to repeated decisions of this Court. *Carter v. Telegraph Co.*, 141 N. C., 374, and cases there cited. Besides, by defendant's evidence, both messages were received within office hours at Lowell, and, as the second message, on which the cause of action (for failure to reach the funeral) rests, was received at Jamesville within office hours, *i. e.*, at 7:30 a. m., the prayer is a pure abstraction, and its refusal could not be error.

Exception 6 is for refusal to charge that, "If the defendant used due diligence in trying to send to plaintiff next morning in time for him to catch the morning train," etc. But, upon the operator's own showing, he made no effort whatever on the "next day," 13 January, to deliver either message.

The court gave the following prayers, at the request of the defendant: "If the jury shall find from the evidence that the second message was received at 7:30 in the morning, 13 January, 1906, and if they shall further find that the morning train passed Jamesville, N. C., on schedule time, about 8 o'clock a. m., and that the defendant could not, with all due diligence, have gotten the message to plaintiff, 6 miles in the country, in time for him to have taken said train, then the defendant would not be negligent as to that message, unless they should further find that said message was delivered too late to catch the afternoon train, the only other train going west on that day." "It being admitted that said messages were delivered too late for the plaintiff to catch the morning train, yet, if the jury find from the evidence that said messages were delivered in time for plaintiff to have caught the afternoon train going west, and they further find that by the taking of said train the plaintiff could have made the proper connections and reached the place of burial in ample time, and that plaintiff made no effort to do so, after being advised by defendant's agent, then the plaintiff himself would have been negligent, and, the same being the proximate cause of his alleged grievance, he would not be entitled to recover, and you should answer the (131) second issue 'Nothing.'"

Exceptions 7, 8, and 9 require no discussion. They are without merit.

The tenth exception is to the following paragraph of the charge: "The court further charged the jury that it was the duty of the sender to have guaranteed all charges, including transmission and delivery charges; but that if he failed to guarantee all charges for transmission and delivery, still, if the message was received at 7:30 p. m., showing that a father was dying, that the operator at Jamesville knew where the addressee lived, that the telegram was transmitted from Lowell through

the Charlotte and Norfolk offices, and they stayed open all night, and messages under usual conditions could be transmitted in an hour, it was the duty of the operator down at Jamesville to send an office message that night and ask Lowell if the delivery charges were guaranteed, and if the operators at the two points, Lowell and Jamesville, had time to get information and deliver the messages in time for the plaintiff to go to the funeral, and failed to do so, and did not deliver the messages, that would be actionable negligence, for which the defendant would be liable, provided the plaintiff was damaged thereby."

The defendant's witness testified that the Lowell, Charlotte, and Norfolk offices stayed open all night, and a message would require thirty or forty minutes in transmission. The operator at Jamesville received the message at 7:30 p. m., without demur. He says he knew where the plaintiff resided, and, as Rule 50 of the rules of the company provides for delivery of such messages "at actual cost of delivery service," if unwilling to undertake a delivery, trusting to plaintiff paying the cost (*Mott v. Telegraph Co.*, 142 N. C., 537), he should at once have sent a service message asking if costs were guaranteed. *Carter v. Telegraph Co.*, 141 N. C., 374. He would not have needed to hold the office
(132) open until the Lowell office replied. Had he sent the message, the reply should have been there next morning at 7:30, when he got the second message.

His Honor made his instruction contingent upon there being time for a reply to the service message in time for delivery of the telegrams the next day to the plaintiff, 4 miles away. If sent out so as to reach him by 11 a. m., or even later, he could have had time to take the midday freight, or "afternoon train," as the defendant's operator calls it, and he could have reached Fayetteville in time for the funeral. Upon the operator's own testimony, he made no effort whatever during the next day to deliver these urgent telegrams, which the ordinary feeling of humanity, as well as his duty, required him to do. He knew where plaintiff lived. He says he went to his office at 7 a. m. He knew the plaintiff could take the midday train and reach Fayetteville in time for the funeral, so he says, but he made no effort to deliver the telegrams, and the plaintiff going to the telegraph office to inquire, finds them on his table, in the middle of the afternoon, and, when asked why he acted thus, the operator replied: "I don't know." Can there be any doubt that the defendant was negligent in its duty to this plaintiff and caused him detriment?

The real facts at issue, as contended for by the defendant, were fairly presented in the two instructions above set out, which were given at the request of the defendant itself. These prayers are based upon the presumption, too, that the plaintiff's evidence was untrue that the charges

were "guaranteed" when the messages were sent, for, if there was such guarantee, it was negligence of the defendant that such fact was not wired when the messages were sent.

No error.

Cited: *Wilson v. Scarboro,* 169 N. C., 657.

(133)

JOHN R. BATTS AND WIFE v. W. H. PRIDGEN ET AL.

(Filed 18 March, 1908.)

Processioning—Clerk—Judgment—Appeal—Superior Court—Entire Case.

When it appears that after judgment by the clerk in proceedings for processioning an appeal has been taken, it is proper for the judge below to permit others having an interest in the *locus in quo* to come in as parties, upon motion, as the appeal carried the entire case into the Superior Court (Revisal, sec. 614), and the registration of deeds under which they claim after the proceedings had commenced does not affect the question.

APPEAL from *Neal, J.,* at November Term, 1907, of NASH.

This is a proceeding under the statute, commenced before the clerk of the court, for processioning the lands of the parties and ascertaining the true boundary lines. John L. Bailey is one of the defendants. Before the commencement of the proceeding he contracted to sell his tract of land to A. B. Robbins for $375, of which sum, it is alleged in the affidavit of the appellee, Bettie Bailey, $175 was paid in cash. The contract of sale was in writing, but was not registered until this proceeding was instituted, though A. B. Robbins took possession of the land and was in possession until after the commencement of this proceeding. The land was sold under the provisions of that contract by order of the court, and bought by John L. Bailey, who received a deed from the commissioner appointed by the court to sell the land, and then conveyed it to Bettie Bailey, wife of Robert Bailey, for $325. John L. Bailey had previously purchased the land under an order of sale in a suit to foreclose a mortgage made by John L. Mann to John L. Bailey & Co., and a deed had been executed by the commissioner to him. The contract and deeds above mentioned were not registered until after this proceeding was brought.

The defendants in this proceeding not having answered, the (134) clerk, on 30 June, 1905, gave judgment for the petitioners, and the defendants appealed. The cause was docketed in the Superior

Court and pended therein for two years, without any objection on the part of the petitioners, when, at November Term, 1907, Bettie Bailey and her husband, Robert Bailey, moved that they be made parties to the proceeding and allowed to file an answer to the petition, the said Bettie Bailey having acquired the interests of John L. Bailey and A. B. Robbins in the tract of land described in the pleadings. A. B. Robbins was not a party to the proceeding before the clerk, and never has been made a party to it. The plaintiffs moved to affirm the judgment of the clerk. The court granted the motion of Robert Bailey and wife, Bettie Bailey, and refused the motion of plaintiffs, whereupon the latter excepted and appealed.

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

WALKER, J., after stating the case: The appeal of the defendants carried the entire case into the Superior Court, under the provisions of the act of 1887, ch. 276; Revisal, 614; Clarke's Code (3 Ed.), sec. 255, and notes, at pp. 266 *et seq.*, and that court was then vested with full jurisdiction of it. If it appeared to the presiding judge that Robert and Bettie Bailey, who had acquired an interest in the land described in the pleadings, should be made parties, in order that there may be a final determination of the matters in controversy upon the merits, it was within the power of the court to permit them to come in and answer the petition, and thereafter to proceed in the cause according to the statute and the course and practice of the court. The act of 1887 has been liberally construed, as it is remedial in its nature and was evidently intended to confer ample powers upon the Superior Court when it acquired jurisdiction by appeal or otherwise of a case which was originally commenced before the clerk. The statute has been so often con-

(135) strued so as to suppress the former mischief and to advance the remedy that it seems necessary only to cite the cases in order to support the ruling of the court below. *Ledbetter v. Pinner,* 120 N. C., 455; *Faison v. Williams,* 121 N. C., 152; *Lictie v. Chappell,* 111 N. C., 347; *In re Anderson,* 132 N. C., 243; *Roseman v. Roseman,* 127 N. C., 494; *R. R. v. Stewart,* 132 N. C., 248; *Taylor v. Gooch,* 110 N. C., 392; *Oldham v. Reiger,* 145 N. C., 254. At the time this proceeding was brought, A. B. Robbins had an interest, if not an estate, in the land, under the contract with John L. Bailey. It is alleged that he had paid nearly half of the purchase money at that time to Bailey, and was also in the actual possession of the land. He was at least a proper party to the proceeding, and the plaintiffs assert title under him as well as under John L. Bailey. However this may be, the law has conferred

jurisdiction upon the court in the broadest terms to allow amendments and make new parties, in order that cases may be tried upon their real merits and that failure of justice may be prevented. Revisal, secs. 507, 512, and 614; Clark's Code, secs. 255, 273, 274, and notes. We do not think the discretion of the judge was improperly exercised in this case. The delay in registering the deeds has no bearing upon the question involved.

Affirmed.

Cited: *Thompson v. Rospigliosi,* 162 N. C., 153.

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(136)

JOHN D. BROWN v. SEABOARD AIR LINE RAILWAY.

(Filed 18 March, 1908.)

1. Damages—Declarations, When Competent—Personal Injury—Subsequent Suffering—Evidence.

While the declaration of the plaintiff, in a suit for damages for personal injury, is not competent evidence when given by another witness, it is not objectionable when given by the plaintiff in person, and he will be permitted to testify that since the injury was inflicted he had suffered from extreme nervousness and "nightmares."

2. Damages—Declarations, When Competent—Personal Injury—Subsequent Suffering—Evidence—Expert.

Evidence is competent tending to show that, since the injury complained of, and not before, the plaintiff has suffered from nervousness and excessive "nightmares," as corroborative of the expert evidence of a physician regarding the effects of the bodily injury received.

3. Appeal and Error—Assignment of Error—Abandoned—Brief.

An assignment of error, on appeal to the Supreme Court, not stated in the brief of appellant will be deemed abandoned.

ACTION for damages for personal injury, tried before *Biggs, J.,* and a jury, at September Term, 1907, of NEW HANOVER.

Defendant appealed. The facts are stated in the opinion of the Court.

Bellamy & Bellamy and Herbert McClammy for plaintiff.
J. D. Bellamy & Son for defendant.

BROWN, J. The plaintiff was conductor of a train, and seriously injured in a head-on collision between his train and another train on defendant's railway. The defendant admits its liability and states three assignments of error, relating exclusively to the issue as to damages.

1. The plaintiff, examined in his own behalf, was permitted to testify that since the collision, in addition to the bodily injury received, he suffered from extreme nervousness and "nightmares." He was
(137) asked to describe the nightmares, and defendant objected. Witness said: "I had collisions and terrible happenings like that, and would have to be waked by somebody else, and sometimes would find myself jumping, and it would throw me into such a nervous condition I couldn't go to sleep for hours."

Q. "How frequently have they troubled you since last July?" A. "I suppose they would average two or three times a week."

Q. "Did you ever, previous to your trouble that occurred on the train that night, have any trouble similar to the one you have detailed to the jury since that night?" A. "I have not." (Objection to this last question and answer sustained.)

Q. "What was the condition of your health previous to that accident?" A. "I was a sound, healthy man."

The testimony admitted by his Honor is not the declaration of the injured party, made *post litem motam,* offered in evidence through the medium of another witness, and generally held to be inadmissible. 3 Wigmore, 1722; *Chapin v. Marlborough,* 75 Mass., 244. The authorities cited by the learned counsel for defendant apply to such declarations, and not to the direct personal testimony of the injured party himself. The evidence of the physician examined tends to prove that, as a direct consequence of the blow on the head and the other physical injuries received in the "wreck," the plaintiff suffered from serious nervous derangement, called traumatic neurasthenia. It was, therefore, competent to prove by the plaintiff, as corroborative of the medical theory, the physical manifestations of such disease and how it affected him, for the purpose of establishing the nature, character, and extent of his injuries. 13 Cyc., 194.

2. The plaintiff's wife was permitted to testify as follows: "On an average of three or four times a week I have to arouse him from sleep on account of those terrible nightmares. He suffers terribly with that limb and deafness in one ear. It did not occur before the acci-
(138) dent."

Q. "Did you notice any of those troubles before the accident?" A. "No, sir; none at all."

Q. "You say he suffers from them frequently?" A. "Yes, sir."

Q. "State to his Honor and the jury what the character of those nightmares is—how they manifest themselves." (Objection by defendant overruled.) A. "He hollers out and seems to be in a stupor. Calling him doesn't arouse him at all. I have had to go to him and shake him—move him around—before he aroused from them."

The same observation applies to this assignment of error as to the first. The testimony does not consist of declarations of the plaintiff constituting in any degree a narrative of a past transaction.

It is the testimony of the wife of what she observed herself, and not what she heard her husband say, and tends strongly to corroborate the medical expert that plaintiff suffered from nervous disorder.

3. The third and last assignment of error, relating to the charge of the court, is not stated in the brief, and is, therefore, deemed to be abandoned. We have, nevertheless, examined the instructions given the jury upon the issue of damage, and find them to be a very lucid and correct exposition of the law as laid down by this Court in repeated decisions. *Wallace v. R. R.*, 104 N. C., 449; *Ruffin v. R. R.*, 142 N. C., 129.

No error.

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(139)

H. A. GRAY v. J. I. JAMES ET AL.

(Filed 18 March, 1908.)

1. Injunctions—Deeds and Conveyances—Sale Under Senior Mortgage—Affirmative Defense—Fraud and Deceit—Issues Irrelevant—Appeal Premature.

Action by a junior mortgagee to enjoin the senior mortgagee from foreclosing upon all the land conveyed by his mortgage, and to require him to first sell so much as was not embraced in the junior mortgage. The defendant set up an affirmative defense, that more land had been conveyed in plaintiff's mortgage than intended, being thereto induced by plaintiff's fraud and deceit. Issues were submitted on affirmative defense, and from adverse judgment plaintiff appealed: *Held*, (1) the issue submitted was irrelevant to the inquiry; (2) the appeal was prematurely taken.

2. Two Mortgages—Marshalling of Assets—Disputed Premises—Surplus—Appeal and Error.

When, in an action by the plaintiff, the junior mortgagee, to restrain the senior mortgagee from selling the smaller quantity of land embraced in his mortgage until or unless necessary, an affirmative defense is set up by the mortgagor, that a larger quantity of land was fraudulently induced by the plaintiff to be conveyed to him, and the issue was addressed to the affirmative defense and found adversely to plaintiff, an appeal will lie only from a judgment disposing of the surplus arising from the sale of the disputed premises, in the event such should become necessary and be made.

3. Appeal and Error—Appeal Dismissed—Entry of Appeal—Noting an Exception.

When an appeal is dismissed in the Supreme Court as premature, the entry will be regarded as equivalent to "noting an exception."

GRAY *v.* JAMES.

APPEAL from *Lyon, J.,* and a jury, at November Term, 1907, of PITT. Plaintiff appealed. The facts are stated in the opinion of the Court.

Moore & Long and Jarvis & Blow for plaintiff.
(140) *Skinner & Whedbee and F. G. James for defendants.*

CLARK, C. J. This action was brought to enjoin the defendant Jenkins (mortgagee) from selling all the land contained in his mortgage, and to require him first to sell so much thereof as was not embraced in a conveyance from his codefendant, James, the mortgagor, to plaintiff. The defendant James sets up an affirmative defense that he had not agreed and intended to convey so much land as is contained in the description in said deed, but was induced to execute it by the deceit and fraud of the plaintiff, and prayed for a reformation of the deed. The issues submitted were upon this affirmative defense. This appeal is prematurely taken. The point presented may never arise for adjudication. As the mortgages to Jenkins antedate the deed to plaintiff, if the sale of all the land is necessary to satisfy the mortgage, it is entirely unnecessary to determine where the boundary of plaintiff's line is—whether it is where his deed calls for or where the defendant James avers that it was agreed and intended to be. If the sale of the disputed land is not necessary to the satisfaction of the mortgage debt, or the entire proceeds of it are needed, in either event the issue between James and the plaintiff was irrelevant. It should not have been submitted unless a return of the sale showed it to be a relevant matter before final judgment.

The judgment entered below properly directs that the defendant Jenkins have leave to sell (1) so much of the mortgaged land as lies outside of the boundaries of the land conveyed to plaintiff; (2) and, if it shall be necessary to sell more land to discharge the mortgagee's debt, he shall proceed further to sell that part of the land conveyed to plaintiff which James contends was not intended and agreed to be conveyed to plaintiff; and, lastly, that the mortgagee, if it is necessary in order to satisfy his debt, can proceed to sell that part of the tract which was admittedly conveyed to plaintiff.

It is only in the possible contingency that there is both a necessity for sale of the disputed part of the land conveyed to plaintiff and,
(141) further, a surplus of proceeds arising therefrom to be appropriated either to plaintiff or defendant James, that it can be a relevant inquiry in this proceeding whether the deed of James to plaintiff did or did not convey more than was intended and agreed. The judgment provides for sale of the premises in the above order, but not unless and until the contingency above set forth arises will an appeal lie, and then only from a judgment disposing of the surplus arising from sale of

the disputed premises. The Court will not adjudicate upon an abstract proposition. The appeal is, therefore, premature.

While the appeal is dismissed as premature, its entry is equivalent to "noting an exception" (*Alexander v. Alexander,* 120 N. C., 472)—the proper course—and if, on return of the sale, it shall appear that there is a surplus arising from the sale of the disputed premises, an appeal will lie from the adjudication as to its disposal. On such appeal the "case on appeal" already settled by his Honor will come up for review.

Remanded.

CONNOR and HOKE, JJ., dissent, being of opinion that there is a final judgment in the record, giving the parties affected a right to have the questions raised considered and determined on the present appeal.

Cited: *Smith v. Miller,* 151 N. C., 629; *s. c.,* 155 N. C., 247.

(142)

F. C. McGHEE v. NORFOLK AND SOUTHERN RAILWAY COMPANY AND J. G. WHITE & CO.

(Filed 18 March, 1908.)

1. Explosives—Negligence—Duty of Owner of Premises—Trespasser—Pistol Shot—Evidence—Nonsuit.

Defendant construction company, engaged in building a railroad for defendant railway company, stored a quantity of dynamite, to be used in its operations, in a shanty on its right of way, near-by a public highway. Plaintiff, passing near to the shanty, not knowing its contents, fired a pistol ball into a knot-hole in the shanty as a target, exploding the dynamite and injuring plaintiff: *Held,* (1) that defendant was not guilty of any breach of duty to plaintiff in the premises; (2) that the proximate cause of the explosion was the wrongful trespass by plaintiff in unlawfully shooting into the shanty; (3) that the court below should, upon plaintiff's evidence, have sustained a motion for judgment of nonsuit.

2. Same.

It is immaterial whether plaintiff was in the highway or on the right of way at the time he fired the pistol. In either place he became a trespasser by firing the ball into the shanty.

3. Same—Public Nuisance.

If defendant's act constituted a public nuisance, he was liable to indictment, and to an action for damages by one who sustained special injury, of which such nuisance was the proximate cause.

4. Public Nuisance—Damages—Proximate Cause.

When the plaintiff sues for special damages by reason of a public nuisance, he must show as an essential element in his cause of action that

such nuisance was the proximate cause of his injury. When upon his own evidence he fails to do so, the court should enter judgment of nonsuit.

5. Trespasser—Explosives—Duty of Owner of Premises—Reasonable Precaution.

The measure of duty which the owner of the premises owes to a trespasser is not to willfully injure him or to place a dangerous instrumentality on his premises, if he has reasonable cause to believe that a trespasser will come thereon and be injured—that is, to take reasonable precaution to prevent injury to a possible trespasser.

CLARK, C. J., dissenting, *arguendo*. HOKE, J., concurring in the dissenting opinion.

(143) APPEAL from *Lyon, J.*, at November Term, 1907, of CRAVEN.

This action was heard upon the complaint and demurrer. Plaintiff alleged:

1. That the defendant Norfolk and Southern Railway Company is organized and existing according to law, and that at all times herein mentioned it was engaged in operating railroads in said State and elsewhere.

2. That defendant J. G. White & Co. is a foreign corporation and at all times herein mentioned was engaged in constructing a railroad for the defendant Norfolk and Southern Railway Company from New Bern to Washington, North Carolina, as plaintiff is informed and believes.

3. That on or about 14 May, 1907, the defendants wrongfully, unlawfully, and negligently permitted about 1,600 pounds of dynamite to be kept in a small wooden building along the line of its track and near one of the public roads of Craven County, about one mile from the city of New Bern, without any notice or warning to the public that said wooden structure contained dynamite or other explosive matter.

4. That said wooden structure in which said dynamite was kept was in a public place, where trains were passing and were many people passed to and fro, and the house appeared to be an old abandoned shanty, without any evidence that it contained dynamite, and was a public nuisance to the citizens of Craven County and others along said railroad and said public road.

5. That the plaintiff, on the said 14 May, 1907, was an employee of the Western Union Telegraph Company and was engaged in constructing a telegraph line for said company from New Bern, N. C., to Bayboro, N. C., and was living in a camp near to said shanty which contained the said dynamite, without any knowledge on the part of the said plaintiff that the said shanty contained dynamite or other explosive matter.

(144) 6. That on the morning of said 14 May, 1907, the plaintiff, with a companion of his, was engaged in shooting at a target, and, on account of the negligence of the defendants in keeping the dynamite

stored in said shanty, without guards and without any warning to the public or to this plaintiff, plaintiff shot at a knot hole of said shanty, when a terrific explosion followed, blowing the house to atoms and causing portions of the house to be blown against and upon the plaintiff, striking him upon the head and arm and knee and across his stomach, severely wounding and injuring him and knocking him unconscious and almost killing him, and causing him to be confined to the hospital for a long time and to suffer great mental and physical pain and anguish, and to incur a doctor's bill of $....., to his damage in the sum of $2,000. Whereupon, etc.

Defendant demurred, assigning as grounds of demurrer that the facts set out in the complaint did not constitute a cause of action, for that, etc. His Honor overruled the demurrer, and defendants excepted and appealed.

D. E. Henderson and D. L. Ward for plaintiff.
Moore & Dunn for defendants.

CONNOR, J., after stating the facts: Taking the averments in the complaint to be true, as admitted by the demurrer, two questions are presented:

1. Was there a breach of duty to the plaintiff on the part of the defendants?

2. Was it the proximate cause of the injury?

It is said that the demurrer admits negligence. The demurrer admits the *facts* set out, with such inferences to be drawn from them as are most favorable to plaintiff. The law prescribes the measure of duty which defendants owe to plaintiff upon the *facts* and the inferences to be drawn from them. A defendant cannot by demurring change the law. Stripped of immaterial verbiage, the plaintiff says defendants were engaged in constructing a railroad between the points named; they permitted about 1,600 pounds of dynamite to be kept in a small wooden (145) building along the line of their track and near one of the public roads in Craven County, about 1 mile from the city of New Bern, without any notice or warning to the public that the building contained dynamite. The building was in a public place, where trains were passing. The house appeared to be an old abandoned shanty. Plaintiff was an employee of the Western Union Telegraph Company, was engaged in constructing a telegraph line, and was living in a camp near the shanty in which the dynamite was stored, of which he had no knowledge. On the morning of 14 May, 1907, the plaintiff, with a companion, while engaged in shooting at a target, shot at a knot-hole in the weatherboarding of the shanty, causing a terrific explosion, whereby he was injured, etc.

Actionable negligence consists in a breach of duty to plaintiff. A public nuisance is actionable only when a private injury is sustained by plaintiff. "In order to sustain an action, the plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him." *Shepherd, J.*, in *Emry v. Nav. Co.*, 111 N. C., 94. "It has been often pointed out that a person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected." *Lane v. Cox*, 1 Q. B. D., L. R. (1897), 415. "The duty itself arises out of the various relations of life and varying obligations under different circumstances. In one case the duty is high and imperative; in another it is of imperfect obligation." In every case wherein negligence causing injury is alleged, it becomes necessary to inquire what relation plaintiff bears to defendant. It is impossible to ascertain whether the defendants owe any, and if so, what, duty to plaintiff, until the legal relation existing between them in respect to the cause and occasion of the damage is settled. To say that the storing of the dynamite in the place and manner alleged in the complaint is a public nui-
(146) sance does not in any degree affect the question or aid us in its settlement. For maintaining a public nuisance the defendants are liable to indictment. The citizen can sue only when he sustains special damage—different in kind from the public. It is elementary that plaintiff had no cause of action against defendants for placing the dynamite in the shanty. He must establish some relation between defendants and himself from which a duty to him is imposed upon defendants. "The expression 'duty' properly imports a determinate person to whom the obligation is owing, as well as the one who owes the obligation. There must be two determinate parties before the relationship of obligor and obligee of a duty can exist." 1 Street Foundations Legal Liab., 94. The duty grows out of the relationship. What relationship existed between plaintiff and defendants at the time of and in regard to the conditions out of which the damage was sustained? Plaintiff had a right to pass along the public highway and to use the public highway as any other citizen. Defendants owed him the duty not to obstruct the highway or to place dangerous explosives so near thereto as to endanger his life or person. For any injury caused by a breach of this duty defendants were liable. Plaintiff had no right, while passing along the highway, to go upon defendants' premises or to shoot at or into their houses. He was not in the employment of defendants, nor does he pretend that he occupied any relation to defendants making him a licensee, either express or implied. He says that he "was engaged in shooting at a target." The case then comes to this: Defendants have stored on their right of way, in the shanty, to be used in constructing a railroad, the quantity of dynamite named. The plaintiff commits a trespass upon the property by

shooting into the house, through a knot-hole, not knowing the dynamite was stored therein. Conceding that storing the dynamite in the shanty without giving notice constituted a public nuisance, what duty did defendants owe plaintiff, a trespasser upon their premises? It will be observed that he was not attempting to abate the nuisance. (147) The defendants were engaged in constructing the railroad, hence no question in regard to the right of the public to go upon the right of way is presented. It does not very clearly appear whether, when he shot at the knot-hole, plaintiff was on the public highway or on the right of way. It is immaterial where he was standing. Assuming that he stood in the highway, it is manifest that in shooting at the knot-hole he was as essentially a trespasser as if he had gone on the right of way or premises and struck the shanty with his pistol. It is clear that, in respect to the cause of the explosion, plaintiff was a trespasser. In 1 Street Foundations of Legal Liab., 155, it is said: "When mischief happens to a trespasser by reason of the defective or dangerous condition of the premises upon which he trespasses, he is very properly held to assume the risk, and no recovery can be had against the keeper of those premises. As it is commonly and somewhat more artificially put, the implied duty to prevent harm from unsafe premises does not exist in favor of a trespasser." *Zoebisch v. Tarbell,* 92 Mass., 385. The view we find most favorable to plaintiff is thus stated: "The preferable view is believed to be that a party's liability to trespassers depends upon the former's contemplation of the likelihood of their presence on the premises and the probability of injury from contact with conditions existing thereon. While, as a rule, a party will not be deemed to anticipate the commission of a willful wrong, yet when, under the circumstances, a technical trespass may reasonably be anticipated, the owner of premises will be liable for a failure to take reasonable precautions to prevent injuries to the trespasser." 21 A. & E. Enc., 473. Adopting this standard of duty, we are unable to perceive how the plaintiff can maintain his action. There is no suggestion that plaintiff or any other person was in the habit of shooting at the house in which the dynamite was stored, or that it was so situated, with reference to the camp in which he lived, that defendants' servants knew or had cause to (148) believe that he would "engage in shooting at a target" near the house. To impose upon defendants the duty of prevision to the extent necessary to maintain this action would be burdensome to the owners of property. To say that defendants are required to anticipate, not only that some one would engage in shooting at a target there, which is about as far removed from a knot-hole as substance is from shadow, but that he would find a knot-hole in a shanty unknown, so far as it appears, to defendants; that not a technical, but an actual and injurious trespass

would be successfully committed; that a skilled marksman would select this particular knot-hole and shoot into it, is, to put it mildly, a severe strain upon the duty of prevision. It will be observed that the breach of duty, even to the public passing along the highway or to persons rightfully on the premises, is not in storing the dynamite, but in failing to give warning or to put some notice on the house showing that dynamite was stored in it. The plaintiff invokes the maxim, *Sic utere,* etc. Why may not the defendants successfully invoke the same maxim against him? Why may they not say to him, "The use which we made of our property would not have injured you if you had not wrongfully used your pistol, to the injury of our property"? The defendants were doing what they had a legal right to do, provided they gave notice to all persons who were in the exercise of their rights; or, if trespassers, they could not reasonably have anticipated the trespass. If I leave an obstruction to passage through my premises, I am not required, in the absence of any condition putting me upon guard, to anticipate that some one will come along, commit a willful trespass upon them, and be injured by disturbing the conditions which I have created. It is but reasonable and just, if I know or have reason to think that a trespass will be committed, that I am not permitted to leave a death trap or a spring gun set upon my premises without giving notice thereof. If I have dug a pit on my prem-
(149) ises, and know or have reason to think that a trespasser, ignorant of its existence, is going towards it, I may not, either by the code of sound morality or law, stand by and permit him to go to his death and acquit myself of liability by saying that he was a trespasser. The distinction between such a case and the one developed by the complaint is obvious. Defendants had no reason to suppose that some person would pass along the highway and shoot, not only at the house, but select a knot-hole, of which they had no knowledge, as a target, and put the ball through the hole, causing the explosion. Hence they owed no duty to plaintiff to anticipate such an improbable and unusual combination of conditions. The law is made by and for practical men for the practical affairs of everyday life. Judges must, in its interpretation and application, have regard to its origin and function. While enforcing the wise and just maxim requiring every one to so use his property as not to injure his neighbor, harsh rules and heavy burdens must not be imposed upon the use of property for the benefit of trespassers and wrongdoers. To do so would render the fruits of honest industry and economy not only insecure, but make these virtues the occasion for punishment. If men wish to go along the public highway shooting at targets, either real or imaginary, on the premises of those owing or using property near by, they must abide the consequences, however regrettable. The plaintiff, instead of seeking to mulct the defendants in damages, should congratu-

late himself that his folly has not resulted in his own and the death of his companion and of other innocent persons, and that he is not sued for the injury done defendants' property. It is suggested that the case may be likened to those wherein the owner sets a spring gun or trap on his premises for the purpose of injuring apprehended trespassers. The liability there grows out of the fact that the gun or trap is set for the purpose of injuring trespassers. The owner foresees that they will come upon his premises, and intends that they shall be injured. (150) As he could not, for the purpose of preventing a trespass, shoot or wound the trespasser with a gun in his hand, he cannot accomplish the same end by setting the gun for that purpose. The distinction between those cases and the one before us is manifest.

It is a mistake to say that the defendants are driven to the defense of contributory negligence. The plaintiff fails to make a case of actionable negligence, because, in respect to the conditions existing and the manner in which he sustained damage, he shows no breach of a legal duty to him. It is by no means clear that the dynamite stored as described in the complaint was, in the ordinary acceptation of the term, a public nuisance. While we do not conceive that it is material to the decision of this appeal, we note an interesting discussion upon the question in *Kleebour v. West Fuse, etc., Co.,* 138 Cal., 497 (94 Am. St., 62). In this case defendant had stored, in the prosecution of its business, a quantity of gunpowder in a magazine near dwelling-houses. A Chinaman, who had been in the employment of defendant company, killed another Chinaman and fled into the magazine. He piled a number of metal cans, in which gunpowder was kept, in the door of the magazine, and announced that, if any officer attempted to arrest or take him, he would set fire to the powder. After some time spent in endeavoring to persuade him to come out of the magazine, an attempt was made to take him, when he set fire to and exploded the powder, destroying the factory, killing some of the officers and injuring the dwelling-house of plaintiff. The trial court held that the defendant company was guilty of maintaining a nuisance *per se,* and "that it was an insurer against all damage from whatever cause." Defendant appealed from a judgment against it. The appeal was heard by a "department" of the Supreme Court and affirmed. (69 Pac. Rep., 246.) It was thereupon, in accordance with the system of hearing appeals which prevailed in Californina, heard *"in Banc"* by the full bench and the judgment reversed. The opinion by *Van* (151) *Dyke, J.,* is learned and exhaustive in the discussion of the authorities. He concludes: "The damage in question resulted from a cause entirely beyond its control and without any carelessness on its part whatever, and, under the more recent and better line of authorities, it is not responsible." Among other decided cases cited and commented upon

by the learned judge is *Tuckachinsky v. R. R.,* 199 Pa., 515, in which it appeared that the defendant had stored dynamite and black powder in a wooden building, 14 feet square and 12 feet high, in an open space near the shaft of its colliery. An explosion was caused by lightning. The plaintiff, standing in the door of her father's house, was injured. The court instructed the jury to find for the defendant. Upon appeal it was said: "The explosion was caused by no act of the defendant, but by a stroke of lightning. The trial court could not have sustained a verdict for the plaintiff upon the evidence." The judgment was affirmed. *Kenney v. Koofman,* 116 Ala., 310 (67 Am. St., 119.) These cases are not cited to establish the proposition that defendant would not be liable to a person using the highway or living near-by the place at which the dynamite was stored, if injured by its explosion. Nor do we express any opinion in regard to the liability of defendants for damage sustained by one who had no connection with the explosion. In many of the cases cited in support of plaintiff's right to recover it will be noted that the injury "resulted from the nuisance," which we take to mean was the proximate cause of the injury. This is manifestly true, but by no means decisive of this case. In *Woolf v. Chalker,* 31 Conn., 131, the plaintiff was not a trespasser; the liability is made to rest upon the same principle which holds the owner of premises liable for injuries inflicted by spring guns. *Butler, J.,* says: "A dog is an instrument for protection; a ferocious one is a dangerous instrument, and the keeping him on the premises to protect them against trespassers is unlawful, upon (152) the same principle that setting spring guns or concealed spears or placing poisonous food is unlawful." It is not practicable to discuss this case at length, but an examination of it will discover that it is by no means decisive of the question before us.

In *Allison v. R. R.,* 64 N. C., 382, the slave was placed by agents of the defendant company to sleep in a room in which powder was stored under the bed. It was exploded and the slave was killed. The difference between the cases is obvious and needs no discussion. In *Haynes v. Gas Co.,* 114 N. C., 203, defendant permitted a live wire to be on or near the sidewalk along a public street in the city of Raleigh. Plaintiff's intestate, a boy about 10 years old, walking along the street, took hold of it and was killed. *Burwell, J.,* writing the opinion, thus puts the case: "Plaintiff says to defendant: 'The wire you put in the street killed my son while passing along the highway, as he had a right to do. If you are not in default, show it and escape responsibility.'" This language clearly points out the distinction between the cases. In *Powers v. Harlow,* 51 Am. Rep., 160, the shed was not securely fastened, and the child of one of defendant's lessees got into it and exploded the cartridges. Defendant was held liable. The *child,* in regard to whom an

exception is always recognized, as in the "turntable cases," was rightfully on the premises; its father was lessee. Conceding, however, that the defendant was guilty of negligence in storing the dynamite, as alleged in the complaint, and eliminating all question of contributory negligence, it is manifest that, upon the facts set forth, such negligence was not the proximate cause of the damage sustained by him. We know, without controversy, that the dynamite stored as described in the complaint would not have been exploded unless brought into contact with either an electric current or some substance adequate to that end; that, as a matter of fact, plaintiff by his act caused the explosion; that no explosion at that time or in that manner would have occurred if plaintiff had not by his conduct caused it; that in doing so he (153) was not in the discharge of any duty to defendant or to any employee of defendant, or exercising any legal right, either express or implied; that, on the contrary, he was committing a trespass, a misdemeanor (Revisal, sec. 3673), in shooting at "an uninhabited house." Why, then, is not his act, in legal contemplation, the proximate cause of the damage? It is the last cause in order of time—the efficient cause. Our investigation does not disclose any case in which a trespasser whose conduct actively, affirmatively, brought about the condition which caused the damage has sued therefor. Many cases discussing and illustrating the doctrine of proximate cause as an essential element in actionable negligence are to be found wherein an innocent person has sustained injury by reason of the intervention of strangers with conditions for which the defendant was responsible. In these cases the question which has sometimes given concern to the courts is whether such interference was so related to the conduct of defendant and the injury sustained by plaintiff as to break the connection, or, as is sometimes said, "insulate" the original negligence. This case, so far as we can discover, is of first impression. In a recently reported case decided in the Court of Appeals in England the doctrine is discussed and clearly stated. The servants of a railway company left trucks or vans in a condition which enabled some boys, trespassers, to release or turn them loose. They ran down the inclined track and injured a person passing along the highway. The jury found that the trucks were in a safe condition, unless interfered with; that the accident would not have happened if the van had not been interfered with; that the interference was the act of trespassers, who acted negligently; that the danger of interference was known to and could have been guarded against by defendant, etc. *Williams, L. J.*, after discussing the question of defendant's negligence, concludes: "Even assuming any neglect of duty here by the railway company, what one has to ask oneself is this, Was the neglect by the (154) railway company of precautions the effective cause of this acci-

dent? I confess I think, on this evidence, such neglect was not the effective cause of this accident, and, as *Lord Esher* says, if it it was not, that means that the defendants are not liable." *Stirling, L. J.,* says: "The jury have found that the van was in a safe position as and where it was left by the defendant's servants, unless interfered with afterwards, and that the accident would not have happened if the van had not been interfered with, and that the interference was the act of trespassers, who acted negligently. Then what really happened was that some boys got into or on the van and undid the brake and couplings, and that this led to the accident." *McDowell v. R. R.,* L. R. 2 (K. B.), (1903), 331.

We had occasion to consider the doctrine of proximate cause as an element in actionable negligence involving the intervention of an intelligent independent agent in *Horton v. Tel. Co.,* 146 N. C., 429. In that case injury resulted from the conduct of an intervening agent. It was held that her administrator could not recover. We do not care to review the authorities cited in that opinion. Our investigation has discovered several well considered cases on this much discussed doctrine. *Tel. Co. v. McCullough,* 118 Ky., 182; *McGohan v. Gas Co.,* 140 Ind., 335 (49 Am. St., 199). The doctrine is well stated in *Wright v. R. R.,* 27 Ill. App., 200. Defendant, in violation of the town ordinance, stored in a frame building a large quantity of crude petroleum, gasoline, etc., which was dangerous to plaintiff's building. Defendant's building took fire and the oil exploded, destroying plaintiff's building. The cause of the fire was not stated. The judge rendered judgment of nonsuit. The question was whether keeping the oil in the building in violation of the ordinance was the proximate cause of the injury. The Court said:

"The mere keeping the oil in its building, although prohibited by (155) the ordinance, gives no right of action to appellants. It is still a question of fact whether the damage alleged was the proximate consequence of such keeping." Quoting the language used by the Court in *R. R. v. Standford,* 12 Kan., 254, it is said: "Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and if they are such as might with reasonable diligence have been foreseen, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrong cause. But whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequence must be deemed too remote to constitute the basis of the cause of action." *Ramsbottom v. R. R.,* 138 N. C., 38. That one of the defendants maintained a public nuisance on its premises does

not make it liable to plaintiff. To do so, the maintenance of the nuisance must be the proximate cause of his injury. This principle is illustrated in many cases wherein actions are brought for violation of town ordinances. As said in *Brown v. Seigel-Cooper Co.*, 90 Ill. App., 49, "The mere failure to obey a town ordinance is not of itself sufficient to entitle the plaintiff to recover for personal injuries. It must appear that such failure was the proximate cause of, or at least contributed to, the injury." The law is thus stated and supported by abundant authority in a note to *Sluder v. Transit Co.*, 189 Mo., 107; 5 L. R. A. (N. S.), 186: "Another rule that admits of no exception is that the violation of a municipal railroad ordinance imposes no liability upon the offender to one who suffers injury, unless such violation is the proximate cause of the injury." (Page 209.) We announced the same familiar doctrine in *Leathers v. Tobacco Co.*, 144 N. C., 330, reported in 10 L. R. A. (N. S.), with exhaustive note. So, conceding that the dynamite (156) as stored was a public nuisance, the plaintiff must, in order to recover, show that, without any independent intervening cause, it resulted in damage to him. Care must be taken to note that we are not considering the question of contributory negligence. Proximate cause pertains to the plaintiff's cause of action; contributory, to the defendants' claim to be exonerated from their negligence, and it does not arise until plaintiff has made out his case, *damnum et injuria*. It is, therefore, not only proper but necessary to decide the question upon the demurrer. If the facts stated in the complaint in respect to the manner in which the injury was sustained are capable of more than one reasonable inference, the question should be submitted to the jury. If, as said in *Leathers v. Tobacco Co., supra,* "there be any dispute regarding the manner in which the injury was sustained, or if upon the conceded facts more than one inference may be fairly drawn, the question should be left to the jury; yet it is equally well settled that where there is no dispute as to the facts, and such facts are not capable of more than one inference, it is the duty of the judge to instruct the jury, as matter of law, whether the injury was the proximate cause of the negligence of the defendant." *Ramsbottom v. R. R., supra; Harton v. Tel. Co., supra.* We entertain no doubt that, considered from either point of view, the demurrer should have been sustained. In overruling it there was

Error.

CLARK, C. J., dissenting: The demurrer admits every allegation properly pleaded in the complaint. It is, therefore, admitted, for the purposes of the demurrer, that the defendant White & Co., while engaged in building a railroad for its codefendant, "wrongfully, unlawfully, and negligently kept 1,600 pounds of dynamite in a small wooden building

near the railroad track and near a public road, about 1 mile from
(157) the city of New Bern, without any notice or warning to the public that said building contained dynamite or other explosive."

It further admits "that said wooden building in which said dynamite was kept was in a public place, where trains were passing and where many people passed to and fro; that the house appeared to be an old, abandoned shanty, without any evidence that it contained dynamite."

It further admits that storing such a quantity of dynamite near a public road, where many people passed to and fro, near a city, in an apparently abandoned shanty, without any notice of dynamite being stored therein, "was a public nuisance to the citizens of Craven County and others along said railroad and said public road."

The demurrer further admits that the plaintiff, who was an employee, "constructing a telegraph line and living in a camp near said shanty containing said dynamite, without any knowledge on his part that dynamite was stored therein," and, "on account of the negligence of the defendant in keeping dynamite stored in said shanty, without any notice of such storage and without any guard, shot at a knot-hole in said shanty, causing a terrific explosion," demolishing the house, portions of which were blown against and severely wounded and injured the plaintiff, who barely escaped his life.

It was criminal negligence, greater by far than setting a spring gun or strewing posion about, to store 1,600 pounds of one of the most powerful explosives known to science in an apparently abandoned old shanty near a public road frequented by many passers-by, in a mile of a populous city and without the slightest notice that it contained concealed therein a most deadly peril. Any boy passing along the public road would be tempted to throw a stone and any sportsman to fire at a mark on an "apparently abandoned" old shanty near the side of the public road, when there was no notice or other reason to suppose that it was dangerous or other than it seemed.

(158) Whether the plaintiff was guilty of contributory negligence, which our statute (Revisal, sec. 483) requires "shall be set up in the answer and proved on the trial," and whether there were reasons which excused the negligence of the defendants in storing 1,600 pounds of a most powerful explosive near the side of a much traveled public road, within a mile of a large town, without any notice, are matters which could only arise upon an answer and on the trial. The nature and location (near a public road and near a railroad track as well) of the building was not such as would cause any one to suspect that it was almost certain death to strike the house with a stone or other missile. It does not appear whether the shot went through the knot-hole or not, for after it was fired the hole was the only part of the building that remained.

The demurrer admits the allegation that such conduct of the defendants was such negligence as to make it a "public nuisance," and admits in express terms that "on account of such negligence" the plaintiff was moved to fire at a mark on such "apparently abandoned old shanty." Upon such admissions, his Honor, in accordance with numerous precedents, a few of which are cited below, overruled the demurrer, so that the defendant might set up his defense. The defendant, notwithstanding the known diligence of his counsel, does not cite a single precedent in his brief to show error.

The doctrine is well known that spring guns and traps placed on one's own premises, but to the danger of others, are a nuisance. This dynamite was in effect "concealed," for it was put in an apparently abandoned shanty, where no one could, with the greatest forethought and sagacity, suspect it to be, and it does not appear even that it was on the premises of either of the defendants. Presumably it was not on the premises of the owners of the dynamite, who were contractors; and whether or not the codefendant, the railroad company, was responsible for such negligence of an independent contractor is a matter not arising upon the demurrer. The demurrer admits that the conduct alleged was a "public nuisance," and that "on account of the negligence" in storing dynamite in said shanty, without any notice, the plaitiff (159) did the act which brought about the injury."

Where dynamite was stored on a farm in a shed not securely fastened, and the child of one of the landlord's lessees got into the shed and exploded one of the cartridges, the landlord was held liable for the injury because there was no warning on the shed to notify parents of the danger. *Powers v. Harlow,* 51 Am., 160. Yet there, unlike here, it appeared that the shed was on defendant's own premises, and that it was not near the road.

It is negligence for a railroad company to leave on its own track explosive and dangerous objects, like a signal torpedo (exploded like dynamite), without notice or other precaution. 19 Cyc., 15.

The law implies a duty not to place an explosive where it is likely to injure property or persons. 7 Current Law, 16, 378. If some one else had exploded this concealed dynamite, injuring the plaintiff, who happened to be near, the demurrer could not be sustained. It is, therefore, a question of contributory negligence, to be raised by answer, whether the defendant is protected from liability because the plaintiff himself fired the shot, which the demurrer admits he was moved to do "on account of the negligence of the defendant" in storing the dynamite in an unlikely place without notice. Whether the storage of dynamite, by reason of the location or its manner, is negligence, is a question of fact

for a jury. The highest degree of care is required as to so powerful an explosive. *Tissue v. R. R.*, 112 Pa., 91.

In *Allison v. R. R.*, 64 N. C., 382, the company was held liable where an employee was killed by an explosion of powder temporarily placed under his bed without his knowledge, the explosion having been caused, as was supposed, by fire from a torch while he was looking for his hat.

In *Haynes v. Gas Co.*, 114 N. C., 203, in a very able opinion
(160) by *Burwell, J.*, it was held that the court should have told the jury that there was no evidence of contributory negligence when a boy 10 years old, while walking along the street, grasped a live wire (which killed him), because there was no visible indication that it was charged with electricity.

This apparently abandoned old shanty near a much traveled public road and near the railroad track also, in a mile of a large town, had no notice on it, and nothing else visible to indicate that it had 1,600 pounds of dynamite therein and that it was more deadly than a live wire.

Whether it was contributory negligence or not for a passer-by to shoot at the old shanty, is a defense, and might be raised if set up by the answer; but surely it should not be held that the plaintiff was guilty of contributory negligence, or that the defendant was not guilty of negligence, upon a demurrer which admits that the storing of dynamite in such a place, without notice of any kind, was "a public nuisance," and that "on account of such negligence" the plaintiff was moved to fire at the shanty.

The explosion was not caused by the shot striking the shanty, but by its striking the dynamite, negligently stored therein by defendants without any notice posted or other precaution, and that such storage was negligence is averred in the complaint and admitted by the demurrer.

On a complaint and demurrer the facts must be taken as stated in the complaint. There is no statement therein that the shanty was "on the defendant's premises," nor that the plaintiff shot "at its house." It is not alleged that the defendant contractors had any premises; and, while it is alleged that the shanty was along the railroad track and near the public road, it is not alleged how wide the right of way was, nor how near the shanty was the track, nor that it was on the right of way, and there is no allegation to justify the assumption that the plaintiff was a trespasser. For all that appears, he was in the public road
(161) and fired at a shanty near the public road, and not on the right of way of the railroad. It is hardly probable that 1,600 pounds of dynamite were stored on the right of way, so near the track as to endanger an explosion by the concussion of passing trains or the shanty being set on fire by sparks. If stored there, this was beyond question a public nuisance. If any presumption of fact could arise on a demurrer,

it is that the plaintiff, "living in a tent, engaged in putting up a telegraph line," was on the spot rightfully and on the telegraph company's premises.

If the demurrer does *not* admit the allegations in the complaint, *i. e.,* (1) that the dynamite was "negligently, wrongfully, and unlawfully stored near a public road"; (2) that, thus stored, without any notice, it "was a public nuisance," and (3) that, "on account of the negligence of the defendants in storing dynamite at such place, without any warning to the public or this plaintiff," the plaintiff shot at a knot-hole on the shanty: if the demurrer does not admit these allegations, which are in the complaint, but, on the contrary, *does* admit facts *not* stated in the complaint, *i. e.,* (1) that the shanty was on the defendant railroad's right of way, and (2) on the defendant contractor's premises, and (3) that the plaintiff was a trespasser, and (4) that the plaintiff was guilty of contributory negligence, then the defendants were well advised to resort to a demurrer instead of setting up such allegations in an answer which they might have found difficult to prove.

The vice in the argument of defendants is not only in assuming as a fact that the dynamite was stored on defendants' premises, but, if that had been a fact (which could not be true as to but one of the defendants, if true as to either), in ignoring that the storing of so dangerous a substance "near a public road" without notice or other safeguard is *per se* negligence and a public nuisance as well, because of the danger. When such is the case, the party guilty thereof is liable when injury occurs, whether the injury proceeds from the public nuisance by the negligent or malicious act of a third person or by the act of the (162) injured party himself. One is liable if he places on his own premises anything that may be dangerous or injurious to the public.

In *Smith v. Pelah,* 1 Strange, 1263, *Chief Justice Lee* held that if the owner of a dog knows that it is dangerous and has once bitten a man, and lets him go about or lie at his door, he is liable to an action by any one bitten thereafter, though it happened by such person treading on the dog's toes. *Id.,* 3 Starkie Ev., 981. This Court has followed the same ruling as to liability of the owner for injury caused by a dog, though on the owner's premises, if he knows he is dangerous. *Harris v. Fisher,* 115 N. C., 318. How much more, therefore, are the defendants liable for storing 1,600 pounds of dynamite "near the public road," without any warning, and in a dilapidated shanty, where its presence could not reasonably be suspected!

In *Woolf v. Chalker,* 31 Conn., 131, the above English case is cited with approval, the Court adding that when the owner of a dangerous dog allows him to be at large on his own premises and a *trespasser* has been bitten by him, the owner has been held liable, citing *Loomis v.*

Terry, 17 Wend., 496; *Sherfey v. Bartley,* 4 Sneed, 58, both of which cases so hold. The above and many other like cases are cited and approved in *Muller v. McKesson,* 73 N. Y., 200. The fact that the dog is known to the owner to be dangerous makes him liable for the injury done by the dog, even on the owner's premises and even to a trespasser, because such a dog, unmuzzled, is a common or public nuisance.

For a stronger reason the dangerous storing of 1,600 pounds of dynamite in an old shanty near the public road and a railroad track, without notice or guard, would make such storing a public nuisance and the owner liable for any injury arising from an act done "on account of such negligence," even though (as does not appear here) the dangerous instrumentality had been stored on the defendants' premises and
(163) the plaintiff had been a trespasser. We need not cite the many similar cases as to injuries to trespassers from spring guns set or poison placed on the defendant's premises. *Hooker v. Miller,* 18 Am. Rep., 18; *S. v. Moore,* 83 Am. Dec., 159.

In a late case from California (*Kleebauer v. Fuse Co.,* 69 Pac., 246) the Court reviews the cases as to storing powder and other dangerous explosives, and says: "The principle is correctly stated by *Mr. Justice Blackburn* in *Fletcher v. Rylands,* 1 Exch., 265: 'We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and, if he does do so, he is *prima facie* answerable for all the damages which is the natural consequence of its escape. But for his bringing it there no mischief could have occurred.' This language was approved by *Lord Cranworth* on appeal. 3 H. L. Cas., 330." 1 Wood Nuisance (3d Ed.), 183, says that when the storing of explosives on one's own premises is under such circumstances as to be dangerous, it is a nuisance, "and if actual injury results therefrom, the owner is liable therefor, even though the act occasioning the explosion is due to other persons and is not chargeable to his personal negligence."

The California Court, *supra,* cites many cases where the owner of the powder, etc., was held liable when the explosion was caused by lightning, on the ground that the cause was the negligent storing, giving opportunity for the explosion. Such was the cause here.

In *Wilson v. Powder Co.* (W. Va.), 52 Am. St., 890, the Court said: "Was the defendant maintaining a public nuisance? If it was, it was engaged in the commission of a public wrong, and for injury resulting therefrom" the defendant is liable.

That this immense amount of dynamite stored in a dilapidated shanty near a public road, without guard or notice, was liable to be
(164) exploded by any passer-by is shown by the manner in which it was exploded. That made it a menace to the public and a public

nuisance, just as a vicious dog or a spring gun would be, and, being a public nuisance, under the above authorities, both English and American, the defendants would be liable even if dynamite had been stored on defendants' premises and the plaintiff had been a trespasser. *People v. Sands,* 3 Am. Dec., 296; *Myers v. Malcolm,* 41 Am. Dec., 744; Anon., 12 Mod., 342.

The cases which hold that one injured by a public nuisance can recover of the owner without showing negligence and even when the injured party is himself a trespasser or negligent, are very numerous. Besides those above quoted, and among those where an explosion results, are *Kennedy v. Koopman,* 67 Am. St., 134; 37 L. R. A., 498; *Glycerine Co. v. Mfg. Co.,* 45 L. R. A., 658; 71 Am. St., 740, and the numerous cases collected; 69 Pac., 249. The facts set out in the complaint and the very manner of this explosion demonstrate the imminent danger of explosion from such manner of storing dynamite, and of injury to those passing along the public road. These made it a public nuisance. Besides, the complaint specifically alleges that it was a public nuisance, and the demurrer admits the fact. Had it been a vicious dog on the owner's premises, and he had bitten one treading on his toes, the owner would have been liable, if knowing the character of the dag. Here the owner did know the dangerous quality of the dynamite. Yet he left it at large, near a public road and near a railroad track, without guard or notice, in a house where no one would suspect its presence. On all the authorities, this was a public nuisance, and the owner is liable for injury from an explosion, however caused, whether by man or the lightning, and whether by the plaintiff or another.

Cited: Briscoe v. Power Co., 148 N. C., 402; *Fanning v. White, ib.,* 543; *Brittingham v. Stadiem,* 151 N. C., 302; *Monroe v. R. R., ib.,* 376.

(165)

ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY v. CITY OF NEW BERN AND J. J. TOLSON, TAX COLLECTOR.

(Filed 18 March, 1908.)

1. Property—Assessments for Taxes—Ad Valorem—Corporation Commission—Constitutional Law.

Revisal, sec. 5290, providing for the assessment of railroad property by the Corporation Commission, is not in conflict with section 3, Article V of the State Constitution, providing that such assessment be uniform and *ad valorem.*

2. Railroads—Rights of Way—Charter Provisions—Evidence—Questions for Jury.

When the only evidence tends to show that the charter of a railroad corporation provided that it could acquire a right of way extending 100 feet upon each side of a definite line, and that the location of the right of way at the place in question had not been changed since originally acquired, it is sufficient to support a finding by the jury that the present right of way extended 100 feet upon each side of said line.

3. Railroads—Assessments—Corporation Commission, Property Assessed by—Constitutional Law.

The roadbed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, etc., by reasonable interpretation and under constitutional powers, are included in the language of Revisal, sec. 5290, delegating to the Corporation Commission the power to assess railroad properties, and such are excluded from the power of local tax assessors.

APPEAL from *Lyon, J.*, at November Term, 1907, of CRAVEN.

This is an action brought by the plaintiff to enjoin the defendants from collecting certain taxes assessed and levied upon plaintiff's property in the city of New Bern by the tax assessors of said city, and claimed to be in violation of Revisal, 5290, regulating the assessment of railroad property and providing when and how the said assessments shall be made.

The judge, by consent, found all the facts and rendered his judgment enjoining the defendants from collecting the tax. From the judgment rendered the defendants appealed.

(166) *P. M. Pearsall and W. W. Clark for plaintiff.*
W. D. McIver and E. M. Green for defendants.

BROWN, J. It was suggested on the argument by the learned counsel for defendants that the method provided by law for the ascertainment of the monetary value of railroad property is in conflict with section 3, Article V of the Constitution, which provides that "laws shall be passed taxing by a uniform rule all moneys, credits, etc., and also all real and personal property, according to its true value in money."

In the absence of any authority cited in support of such contention, we deem it only necessary to notice it briefly in passing. The section of the Constitution in question is mandatory in requiring that taxation upon the property mentioned in it shall be *ad valorem*, and that whatever tax is levied shall be uniform in its application. It is in no sense a limitation upon the power of the General Assembly to provide the machinery by which the "true value in money" of various kinds of property may be best ascertained.

The General Assembly has enacted what is apparently a very well

considered method for ascertaining the true value of the property of railroads and other companies exercising the right of eminent domain, but nowhere in the act does it undertake to tax such property except upon an *ad valorem* basis and by a uniform rule, as all other property is taxed. While the valuation is ascertained and reported to the municipal authorities by the Corporation Commission, the tax itself is levied and collected by the former, by the same method and at same rate of taxation applicable to all property.

The Legislature doubtless profited by the experience of other States, and concluded that the true value of the property of railways and other public-service corporations was more likely to be accurately ascertained by a central commission charged especially with that particular duty than by innumerable tax assessors scattered all over the State, whose technical knowledge of the value of such property must necessarily be limited. While the method devised provides for assessing the (167) value of such property, it does not inaugurate a method of taxation which is not uniform and not based on actual value, nor does it provide for levying a tax rate upon the property of such corporations greater than that levied on all property. This method of determining the true value in money of their real and personal property applies to all public-service corporations alike, and the fact that local assessors are given authority to value the property of individuals at their places of residence does not make the tax levied upon such assessments any the less uniform.

A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. *Gatlin v. Tarboro,* 78 N. C., 119; Burroughs Taxation, sec. 77, pp. 147-159.

Coming to consider the exceptions appearing in the record, we find the principal objections to relate to the finding of the judge as to the right of way and to the construction which he placed upon this legislative enactment.

His Honor first found as a fact that the right of way of the plaintiff from the north side of Queen Street through the city of New Bern northwardly and westwardly is 100 feet from the center of the railway track on each side. The exception of the defendants to this finding, that it is not supported, is untenable. The finding is in accord with plaintiff's charter (section 26), as follows: "The right of said company to condemn lands in the manner described in section 25 of this act shall extend to the condemning of 100 feet on each side of the main track of the road, measuring from the center of the same, unless in deep cuts and fillings, when the said company shall have power to condemn as much in addition thereto as may be necessary for the purposes of constructing said roads," etc.

This provision authorizes the road to acquire 100 feet on each side of its main track as a right of way. The evidence of J. D. Whitford
(168) and William Dunn proves that the road had been built in 1858, and that its main line was then located practically where it now is. Upon these facts the law presumes that the road has acquired the right of way which it was authorized to acquire by its charter, to wit, 100 feet on each side of its main line. This is not left to conjecture, for section 27 of the charter of the plaintiff expressly so provides, and similar provisions have been frequently before the courts. *R. R. v. McCaskill,* 94 N. C., 746; *Olive v. R. R.,* 142 N. C., 257.

The other findings of fact appear to be equally well sustained by proof. The other exceptions of the defendants which we deem it necessary to notice are those to his Honor's conclusions of law, involving the construction of the law under which railway and other public-service corporations are required to list their property for taxation.

The statute is embraced in Laws 1901, ch. 7, sec. 48, now section 5290, Revisal 1905, and reads as follows: "The number of miles of such railroad lines in each county in this State, and the total number of miles in the State, including the roadbed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repair, or successful operation of such railroad lines, including, also, if desired by the North Carolina Corporation Commission, Pullman or sleeping cars owned by them or operated over their lines: *Provided, however,* that all machine and repair shops, general office buildings, storehouses, and also real and personal property outside of said right of way and depot grounds, as aforesaid, of and belonging to any such railroad companies, shall be listed for purposes of taxation by the principal officers or agents of such companies with the list takers of the county where the real and personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property."

(169) His Honor held that the roadbed, right of way and superstructure thereon, main and side tracks, depot buildings and depot grounds, etc., are to be listed with the Corporation Commission, and that the word "superstructures" covers all buildings situated on the right of way. This construction gives to the language of the statute that meaning which is not only easily borne out by the words, but consistent with the evident purpose of the General Assembly, to commit to a commission of competent experts the duty of determining the monetary value of the roadbed, right of way, and all that is on it. If the local assessors were permitted to invade the boundary of the right of way and assess permanent structures used for railroad purposes situated thereon, much con-

fusion would ensue. As it is, the line of demarcation is well drawn by the act between the jurisdiction of the Corporation Commission and that of the local assessor.

This is the construction, we are informed, which has been given to the act by the commission itself, and acted upon generally throughout the State since the law was first enacted.

Upon a review of the entire record we find no error in the findings or rulings of the judge below, and his judgment is .

Affirmed.

Cited: Land Co. v. Smith, 151 N. C., 74; *Earnhardt v. R. R.,* 157 N. C., 364.

D. W. BASNIGHT v. NORFOLK AND SOUTHERN RAILROAD COMPANY.

(Filed 18 March, 1908.)

Contract—Evidence—Rights of Passengers—Stateroom—Nonsuit.

When the evidence discloses that plaintiff purchased from defendant a berth on its steamship, and the suit was brought for damages alleged to have arisen from the wrongful refusal of defendant to furnish a whole stateroom, with two berths in it, which was totally unoccupied, a motion as of nonsuit was properly sustained.

ACTION for damages, tried before *Lyon, J.,* at October Term, 1907, of CRAVEN.

Motion to nonsuit sustained. Plaintiff appealed. (170)

The facts are stated in the opinion.

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

Moore & Dunn and Simmons, Ward & Allen for defendant.

BROWN, J. The testimony of plaintiff tends to prove that the plaintiff's father bought for himself and plaintiff tickets and presented them to the purser of defendant's steamer, and a stateroom of his own selection, with two berths, was assigned to them. Later, plaintiff came aboard and insisted that he should have a whole stateroom to himself. The purser refused to furnish him a whole stateroom, as his ticket only entitled him to a berth. The plaintiff brought the action for damages for wrongful refusal to furnish a whole stateroom, and was nonsuited.

The principle laid down in *Patterson v. Steamship Co.,* 140 N. C.,

413, now invoked by plaintiff, will not help him under the facts of this case. The defendant contracted with plaintiff to furnish him a berth on its steamer, and made no charge for it other than what was paid for the ticket, and performed its contract. In *Patterson's case* the passenger, after securing his ticket, was first to apply at the purser's office for his berth, and was refused and had to sit up all night, though others who applied after him were supplied. In that case defendant failed in its duty and wrongfully discriminated against the passenger. The defendant was not required to furnish the plaintiff the exclusive use of a stateroom with two berths simply because it had some vacant at the time. The plaintiff himself testifies that the purser told him that his ticket entitled him to a berth, and that, after each passenger had been supplied with a berth, the plaintiff could have an entire stateroom by paying the usual charge of $1 for it, which plaintiff refused to do. This evidence disproves any purpose to discriminate against the plaintiff, and the rule of the steamer would seem to be manifestly fair to all its passengers.

Affirmed.

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(171)

METZGER BROS. v. W. E. WHITEHURST.

(Filed 18 March, 1908.)

1. Principal and Agent—Liability of Principal—Agent's Unauthorized Acts.

One may unintentionally, by his conduct, become liable to innocent third persons who have parted with their property on account of the acts of another, whom he has permitted to act as his agent.

2. Same—Evidence.

Defendant sold his retail liquor business to one J. and continued to take out the license in his own name. Plaintiff, during this time, sold several invoices to J., but upon the occasion respecting the shipment in question there was conflicting evidence as to whether plaintiff told J. that he would not ship any more liquor upon his credit, but would do so upon the credit of defendant, as he then noticed the license to sell was in defendant's name, and J. assented. The shipment was made, charged, and invoiced to defendant, and, under a general order of defendant respecting such shipments, was delivered by the railroad agent to J.: *Held*, evidence sufficient to sustain a verdict for plaintiff.

APPEAL from *Neal, J.*, and a jury, at October Term, 1907, of EDGECOMBE.

Plaintiffs sue to recover the price of goods alleged to have been sold and delivered. Defendant denies that he purchased the goods or is in any way liable for them. The testimony tended to show that defendant

applied for and obtained from the county commissioners, January, 1906, and July, 1906, license to sell spirituous liquors at Conetoe, in Edgecombe County. One of the plaintiffs testified that he had sold goods to James, who was in charge of the business from February to October, 1906, and that he paid for them; that he was under the impression that the bar was the property of James. On 22 October he learned that it was defendant's bar. The license posted in the bar was in the name of Whitehurst; so was the sign on the sidewalk. He told James, 22 October, 1906, that he could not sell him any more goods; that he found the revenue license showed it was Whitehurst's business. He took this and the subsequent orders in Whitehurst's name. The in- (172) voices and bills of lading for goods subsequent to October were sent to Whitehurst—mailed to him at Conetoe. James never told him not to ship goods to Whitehurst—that he (Whitehurst) had no interest in the business. James gave his personal check for amount of account. After it was due it went to protest. Witness says that he knows defendant; had seen him in the bar, February, 1906.

The freight agent at Conetoe testified that the goods sued for came to Whitehurst and were delivered by him to James. Whitehurst sold out to James, and he then told witness to deliver his goods to James. He said James had taken charge of his business. Heard, in January, that James had bought out the business. Defendant testified that he sold out to James, December, 1905, or January, 1906, after getting license, and he took out license in July for James' convenience. Never saw plaintiff until at trial; never saw bills of lading for goods or received any invoices; did not know plaintiffs were shipping goods in his name. When he sold out he gave notice to all with whom he had been dealing, but did not notify plaintiffs, because he had not dealt with them.

J. C. James testified that he bought out defendant 1 January, 1906; advertised business in his own name; bought from plaintiffs in February and about every thirty days thereafter. Plaintiff B. F. Metzger asked witness if he had better not ship in Whitehurst's name, as the license was in his name. Witness told him no, that Whitehurst had nothing to do with the business. The invoices were sent to witness; Whitehurst never saw them—had nothing to do with business. About Christmas witness gave plaintiff his check for the account in suit. It was not paid. There was evidence tending to corroborate the testimony on each side.

His Honor submitted the case to the jury in two aspects. He first instructed them: "Your first inquiry will be, Was the business the property and owned by the defendant? If you answer this inquiry 'Yes,' you should answer the issue 'Yes' and assess the amount. (173) If you answer the inquiry 'No,' then proceed further and ascertain whether defendant so acted as to lead plaintiffs to believe that this

was his business." To this defendant excepted. In this aspect of the case his Honor, at the request of defendant, instructed the jury: "If the jury shall find as a fact that the business did not belong to the defendant Whitehurst, but in fact was conducted by J. C. James as his own, then the defendant Whitehurst would not be chargeable with the value of said goods, unless you should find further as a fact that the defendant Whitehurst, by his acts and conduct, reasonably led the plaintiffs to believe that the business was his or that his credit was behind the same, and they made the sale in question relying upon this belief." (Given.)

"That if, at the time of the sale of said goods, the plaintiffs extended credit to the said J. C. James and looked to him for the payment of the same, then the defendant Whitehurst would not be liable, and the jury should answer the issue 'No.'" (This prayer was given as amended by the insertion of the words "and not to Whitehurst" after the words "looked to him for the payment of the same.") Exception by defendant.

In the second aspect his Honor instructed the jury: "If Whitehurst so acted as to induce plaintiffs to believe that James was his agent, he is liable for all his acts in the same manner as if he was actually his agent, and he would in that event be estopped from denying the existence of the agency. The court charges you, if you find by the greater weight of the testimony that the defendant Whitehurst knew goods were being ordered in his name by James, and the plaintiff shipped the goods upon the credit of Whitehurst to Whitehurst himself, and Whitehurst ordered them turned over to James, then Whitehurst would be liable for such shipments, and you will answer the issue 'Yes, and the value of
(174) the goods shipped.'" His Honor further instructed the jury that if Whitehurst permitted the sign to remain over the store after he claims to have sold to James, and that plaintiffs knew that the license was taken out by Whitehurst, and were induced thereby to believe that James was Whitehurst's agent, he would be liable, etc. He also instructed them that if Whitehurst gave instructions to the agent at Conetoe to deliver to James all whiskey shipped to Whitehurst, and that the goods were shipped to him, and the agent, in consequence of such instruction, delivered the goods to James, then Whitehurst would be estopped, etc. Defendant excepted. Defendant requested the court to charge the jury that upon the whole evidence in the case the plaintiffs could not recover, and duly excepted to his refusal to do so. The jury answered the issue for plaintiffs. Defendant duly excepted, assigning errors in the charge and refusal to charge as requested. Judgment for plaintiffs. Defendant appealed.

W. O. Howard for plaintiffs.
Gilliam & Gilliam for defendant.

CONNOR, J., after stating the case: In view of the uncontradicted evidence and the instructions of his Honor, we may infer that the jury found the following facts: Whitehurst was engaged in the business of selling spirituous liquors at Conetoe, in Edgecombe County, prior to 1 January, 1906. He took out license to continue the business from January to July and from July to 31 December, 1906. The sign over the store had his name upon it. He sold out to James in January, 1906. Plaintiffs sold to James goods from February to 22 October, 1906, not knowing Whitehurst was in the business. Plaintiff B. F. Metzger, being in the store on 22 October, 1906, sold a bill of $71.60, which he charged to Whitehurst and shipped to him, sending invoice and bill of lading to him at Conetoe. They afterwards mads two other sales, for which invoices and bills of lading were directed to Whitehurst. The original bills of lading were introduced, showing the shipment (175) to Whitehurst. These goods were delivered by the freight agent to James, in accordance with Whitehurst's order. Whitehurst says, without contradiction, that he knew nothing of either of the shipments. He does not deny having instructed the freight agent to deliver his goods to James. James says that he got the invoices; Whitehurst never saw them. The plaintiffs' bookkeeper says that the invoices were sent to Whitehurst at Conetoe—the last one to James' care. The foregoing facts may be taken as true, without much, if any, contradiction. Metzger says that, up to 22 October, he was under the impression that the bar was the property of James and that he sold to him; that on 22 October he told James that he could not sell him any more goods; that he had found out the license was in Whitehurst's name; that he took the orders in Whitehurst's name. James denies this, saying that plaintiff asked if he had better not ship in Whitehurst's name, as the license was in his name, and that he told plaintiff no, that Whitehurst had nothing to do with the business. In view of the evidence that the goods were shipped and bills of lading sent in Whitehurst's name, the jury were warranted in finding that Metzger's testimony in respect to the transaction was true. Assuming, therefore, that Whitehurst sold to James in January, 1906, does his conduct in taking out license in his own name in July, 1906, leaving James in charge of the business conducted under his license, leaving his name on the sign over the store, directing the freight agent to "deliver his goods to James," followed by the conduct of James in receiving and using the goods shipped and invoiced to Whitehurst, justify the conclusion reached by the jury, that the plaintiffs were reasonably induced to believe that James was acting as agent for Whitehurst? This view accepts as true Whitehurst's testimony and eliminates the theory that he in fact owned the business. In this aspect of the case the only contradictory testimony is that of Metzger and James, 22 Octo- (176)

ber, 1906. It is hardly probable that if Metzger, after learning that the license was in Whitehurst's name and proposing to sell to him, had been told by James not to do so, that he (Whitehurst) had no interest in the business, he would have immediately shipped the goods to Whitehurst, and in November and December shipped other bills in the same way, amounting in all to $477. It is equally improbable that if James' version of the conversation of 22 October is correct, he would have received the goods shipped and invoiced to Whitehurst. That they were so invoiced and billed seems to be established by plenary proof. The learned counsel for defendant insists that the order given by Whitehurst to the freight agent at Conetoe "to deliver his goods to James" cannot, with reason, be interpreted to apply to any other goods than those at that time in the warehouse. We do not think that the testimony of the freight agent should be so confined. He did not so understand the order, nor does it appear that Whitehurst had at that time any goods in the warehouse. That one may so act as to unintentionally become liable for the conduct of another whom he permits to hold himself out as his agent, when innocent third parties, relying upon such conduct, part with property, is elementary. His Honor, at defendant's request, correctly stated the law to the jury. The only question which has given us concern is whether the evidence brings the defendant within the rule. Plaintiffs cite *Miller v. Land Co.*, 66 N. C., 503. In that case it was denied that the person holding himself out as agent of defendant had any authority to buy the goods for defendant. As here, the goods were invoiced to defendant, who received the invoices and used the goods. As was said by *Rodman, J.*, "If it did not mean to become liable, it should at once, on receipt of the invoices, have repudiated the purchase and refused to receive the goods." Here there is no evidence that Whitehurst received the invoices or the goods, and the distinction is clear.

(177) Did the fact that he took out the license, placed James in charge of the business, and instructed the freight agent to deliver his goods to James make him responsible to plaintiffs for the price of the goods sold to the agent in his name, upon his credit? Of course, if James' testimony in regard to the transaction of 22 October, 1906, was accepted by the jury, the verdict should, under his Honor's instructions, have been for defendant. "A person may by his words or conduct be estopped as against a third person to deny that another person is his agent." In that case the relation of principal and agent does not actually exist, although as against a third person who has been led to deal with the supposed agent in the belief that it exists, the principal is estopped to deny its existence. Tiffany on Agency, p. 15. If plaintiff had examined the application for license made by Whitehurst to the county commissioners, he would have found a statement by him that he was

trading as W. E. Whitehurst, 1 July, 1906, "and applying for a license to sell spirituous liquors" until 31 December of the same year, said to be conducted or carried on in that building of W. E. Whitehurst known as the W. E. Whitehurst brick store, situated in the town of Conetoe. He would have also found a certificate of six freeholders of said town, stating that W. E. Whitehurst was a suitable person to conduct said business. When plaintiff did see the license issued to Whitehurst, on 22 October, 1906, he must have known that James could not, without violating the law, both State and Federal, carry on the business of selling liquor. That he called James' attention to the fact is conceded. There is evidence that James assented to and gave the order on that day, and on two other occasions, for liquor in Whitehurst's name; that the invoices were mailed to Whitehurst, the goods shipped under bill of lading to him, and, by an order given the freight agent by Whitehurst, delivered to James. We cannot escape the conclusion that the jury was warranted in finding, upon this and other testimony, that the defendant by his conduct put it in the power of James to hold himself out as his agent; (178) that James, using the opportunity thus afforded him, induced the plaintiffs to sell and ship the goods on Whitehurst's credit and got possession of them from the freight agent. The liability of defendant rests upon the familiar principle that when one of two innocent persons must sustain a loss, the law will place it upon the one whose conduct, either intentionally or negligently, misleads the other.

Upon an examination of the entire record we find no reversible error.

No error.

Cited: *Latham v. Field,* 163 N. C., 361; *Wynn v. Grant,* 166 N. C., 48; *Ferguson v. Amusement Co.,* 171 N. C., 665.

E. H. & J. A. MEADOWS CO. v. R. M. WHARTON.

(Filed 18 March, 1908.)

Appeal and Error—Contentions of Fact.

When the case on appeal to the Supreme Court discloses only a contention upon the facts which have been found by the jury, upon proper evidence and issues, and under correct instructions, there is nothing upon which error can be based.

APPEAL from *Neal, J.,* at March Term, 1907, of CARTERET.

The action was brought to recover money alleged to have been col-

lected by defendant for plaintiff and wrongfully appropriated by the defendant to his own use.

The court, without objection, submitted these issues:

1. Was it agreed between the parties that defendant, in collecting for plaintiff, should receive from the customers of plaintiff potatoes, which could be credited to the account of such customers and received by plaintiff in cash, as alleged in the answer? Answer: "Yes."

2. Did defendant wrongfully and unlawfully convert to his own use the property of plaintiff, as alleged? Answer: "No."

3. What damage is plaintiff entitled to recover?

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

(179) *W. W. Clark and W. D. McIver for plaintiff.*

D. L. Ward, Moore & Dunn, and Simmons, Ward & Allen for defendant.

BROWN, J. A careful examination of the record in this case confirms us in the opinion that the learned counsel for the defendant are not far from correct in asserting that the matters in controversy in this action are exclusively those of fact, and that they have been decided by the jury adversely to the plaintiff. We find no real question of law presented upon this record, which may account for the fact that there is no citation of legal authority whatever in the briefs or arguments of counsel for either party to the action. The plaintiff is a corporation, engaged in the manufacture and sale of fertilizers, barrels, etc., in the city of New Bern. E. H. Meadows is president and J. A. Meadows secretary and general manager. The defendant was employed by plaintiff as its agent in the sale of its products and also in collecting the debts due by purchasers for the same. The paintiff alleges that the defendant received for the use of plaintiff the sum of $1,750 and wrongfully appropriated it to his own use, which is denied by defendant. The defendant admits that he was acting as agent in the sale of plaintiff's products, and also in collecting the bills therefor, but he avers and offers evidence tending to prove that the plaintiff was also engaged in buying potatoes for the market and operating in them in connection with one J. M. Howard; that he received payment for the bills for fertilizers, etc., which he is charged with misappropriating, in potatoes, and he gives a list of many customers of plaintiff who, he states, paid him their debts with potatoes. The defendant also testifies that he was directed by the general manager of plaintiff, J. A. Meadows, not only to take potatoes in payment for debts, but also to buy potatoes and to draw on the National Bank

(180) of New Bern in payment for them, and that money would be

there to meet the drafts; that, in pursuance of such directions, he received payments in potatoes and also drew as directed, and his drafts were promptly paid. Defendant further testifies: "J. A. Meadows told me to go and see Jim Howard and ship all the potatoes to him. I did that, at J. A. Meadows' request. J. A. Meadows told me to go home, hustle, buy potatoes, for there was money in them." This evidence was objected to, but properly admitted. The defendant not only testified that he had authority to take potatoes as cash, but also to draw on plaintiff for all needed money to buy them with, and that he did receive the potatoes and shipped them as directed, and that he spent over $8,000 for potatoes that year.

The plaintiff offered evidence tending to prove that the defendant had no authority to buy potatoes or to receive potatoes in payment of fertilizer debts, and tending strongly to contradict the evidence of the defendant. The issues present distinctly the controversy between the parties. We find no error in the reception or rejection of evidence and no error in the charge of his Honor which will warrant us in directing another trial. The matters in controversy appear to be purely those of fact, and to have been fairly presented to the jury, who have settled them adversely to plaintiff.

No error.

(181)

LILLIE BRYANT v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 25 March, 1908.)

1. Insurance — Application — Statements — Warranty—Misrepresentations—Effect.

Under Revisal (Vol. II), sec. 4808, providing that statements or descriptions in applications for policies of life insurance, or in the policy itself, are to be representations and not warranties, and do not prevent a recovery unless material, it is not necessary, to defeat a recovery, that a material misrepresentation by the applicant must contribute in some way to the loss for which indemnity is claimed.

2. Insurance—Application—Statements—Materiality.

In an application for a policy of life insurance every fact stated will be deemed material under Revisal (Vol. II), sec. 4808, which would materially influence the judgment of the insurance company either in accepting the risk or in fixing the premium rate.

3. Insurance—Application—Statements—Care of Physician—Relationship—Effect.

When it appeared that the insured, in his application for a policy of life insurance, made a statement that he had not been under the care of a physician within twelve months next preceding its date, it was not

necessary that he should have been bedridden to constitute the relationship; for if he was apprehensive as to his condition, though "up and around," within the time named, consulted a physician and intrusted his case to him, it would be a material representation, and, if false, would relieve the defendant from the obligation of the contract by reason of the death of the insured.

4. Same.

Upon objection properly taken, it was error in the court below not to submit a determinative issue to the jury for their findings upon the truth of a statement made by the applicant that he had not been under the care of a physician within two years next preceding that time, when there was evidence by a witness (a doctor) to the effect that the insured, upon whose death the policy sued on matured, called at his office about five or six times within the two-year period; that he put him on creosote with strychnine and hypophosphites, and afterwards gave him cod liver oil and creosote and advice as to his surroundings, diet, etc.

5. Same—Evidence—Issues.

When there was evidence that the insured made a misrepresentation in his application for a policy of life insurance, that he had not been under the care of a physician within two years, such conditions and other relevant facts and circumstances relating to the truth or falsehood of the statement should be determined by the jury upon a proper issue.

(182) ACTION to recover on a policy issued by defendant company on the life of Matthew Bryant, brought by his widow and beneficiary of the policy, tried before *Neal, J.*, and a jury, at October Term, 1907, of EDGECOMBE.

In the answer defendant admitted that proper proof of death of the insured had been furnished the company, which resisted recovery on the ground chiefly that the insured, unknown to the company, had consumption at the time the policy was delivered, and that the insured, at the time of the application for the policy, made false representations to the company on material matters, chiefly that he had never had consumption, that he was then in sound health, and that he had not been under the care of any physician within two years.

In apt time defendant's counsel tendered issues addressed to these defenses, and the question as to the proper issues was reserved by the court. It was shown that application for the policy was made 3 August, 1905; that medical examination was had 4 August, 1905; that the policy was received by the agent 10 August and delivered to insured 2 September, and that insured died 31 December, 1905. At the close of the testimony the court, by consent of the parties, found certain facts, considered as material and relevant to the inquiry, as follows: That Matthew Bryant, on 3 August, 1905, made to the defendant an application for insur-

ance, and in the said application represented to the said defendant that he did not have consumption; that the said representation was a material one. He also represented to the company that he had not been under the care of a physician within two years next preceding that time, and on that point the following is the undisputed evidence:

Dr. Whitehead was asked, "Please state what medical attention (183) you gave Bryant from start to finish," and he replied: "He called at my office about five or six times within twelve months time. I put him on creosote with strychnine and hypophosphites. Afterwards I gave him cod liver oil and creosote. This is all the medical treatment I gave him. I gave him advice as to his surroundings, diet, etc. This was about twelve months prior to his death."

The said inquiry was a material one. It was contracted and agreed between the insured and the defendant at the time of the application that the said company should incur no liability until the delivery of the policy to the insured while he was in good health, and that no liability was assumed by the company unless the same was delivered while he was in sound health. There was no evidence of unsoundness of health, except that bearing on consumption.

The court further submitted certain issues, which were responded to by the jury, as follows:

1. Did the insured, Matthew Bryant, in his application falsely represent that he did not have consumption? Answer: "No."

2. Did the insured, Matthew Bryant, have consumption at the time of the delivery of the policy? Answer: "No."

3. Did the insured, Bryant, know that he had consumption at the time of the delivery of the policy? Answer: "No."

4. Did the defendant have knowledge of the fact at the delivery of the policy that the insured had consumption? Answer: "No."

On the verdict and findings of fact by the court there was judgment for plaintiff, and defendant excepted and appealed.

Kitchin & Allsbrook and G. M. T. Fountain for plaintiff.
Gilliam & Gilliam for defendant.

HOKE, J., after stating the case: Our statute on insurance, in (184) reference to the question involved in this appeal, Revisal, 4808, provides: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties; nor shall any representation, unless material or fraudulent, prevent a recovery on the policy." And in *Fishblate v. Fidelity Co.*, 140 N. C., 589, the Court, in construing this section (erroneously printed in the opinion as section 4646), held as follows:

"1. In an action for indemnity on an accident policy, where, on an issue involving the question as to whether the plaintiff, in representing himself to be sound physically and mentally, made a false statement on a matter material to the contract, a charge that a misrepresentation, to become material, must be as to a defect which contributes in some way to the loss for which indemnity is claimed, is erroneous.

"2. Every fact untruly asserted or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premium."

There are decisions apparently to the contrary in other jurisdictions, but, as shown in the opinion referred to, they were rendered usually, all of them as far as we have examined, in applying statutes having a different wording from ours and requiring a more restrictive interpretation. This being the construction we have put upon our statute—and, as the law is now expressed, it is, we think, undoubtedly the correct construction—the court below properly held that the representation of the insured as to having been under the care of the physician within two years was material to the contract; and, under the facts and circumstances disclosed by the testimony, defendant has a right to insist and the case requires that there shall be a determinative finding on the
(185) issue addressed to that question; and this has not been done. The judge below takes an excerpt from the testimony of Dr. Whitehead and finds such statement to be true, but this statement is not conclusive on the issue and does not in itself embody all the facts relevant to the inquiry. It is true that the courts will hold that a prescription given by a physician in response to a casual inquiry does not amount to being under such physician's care, within the meaning of this stipulation. A prescription given after more careful examination, as an exceptional or isolated occurrence, might not be so. No more is it required that a patient should be bedridden to constitute the relationship; and if the insured, being apprehensive as to his condition, though "up and around," within the time named, consulted Dr. Whitehead or any other physician and intrusted his case to him for regular or continuous treatment, this would come within the representation, and, if false, would relieve the defendant from the obligations of the contract. Dr. Whitehead's entire statement on this subject, as shown in the record, is as follows: "I saw Matthew Bryant ten or twelve months prior to his death. He showed the history of a cough. He came back in a few days and I examined him. I asked him for a specimen of his sputum. He did not give it. I got a specimen of his sputum a few days before he left Rocky Mount. I know

he had tuberculosis. I cannot swear he had it two weeks before he left Rocky Mount. He had irregular temperature, chilly sensations, cough, husky voice, etc. I thought he had tuberculosis before." Dr. Whitehead was asked, "Please state what medical attention you gave Bryant from the start to finish," to which he replied: "He called at my office five or six times within twelve months time. I put him on creosote with strychnine and hypophosphites. Afterwards I gave him creosote and cod liver oil. This is all the medical treatment I gave him. I gave him advice as to his surroundings, diet, etc. The paper shown me (Exhibit 6) is in my handwriting." It is not clear how much of this statement referred to conditions existing prior to or at the time of the appli- (186) cation, but such conditions and other facts and circumstances pertinent to the inquiry should be heard and considered and the issue in some way determined before the court is in a condition to enter a proper judgment in the cause.

As the matter stands, questions raised by the pleadings and material to the inquiry have not been determined. And for this error a new trial of the cause is awarded.

New trial.

Cited: Alexander v. Ins. Co., 150 N. C., 538; *McManus v. R. R., ib.*, 662, 667; *Powell v. Ins. Co.*, 153 N. C., 127; *Vaughan v. Davenport*, 159 N. C., 371; *Gardner v. Ins. Co.*, 163 N. C., 374, 375; *Sedbury v. Express Co.*, 164 N. C., 364; *Daughtridge v. R. R.*, 165 N. C., 193, 195; *Schas v. Ins. Co.*, 166 N. C., 58, 60; *Hardy v. Ins. Co.*, 167 N. C., 23; *Lummus v. Ins. Co., ib.*, 655; *Cottingham v. Ins. Co.*, 168 N. C., 265; *Burch v. Scott, ib.*, 604.

LOU H. HOCUTT v. WESTERN UNION TELEGRAPH COMPANY.*

(Filed 25 March, 1908.)

1. Telegraph Companies—Messages—Failure to Accept—Liability.

A telegraph company is liable for nominal damages at least for negligent failure or refusal of its agent to receive for transmission a telegram, properly addressed, with money to pay the necessary toll, whether such conduct on the part of the agent was a breach of contract or a tort.

2. Same—Insufficient Defenses.

When a telegram, properly addressed is offered to the agent of a telegraph company, with the toll for its transmission, it is no defense,

*BROWN, J., took no part in the decision of this case.

upon the question of the plaintiff's right to nominal damages for the failure to receive the message for transmission, that its agent had recently received a telegram from the addressee and erroneously supposed that the message in question was addressed to the wrong destination, and therefore returned the telegram, with the money, to the sender, with a note to that effect.

3. Telegraph Companies—Rights of Public, Invasion of—Measure of Damages.

Nominal damages are awarded against a telegraph company for the violation or invasion of some legal right of its patron, and to determine such right, and when substantial damages are shown, the injured party can recover, on account of the wrongful act, compensation commensurate with the injury thereby sustained.

4. Telegraph Companies—Negligence—Ordinary Care—Repeating Message—Substantial Damages—Avoidance of Injury—Questions for Jury.

When the operator of defendant, erroneously supposing that a telegram had not been addressed to the correct destination, returned it to the sender, with the money sent to pay its toll, and afterwards asked the sender to send him the message again, so that he might transmit it as written, which she refused to do, and requested another person, as her agent, to have the message sent, it is for the jury to find whether the sender therein exercised ordinary care, after knowledge of the negligence of defendant's operator, in not repeating the message, when requested by him to do so, or whether her agent exercised due care, and, if not, whether, except for such negligence on her part or on the part of her agent, the addressee would have received the telegram in time to have avoided the infliction of substantial damages.

5. Telegraph Company—Avoidance of Injury—Duty of Sender.

In order to recover of the defendant telegraph company substantial damages for its failure to transmit a telegram, it must appear in proper instances that the plaintiff, after she had knowledge of the defendant's negligence, exercised ordinary care to prevent the probable damage, if the telegram was finally delivered to the company too late to prevent such damage.

(187) APPEAL from *O. H. Allen, J.*, at December Term, 1907, of BEAUFORT.

This action was brought to recover damages for negligently failing to transmit and deliver a telegram addressed by the plaintiff to her husband at Greensboro, N. C. The message was dated 20 June, 1905, and was as follows: "Baby very sick. Come at once." She also, at the same time, wrote him a letter, to which he replied on the 21st in a telegram: "Letter received. How is the baby this morning? Could you bring him away tomorrow? I could meet you at Selma." She then attempted to send to her husband, at Greensboro, the telegram in question, which was as follows: "Cannot leave. Doctor says baby no better. Come home immediately." The telegrams to Hocutt were sent "deadhead"—that is, without

any charge by the defendant—as he had been its operator at Washington, N. C.

The testimony tended to show that the last telegram was deliv- (188) ered by a colored woman for Mrs. Hocutt to the operator of defendant at its office in Washington, N. C., with the money to pay the cost of sending it, and a note from Mrs. Hocutt. The operator, thinking that Mr. Hocutt was at Wilson, N. C., and not at Greensboro, which turned out to be a mistake, returned the telegram and money to Mrs. Hocutt, with a message that Mr. Hocutt was in Wilson (presumably on the way to his home at Beaufort), and it would not be necessary to send the telegram. It was then about 12 o'clock. When the colored woman returned with the message Mrs. Hocutt went to a neighbor's house and inquired by telephone of the operator why he had not sent the telegram. In consequence of her conversation with him she then went to the Atlantic Coast Line Railway station and gave the telegram to D. C. Ross, about 12:30 o'clock, to be delivered to the operator of the defendant and sent to Greensboro. There was some delay by Ross in delivering the telegram, by reason of which it was not received by the plaintiff's husband until too late to take the train which left Greensboro at 1:57 o'clock p. m. on that day, and he consequently did not reach his home until the next morning at 7 o'clock. The operator at Washington, N. C., W. F. Clark, testified that when he discovered his mistake as to the whereabouts of Hocutt he told Mrs. Hocutt, in reply to her inquiry of him through the telephone, that if she would repeat the telegram to him he would send it to her husband, and that she refused to do so, saying at the time "that she was right and would not have him send it then." In her testimony this was not contradicted by Mrs. Hocutt, though it was not admitted by her to be true. There was other evidence, but it is not necessary to state it, because of the view taken by the Court of the case.

The issues submitted, with the answers thereto, were as follows:

1. Was the defendant guilty of negligence in respect to for- (189) warding the telegram from Mrs. Hocutt to E. J. Hocutt, dated 21 June, 1905? Answer: "Yes."

2. If so, did such negligence prevent the husband of plaintiff from reaching his home as early as he would otherwise have done? Answer: "Yes."

3. If so, what damages, if any, has plaintiff sustained? Answer: "Two thousand dollars."

Among other instructions to the jury, not material to be mentioned, the court gave substantially the following:

"1. If the jury find from the evidence that the plaintiff had reasonable grounds to abandon her effort to send the message through the agent,

Clark, on account of his negligence, and that his negligence caused her to request Ross to have the message sent for her, which resulted in delay and prevented her husband from reaching his home as soon as he otherwise would have reached it, you will answer the second issue 'Yes,' even if Ross was delayed or was negligent, provided you find that his negligence was caused by reason of Clark negligently failing to send off the message when he ought to have done so, as then the negligence of Ross, if you find that he was dilatory or negligent, would not be chargeable to the plaintiff.

"2. The plaintiff, if entitled to recover at all, would only be entitled to recover for such mental anguish and physical suffering as were directly due to the delay of her husband in reaching her, on account of the negligence of the defendant in not sending the message off to the husband, and no other."

The defendant excepted to each of these instructions. Judgment was entered upon the verdict, and defendant appealed.

Bragaw & Harding and Ward & Grimes for plaintiff.
Small, McLean & McMullan and F. H. Busbee & Son for defendant.

WALKER, J., after stating the case: When the agent of the defendant received the message, with the money to pay the charges of trans-
(190) mission, and failed to send it, a wrong was committed to the plaintiff which gave her a cause of action and entitled her to recover at least nominal damages. It can make no difference whether it was a breach of contract or a tort. The defendant owed the plaintiff the duty to transmit the message to Mr. Hocutt at Greensboro, N. C., and there is nothing to show that it was in any way excused for the nonperformance of this duty. The operator, it is true, thought that Mr. Hocutt was at Wilson, as he supposed a message from that place had been sent by him that day and received at the defendant's office in Washington, N. C., but in this it turned out that he was mistaken. The telegram was from Greensboro, and when he received the message from Mrs. Hocutt addressed to her husband at Greensboro he could have referred to the other message then in his office and prevented the mistake which he committed, and the consequent delay, instead of returning the message and the money to the sender. We do not see why the operator returned the message and the money to Mrs. Hocutt. He could just as well have made the inquiry of her in regard to the whereabouts of her husband without doing so, and by note, as he did, and when she refused in the conversation over the telephone to give him the desired information, if she did so, his duty would have been fully discharged and the consequent damage to her prevented altogether by sending the message according to the address on its face when he received it from her. Mrs. Hocutt was

not bound to do more than she did when she caused a properly addressed message to be delivered to the defendant's operator and tendered the proper charges for transmission. The duty then devolved upon the defendant to send and deliver the message to the addressee, unless it had some legal excuse for not doing so, and none appears in this case. *Sherrill v. Tel. Co.*, 116 N. C., 655; *Gerock v. Tel. Co.*, 142 N. C., 22; *same case, ante*, 1; *Bartlett v. Tel. Co.*, 62 Me., 221; *Kennon v. Tel. Co.*, 92 Ala., 399; *Tel. Co. v. Aubrey*, 61 Ark., 613. So far, the case (191) is with the plaintiff, and the first two issues were correctly answered in law, upon the controverted facts, and if there had been no evidence of substantial damages the plaintiff would be entitled to nominal damages, under the third issue. The rule has been stated thus: "Where a person has entered into a contract with another, by which the performance of some obligation is imposed upon or assumed by him, or where by common law or by statute some duty is imposed upon a person with reference to the rights of others, in case of a violation of such obligation or duty the aid of the courts may be invoked by a suit for damages, the object of such action being to enable the injured party, as far as is possible, to obtain compensation or satisfaction for the loss he has suffered by such violation. According as the facts of each case may require, damages, if awarded, may be nominal, actual, or exemplary. Nominal damages are a small or trivial sum awarded for a technical injury due to a violation or invasion of some legal right and as a consequence of which some damages must be awarded to determine the right. Thus, though no actual damage may result from a breach of the contract by a telegraph company in negligently failing to promptly deliver a message, yet nominal damages may be awarded. And as a general rule in such cases only nominal damages can be recovered, unless some substantial damage be shown, or unless the negligence of the company is the proximate cause of the damages sustained. Actual damages are those which are given as compensation to a person injured by the wrongful act of another, commensurate with the actual loss or injury sustained." 2 Joyce Electric Law, secs. 941, 942, 943.

When the plaintiff discovered that the agent had made a mistake, and that by his negligence she was about to suffer damage, the law imposed the duty upon her to use such care and diligence as a person of ordinary prudence under the circumstances would have used to prevent the threatened damage or to minimize it. The rule has been thus (192) stated and applied to cases of delayed telegrams: "The duty rests upon all persons for whose losses others may be liable to respond to take all reasonable measures to diminish the damages that may occur. This principle applies to all who may claim indemnity from others for

losses, either upon express contracts or for torts. So in cases where a person has been injured by the failure to deliver a telegraphic message or by an error in transmission thereof, and he stands in a position to suffer further loss in addition to that already incurred, he should exercise reasonable efforts to make the loss as light as possible, and there can be no recovery of damages for any loss which might have been averted by the exercise of such efforts." 2 Joyce Electric Law, sec. 972. He adds, in the same section, that if the injured party has exercised reasonable care to prevent the damage which would otherwise result, the mere fact that his efforts might have been more judicious will not enable the company to escape the consequences of its negligence.

This doctrine, that a party will not be permitted to recover damages which he could have averted by the exercise of ordinary care and diligence *after* he discovered the wrong, has been variously stated by the text-writers and the courts. In Hale on Damages, p. 64 *et seq.*, it is said: "Compensation for a wrong is limited to such consequences as the injured party could not have avoided by reasonable diligence. All other consequences are regarded as remote. The rule is the same in cases of contract and cases of tort. The injured party's own negligence or willful fault in failing to take reasonable precautions to reduce the damage, after notice of defendant's wrong, is the proximate cause of such injuries. If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach at a trifling expense or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. *Qui non prohibet, cum prohibere*
(193) *possit, jubet.* And he who has it in his power to prevent an injury to his neighbor and does not exercise it is often, in a moral if not a legal point of view, accountable for it. The law will not permit him to throw a loss resulting from a damage to himself upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might by common prudence have prevented. The party who is not chargeable with a violation of his contract should do the best he can in such cases, and for any unavoidable loss occasioned by the failure of the other he is justly entitled to a liberal and complete indemnity." So, in Sutherland on Damages, sec. 88, it is thus expressed: "The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him. This is a practical obligation under a great variety of circumstances, and, as the damages which are

suffered by a failure to perform it are not recoverable, it is of much importance." This Court has recently held that a party can recover damages only to the extent they could not have been avoided or diminished by ordinary care and diligence on his part, and that for any loss incident to a failure in the use of such care or diligence no recovery can be had. *Bowen v. King,* 146 N. C., 385; *R. R. v. Hardware Co.,* 143 N. C., 58. See, also, *Baldwin v. Tel. Co.,* 45 N. Y., 753; *Pepper v. Tel. Co.,* 87 Tenn., 571; *Tel. Co. v. Reid,* 83 Ga., 401. In the case last cited *Bleckly, C. J.,* says that, after the discovery of the negligence and its probable consequences, "the authorities all hold that it is the duty of the injured party to exercise some degree of diligence in rendering the damage of a negligent act as little as practicable."

The question in our case is, Did the plaintiff exercise ordinary (194) care to prevent the probable damage to herself after she knew that Clark had been negligent? and not whether the negligence of her agent, Ross, if he was her agent, was induced by the prior negligence of Clark. If a person of ordinary prudence would have repeated the message to Clark over the telephone when he requested it to be done, if it be found as a fact by the jury that he did make the request, and Mrs. Hocutt failed to do so and was negligent in this respect, or if she constituted Ross her agent to deliver the message to Clark for the purpose of being transmitted by him to her husband, and Ross was negligent, and the jury find that either act of negligence was the proximate cause of the damage, or that if neither she nor her agent had been negligent, her husband would have received the telegram in time to have taken the train which left Greensboro at 1:57 p. m. and would have arrived at Washington as soon as he would have reached that place if the first message had been sent by Clark when received by him for transmission, then the damages would be only nominal. But if there was no such intervening act of negligence, and Clark's negligence, therefore, was the proximate cause of the damage, the plaintiff is entitled to recover whatever actual or substantial damages she suffered. If we should hold that the prior negligence of Clark could have the legal effect of excusing the subsequent negligence of Mrs. Hocutt or her agent, we would then ignore the rule as to the duty of the injured party, when informed of the negligence which caused the injury, to exercise care in avoiding its consequences, if, indeed, it would not nullify the rule, for the latter presupposes the existence of prior negligence. We think, therefore, that the first of the instructions set out in our statement of the case, notwithstanding the second instruction given by the court, was calculated to mislead the jury upon the question of damages, and for this reason a new trial is awarded, but it will be restricted to the third issue, as to damages.

Partial new trial.

Cited: Owens v. R. R., post, 359; *Woods v. Tel. Co.,* 148 N. C., 7; *Hauser v. Tel. Co.,* 150 N. C., 558; *Lanning v. Tel. Co.,* 155 N. C., 345; *Barnes v. Tel. Co.,* 156 N. C., 153; *Mullinax v. Tel. Co., ib.,* 552; *Hardy v. Lumber Co.,* 160 N. C., 124; *Hoaglin v. Tel. Co.,* 161 N. C., 398; *Alexander v. Statesville,* 165 N. C., 532; *Smith v. Tel. Co.,* 167 N. C., 254; *Watts v. Vanderbilt, ib.,* 567; *Wilson v. Scarboro,* 169 N. C., 657; *Howard v. Tel. Co.,* 170 N. C., 496; *Cotton Oil Co. v. Tel. Co.,* 141 N. C., 708.

(195)

J. C. McCASKILL ET AL. v. SARAH E. WALKER ET AL.

(Filed 25 March, 1908.)

1. Deeds and Conveyances—Chain of Title—Presumptive Possession.

Plaintiff, claiming lands by virtue of paper title from A. against defendants in possession, must show a connected chain of title before the provisions of Revisal, sec. 386, as to presumptive possession, will apply.

2. Same—Chain of Title—Common Source—Adverse Possession—Evidence—Pleadings.

When plaintiff claimed the *locus in quo* from the defendants in possession, and failed to establish his chain of title, and seeks to recover by showing that he and defendants claimed under W. as a common source, and that defendants were estopped to deny title therein, it was proper for the court below not to allow the plaintiff, under defendants' objection, to put in evidence a part of a sentence of the answer alleging that W., the ancestor of defendants, was in open, notorious, and adverse possession, under known and visible lines and boundaries, when such destroys the sense in which the entire admission is made and perverts its meaning.

3. Evidence—Pleadings—Meaning Perverted.

When a paragraph of a pleading states a proposition complete in itself as a whole, it cannot be "cut up" into different and distinct propositions, so as to change its meaning from that which, by reasonable construction, the pleader has therein stated.

4. Adverse Possession—Chain of Title—Common Source—Evidence—Pleadings.

When defendants' answer alleges adverse possession in A., insufficient in itself in point of duration to ripen the title, but that his with their adverse possession would do so, such allegation introduced in evidence would not avail plaintiff upon showing that the deed of A. was a chain in their paper title, as the defendants cannot be said to claim under A.

5. Same—Chain of Title—Adverse Possession—Evidence—Sufficiency.

When plaintiff failed to connect his chain of paper title and seeks to introduce the answer as an admission that A., as a common source of title, held the *locus in quo* adversely, under known and visible metes and bounds, it was necessary for plaintiff to show that the adverse possession of A. was sufficient in time to ripen title in him.

6. Pleadings—Admissions—Evidence.

When issuable matters are not controverted in the pleadings, it is unnecessary to introduce them in evidence; but when they are independent of and collateral to the issues raised, they are only available as evidence when properly introduced.

APPEAL from *Jones, J.*, at December Term, 1907, of ROBESON. (196)

Plaintiffs allege that they are the owners and entitled to the possession of the *locus in quo*, and that defendants are in the wrongful possession thereof, and they demand judgment. Defendants deny each allegation of the complaint, and for further answer say: That the defendants are advised and believe, and therefore aver, that the plaintiffs claim title to the lands described in the complaint under and by virtue of an alleged conveyance purporting to have been executed by John Walker and wife to one H. J. McLean, bearing date of 2 June, 1869, and purporting to have been recorded in Book JJJ, page 257, office of the register of deeds of Robeson County; and the defendants allege that the said alleged paper-writing was never in fact executed and delivered by the said John Walker to the defendant H. J. McLean or to any other person for him, and that the same was wholly without consideration, and that the said alleged paper-writing, together with the attempted registration thereof in the office of register of deeds of Robeson County, is fraudulent and void and of no legal effect as a conveyance; that for a long time before the date of the said alleged conveyance, and continually from that time up to the present, John Walker, the ancestor of defendants, and these defendants, his widow and heirs at law, since his death, have been in the open, notorious, and adverse possession of all of said lands under known and visible lines and boundaries, using the same to the exclusion of the plaintiffs and those under whom they claim and of all other persons.

Plaintiff introduced a grant from the State to Jacob Alford, dated 3 October, 1765; a deed from James McNeill to McDuffie, 11 January, 1806; a deed from McDuffie to John Walker, Sr., 28 Oc- (197) tober, 1811; a deed from John Walker, Sr., to John Walker, Jr., 11 March, 1853, and a deed from John Walker, Jr., to Hector J. McLean, 2 June, 1869. Hector McLean died intestate, December, 1870, leaving plaintiff Lola Wright and three others his heirs at law. Plaintiff McCaskill introduced deeds from them to himself for their individual

interests. All of the deeds were duly recorded. The summons issued 29 August, 1901.

The plaintiffs proposed to offer in evidence so much of the said paragraph as stated that for many years before his death John Walker had been in possession of the land. The defendants objected. Thereupon the court requested plaintiffs' counsel to indicate just what parts or words of the paragraph they wished to offer and the court would then rule upon the matter. Counsel declined to do this, stating that the sentence was so involved that they could not offer connected words that would make sense.

The court then proposed to allow the plaintiffs to offer the entire paragraph or such connected words as would make sense, if they would indicate what words they desired to offer. This plaintiffs declined to do, for the reason above stated. The plaintiffs then proposed to offer in evidence so much of paragraph 10 of the amended answer as alleges that, for a long time before the date of the alleged conveyance, John Walker, the ancestor of the defendants, was in open, notorious, and adverse possession of all of said lands under known and visible lines and boundaries.

To this evidence the defendants in apt time objected. Objection sustained, because plaintiffs' counsel again declined to offer such connected part or words as would make sense, as above set forth.

The plaintiffs here rested their case. Thereupon the defendants moved for judgment as in case of nonsuit. The motion was allowed, and plaintiffs excepted and appealed.

(198) *McIntyre, Lawrence & Proctor for plaintiffs.*
McLean & McLean for defendants.

Connor, J., after stating the case: Plaintiffs, having showed title in Alford, could make out their case either by connecting themselves with such title and relying upon the presumption raised by the statute (Revisal, sec. 386), that they were possessed of the land "within the time required by law" (section 383), or, failing to connect themselves with Alford, by showing an adverse possession in themselves or those under whom they claimed for a period sufficient to give them title. *Mobley v. Griffin,* 104 N. C., 115; *Hunneycutt v. Brooks,* 116 N. C., 788. It being conceded that they failed to show a connected chain of paper title, they could not avail themselves of the statutory presumption, and hence they were compelled to rely upon a title originating in an ouster of the owner, with continued adverse possession, until by lapse of time they acquired title. Failing to show such ouster and adverse possession, they could not recover, unless by showing that they and defendants claimed under a common source, when they could estop the defendants from denying title

in such common source. This they sought to do by offering to introduce a portion of paragraph 10 of the answer. We concur with his Honor that they could not so disconnect the words of the pleader as to destroy the sense in which they were used. The purpose of a trial is to show forth the truth. The language used by parties in pleading or elsewhere must be given in evidence in such a way as to enable the jury to see what, by reasonable interpretation, they intended to say and did say. In their answer the defendants said in a connected narrative that John Walker, their ancestor, and themselves after his death, had been for a long time prior to 22 June, 1869, the date of an alleged deed, in the adverse possession of the land in controversy. This admission, as made, plaintiffs were entitled to put in evidence. His Honor offered to permit them to do so, or to put in such parts thereof as "would make sense." Certainly, the plaintiffs could not do otherwise. His Honor further asked (199) them to indicate what portion of the paragraph they offered— what words they wished to introduce. This they declined to do. We concur with his Honor that they could not in a general way, without designating the language which they proposed to introduce, put in evidence a portion of the paragraph. We think that the paragraph, correctly read, states one proposition, which cannot be separated and "cut up" into different and distinct propositions. While it is not always easy to draw the line by which portions of a pleading may be separated from other portions and introduced, we think it clear that where there is but one proposition stated, it should not be separated so that the pleader is made to say something which he never intended, and which by reasonable construction he has not said. The defendants deny that plaintiffs are the owners of the land in controversy. This denial puts the plaintiffs to proof of their allegation. Defendants, for further defense, make certain averments, the burden of which is upon them. If in doing so they make admissions which aid the plaintiffs in making out their title, they are entitled to put such admissions in evidence. In doing so, however, they may not, by discarding such parts of the language and cutting up the sentence, destroy the sense in which the entire admission is made. To do this would be to mislead and not enlighten the jury. The plaintiffs construe the admission to be that defendants claim under John Walker. We do not think this a fair construction of the language. They say that John Walker was in the adverse possession of the land prior to 22 June, 1869, and that since his death they have been in adverse possession. If John Walker ousted the true owner and remained in adverse possession until he acquired title by lapse of time, and died, his heirs would be in by descent under him; but if he ousted the owner and died before his disseizin ripened into title, and descendants then went into the adverse

possession and remained until, either by their possession or by tacking that of their ancestor, they acquired title, it cannot be said that (200) they claim under him. John Walker died in 1871. If the plaintiffs had shown possession in him since the date of his deed, 1853, they could have sustained their contention that defendants, his heirs at law, claimed under him; but they proposed by introducing the answer to show simply that "for a long time prior to the date of the alleged deed" he was in the adverse possession. This falls short of showing title in John Walker, so as to compel defendants to claim under him. Besides, the allegation is that Walker and defendants have been in the adverse possession of the land under known and visible boundaries, claiming against the plaintiffs and all others. If the admission is treated or offered by plaintiffs as evidence, it would show an adverse possession against plaintiffs since 1870, which, without color, would bar plaintiffs' entry, independent of any possession by Walker. We concur with his Honor's ruling excluding the proposed testimony. We are further of the opinion that if the admission were introduced it would fail to show that plaintiffs and defendants claimed under Walker. When issuable allegations are made in the complaint and admitted in the answer, it is not necessary to introduce the pleading. *Leathers v. Tobacco Co.*, 144 N. C., 330. The matters set up in the seventh and tenth paragraphs of the answer were independent of and collateral to the issues raised by the allegations in the complaint and denied in the answer. Plaintiffs were first called upon to make out their case to the extent of showing a *prima facie* title. They could avail themselves, for this purpose, of the averments in the answer of new matter only by introducing it in evidence. For manifest reasons they could not do this as pleaded, and, as we have seen, they could not so separate parts of sentences and paragraphs as to destroy the sense of the admission. In the condition of the case at the conclusion of plaintiffs' evidence, they having failed to make out a *prima facie* case, his Honor properly rendered judgment of nonsuit. There is

No error.

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(201)

KATE RACKLEY, EXECUTRIX, v. F. M. ROBERTS ET AL.

(Filed 25 March, 1908.)

1. Special Proceedings—Land, Sale of — Process — Irregularity — Minors — Married Women—Collateral Attack.

A sale of lands under special proceedings, in the absence of service of summons upon a minor and married woman, a necessary party, cannot be attacked collaterally for irregularity in a separate and inde-

pendent action, in the absence of fraud, when she was represented by attorney and a guardian *ad litem*, who defended in her behalf. The proceeding should have been by motion in the original cause.

2. Special Proceedings—Process—Minors—Appearance—Authority of Attorney—Collateral Proceedings.

An independent action to set aside a sale of land formerly had under special proceedings will not lie for an alleged absence of service of process upon an infant defendant for whom an attorney and a guardian *ad litem* appeared and were recognized as such by the court in the original cause, as such appearance precludes in collateral proceedings an inquiry into the authority possessed by the attorney and guardian to represent her.

3. Special Proceedings—Judgment—Lands, Sale of—Purchaser—Good Faith.

An innocent purchaser in good faith, buying land sold under an order or judgment in special proceedings, is protected, if it appears upon the face of the record that the court had jurisdiction both of the parties and of the subject matter.

4. Special Proceedings—Sale of Lands—Independent Action to Set Aside Sale—Evidence—Nonsuit—Failure to Renew Motion—Appeal and Error—Fraud—New Trial.

In an independent action to set aside a sale of lands under a former judgment in special proceedings defendants moved to nonsuit at the close of the plaintiff's evidence (Revisal, sec. 539), but did not renew the motion at the close of all the evidence. As fraud is alleged, which plaintiff may be able to show, a new trial was granted by the Supreme Court instead of dismissing the action.

APPEAL from *Biggs, J.*, at August Term, 1907, of DUPLIN.

Action to recover a one-seventh interest in the land described in the complaint. The tract of land originally belonged to Daniel Glisson, who died in April, 1880, leaving a will, in which a one- (202) seventh interest in the said land was devised to the *feme* plaintiff. Mary Glisson, the widow of Daniel Glisson, qualified as his administratrix with the will annexed, and on 2 November, 1881, instituted proceedings against the heirs and devisees of the testator for the sale of his lands for assets. Some of the defendants were personally served with process. It does not appear, except inferentially, that the plaintiff, who was Catherine Glisson, now Catherine Rackley, was personally served, but John L. Tew was appointed guardian *ad litem* of the said Catherine Glisson and other infants, and a summons was duly served upon him. In her petition the administratrix prayed that a summons, with a copy of the petition, be issued to each of the defendants. An answer was filed, as follows: "Mary Glisson, administratrix of Daniel Glisson, plaintiff, v. H. J. Glisson and others, defendants. John L. Tew, guardian *ad litem* for Robert, Ann Glisson, and others, answering the com-

plaint, says: (1) That according to their best information and belief, the first allegation is not true, etc. (2) They deny the second allegation, etc. Whereupon the defendants pray that the proceeding be transferred to the Superior Court at term, in order that the issues of fact may be investigated and that they may obtain such other and further relief as may seem just and according to law. (Name of attorney), attorney for defendants above mentioned."

The answer avers fraud and collusion and resists a sale upon the ground that it is not necessary. It is then stated in the record that, "by consent of all parties," a reference was ordered to B. Witherington to take and state an account of the debts of Daniel Glisson, deceased, and then to ascertain the value of the personal property and report to the court. The referee filed his report, and upon it and the pleadings the clerk ordered that a sale of the land be made by the administratrix. At the sale F. M. Roberts, wife of J. B. Roberts, purchased the land (203) for the sum of $1,450, and a deed was executed by the administratrix to her, 16 February, 1883. It was admitted that the purchaser has ever since been in possession of the land, receiving the rents and profits, except the part covered by the dower, and she has been in possession of that part since 1890. The defendants moved to nonsuit the plaintiff. The motion was overruled, and the defendants excepted. The issues, with the answers thereto, were as follows:

1. Was the plaintiff, Mrs. Kate Rackley, served with summons in the proceeding to sell the lands of Daniel Glisson for assets? Answer: "No."

2. When was the plaintiff, Mrs. Kate Rackley, born? Answer: "May, 1862."

3. Was the plaintiff married before the above proceedings were commenced? Answer: "Yes."

4. Is the plaintiff the owner of the lands described in the complaint, or any part thereof or interest therein? Answer: "Yes; undivided one-seventh interest, subject to the defendants' interest, which was heretofore adjusted."

5. Do the defendants wrongfully withhold the possession of said lands or any part thereof from the plaintiff, and if so, what part or interest? Answer: "Yes; one-seventh undivided interest, subject to defendants' equity, to be hereafter adjusted."

6. What is the annual rental value of said lands described in the complaint? Answer: "One hundred and twenty-five dollars."

It was agreed that the court should answer the fourth and fifth issues, as a matter of law, according to the finding of the jury upon the other issues. The defendants' counsel requested the court to give several instructions to the jury, but it is not necessary, in the view taken by the

Court of the case, to set out the prayers or the instructions given by the court. From the judgment the defendants appealed.

Kerr & Gavin for plaintiff. (204)
Stevens, Beasley & Weeks for defendants.

WALKER, J., after stating the case: The question presented in the record is whether the validity of the special proceeding for the sale of the land can be attacked collaterally in a separate suit like this, where the ground of the attack is that process was not served upon the *feme* plaintiff, who was a defendant in that proceeding and at the time a minor, and in whose behalf a guardian *ad litem* was regularly appointed and answered. It is true, the plaintiff alleges that the judgment in the special proceeding was obtained by fraud and collusion, but there does not seem to be any evidence of it, and no issue was submitted upon that allegation. So far as appears or is found by the jury, the defendant F. M. Roberts purchased for value and without notice of any irregularity in the proceeding. The jury by their verdict simply find that there was in fact no service of a summons upon the plaintiff, Mrs. Kate Rackley; that she was at the time a minor, and was married before the proceeding was commenced, and that the annual rental value of the land is $125. Upon these findings the court was of the opinion, as matter of law, that the plaintiff is the owner of a one-seventh interest in the land, and that the defendant wrongfully withholds the same from her, and directed the other two issues to be answered accordingly, the parties having agreed that he might answer them as he should rule upon the law. He thereupon adjudged that the plaintiff was entitled to recover the said one-seventh interest. We do not think the special proceeding could be assailed by an independent action for mere irregularity. The plaintiff should have proceeded by motion in the cause to set aside the judgment as to her. *Grant v. Harrell,* 109 N. C., 78; *Carter v. Rountree,* 109 N. C., 29. Before the adoption of the reformed procedure, in 1868, a judgment in a proceeding to sell land for assets would not be set aside upon the application of a minor who had not been served with process, provided a guardian *ad litem* to defend his interests had (205) been duly appointed and there had been a real and *bona fide* defense in his behalf. *Hare v. Holloman,* 94 N. C., 14, citing *Matthews v. Joyce,* 85 N. C., 258, and other cases. See, also, *Cates v. Pickett,* 97 N. C., 21; *Sledge v. Elliott,* 116 N. C., 712. It was held in *Hare v. Holloman* that where infant defendants are not served with process, but the record shows that a guardian *ad litem* was appointed for them, who proceeded in the cause and defended their interests, the decree against the infants is not void and cannot be collaterally impeached. This was said,

of course, with reference to the practice prior to 1868. *McGlawhorn v. Worthington,* 98 N. C., 199; *Brittain v. Mull,* 99 N. C., 483; *England v. Garner,* 90 N. C., 197; *Syme v. Trice,* 96 N. C., 243; *Coffin v. Cook,* 106 N. C., 376; *Tyson v. Belcher,* 102 N. C., 112; *Turner v. Shuffler,* 108 N. C., 642. What is said in *Carraway v. Lassiter,* 139 N. C., at p. 154, had reference to the special facts of the several cases cited to support it. We will now refer to those cases. *Moore v. Gidney,* 75 N. C., 34, was a motion in the cause, and not an independent civil action. *Gulley v. Macy,* 81 N. C., 356, was a civil action, in which fraud was alleged and shown, and it was further established that the purchasers, who were defendants, had notice of the plaintiff's equitable rights. In *Young v. Young,* 91 N. C., 359, there was no attempt to attack a prior proceeding, but the court in the original cause refused to construe the deed in question and to declare the nature of the trusts because the parties had not been properly served with process. *Stancill v. Gay,* 92 N. C., 455 and 462, was a motion in the original cause. We may add, also, that what we said in *Carraway v. Lassiter, supra,* was not intended to change the doctrine as to the rights of innocent purchasers at judicial sales or to impair those rights; but the case, when considered with reference to its own facts and the authorities cited, will clearly appear to be in perfect accord with our previous decisions and the ruling in the present case. In con-
(206) sidering the cases decided by this Court as to the validity of judicial sales, care should be taken to examine each case and to construe what is said by the Court with due regard to the special facts and the nature of the case itself, whether a motion in the original cause to vacate the judgment for irregularity or a separate civil action, and, in the former case, whether the rights of *bona fide* purchasers for value have intervened. An independent action will undoubtedly lie to set aside a judgment in a former proceeding or in a civil action upon the ground of fraud or when it involves some other equitable element, when relief can only be had in that way. *Gulley v. Macy, supra,* was such a case, and numerous others of a like character are to be found in our reports. The distinction is stated with clearness in *Syme v. Trice, supra.*

In our case fraud was alleged, but it was not established, nor was any issue submitted in regard to it. The verdict of the jury only ascertains that there was irregularity in the former proceeding. The jury did not even pass upon the rights of Mrs. Roberts as an innocent purchaser. The case, therefore, would seem to be governed by the decision of this Court in *Sumner v. Sessoms,* 94 N. C., 376, in which *Chief Justice Smith* says: "The only complaint of the action of the court in licensing the sale and directing title to be made pursuant to its terms proceeds from the plaintiffs, while the other heirs are passive and acquiesce in what was done. A guardian *ad litem* was appointed for the infant defendant, whose

acceptance and presence in court must be assumed, in the absence of any indication in the record to the contrary, from the fact that the court took jurisdiction of the cause and rendered judgment. It is true, the record produced does not show that notice was served on the infant or upon her guardian *ad litem,* nor does the contrary appear in the record, which, so far as we have it, is silent on the point. The jurisdiction is presumed to have been acquired by the exercise of it, and, if not, the judgment must stand and cannot be treated as a nullity until so declared in (207) some impeaching proceeding instituted and directed to that end. The irregularity, if such there be, may in this mode be such as to warrant a judgment declaring it null, but it remains in force until this is done. The voluntary appearance of counsel in a cause dispenses with the service of process upon his adult client. The presence of a next friend or guardian *ad litem* to represent an infant party, as the case may be, and his recognition by the court in proceeding with the cause, preclude an inquiry into his authority in a collateral proceeding and require remedial relief to be sought in the manner suggested, wherein the true facts may be ascertained. This method of procedure, so essential to the security of titles dependent upon a trust in the integrity and force of judicial action, taken within the sphere of its jurisdiction, is recognized in *White v. Alberson,* 14 N. C. 241; *Skinner v. Moore,* 19 N. C., 138; *Keaton v. Banks,* 32 N. C., 384, and numerous other cases, some of which are referred to in *Hare v. Holloman, supra,* and all of which recognize the imputed errors and imperfections as affecting the regularity and not the efficacy of the judicial action taken." The proceeding assailed in that case was commenced in 1870. *Carter v. Rountree,* 109 N. C., 29.

In this case it appears that there was a general appearance by counsel for all the defendants and an answer filed, and when this is the case the judgment cannot be attacked collaterally, even if the attorney had no authority to act in that capacity. It can make no difference that some of the defendants were infants. *White v. Morris,* 107 N. C., 92; *Turner v. Douglas,* 72 N. C., 127.

While it may not be necessary to the decision of this appeal, as we view it, to consider what may be the rights of Mrs. Roberts as an innocent purchaser, for all the facts in regard to that question are not now before us, it may be well to refer again to the general doctrine settled by this Court, to the effect that when there is a purchase under an order or judgment, the purchaser need only inquire if upon the (208) face of the record the court apparently has jurisdiction of the parties and the subject-matter, in order to be protected, provided he buys in good faith and without notice of any actual defect. *Morris v. Gentry,* 89 N. C., 248; *England v. Garner,* 90 N. C., 197; *Syme v. Trice, supra; Adams v. Howard,* 110 N. C., 15; *Williams v. Johnson,* 112 N. C., 424;

Sledge v. Elliott, supra; Herbin v. Wagoner, 118 N. C., 656; *Harrison v. Hargrove,* 120 N. C., 96; *Morris v. House,* 125 N. C., 550. In *Sutton v. Schonwald,* 86 N. C., 198, when discussing this subject, the Court says: "In such cases the law proceeds upon the ground as well of public policy as upon principles of equity. Purchasers should be able to rely upon the judgments and decrees of the courts of the country, and, though they know of their liability to be reversed, yet they have a right, so long as they stand, to presume that they have been rightly and regularly rendered, and they are not expected to take notice of the errors of the court or the laches of parties. A contrary doctrine would be fatal to judicial sales and the values of title derived under them, as no one would buy at prices at all approximating the true value of property if he supposed that his title might at some distant day be declared void because of some irregularity in the proceeding altogether unsuspected by him and of which he had no opportunity to inform himself. Under the operation of this rule occasional instances of hardship (as this one of the present plaintiffs seems to be) may occur, but a different one would much more certainly result in mischievous consequences and the general sacrifice of property sold by order of the court. Hence it is that a purchaser who is no party to the proceeding is not bound to look beyond the decree if the facts necessary to give the court jurisdiction appear on the face of the proceedings. If the jurisdiction has been improvidently exercised, it is not to be corrected at his expense who had a right to rely upon the order of the court as an authority emanating from a competent source, (209) so much being due to the sanctity of judicial proceedings." The Court, in *Herbin v. Wagoner, supra,* thus refers to that case: "It was held accordingly that the purchaser's title was not rendered invalid by the reversal of the decree on account of the irregularity in the proceeding, of which the purchaser had no notice. In that case the defendant acted as guardian of two infants, being, however, guardian for only one, and sold the land of both under an order of the court, and the sale was upheld."

As the plaintiff in her complaint alleges fraud and collusion, and may be able to establish her charges at the next trial, and as defendants moved to nonsuit at the close of the plaintiff's evidence, but did not renew the motion at the close of all the evidence (Revisal, 539; *Means v. R. R.,* 126 N. C., 424; *McCall v. R. R.,* 129 N. C., 298), we will not dismiss the action, but award a new trial for error in the ruling of the court as indicated, and set aside the judgment upon the verdict.

New trial.

Cited: Rutherford v. Ray, post, 262; *Hargrove v. Wilson,* 148 N. C., 441; *Bailey v. Hopkins,* 152 N. C., 751; *Barefoot v. Musselwhite,* 153

N. C., 211; *Glisson v. Glisson, ib.*, 186; *Phillips v. Denton*, 158 N. C., 302; *Harris v. Bennett*, 160 N. C., 344, 346; *Cooke v. Cooke*, 164 N. C., 287; *Massie v. Hainey*, 165 N. C., 178; *Cox. v. Boyden*, 167 N. C., 321; *Hassell v. Steamboat Co.*, 168 N. C., 298; *Pinnell v. Burroughs, ib.*, 320; *Johnson v. Whilden*, 171 N. C., 155.

JOHN B. VICK, ADMINISTRATOR, v. W. S. FLOURNOY ET AL.

(Filed 25 March, 1908.)

1. State Courts—Jurisdiction—Nonresident Defendants—Quasi in Rem.

The courts of this State have jurisdiction of the persons of nonresident defendants to the extent required in proceedings *in rem* or *quasi in rem*, when personal service, is made by complying with the requirements of Revisal, sec. 448, and the property is situated here.

2. State Courts — Jurisdiction — Nonresident Defendants — Locus in Quo — Situs.

A motion, by special appearance of nonresident defendants, to dismiss the action for want of jurisdiction of the person will not be granted in a suit to redeem lands and to enforce a contract solely in respect of the same, when the *locus in quo* is situated within the State and personal service was made in compliance with Revisal, sec. 448.

3. Service—Summons—Nonresident Defendant—Seal of Clerk—Irregularity.

A summons issued without the seal of the clerk of the court, personally served upon nonresident defendants (Revisal, sec. 448), is an irregularity.

4. Service—Summons—Nonresident Defendant—Seal of Clerk—Irregularity Cured.

Objection made to the summons for that it was issued under Revisal, sec. 448, without the seal of the clerk of the court, to nonresident defendants, cannot be sustained when it appears that defendants have been actually notified of the time and place of the trial and informed of the nature and purpose of the action. Such defect may now be cured by the act of the clerk in supplying the seal pursuant to order properly made in the cause.

MOTION to dismiss action, heard before *Neal, J.*, at October (210) Term, 1907, of EDGECOMBE.

The facts upon which said notice was considered and determined were as follows:

On August 1, 1884, John Vick, who was the owner of a tract of land in Edgecombe County, North Carolina, executed to O. C. Farrar a mortgage on said land to secure a note for $1,474.34, which he owed Farrar

and which was due and payable on 1 January, 1885. This mortgage was put to record in the Edgecombe registry, in Book 59, at page 265.

On .. May, 1891, O. C. Farrar died testate and G. B. Wright qualified as his executor.

On .. January, 1892, George B. Wright, executor, etc., and John Vick made an agreement that the said Wright, executor, should take possession of the land and work out the mortgage debt then due, and, in pursuance of that agreement, Wright, executor, did go into possession of the tract of land.

On .. September, 1894, G. B. Wright, executor, died, and F. S. Royster qualified as administrator *d. b. n. c. t. a.* of O. C. Farrar.

On 11 April, 1898, John Vick, the owner of the land, died intestate, and on 23 August, 1907, his son, John B. Vick, qualified as his
(211) administrator. He was also the sole heir at law of the decedent.

In pursuance of the agreement by which Wright went into possession of the land and after his death, the succeeding administrator, F. S. Royster, remained in possession of the same till 14 April, 1898, receiving the rents and profits therefrom.

On 14 April, 1898, the land was allotted to Annie M. Farrar as heir at law of O. C. Farrar in the division of his lands among his heirs at law, and soon thereafter the said Annie M. Farrar was married to the defendant W. S. Flournoy.

The said Annie M. Flournoy, from the time the land was allotted to her in the division of her father's land among his heirs at law, to wit, 14 April, 1898, remained in possession of the same, receiving the rents and profits therefrom, till November, 1898, when, by regular proceedings begun by Mrs. Mary Vick (John Vick's widow) against Annie M. Flournoy and John B. Vick (John Vick's heir at law), dower was allotted in the tract of land to Mrs. Mary Vick. The boundaries of the dower tract are specifically set out in the complaint, and the proceedings are duly recorded in the records of Edgecombe County.

After her dower was allotted, in November, 1898, Mary Vick, the widow of John Vick, went into possession of the dower part of said land and held the same, receiving the rents and profits, till 30 August, 1905, when she died.

F. S. Royster, the administrator *d. b. n. c. t. a.* of O. C. Farrar, and Annie M. Flournoy and her husband, W. S. Flournoy, are all nonresidents of North Carolina, the former residing in Virginia and Mr. and Mrs. Flournoy in Missouri.

Various and sundry payments have from time to time been made on the mortgage debt of John Vick prior to his death, and these payments, with the rents and profits collected by Wright and Royster, are sufficient to discharge the mortgage debt.

On 11 August, 1906, J. B. Vick brought his suit in the Superior Court of Edgecombe County to redeem the said land and to enforce the contract made in respect of the same with him by the said Wright, (212) executor, by virtue of which he went into possession.

All the defendants being nonresidents, personal service could not be had, and plaintiff made service in compliance with provisions of subsection 8, section 218, Clark's Code, or section 448 of the Revisal of 1905. With the requirements of this statute strict compliance was made.

When the case came on for hearing, the defendants, through their counsel, who had entered special appearance, moved to dismiss the action, upon the ground that the court had "no jurisdiction of the persons of the defendants, for want of proper service of the process." Motion sustained, and the plaintiff appealed.

F. S. Spruill, W. O. Howard, and J. R. Gaskill for plaintiff.
W. Stamps Howard and G. M. T. Fountain for defendants.

HOKE, J., after stating the case: The principal question presented in this appeal, on the right of plaintiff to proceed as a matter of jurisdiction in the court, has been resolved against the defendants' position in several decisions of this Court, notably the case of *Bernhardt v. Brown,* 118 N. C., 701 *et seq.* In that well considered opinion the present *Chief Justice* points out the different methods by which a court may acquire jurisdiction of a cause and of parties litigant, and, among other rulings, holds as follows.

"1. There are three modes for the 'due services of process'—(*a*) by actual service, or, in lieu thereof, acceptance or waiver by appearance; (*b*) by publication, in cases where it is authorized by law, in proceedings *in rem,* in which case the court already has jurisdiction of the *res,* as to enforce some lien on or a partition of property in its control; (*c*) by publication of the summons, in cases authorized by law, in proceedings *quasi in rem,* in which cases the court acquires jurisdiction by attaching property of a nonresident, absconding debtor, etc. A judgment (213) obtained under process served by the two last-named methods has no personal efficacy, but acts only on the property.

"2. A proceeding to enforce a mechanic's lien being *in rem,* the service of summons by publication is authorized by section 218 (4) of The Code, if defendant cannot after due diligence be found in the State, whether he is a nonresident or a resident.

"3. In an action to enforce a mechanic's lien and in all other proceedings *in rem* it is not necessary, as in proceedings *quasi in rem,* to acquire jurisdiction by actual seizure or attachment of the property, the mere bringing of the suit in which the claim is sought to be enforced being equivalent to seizure."

In *Graham v. O'Bryan,* 120 N. C., 463, the same judge, for the Court, said: "A service by publication on a nonresident, in an action affecting property, is valid without attachment." And again, in *Long v. Ins. Co.,* 114 N. C., 465, and in other cases, it has been held that while personal service of process in another State on a nonresident defendant is in lieu of service by publication and only available in cases where such service would be sufficient, yet when the statute so provides and its terms are complied with, both methods are valid as to actions substantially *in rem* or *quasi in rem,* and where the relief sought is restricted to an application of the property seized by process in the cause or to a judgment affecting the title to property or some interest therein or lien thereon which had its *situs* within the limits of the court's jurisdiction.

The cases are in accord with the decisions of the Supreme Court of the United States on the same subject. *Pennoyer v. Neff,* 95 U. S., 715; *Arndt v. Griggs,* 134 U. S., 316. In this last case, being an action to determine the interest of certain claimants to real estate situated within the State of Nebraska, and to quiet the title thereto, *Mr. Justice Brewer,* delivering the opinion of the Court, quotes with approval from *Beebe v. Doster,* 36 Kan., 666, 675, 677 *et seq.,* as follows: "Mortgage liens,
(214) mechanics' liens, material men's liens, and other liens are foreclosed against nonresident defendants upon service by publication only. Lands of nonresident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against nonresidents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication. *Gillespie v. Thomas,* 23 Kan., 138; *Walkenhorst v. Lewis,* 24 Kan., 420; *Rowe v. Palmer,* 29 Kan., 337; *Venable v. Durch,* 37 Kan., 515, 519. All the States, by proper statutes, authorize actions against nonresidents and service of summons therein by publication only, or service in some other form no better; and, in the nature of things, such must be done in every jurisdiction, in order that full and complete justice may be done where some of the parties are nonresidents." And again: "Turning now to the decisions of this Court: In *Boswell v. Otis,* 9 How., 336, 348, was presented a case of a bill for a specific performance and an accounting, and in which was a decree for specific performance and accounting, and an adjudication that the amount due on such accounting should operate as a judgment at law. Service was had by publication, the defendants being nonresidents. The validity of a sale under such judgment was in question. The Court held that portion of the decree and the sale made under it void, but, with reference to jurisdiction in a case for specific performance alone, made these observations: 'Jurisdiction is acquired in one of two modes—first, as against the person of the defendant, by the service

of process, or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be (215) substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem* in ordinary cases; but where such a procedure is authorized by statute on publication, without personal service or process, it is substantially of that character.' And on the question before them the Court held: '(1) A State may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court by publication. (2) The well settled rules that an action to quiet title is a suit in equity, that equity acts upon the person, and that the person is not brought into court by service by publication alone, do not apply when a State has provided by statute for the adjudication of titles to real estate within its limits as against nonresidents who are brought into court only by publication.' "

This is an action to establish plaintiff's title to a tract of land situated within the jurisdiction of the court, and to relieve the same from any and all liens that the defendants may hold on same. The terms of the statute providing for personal service beyond the State have been duly complied with. Revisal, 448. And a correct application of the principles announced in the foregoing decisions clearly determines that if the facts are established as alleged, the court has jurisdiction to afford the relief demanded. There is no doubt of the correctness of the position urged upon us by the defendant's counsel, that a valid judgment strictly *in personam* cannot be had unless there has been a voluntary appearance by defendant or there has been service of process upon him within the jurisdiction of the court, and that personal service of process beyond the jurisdiction does not affect the principle or render such a judgment valid. But the relief sought here is not strictly *in personam,* and, while it may not be with exactness a proceeding *in rem,* the decisions all treat it as substantially *in rem,* and the question of the court's jurisdic- (216) tion comes clearly within the principles we hold to be controlling, and the facts bring the case within the express terms of our statute providing for service by publication. Revisal, 442. Such service may be had whenever defendant is a proper party relating to real property, and (subsection 3) "where he is not a resident of this State, but has property therein and the court has jurisdiction of the subject of the action"; (subsection 4) "where the subject of the action is real or personal property in this State and the defendant has or claims a lien or interest, actual or

contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein."

Objection is further made to the summons served, for that same is not under seal of the court. We are inclined to the opinion that, under Revisal, sec. 431, a seal is required—certainly it is always desirable—when a summons is sent to a distance. Its presence may serve to assure the officer of another State that the proceedings are in good faith and under official sanction; but when it appears that the defendants have been actually notified, as in this case, not only of the time and place when they are required to appear, but also fully informed of the nature and purpose of the action, the objection that there is no seal to the summons is not of the substance. If the officer has acted without it, the absence of a seal is only an irregularity, which may be cured now by having the seal affixed, and the same may be said as to the form of the summons. It is sufficient to notify the parties, and is a substantial compliance with the statute, accompanied as it is by a sworn statement of the nature of the action. The power of amendment to the extent indicated has been upheld by express decision. *Henderson v. Graham,* 84 N. C., 496; *Clark v. Hellen,* 23 N. C., 421.

We hold that the court had acquired jurisdiction and there was error in dismissing the action.

Reversed.

Cited: Lawrence v. Hardy, 151 N. C., 128; *Warlick v. Reynolds, ib.,* 610; *Calmes v. Lambert,* 153 N. C., 252; *Johnson v. Whilden,* 166 N. C., 109.

(217)

CHARLES A. BROWN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 25 March, 1908.)

1. Assault — Damages — Limitations of Actions — Agreement Not to Plead Statute.

In an action to recover damages for an assault it is necessary for the plaintiff, in order to rebut the plea of the one-year statute of limitation [Revisal, sec. 397 (3)], forbearance on his part to sue, to show an agreement with defendant not to plead it, or some conduct on his part which would make it iniquitous for him to do so. Defendant's promise to investigate the charges and his unaccepted request not to sue at all, without any reference to the statute, are insufficient.

2. Same—Writing—Quære.

As to whether a promise not to plead the statute of limitations [Revisal, sec. 397 (3)] in an action to recover damages for an assault should be in writing, *quære.*

BROWN *v.* R. R.

APPEAL from *Jones, J.*, at October Term, 1907, of CUMBERLAND. Plaintiff appealed. The facts are stated in the opinion.

Thomas H. Sutton for plaintiff.
Rose & Rose for defendant.

CLARK C. J. Action was begun 4 June, 1906, to recover damages for an assault committed 19 September, 1904. To rebut the plea of the statute of limitations [Revisal, sec. 397 (3)], the plaintiff relies upon evidence that the deceased attorney or claim agent of the defendant "orally requested plaintiff's attorney not to bring suit; that he would give the matter his special attention and try to adjust it in some way," . . . and that "the matter would be settled without suit being brought," and later, in the summer of 1905, "requested plaintiff's attorney not to bring suit—to leave the matter open still further, and said, 'We can adjust claim without suit.'" Four letters of defendant's attorney were put in evidence, but contained no request as above, but merely promised to investigate the matter. His Honor being of opinion (218) on this evidence that the statute of one year applied, the plaintiff took a nonsuit and appealed.

The oral declarations of the deceased agent were objected to by defendant, but were admitted by the court. *Sprague v. Bond,* 113 N. C., 551. But there is in them no such promise "not to plead the statute of limitations," either expressly or by such implication as should have been relied on by the plaintiff or have made it iniquitous for defendant now to plead that defense. There was no promise of plaintiff not to sue. There was simply a request of defendant not to sue, without any acceptance by plaintiff and without any promise by defendant to waive the statute as a consideration. It was no more than chaffering, and if plaintiff did not sue it was his own fault to refrain without an agreement to waive the statute. The courts cannot dispense with the statute upon such evidence.

In *Hill v. Hilliard,* 103 N. C., 34, the point is fully discussed by *Shepherd, J.*, who holds that, to waive the statute, there must be an "agreement, either express or implied, not to plead it." Here there is no agreement, which requires two parties, but merely a request not to sue and an expression of opinion that the matter would be adjusted. There was no time fixed and no sum mentioned, though the claim was for damages for a tort; no promise to pay, no acknowledgment of liability, and no promise not to plead the statute, and no consideration offered for such promise. There was no agreement of any kind. *Hill v. Hilliard, supra,* was approved in *Cecil v. Henderson,* 121 N. C., 247. *Faircloth, C. J.*, who wrote that opinion, in the later case of *Raby v. Stuman,* 127 N. C.,

464, said: "The defendant is not estopped to plead the statute, as his promise was not an agreement not to plead it, as it was in *Haymore v. Comrs.*, 85 N. C., 268." In this last there was an agreement that the case should abide the decision in another case, which was, of course, a promise not to plead the statute.

(219) There may be cases, as is intimated in *Tomlinson v. Bennett*, 145 N. C., 279, where the conduct and promises of defendant, while not amounting to an express promise not to plead the statute, may be so calculated to throw the plaintiff off his guard as to make it iniquitous to plead the statute. But certainly not so here, where there is no acknowledgment of any liability, no sum or time indicated, and no promise not to sue.

In 25 Cyc., 1339, it is said: "It is necessary, in order to arrest the running of the statute of limitations, that there be acknowledged the present existence of a debt or obligation, nor is it sufficient that the claim be acknowledged as just." In *Joyner v. Massey*, 97 N. C., 153, *Smith, C. J.*, was of the opinion that a promise not to plead the statute in consideration of refraining from suit must be in writing, since a promise not to use such plea against a debt is required to be in writing. Revisal, sec. 371. That statute provides that a new *or continuing* contract must be in writing and signed by the party to be charged, but the Court did not decide the point.

Affirmed.

J. A. WADE v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY.*

(Filed 25 March, 1908.)

1. Measure of Damages—Easements—Evidence.

In an action for permanent damages to land, claimed by reason of construction of a telephone line, the measure of damages is the difference in value before and that after the burden was imposed upon it, and while it were better form to ask witness the value of the land in each event, it is not reversible error to permit him to testify directly to the amount of the damages.

2. Same—Evidence—Opinion Evidence.

While it is essentially a matter of opinion, in an action to recover permanent damages, for witness, who knows the land, to testify to the value of plaintiff's land upon which defendant has constructed its telephone line, and the effect upon such value by improvements upon the one hand or burdens upon the other, it is not objectionable as "opinion evidence." The jury may give it such weight as they think it entitled

*BROWN, J., did not sit at the hearing of this case.

to, in connection with the intelligence of the witness, his means of observation, and all the other circumstances attending his testimony.

3. Same—Instructions—Corporations—Easements—Harmless Error.

An instruction upon the measure of damages, in an action against defendant corporation to recover permanent damages to land occasioned by the construction of its telephone lines, that the jury will consider the value of the "franchise of the company" is harmless error when it appears that his Honor's meaning was the value of the easement or privilege acquired over plaintiff's land, and the plaintiff was not prejudiced.

4. Limitations of Actions—Easements—Highways—Permanent Damages.

Revisal, sec. 1571, applies to the statute of limitations respecting defendant's constructing its telephone lines along a highway, and is not applicable when the action is for permanent damages otherwise occasioned to the use of plaintiff's land by the construction of telephone lines.

APPEAL from *Jones, J.*, at October Term, 1907, of CUMBERLAND. (220)

The plaintiff alleges that the defendant entered upon his land, dug holes thereon, placed poles and swung wire upon them over and across the land, and thereby occupied and appropriated it to its use; that by such entry and appropriation he has sustained damage, by reason of the decreased value of his land, to the amount of $200. Defendant denies that it has placed any poles or strung any wires over plaintiff's land. It admits that more than three years prior to the beginning of the action it placed its poles and strung its wires, or a part of its telephone line, along the public highway, passing by plaintiff's land. It avers that the poles are so placed that no injury has been done the public or plaintiff. Defendant relies also upon the statute of limitations. There was evidence on the part of plaintiff that the poles were on his land; that he forbade defendant's agent from placing them thereon, and has (221) never consented thereto. Defendant's witnesses testified that the poles were on the side of the highway and not on plaintiff's land. There was evidence tending to show that the road was changed during the year 1905. Plaintiff was permitted to answer, in response to a question, over defendant's objection, that the poles and wires had "decreased the value of his land $300 or $400." Defendant excepted. Other witnesses on behalf of plaintiff were asked the same question and permitted to answer. Defendant excepted to all of this testimony. The estimates of the decrease in value of the land varied, some putting it at $250 and one witness at $400. The defendant's witness testified that the poles and wires did not affect the value of the land. At the conclusion of the evidence defendant moved for judgment of nonsuit. Motion denied, and defendant excepted.

The following issues were submitted to the jury:

"What permanent damage has plaintiff sustained by reason of the defendant's appropriation of his land, as described in the complaint?

"Is plaintiff's action barred by the statute of limitations?"

The jury answered the first issue, "One hundred and twenty five dollars," and, under the instructions of his Honor, answered the second "No." There were exceptions to the instructions given by the court, which are set out in the opinion.

Judgment for plaintiff. Defendant appealed.

Cook & Davis and Sinclair & Dye for plaintiff.
Robinson & Shaw and J. C. Clifford for defendant.

CONNOR, J., after stating the case: The exceptions to the admission of evidence cannot be sustained. The measure of plaintiff's damage is the diminution in the value of the land by the occupation and appropriation of it to the extent of the easement acquired by defendant under its charter in placing and keeping its poles and wires thereon. The (222) action is not for trespass, in which the damage may be assessed to the time of the trial for the real injury done the land. The plaintiff, treating the defendant's act as an appropriation of his land for the purpose of maintaining its telephone line, sues for the permanent damage sustained by reason of the burden or easement thus imposed upon it. Damage is the difference in the value of the land before and after the burden is imposed upon it or the decrease in the value by reason of the burden. Defendant recognized this rule of damages by asking the court to so instruct the jury, which was done. The objection to the question and answer is that the witness is permitted to give his opinion of the decrease in value by reason of the burden imposed. While it would have been better form to have asked the witness his opinion respecting the value before the poles were put upon the land and afterwards, we can perceive no substantial difference in this and the question asked. The value of a tract of land and the effect upon such value by improvements on the one hand or burdens on the other is essentially a matter of opinion. It is insisted that "opinion evidence" is not admissible. Thus stated, the proposition is incorrect. To exclude all "opinion evidence" in the trial of cases before the jury, and to require each witness to detail all the facts of which he has knowledge and upon which his opinion is based in regard to the value of a tract of land would be impracticable and useless. There must of necessity, in the transaction of business and other affairs of life, be a large number of matters in regard to which men act upon the opinion of others. The distinction between that class of cases in which opinions may be expressed only by experts or persons having skill and

experience and those in which any person having means and opportunity of forming an opinion is well stated in *Clary v. Clary,* 24 N. C., 78. It is said: "Mere opinion as such is not admissible. But when it is shown that the witness has had an opportunity of observing the character of the person or the handwriting which is sought to be identi- (223) fied, then his judgment or brief, framed upon such observation, is evidence for the consideration of the jury, and it is for them to give to this evidence that weight which the intelligence of the witness, his means of observation, and all other circumstances attending his testimony may in their judgment deserve. And why is this but because it is impossible for the witness to specify and detail to the jury all the minute circumstances by which his own judgment was determined, so as to enable them by inference to form their judgment thereon? The question is discussed and many authorities cited in Greenleaf Ev. (16 Ed.), sec. 441 (g). *Judge Elliot,* in *Yost v. Conroy,* 92 Ind., 464, says: "It is impossible to conceive that juries or courts can justly estimate benefits and damages without the aid of opinions of values from competent witnesses, unless, indeed, it be assumed that courts and juries have knowledge of the values of all kinds of property. If this assumption were just, then no doubt all that would be needed would be an accurate description of the property; but every one knows that in the very great majority of cases neither courts nor juries possess such knowledge as would enable them, unaided by opinions, to affix just values to property.

"It is the purpose of evidence to place jurors in possession of such facts as will enable them to award the litigant that which he is justly entitled to recover. In order to justly measure the amount of recovery the jury must, where property rights alone are concerned, know the value of the thing of which the plaintiff is deprived, and whatever evidence tends to place them in possession of this knowledge should be regarded as competent. Opinions from witnesses of integrity and knowledge must always be of service to impartial triers upon such a question. The weight of a witness's opinion depends upon his knowledge, his integrity, and the facts which he states as constituting the basis of his judgment. It is, therefore, not correct to assume that wild or ill-considered opin- (224) ions will control; on the contrary, the presumption of the law is exactly the reverse. It is to be presumed that only the opinions of honest witnesses, possessed of competent knowledge and assigning sufficient grounds for their judgment, will prevail.

"The question which here directly faces us is this: Is it competent to prove the value of land before a ditch is constructed and what its value will be after the construction of the ditch? It cannot be doubted that such evidence tends to assist in determining the question of damages and benefits, nor is there reason for supposing that it is not material. The

situation of the land and the location and capacity of the ditch may be described with perfect accuracy, and yet a jury be utterly unable to form a just estimate of the amount of benefits or damages. Of what assistance to a jury composed of clergymen, merchants, and bankers would be a description of the minutest accuracy without some estimate of values by competent witnesses? Possibly it would enable such a jury to form a crude conjecture; it could do but little more. In such a case as that supposed the testimony of witnesses possessed of knowledge and honesty, expressing their opinion of the value of the land with and without the ditch, would go very far in assisting the jury to a safe and just conclusion. It is no doubt true that such evidence is subject to some objections, but is there any class of human evidence entirely free from imperfections? If it be subject to objection greater in degree than evidence of facts, is it not true that the objections will lie against opinions of values in every imaginable case? If we would declare the evidence incompetent upon this ground, then we must close the door against the admission of opinions in all classes of actions, for if the objections are valid in the one instance, so they are in all. But they are valid in none."

(225) There is a marked tendency on the part of the courts to recognize the truth that "rules of evidence are based upon experience, and not logic." It is difficult to perceive why testimony which experience has taught is generally found to be safely relied upon by men in their important business affairs outside should be rejected inside the courthouse. *Ins. Co. v. R. R.*, 138 N. C., 42; *Taylor v. Security Co.*, 145 N. C., 383.

His Honor at the request of defendant, instructed the jury that "The measure of damages which the plaintiff is entitled to recover, if anything, is the difference in market value of his tract of land immediately before and immediately after its appropriation to the uses of the defendant, and in arriving at the amount of such damage the jury should take into consideration any benefits accruing to the plaintiff and any enhancement of the value of his land, if any, by reason of the erection and maintenance of defendant's telephone line upon his land."

And the court, in addition, charged the jury: "In estimating what damage, if any, the plaintiff is entitled to recover the jury will take into consideration that the lines and poles will remain upon plaintiff's land for all time to come; that he cannot build a building or fence upon the land which will in any way interfere with the defendant's use of its line; that he cannot complain of any damages which the defendant may do to crops or fences upon the land, in so far as such damages may be necessary in the operation or repair of its line. You will also take into consideration the value of said franchise to the company and place upon it such reasonable value as you shall find."

Defendant excepted to the last sentence in the instruction, because of the use of the word "franchise." We do not understand, nor do we think that the jury understood that his Honor used the word with reference to defendant's chartered privileges. He evidently meant to tell the jury that they should take into consideration the value of the easement or privilege acquired by defendant over plaintiff's land. While (226) the charge as given is not happily expressed, we do not think that the defendant could possibly have been prejudiced or that the jury could have been misled in regard to the measure of damages. They gave plaintiff about one-half the amount estimated by his witnesses. His Honor correctly instructed the jury to answer the issue regarding the statute of limitations. Defendant's counsel submitted to the court several instructions based upon the theory that the poles were on the highway and not upon plaintiff's land, thus treating the action as having been brought by plaintiff to recover damages for the additional burden placed upon the highway. The questions which counsel thus proposed to raise, and which were argued by them, are excluded by the verdict. The jury find that the defendant had appropriated plaintiff's land, "as described in the complaint." What plaintiff's rights as against defendant may have been if the poles had been on the highway passing through his land, in the light of the provisions of section 1571, Revisal (*Hodges v. Tel. Co.*, 133 N. C., 225, and *Phillips v. Tel. Co.*, 130 N. C., 513), is not presented. Revisal, sec. 1571, applies only to the right conferred upon the telephone companies to construct their lines along the highway. An examination of the entire record discloses no reversible error.

No error.

Cited: *Davenport v. R. R.*, 148 N. C., 295; *Morrisett v. Cotton Mills*, 151 N. C., 33; *Lumber Co. v. R. R., ib.*, 221; *Whitfield v. Lumber Co.*, 152 N. C., 214.

(227)

R. L. GODWIN ET AL. v. ERWIN COTTON MILLS COMPANY.*

(Filed 1 April, 1908.)

Contracts — Bankruptcy—Preferences—Principal and Agent—Partnership—Evidence—Demurrer.

"Equity regards that as done which ought to be done." Defendant and Y. entered into an agreement to form a corporation for mercantile purposes. With this in view, Y. bought goods, commenced business and thereafter requested defendant to pay for its part of the merchandise, which it did. The business was chartered, but not incorpo-

*BROWN, J., took no part in the decision of this case.

rated. Y. sent a bill of sale of the merchandise to defendant without its suggestion, in value equaling the amount paid by defendant. In an action by the trustee in bankruptcy of Y. to recover the amount as a fraudulent preference: *Held*, (1) there was no evidence to establish the relationship of debtor and creditor nor of partnership; (2) there was no evidence of fraud or a preference, under the bankrupt act; (3) the court should, upon the foregoing evidence introduced by the trustee in bankruptcy, have sustained a demurrer and dismissed the action.

HOKE, J., concurred in the result.

APPEAL by both parties from *Jones, J.*, at May Term, 1907, of HARNETT.

The plaintiffs' evidence and the verdict of the jury tend to establish the following facts: Defendant corporation was, some time prior to 16 May, 1903, engaged in building a cotton mill at Duke, a village a few miles distant from Dunn, in Harnett County. E. F. Young, who resided in Dunn, had prior thereto been the agent of defendant company at Dunn. Young and W. A. Erwin had made an agreement looking to the establishment of a "commissary" at the mills, when completed, to be known as "The Young Mercantile Company." Prior to the time at which the mercantile company was to be started, and in pursuance of the agreement, Young opened a commissary at Duke, the purpose being to organize the corporation when the mill was completed. A charter was obtained from the Secretary of State for the said Young Mercan-
(228) tile Company, 5 August, 1903, Young taking five shares, Erwin four shares, and Fuller one share. The company was never organized. Young, a witness for plaintiff, testified: "As the work increased it became necessary to enlarge the stock, and a few days prior to the receipt of the check (in controversy) Mr. Erwin was at Duke, and I told him I wanted him to advance some money for the commissary, and he agreed to do so, and sent the check, accompanied by a letter, as follows: 'Enclosed please find our check on Fidelity Bank, Durham, N. C., No. 16862, for $2,000, in payment of the advancement that you recently made in the purchase of stock of merchandise for the commissary at Duke, and which, agreeable to understanding and in consideration of this payment, you are to assign to the mercantile company to be incorporated by us. Wishing, etc. (Signed) Erwin Cotton Mills Company, by W. A. Erwin, Secretary and Treasurer.'" This letter, with the check, bears date of 16 May, 1903. On 9 June, 1903, Young acknowledged receipt of the check "for commissary account, on terms as stated in letter inclosing the same." The check was deposited in bank to Young's personal account. He had bought the goods for the commissary with his individual funds. The Erwin Cotton Mills Company was to have stock in The Young Mercantile Company. On 6 February, 1904, Young executed a bill of sale

to the Erwin Cotton Mills Company (reciting a consideration of $2,000) of the goods, wares, merchandise, etc., of the "commissary situated in the village of Duke." This assignment was made and sent by Young to Erwin without any request from him. Young says: "At the time I got this check for $2,000 it was understood between Mr. Erwin and myself that this was to be accounted for in the formation of the commissary. . . . I was not then indebted to defendant." It was found by the jury that defendant sold the goods assigned for $2,304, leaving a balance of $218, which was paid to Young, 4 June, 1904, before the proceedings in bankruptcy and before any suit was brought. The testi- (229) mony of W. A. Erwin, a witness for defendant, was substantially the same as Young's about the agreement in regard to the commissary. He says: "We began a commissary business under the name of 'Commissary.' Mr. Young was working for us and was acting for The Young Mercantile Company in conducting that business. Goods were bought and business begun. Young told me on one occasion he had spent $4,000 for goods and wanted half; so I sent him check on my return. . . . We neither loaned nor advanced him the $2,000, but paid him $2,000 for one-half interest in the stock of goods he told me he had paid for. The stock of goods belonged to Young Mercantile Company and we were paying our part. . . . I never considered myself a partner with E. F. Young in his mercantile business. The commissary belonged one-half to Young and one-half to Erwin Cotton Mills. The cotton mills put in $2,000 because Young said he had put $4,000 in the business and we wanted to pay our half of it." The jury found, under instructions from the court, that the defendant had no interest "as partner" in the stock of goods; that Young was indebted to defendant in the sum of $2,000; that the transfer was an unlawful preference, and that defendant had reasonable cause to believe that a preference was intended by Young. There was testimony bearing upon the last two issues which, in the view taken by the court, becomes immaterial. Young was insolvent 6 February, 1904, and adjudged a bankrupt 4 June, 1904. The defendant moved for judgment of nonsuit. Motion denied. Defendant excepted. There are other exceptions in the record, not necessary to be set out. Plaintiffs demanded judgment for the whole amount for which defendant sold the goods, as found by the jury to be $2,304. The court rendered judgment that plaintiffs recover of defendant $2,000, and refused to adjudge the recovery of the amount paid to E. F. Young, $218. Both parties excepted and appealed.

Godwin & Townsend, R. L. Godwin, and Stewart & Muse for (230) *plaintiffs.*

Rose & Rose and J. C. Clifford for defendant.

CONNOR, J., after stating the case: We are of the opinion that this case was tried upon an erroneous theory or principle. Taking the plaintiffs' evidence to be true, and it is fully sustained by the two letters which give character to the transaction, and the evidence of the defendant, it is clear that, in respect to the $2,000 check sent Young by the defendant, the relation of debtor and creditor did not exist. The defendant company never loaned Young the amount and Young never promised to pay it. The facts repel any implied promise to do so. It is manifest that Young expressly assumed the duty to hold the goods as the property of the mercantile company and, upon the organization of the corporation, to transfer them to it. If the corporation had been organized, can there be any doubt that, by an action in the nature of a bill in equity, the performance of this duty, upon Young's own evidence, would have been enforced and he required to assign the goods? Is it not equally clear that if for any good reason the agreement to organize was not affected, Young had the goods in trust for the persons who had paid for them? The jury correctly found that there was no partnership relation between the parties. How it may have been in respect to persons who may have become creditors of the "commissary" or Young Mercantile Company (in process of formation) is another and different question, not presented upon this appeal. For the purpose of carrying into effect an agreement to open and conduct a "commissary" at the mills, to be organized under a charter, Young bought and paid for the goods and called upon defendant to pay its one-half of the amount which he had expended. Recognizing its obligation to do so, defendant sent Young the check "in payment of the advancement that you recently made in the purchase of stock of merchandise for the commissary at Duke, and which, (231) agreeable to understanding and in consideration of this payment, you are to assign to the mercantile company to be incorporated by us." Young acknowledges receipt "for the purpose indicated." There is nothing in this transaction which either shows or tends to make Young the debtor of defendant. If the goods had been destroyed by fire, is it not clear that the loss, to the extent of one-half, would have fallen upon the defendant? Instead of making Young the debtor of the defendant, the transaction savors more strongly of a payment by the defendant to Young of a debt due him. He had advanced $4,000 to purchase a stock of goods for the joint benefit of defendant and himself, and the latter was paying its part of the money advanced. The equitable principle upon which the relation of the parties rested, and by which their duties and rights are fixed, finds expression in the maxim that "Equity regards that as done which ought to be done." Of this maxim Mr. Bispham says: "This is a very important maxim, and which lies at the foundation of many of the great doctrines of equity. For the purpose of reaching

exact justice, equity will frequently consider that property has assumed certain forms of which it ought in justice to assume, or that parties have performed certain duties which they ought in justice to fulfill, and will regulate the enjoyment and transmission of estates and interests accordingly." Bispham Eq., sec. 44. Professor Pomeroy says: "It is the source of a large part of that division of equity jurisprudence which is concerned with equitable property; the doctrines and rules which create and define equitable estates or interests, in a large measure, are derived from its operation. . . . In the first place, it should be observed that the principle involves the notion of an equitable *obligation* existing from some cause; of a present relation of equitable right and duty subsisting between two parties—a right held by one party, from whatever cause arising, that the other should do some act, and the corresponding duty, the *'ought,'* resting upon the latter to do such act. Equity does not regard that as done which *might* be done or that *could* be (232) done, but only what *ought* to be done. Nor does the principle operate in favor of every person, no matter what may be his situation and relations, but only in favor of him who holds the equitable right to have the act performed, or against the one upon whom the duty of such performance devolved. . . . When, in this proposition, it is said that an 'equity' exists between the two parties, the meaning is that some equitable obligation to do some positive act with respect to the subject-matter arising from a cause recognized by the rule of equity jurisprudence rests upon B., and a corresponding equitable right to have the act done by B. with respect to the same subject matter springing from the same efficient cause is held by A. This active relation subsisting between the two parties, a court of equity, partly acting upon its fundamental principle of going beneath the mere external form and appearance of things and dealing with the real fact, the real, beneficial truth, and partly for the purpose of making its remedies more complete, treats the resulting right of A. as though the obligation of B. had already been performed—regards A., in fact, as clothed with the same ultimate interests in the subject-matter which he would receive and hold if B. had actually fulfilled his obligation by doing the act which he ought to do." 1 Pom. Eq., sec. 365; Adams Eq., 135 (6 Am. Ed., 295.) Many illustrative cases can be found in our own and the reports of other States. The conceded facts in this case bring it within the maxim. Young, for a valuable consideration, *ought* to have made the assignment immediately upon the receipt of the check. Equity, for the purpose of effectuating the intention of the parties and doing exact justice, regards him as having done so, and secures to the defendant, to which he owed the duty, the benefit of its maxim. Young made the assignment in conformity to his agreement. He did exactly what a court of equity would have

(233) decreed him to do. Conceding that he did so because he found that his financial condition was becoming involved, we can perceive no reason why a delayed performance of a clear legal duty in respect to this specific property, to which his general creditors had no claim or right, can be imputed to him or to the defendant for unrighteousness. It has been well said: "When chancery interposes to compel the performance of an act which has been covenanted to be performed, it always treats the subject as if it had been performed at the time contracted." Thus, money placed in the hands of a trustee with direction to buy land and take title in the name of a *cestui que trust* will be regarded in equity as real estate and be disposed of, in the event of death before the purchase is made, accordingly. When land is devised or conveyed with direction to sell and pay the proceeds to specified persons, it will be treated as money and be so distributed in the event of death before the sale is made. Trusts will be impressed upon property by applying the maxim. As said, equity disregards mere form and looks to the substance, administering rights and remedies, molding decrees to the securing of justice. It is immaterial whether the defendant knew of Young's insolvency. No liens had attached, no adjudication in bankruptcy had been made on 6 February, 1904, the date of the assignment. Young made the assignment, the goods were sold and the whole matter closed up before there was an adjudication in bankruptcy. We are of the opinion that, upon the entire evidence, defendants were entitled to judgment of nonsuit.

This disposes of both appeals.

Error in defendant's appeal.

Plaintiff's appeal affirmed.

HOKE, J., concurred in result.

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R. H. GULLEDGE, ADMINISTRATOR, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 1 April, 1908.)

1. Revisal, Sec. 59—Actions—Negligence—Killing—One Year—Condition Annexed—Limitations of Actions.

Under Revisal, sec. 59, giving a cause of action on account of the wrongful killing of intestate to the (executor) administrator or collector of decedent, the provision that suit should be brought within one year after such death is a condition annexed and must be proved by the plaintiff to make out a *prima facie* case, and is not required to be pleaded as a statute of limitation.

2. Same—Controversy—Executors and Administrators—Collectors.

It is no excuse for plaintiff not bringing an action under Revisal, sec. 59, within one year, etc., to show that there was a controversy over the administration. A collector should have been appointed for the purpose of suit.

ACTION to recover damages for the death of plaintiff's intestate, tried before *Webb, J.*, and a jury, at October Term, 1907, of ANSON.

There was a verdict and judgment against defendant and an appeal therefrom to this Court.

Robinson & Caudle, H. H. McLendon, J. T. Bennett, and J. A. Lockhart for plaintiff.

John D. Shaw and Murray Allen for defendant.

BROWN, J. The defendant moved to dismiss the action because the evidence of plaintiff disclosed that the action had not been commenced within one year from the death of plaintiff's intestate. The intestate died 16 April, 1902, and the action was not commenced until 26 January, 1906. The plaintiff contends that the statute of limitations has not been pleaded in the answer, and, further, that there was a prolonged contest over letters of administration upon the intestate's estate, begun 7 June, 1902, and ended in June, 1905, which time should not be counted, under Revisal, sec. 369. This action is brought under section 59 of the Revisal of 1905: "Whenever the death of a person is caused by a (235) 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 administrators, executors, 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."

Unfortunately for the plaintiff's case, this Court has heretofore interpreted the words "to be brought within one year," contained in the statute, as a condition annexed to the cause of action, and not as a statute of limitation which must be pleaded. Before the plaintiff can make out a *prima facie* case he must offer evidence tending to prove that the action was commenced within one year after death.

In *Taylor v. Cranberry Co.*, 94 N. C., 526, *Justice Merrimon*, speaking for the Court, says: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate. It must be accepted in all respects as the statute gives it."

In *Best v. Kinston,* 106 N. C., 205, it is held that the fact that no administrator was appointed does not vary the rule, as no explanation why the action was not brought within one year can avail. These cases are cited with approval in the more recent case of *Hartness v. Pharr,* 133 N. C., 571.

The old law prohibiting usury contained a similar clause, requiring that the action must be commenced within two years. It was held not to be a statute of limitation and that the statute need not be pleaded; for, says the Court, "Unless he commences his action within two years from the usurious transaction, he has no cause of action." *Roberts v.* (236) *Ins. Co.,* 118 N. C., 434; *Tayloe v. Parker,* 137 N. C., 418. The present statute in respect to usury is different and creates a statute of limitation. This condition which the Legislature has annexed to the cause of action works no hardship upon the next of kin, for whose benefit the statute was enacted, for the statute provides that the action may be brought by a collector as well as an executor or administrator. Doubtless the General Assembly wisely intended to compel the commencement of such actions before time had obliterated the evidence relating to the cause of death. The fact that a controversy over the administration was pending could not prevent the next of kin of plaintiff's intestate from having a collector appointed, who could have brought the action within the statutory time. By reason of their failure to do so they have now no cause of action which the administrator can assert. The motion to nonsuit is allowed.

Reversed.

Cited: Hall v. R. R., 149 N. C., 109; *Bennett v. R. R.,* 159 N. C., 346.

OSCAR WHITFIELD v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 April, 1908.)

1. Evidence—Opinion—Speed of Train.

The "opinion" of the witness as to the speed of a moving train at the time he was endeavoring to get aboard is competent evidence.

2. Employer and Employee—Respondeat Superior—Employment.

The doctrine of *respondeat superior* does not apply when the brakeman, not on duty, but being permitted by the conductor to ride to his home on the train, at the request of the conductor goes to the agent at a station for some flowers for him and is injured in boarding the moving train as it left the station.

3. Contributory Negligence—Moving Train—Evidence—Nonsuit.

The contributory negligence of plaintiff in attempting to board a train moving at the rate of 15 miles an hour will bar his recovery, in the absence of evidence making the case an exception to the general rule, and a judgment as of nonsuit on the evidence, on proper motion, should have been allowed.

CLARK, C. J., dissenting, *arguendo.*

ACTION for damages for personal injury, tried before *Long, J.,* (237) and a jury, at November Term, 1907, of WAYNE.

The court submitted these issues:

1. Was the plaintiff injured by the negligence of the defendant company? Answer: "Yes."

2. Did the plaintiff by his own negligence contribute to said injuries? Answer: "No."

3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: "Five hundred dollars."

At the conclusion of the evidence the defendant moved to nonsuit the plaintiff, which motion was denied, and defendant excepted. From the judgment rendered defendant appealed.

The facts are stated in the opinion of the Court.

W. T. Dortch and J. L. Barham for plaintiff.
Aycock & Daniels for defendant.

BROWN, J. The plaintiff was a brakeman of a freight train, in defendant's employment. At the time of the injury he was not on duty, but was on his way to his home at Mount Olive from Wilmington. He was traveling on a freight train by permission of the "boss man," who refused him a pass, but told him to get aboard the freight and go home. Plaintiff was riding on the engine when the train reached Magnolia. The conductor directed him to get off and see the agent and inquire if there was a package of flowers for him. The conductor told plaintiff to get the flowers and then catch the train. The plaintiff testifies further: "I got off and went to agent and told him what Captain Southerland told me. The agent said there was no package there for Captain Southerland. I went back to get on the train. When I went to get on the train it gave a sudden snatch and threw me right under it. My left leg was cut off a little above the knee and my right forefinger near the upper joint. Do not know how fast the train was running when I tried to get on. I guess it was running 10 or 15 miles per hour. I had not been in the employment of the railroad quite two months at that time." No other evidence was introduced, and the case rests (238)

entirely upon plaintiff's own version of the facts, and upon these facts we are of opinion that the judge erred in not sustaining the motion to nonsuit. We place the same construction upon the language of the plaintiff in reference to the speed of the train which his counsel place upon it in their brief, viz., that he was giving *"his opinion"* of the speed at which the train was running at the time he attempted to board it. His opinion was, nevertheless, evidence, for no witness can do more than give an opinion upon such a matter, and it is the only evidence in this case bearing upon it.

We are somewhat at a loss to understand upon what theory of negligence the court below held the defendant liable, but assuming for the sake of the argument that there is evidence of negligence, then upon the unbroken line of precedents the plaintiff, upon his own evidence, is guilty of such contributory negligence as bars recovery. The general rule is that persons who are injured while attempting to get on or off a moving train cannot recover for any injury they may sustain in so doing. *Burgin v. R. R.,* 115 N. C., 673. This rule is reiterated by the present *Chief Justice* in *Johnson v. R. R.,* 130 N. C., 488, and enforced by *Mr. Justice Walker* in *Morrow v. R. R.,* 134 N. C., 99, where all our precedents and many others are collected. There may be some few exceptions to the rule, but this case falls within none of them.

In a case very similar to this the Court of Appeals of New York says: "In boarding a moving train there is generally less excuse than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens in the former case. He may be compelled to wait for another train, but this is an inconvenience merely, which does not justify exposing himself to hazard." *Hunter v. R. R.,* 112 N. Y., 378. See, also, *Denny v. R. R.,* 132 N. C., (239) 340; *Gordon v. R. R., ib.,* 565.

The motion to nonsuit is allowed and the action dismissed.

Error.

CLARK, C. J., dissenting: On the motion to nonsuit in this Court there is a double presumption in favor of the plaintiff: First, the presumption that always exists as to the proceedings below, that the jury and judge were correct in rendering the verdict and judgment in his favor; and, second, the evidence must be taken in its most favorable aspect to the plaintiff and with the most favorable inferences that can be drawn from it.

The plaintiff testified that he was a brakeman in defendant's employ; that he was not acting as such this day; that he was refused a pass and was told that he must work his way home, and was handling freight on the train that day, like other brakemen. When he got to Magnolia the

conductor told him to get off and see the agent there and get a package. He got off the train and saw the agent, who said there was no package for the conductor. He went back to get on the train, and as he went to get on the train "it gave a sudden snatch and throwed him right under it." His left leg was cut off a little above the knee and his right forefinger near the upper joint. He does not know how fast the train was running. He was laid up two years and is not able to do anything yet. The conductor told him to get the package and get back on the train. It does not appear that the train did not come to a full stop. Presumably it did, according to the custom of freight trains.

This state of facts shows that the plaintiff was an employee; that, by orders of the conductor on the freight train, he got off at the station to get a package, with directions to get back on the same train; that he obeyed his orders, and in trying to get back on the train and as he did so "it gave a sudden snatch," and this "threw him right under" the train, by which the poor fellow lost his leg, has been laid up two years, and is still unable to do anything. The plaintiff did not come (240) into this great trouble by any voluntary act of his own. The conductor, under whose orders he was working, told him to get off, to get a package, and get back on the train. He did as he was ordered, and he dared not disobey. As he was getting back on the train it gave a "sudden snatch" and he was thrown under it and hurt. It was negligence in the conductor, after having given such order, to start the train off before the plaintiff got back. The "sudden snatch" was also evidence of negligence. As plaintiff was hurt in obeying orders, the court should not nonsuit the case, but submit it to the jury. *Mason v. R. R.*, 111 N. C., 483.

In all the above there was sufficient evidence of negligence on the part of the conductor and engineer, and nothing to excuse them. The solitary bit of evidence against the plaintiff is that, after saying he "did not know how fast the train was going," the poor, ignorant brakeman further said: "I guess it was running 10 or 15 miles an hour." If the two statements stood on an equal footing, it was for the jury to find which was true, and certainly on a motion to nonsuit only that evidence is to be taken which is most favorable to the plaintiff.

But the statements are not of equal value. This Court has often held that in such matters as the speed of trains, the distance in which they can be stopped, etc., the "jury are at liberty to exercise their own common sense and to use the knowledge acquired by their observation and experience in everyday life in solving the question." *Deans v. R. R.*, 107 N. C., 693; quoted and approved; *Lloyd v. R. R.*, 118 N. C., 1013; *Wright v. R. R.*, 127 N. C., 227. The jury, applying their common sense, knew that a freight train starting out from a station could not

possibly reach a speed of 10 or 15 miles an hour before it cleared the station; they knew that the plaintiff could not catch hold of a train moving at that speed; they knew that a man who "guessed" a speed at "10 to 15 miles" an hour was not entitled to have his guess considered
(241) accurate, with so wide a margin. They did what a sensible, fair-minded jury ought to have done, and found that the other part of his testimony, that he "did not know how fast the train was running," was the simple truth, and that his subsequent wild guess of "10 to 15 miles" was, from their own observation of freight trains leaving a station, an impossibility. The jury were at liberty to believe all or a part or none of the witness's testimony. And, on a motion of this kind, the Court must take as true the evidence most favorable to the plaintiff. If a witness makes inconsistent statements the jury, not the court, must say which is correct. *Ward v. Mfg. Co.*, 123 N. C., 248.

It is a hard measure to reverse this rule, and, when all the evidence shows the negligence of the conductor or engineer as the cause of the injury save one sentence of an ignorant man, a wild "guess" which is against natural evidence, to take the latter as true and nonsuit the plaintiff on account of it. The jury found, on the conflicting statements, that the plaintiff "did not know" the speed, and that he was not guilty of contributory negligence. How can this Court find that he did know?

This is not the case of a passenger voluntarily getting off. It is an employee getting back on the train under orders to do so; and if it was running too fast, that was the negligence of the conductor, who, having ordered the plaintiff to get back on the train, should have seen to it that the train was not moving too fast for him to get on. The plaintiff had simple faith that the conductor would do this, and such "faith should not be counted unto him" as his own negligence. Even where a passenger gets off a moving car with the assent of the conductor, express or implied, it is not negligence. *Lambeth v. R. R.*, 66 N. C., 495; *Nance v. R. R.*, 94 N. C., 623; *Watkins v. R. R.*, 116 N. C., 967; *Johnson v. R. R.*, 130 N. C., 488. Certainly it cannot be negligence when he is not a
(242) passenger, but an employee, and he gets on or off because he is ordered to do so. The plaintiff testified that the "sudden snatch" threw him under the car—not the speed—and the jury find, under his Honor's charge, that the actual speed was not sufficient to make contributory negligence.

The case was fairly put to the jury in the following charge: "If you find from the evidence that the plaintiff was on the defendant's train, in transit to his home, at the time alleged in the complaint, by permission of the conductor in control of the train, and that he was doing certain work, aiding in loading or unloading freight on the trip, under the direc-

tion of the conductor; and if you find that when the train reached Magnolia the conductor ordered the plaintiff to see the agent at Magnolia, get a package for the conductor, and then to board the train, and you find that the plaintiff obeyed the order of the conductor, inquired for the package, and then undertook to board the train, which was running, and was thrown under the train and had his finger and leg cut off, then the question of negligence of the defendant and of the plaintiff will depend upon how you shall find the other facts to be. If the motion of the train was such as to speed that the danger of getting on the train would not be apparent to a reasonable person, and you find that the plaintiff acted under the instructions of the conductor and undertook to board the train and was injured, then the resulting injury was not caused by the contributory negligence or want of care of the plaintiff. Ordinary care is that degree of care which may have been reasonably expected from a sensible person in the situation of the plaintiff and defendant at the time. The general rule is that a person who gets off a train or on a train while in motion is guilty of contributory negligence. If the conductor ordered the plaintiff to board the train, as alleged in the complaint, and he undertook to do it; if the train was moving at such speed that to board it was manifestly dangerous and so apparent as to deter a man from boarding the train who used ordinary prudence and care, you would in such event answer the first issue 'No' and the (243) second issue 'Yes.' On the contrary, if plaintiff was ordered to get on the train at the time and place alleged by the complaint, and you find that the danger of getting on the train, moving as it was then found to be moving, was not so apparent as to deter a man of ordinary prudence from doing so, then you would answer the first issue 'Yes' and the second issue 'No,' provided you further find that the plaintiff was injured as alleged."

His Honor further instructed the jury "that the burden of proof is on the plaintiff as to the first issue and on the defendant as to the second issue; that is to say, the plaintiff must satisfy you by the greater weight of evidence that the defendant was negligent, or you will answer the first issue 'No'; but the burden is upon the defendant to satisfy you by the greater weight of the evidence that the plaintiff was guilty of contributory negligence, or you will answer the second issue 'No.'"

On the evidence, with the aid of the lucid and correct statement of the law thus laid down by the court, the jury did not permit the wild "guess" of an ignorant man as to the speed of a train which he had just said he "did not know" to overcome all the rest of his testimony, which clearly convicted the conductor of negligence and not the plaintiff. And certainly, on appeal, we cannot reject all the evidence in favor of plaintiff

because of one paragraph that is otherwise, and wholly disregard likewise the presumption that the judge and jury acted correctly.

Cited: *Owens v. R. R., post,* 359; *Lumber Co. v. R. R.,* 151 N. C., 221; *Reeves v. R. R., ib.,* 320; *Carter v. R. R.,* 165 N. C., 254.

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CORINTHIAN LODGE v. SMITH & BAKER.

(Filed 1 April, 1908.)

1. Contracts—Breach—Condition Precedent—Legal Excuse—Liability.

A party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligagations arising on the contract or some legal excuse for a nonperformance, when the stipulations are not concurrent.

2. Contracts, Executory — Conditions Precedent — Strict Compliance — Liability.

When the conditions imposed upon the plaintiff, in an action to recover of defendant damages for his nonperformance of an executory contract, are in the nature of conditions precedent, a strict compliance therewith may be insisted on by defendant in bar of a recovery.

3. Same—Waiver.

Plaintiff and defendants entered into an executory contract that defendants would rent a store in a building of plaintiff's, then under construction, to be completed, heated with steam heat, and ready for occupation by 1 January following. The building was not completed when contracted to be, and for some time after 1 January was heated by two stoves. Plaintiff informed defendants in December that the store would not be ready by 1 January. Defendants were merchants, doing a retail business, for which the store was to have been used: *Held,* (1) that plaintiff could not recover damages on account of defendants' refusal to take the store when not completed as and at the time agreed upon; (2) that the information given beforehand that the store would not be completed 1 January does not affect the question, in the absence of some act or thing done by the defendants amounting to a waiver of their right of demand for a strict performance of the contract.

(The difference between this and a "builder's contract," in its accepted meaning, and the liability under the latter, discussed and distinguished by HOKE, J.)

APPEAL from *Neal, J.,* and a jury, at October Term, 1907, of EDGECOMBE.

There was evidence tending to show that plaintiff lodge, in 1904, was

erecting a Masonic temple for the use of the order in the town of Rocky Mount, N. C., and intended to prepare the first floor, 25 x 130 feet, to rent as a storeroom for mercantile purposes, and, pending (245) the construction of the building, plaintiff entered into a contract with defendants to rent them the store for one year, with privilege of renewal, at the contract price of $700 per year, to commence 1 January, 1905; that defendants failed and refused to take the store as agreed upon, to plaintiff's damage $375. Defendants admitted that they had entered into an executory contract to lease the store; that they had refused to take the same, and justified their action on the alleged ground that the contract stipulated that plaintiff was to fit up and furnish the storeroom and have same provided with steam heat; with awnings at either end of store, same having two fronts; with oak counters, grained; have sidewalks in front of each end of store paved; and all to be completed and ready for occupation by 1 January, 1905; and that plaintiff had totally failed to comply with these requirements of the contract. On the trial there was conflict of testimony as to other terms of the contract and compliance with the same, but the evidence of both parties was to the effect that the storeroom was to be steam-heated and ready for occupation by 1 January, 1905; that the steam heat was not ready at that time, but the heat was turned on some time between the 5th and the 10th of January; that two stoves had been put in the building to supply heat for the workmen and then for use by defendants. H. E. Brewer, a witness for plaintiff, and one of the trustees, said that he told defendant Smith as early as 1 December that they could not get the heat in by 1 January, and he made no reply. At the close of the testimony his Honor stated to the counsel for plaintiff that he would instruct the jury "that if they should find from the evidence that the contract between the plaintiff and the defendants was that plaintiff was to have the store steam-heated, completed and ready for occupancy by 1 January, 1905, and did not have said store steam-heated on that day according to contract, but had it heated by two stoves, to answer the first issue 'No,' and this would be so notwithstanding the plaintiff had stated to the defendant (246) Smith, some time in December, 1904, that the plaintiff could not have the store steam-heated by 1 January, to which statement the said Smith made no reply; and if you so find the facts, then this would be the law, notwithstanding all else that appears in the evidence." In deference to this intimation, the plaintiff submitted to a nonsuit and appealed.

Gilliam & Bassett for plaintiff.
G. M. T. Fountain for defendants.

HOKE, J., after stating the case: In *Ducker v. Cochrane,* 92 N. C., 597, the Court held "that one party to a contract cannot maintain an

action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract or some legal excuse for a nonperformance thereof, or, if the stipulations are concurrent, his readiness and ability to perform them." This principle has been recognized and applied by us in many well considered cases. *Tussey v. Owen,* 139 N. C., 457; *Jones v. Mial,* 79 N. C., 164, modified, but not on this point, in 82 N. C., 252; *Niblett v. Herring,* 49 N. C., 262; *Grandy v. McCleese,* 47 N. C., 142. And it is also well established that when the stipulations imposed by such a contract on the complaining party are in the nature of conditions precedent a strict compliance may be insisted on. *Mizell v. Burnett,* 49 N. C., 249; *Norrington v. Wright,* 115 U. S., 188; *Oakley v. Morton,* 11 N. Y., 25; *Pickering v. Greenwood,* 114 Mass., 479.

A correct application of the principles upheld in these cases fully sustains the charge as proposed by his Honor, and in our opinion there is nothing presented here which would justify the Court in holding that substantial compliance had been shown or that time was not of the essence. The testimony is to the effect that defendants were merchants having an established business in the town of Rocky Mount, and (247) they agreed to take a lease of plaintiff's storeroom if it was furnished with steam heat and ready for occupation in this and other specified particulars by 1 January, 1905. They were not called on to accept two stoves as a substitute for the steam heat for which they had contracted, and they were not required to enter in the occupation of an unfinished storeroom without knowing how long such a condition would continue—a condition that might subject themselves and customers to much annoyance and possibly result in a substantial falling off of their trade. They had made a careful contract, provident against any serious interruption of their business by reason of the contemplated move, and they had a right to insist that its terms be complied with in the specified particulars and within the specified time. Nor are defendants estopped from maintaining this defense by the fact that one of plaintiff's trustees told one of defendants, on or about 1 December, 1904, that plaintiff would not be able to complete the store within the time allowed. There is no testimony offered that at that time or afterwards defendants gave any directions about the work or assumed any authority over it or gave indication in any way that they waived their right to demand a strict performance of the contract; and there is nothing in this occurrence, therefore, which prevents them from setting up the defense on which they insist.

The doctrine which we hold to be controlling on the facts of this appeal is modified to some extent by a line of cases which establishes the principle that when "one party has performed the contract in a substantial part and the other party has accepted and had the benefit of the part per-

formance, the latter may under certain circumstances be precluded from relying on the performance of the residue as a condition precedent to his liability." 1 Beach Contracts, sec. 107; 9 Cyc., 645. This principle more usually obtains in the case of building contracts, when the owner or proprietor of a house that has been built or substantially completed by another has entered into the possession and use of his (248) building. In such case, owing to the great hardship and injustice that would frequently arise by a strict application of the general rule, the courts are disposed to lay hold of slight circumstance as justifying the modification suggested and apply the principle stated in Beach Modern Law of Contracts, as follows (section 108): "Where a building is erected upon and becomes a part of the realty of the owner, and, although defective in some respects, is of real and substantial value to the owner, the contractor can recover the value of his work, less the damages to the other party, for a failure to comply with the terms of the agreement." But the facts of this case do not call for or permit the application of the principle referred to. The defendants have never entered in possession of this storeroom, nor have they received or enjoyed the benefit of any labor or expenditure on the part of plaintiff. On the contrary, they insist that, by reason of plaintiff's failure to comply with antecedent conditions, they are not called on to take the plaintiff's store, and they are not responsible in damages for refusing to do so. While the contract is about a building, it is in no sense a building contract within the meaning of the principle which plaintiff seeks to invoke, but as between these parties it is an ordinary business contract, governed by the general principles stated at the outset and decisive of the question presented in defendants' favor.

There is no error, and the judgment below is

Affirmed.

Cited: Supply Co. v. Roofing Co., 160 N. C., 445; *Raby v. Cozad,* 164 N. C., 290; *McCracken v. R. R.,* 168 N. C., 67; *McCurry v. Purgason,* 170 N. C., 468.

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A. S. T. JOHNSON ET AL. v. EVERSOLE LUMBER COMPANY.

(Filed 1 April, 1908.)

1. Deeds and conveyances—Married Women—Probate of Certificate for Registration.

Since 1868 it has been necessary to the validity of a conveyance of land by a married woman for the probate court to adjudge that the certificate of the probate officer was "in due form and according to law." Revised Code, ch. 37; Revisal, secs. 999, 1001.

2. Deeds and Conveyances—Chain of Title—Defective Probate—New Trial.

Refusal of the court below to hold in rebuttal of plaintiff's chain of paper title that a certain deed therein was invalid for want of a proper adjudication and certificate by the probate court, when the probate of a married woman to a conveyance of land was not certified (since 1868) in due form and according to law, would be error, and a new trial in proper instances would be awarded.

3. Deeds and Conveyances — Married Women — Probate—Commissioner of Deeds—Seal.

When the copy of the certificate of the commissioner of affidavits for the State of North Carolina of the separate examination and acknowledgment of a married woman to a conveyance of lands situated here concludes, "Given under my hand and seal," the presumption is that the seal was affixed to the original, though not appearing in the copy. The seal, however, is not required to be registered, under Revised Code, ch. 21, sec. 2.

4. Pleadings—Admissions—Inconsistent Defenses.

In an action for trespass for cutting timber, when the plaintiffs make the necessary allegation of title, which is denied by the answer, it is not an admission of plaintiffs' title for the answer to set up, in addition, a prayer for affirmative relief, "that the plaintiff be decreed a trustee for his benefit."

APPEAL from *McNeill, J.*, at March Term, 1906, of SWAIN.

Defendant appealed. It was argued in and determined by this Court during the Spring Term, 1907, and no error adjudged. It is again before this Court upon a petition to rehear. The facts are stated in the opinion.

George H. Smathers and Shepherd & Shepherd for plaintiffs.

A. M. Fry and Davidson, Bourne & Parker for defendant.

(250) CLARK, C. J. Petition to rehear this case, reported 144 N. C., 717. After deciding several points therein, the Court added that the "other exceptions do not require discussion." The petition to rehear

is rested upon alleged inadvertence in this last particular, and we think there was an inadvertence as to one point which entitles the appellant to a new trial. This was properly presented in appellant's brief on the former argument, but was not pressed in the oral argument.

Reaffirming in every respect the decision in this case (144 N. C., 717) on the points therein decided, we think there was error below as to the following point, which was not discussed in the opinion: The defendant, to show a break in plaintiffs' chain of title, offered a deed from Wilson and wife to Farrer, dated 1 February, 1859, and registered 8 April, 1859. This deed was duly acknowledged and the privy examination of the wife taken in the District of Columbia before a commissioner of deeds of this State in said District, as appears from the certificate of said commissioner in due form attached to said deed and duly registered. The order of the court of pleas and quarter sessions merely directed that said deed and certificate of the commissioner "be recorded and registered in Jackson County," without any adjudication that the certificate was "in due form and according to law." Such adjudication is required by the statute of 1868, and ever since, to be made by the probating officer in this State as an essential part of the order of registration (Revisal, secs. 999, 1001), and the omission of such adjudication has always been held under such statute to make the registration without authority of law and without effect. *Starke v. Etheridge*, 71 N. C., 243; *Todd v. Outlaw*, 79 N. C., 237; *Evans v. Etheridge*, 99 N. C., 46, and numerous cases since. But these all rest upon the wording of the statute in force in 1868 and since. Those cases cite, it is true, cases prior to 1868, but such cited cases are only to the well settled rule that when the probate, acknowledgment, or order of registration does not conform to the statute the registration is void.

The statute in force when this foreign acknowledgment, privy (251) examination, and order of registration took place, in 1859, was Rev. Code, ch. 37, sec. 5, which did not contain any requirement, as now, that the probate court here should after due examination *adjudge* that the acknowledgment and privy examination were duly proven and that the certificate was *in due form before ordering registration*; but said section 5, ch. 37, Rev. Code, only required that the instrument, "being exhibited in the court of pleas and quarter sessions of the county where the property is situate or to one of the judges of the Supreme Court or of the Superior Courts of this State, shall be ordered to be registered with the certificates thereto annexed." Presumably these officers would not have ordered any such conveyance to registration unless it had appeared to be duly proven and certified in due form. But as the statute did not at that time require the probating officers, as now, to so adjudge as a preliminary condition to making the order of registration, a failure

to enter such adjudication as a part of the order does not invalidate the registration, and it was error to exclude the deed as evidence. The probate to this very deed was presented (*Johnson v. Duvall,* 135 N. C., 642), but the Court did not find it necessary to pass on it.

The certificate of the commissioner of deeds in the record concludes with the words "Given under my hand and seal." The presumption is that the seal was affixed to the original. *Shepherd, C. J.,* in *Heath v. Cotton Mills,* 115 N. C., 208. It does not appear that it was not. Besides, the statute of that date (Rev. Code, ch. 21, sec. 2) does not require the certificate of the commissioner to be under seal, though doubtless the probating court or officer would have doubted the authenticity of a certificate from another State lacking an official seal and would have refused an order of registration. The point, moreover, is directly passed upon as to this very probate in *Johnson v. Duvall,*
(252) 135 N. C., 642, and the omission of any seal to the commissioner's certificate held immaterial.

The plaintiff further insists that this was not an action of ejectment, and that the defendant, by setting up a prayer for affirmative relief, that the plaintiff be decreed a trustee for its benefit, admitted title in the plaintiff. It is essential that the plaintiff should aver and show that he is owner of the property to sustain his action for damages for trespass in cutting timber by defendant, and the allegations as to title are denied in the answer. The equitable relief demanded by defendant, based upon further allegations in the answer, is not a waiver of such denial. Inconsistent defenses can be pleaded. Revisal, 482; *Ten Broeck v. Orchard,* 79 N. C., 521; *Reed v. Reed,* 93 N. C., 465; *Threadgill v. Comrs.,* 116 N. C., 628. And these cases are far from measuring up to the classic instance where a defendant, sued for damaging a borrowed pot, answered (1) that the pot was cracked when he got it; (2) that it was not cracked when he returned it; (3) that he had never had the old pot.

For the error in excluding the deed from Wilson to Farrer there must be a new trial.

Petition to rehear allowed.

Cited: Cozad v. McAden, 148 N. C., 12; *s. c.,* 150 N. C., 210; *King v. McRackan,* 168 N. C., 623.

(253)

L. A. RUTHERFORD AND WIFE v. MRS. L. P. RAY, EXECUTRIX, ET AL.

(Filed 1 April, 1908.)

1. Lands—Suits—Quieting Title—Removing Cloud Upon Title.

Under Revisal, sec. 1589, a suit may be instituted by any person against any other person claiming an interest adverse to his title for the purpose of quieting it or removing a cloud therefrom.

2. Judgments — Justice of the Peace — Collateral Attack—Coverture—Innocent Purchasers.

To successfully attack a judgment rendered by a justice of the peace collaterally, upon the ground of coverture, the fact of coverture must appear upon the face of the record in the former action upon which the judgment was rendered, or it must have been pleaded therein; especially so as against a stranger or an innocent purchaser for value under the execution upon the judgment.

3. Appeal and Error—Jurisdiction of Parties—Supreme Court—Record Examined.

When the question is properly presented, the Supreme Court will examine the entire record, on appeal, to ascertain if jurisdiction of the parties to an action commenced before a justice of the peace has been acquired.

4. Appeal and Error—Objections and Exceptions, When Necessary.

Questions relating to procedure, admissibility of evidence and the like can only be reviewed on appeal in the Supreme Court when objections and exceptions are taken at the time.

5. Jurisdiction — Justice's Court — Process — Summons—Service—Different County.

A justice of the peace cannot acquire jurisdiction of the person by issuing summons to another county, when one or more *bona fide* defendants do not reside in his own county, and the defendant has done no voluntary act to confer it. (The question of mere jurisdiction of the parties and venue discussed and distinguished.)

6. Judgments, Void—Collateral Attack—Justice's Court—Jurisdiction of Parties.

A judgment rendered by a justice of the peace upon a summons wrongfully issued to another county is void and may be collaterally attacked.

7. Jurisdiction—Justice's Court—Lands—Liens—Proceedings Quasi in Rem.

A justice of the peace can acquire no jurisdiction of the person served with process in the wrong county by virtue of a lien filed on his land situated in the county in which the justice resides, upon the ground that the proceedings are *quasi in rem* and the judgment rendered affected the sale of the land under the lien upon it.

8. Judgment — Justice's Court—Transcript—Jurisdiction Shown—Purchaser for Value.

The transcript of a justice's judgment should show jurisdictional facts for the protection of purchasers of real property sold under execution thereon. When the transcript shows affirmatively that no jurisdiction had been acquired, the defense that the purchaser is one for value, etc., cannot be sustained.

CLARK, C. J., dissenting, *arguendo*.

(254) APPEAL from *Jones, J.*, at October Term, 1907, of CUMBERLAND.

This action is prosecuted by the *feme* plaintiff for the purpose of quieting and removing a cloud from the title to her separate real estate. The undisputed facts as disclosed by the record are: The *feme* plaintiff was, on 21 February, 1895, the owner of the real estate described in the complaint, being a lot in the city of Fayetteville. The deed under which she claims recites a consideration of $150. On the said day Poe & Co. filed in the office of the clerk of the Superior Court of Cumberland County an itemized account reciting that "Mr. L. A. Rutherford bought of Poe & Co." certain brick, the price whereof aggregate $45. He also filed notice of lien "against the said L. A. Rutherford and Nancy A. Rutherford for material furnished on the dwelling of said L. A. and Nancy A. Rutherford, as per bill of particulars herewith filed and attached." On 21 March, 1895, W. D. Gaster, justice of the peace in Cumberland County, issued a summons directed to the sheriff of Robeson County in behalf of Poe & Co. and against "L. A. Rutherford and Nancy A. Rutherford," commanding them to appear at his office in Fayetteville 4 April, 1895. The clerk of the Superior Court of Cumberland County duly certified that Gaster was a justice of the peace in said county. The summons was served on L. A. and Nancy A. Rutherford by the sheriff of Robeson County. On the return day judgment was
(255) entered by Gaster, justice of the peace, against defendant for $45, interest, and costs, no appearance having been made. It was also adjudged that the judgment constituted a lien "on a house and lot and material," etc. A transcript of this judgment was docketed on the judgment docket of the Superior Court of Cumberland County and execution issued thereon, directed to the sheriff of said county, on 1 October, 1895. The sheriff made return on said execution that he had sold the lot at public auction to N. W. Ray for the sum of $75, which he applied to the payment of the execution and cost, and that he paid the balance on another execution against defendants. The sheriff executed a deed to the purchaser. At the time the lien was filed, and at all times since, the *feme* plaintiff was a married woman. It does not appear from the

record in what county she and her husband resided at the time the summons was issued and served. She has been in the continuous possession of the lot since the sale by the sheriff. Mr. Ray, the purchaser, died, devising the lot to his wife, one of the defendants herein. The *feme* plaintiff alleges that the judgment of the justice and the sale were void, because she was a married woman. She demands judgment that the deed be declared void, etc. The only issues submitted to the jury were directed to the question of the *feme* plaintiff's marriage and her ownership of the lot. His Honor directed the jury, if they found the facts to be as testified to by the witnesses, to answer both issues "Yes." Defendants excepted. Judgment on the verdict, and appeal.

Rose & Rose and E. S. Wooten for plaintiffs.

Charles W. Broadfoot, John W. Hinsdale, and Shepherd & Shepherd for defendants.

CONNOR, J. The action is brought pursuant to the provisions of chapter 6, Laws 1893; Revisal, 1589. This statute was intended, and properly framed for that purpose, to permit any person to institute an action against any other person claiming an adverse (256) interest in land to have his title quieted and any cloud thereon removed. The purpose of the statute was to avoid the difficulties encountered by plaintiff in *Busbee v. Lewis,* 85 N. C., 332. The complaint attacks the validity of the judgment because of *feme* plaintiff's coverture. She encounters the difficulty in this aspect of the case that it does not appear upon the face of the record in the case of *Poe v. Rutherford* in the justice's court that the *feme* plaintiff was under coverture, nor is there any plea of coverture. This was necessary to enable the *feme* plaintiff to attack the judgment collaterally. *Neville v. Pope,* 95 N. C., 346; *Green v. Ballard,* 116 N. C., 146. We concur with defendants that in the absence of any indication on the record that Nancy Rutherford was a married woman or of any plea of coverture, the judgment is not void. Certainly it is not so against a stranger who purchases land sold under an execution issued upon it. The counsel for defendants insist that we are confined to the objection made by plaintiffs, and that, failing to sustain this contention, we should reverse the judgment. The plaintiffs, on the contrary, contend that an inspection of the record in *Poe v. Rutherford* discloses that the justice never acquired any jurisdiction of the parties. We think it our duty in such a case to examine the entire record, and if any fatal defect going to the jurisdiction is disclosed, to so adjudge it. There are matters pertaining to the mode of procedure, admissibility of testimony, and such like questions raised by rulings of the court which can be presented only by exceptions duly taken during

the trial. The *feme* plaintiff insists that the justice never acquired jurisdiction of her person, the summons having been issued to a county other than that in which she lived. It seems that chapter 63, section 50, Bat. Rev., as construed in *Sossamer v. Hinson,* 72 N. C., 578, authorized a justice of the peace, "when one or more of the defendants
(257) resided out of his county," to issue summons to such county, etc.

As noticed in *Lilly v. Purcell,* 78 N. C., 82, the law was changed by the act of 1876-'77, ch. 287, by providing that "No process shall be issued by any justice of the peace to any county other than his own unless one or more *bona fide* defendants shall reside inside of his county and one or more *bona fide* defendants shall reside outside his county, in which case only he may issue process to any county in which such non-resident defendant resides." The statute in this form was made section 871, The Code 1883, and so continued without amendment until incorporated into section 1447 of the Revisal of 1905, when the summons was issued and served on the present *feme* plaintiff in the action of *Poe v. Rutherford.* Was the judgment, in the absence of any appearance by her, void or only irregular? If the justice acquired jurisdiction of the person, and the only objection to his procedure was that the *venue* was wrong, we concur with the defendants' counsel that it cannot be attacked in this action. The distinction between process running out of the Superior Courts, having in respect to the counties of the State general jurisdiction, and from a justice's court, with limited jurisdiction, is obvious. In the former an action brought in some other than the proper county may be removed or, upon failure of defendant to ask for an order of removal, tried in the county in which the action was brought. It is a question of *venue* and not of jurisdiction. Revisal, sec. 425. A justice, having no jurisdiction to issue process running out of his county, is confined to the statutory method of acquiring jurisdiction of the person. The language of the statute expressly restricts his power to acquire jurisdiction by sending process out of his county unless one or more *bona fide* defendants reside in and one or more reside out of the county. In the record before us it is obvious that no defendant in the case resided in Cumberland County. The justice therefore had no power to issue summons to Robeson County, and therefore acquired no jurisdic-
(258) tion of the persons of the defendants by doing so. It is elementary that a judgment *in personam* against a person who is *sui juris,* when no process has been served or service accepted and no voluntary appearance made, and these facts appear on the record, is void and may be attacked collaterally. *Doyle v. Brown,* 72 N. C., 393; *Whitehurst v. Transportation Co.,* 109 N. C., 342, and many other cases. It is apparent from the record that no such summons as the justice had authority

to issue was served upon defendants; hence no jurisdiction of their persons was acquired and the justice had no power to render the judgment.

It is suggested by the learned counsel for defendants herein that the action to enforce a lien for material furnished for building is a proceeding *quasi in rem* and that the general statutory provisions regarding jurisdiction of the person do not apply. In *Smaw v. Cohen,* 95 N. C., 85, it is held that the justice has jurisdiction of an action to enforce a lien against the property of a married woman if the sum demanded is less than $200. This decision is based upon the language of the statute. It will be observed that the statute uses the words "according to the jurisdiction thereof." It cannot be that the Legislature intended by this indirect method to extend the jurisdiction of justices of the peace to issue summons, in actions to enforce liens, to any county in the State. We think that sufficient force was given the language of the statute in the enlargement of their jurisdiction by the decision in *Smaw v. Cohen, supra.* In respect to the statutes limiting their jurisdiction in issuing summons to other counties no change could have been contemplated or made.

The statement of the case in *McMinn v. Hamilton,* 77 N. C., 301, shows that the justice, the plaintiff, and defendant resided in the same county, and that the summons issued to that county. The defendant appeared and defended the action. He had administered in another county. The decision was clearly correct, and with all possible deference we are unable to see how it in the slightest degree mili- (259) tates against the conclusion reached by us. We do not think that an action to enforce the lien given for "material furnished" is a proceeding *quasi in rem.* The debt is the personal liability founded upon contract; the action is to recover judgment for the debt. The lien attaches, is filed and enforced as directed by the statute for the security and payment of the judgment obtained on the debt. We are therefore of the opinion that the judgment rendered in the action of *Poe v. Rutherford* by the justice was void and that the purchaser at the sale under the execution acquired no title.

We note that the "bill of particulars" filed shows no liability of the *feme* defendant, and that the plaintiffs did not prove their claim as required by Rule 8, section 1464, Revisal, which provides "that when a defendant does not appear and answer the plaintiff must still prove his case before he can recover." It may be that the law would presume that this was done or that the failure to do it rendered the judgment erroneous or irregular, but not void. In view of the fact that upon docketing a transcript of the judgment in the Superior Court a lien upon land is acquired and title passed under execution sale, it would seem that for the

protection of purchasers jurisdictional facts should be made to appear upon the transcript. It is uniformly held that if such facts appear on the record of judgments rendered by courts of general jurisdiction the purchaser is not required to look further, but is protected. Here the jurisdictional facts do not appear upon the justice's record. On the contrary, it does appear that the justice had no jurisdiction. Upon an inspection of the entire record we concur with his Honor's ruling. There is

No error.

CLARK, C. J., dissenting: In *Greene v. Branton,* 16 N. C., 504, *Ruffin, C. J.,* says: "Married women are barred by judgments at law as much as other persons, with the single exception of judgments allowed by the fraud of the husband in combination with another. . . . She (260) must charge and prove that she was prevented from a fair trial at law by collusion between her adversary and her husband preceding or at the trial." In *Vick v. Pope,* 81 N. C., 22, *Smith, C. J.,* quoting *Ruffin, C. J.,* in *Greene v. Branton, supra,* and *Taylor, C. J.,* in *Frazier v. Felton,* 8 N. C., 231 says: "If it were otherwise, how could a valid judgment ever be obtained against a married woman, and how could her liability be tested? . . . The judgment conclusively establishes the obligation, and such facts must be assumed to exist as warranted its rendition, inasmuch as neither coverture nor any other defense was set up in opposition to defeat it." And in *Neville v. Pope,* 95 N. C., 346, *Judge Merrimon* reaffirmed what the other three Chief Justices had said. In that case a judgment had been taken against a married woman before a justice of the peace, and in the action brought to set aside the judgment the plaintiff laid stress upon *Dougherty v. Sprinkle,* 88 N. C., 300, in which it had been held that such action could not ordinarily be maintained in a justice's court; but the Court said: "It may be that if the plaintiff in this case had made defense, pleaded her coverture, and had appealed from the adverse judgment given against her, she would have been successful; but she did not make defense at all, and as there was judgment against her according to the course of the court, it must be treated as conclusive that the cause of action and the facts were such as warranted the judgment." In *Grantham v. Kennedy,* 91 N. C., 148, the same learned judge, quoting the same authorities, said: "Married women and infants are estopped by judgments in actions to which they are parties in the same manner as persons *sui juris.*" *Vick v. Pope* was strongly indorsed by *Dillard, J.,* in *Nicholson v. Cox,* 83 N. C., 53. Both *Vick v. Pope* and *Neville v. Pope, supra,* have been cited in *Wilcox v. Arnold,* 116 N. C., 711; in *Patterson v. Gooch,* 108 N. C., 503, and in many other cases.

In *Neville v. Pope, supra* there was a direct attack by a motion (261) in the cause alleging that the justice of the peace had no jurisdiction of an action against a married woman by reason of the ruling in *Dougherty v. Sprinkle,* 88 N. C., 300, but the Court held that the objection could not be taken after verdict. This is not an action against the plaintiff in the original cause to assail the judgment, but it is an action collaterally to remove cloud on title against an innocent purchaser at an execution sale. For a stronger reason, therefore, the jugdment cannot be assailed thus collaterally on the ground of irregular service in the wrong county. The justice had jurisdiction of the amount and of the subject-matter, and the defendants were served with process. The Constitution fixes the jurisdiction of a justice of the peace, and this cause was within it. The Constitution does not forbid service of a justice's summons outside the county. Up to the act of 1876 it could be and was done. *Sossamer v. Hinson,* 72 N. C., 378. That act did not change the jurisdiction, but affected and restricted the *venue.* Service outside the county thereafter was irregular, not void. The defendants, having been served with a summons from a justice of the peace while in another county, should have made objection at the trial. Not having done so, as was said in *Vick v. Pope,* 81 N. C., 22, "the judgment conclusively establishes the obligation," and, as was later said in *Neville v. Pope,* 95 N. C., 346, as there was judgment against her, she having interposed no objection, it must be treated as conclusive. The justice had jurisdiction to declare the lien and give judgment. *Smaw v. Cohen,* 95 N. C., 85.

A judgment cannot be impeached collaterally on the ground that one recited in the pleadings and judgment as a party was not in fact made a party. *Weeks v. McPhail,* 128 N. C., 133, citing *Doyle v. Brown,* 72 N. C., 393, and many other cases.. In the latter case the matter was fully discussed, and it was held that if the record showed that one was served with process when in fact he was not, the judgment was (262) conclusive till attacked by direct proceeding. This case has been very often approved. See annotations thereto in the annotated reprint of 72 N. C., 396. In *Whitehurst v. Transportation Co.,* 109 N. C., 334, the Court held that when a summons before a justice of the peace purports to have been served when it was not, the judgment is not void, and the remedy is not in the Superior Court, but by motion in the cause. To the same effect *King v. R. R.,* 112 N. C., 319.

In *Cherry v. Lilly,* 113 N. C., 26, it was held that one justice of the peace could not issue a writ returnable before another justice of the peace (as here he could not issue to another county), yet, if the summons so issued was served and no objection taken, the judgment was valid.

That a judgment cannot be assailed collaterally, as here attempted, is well settled, and the doctrine is nowhere better stated than by *Mr. Justice Walker* in *Rackley v. Roberts, ante,* 201. The following quotation therein made and approved from *Sutton v. Schonwald,* 86 N. C., 198, is exactly in point: "Purchasers should be able to rely upon the judgments and decrees of the courts of the country, and though they know of their liability to be reversed, yet they have a right, so long as they stand, to presume that they have been rightly and regularly rendered, and they are not expected to take notice of the errors of the court or laches of parties. A contrary doctrine would be fatal to judicial sales and the values of titles derived under them, as no one would buy at prices at all approximating the true value of property if he supposed that his title might at some distant day be declared void because of some irregularity in the proceeding altogether unsuspected by him and of which he had no opportunity to inform himself. Under the operation of this rule occasional instances of hardship may occur, but a different one would much more certainly result in mischievous consequences, and the general sacrifice of property sold by order of the court. Hence it is that a
(263) purchaser who is no party to the proceedings is not bound to look beyond the decree if the facts necessary to give the court jurisdiction appear on the face of the proceedings. *If the jurisdiction has been improvidently exercised, it is not to be corrected at his expense who had a right to rely upon the order of the court as an authority emanating from a competent source, so much being due to the sanctity of judicial proceedings.*"

Besides this well settled and most essential principle, it so happens that we have a precedent "on all-fours" with this and exacty in point. In *McMinn v. Hamilton,* 77 N. C., 301 (which has been often cited since), the defendant was sued officially as an administrator by service on him of a summons of a justice of the peace in another county than that where he had qualified and in which latter alone he could be sued. It was held that, not having made the objection at the trial that a justice of that county could not have his summons served on him, it was waived, and it could not avail even on an appeal direct to the Superior Court. The Court holds distinctly that this is a defect of *venue* and not of jurisdiction.

HENRY T. KING v. RALEIGH AND PAMLICO SOUND RAILROAD.

(Filed 1 April, 1908.)

1. Contracts—Bought Editorials—Immoral Consideration—Public Policy.

A contract with the editor of a newspaper that he was to be paid by defendant railroad company for his editorials is based on an immoral consideration and not enforcible.

2. Same—Carrying Municipal Bond Issue.

Compensation cannot be recovered upon a contract to aid in carrying an election for a bond issue. Such contract is against public policy and void.

3. Same—Pleadings—Demurrer—Good and Lawful Considerations.

A demurrer to a complaint in a suit brought for the recovery of the value of services rendered should be sustained when the alleged considerations are immoral and against public policy or so mixed up with them as to poison the whole.

APPEAL from *Lyon, J.*, at October Term, 1907, of PITT. (264)

Defendant appealed. The facts are stated in the opinion.

J. L. Fleming for plaintiff.

Moore & Long for defendant.

CLARK, C. J. The complaint alleges that the plaintiff was editor of a newspaper, and "(2) that during February, 1902, the defendant company, then trying to secure aid in building a line of railroad from Raleigh to some point on Pamlico Sound, applied to the plaintiff *to secure the columns of his paper* and his personal service in trying to carry elections along the route of the proposed road by which bonds were to be issued for the use and benefit of said road, and to gain for said road the good-will of the citizens along said road and in other ways assist the managers and directors of said road in their undertaking; and under the promise from the manager and one of the directors of said defendant company that he should be 'taken care of,' well paid for his services, he agreed to serve the defendant as best he could in the manner suggested, and did serve it, in the ways indicated by defendant, through the columns of his paper, by advertisements and by personal services at elections and in other ways well known to defendant. For such services the defendant agreed and promised to pay, but when demand was made the defendant admitted his right to compensation; but only offered him $300 in second-mortgage bonds of its railroad company for his services; (3) that the services rendered the defendant by the plaintiff were reasonably worth the sum of $1,500; (4) that payment has been demanded and refused."

(265) The plaintiff makes clear his meaning by his evidence, in which he said: "I was to do everything I could, through my paper and by personal service, in the interest of the railroad. . . . I published editorials, etc., in the paper for two years. . . . I don't know that I published articles favoring the railroad in every issue. They were to *pay me for editorials.*" He further testified that he had a great many conversations with the president and general manager of the defendant railroad company, "in all of which he agreed to pay for my services. I ran a paper—that was my regular work. . . . Another service I rendered was in arranging for and *helping to carry the elections for issuing bonds for the railroad in 1903.* Contract was, 'if it won, would issue $15,000 bonds and take second mortgage,' etc. I was largely instrumental in getting citizens interested and in calling elections and in getting people to register and vote and in carrying the elections. Don't know that others got anything for services. . . . Munford (an advertiser) has paid me as much as $400. I gave him more space than I did the railroad, but *if I had advocated his business like I did for the railroad* it would have been worth several thousand to his business. I never published notices for railroad. County and town paid me for election notices. I wrote the editorials published in my paper myself and would copy extracts from other papers." On redirect examination he admitted that "There is a difference in advertising a thing and advocating a measure." The Court concurs in this last proposition.

When an advertisement is inserted the public knows that it is paid for, that it speaks for the advertiser and that the representations are made by him and not by the editor. But an editorial is understood to express the true and unbought views of the editor. It is because of that fact that they carry any weight with the public. It was precisely because of such weight that the defendant thought it worth money to buy the use of plaintiff's editorial columns. Had the plaintiff
(266) informed the public that he had sold his editorial columns to the railroad company his editorials would have had no weight whatever in inducing the citizens to vote a bond issue on themselves in favor of the railroad. Both parties knew this. Both are at fault. Public policy will not permit the courts to enforce a contract based upon an immoral consideration, but will leave the parties to their own devices. *Basket v. Moss,* 115 N. C., 448; 44 Am. St., 463; 48 L. R. A., 842; *Burbage v. Windly,* 108 N. C., 357; 12 L. R. A., 409, and many other cases cited, 135 N. C., at pp. 733, 734. Neither the sale of editorial columns nor services for carrying an election are recognizable in a court of justice as ground of action for a recovery of compensation.

Contracts, for money or personal profit, to use efforts and influence to

"carry an election," especially an election of this character, are *contra bonos mores.* 9 Cyc., 500; *Wilson v. Puryear,* 12 Ky., 556; 15 A. and E., 984; *Dean v. Clark,* 80 Hun., 80.

In *Trist v. Child,* 88 U. S., 449, there is citation of numerous authorities which have refused to uphold contracts alleged in the complaint because they are held to be against the policy of the law and the theory upon which the government of this Republic is founded.

The plaintiff in this case was the editor of a paper and is seeking to recover for sale of his editorial influence and for other alleged services in carrying an election to issue bonds. Certainly this was as much against public policy as an agreement for a consideration not to bid on articles to be sold by the Government, or an agreement to pay for a contract to carry the mail, or an agreement to pay for procuring signatures to a pardon to be presented to the Governor, or an agreement not to bid at a sale made under the judicial order, or an agreement to pay for promoting a marriage; because in each of the several instances mentioned, which have all been held to be invalid by reason of public policy, the interests affected are private and largely bear upon individuals rather than upon a community, while in this case the interests affected
are public and bear, if the burden should be placed, upon the (267) whole community.

There are other services mentioned in the complaint, but they are all stated in the same cause of action and so mixed up with it as to poison the whole. *Trist v. Child,* 88 U. S., 441. It is probable that the whole employment was based upon the influence of the newspaper and its editorials. Certainly the defendant's demurrer *ore tenus* to the action should have been sustained below, and it must be sustained here.

Action dismissed.

Cited: Lloyd v. R. R., 151 N. C., 540; *Stehli v. Express Co.,* 160 N. C., 506.

HAYNOR MANUFACTURING COMPANY v. E. L. DAVIS.

(Filed 1 April, 1908.)

1. Principal and Agent—Agency to Sell—Warranty.

Authority to an agent to sell goods is as a general rule authority to bind his principal by warranty.

2. Contracts—Sale of Goods—Implied Warranty—Breach—Latent Defect—Damages.

The selling of an article carries an implied warranty that it is merchantable and can lawfully be sold by the purchaser in his locality if

bought for resale; and when the prohibitive quality is latent and could not have reasonably been detected by ordinary observation, the seller is liable upon the implied warranty for such damages as were the direct and natural consequence of the breach.

3. Principal and Agent—Representations, Fraudulent—Inducing Sale.

The principal is liable for the fraudulent representations of his agent, general or special, made by the agent in the course of his employment and to induce the sale of his goods, and acted upon.

4. Principal and Agent—Warranty—Verdict, Directing—Counterclaim—Nonsuit—Knowledge of Principal.

The salesman of plaintiff sold to defendant certain goods called "Buchu Tonic," representing that it was nonalcoholic and that no license or tax would be required for a sale, and if so, his principal would pay it. The principal knew at the time of sale that the defendant was a general merchant at Rocky Mount, N. C., and subsequently shipped the "tonic" to him. The "tonic" contained 32 per cent alcohol, was highly intoxicating, and required the payment of a license tax, which was duly demanded of defendant. In an action to recover of defendant the price of the "tonic": *Held*, (1) that it was error in the court below to direct a verdict in plaintiff's favor and against defendant's counterclaim for license tax paid by him; (2) that such was in the nature of a nonsuit upon the whole evidence as to the counterclaim; (3) that the knowledge of the agent of the facts and circumstances was the knowledge of the principal; (4) that by its subsequent shipment the plaintiff was fixed with such knowledge.

(268) APPEAL from *Neal, J.*, at November Term, 1907, of NASH. Defendant appealed. The facts are stated in the opinion.

Jacob Battle for plaintiff.
Austin & Grantham for defendant.

CLARK, C. J. This action was begun before a justice of the peace to recover the value of goods sold. The defendant sets up orally a counterclaim, or payment, as follows, which presents the only question before us: "The defendant denied that he owed the plaintiff anything and pleaded payment in full of all accounts, and set up as a reason, among other things, that the goods for which the account was made was, in part, *'Buchu Tonic,'* and that at the time he purchased it from the plaintiff the plaintiff's salesman, R. D. Guy, had represented the said 'Buchu Tonic' to the defendant as nonalcholic and not subject to any privilege or license tax of any kind, either Federal or State, and guaranteed the defendant when he purchased the said 'Buchu Tonic' of the said salesman that if defendant should ever be required to pay any taxes of any kind for the privilege of selling the same in his store at South Rocky Mount the plaintiff company would make good to the defendant any such

license tax paid by him; that after having sold at retail the said 'Buchu Tonic,' relying upon the representations and warranties of the said Guy, general salesman for the said company, he had been called (269) upon and required to pay a Federal license tax of $37.50 because of the fact that the said 'Buchu Tonic' was a beverage and highly intoxicating and contained about 32 per cent alchohol. The defendant contends that he is entitled to a credit in this transaction against the account of plaintiff for the $37.50 paid as a Federal license tax, and that he, upon being required to pay such tax, returned to the plaintiff all the 'Buchu Tonic' which he had on hand, deducted the $37.50 and sent the plaintiff a check for the excess of the account over and above the $37.50 and demanded that he be credited with the $37.50."

On the trial in the Superior Court the defendant's testimony was to said purport. Mr. W. M. Allen, the pure food chemist for the State, testified that he had analyzed the "Buchu Tonic" manufactured by plaintiffs, on several occasions; that it usually ran about 32 per cent alcohol, was highly intoxicating, and that a license tax was collectible on beverages containing one-half of 1 per cent alcohol or upwards.

At the close of the evidence the court directed a verdict in favor of the plaintiff for $37.50. As this is equivalent to a nonsuit against the defendant upon his counterclaim, it is irrelevant to consider the evidence in reply introduced by the plaintiff. There was no controversy that the defendant owed plaintiff a balance of $37.50 unless he were entitled to this counterclaim.

The defendant was entitled to have his counterclaim submitted to the jury, and if the facts were found in accordance with his testimony it was a valid counterclaim.

1. There was the express warranty of the plaintiff company through its agent to sell the goods. "As a general rule an agent authorized to sell property, in the absence of express limitation of his powers, is authorized to bind his principal by warranty." 30 A. & E., 164. "An agent authorized to sell is authorized to make a warranty." *Alpha Mills v. Engine Co.*, 116 N. C., 802; *Davis v. Burnett*, 49 N. C., 72; *Hunter v. Jameson*, 28 N. C., 252. Even though such agent exceeds (270) his authority, he binds his principal. *Lane v. Dudley*, 6 N. C., 119.

2. There was an implied warranty arising because the manufacturer of the article knew that it was alcoholic and subject to tax, and because also this was a latent quality which the defendant could not have detected by ordinary observation. Without reference to any authority in the agent to make an express warranty, the manufacturer in selling through Guy warranted against latent defects, that the aticle is merchantable and can be lawfully sold by the purchaser if bought for resale. *McQuaid*

v. Ross, 22 L. R. A., note at p. 190 *et seq.; Bierman v. Mills Co.,* 37 L. R. A., 800.

The plaintiff would be responsible for such damages as were the natural and direct consequence of the breach of such warranty. And what could be more direct than the license tax required by the Government for the shortest period for which license is issued to sell said alcoholic beverage?

3. The plaintiff company is liable for the fraudulent representations of its salesman and agent which were made to defendant to induce the trade and acted upon by defendant to his injury. This would be so whether the agency of Guy were general or special. *Hunter v. Matthias,* 90 N. C., 105; *Peebles v. Patapsco Co.,* 77 N. C., 233; 1 A. & E. Enc. (2 Ed.), 1143. The president of the company testified that when the sale was reported he knew where defendant was and engaged in what business, and he must have known that a general merchant could not sell "highly intoxicating liquor, running usually 32 per cent alchohol" (for this evidence of the State chemist must be taken as true on the nonsuit), and subsequently thereto he shipped the "Buchu Tonic" to the defendant. The company therefore assumed full responsibility for the act of its agent, for the knowledge of the agent that the defendant bought (271) and was induced to buy by his representations and promise that the company would pay the license tax if liability therefore was incurred was the knowledge of the company, and in its subsequent shipment it was fixed with such knowledge, even though it had not authorized the express warranty. *Lane v. Dudley,* 6 N. C., 119.

Error.

Cited: Unitype Co. v. Ashcraft, 155 N. C., 69; *Briggs v. Ins. Co., ib.,* 76; *Machine Co. v. McKay,* 161 N. C., 588; *Grocery Co. v. Vernoy,* 167 N. C., 428.

BRIDGEPORT ORGAN COMPANY v. GEORGE H. SNYDER.

(Filed 1 April, 1908.)

1. Principal and Agent—Conversion—Evidence—Verdict, Directing.

In an action for the defendant's wrongful and fraudulent conversion to his own use of notes, liens, accounts, and cash collections of the plaintiff as its agent, it was error for the court below to direct a verdict upon the issue in defendant's favor, under evidence tending to show that defendant was plaintiff's agent and had organs in his hands for sale for it, and also for collection of its notes and mortgages, and refused to account for them when repeatedly requested to do so.

2. Same—Intent.

The question of intent is not material in a civil action brought by the principal against his agent for wrongful and fraudulent conversion. Evidence of such breach of trust is sufficient.

APPEAL from *Jones, J.*, at October Term, 1907, of CUMBERLAND.

The following issues were submitted to the jury:

1. Did the defendant wrongfully and fraudulently convert to his own use the notes, liens, accounts, and cash collections of the plaintiff, as alleged? Answer: "No."

2. What damages has the plaintiff sustained? Answer: "Four hundred and fifty-eight dollars and fifty-one cents, with interest from 17 September, 1906."

The court rendered judgment in favor of plaintiff and against defendant for $458.51, with interest from 18 September, 1906. The plaintiff appealed.

Q. K. Nimocks for plaintiff. (272)
No counsel for defendant.

BROWN, J. The plaintiff resorted to the ancillary proceeding of arrest and bail, and in order to entitle him to execution against the person it was incumbent upon it to secure an affirmative answer to the first issue. His Honor instructed the jury that there was no evidence of a fraudulent conversion and directed them to answer the first issue "No," to which plaintiff excepted. We think the court erred in withdrawing the first issue from the consideration of the jury by directing them to answer it "No." He should have submitted the issue to them with appropriate instruction, for we think there is evidence tending to prove a fraudulent detention and conversion of the plaintiff's property by the defendant. The evidence tends to prove that defendant was the agent of plaintiff and had in his hands for sale for plaintiff a number or organs, and also had in his possession for collection notes and mortgages belonging to plaintiff. The evidence tends to prove that he has refused and failed to account to plaintiff for the property or the proceeds thereof, although such accounting has been repeatedly demanded.

The fact that the defendant detains the property and refuses to deliver it to the plaintiff, who he admits is the true owner, is evidence of a breach of trust and of a wrongful and fraudulent conversion. In a civil action for the wrongful and fraudulent conversion of property by an agent the question of intent is not material. If such conversion took place the plaintiff is entitled to his remedy. The intent does not enter into it. "Good intentions," says *Mr. Justice Burwell,* "do not at all lessen the

wrongfulness of a breach of trust; or, rather, the law will not allow one to say that he violated its plain precepts with good intentions." *Boykin v. Maddrey,* 114 N. C., 100; *Fertilizer Co. v. Little,* 118 N. C., 817; *Gossler v. Wood,* 120 N. C., 70; *Doyle v. Bush,* 171 N. C., 12.

New trial.

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(273)

G. F. TALBOT v. W. J. TYSON.

(Filed 1 April, 1908.)

1. Objections and Exceptions—Appeal and Error—Receivers.

When there is no exception taken at the time of or appeal from an order of court appointing a receiver, the receivership continues in full force.

2. Appeal and Error—Receivers—Allowance, Excessive—Wrong Principle.

When the order of the court below allowing an amount to a receiver for services as such is appealed from, and there is no suggestion that the amount was excessive or based upon a wrong principle, the order will not be disturbed.

3. Claim and Delivery—Action in Superior Court—Revisal, Sec. 1995.

When parties, landlord and tenant, have an adequate remedy by claim and delivery, but do not resort to it, they may bring an action in the Superior Court to determine the matters in controversy. Revisal, sec. 1995.

APPEAL from *Jones, J.,* at chambers, 20 November, 1907, from CUMBERLAND.

Defendant appealed. The facts are stated in the opinion.

Robinson & Shaw and Sinclair & Dye for plaintiff.
A. S. Hall for defendant.

WALKER, J. This action was brought by the plaintiff as landlord against the defendant as his tenant, for the recovery of cotton, being a part of the crop grown on the land which had been leased. The plaintiff alleged that the defendant owed him for guano and supplies the sum of $240, and that the cotton was to be delivered at his ginhouse to be ginned and sold, and after paying the plaintiff the amount due him for fertilizers and supplies the balance was to be divided between them; that the defendant was disposing of the crop in violation of their agreement and was insolvent. He asked for the appointment of a receiver. The court appointed a receiver to take possession of the crop and retain it in

his possession, selling only so much as should be necessary to (274) pay the expenses of gathering and keeping the same. The defendant demurred to the complaint upon the ground that the cause of action as stated therein does not entitle the plaintiff to the appointment of a receiver. The demurrer was overruled at October Term, 1907, and the court directed the receiver to deliver to the plaintiff one-half of the crop and to the defendant the other half when the latter had executed a bond in the sum of $400, payable to the plaintiff, with proper conditions. The determination of the rights of the respective parties in the crop was reserved to the final hearing, with leave to the parties to amend the pleadings. The defendant gave bond and received his share of the crop. Defendant excepted to the above order. The judge, at chambers, after due notice to the parties, directed that the receiver retain $20.70 (it being one-half of the expense of gathering and caring for the crop) under the original order in the case, and that the plaintiff pay to the receiver a similar amount, with leave to each of the parties to except to the report of the receiver. The order was made without prejudice to the rights of the parties, which were left to be determined at the final hearing. The defendant excepted to this order and appealed.

We can discover no error in the order of the court. The receiver had been originally appointed, apparently, without any exception by the defendant. But, assuming that he did except, there was no appeal taken at the time, and the order of the court appointing the receiver continued in full force. Conceding, for the sake of argument, that by a proper construction of *Bank v. Bank,* 126 N. C., 531, an appeal will lie from an interlocutory order of the kind made by the judge in this case, and is not therefore fragmentary, there is no suggestion that the amount allowed the receiver for his services is based upon a wrong principle or is clearly excessive. *Bank v. Bank, supra.* We cannot at this stage of the case review the former order of the judge appointing the receiver, as there was no appeal from that order at the time it was made, and its correctness is not a question now presented to us for decision. In (275) this appeal we are confined to the allowance of commissions.

Mr. Hall submitted an able and interesting argument to show that the plaintiff could not resort to an equitable action when he had a plain and adequate legal remedy for the possession of the crop, with the ancillary or provisional remedy of claim and delivery; but we find that the statute (Revisal, sec. 1995) provides that an action may be brought in the Superior Court to settle and determine any matters in controversy between the parties if neither party avails himself of the remedy by claim and delivery given in sections 1993 and 1994.

No error.

G. H. WINSLOW v. NORFOLK HARDWOOD COMPANY.

(Filed 1 April, 1908.)

1. Issues—Burden of the Issue.

The burden of the issue, in the sense of ultimately proving or establishing it, does not shift from the party upon whom it originally rested.

2. Burden of Proof.

In accordance with whether the party upon whom is the burden of issue has made a *prima facie* case, or of other pertinent conditions of the evidence, the burden of proof may shift from one party to another, or back again; but when the burden of proof shifts from the party originally bearing it, it is not required of the other party to disprove by the preponderance of the evidence.

3. Same—Instructions.

When the plaintiff has made out a *prima facie* case the burden of proof shifts to the defendant, and the jury should be instructed that, giving due weight to the presumption which carries the issue to the jury, the plaintiff must in the end prove his case upon that issue by the greater weight of the whole evidence, his own and that of defendant, when the latter has introduced any.

CLARK, C. J., and HOKE, J., dissenting, *arguendo.*

(276) APPEAL from *O. H. Allen, J.,* at Fall Term, 1907, of PERQUIMANS.

Defendant appealed. The facts are stated in the opinion.

Charles Whedbee and C. E. Thompson for plaintiff.
Pruden & Pruden and Shepherd & Shepherd for defendant.

WALKER, J. The plaintiff, who was an employee of the defendant and rightfully on one of the trains operated by it, was injured by a derailment of the train. The court charged the jury, with reference to the effect of the derailment as evidence of negligence, in the following words:

"1. When it is shown that a derailment has occurred on such a road and that injury was caused by such derailment, the law presumes the derailment to have resulted from the negligence of the defendant, and the burden shifts to the defendant to show that it did not so occur, and the defendant may rely upon the plaintiff's evidence, or upon a failure of evidence, to remove this presumption.

"2. If it appears from the evidence that the track was in good condition and the speed not excessive, considering the kind of road this was,

and the evidence of this preponderates and overcomes the presumption raised by the fact of derailment, and that the derailment was the result of negligence, the jury will answer the first issue 'No'; otherwise, 'Yes.'"

The defendant excepted to each of these instructions.

We think the court placed too great a burden upon the defendant, and the charge seems to be in conflict with several decisions of this Court.

The burden of the issue does not shift, but the burden of proof may shift from one party to the other, depending upon the state of the evidence. When the plaintiff introduces testimony in a case of this kind to the effect that the injury to him was caused by the derailment of a train, it is sufficient to carry the case to the jury; but the burden of the issue remains with the plaintiff, though the burden of proof may shift to the defendant in the sense that if he fails to explain the (277) derailment by proof in the case, either his own or that of the plaintiff, he takes the chance of an adverse verdict, for then the jury may properly conclude that the plaintiff has established the affirmation of the issue as to negligence by the greater weight of the testimony. But the defendant is not required to overcome the case of the plaintiff by a preponderance of the evidence. In 1 Elliott on Evidence, 139, the rule is thus stated: "The burden of the issue—that is, the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence—never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if upon the whole evidence he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced." The question has been so recently and so fully considered by us that much further discussion would be useless. *Board of Education v. Makely,* 139 N. C., 31; *Overcash v. Electric Co.,* 144 N. C., 572; *Shepard v. Tel. Co.,* 143 N. C., 244; *Ross v. Cotton Mills,* 140 N. C., 115; *Stewart v. Carpet Co.,* 138 N. C., 60; *Womble v. Grocery Co.,* 135 N. C., 474; *Stanford v. Grocery Co.,* 143 N. C., 419; *Furniture Co. v. Express Co.,* 144 N. C., 644.

If the plaintiff proves a fact which raises a *prima facie* or presumptive case of negligence or which entitles him to have the issue sub-
(278) mitted to the jury, the burden of proof may shift to the defendant, but he is not required to make the evidence preponderate in his favor. *Shepard v. Tel. Co., supra.* He may introduce evidence himself or rely upon that of the plaintiff to defeat the plaintiff's recovery, but the jury must be instructed that, giving due weight to the *prima facie* case or the presumption or to the fact proved by the plaintiff which carries the issue to the jury for their determination, the plaintiff must in the end establish the issue in his own favor by the greater weight of the testimony; and for this reason it is said that the burden of the issue is always upon him. It is erroneous to require the defendant to overcome by a preponderance of the evidence the case made by the plaintiff, even though the latter may be entitled by reason of the proof he has offered to have the issues submitted to the jury with proper instructions from the court.

New trial.

CLARK, C. J., dissenting: Where an injury occurs, and nothing else is shown, this Court has adopted the rule as to *res ipsa loquitur* that this is evidence of negligence and does not raise a presumption of negligence. But when the manner of the injury is in proof and it is shown that it was caused by a derailment or collision, this raises a presumption of negligence, and the burden is properly thrown upon the defendant to disprove it. Our authorities are uniform as to this, and there is no cause shown for overruling them.

In *Marcom v. R. R.*, 126 N. C., 204 (derailment), the Court said: "The burden of proving such a failure of legal duty rests upon the plaintiff; but when that fact is proven or admitted, the burden of proving all such facts as are relied on by the defendant to excuse its failure rests upon the defendant."

In *Wright v. R. R.*, 127 N. C., 229 (derailment), this Court said:
"While the mere fact that one has been injured while in a public
(279) conveyance does not raise a presumption of negligence in the carrier, it is otherwise when the injury results from something over which the carrier has control. Shear. and Red. Neg. (5 Ed.), sec. 59. Accordingly, when there is a collision or a derailment, and in similar cases, there is a *presumption of negligence.* 2 Shear. and Red. Neg., sec. 516, and numerous cases cited." Then the Court proceeded to quote with approval the following paragraph from *Marcom v. R. R., supra:* "Where the derailment of the engine resulted in the death of the intestate, a fireman in the employ of the defendant company, a *prima*

facie case of negligence is to be inferred, and the burden is thrown upon the defendant to disprove of negligence on its part."

In *Stewart v. R. R.,* 137 N. C., 689, it is said: "This case, arising out of a collision, is one of those in which the law raises a presumption of negligence on the part of the carrier. *Wright v. R. R.,* 127 N. C., 229; *Marcom v. R. R.,* 126 N. C., 200; *Kinney v. R. R.,* 122 N. C., 961; *Grant v. R. R.,* 108 N. C., 470; S. & R. Neg., sec. 516, and cases cited."

In *Hemphill v. Lumber Co.,* 141 N. C., 488, a unanimous Court again said: "Where there is a collision or derailment, and in like cases, the presumption of negligence arises," citing above cases.

In a very recent case (*Overcash v. Electric Co.,* 144 N. C., 572) *Mr. Justice Connor,* for a unanimous Court, said: "This Court has uniformly held—and in that respect it is in harmony with other courts and approved text-writers—that a derailment of a railway train raises a presumption or makes a *prima facie* case of negligence: that is, a presumption that there is a defective construction or condition of the car or track or the mode of operation," citing *Marcom v. R. R.,* 126 N. C., 200; *Wright v. R. R.,* 127 N. C., 229; *Stewart v. R. R.,* 137 N. C., 687; *same case,* 141 N. C., 266, and *Haynes v. R. R.,* 143 N. C., 154, adding: "This may be regarded as settled." Among other cases to same effect, *Hemphill v. Lumber Co.,* 141 N. C., 488; *Wilkie v. R. R.,* 127 (280) N. C., 210; *Grant v. R. R.,* 108 N. C., 471.

There is a wide distinction between *res ipsa loquitur,* which is merely evidence of negligence, and which arises from the mere fact of injury sustained, without showing the cause, and proof that it was caused by a derailment or collision, which is so unusual a cause, so dangerous in the natural results, and which can scarcely ever possibly occur without negligence. In such cases our authorities, as above shown, raise a "presumption of negligence, the burden of disproving which is upon the defendant."

This rule is a matter of settled public policy and should not be changed, if at all, except by the superior power of legislative enactment, which is exceedingly improbable. Indeed, it is far more probable that the Legislature would reënact the rule we have hitherto held. There are good and sound reasons why common carriers should not be relieved of this duty, recognized as a "settled rule," that they must disprove the presumption of negligence arising from a collision or derailment. Accidents from such cause can rarely, if ever, happen without grave negligence. If there should be facts in any case to disprove such presumption of negligence, evidence thereof is easily accessible to the common carrier. It would be difficult in behalf of the deceased or dismembered

victim to prove negligence as an independent fact. He knows nothing of the surroundings. He may never have been at the spot before. When he has shown that the injury was caused by a derailment or collision, he has usually done all that he can do. The burden of disproving the presumption of negligence arising from a collision or derailment should remain upon the carrier, as it has always been heretofore held.

With the officially ascertained fact that over 100,000 persons were wounded and more than 10,000 killed by the railroads of the United States last year, and that the ratio of killed and wounded in pro-
(281) portion to the number of passengers and employees is twenty times greater in this country than on the railways of Europe, the demands of justice are for the exaction of stricter requirements for the prevention of such terrible consequences of negligence, and not for the lessening of the safeguards heretofore exacted in fixing liability for injuries sustained, when they have occurred in a collision or derailment.

The charge of the court that, the injury having been caused by a derailment, a presumption of negligence arises and the burden is upon the defendant to disprove such presumption, is in accord with the repeated and uniform decisions of this Court, above cited, applicable to such state of facts.

HOKE, J., dissenting: While it is true that several of our more recent decisions have approved the doctrine that the presumption arising on the facts of this case and others of like kind does not change the burden of the issue, but only the burden of proof, requiring that the judge shall direct the jury to consider the evidence as affected by the presumption, it is also true that very frequently on the facts presented the two burdens are very nearly the same, the line of demarcation between them being very difficult to draw and at times well-nigh impossible for the trial judge to state with clearness. Although the distinction referred to is recognized by the best writers, and I have now no disposition to question it, in many cases and in practical application it partakes somewhat of refinement; and unless it plainly appears that the trial judge has placed too great a burden on the defendant and has in express terms or by clear intendment changed the burden of the issue, I don't think that reversible error should be readily imputed.

In the present case, as I understand the charge, the court nowhere tells the jury in terms that the burden of the issue is changed; on the contrary, I think it sufficiently appears that he speaks throughout as to the burden of proof, and in effect and by fair intendment he tells
(282) the jury that on the facts, if established, there was a presumption of negligence arising against the defendant, and directs them to

consider the testimony as affected by that presumption. To my mind the charge is in substantial compliance with the rule we have adopted, and I am of opinion that no reversible error appears in the record.

Cited: Briggs v. Traction Co., post, 392; *Cox v. R. R.,* 149 N. C., 118; *S. v. McDonald,* 152 N. C., 806; *Houston v. Traction Co.,* 155 N. C., 8; *Brock v. Ins. Co.,* 156 N. C., 117; *S. v. Wilkerson,* 164 N. C., 437, 438; *Land Co. v. Floyd,* 171 N. C., 546.

R. J. PHILLIPS ET AL. v. JOHN J. LITTLE.

(Filed 1 April, 1908.)

Mortgagor and Mortgagee—Purchaser of Mortgaged Goods—Possessory Action—Inadequate Value of Mortgaged Goods—Judgment of Ownership—Costs.

In a suit brought by mortgagees for the possession of certain goods embraced in their chattel mortgage against the defendant, who had subsequently bought them from the mortgagor, when it is found that the plaintiffs, mortgagees, were owners and entitled to possession, and that the goods would not bring the mortgage debt: *Held,* (1) it was not error in the court below to render judgment that plaintiffs, mortgagees, recover the goods embraced in this mortgage instead of for the possession and sale of the goods; (2) in the absence of tender of judgment by defendant (Revisal, sec. 860) the plaintiffs should recover their costs of the action.

APPEAL from *Webb, J.,* and a jury, at October Term, 1907, of ANSON. Defendant appealed. The facts are stated in the opinion.

Robinson & Caudle for plaintiffs.
J. A. Lockhart and McLendon & Thomas for defendant.

CLARK, C. J. This was an action for the recovery of a mule, buggy and harness, alleging (1) that the plaintiff Phillips was induced to trade them off and deliver them to the defendant at a time when said Phillips was so intoxicated that he did not know the nature and consequences of his act; (2) that the plaintiffs, other than Phillips, are owners and entitled to possession of said property by virtue of a mortgage.
from him to them, executed prior to the transaction aforesaid (283) between Phillips and the defendant.

Issues were submitted to the jury, who found that Phillips was not intoxicated at the time of the above transaction with the defendant, but

that the plaintiffs, mortgagees, as such, were owners and entitled to possession of the buggy and harness, and that the value of same was less than the sum due on the mortgage. His Honor rendered judgment for recovery of the buggy and harness. The defendant excepted because the judge did not sign the judgment as asked; that the defendant was entitled to possession of the mule; that the buggy and harness be sold to pay the debt; that the defendant recover of Phillps and surety on prosecution bond their costs, and the other plaintiffs recover their costs of the defendant.

Cui bono order the additional cost of a sale of the buggy and harness when the jury find them worth less than the sum due on the mortgage upon them? If the defendant had tendered judgment before trial or verdict for the buggy and harness, the plaintiffs could not have recovered the costs incurred after the tender. Revisal, sec. 860. But, having fought the case out, the conquered must abide the result of the contest and pay the costs of the struggle. Revisal, sec. 1264 (2). When the plaintiff establishes title to any part of the property sued for, he is entitled to judgment for costs. *Horton v. Horne,* 99 N. C., 219; *Wooten v. Walters,* 110 N. C., 258; *Field v. Wheeler,* 120 N. C., 264. This is not the case where some of defendants recover judgment, in which case, of course, they recover their costs. *Harris v. Lee,* 46 N. C., 226.

The judgment appealed from is

Affirmed.

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(284)

J. W. BRYAN ET AL. v. JULIUS EASON.

(Filed 8 April, 1908.)

1. Deeds and Conveyances—Contemporaneous Indorsements—Construction.

A deed and two indorsements thereon, executed contemporaneously, each bearing the signature and seal of the grantors, and duly probated and registered together, must be considered as intended for one deed.

2. Deeds and Conveyances—Construction—Uses and Trusts—Shifting Uses—Habendum.

An indorsement on a deed conveying the fee to lands to J. C. and J. V., reserving to the grantors a life estate, with the condition "that in the event either J. C. or J. V. should die leaving no issue living, then the survivor to inherit all the within described lands, with the conditions within stated," when construed with the deed as one instrument, establishes the maker's intent to convey, and does convey, an estate in fee to J. C. and J. V., with a shifting use to the survivor in case either

should die without issue living at his death; and there is no repugnancy between the deed and the indorsement, whether the latter is considered as a last clause of the deed or as the *habendum.*

3. Uses and Trusts—Limitation of Fee.

By a shifting use expressed in a deed a fee may be limited after a fee.

4. Deeds and Conveyances—Uses and Trusts—Femes Covert—Probate Defective—Quitclaim—Registration—Seizin—Consideration.

E., the owner of land, joined with her husband in the conveyance thereof, and after the death of her husband executed and delivered another deed to the same parties for the land, which expressly referred to the first deed, stating in the premises that it was executed to carry out more effectually the intention and purpose thereof, and reciting that it was made in consideration of said premises and one dollar: *Held*, (1) that as the first deed of E. was in effect as recited in the premises of the second deed after the death of her husband, she was the owner of the land in fee, and the fact that the deed from herself and husband was void because of a defect in the probate would not affect the interests thereunder acquired as between the parties, as the second deed was sufficient to pass the title; (2) that the registration laws now take the place of livery of seizin, and, when they are complied with, a failure of consideration between the parties under the first deed did not operate to defeat the vesting of the use. (The nature and effect of a quitclaim deed operating as an estoppel discussed by WALKER, J.)

5. Deeds and Conveyances—Femes Covert—Husband's Subsequent Execution—1857—Void Probate.

The probate of a deed made by a *feme covert* in 1857 of her lands is defective when her acknowledgment and privy examination were taken before the execution by her husband was proved.

6. Deeds and Conveyances—Quitclaim—No Title—Grantor Not Estopped.

A grantee is not estopped to show that no interest passed to him under a quitclaim deed when the grantor is not estopped to show it. Estoppels must be mutual.

APPEAL from *Jones, J.*, at March Term, 1907, of JOHNSTON. (285)

This proceeding was brought before the clerk for the partition of land and transferred to the Superior Court for trial upon the issues raised by the pleadings. It was referred to Hon. F. A. Daniels, from whose findings of fact it appears that on 12 August, 1857, Betsy Eason, being the owner of the tract of land described in the petition, joined with her husband, John Eason, in the execution of a deed for the same to their sons, Julius C. Eason and John V. Eason, by which they conveyed to them the said tract of land in fee, reversing a life estate to themselves. At the same time they made the following indorsement on the deed:

Witnesseth further, that in the event either of our sons, Julius C. or John V. Eason, should die leaving no issue in wedlock born and living,

then and in that event the surviving brother to inherit all the within described lands, with the conditions within stated.

In testimony whereof, the said John and Betsy Eason have hereunto set our hands and seals. This 12 August, 1857.

JOHN EASON, [SEAL]
BETSY EASON. [SEAL]

(286) And it is further declared and intended by us both, whose names are hereunto assigned, that the said Julius C. and John V. Eason are to inherit the said described lands, and not to be accounted for in any future distribution of our estate of whatsoever kind, but each to share alike outside of said lands. This 12 August, 1857.

JOHN EASON, [SEAL]
BETSY EASON. [SEAL]

The execution of the deed and the indorsement were attested by the same witnesses. It further appeared that the acknowledgment and privy examination of Betsy Eason were taken 2 September, 1857, before two justices of the peace appointed by the county court, and the execution as to John Eason, her husband, was proven by one of the subscribing witnesses at February Term, 1858, of that court, and the deed ordered to be registered. The certificate of acknowledgment and privy examination of Betsy Eason expressly mentioned the indorsements on the deed. The certificate of probate as to John Eason refers to the instruments as the "deed and conveyance." The deed and indorsements were duly registered.

John V. Eason, on 5 February, 1874, executed to Julius C. Eason for the recited consideration of $1 a release or quitclaim deed for his right, title, and estate, it being the one-half interest of J. C. Eason in the land as described in the deed of 12 August, 1857. The quitclaim deed was duly proven and registered 11 August, 1876.

Betsy Eason, widow of John Eason on 2 June, 1883, conveyed to Julius C. Eason and his heirs all her real estate in Sampson County (including the lands described in the deeds of 12 August, 1857, and 5 February, 1874), "in trust, to hold the same for the use of himself and his heirs and his brother John V. Eason and his heirs," provided "that if either should die without leaving issue at his death the portion so held in trust for him shall be held to the use of the other and his (287) heirs." This deed conveyed a part of the said lands to each of the brothers by metes and bounds, and further provided that the part held in trust by Julius C. Eason for his brother John V. Eason should be subject to a life estate which was reserved to the mother, Betsy Eason.

The deed expressly refers to the deed of 12 August, 1857, and it is stated in the premises that it was executed to carry out more effectually the intention and purpose of John and Betsy Eason in making the said deed, and further recites that it was made in consideration of the said premises and $1. It further appeared that the interest of John V. Eason in the land in excess of his homestead was sold under execution against him by the sheriff, 13 March, 1900, and bought by Julius C. Eason at the price of $125, and a deed was executed to the purchaser, which was duly proven and registered. Julius C. Eason announced at the sale and before the land was sold "that it belonged to him at the death of his brother John V. Eason." The latter was about 50 years old at the time, had been married many years, and had no children. He died intestate and without issue in November, 1900, leaving a widow, Kate Eason, and the other plaintiffs and the defendant as his heirs at law. Betsy Eason died in 1892, before this proceeding was commenced.

The referee concluded as matters of law:

1. That the deed of 12 August, 1857, is inoperative and void, as it had not been properly probated, and the defective probate had not been cured by any statute; but if it is valid, the indorsements are integral parts of the deed, the same as if they had been written into it, and that the deed, thus considered, conveyed the land to the defendant J. C. Eason and his heirs, if he survived his brother, and the latter died without issue living at the time of his death.

2. That the quitclaim deed did not estop Julius C. Eason from asserting title to the interest in the land now claimed by the petitioners.

3. That Julius C. Eason, by virtue of the sheriff's sale and deed, acquired the interest of John V. Eason in the land, whether (288) a life estate or fee simple, under the deed of 12 August, 1857, if valid, and that there is no evidence of any suppression of biddings to render the sheriff's deed invalid.

4. That the defendant Julius C. Eason is sole seized of the land in controversy, and the petitioners, other than Kate Eason, have no interest therein, but that she is entitled to dower in the original share of John V. Eason.

The petitioners filed numerous exceptions to the report, which were all overruled by the court, and the report in all respects was confirmed, the court holding with the reference that Julius C. Eason is sole seized of the land, subject to the dower of Kate Eason, widow of John V. Eason.

Judgment was entered accordingly, and the petitioners appealed.

F. H. Brooks for plaintiffs.

W. C. Moore for defendant.

WALKER, J. The first question to be determined is as to the effect of the three paper-writings executed by John and Betsy Eason, 12 August, 1857. Do they all constitute one deed, or is the first of the writings to be treated as separate and distinct from the others and to be regarded as a deed conveying the land in fee to Julius C. and John V. Eason in severalty, each taking the part allotted to him? These writings were all executed at one and the same time, and, in our opinion, must be considered together as intended to be one deed. *Helmes v. Austin,* 116 N. C., 751. But whether this is so or not, the three instruments express the true intent of the parties, and, upon the allegation of the answer that the purpose was to convey the land to Julius C. and John V. Eason in fee, with a provision that if either of them should die without issue living at the time of his death his share should go to the other, we would, upon a bare inspection, so reform the first instrument as to express what (289) was unmistakably the real intention of the parties. *Vickers v. Leigh,* 104 N. C., 248; *Helmes v. Austin, supra.* The makers of these instruments evidently intended that they should be considered as parts of one indivisible transaction and have the force and effect of conveying the estate as above indicated, the same as if the words of limitation had been contained in one deed. This construction of the instruments as one deed conveying an estate in fee to the brothers, Julius C. and John V. Eason, with a shifting use to the survivor in case either should die without issue living at his death, does not produce any repugnancy in the different clauses of the deed. It is contended by the learned counsel for the plaintiffs that the first of the indorsements should be treated as a last clause in the deed. *Wilkins v. Norman,* 139 N. C., 40. But we do not think so. As the purpose of the parties is manifest, the limitation in the indorsement should be inserted as to effectuate it; but even if treated as a last clause in the deed, a repugnancy would not arise between it and what proceeds in the premises and *habendum.* We do not think such repugnancy would in law be the result. The case of *Rowland v. Rowland,* 93 N. C., 214, is a direct and conclusive authority against such a construction of the deed, if it were read as the plaintiffs insist it should be. There the limitation in the premises was by John S. Rowland to his two children, John and Ophelia, and to the heirs of each of them forever, and in the *habendum* to the said John and Ophelia and their heirs as aforesaid, as tenants in common, and, upon the death of either of them, to the survivor and his or her heirs forever. The Court said, according to 2 Blackstone, 298, that the office of the *habendum* is to lessen, enlarge, explain, or qualify the premises, but not to contradict or be repugnant to the estate granted therein. If an estate is given to one and his heirs in the premises, *habendum* to him for life, there is a

repugnancy, and the fee is not diverted or turned into a life estate by the *habendum;* but if an estate is given to one and his heirs, (290) *habendum* to him for the life of another, there is no repugnancy, for, as the estate may endure beyond the life of the grantee—that is, during the life of the *cestui que vie*—the heir may take and hold after the death of his ancestor as a special occupant during the time for which the estate is limited—that is, during the life of the *cestui que vie.* Other illustrations might be given as showing how the word "heirs" used in the premises may be qualified and explained in the *habendum* or subsequent part of the deed without producing any repugnancy. So, in *Rowland v. Rowland,* supra, the Court, when construing a proviso similar to the one we are now considering, said: "After giving effect to the operation of the *habendum* as maintained by the authorities cited, the question is still presented, Does the estate, upon the death of Ophelia, pass to the *survivor* or go to her heirs generally? We are of the opinion it did pass to John B. Rowland as *survivor* by the operation of a shifting use. The deed is a covenant to stand seized to uses. Its effect was to transfer the use to the two donees in fee, and upon the death of Ophelia to shift the use of her moiety to John and his heirs. By a shifting use a fee may be limited after a fee. 2 Blackstone, p. 334; *Smith v. Brisson,* 90 N. C., 284." See *Rowland v. Rowland,* 93 N. C., 220.

Having arrived at the conclusion that the contemporaneous writings executed by John and Betsy Eason, 12 August, 1857, constitute but one instrument in law, to be considered as if all their provisions had been inserted in the first of the writings, and that by a proper construction of them the land was conveyed to the uses declared by the grantors, it would seem to be unnecessary to decide whether the defective probate of these instruments was cured by Laws 1893, ch. 293; Revisal, sec. 1017. The acknowledgment and privy examination of the wife having been taken before the execution was proved as to the husband, the probate was defective under the law then existing. *Burgess v. Wilson,* 15 N. C., 360; *Pierce v. Wanett,* 32 N. C., 446; *McGlenery v. Miller,* (291) 90 N. C., 215; *Ferguson v. Kinsland,* 93 N. C., 337; *Southerland v. Hunter,* 93 N. C., 310. If the defective probate is cured by subsequent legislation, Julius C. Eason, as the survivor of the two brothers, the other having died without having issue living at his death, succeeded to the latter's interest in the land. But if the probate is not validated and the deed of 1857 is consequently void, he would succeed to his brother's interest in the same way under the deed of 1883, as the limitations under the two deeds are substantially the same. In other words, if Julius C. Eason acquired nothing under the deed of 1857 because of the defective probate, the entire estate remained in his mother, and she,

by the deed of 1883, conveyed it to her two sons, so that Julius, by the death of his brother without issue, acquired the same estate as he would have taken under the deed of 1857, had it been valid.

In view of the construction placed by us upon the deed of 1857, it is also useless to consider the effect of the quitclaim deed and the deed of the sheriff, as it must be that whatever interest Julius C. Eason did not acquire under either of them passed to him under the deed of 1883.

The plaintiffs also contended that the deed of 1883 is void for want of a sufficient consideration to raise a use in favor of Julius C. and John V. Eason, because the statute of uses converts into a legal estate the use which was before only an equitable interest, and equity would enforce no use where there was not either a good or a valuable consideration to support it. But this doctrine does not apply since the statute concerning the registration of deeds, registration now taking the place of livery of seizin. It is for that reason said by the Court in *Rowland v. Rowland,* 93 N. C., at p. 221: "Our courts, in their policy of relaxing the rigid and technical rules of the common law, have since extended the construction so as to bring all of our deeds of conveyance within
(292) the purview of that statute. Thus it has been held that deeds of bargain and sale and covenants to stand seized to uses are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration." And in *Love v. Harbin,* 87 N. C., 252, the Court said: "Whatever may once have been our opinion upon the subject, it is now the settled rule in this State that, by reason of the efficacy which the statute gives to the fact of their registration, all deeds are put upon the footing of feoffments, which take effect by livery of seizin and need no consideration as between the parties to support them." See, also, *Hogan v. Strayhorn,* 65 N. C., 279; *Ivey v. Granberry,* 66 N. C., 223; *Mosley v. Mosley,* 87 N. C., 69; *Cheek v. Nall,* 112 N. C., 370. These authorities support the deed of 1883, even if it cannot be sustained as a covenant to stand seized to the uses declared therein, under *Cobb v. Hines,* 44 N. C., 343; *Bruce v. Faucett,* 49 N. C., 391, and cases of that class.

The quitclaim deed did not estop Julius E. Eason to deny the title of plaintiffs. "It is elementary learning that a quitclaim deed operates as a release only of such interest as the maker has or as may be specifically named. It is for this reason that no estoppel grows out of such a deed. Nothing in respect to the maker's interest is asserted. The very terms of the deed put the purchaser upon notice that he is buying a doubtful title. 'In form a quitclaim deed is like the common-law release—a derivative or secondary common-law form. In substance it is similar to an original common-law deed, creating an estate and not requiring for

its operation any estate in possession or otherwise in the grantee. In effect it transfers to the grantee whatever interest the grantor has in the property described, be it a fee, chattel interest, a mere license, or nothing at all.' 9 A. & E. Enc., 104. It implies a doubtful title in the party executing it." *Lumber Co., v. Price,* 144 N. C., 53; *Hallyburton v. Slagle,* 132 N. C., 947. It is not an estoppel upon the grantee so as to preclude him from denying that he received any estate by the (293) deed or from setting up rights under superior titles. *San Francisco v. Lawton,* 18 Cal., 465 (79 Am. Dec., 187). "If the grantor, then, might show that no title passed by his quitclaim, and recover the land in opposition to it, why should the mouth of his grantee be closed from denying that he received an estate in fee from him or that, indeed, any title passed by his conveyance? Apply the rule of mutuality and it is impossible to assign a valid reason. Both parties must be bound or intended to be, else neither is concluded. There can be no soundness in the principle of estopping a grantee from showing that no interest passed to him by the deed of the grantor, while the latter is permitted to show it." *Sparrow v. Kingman,* 1 N. Y., 248. But in the view we take of the case it does not appear how the question involved can be affected in any way by an estoppel under the quitclaim deed.

We are of the opinion, upon a consideration of the whole case, that the conclusion of the referee and the judgment affirming the same were correct.

Affirmed.

Cited: Real Estate Co. v. Bland, 152 N. C., 231; *Beacom v. Amos,* 161 N. C., 365; *Ipock v. Gaskins, ib.,* 681; *Torrey v. McFadyen,* 165 N. C., 239; *Weil v. Davis,* 168 N. C., 303; *Coble v. Barringer,* 171 N. C., 450.

ATLANTIC NATIONAL BANK ET AL. v. PEREGOY-JENKINS COMPANY.

(Filed 8 April, 1908.)

1. Attorney and Client—Original Authority—Continuance Presumed—Scope of Authority.

The presumption is that generally the authority of an attorney to represent his client continues until there is evidence of its having been revoked; and it appearing that such original authority existed, without more, his motion in the original cause to set aside the judgment on the ground that it was void cannot successfully be attacked for the want of such authority.

2. Superior Courts—Hearing Cause in Another County—Orders—No Jurisdiction.

A judge of the Superior Court, except by consent appearing of record, or where special statutory provisions have been made, has no jurisdiction to hear a cause or make orders therein in a different county from the one in which the action is pending.

3. Same—Substantial Rights.

The judge of the Superior Court has no jurisdiction, upon motion in the cause, to order a sale of lands in the hands of a receiver, affecting a substantial right and interest of the parties to the action, outside of the county wherein the action is pending. An order of sale may be made out of term, but a final order can be made only at the term of the court.

(294) APPEAL from *O. H. Allen, J.*, at Kinston, in LENOIR, 30 May, 1907.

This is a motion to set aside an order made by the judge of the Fifth Judicial District at Kinston, N. C., on 30 May, 1907, directing A. G. Ricaud, receiver, to sell to R. G. Grady certain timber, the title to which is now in controversy, and also to set aside the deed of the receiver to the purchaser. The motion was made in an action which was originally brought under the statute in the Superior Court of New Hanover County to settle the affairs of the corporation known as the "Peregoy-Jenkins Company," and A. G. Ricaud was appointed receiver to take possession of its assets and administer the same for the benefit of the creditors who brought the suit. A mortgage was executed by the Peregoy-Jenkins Company and a sale made thereunder, and by a deed to the purchaser and certain mesne conveyances the timber in controversy is alleged to have been acquired by Charles S. Reilly & Co., but it is not necessary to set out the chain of title in detail. The order permitting the receiver, A. G. Ricaud, to sell the land at private sale to R. G. Grady was made at chambers in Kinston, N. C., without notice to the parties to the action, and at a time when the Superior Court of New Hanover County, *Judge Long* presiding, was actually in session, but the application for the order was made before the court had convened. The motion to set aside the order allowing the receiver to sell the land to R. G. Grady was made by

Mr. John D. Bellamy as attorney in behalf of Charles S. Reilly
(295) & Co., and also in behalf of the Peregoy-Jenkins Lumber Company, he being attorney of record for the last named company. Mr. Bellamy has not been specially requested by his client, the Peregoy-Jenkins Lumber Company, to make this motion, and has not heard from them in regard to it. At the time the motion to set aside the order allowing the receiver to sell was made, an order was issued restraining R. G. Grady from disposing of the property in controversy. At the hearing before the judge he refused to set aside the order allowing the receiver

to sell the timber to R. G. Grady and dissolved the restraining order. The parties who made the motion excepted and appealed.

E. K. Bryan for plaintiffs.
Herbert McClammy and J. D. Bellamy & Son for defendant.

WALKER, J. It cannot be material in this case that the motion is made by Mr. Bellamy as attorney in behalf of Charles S. Reilly & Co., if in making the motion he is also representing his client, the Peregoy-Jenkins Lumber Company, which is a party to the record. His right to move in the cause is derived from the original authority which was given by the defendant, the Peregoy-Jenkins Lumber Company, to appear for it generally in the proceeding, and this authority was not terminated by the order of sale which the court made. If the Peregoy-Jenkins Lumber Company could move to set aside the order allowing the receiver to sell the timber to R. G. Grady, because it was voied, it would seem to follow that its attorney of record, acting in its behalf, could do the same thing, unless his authority had been revoked, and there is no finding of fact in this case to the effect that it had been. So far as appears, therefore, he still had the authority to make the motion. *Rogers v. McKensie,* 81 N. C., 164; *Branch v. Walker,* 92 N. C., 87; *Allison v. Whittier,* 101 N. C., 490; *Ladd v. Teague,* 126 N. C., 544. The order of the court for the sale of the property to R. G. (296) Grady provides that the Peregoy-Jenkins Lumber Company and all the creditors of the said company shall be forever excluded from any right, interest, or title therein, and it is found as a fact that the order was made without any notice to the parties to be thus affected by it. The motion for the order of sale and the order itself were made out of the county in which the case was pending. The motion was one in the cause, as distinguished from a motion for an ancillary remedy, such as an application for an injunction, receiver, etc., and should have been made in the county where the cause was then pending. The order disposed of a part of the assets in the possession of the receiver and affected a substantial right and interest of the parties to the action. In *McNeill v. Hodges,* 99 N. C., 248, the Court said that "Regularly an action must be conducted, tried, and disposed of, not only in the court, but as well in the county where it is pending. The several statutes prescribing and regulating the jurisdiction of the courts, the method of procedure and practice, so in effect provide, except in particular cases and respects specially provided for, such as the granting of injunctions pending the action until the hearing upon the merits, the appointment of receivers, and the like. *Bynum v. Powe,* 97 N. C., 374." It was therefore held

that, except by consent or in those cases for which special provision is made by the statute, a judge of the Superior Court, even in his own district, has no jurisdiction to hear a cause or make an order therein outside the county in which the action is pending. If consent has been given by the parties, it should so appear in the record. *Godwin v. Monds,* 101 N. C., 354. This case differs from *Parker v. McPhail,* 112 N. C., 502, for in that case the judge acquired jurisdiction as incident to the original power he had to grant the order of arrest outside the county where the action was pending, and, by virtue of The Code, sec. 594 (6),

as stated by the present *Chief Justice,* and *Fertilizer Co. v. Tay-*
(297) *lor,* 112 N. C., 141, differs from our case in the fact that the

judge was in that case merely enforcing obedience to his own order requiring the defendant to submit to an examination in supplementary proceedings. The jurisdiction to order the examination of a party implied the power to enforce the order by attachment for contempt. In both cases the necessity for conceding such jurisdiction to exist under the statute was considered as arising out of the urgency of the case and the nature of the relief demanded, requiring the remedy to be speedy in order to be effectual. But not so in our case. There was no reason why the judge should act at once here in a county other than the one where the cause was pending. Besides, as we have said, the order affected the *corpus* of the assets in the hands of the receiver, and the motion was, in legal contemplation, one made in the principal cause. It was not for those reasons merely ancillary in its nature. In the case of *Brown v. R. R.,* 83 N. C., 128, this Court held that a Superior Court of one county should not interfere with property in the hands of a receiver appointed by the Superior Court of another county, although the property is in the former county, but that relief should be sought in the county where the receiver was appointed. While that case is not directly in point, it furnishes a clear analogy for our guidance and assigns a good reason why motions of this kind should be made in the county where the principal cause is pending.

Our decision is that the judge had no power to order the sale to be made, and there was consequently error in the refusal to vacate the order and to set aside the deed made to the purchaser. It must be understood that we are reversing the order of the court solely upon the ground that the original order, which was made outside the county of New Hanover, where the case was then pending, disposed of a part of the assets in the possession of the receiver. In such case the order is final as to the

property disposed of, the title to which passes thereby, and such
(298) order should therefore be made in the county and at the term of

court. It is otherwise as to orders to advertise property for sale,

which are mere directions from the court to the receiver in the management of the property and which may be made by the judge anywhere in the district. The advertisement, the public sale, and the requirement that the final order confirming the sale (with opportunity of raising the bid) must be made at term and in the county, safeguard the rights of all parties. Besides, an order to advertise for sale can be modified or set aside, on motion, before the sale takes place, for good cause shown.

Reversed.

Cited: Clark v. Machine Co., 150 N. C., 375; *Riley v. Carter*, 165 N. C., 337; *Cox v. Boyden*, 167 N. C., 321.

J. M. MANNING AND T. A. MANN v. INTERSTATE TELEPHONE AND TELEGRAPH COMPANY.

(Filed 8 April, 1908.)

Telephone Companies—Partnership—Rates to Partnerships—Persons Entitled to Partnership Rates.

When the rates of charges by a telephone company fix a certain charge for telephone service for copartnerships, two persons having connecting offices and partners as to some but not as to all matters of their vocation are entitled to the rate of charge allowed to copartners.

APPEAL from *W. R. Allen, J.*, at September Term, 1907, or DURHAM. Defendant appealed.

Manning & Foushee for plaintiffs.
Fuller & Fuller for defendant.

PER CURIAM. The Court deems it unnecessary to discuss the subject of what constitutes an unlawful discrimination upon the part of a telephone company. It appears in the record that the fee which defendant is authorized to charge to copartnerships for the use of one phone is $3.50 per month. It appears that plaintiffs are copartners in (299) "minor surgery" (whatever that may be) and occupy connecting offices used in the business, and as such use one phone in common. The fact that they have private practice not embraced by their copartnership does not make them any the less copartners, and we think as such they come within the schedule of defendant's rates and must be charged as copartners.

Affirmed.

J. A. BIGGERS v. N. S. MATTHEWS.

(Filed 8 April, 1908.)

1. Contracts, Executory—Personal Employment to Cut Timber—Vested Interest.

An executory contract made by the owner of land, by which another person is to cut the timber on a stipulated piece, is a contract of personal employment, vesting no interest in the land or the standing timber in the employee.

2. Contracts—Standing Timber—Sale to Third Person—Breach—Compensatory Damages.

For a breach of such contract on the part of the owner of the land, by selling it to a third person, such owner is liable for compensatory damages. The purchaser takes title to the land, with the standing timber, free from any right or claim of the person with whom the contract to cut was made, and is not liable to him for damages sustained by reason of the purchase.

3. Same—Liability of Third Person.

B., the owner of timberland, contracts with C. to cut the timber thereon. A., with knowledge of said contract, purchases the land and standing timber from B., for the purpose of preventing the timber from being cut. *Held*, A. is not liable to C. for damages sustained by reason of the breach of the contract made by the owner with C.

APPEAL from *Jones, J.*, at February Term, 1908, of UNION.

Plaintiff appealed. The facts are stated in the opinion.

(300) *A. M. Stack for plaintiff.*

Robinson & Caudle, Stevens & Love, and Williams & Lemmond for defendant.

CONNOR, J. The pleadings disclose this case: The defendant Matthews, on 22 December, 1905, entered into a contract in writing with Gordon & Smith, which, as contended by plaintiff, may be interpreted to constitute a sale of certain standing timber on his land at the price and upon the terms set forth therein. Plaintiff, on 3 January, 1906, contracted with Gordon & Smith to saw the timber into lumber, receiving as compensation therefor 30 cents per hundred feet. Pursuant to the terms of his contract, plaintiff carried his sawmill, engine and boiler to defendant's land, upon which the timber was standing, and began to saw it into lumber. Defendant, on 5 February, 1906, after the plaintiff had carried his mill to the land and begun sawing, having knowledge of plaintiff's contract with Gordon & Smith, took an assignment from Gordon of his interest in the timber and forbade plaintiff sawing the same

into lumber. His purpose in taking said assignment from Gordon was to prevent plaintiff from continuing to saw the timber and performing his contract. Defendant, on 13 September, 1906, sued Smith and obtained from the court an injunction restraining him and his employees from sawing said timber. Plaintiff was not a party to this action. Plaintiff alleges that defendant took said assignment and sued out said injunction for the purpose of preventing him from sawing the timber under his contract with Gordon & Smith. The foregoing are the material facts in the case. His Honor, being of the opinion that upon the pleadings plaintiff was not entitled to maintain the action against defendant for damages sustained by reason of the breach of contract, rendered judgment for defendant, to which plaintiff excepted and appealed. While it is not clear, it may be, for the purpose of disposing of this appeal, conceded, as contended by plaintiff, that the contract between Gordon, Smith, and defendant constituted a sale of the (301) timber, to be paid for at the price named, as it was cut. Plaintiff acquired no title to or interest in the timber by his contract with Gordon & Smith. The agreement between them was an executory contract in the nature of an employment, whereby plaintiff was to saw the timber and receive as compensation 30 cents per hundred feet. A similar contract to cut cordwood was considered by us in *Ives v. R. R.*, 142 N. C., 131. *Mr. Justice Walker* (at p. 134) said: "The contract was not for the sale of standing trees, but . . . for the conversion of trees growing on defendant's land into cordwood and the delivery of the same on the defendant's right of way. It was not contemplated by the parties that there should be a transfer of any title to or interest in the trees as they stood upon the land." We can perceive no reason why Gordon could not assign and the defendant purchase his interest in the timber, free from any liability on the part of defendant to carry out Gordon's executory contract with plaintiff. It was a personal obligation on the part of Gordon, and not a covenant running with his title to the timber. He did not assign the contract with plaintiff, but the timber. We can perceive no difference as to the principle involved between this case and one in which the owner of a lot had contracted with a builder to erect a house thereon and thereafter sold the lot, or one in which the owner of a farm had contracted with a superintendent for a year and during the time sold the farm. In neither case does the purchaser come into any contractual relation with or obligation to the person with whom the owner has contracted. For any damages sustained by the builder or the superintendent by the sale of the property the owner with whom he contracted is liable. If the owner has made a lease or granted an easement, or made a covenant real which runs with the land, the purchaser takes the title *cum*

onere, and, of course, is liable for a disturbance or breach, as the case may be. What the liability of defendant would be to plaintiff if
(302) Gordon had assigned his contract with plaintiff is not presented.

Plaintiff says, however this may be, defendant took the assignment from Gordon for that purpose and with the intent to prevent him from sawing the timber, and relies upon *Haskins v. Royster,* 70 N. C., 601, to sustain his action. There the plaintiff alleged that defendant unlawfully enticed and persuaded his servants to leave his employment. *Rodman, J.,* says: "We take it to be a settled principle of law that if one contracts upon a consideration to render personal service for another, any third person who maliciously—that is, without a lawful justification—induces the party who contracted to render the service to refuse to do so is liable to the injured party in action for damages." *Jones v. Stanly,* 76 N. C., 355. One who has entered into a contract of service would have the same right of action against a person who under similar conditions procured his discharge. This is elementary, but not applicable to the facts set out in the complaint. The defendant in the case cited maliciously, without any lawful justification, interfered with the plaintiff's contractual rights. Here the defendant purchased Gordon's interest in the timber, but it is not charged that he did so from malicious motive, but willfully and intentionally. If a person does that which he has a legal right to do, violating no legal duty or obligation, the motive which prompts him is immaterial. Conceding that defendant did not wish the timber cut and sawed into lumber, and repurchased from Gordon to prevent it, we are unable to see how he violated any legal duty or did any actionable wrong to plaintiff. He was under no obligation to permit him to saw it. He did not by purchasing come into any contractual relation with plaintiff. We do not perceive that the case differs in principle from one in which the owner of a lot finds that an adjacent owner has made a contract with a builder to erect a house, to which he objects, and for the purpose of preventing the erection of the house purchases the lot and forbids the builder from proceeding with the
(303) work. He has committed no actionable wrong. The one who, after making the contract, sells the lot, thereby preventing the builder from performing his contract and making his profit, is liable for breach of his contract. If the defendant had the legal right as against plaintiff to buy from Gordon, his purpose is irrelevant. In *Richardson v. R. R.,* 126 N. C., 100, *Clark, J.,* says: "But upon plaintiff's own showing his discharge was within the right of the defendant and not wrongful, and malice disconnected with the infringement of a legal right cannot be the subject of an action." *Judge Black,* in *Jenkins v. Fowler,* 24 Pa., 308, says: "Malicious motive makes a bad act worse, but it can-

not make that wrong which in its own essence is lawful. . . . Any transaction which would be lawful and proper if the parties were friends cannot be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart." "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." In Cooley on Torts, 93, the author says: "That the exercise by one man of his legal rights cannot be a legal wrong to another is a truism." *Ib.*, 830; *Steamship Co. v. McGregor,* 23 Q. B. D., 612; *Allen v. Flood,* L. R. A. C., 1. We think it clear that no cause of action is stated in respect to the assignment by Gordon to defendant. The fact that he had made the original contract does not affect his right to take the assignment. It seems that for some reason, which the court deemed sufficient, the present defendant enjoined Smith, his employees and agents, from cutting the timber. While plaintiff was not a party to that action, and therefore not estopped by the judgment, his right to saw the timber was dependent upon Smith's title, and if Smith had violated his contract or otherwise forfeited his interest in the timber, plaintiff cannot sue defendant for damages. He must look to Smith, with whom he contracted.

Plaintiff assumes that Gordon & Smith assigned to him some interest in the timber and that the assignment by Gordon to defendant was subject to such assignment to him. The fallacy in the (304) argument is just here. As we have undertaken to show, plaintiff took no interest in the timber, but had only an executory contract to saw it for Gordon & Smith. While he is not estopped by the injunction order, he is prevented, as an employee of Smith, from sawing it. He was not a necessary party to that action. His right to sue ceased when the court enjoined Smith, *his employees and agents.* There are many averments regarding defendant's motives, etc., but when we eliminate them and get to the real facts we do not find any violation of a legal duty or an unlawful interference with plaintiff's legal right by defendant. Calling his conduct unlawful does not make it so. Upon a careful examination of the entire record we concur in the judgment rendered by the court. There is

No error.

Cited: *Younce v. Lumber Co.,* 148 N. C., 35.

HENRY A. REAMS v. H. F. WILSON.

(Filed 8 April, 1908.)

1. Principal and Agent—Agency to Sell—Purchaser—Agent's Compensation —All Over a Fixed Price—Contract, Express.

An agreement between principal and agent that the latter is empowered to sell for the former a piece of property and to have all he could obtain for it over a certain price is a valid express contract as to the agent's compensation, and he is entitled to recover upon the contract in obtaining a purchaser "ready, able, and willing" to pay for the property.

2. Principal and Agent—Agency to Sell—No Time Limit—Revocation, Notice of.

When a principal places his property with an agent to be sold, without specifying a definite time therefor, notice of revocation is necessary to terminate the agency, especially when there is an agreement to that effect.

3. Principal and Agent—Agency to Sell—Purchaser Procured—"Ready, Able, and Willing"—Evidence Sufficient.

An agent to sell property of his principal can corroborate his evidence that his vendee was "ready, able, and willing" to comply with the sale by showing that his vendee soon after bought the property, from the one to whom the principal had sold, at the price agreed upon with the agent.

(305) APPEAL from *Webb, J.*, at January Term, 1908, of DURHAM.

Plaintiff appealed. The facts are stated in the opinion.

W. W. Mason and Giles & Sykes for plaintiff.

R. O. Everett and Manning & Foushee for defendant.

CLARK, C. J. The uncontradicted testimony of the plaintiff is that in December, 1906, the defendant placed in his hands a piece of property to sell at $1,400, with a stipulation that in lieu of commissions the plaintiff was to have all he could get over $1,400, and that it was agreed further between them that the defendant would not dispose of the property without giving the plaintiff notice; that in February the plaintiff sold the property for $1,500 to a party "ready, able, and willing" to pay for it, but, on reporting the sale to defendant, found that the latter had sold the property, 29 January, 1907, to another party for $1,350, without giving the plaintiff any notice.

Upon the above evidence the court charged that the defendant had a right to sell the land and that "the plaintiff would not be entitled to recover $100—that is, the difference between $1,400 and $1,500—but that he would be entitled to recover the *quantum meruit, i. e.*, such com-

pensation as the jury may find he is entitled to recover for the services he rendered the defendant in attempting to sell the land between the date of the contract and the time (29 January) when the defendant sold it."

This was erroneous. There being a valid express contract, there is no ground for recovery on a *quantum meruit*. The plaintiff was entitled to recover the stipulated compensation (here $100), if (306) the jury believed the evidence. *Reed v. Reed,* 82 Pa. St., 420; *Phelan v. Gardner,* 43 Cal., 306; *Doty v. Miller,* 43 Barb., 529; *Bailey v. Chapman,* 41 Mo., 537; *Monroe v. Snow,* 131 Ill., 136, and numerous cases collected in notes to *Beckenridge v. Claridge,* 43 L. R. A., 593.

Notice of revocation must be given by the principal to the agent. Mechem Agency, sec. 226. Besides, in this case an express agreement that notice should be given is shown.

If there had been no agreement as to the compensation the plaintiff could have recovered on a *quantum meruit* for the value of his services in making sale at the price he did, and not merely the value of services in trying to make sale up to 29 January, when the defendant, unknown to plaintiff, actually made sale—the rule which his Honor laid down. That the vendee of the plaintiff was "ready, able, and willing" to comply is fully shown by the fact that the plaintiff, on defendant's failure to comply, bought the land for his vendee from defendant's vendee for $1,500.

Error.

BRYAN W. IVES v. NEW BERN LUMBER COMPANY.

(Filed 8 April, 1908.)

1. Issues, Sufficiency of.

Issues are sufficient which enable the parties to present every material phase of the controversy.

2. Same—Matters Evidential.

Issues tendered upon matters merely evidential and not issuable should be refused.

3. Evidence—Opinion—Result of Knowledge and Observation.

In an action for recovery for services rendered in cutting logs under a part performance of a contract, under the contention that defendant wrongfully refused to permit plaintiff to cut more and to furnish sufficient rafting gear required, which he had agreed to furnish as a part consideration of the contract, it was competent for witness to testify that the rafting gear actually furnished was not "sufficient," not as a matter of opinion, but the result of knowledge and observation.

4. Contracts—Assignment Unaccepted—Amount Unascertained—Revocation—Defense—Consent of Assignee.

An order or request by one on his debtor to pay over to another an unascertained amount, which was not accepted, is revocable and not binding except as to the amounts actually paid thereunder; and it cannot be set up as a defense in a suit for an unpaid balance due, especially when the legal representatives of the assignee come into court and ask that judgment below in favor of the assignor be affirmed.

(307) APPEAL from *Lyon, J.*, at November Term, 1907, of CRAVEN. Defendant appealed. The facts are stated in the opinion.

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

CLARK, C. J. The jury found that the defendant contracted with one Kimball to log certain timber lands which it owned; that Kimball assigned the contract to the plaintiff with knowledge and consent of the defendant; that the plaintiff had cut a large quantity of logs, when the defendant wrongfully refused to let him cut more and did not pay him in full for what he had cut. The complaint alleged, among other matters, that the defendant agreed to furnish rafting gear to plaintiff, but failed to do so, causing the plaintiff loss thereby.

The court properly refused the motion to nonsuit. The issues submitted were such as enabled the parties to present every material phase of the controversy, and were therefore sufficient. *Vaughan v. Parker*, 112 N. C., 100. The issue as to the counterclaim was sufficient for that phase of the case. Most of the twenty issues tendered by the defendant were as to merely evidential, not issuable, facts, and were properly refused.

(308) The reply of the witness that the defendant did not furnish rafting gear "sufficient" to do the business was competent as evidence of a fact within his knowledge. This was not a mere matter of opinion, but the result of knowledge and observation. The witness was subject to cross-examination to test the credence to be given his knowledge and information. The other exceptions to evidence do not require discussion, and the same is true as to the exceptions to the charge. The order or request to pay over to Meadows the money due plaintiff was not an assignment, but a request to pay money, the amount of which was not fixed. Such order was not accepted and was revocable, and is only binding on plaintiff to the extent that money was paid in compliance with the request. Besides, the personal representative of Meadows comes into this Court and on her own request is made a party, and asks that the judgment below be affirmed.

The controversy is almost entirely one of fact, and the exceptions do not require a fuller discussion in an opinion, though we have, notwithstanding, carefully and fully considered each of them before coming to our decision.

No error.

Cited: *Alley v. Pipe Co.*, 159 N. C., 330; *Cotton Mills v. Assurance Corporation*, 161 N. C., 564.

A. P. GILBERT AND W. R. KUKER v. HOWARD AUTOMATIC MACHINE COMPANY ET AL.

(Filed 15 April, 1908.)

1. Partnership, Prospective—Patent—Money Advanced—Work Done—Condition Precedent.

Under a contract between the plaintiffs and defendants, that in consideration of moneys to be advanced by some and work to be done by others upon a machine invented by one of them and proposed to be patented, and in the event of its being patentable the article to be manufactured or sold, with a specified division of profits, a partnership was created as an executed agreement, and a stipulation that the plaintiffs were to erect or construct the machne and make certain advancements was not in the nature of a condition precedent or concurrent, but an obligation for breach of which, if not properly explained, the plaintiffs could be held responsible, either as an item of charge in taking a partnership account or by way of counterclaim.

2. Partnership—Termination at Will—Purpose of Patent—Sale of Patent—Breach of Contract—Damages.

When it appears that a partnership had been formed for the definite purpose of having patented and manufacturing a certain device for the purpose of sharing in the profits, the partnership could not be terminated at the will of either partner, and this being established between the plaintiffs and defendants, the latter, without just cause and lawful excuse and in breach of the partnership agreement, having profitably disposed of the device and refused to account, an actionable wrong is done, for which plaintiffs can recover their portion of the profits as established by the partnership agreement.

3. Partnership—Definite Purpose—Continuance—Termination.

A partnership for the accomplishment of certain definite objects, but not expressly specifying any time for its continuance, is not a partnership at will within the meaning of the general rule, but is to be regarded as a partnership to continue until its purpose is accomplished or the impracticability thereof is demonstrated.

(309) APPEAL from judgment on demurrer before *Webb, J.*, at January Term, 1908, of DURHAM.

The complaint, containing, the written contract entered into between the parties, is as follows:

Plaintiffs allege:

1. That on 16 December, 1904, plaintiffs and J. H. Howard and A. Lyon entered into a contract of copartnership in the words and figures as follows:

Articles of agreement entered into this 16 December, 1904, at Durham, N. C., by and between A. Lyon, J. H. Howard, W. R. Kuker, and A. P. Gilbert: Witnesseth, that the said parties, for the consideration and for the purposes hereinafter recited, have this day entered into a copartnership under the name and style of Howard Automatic Cigarette Wrapping and Packing Machine. The object of the copartnership is to secure from the United States Government letters patent to be

(310) issued to the above named copartnership granting to them the sole privilege to make, use, sell, or otherwise dispose of a certain device to be called and to be used as an automatic cigarette wrapping and packing machine, and this copartnership shall likewise embrace the right to secure letters patent in any foreign country.

It is further understood and agreed by and between the parties hereto that W. R. Kuker and A. P. Gilbert will without delay construct and erect at the Durham Iron Works Company, Durham, N. C., without cost or expense to the other partners, one complete automatic cigarette wrapping and packing machine, and that the said J. H. Howard shall render to them, when called upon, his friendly assistance in the construction of the same and in experimenting with the same. The said W. R. Kuker and A. P. Gilbert likewise agree and bind themselves as a part hereof that they will advance from time to time, when necessary, an amount not exceeding $300, to be used for the sole purpose of securing such letters patent upon said machine in the United States. They do not agree to advance any sum over and above said amount, and no greater sum than is demanded for said purpose shall be required of them. On account of amounts heretofore advanced, the said A. Lyon is to receive his interest in the said copartnership, as is hereinafter set out.

In the event of securing the said patent the said copartnership shall thereafter enter into such agreements, as a majority in interest shall wish, to manufacture and sell said machines or to sell the patent right within a restricted territory or to dispose of the machine through manufacturers, retaining a royalty upon each machine sold.

It is, however, expressly understood and agreed between all the parties

hereto that no one of the partners shall sell his interest in said patent without first offering his said interest to each and all his copartners and without giving them ten days time within which to accept or reject such offer.

In consideration of the foregoing, the said J. H. Howard is (311) hereby declared to be the owner of 35 per cent of the said patent, the said A. Lyon the owner of 25 per cent thereof, the said W. R. Kuker the owner of 20 per cent thereof, and the said A. P. Gilbert the owner of 20 per cent thereof; and all moneys derived from the sale or manufacture of said machine or from the sale of any right to make, use, or enjoy said machine, either directly or indirectly, and also any and all royalties, rentals, or returns of whatever kind which shall be realized therefrom shall be divided between said parties in the proportion above set out.

It is further understood and agreed that this copartnership is of indefinite duration and that the same shall be dissolved in the following manner: First, if no patent is granted to the said copartnership, or if the manufacture or sale of the said machine shall be in violation of existent patent laws and rights, and worthless, the said copartnership shall be immediately dissolved. Second, in case of the issue of a patent to the said copartnership by the United States Government, if any of the partners shall be dissatisfied with the copartnership and shall desire to withdraw from the same, he shall give notice in writing to the other partners of his intention to withdraw from the said copartnership, and he shall in such notice name a price which he will either give or take for the several interests mentioned in the agreement.

Witness our hands and seals, this the day and date above written.

J. H. HOWARD, [SEAL]
A. LYON, [SEAL]
W. R. KUKER, [SEAL]
A. P. GILBERT. [SEAL]

2. That immediately thereafter W. R. Kuker and A. P. Gilbert advanced to the said copartnership, under said agreement, in order to secure a patent and to pay the expenses of J. H. Howard on trips to Washington and New York, the sum of $300, and that they likewise immediately expended under said contract in constructing a machine the sum of not less than $150, and would have constructed same at once but for the changes made in the application by the patent (312) examiner.

3. That at said time plaintiffs were operating a machine shop and foundry in Durham, N. C., and the defendant Howard made application

to the Patent Office for a patent for a cigarette machine, and he and said Lyon entered into a copartnership, which now exists, in order to get means to pay the costs of said patent and to get a model when the said patent was granted, and to have the benefit of plaintiffs' business experience in handling same, and that it was well understood and agreed that plaintiffs should construct such model without delay. The plaintiffs at once set about the task of making said machine, but the patent examiner cited interferences which made radical changes in the application, and it was impossible to make a machine until it was known exactly what kind of machine was required. That plaintiffs were then and are now and have been at all times willing, ready, and able to construct said machine as provided in said contract, and that they have fully complied with the terms of said contract.

4. That plaintiffs are informed and believe, and therefore allege, that said Howard and Lyon have sold the device mentioned in said contract to the American Tobacco Company for the sum of $6,000, which said sum they have received, but have unlawfully and willfully appropriated and converted it to their own use and have refused to pay the plaintiffs their proportionate part of the same, and that said W. R. Kuker is entitled to 20 per cent thereof and the said A. P. Gilbert to 20 per cent thereof.

5. That said Howard and Lyon have proceeded very secretly in connection with the sale, disposal, and conversion of said device, and they the said plaintiffs, received no information from either of said parties as to said sale until after it had been reported to them by another party.

6. That the manufacture and sale of the cigarette machine in
(313) question is not in violation of existing patent laws and rights, but that the same is a valuable asset, and that, while no patent has been granted, no patent has been refused; that the application for a patent is pending in the Patent Department at Washington and will shortly be granted.

7. That it would have been granted previous to this time but for the interference of the American Tobacco Company, who were interested in thwarting the issue of a patent and who have since bought said device.

8. That the Patent Department does not permit a model to be shown to them before granting a patent, and that no model was necessary or could be used in said department for that purpose.

9. That since this action has been instituted the defendants Lyon and Howard have given a bond, which has been approved by the clerk of this court, to pay to the plaintiffs whatever sum shall finally be recovered in this action against said defendants.

10. That before this action the plaintiffs made demand upon the

defendants Howard and Lyon for their part of the assets, but that said Howard and Lyon refused to pay to them their part of said assets and tendered them the sum of $300, which they refused to accept.

Wherefore plaintiffs pray judgment against the defendants for 40/100 of $6,000, to wit, $2,400, together with interest upon the same from the date of said sale, to wit, .. February, 1907, and the costs of this action, and for other and further relief.

Demurrer by defendants to this complaint having been duly entered, the same was sustained and the action was dismissed. Plaintiffs excepted and appealed.

Winston & Bryant and R. P. Reade for plaintiffs.
Bramham & Brawley for defendants.

HOKE, J., after stating the facts: The Court is of opinion that (314) by the contract, set out in full in the complaint, a partnership was created between the parties as an executed agreement and that the stipulation in the second clause of said contract, by which the plaintiffs were to erect and construct a machine and make certain advancements, was not in the nature of a condition precedent or concurrent, but an obligation for the breach of which, if not properly explained, the plaintiffs could be held responsible, either as an item of charge in taking a partnership account or by way of counterclaim to an action brought by themselves, as the defendants may be advised.

This construction, we think, finds support in numerous and well considered decisions. *Hartman v. Wœhr,* 18 N. J. Eq., 383; *Pierce v. Whitney,* 39 Ala., 172; *White Lead Co. v. Haus,* 73 Iowa, 399; *Wadsworth v. Manning,* 4 Md., 59; *Cogswell v. Wilson,* 11 Ore., 371. In the New Jersey case, *supra,* it is held:

"1. A part of the partners cannot exclude from the partnership one of their number who has failed to pay in part of the amount which he agreed to contribute as his share of the capital; but if part of his capital has been paid in, accepted and used, and the business has been commenced in the name of the firm, he is a partner until the partnership is legally dissolved.

"2. A partner excluded from the business of the firm by the illegal acts of his copartners is entitled to an account of profits and to his share of them until the partnership is legally dissolved, and is entitled to a decree of dissolution on the ground of such illegal exclusion from the business."

The partnership, then, having been established and being one for a definite purpose and creating an interest in the device itself, could not be terminated at the will of either; and if defendants, without just cause

and lawful excuse and in breach of the partnership agreement as charged in the complaint, have disposed of the device and received therefor a large sum of money, for which they refuse to account, there would (315) be a wrong done plaintiffs, for which, as the facts now appear, an action would lie. *Kavick v. Hannaman,* 168 U. S., 328; *Pearce v. Ham,* 113 U. S., 585; *Bagley v. Smith,* 10 N. Y., 489; *Dart v. Lainbeer,* 107 N. Y., 664; 22 A. and E., 205. In this last citation it is said: "A partnership for the accomplishment of certain definite objects, but not expressly specifying any time for its continuance, is not a partnership at will within the meaning of the rule just stated, but is to be regarded as a partnership to continue until its purpose is accomplished or the impracticability thereof is demonstrated."

We are of opinion that the defendants should be required to answer and that the judgment sustaining the demurrer should be

Reversed.

Cited: *Gilbert v. Howard,* 150 N. C., 790.

D. D. WAGNER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 April, 1908.)

1. Railroads — Negligence — Passenger — Invitation to Alight — Platform — Warnings—Contributory Negligence.

It is *prima facie* negligence for a passenger to voluntarily ride on the platform of a rapidly moving train; and while he has the right to presume that the next stop made after a station is called is at such station, the defendant is not liable in damages for his stepping from the train on a dark night under such circumstances, whereby the injury was incurred, when by being on the platform he was prevented from hearing the conductor call out that the station had not yet been reached and for the passengers to keep their seats.

2. Same—Evidence—Instructions.

When there is evidence that the plaintiff was negligent in his voluntarily riding upon the platform of defendant's train, and that by riding there he could not have heard the warning of the conductor for passengers to "keep their seats," etc., and in consequence the plaintiff stepped from the train on a dark night and was injured, it was error in the court below to omit to charge thereon in his instructions to the jury upon the liabilities arising from the fact that the station had previously been called and the right of plaintiff to act upon the assumption that the next stop was his destination.

3. Same.

An instruction, based upon the evidence as to defendant's having placed notices in the car warning passengers from riding on the platform (Revisal, sec. 2628), is erroneous which leaves out an independent defense against the plaintiff's action that by so doing the plaintiff was prevented from hearing a warning called out in the coach, which would have prevented the injury.

4. Evidence—Burden of Proof—Admissions—Instructions—Issues.

While the burden of the issue is upon the defendant setting up contributory negligence as a defense, it was error in the court below to so instruct the jury when plaintiff's evidence established negligence on his part. Then the question becomes one of proximate cause alone, when there is evidence of defendant's negligence. (The question of appropriate issues in such cases discussed and proper issues suggested by CONNOR, J.)

HOKE, J., dissenting.

APPEAL from *Neal, J.*, at Fall Term, 1907, of EDGECOMBE. (316)

Action for personal injury sustained by the alleged negligence of defendant.

The testimony tends to show that the defendant corporation owns and operates as a part of its system a railroad from Plymouth to Tarboro, N. C., for the transportation of freight and passengers; that as said railroad approaches Tarboro from the east it crosses a bridge over the Tar River and the lowgrounds thereof.

Plaintiff's witness Harris, who took measurements of the bridge, etc., says: "From stop post to beginning of trestle is 12 feet; from beginning of trestle to the bridge, 599 feet; width of the bridge, 9 feet 8 inches from guard rail to guard rail. Car steps would be over the guard rail. About a couple of inches of the guard rail would be showing. River bridge is 289 feet 7 inches. From end of bridge to crossing at Water Street, to center of street, 227 feet; from bridge to water, 35 feet 2 inches. It was low water. Total length from stop post to bank, 889 feet 3 inches. Average height of trestle, 26 feet. From the embank- (317) ment to the river there is swamp and undergrowth; trees on west side; no trees on east side. When the road crosses Water Street the train stops to receive and put off passengers. It is called 'Lower Tarboro.'"

On 2 June, 1905, plaintiff boarded the local freight train at a station 8 miles east of Tarboro, between 7 and 8 o'clock at night, as a passenger for Tarboro. The train, with combination car and freight cars, was about 200 yards long. He took a seat on the platform of the car. One foot was on the lower step and one leg straight out. The night was very dark. Plaintiff was in the habit of riding on this train "two to four trips a week"; was working at stations below Tarboro. He says: "The

train blew for the crossing, then stopped for bridge, and just before getting to bridge the porter called out, 'Next stop, Lower Tarboro.' As the train pulled up again I was sitting on platform. Train stopped again after pulling maybe 250 or 300 yards. I had gotten up when train stopped. When it stopped I got up and stepped off. Porter was in the door by me when he called out, 'Next stop, Lower Tarboro.' He then went back in baggage car. When it stopped I stood there a second or two. I thought I would go to the upper depot, but thought of my wheel which I had left downtown, and got off to get it. The train always stopped for the drawbridge. It then pulled up and stopped at Lower Tarboro. I never knew it to stop at this place before. . . . Conductor gave no notice that the train had not reached Lower Tarboro. It looked so to me. The light in the car was dim and blinded me. I carefully looked before stepping." He says: "I did not see anything there. I got off in the swamp. There were about six passengers on the car. It was warm and I preferred riding on the platform." Plaintiff says that it was his custom to ride on the platform. No one spoke to him about it. Conductor knew he was on the train. The flagman and porter knew he was on the platform. He did not see any notice posted in car. He was seriously injured.

(318) Plaintiff introduced several witnesses, whose testimony tended to corroborate him.

Mr. Stewart, a witness for plaintiff, says: "There were plenty of seats; there was light in the car and the door was open. I don't think there was anything to prevent a man on the platform seeing between the cross-ties. On the steps near the end of the cross-ties a man could look down and see anything below. There was no light on the platform until conductor went out." Plaintiff says that he did not see conductor after he got on at Conetoe. Mr. Jenkins, a witness for plaintiff, testified that he had traveled on the car with the door open and a light in the car. He thought a man could see that there was nothing between the cross-ties. Sam Taylor testified to same effect.

Mr. Hill, the conductor for defendant, testified: "We stopped at the stop post at the drawbridge and pulled up again and waited for an extra we were to meet there. Everything was quiet. I told the passengers to keep their seats. We had been there five or ten minutes, when I heard a lumbering. A man was sitting behind me, and about that time some one said that somebody had fallen off the train, and it turned out to be Wagner. We had a plenty of seats. I did not hear any one call out, 'Next stop, Lower Tarboro.' I had no porter." The flagman corroborated the conductor.

Mr. Braswell, a passenger on the train, testified for defendant that he

saw plaintiff sitting on platform before reaching the trestle and told him he had better go in, he would fall off, and plaintiff said he was where he generally rode. When the train stopped he heard the conductor say: "Keep your seats; you are not at Lower Tarboro yet." No passengers came out on platform when the train stopped. This witness said that plaintiff fell off—"he was not in a position to step off."

The conductor testified that there were three signs in the car—one on each side and one on the end—which read: "Passengers are warned not to put their heads or arms out of the windows, or use the platform except on entering or leaving the car." He further said: "I do (319) not know how it read, but it was a warning to passengers not to use the platform or stand on it." W. I. Walker and L. A. Hinson, for defendant, testified to the same effect.

The foregoing sets forth substantially the facts upon which the rights and liabilities of the parties depend.

The defendant, at appropriate stages of the trial, moved for judgment of nonsuit and duly excepted to the refusal of the court to grant the motions.

The issues submitted to the jury presented the inquiry as to whether the plaintiff was injured by the negligence of defendant, as alleged, and whether plaintiff was guilty of negligence which contributed to the injury. There was a verdict for plaintiff, with an assessment of damages. Judgment and appeal. The defendant's exceptions are set forth in the opinion.

Gilliam & Gilliam for plaintiff.

F. S. Spruill and John L. Bridgers for defendant.

CONNOR, J., after stating the facts: Eliminating all immaterial and corroborative testimony, there is but little controversy respecting the facts. Plaintiff got upon defendant's train at a station 8 miles east of Tarboro, between 7 and 8 o'clock in the evening of 2 June, 1905, and took his seat on the platform of the combination car, "with one foot on the bottom step and the other leg straight out." There were "plenty of seats" inside the car, and plaintiff sat on the platform because it was warm and he preferred riding there. There is no evidence that the conductor knew he was on the platform, although plaintiff says that "he knew I was on the train." The porter knew that plaintiff was on the platform. Plaintiff made "two to four trips every week; he was working at Parmele, Bethel, and Conetoe," towns below Tarboro. As the train reached the top post at the approach to the trestle and bridge over the lowgrounds and the river it stopped. As it moved forward

(320) the porter called out, "Next stop, Lower Tarboro," and passed into the baggage car. By reason of an excursion train on the other or Tarboro side of the river going into a siding, the train, being an accommodation freight "about 150 or 200 yards long," stopped on the trestle side about 250 or 300 yards from the stop or the post. The entire length of the trestle and bridge is 889 feet. From stop post to bridge is 611 feet. Before reaching the river the trestle is about 16 feet high. The conductor and other passengers were inside the car and remained therein.

Up to this point the only matter in regard to which there is any controversy is the call by the porter, "Next stop, Lower Tarboro." We assume, for the purpose of this decision, that plaintiff's version is correct. The conductor, who was inside the car with the other passengers, swears that when the second stop was made he said: "Keep your seats; we are not at Lower Tarboro yet." One passenger in the car corroborates the conductor; two others say they did not hear him say anything. One of the latter says that he did not hear either call.

The defendant's witnesses testify that notices warning passengers from riding on the platform were posted inside the car. Plaintiff says that he never saw them; that it was his custom to ride on the platform. He also says that his residence was "near upper depot, about 300 yards to the west." He was uncertain whether to get off at Lower Tarboro, but decided to do so because he had left his wheel there. There is no evidence that he had a ticket or that conductor or porter had any notice that he would get off at Lower Tarboro or that any other passenger wished to do so. The night was dark. Plaintiff says that he stood up, looked carefully, thought he was at Lower Tarboro; that it was very dark; he could not see that the train was on the trestle, and stepped off, falling to the ground and sustaining serious injury.

Stewart, plaintiff's witness, says: "About the time the train stopped the second time, I heard somebody say 'Hello!' and I heard a (321) noise of something hitting the ground, and we all knew some one had fallen off, and somebody said it was Mr. Wagner, the contractor from Tarboro." His son, J. W. Stewart, testified to the same. Hinson and Braswell, for defendant, say that plaintiff fell off. Mr. Stewart and other witnesses for plaintiff testified to effect of light from car upon the cross-ties.

It is undoubtedly true, as contended by plaintiff, that "the announcement by the conductor or other train employee of the station the train is approaching is the customary warning to passengers that the train is nearing the station, in order that they may get ready to alight. When a station is called the passengers have the right to infer that the first stop

of the train will be at such station, and when the train is stopped it is an invitation to the passenger to alight." Moore on Carriers, sec. 34; Elliott on Railroads, sec. 1628, and many other authorities cited in plaintiff's brief. It will be observed, however, in the cases cited the passenger was inside the car at the time the announcement was made, and in consequence of it went upon the platform to alight. This case is complicated by the fact conceded by plaintiff that he was voluntarily riding on the platform, there being "plenty of seats" on the inside of the car. It is not alleged nor is there any suggestion that it was negligent on the part of defendant to stop the train on the trestle. This was evidently necessary to permit another train to clear the track by going into a siding. The alleged and the only possible negligence was in the failure of the conductor, if there was such failure, or of some other employee, to notify plaintiff that the train had not reached Lower Tarboro. It was their duty to give such notice to passengers who were inside the cars. It may, under some circumstances, have been the duty to give such notice to persons standing or riding on the platform. If, for instance, the conductor or the porter knew that plaintiff, although negligently riding on the platform, intended alighting at Lower Tarboro, it would have been their duty to notify him. We find no evidence that either of them had such knowledge or that the plaintiff himself had deter- (322) mined to stop there when he got on the train. He says that when the train stopped he stood a second or two. He thought he would go to the upper depot, but thought of his wheel, which he had left downtown, and got off to get it. He lived near the upper depot. It does not appear that it was his habit to stop at the lower depot. We find nothing in the evidence imposing upon the conductor or porter any other duty to plaintiff than that which they owed to passengers inside the car.

Omitting for the present any reference to the alleged notices in the car, we proceed to consider the rights and duties of the parties in the light of the admitted facts. In *Goodwin v. R. R.*, 84 Me., 203, it was shown that plaintiff's intestate got upon the platform of the defendant's car; that the conductor took his ticket and made no objection to his riding there; that the car was crowded, although there was ample standing room inside; that the weather was warm; that in going around a curve he was thrown from the platform and killed. In an action for damages *Emery, J.*, says: "The danger of standing on the narrow platform of a passenger car while the car is moving with the usual speed of railroad trains is most conspicuous. No prudent man, no man ordinarily mindful of his conduct and of matters about him, would occupy such a position." Referring to the reasons suggested for riding on the platform, the judge says: "All these circumstances may have made it more agreeable to ride

on the platform in the open air than to stand inside the hot, crowded car, but they did not in the least lessen the danger nor the appearance of danger in so doing. That Goodwin was not ordered off the platform could not have led him to believe it was safe to ride there. He needed no warning of such a danger. He knew the place for passengers was inside the car. . . . Within the car, with all its discomfort, was safety. Without the car was obvious peril." In *Fletcher v. R. R.,* (323) 187 Mass., 461, it appeared that plaintiff was in the car. He left his seat some time before reaching his destination, went into the baggage compartment and engaged in conversation with a baggage master, who, when the train approached it for the purpose of stopping, called the station at which the plaintiff was to alight. After this, as the train was moving slowly, the plaintiff left the car and stood on the first of four steps that led from the platform of that end, and while in this position the steps came into collision with a truck and he was injured. The Court said: "Plainly, if he had remained in the car until the train stopped, this damage would have been avoided; but he voluntarily left a place provided for him as a passenger, and where he would have been safe, and exposed himself to the chance of injury which common experience has shown is incident to standing upon the platform of a moving railroad car."

In *Clark v. R. R.,* 36 N. Y., 135 (93 Am. Dec., 495), *Grover, J.,* said: "The negligence alleged against the plaintiff was that at the time of receiving the injury he was standing on the steps of the front platform of the car, it appearing that he would have escaped the injury either inside the car or upon the platform. In the absence of any explanation, I should have no hesitation in saying that this position of the plaintiff at the time of the injury proved that he was negligent." In that case the evidence showed that the car was crowded. The question of negligence under the circumstances was left to the jury. In the note to this case it is said: "When a person is injured while riding in a dangerous position upon a railroad car he is *prima facie* guilty of negligence which will bar recovery, and the burden is on him to show the injury was not the result of his negligence." Fetter on Carriers of Passengers, sec. 167, says: "By the weight of authority it is negligence, as matter of law, for a passenger to be upon the platform of a rapidly moving train, unless he is compelled to assume such position as the best he could do at the time, acting as a careful and prudent man." Elliott on Rail- (324) roads, 1630. We are of the opinion that, taking plaintiff's testimony to be true, he was negligent, as a matter of law, in riding upon the platform in the manner described by himself. The question therefore, involved in the first issue is, Assuming that the porter called

the station and that the conductor failed to notify the passengers inside the car that the train had not reached Lower Tarboro when it stopped on the trestle, was such failure the proximate cause of the plaintiff's injury? In other words, if the jury should find that if the conductor had made the announcement sufficiently loud to be heard by those inside the car, the plaintiff, being on the platform, could not have heard it, was such failure the proximate cause of the injury? While it is true that the authorities cited and many others examined by us relate to injuries sustained by persons thrown from the platform while the car is in motion, we can perceive no difference in principle in a case wherein the plaintiff by voluntarily riding on the platform alights from a train at a time and place which if he had been inside the car he would not have done. In both cases he is guilty of negligence, and if but for such negligence he would not have sustained the injury he cannot recover. The pivotal question, therefore, upon the first issue is, Was the plaintiff injured by the negligence of the defendant? And this involves two propositions—that defendant was guilty of a breach of duty to plaintiff, and that by reason thereof he was injured. As we have seen, the duty which defendant owed plaintiff was to give notice inside the car that, notwithstanding the announcement of the porter, the train had not reached Lower Tarboro. If the jury found that the notice was given they should have answered the issue "No." If they found, as we presume they did, that such notice was not given, the question was presented whether the failure to give it was the proximate cause of the plaintiff's injury; that is, had he placed himself in such a position that he could not have heard it if given sufficiently loud to be heard by those inside the car? This was a question for the jury. It was involved in the first issue upon (325) the essential element of proximate cause of plaintiff's conduct.

This brings us to a consideration of his Honor's instructions. After correctly stating some of the general principles involved in the case, he read the issue and said: "If the jury shall find as facts from the greater weight of the evidence that the conductor, brakeman, or other servant of the defendant company whose duty it was to make such announcement called out in the hearing of the passengers and while the train was yet in motion, 'Next stop, Lower Tarboro,' and very soon thereafter the train came to a full stop; and if the jury shall further find that such announcement and stopping of the train under the circumstances was reasonably calculated to lead an ordinarily prudent and careful man to believe that the train had in fact reached and stopped at Lower Tarboro for the discharge of the passengers; and further, that the plaintiff honestly believed from such announcement and stopping that the train had reached Lower Tarboro and the place where he was to get off, and in this belief

he attempted to get off the train, and in so doing, without negligence on his part, fell from the trestle and injured himself, then you will answer the issue (first) 'Yes.' " Defendant excepted.

The instructions, containing a complete proposition, concluding with a direction to find a verdict for plaintiff if the jury found the facts involved in the proposition, omits any reference to plaintiff's position on the platform and its effect upon his conduct with reference to stepping off; it also omits any reference to the testimony in regard to the alleged notice by the conductor to passengers inside the car, and withdraws from the jury the pivotal question of the proximate cause of the conduct of plaintiff, making the answer to the issue to depend upon the call by the porter and upon plaintiff's belief that the train had stopped at the station and his care in stepping off. The jury may well have found (326) all of the conditions without concluding that the plaintiff was injured by defendant's negligence. There was evidence tending to show that the conductor gave the notice. It is true that it was controverted, but the defendant was entitled to have it submitted to the jury upon the issue. There was evidence that none of the passengers inside the car attempted to get off. The first issue could not be answered until either the court, as a matter of law, or the jury, as a matter of fact, found upon all of the evidence relating to the subject that there was negligence on the part of defendant, and that such negligence was the proximate cause, the *causa causans,* of the injury. In other words, conceding all of the testimony on behalf of plaintiff and so much of defendant's evidence as tended to sustain plaintiff's contention to be true, would plaintiff have been misled by the announcement of the porter and the failure of the conductor to give the notice inside the car if he had not been voluntarily on the platform? Viewed from any and every possible point of view, the plaintiff's right to have the first issue found for him depends upon the answer to this question. Assuming that it is upon the evidence a question for the jury, his Honor inadvertently took it from them in the instruction and made the answer to the issue to depend upon other findings. As we have seen, the plaintiff was negligent in being on the platform, and he was injured while in that position. The burden is upon him to show that his injury was caused by the negligence of defendant. But one negligent act or omission of duty is charged—failure to give the notice that the train had not reached Lower Tarboro. The question, therefore, is, Was there an omission of duty; if so, was it the proximate cause of the plaintiff's conduct, whereby he was injured? Any instruction concluding with a direction to answer the issue should present these questions to the jury. His Honor said to the jury in this instruction, if plaintiff, "without negligence on his part," etc. The jury

may have understood his Honor to refer to them the question whether being on the platform was negligence. It may be that (327) his Honor was referring to the manner in which he stepped off. His Honor should have told the jury that being voluntarily on the platform was *per se* negligent. It is true that his Honor, in another part of the charge, said to the jury: "It may be that the plaintiff, Wagner, heard a porter or some other authorized servant of the company announce, 'Next stop, Lower Tarboro,' and still he might not be entitled to a recovery, and for the following reasons: The statute, the aid of which is invoked in this case, reads": [Reads section 2628, Revisal.] "It was plaintiff's duty to be on the inside of the car. If you find from the evidence that the plaintiff was on the platform, that he heard the announcement that he says he heard, yet, if you further find from the evidence that the conductor, Hill, announced, 'This is not Lower Tarboro; keep your seats,' or 'hold your seats,' loud enough for the passengers, whose duty it was to be on the inside of the car, to hear it, and the plaintiff, being on the outside of the car did not hear it, then the railroad company would not be liable, and you ought to answer the first issue 'No.' The statute is made for the protection of passengers as well as for the railroad company." This instruction was given upon the contention advanced by defendant that in compliance with the statute notices warning passengers not to ride on the platform were posted in the car. It involved the proposition, in regard to which there was controversy, that the notice required by the statute had been posted. It had no relation to the instruction to which the exception is pointed. The defendant was making this as an independent contention. His Honor in this instruction imposed upon the defendant the duty not only to comply with the statute by imposing the notice, but that the conductor give the notice inside the car. This instruction did not cure the error involved in the other.

There are a number of other exceptions in the record, but one of which we deem it necessary to discuss, as they may not arise upon a second trial. His Honor, upon the second issue, instructed the (328) jury: "The burden of this issue, contributory negligence, is upon the defendant company; that is, the defendant is required to prove by the greater weight of the evidence that the plaintiff was guilty of negligence and that such negligence was the proximate cause of the injury, in order for you to answer the issue (second) 'Yes'; and so, unless the defendant has shown by the greater weight of the evidence that the plaintiff was guilty of negligence, and also that such negligence was the proximate cause of the injury sustained by him, then the jury will answer the issue (second) 'No.'" Defendant excepts to this instruction

because the jury are told that it is required to show by the greater weight of the evidence that the plaintiff was guilty of negligence, whereas his Honor should have instructed them as a matter of law upon plaintiff's own testimony that he was guilty of negligence, leaving only the question of proximate cause to them. It is elementary that the burden is upon the defendant to show contributory negligence, but it is equally true that if upon plaintiff's own evidence he shows negligence as a matter of law the question should not be left to the jury. It is the same as if defendant had by its own evidence shown negligence; the plaintiff would have the benefit of an instruction to that effect, leaving the question of proximate cause to be decided either by the court or jury, as evidence makes proper. We have deemed it best not to discuss the exceptions directed to the instructions, refused and given, regarding the effect of section 2628, Revisal. The correct construction of the statute is not clear, and in this case the questions arising upon it are not clearly presented. It may be well, upon a second trial, if the defendant desires to present this defense, to set it up clearly in the answer, to the end that an issue may be presented in regard to the notice in the car.

The construction of the statute has been before this Court in only one case (*Shaw v. R. R.,* 143 N. C., 312), in which there was a dis-
(329) senting opinion concurred in by two justices. The question of its application to a passenger who alights from a train under the circumstances attending this case presents interesting lines of thought. While we do not hold that it is necessary for the defendant to plead the statute as an affirmative defense, it will be observed that the nonliability of the carrier, when it is relevant, cannot well be presented under the general issue. It may be that if the facts bring the case within its language, the fact that the passenger was injured "while riding on the platform of the car . . . in violation of the printed regulations posted," etc., confers immunity upon the carrier. How the words "riding on the platform" are to be construed in the light of the plaintiff's evidence, and to what extent this position of the plaintiff must contribute to his injury, are interesting questions. It is doubtful whether the language of the statute clarifies the subject. It seems to have been copied from other States. The somewhat variant views of the Court are set out very clearly in *Shaw v. R. R., supra.* It is impossible for us to say what, if any, effect was given the statute in the trial of this case. We have not thought it necessary to discuss several other questions more or less clearly presented, because they may not arise upon a second trial. We must not be understood as intimating any opinion regarding the condition of the depot at Lower Tarboro, about which there is considerable evidence. If railroad companies, either for their own or for the con-

venience of their patrons, establish *quasi* depots or stopping places, they must make them safe—provide lights at night. The courts cannot relax the rule imposing this imperative duty. It is better to suffer some inconvenience than endanger life and limb. *Ruffin v. R. R.*, 142 N. C., 120. We do not perceive any connection between the condition of the depot at Lower Tarboro and plaintiff's injury. For the errors pointed out there must be a

New trial.

HOKE, J., dissenting.

Cited: *S. c.*, 150 N. C., 215; *Redman v. R. R., ib.*, 404; *Kearney v. R. R.*, 158 N. C., 542, 548.

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(330)

J. F. WHITE COMPANY v. C. A. CARROLL.

(Filed 15, April, 1908.)

1. Liens—Chattel Mortgages—Parol Mortgage—Evidence—Proof.

In an action to engraft upon a written chattel mortgage a lien by parol upon after-acquired merchandise in defendant's store the plaintiff's evidence tended to show that the defendant gave to B. the written mortgage on his stock of goods to secure him (B) for a debt due. Afterwards the defendant gave the written mortgage to B to secure a debt he owed the plaintiff. W., the president of plaintiff company, was absent at this time, and upon the trial testified that defendant afterwards told him that the written mortgage given to B. was to secure his company for goods he "had bought or might buy," and that he "never denied the mortgage in all conversations they had had." It further appeared that plaintiff requested further security and defendant declined to give it: *Held*, (1) the evidence was insufficient to establish the parol lien that the provisions of the written mortgage were thereby extended to after-acquired goods in the store; (2) that the expressions used by defendant, as testified to by W., by reasonable intendment referred to the fact that the written mortgage was to secure under its terms goods which defendant had bought or might buy from plaintiff.

2. Liens—Chattel Mortgages—Correction—Contracts—Parol Evidence—Mutual Mistake.

To correct a written chattel mortgage given to secure plaintiff for merchandise sold and delivered to defendant while conducting a mercantile business, so as to embrace after-acquired goods, the proof must be clear and convincing that the true intention of the parties was not expressed in the mortgage, and that description of the property now claimed was

omitted by mutual mistake, in such manner as not to vary the terms of written instrument. The evidence of W., the president of the plaintiff company, who was not present at the time the mortgage was given, that defendant afterwards told him it was for goods "he had bought or might buy," and that "he had never denied the mortgage," is insufficient.

3. Appeal and Error—Agreement of Parties—Harmless Error—Costs on Appeal.

When the lower court is in error in instructing the jury not to answer an issue as to damages, and the amount thereof is agreed upon in the Supreme Court, the agreement will make the error harmless, but the appellant will be taxed with the cost on appeal.

(331) APPEAL from *Webb, J.*, at February Term, 1908, of GRANVILLE.

This action was brought to recover a debt of $300 and a stock of goods which the plaintiff alleged had been mortgaged to him by the defendant to secure the indebtedness. The property is described in the mortgage as "All the stock of goods now on hand in the storehouse on College Street occupied by me, consisting of groceries, shoes, notions, and general merchandise." At the time the mortgage was given, 15 March, 1900, the defendant, being pressed by his creditors, gave to J. S. Brown, to whom he was indebted, three chattel mortgages, each for $300. J. F. White, who represented the plaintiff company, was not present and did not know the mortgages had been given until they had been registered. One of the mortgages was assigned to him for the plaintiff to secure the defendant's indebtedness to it, which at the time amounted to $220. The defendant told the plaintiff that he had executed the mortgage to Brown and that it would secure him "for what goods the defendant had bought or might buy or for the amount he owed or might owe." The plaintiff contended that the mortgage was intended to embrace not only goods then in the store, but such as were thereafter added to the stock, and, if this was not true, that the defendant afterwards mortgaged the goods described in the complaint to him by parol to secure said indebtedness. The goods seized by the sheriff and now in dispute were not in the store at the time the written mortgage was given—that is, on 15 March, 1900. The plaintiff's counsel thus states the substance of the evidence: "The plaintiff was a wholesale grocer and defendant a retail grocer, doing business within a few doors of each other in the town of Oxford, defendant being a customer of plaintiff. On 1 March, 1900, the defendant was indebted to plaintiff in the sum of $220 and continued to trade with plaintiff; that J. S. Brown was also a merchant and vice president of plaintiff company. The defendant was insolvent and was indebted to Brown and other parties, as well as to plaintiff. He had given Brown
(332) security for the indebtedness to him, and about the middle of

March, 1900, J. F. White, the president of plaintiff company, being absent, defendant gave the mortgage in controversy to J. S. Brown for the benefit of plaintiff, because certain of his creditors were about to sue, as he believed, for their claims, and defendant told Brown and also J. F. White, when the latter returned, that he had given the mortgage to Brown to secure not only what he then owed plaintiff, but what he might thereafter purchase from plaintiff. Defendant continued to trade with the plaintiff up to 13 July, 1906, making payments from time to time, so that, though his purchases amounted to more than $10,000 within that period, still at no time did his account much exceed $300, and when it did the plaintiff would call his attention to it and he would promise to reduce it. In July, 1906, plaintiff made demand upon defendant for the payment of the balance—that is, $382—and, upon defendant's refusal, brought this action."

The court submitted these two issues to the jury:

1. Is the plaintiff entitled to the possession of the stock of goods described in the complaint? Answer: "No."

2. Is the defendant indebted to the plaintiff, and if so, in what amount?

The court instructed the jury, upon the evidence, to answer the first issue "No," but not to answer the second issue. The plaintiff excepted.

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

Graham & Devin for plaintiff.
Winston & Bryant for defendant.

WALKER, J., after stating the case: When this case was here before (146 N. C., 230) we ordered a new trial, for the reason that, upon the pleadings and the proof *tendered* by the plaintiff and rejected by the court, the case should have been submitted to the jury to find (333) whether there had been a mutual mistake of the parties in drawing the mortgage of 15 March, 1900, by which goods thereafter acquired and added to the stock were omitted from the description of the property transferred, and, if not, whether the defendant had given the plaintiff a separate parol mortgage upon the goods in question. We have carefully examined the evidence introduced at the last trial and have been unable to find any which sustains either of the plaintiff's contentions. There is absolutely none tending to show that a parol mortgage was given, and that upon which the plaintiff relies to establish the alleged mistake in the mortgage of 15 March, 1900, falls far short of doing so. It is true, J. F. White testified that the defendant told him the mortgage to Brown was made to secure the plaintiff, White Company, for the goods he had

bought or might buy, he having used both expressions, and also that the defendant "never denied the mortgage we held in all the conversations had with him"; but this evidence does not tend to show that goods thereafter purchased were intended to be covered by the mortgage and that the description of them was omitted by the mutual mistake of the parties. The last expression, when considered in connection with what precedes and follows it, evidently referred to the plaintiff's right to the mortgage by virtue of the transfer from Brown, and not to the goods which the parties intended should be conveyed by it. If it had referred to the goods, the mere negative proof that the defendant "had not denied the mortgage," especially when there was no proof that he was called upon to make a denial, would not tend to show that the goods now claimed by the plaintiff were intended to be conveyed and that the description of them was omitted by a mutual mistake. Indeed, it is difficult to conceive how this can be so, or how there could have been any mutual mistake, as J. F. White was not present when the mortgage was given. Besides, the defendant expressly denies that the mortgage was drawn other-
(334) wise than contemplated by him and Brown, and the later certainly did not testify to any such fact. He says in his deposition that at the time the mortgages were executed he was acting individually and not for the J. F. White Company, and that afterwards Carroll asked him to transfer one of the mortgages to the White Company. This evidence only tends to show that Carroll intended that the mortgage so transferred to the White Company should secure not only his then existing indebtedness to the White Company, but also any indebtedness for goods he might thereafter buy from it. That is all. The proof, therefore, does not correspond with the allegation of the plaintiff. Indeed, the evidence goes to show that Carroll did not intend to give a lien on goods acquired after the date of the mortgage, for when the plaintiff applied to him for additional security he refused to give it and merely replied that he would reduce the amount of the debt by payments. The plaintiff, in order to succeed in attaching a lien to the property in controversy, was required to show by clear and convincing proof that the true intention of the parties was not expressed in the mortgage and that the description of the property, which it now claims, was omitted by a mutual mistake. *Warehouse Co. v. Ozment,* 132 N. C., 839; Bispham's Equity, sec. 469; *Ely v. Early,* 94 N. C., 8. Oral evidence would not be competent to contradict or vary the written instrument or, in other words, to show that it had a meaning not expressed in it by the parties. It is only admissible in equity to correct it, and thereby to conform it to their true intention and agreement. *Lehew v. Hewett,* 138 N. C., 6. The judge, therefore, was right when he held that there was no evidence

to sustain the affirmative of the first issue, for that was virtually what he decided. *Latta v. Bell,* 122 N. C., 641; *Baker v. Mitchell,* 123 N. C., 337.

We think he erred in withdrawing the second issue from the jury. But defendant's counsel agreed in this Court that judgment might be entered for the amount of the defendant's indebtedness to the plaintiff. It is not distinctly stated in the record what the amount (335) is. In the complaint the principal is fixed at $300, but no date from which interest runs is given. If the correct amount appeared we could direct judgment to be entered for it; but as it does not, the case must be remanded, with directions to enter judgment in the Superior Court for the proper amount, with interest and costs. If parties cannot agree upon the amount, it will be ascertained by a jury or otherwise as the law directs. We affirm the judge's ruling upon the first issue, but as there was error in withdrawing the second issue from the jury, though corrected by agreement here, the defendant will pay the costs of this Court.

Modified and affirmed.

Cited: Carson v. Ins. Co., 161 N. C., 447; *Glenn v. Glenn,* 169 N. C., 730; *Ray v. Patterson,* 170 N. C., 22; *Grimes v. Andrews, ib.,* 523.

J. A. TUSSEY AND WIFE v. L. A. OWEN, EXECUTOR.

(Filed 15 April, 1908.)

1. Judgment — Evidence — Nonsuit—Supreme Court — Direction to Dismiss Action.

When in the Supreme Court the lower court is reversed for refusing a motion to dismiss upon the evidence as of nonsuit (Revisal, sec. 539), it is in law equivalent to a direction to dismiss the action.

2. Appeal and Error—Supreme Court—Superior Court Refusing to Obey—Mandate—Mandamus.

Whenever the court below refuses to obey the mandate of the Supreme Court as contained in its opinion disposing of the case on appeal the proper remedy is by *mandamus;* but when at a subsequent term the Superior Court eventually did as directed, when the opinion was certified down and received by it, the error is cured.

3. Appeal and Error—Judgment—Nonsuit—Another Action.

When on appeal a case is ordered to be dismissed by the Supreme Court on a motion to nonsuit upon the evidence, the Superior Court is without authority to allow an amendment or to proceed contrary to the opinion, but the plaintiff may bring another action within twelve months after the judgment of nonsuit.

TUSSEY *v.* OWEN.

(336) APPEAL from *Justice, J.*, at November Term, 1907, of DAVIDSON.

This was an action brought to recover $2,000 for services rendered by the *feme* plaintiff to her father. She alleged that he had agreed to give her one-fourth of his estate in his will if she would continue to live at his home and work for him. When the case was here, 139 N. C., 457, we held that upon her own evidence she could not recover the contract price, as she had failed to show performance of the contract on her part or that she was prevented by her father from performing it. The defendant had moved to nonsuit the plaintiffs, and this Court further directed that the nonsuit should have been allowed, and the judge erred in refusing the motion. When the opinion and judgment of this Court were certified to the Superior Court the plaintiffs, at April Term, 1906, moved to amend the complaint so as to allege that the *feme* plaintiff had agreed to work for her father until his debts had been paid, and not until he died, if he would give her one-third of his property, and that she had performed her part of the contract. The defendant objected to this amendment and excepted to the ruling of the court allowing the same, upon the ground that the court had no power to allow an amendment. To the amended complaint the defendant, at April Term, 1906, filed a demurrer, which, at August Term, 1906, was sustained upon the ground that a new cause of action had been alleged. The plaintiffs were then allowed to further amend the complaint by alleging that the *feme* plaintiff quit the service of her father because of intolerable conditions existing at his home, was married and went with her husband to live in Tennessee. The defendant demurred to this amended complaint; the demurrer was sustained at November Term, 1906, so far as it covered the objection taken in the former demurrer, and in other respects it was overruled. The defendant excepted and answered the amended complaint. At November Term, 1907, the court, upon an inspection and consideration of the record, dismissed the action as upon nonsuit, it appearing from the certificate of this Court that a nonsuit had been ordered. The (337) plaintiff excepted and appealed.

Walser & Walser and Watson, Buxton & Watson for plaintiffs.
E. E. Raper and W. H. Phillips for defendant.

WALKER, J., after stating the case: When this case was here before, 139 N. C., 457, we declared that there was error and that the Superior Court should have entered a judgment of nonsuit. The judgment of this Court was duly certified to the court below, with directions to proceed further in the cause in accordance with the opinion by which

the nonsuit had been ordered. The nonsuit was ordered, not upon the pleadings, but upon the evidence, under the provisions of the statute (Revisal, sec. 539.) It was in law equivalent to a reversal of the judgment below and a direction to dismiss the action. *Hollingsworth v. Skelding,* 142 N. C., 246; *Bowden v. R. R.,* 144 N. C., 28. It was therefore the duty of the Superior Court, when it received the certificate of this Court, with the accompanying opinion, to dismiss the action in accordance with the mandate of the judgment delivered here. It had no power to proceed otherwise than as directed in that judgment, and especially did it not have the power to proceed in a manner inconsistent therewith. The cases to this effect are numerous. *Calvert v. Peebles,* 82 N. C., 334; *Murrill v. Murrill,* 90 N. C., 120; *Brendle v. Herren,* 97 N. C., 257; *Pearson v. Carr,* 97 N. C., 194; *Dobson v. Simonton,* 100 N. C., 56; *Stephens v. Koonce,* 106 N. C., 222; *Herndon v. Ins. Co.,* 108 N. C., 648; *Black v. Black,* 111 N. C., 300. In *McCall v. Webb,* 126 N. C., 760, this Court held that after final judgment in the Supreme Court it is too late to set up a new cause of action by amendment of the complaint, and in *White v. Butcher,* 97 N. C., 7, this Court refused to permit any change in the pleadings for the purpose of introducing new matter into the case after it had been finally (338) decided upon the merits. "The controversy adjusted in this Court could not be reopened in the court below, as seems to have been attempted, by new pleadings introduced or by permitting anything to be done inconsistent or at variance with the rulings here made." *White v. Butcher,* 97 N. C., 10.

In *Murrill v. Murrill, supra,* it is suggested that the refusal of the Superior Court to obey the mandate of this Court is not reviewable by appeal, as there is nothing to be reviewed, the proper remedy being by *mandamus,* following *Ray v. Ray,* 34 N. C., 24. In this case the Superior Court eventually did what should have been done when the judgment and opinion of this Court were certified to and received by the court below. The intermediate orders and proceedings are nugatory. The plaintiff may, under the decisions of this Court, bring another action within one year after the judgment of nonsuit. *Meekins v. R. R.,* 131 N. C., 1; *Prevatt v. Harrelson,* 132 N. C., 250; *Evans v. Alridge,* 131 N. C., 378; *Nunnally v. R. R.,* 134 N. C., 755; *Hood v. Tel. Co.,* 135 N. C., 627. If this were an open question the writer of this opinion would not give his assent to the principle as thus decided, as a dismissal of the case upon the merits, whether called a nonsuit or by any other name, is equivalent in law to a judgment upon a demurrer to the evidence, which by the best considered authorities has the same effect as a bar to another suit, as judgment rendered upon a demurrer to the

pleadings or as any other judgment upon the merits. *Willoughby v. Stevens,* 132 N. C., 254. But the law has been settled the other way by actual decision upon the very question, and we now hold unanimously that another suit will lie within a year of the nonsuit. It would seem that a decision affirming the judgment is the best disposition for the plaintiff that could be made of the case, as it eliminates the serious question raised by the defendant's counsel, whether the judgment of (339) the Superior Court sustaining the demurrer operates as a bar to a second assertion of the same cause of action to which the objection by way of demurrer was first taken. The plaintiff may sue again and plead as she may be advised.

Affirmed.

Cited: Henderson v. Eller, post, 583; *Lumber Co. v. Harrison,* 148 N. C., 334; *Smith v. Mfg. Co.,* 151 N. C., 261; *Tuttle v. Warren,* 153 N. C., 461; *Starling v. Cotton Mills,* 168 N. C., 233; *Culbreth v. R. R.,* 169 N. C., 727.

AMANDA MATTHEWS v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 15 April, 1908.)

1. Insurance—Principal and Agent—Premium—Receipt—Ratification—Money Accepted.

The company waived the following provisions in a policy of life insurance, "Premiums are payable at the home office, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt, signed by the president," etc., when the money for the premium was paid the agent under different conditions and was remitted to and received by the company, which knew the purposes for which it was paid, and kept the money with such knowledge.

2. Same—Official Receipt.

When the insurance company has received from the insured and retained the money for his premium on a life insurance policy paid to its agent, but the agent did not tender and the insured did not receive the "official" receipt therefor, it was the fault of the agent that he did not give the receipt in literal compliance with the requirement of the policy; and the company, by retaining the money for the premium, with notice, waived all irregularity as to the form of the receipt.

3. Insurance — Premium Notice — Foreign Statute Inapplicable — Harmless Error.

When, under objection, the New York statute was introduced and admitted in evidence for the purpose of showing that notice of the maturity

of premiums should have been given, it was harmless error, if error at all, when by a subsequent ruling of the court the law was held inapplicable, as the objection was eliminated from the case by the subsequent ruling.

4. Evidence—Witnesses—Statements—Corroborative.

Testimony of witnesses that the beneficiary under a policy of life insurance sued on said to them that she had paid the premiums on the policy is competent in corroboration of the testimony of the beneficiary to that effect, when it is relevant to the inquiry.

APPEAL from *W. R. Allen, J.*, at September Term, 1907, of (340) DURHAM.

This action was brought to recover $500, it being the amount of an insurance policy issued 8 November, 1905, by the defendant on the life of Roger Matthews, the husband of the plaintiff, for her benefit. The insured died in November, 1906. It is unnecessary to set out the evidence or charge of the court, as the facts and the questions raised in the case are sufficiently stated in the opinion of the Court.

The court submitted the following issues to the jury:

1. Was the premium due 8 August, 1906, paid on or before that date to the agent of the defendant? Answer: "Yes."

2. If so, was said premium remitted to and received by defendant? Answer: "Yes."

3. If so, did said agent have authority to collect said premium, and did he have in his possession the official receipt of defendant? Answer: "Yes."

4. If so, did said agent deliver said official receipt? Answer: "No."

5. Was the premium due 8 November tendered to the agent on or before 8 November, 1906? Answer: "Yes."

6. If so, did said agent refuse to accept the same? Answer: "Yes."

7. Is defendant indebted to plaintiff, and if so, in what sum? Answer: "Four hundred and sixty-eight dollars and sixty cents, from 12 December, 1906."

All of the issues were answered by the court, as set out in the record, by consent of the parties, except the first and fifth issues, which were submitted to the jury. Judgment was entered upon the verdict.

The defendant appealed and assigned the following errors: (341)

1. That the court admitted in evidence the receipt for $5 as part payment of the premium on the policy of Roger Matthews due 8 August.

2. That the court admitted the New York insurance law (section 92 of the Laws of 1896).

3. That the court permitted the witness J. S. Hall to testify as to the

conversation with Mrs. Matthews relative to the payment of the premium on her husband's policy.

4. That the court refused to set aside the verdict and grant a new trial.

Winston & Bryant for plaintiff.
Giles & Sykes for defendant.

WALKER, J. There was evidence in the case sufficient to sustain the verdict of the jury, provided there is no error in the rulings of the court to which the defendant excepted. The policy provides as follows: "Premiums are payable at the home office in the city of New York, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt, signed by the president or secretary and countersigned by the person receiving the payments." Counsel argue from this provision that no receipt for a premium was admissible as evidence of its payment unless it strictly conformed to this requirement of the contract of insurance. We do not think so. It must not be understood, though, that we consider the provision an invalid or immaterial one. *Ins. Co. v. Davis,* 95 U. S., 425. The jury have found upon competent evidence and under proper instructions that the premium due 8 August, 1906, was paid to the agent of the defendants who was authorized to collect it, and that the money was remitted to the defendant and received by it. The stipulation in the policy as to the mode of payment and the form of the
(342) receipt for the premium can have no application where the money is actually received and appropriated by the company, knowing that it was intended as a payment of the premium, as the provision was intended only to protect it against unauthorized payments to local agents or collectors. *Bishop v. Ins. Co.,* 85 Mo. App., 302. It cannot be either morally or legally right for the company to insist on keeping the money paid for the premium and then deny the authority of the agent to receive it because a receipt was not given in literal compliance with the requirement of the policy. It was the agent's fault that the "official" receipt was not delivered to the insured, and his wrong should not be imputed to the plaintiff so as to deprive her of the insurance. By receiving and retaining the money the defendant clearly waived the benefit of the stipulation as to the form of the receipt. Vance, in his work on insurance, at pp. 201, 202, says: "Usually the premium is required to be paid at the home office or to the agent in possession of a properly executed receipt. Such a stipulation must be strictly complied with, but the payment of a premium to an agent not authorized to receive it will be sufficient if the premium money actually comes to the hands of the insurer."

See, also, Joyce on Insurance, sec. 1167; *Mauck v. Ins. Co.*, 54 Atl. Rep., 952.

The New York statute was introduced by the plaintiff and admitted by the court for the purpose of showing that notice of the maturity of premiums should have been given. But the court afterwards ruled that the law was not applicable to policies issued in this State, so that the objection to the admission of this evidence was thus eliminated.

The testimony of J. S. Hall and Charles Matthews was competent as corroborating Mrs. Matthews, who had testified as to the payment of the premiums. What she formerly said to them was clearly admissible for this purpose, and the court restricted evidence within (343) proper limits under Rule 27 of this Court. Rule 27, 140 N. C.

We have carefully examined the case, and find no error in the rulings at the trial.

No error.

Cited: Bedsole v. R. R., 151 N. C., 153; *Coile v. Commercial Travelers*, 161 N. C., 106.

A. T. THOMPSON v. SOUTHERN EXPRESS COMPANY.

(Filed 15 April, 1908.)

Penalty Statutes—"Filing" Claim—Carriers—Paying Claims—Oral Demand.

A penal statute is to be strictly construed, and the provisions of Revisal, sec. 2634, imposing a penalty upon common carriers failing to adjust and pay a claim within a specified time, etc., after the *filing* of such claim with the agent, etc., is not complied with when oral demand is made, as such cannot be filed under the ordinary acceptance of the word and does not afford the carrier the protection that a written demand would give.

APPEAL from *O. H. Allen, J.*, at July Term, 1907, of ALAMANCE.

This is an action instituted before a justice of the peace of Alamance Court for the recovery of $2 for the loss of a jug of whiskey alleged to have been shipped by Moyle Bros., Salisbury, N. C., to the plaintiff at Burlington, N. C., and for $85, the penalty provided by section 3632 of the Revisal for failure to ship and deliver within the time prescribed by law, and for $50, the penalty provided by section 2634 of the Revisal for failing to adjust and pay the claim within sixty days after same had been filed. The action was brought by appeal to the Superior Court of Alamance County. The defendant introduced no evidence, and upon the refusal of the court to nonsuit the plaintiff, the defendant appealed.

The court submitted these issues:

1. Did the defendant receive from Moyle Bros. at Salisbury, N. C., for shipment, the package of goods mentioned in the complaint? Answer: "Yes."

2. If so, was said package plainly addressed to A. T. Thomp-
(344) son, Burlington, N. C., as alleged in the complaint? Answer: "Yes."

3. Did the defendant transport, within the time prescribed by law, said package of goods from its office in Salisbury, N. C., to its office at Burlington, N. C.? Answer: "No."

4. What was the value of said goods at the time they were delivered to the defendant for shipment? Answer: "Two dollars."

5. Did the plaintiff, on or about 1 January, 1907, make a claim against the defendant for the loss of said goods, and if so, when? Answer: "Yes."

6. Has the claim ever been paid? Answer: "No."

7. How much, if any, is the plaintiff entitled to recover? Answer: "Two dollars."

8. How much, if anything, is the plaintiff entitled to recover as a penalty for failure to transport said goods from its office in Salisbury, N. C., to its office at Burlington, N. C.? Answer: "Eighty-five dollars."

9. How much, if anything, is the plaintiff entitled to recover for failure of defendant to audit and settle the account of plaintiff for loss of said goods? Answer: "Fifty dollars."

From the judgment rendered defendant appealed.

Brooks & Thompson and W. H. Carroll for plaintiff.
John A. Barringer for defendant.

BROWN, J., after stating the facts: The testimony tends to prove that plaintiff ordered a jug of whiskey to be shipped to him by defendant from Salisbury, N. C.; that it was so shipped on 22 December, 1906, and that its value was $2, the price prepaid by plaintiff. At the commencement of this action, on 10 April, 1907, the whiskey had not been delivered. There is no evidence that it was burned, stolen, or otherwise destroyed, and no evidence which tends to exonerate the defendant under the act of 1807, ch. 461. We find no error in the record in respect
(345) to the rulings of the court upon any issue except the fifth and ninth, relating to the $50 penalty. His Honor should have given defendant's prayer for instructions, "That if the jury believed the evidence in this case the plaintiff is not entitled to recover the penalty of $50 for failure to pay the claim of $2, the value of the whiskey, under

section 2632 of the Revisal of 1905, and they would answer the issue accordingly."

It is immaterial to consider whether the action was commenced before the sixty days allowed for adjustment by the statute had expired. The plaintiff's own testimony proves that the demand for the $2 was a verbal demand and that no claim in writing was filed with the agent of defendant. The statute giving the penalty is section 2634 of the Revisal of 1905, and provides that "Every claim for loss 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," etc.

The language of the statute plainly contemplates that the claim shall be put in writing by the person making it, or some one for him, and *filed* with the agent of the carrier, to the end that he may transmit the claim as filed to the proper authorities of the carrier for adjustment. The word "file" has a well understood meaning as well as legal significance; and, inasmuch as it is impossible to file an oral demand, the words of the statute, its purpose and intent, and the object to be accomplished by it cannot be met except by a written statement of the claim. The lexicographers derive the word "file" from the Latin *filum,* a thread, and its application seems to be drawn from the ancient practice of placing papers upon a thread or file for ready reference. Webster says to file means to lay away papers for preservation and reference. Bouvier says a paper is said to be filed when it is delivered to the (346) proper officer. To the same effect is *Bube v. Morrell,* 76 Mich., 114, and Black Law Dict., 492. What is meant by "filing a claim" is considered by the Supreme Court of Alabama in *Phillips v. Beene,* 38 Ala., 251, and is held to be placing a paper in the proper custody. The words "to file" have received judicial construction and have been defined as "receiving a paper into custody." *S. v. Lamson,* 9 S. D., 420; 3 Words and Phrases, 2765; *Lamson v. Falls,* 6 Ind., 309, 310. A large number of cases are collected in Words and Phrases which support the proposition that in order to comply with our statute the claimant must present his demand in writing and leave it with the agent of the carrier at the point of destination. The object in requiring the claim to be in writing is because the claimant is permitted to file it with an agent who has no authority to pay it. It is the duty of such agent to transmit the claim as made out and filed to the proper corporate authorities. It is important to all parties to have the written evidence of the demand as

well as of the time when filed, because the failure to adjust within a certain period subjects the carrier to a penalty.

It is suggested that *Stonestreet v. Frost,* 123 N. C., 646, is an authority against our construction of the statute. We have examined the case and do not so regard it. In that case a sheriff held in his hands an execution against the intestate at the time of his death. He presented the execution to administrator within twelve months. The Court held that such presentation was a substantial compliance with section 164 of The Code. The sheriff did not make an oral demand on the administrator for the defendant, but presented to him the *written evidence* of it in the form of judicial process, which the law prohibited him from leaving with the administrator. The Court did not hold or even intimate that a mere verbal demand upon the part of the sheriff without presenting the written evidence of the debt would have been a substantial compliance
(347) with the statute; and we think no authority can be found for any such position, for our statute declares in express terms that the creditor must "exhibit his claim or be forever barred," and upon a claim being presented the personal representative may require an affidavit to accompany it. The Code 1883, secs. 1424, 1425; Revisal, 39, 41. In view of these express statutory provisions it is plain that the Court did not hold or intend to hold in the case cited that an oral demand was a substantial compliance with the law.

In the case at bar the plaintiff did not even present to the agent a written statement of his claim or anything that could be filed. The statute is a penal statute and must be strictly construed, and the plaintiff, having failed to comply with it by delivering or filing his claim in writing, is not entitled to recover the penalty.

Unless the judgment be modified by consent in the Superior Court, there will be a new trial upon the fifth and ninth issues.

Partial new trial.

Cited: Robertson v. R. R., 148 N. C., 326; *Currie v. R. R.,* 156 N. C., 433.

HARRY ROYSTER v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 15 April, 1908.)

1. Railroads — Negligence—Contributory Negligence—General Rule—Recovery Barred.

As a general rule, a person who enters on a railway track in front of a train he knows to be approaching is guilty of such negligence as will bar recovery for injury he may thereby sustain, though the agents and employees of the road may have been negligent as to signals or other warnings to indicate the approach of the train.

2. Same.

The contributory negligence of the plaintiff will bar recovery in a suit against a railroad company when, under his own evidence, it appears that he was not an employee of the company, and in assuming to act for an employee attempted at night to signal a train he knew to be approaching by placing a lighted lantern on the track; that he went to a place of safety, then back upon the track, without first looking or listening for the train, and was injured, though the employees of the company on the engine may not have blown the whistle, rung the bell, or have had the headlight of the locomotive lighted. In such instances a judgment as of nonsuit upon the evidence was properly allowed.

ACTION tried before *Webb, J.*, and a jury, at February Term, (348) 1908, of GRANVILLE, for personal injury received by being struck by defendant's train on its track at Bullock, a flag station of defendant company.

At the conclusion of the evidence the court sustained the motion of defendant to nonsuit the plaintiff upon the ground that upon his own evidence he was guilty of such contributory negligence as barred recovery. The plaintiff excepted and appealed.

B. S. Royster and Winston & Bryant for plaintiff.
F. H. Busbee & Son for defendant.

BROWN, J. This is one of those hard cases which have been called the "quicksands of law." A worthy man is injured in endeavoring to assist another, and yet under his own version of the facts we feel compelled by a long line of precedents to sustain the judge of the Superior Court in holding that he is barred from recovery upon well settled principles of the doctrine of contributory negligence. The plaintiff testifies in substance that he lived at Bullock and that his occupation was that of firing a boiler at night, and that he is not in defendant's employment; that on the night of 23 January, 1907, he undertook to flag defendant's mixed freight and passenger train for one Davis; that he placed a lantern near the center of the track, the usual method used in flagging

trains; that it was customary for the engineer of the approaching train to answer the signal by two short blows of the whistle and to ring the bell. After placing the lantern, plaintiff returned to his work. He soon heard the train coming, some 400 yards distant, running 40 or 50
(349) miles an hour. It was pulling up a grade when he heard it. Plaintiff started for his lantern. He says he looked up the track for the train when about 12 feet from the lantern. After that he stepped behind a box car on a siding so as to place the car between himself and the approaching train. "I stepped on the track just as the train was coming from behind the box car. I heard no station blow; saw no reflection. If the train had a headlight, I did not see it. The top of the grade was about 400 yards from where I was, near the whistle post. The down grade was heavy from that point to beyond my place." Plaintiff further says: "I heard the train coming, and I knew it was coming when I went on the track. It was a great deal nearer than I thought. I heard no blow of the whistle and no bell rung, and that was what fooled me. When I first heard the train I thought it was coming up grade. From the whistle post to the depot is down grade. I knew all about the surroundings about the station and about the place. I kind o' trotted about 4 or 5 yards when I first left my boiler to where I could see the train. I saw no train when I quit trotting. I then went 4 or 5 steps and got behind the car, and then went to get my lantern, and got hit. I did not see the train. I saw no light in the fire box. The curve began about 50 yards from my lamp, I think. The curve is on the same side as my boiler-house, looking down the track towards Oxford. I went to the hotel in Clarksville and was afterwards taken home. Just as I stepped on the track the engine hit me. It was about 100 yards from where I and Mr. Davis were to where the curve began. The lantern was down the track towards Clarksville from me. It was about 20 yards from my shed to the lantern. There were two box cars and a flat car on the siding. The flat car was towards Oxford and the box car was the last car I went around as I went to get the lantern. I could not see up the track in the direction from which the train was coming when I went around the car to get my lantern. I thought I would get my lantern and wave it a time or
(350) two and have them stop. Sometimes the engineer would see my lantern on the track and sometimes I would get it off, and if the train had blown I would not wave my lantern. I saw no reflection of the headlight that night." The plaintiff further testified that "the headlight, if the train had one, would have thrown the light on my shed. I saw no reflection that night. The headlight would throw its beams 100 or 150 yards. I saw no headlight on the engine." These are the salient facts as given by the plaintiff himself.

The doctrine of contributory negligence is founded upon the theory that negligence upon the part of some one sought to be charged with its consequences has been proven, and is based upon the general principle as stated by *Mr. Justice Nelson:* "A man is not at liberty to cast himself upon an obstruction which has been made by the fault of another and avail himself of it if he does not use common and ordinary caution to avoid it. One person being in fault will not dispense with another's using ordinary care for himself." *Williams v. Barrett,* 13 How. (U. S.), 109; *Moore v. R. R.,* 24 N. J., 283.

The courts have universally held that persons, before entering upon a railway track, must look and listen for approaching trains, and that a recovery cannot be had for an injury resulting from the lack of this common precaution. *Cooper v. R. R.,* 140 N. C., 213, and case cited. Upon the same principle it is held that trying to cross the track when a train is known to be due and when the slightest delay in getting across would probably be fatal is negligence and bars recovery. Beach on Cont. Neg., 280, sec. 188; *Mantel v. R. R.,* 33 Minn., 62; *Rhoades v. R. R.,* 58 Mich., 263; *Griffen v. R. R.,* 40 N. Y., 34. And if, with an approaching train in view, a person undertakes to cross the track in advance of the train, he cannot recover for injury sustained. *Pharr v. R. R.,* 133 N. C., 610; Beach, *supra; S. v. R. R.,* 76 Me., 357; *Allen v. Pennsylvania R. R.,* 12 Atl., 493; *R. R. v. Kuehn,* 70 Tex., 582; *Rigler v. R. R.,* 94 N. C., 610. So it has been held that where a person is apprised (351) of an approaching train by its noise, and ventures upon the track from miscalculation of his danger, the error is his, and defendant is not answerable for his mistake. *R. R. v. Hunter,* 33 Ind., 335, and cases cited. The failure to sound bell or whistle will not render the defendant liable to a person who actually knows the train is approaching. *R. R. v. Sunderland,* 2 Ill. App., 307. Nor does the fact that a train is running unusually fast make any difference if the injured party knew it was approaching. *Pepper v. R. R.,* 105 Cal., 389; *Kelly v. R. R.,* 75 Mo., 138. The Supreme Court of Indiana declares that a person who voluntarily attempts to go upon a railroad track in front of a train he knows to be approaching cannot recover for injury, although the railroad company is "culpably negligent" in the management of the train. 131 Ind., 261. The books are full of such cases and it is useless to multiply citations.

Assuming, as we do, that there was no headlight, no bell rung, no whistle blown, that the defendant was derelict in all these, and further that the plaintiff was not a trespasser on the track, how stands his case? Is there anything in it to except it from the universal rule that a person who enters on a railway track in front of a train he knows to be ap-

proaching is guilty of such negligence that he cannot recover for injury sustained?

There are instances where the negligence of one is the proximate cause of an injury to another who is himself negligent; but that cannot be so in a case like this, where every negligent omission of duty complained of was well calculated to put the plaintiff on his guard and to warn him to keep off the track.

This case differs from all the cases cited by plaintiff in the fact that the plaintiff knew the train was rapidly approaching when he stepped on the track. Before he left his shed he heard the exhaust of the engine as it pulled up the stiff grade, the top of which was only about 400 (352) wards from where plaintiff was hurt. As he left the shed and walked 20 yards towards the track to get the lantern, he knew the train had passed the top of the grade and was rapidly speeding down grade, for he says he could hear the noise of the engine and train no longer. The steam was evidently shut off and the exhaust had stopped. He knew the engineer had not discovered the lantern on the track, for he says the engineer always blew when he saw it, and the engine had not blown. He knew what a short distance the train had to run to reach the lantern, and he knew it was coming in the dark, although he could see no headlight and could hear no bell. Plaintiff looked up the track before he reached the siding, and, seeing and hearing nothing, although he knew positively that the train was rapidly approaching, he passed the siding, went around the box cars thereon, and unfortunately, *without again looking,* he stepped on the track and was hit by the engine.

Common prudence demanded that he should look again after he crossed the siding and passed around the box cars before he went on the main track in front of a train he knew was rapidly approaching. In fact, under all the circumstances and conditions as he says he knew them, he should not then have ventured on the main track at all. Had he looked after passing around the box cars he doubtless would not have done so and would have escaped injury. It is evident from his testimony that the plaintiff knew his signal had not been discovered and that he was making a most imprudent effort to get the lantern so as to wave it and stop the train for Davis. Under all the authorities we are of opinion that the judgment of the Superior Court should be

Affirmed.

Cited: Champion v. R. R., 151 N. C., 198; *Mitchell v. R. R.,* 153 N. C., 117; *Exum v. R. R.,* 154 N. C., 411; *Shepherd v. R. R.,* 163 N. C., 522; *Dunnevant v. R. R.,* 167 N. C., 233; *Davis v. R. R.,* 170 N. C., 589; *Horne v. R. R., ib,* 660.

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JALIE H. COX, ADMINISTRATOR, v. HIGH POINT, R., A. AND S. RAILROAD COMPANY.

(Filed 15 April, 1908.)

Railroads—Negligence—Evidence—Scintilla—Question for Jury.

When it appeared from the plaintiff's evidence, in an action to recover damages for the negligent killing by the defendant railroad company of plaintiff's intestate, that the car upon which plaintiff's intestate was usually employed was derailed, owing to the unsound condition of the track, together with other circumstantial evidence; that he was thereon at the time of the derailment; that he was well and left home in the morning for the usual purpose of the trip as a railway postal clerk and returned home on the afternoon of the same day sick, nervous, and exhibiting signs of serious injury; and when from the testimony of his attending physician it appeared that immediately thereafter he had such symptoms and bruises on his body as to indicate the conditions from which his death soon afterwards resulted, it was error in the court below to sustain defendant's motion for judgment as of nonsuit upon the evidence, it being more than a scintilla and sufficient to take the case to the jury.

APPEAL from *W. R. Allen, J.*, at September Term, 1907, of DURHAM.

Plaintiff, administratrix, sues to recover damages for the death of her intestate, alleged to have been caused by the negligence of defendant.

For the purpose of disposing of the single exception in the record the following facts may be regarded as proven: Plaintiff's intestate, residing at Asheboro, N. C., was on and prior to 7 March, 1905, employed by the United States as a railway postal clerk, with his run from Asheboro to Hight Point, N. C., and return, over a branch of defendant's system. He was married, 30 years of age, of sober habits, industrious, economical, and receiving a salary of $1,000. On 14 February, 1905, he went to Dr. Burrus, residing in High Point, for the purpose of submitting to a physical examination and having an application to the Civil Service Commission filled up, etc. Dr. Burrus says that he made a careful examination of his physical condition—made certain analyses, (354) took his pulse, etc.—and found nothing whatever wrong with any of his organs. He was in a normal condition, thin, lean—naturally so. His wife testifies that he was in his usual health on 7 March, 1905. On the morning of that day he left home about 4 o'clock to make his usual trip as postal clerk. The train left at 4:40 a. m. for High Point. He returned on the afternoon of that day sick, nervous—looked as if something had happened. Never went out again. Dr. Burrus says that he saw him on 8 March, 1905. His feet and limbs were swollen, he was nervous, his temperature was high, he complained of severe frontal head-

ache, his face was swollen. He found a bruise 1½ or 2 inches broad and 3 to 4 inches long across the right hip, leading over to the spinal column, over the right kidney, which was congested. He mentioned other symptoms and conditions indicating serious illness. He saw him again the evening of same day. His symptoms were very much worse, his fever was high, and he made analysis and found trouble. He saw intestate almost daily until his death, 19 March, 1905. The doctor says: "The immediate cause of his death, I think, was pneumonia—hyperstatic pneumonia. The injury which I have described produced the pneumonia, I think." He gave a detailed account of his condition and symptoms as the trouble developed to the time of his death. Other witnesses, including his wife, testified to the same effect. The engineer in charge of the train on 7 March from Asheboro to High Point says that at some point between the two stations, at a curve, the mail car, which was one compartment of a combination car, jumped the track, carrying several other cars off and wrecked the train. The "brakebeam" of this car was broken and the car was left at High Point. The flagman says that intestate was mail clerk on that train. There was evidence that intestate was seen in a box car on the return of the train to Asheboro, looking sick.

There was evidence that the condition of the track at the place of (355) the wreck was not good; it was not ballasted.

At the conclusion of the evidence, upon defendant's motion, his Honor rendered judgment of nonsuit. Plaintiff appealed.

R. C. Strudwick, Justice & Broadhurst, and T. J. Murphy for plaintiff.
Wilson & Ferguson for defendant.

CONNOR, J., after stating the facts: Was plaintiff's intestate injured while in the mail car on defendant's road? Was such injury caused by the wreck of the car? Did such injury cause his death? Was the wreck caused by the negligence of defendant company? The plaintiff undertakes to establish by legal evidence the affirmative of each of these propositions as the basis for a recovery. She, by her learned counsel, earnestly contends that she has introduced testimony which is very much more than a mere *scintilla,* or the basis for a conjecture or guess that the facts are as she alleges. If she is correct in this contention, his Honor should have submitted the issues, under proper instructions, to the jury; otherwise the judgment of nonsuit was correctly rendered. This is elementary. The law is clear. Its application to particular cases is sometimes difficult. This is illustrated in many cases in our own and other reports. It is seldom that appellate courts are unanimous in their opinions in such cases. Taking the facts established, and the reasonable inferences of

which they are capable, most favorable to the plaintiff, we are of the opinion that the plaintiff was entitled to go to the jury. We do not think it is a strain upon a logical process of deduction to come to the conclusion upon the facts that on the morning of 7 March the plaintiff, in his usual health, found by the physician less than a month before to be normal, left his home in the discharge of his duty to enter and remain in the mail car from Asheboro to High Point, not exceeding 28 miles; that he was in the car at the time it jumped the track and by striking or being thrown against iron racks or table was bruised on his body and in (356) the region of his kidneys (he was found upon examination to have symptoms indicating an injury to that vital organ); that these symptoms developed into acute Bright's disease, resulting in pneumonia and causing his death on 19 March, 1905. The intelligent physician who testified at length gives a clear and satisfactory explanation of the conditions and symptoms. While, of course, we are discussing the testimony for the sole purpose of testing the question of law, which is alone for our consideration, the jury may reach an entirely different conclusion. They may adopt some one or more of the not unreasonable theories suggested by the learned counsel for defendant or may conclude that the questions are in so much doubt that the scales hang evenly balanced, in which case they would find for defendant. However this may be, we think the testimony is of sufficient probative force and is capable of such reasonable inferences consistent with plaintiff's contention as to entitle her to have the finding of the jury before she is denied a recovery. The fact of derailment, certainly in the light of the testimony in regard to the condition of the track, carries that issue to the jury. The judgment of nonsuit must be set aside and the case proceeded in as indicated in this opinion.

New trial.

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W. T. OWENS v. ATLANTIC COAST LINE RAILROAD COMPANY (OF SOUTH CAROLINA).

(Filed 15 April, 1908.)

Railroads—Pleadings—Demurrer—Rights of Passenger—Contributory Negligence—Contract, Breach of—Nominal Damages.

The complaint alleges that the plaintiff was a passenger on defendant's passenger train scheduled to stop at his destination, and tendered the conductor the money or fare thereto, and was informed by the conductor that the train would not stop there on that trip; that it was impossible to do so. At plaintiff's urgent solicitation the conductor repeatedly refused to stop the train for the reason given. The plaintiff, in the pres-

ence of the conductor, got upon the steps of the car and informed the conductor that he was bound to stop. The train slackened its speed and the conductor "threw up his hand," which plaintiff understood was given for him to jump, and he did jump, but after he felt the train gathering speed, and was injured, the signal being to the engineer to go ahead: *Held,* (1) that under such allegations the plaintiff was guilty of contributory negligence that would bar recovery for actual damages; (2) that for the breach of defendant's duty to stop the train according to its schedule it was answerable in nominal damages; (3) that a demurrer to the complaint should not have been sustained.

APPEAL from *Webb, J.,* at December Term, 1907, of ANSON.

The defendant demurred to the complaint *ore tenus* and moved to dismiss it because it fails to state a cause of action. The court sustained the demurrer and dismissed the action, from which judgment the plaintiff appealed. The facts are stated in the opinion.

Robinson & Caudle for plaintiff.
McLean & McLean and J. H. Pou for defendant.

BROWN, J. The plaintiff alleges in the complaint that on 19 October, 1900, he was a passenger on defendant's train *en route* from Cheraw to McFarlan, a station on defendant's road, at which said train was scheduled to stop; that he tendered his fare to the conductor, who refused to receive it and informed plaintiff that he could not stop at McFar-
(358) lan in consequence of certain orders received, but that he would carry plaintiff to Wadesboro and bring him back to McFarlan without extra charge, and that the conductor did not accept at any time the fare tendered; that plaintiff again told the conductor that he was compelled to stop at McFarlan to attend the funeral of his child, and the conductor again informed him he could not stop. The complaint further alleges: "About this time said train was approaching McFarlan station, and the plaintiff approached the door of the car, passing by the conductor, and took his position upon the steps of the same, in full view of said conductor, the latter taking a position in the side door of said car, a few feet from the plaintiff. Plaintiff from this position again informed said conductor that he was 'bound' to stop. As said train approached McFarlan station it relaxed its speed and the plaintiff was thereby induced to believe that said train was going to stop, as it was required to do, for his safe delivery; that plaintiff and the conductor continued in full view of each other and were looking at each other at the time said train reached said passenger station, at which time said conductor threw up his hand or gave a signal, and plaintiff, feeling the speed of the train increase and believing that said conductor meant and

intended that he should jump, and believing that he could do so with safety, and knowing that if he failed to do so he would miss the burial of his child, thereupon endeavored to jump from said train and was violently hurled to the ground, inflicting painful and serious wounds upon his shoulder and other parts of his body; that before the plaintiff jumped from said car it became evident to him that said conductor was not going to stop said train, and in truth did not stop the same, and said conductor knew that the plaintiff intended to alight from said train, and his conduct and attitude was such as to induce the plaintiff to believe that he could do so with safety."

We are of the opinion that his Honor erred in sustaining the (359) demurrer and dismissing the action, for while, according to the allegations of the complaint, the plaintiff, under our decisions, is clearly not entitled to recover any damages for the physical injuries received by him from jumping off the running train, yet a cause of action is stated which unanswered would entitle him to recover nominal damage (which would carry the cost), although there is no specific allegation of substantial or actual damage in the complaint except such as resulted directly from plaintiff's own negligent act. *Hocutt v. Tel. Co., ante,* 186.

1. There is no allegation in the complaint that at the time plaintiff jumped off the train it had slackened its speed "until it came nearly, almost to a full stop," or that it was moving very slowly, "a slight, gentle, creeping movement," etc., as in *Nance v. R. R.,* 94 N. C., 622, cited by plaintiff. On the contrary, the plaintiff avers that, although as the train approached McFarlan it relaxed its speed, yet before the plaintiff jumped he felt the speed of the train increasing, and he jumped then because he knew it would not stop.

Every court in this country recognizes the just and reasonable rule that those who are injured while attempting to get on or off a moving train cannot recover for injuries sustained in consequence. In *Johnson v. R. R.,* 130 N. C., 488, in the opinion of the Court by the present *Chief Justice,* it is said: "It is the duty of the passenger who sees the train in motion to ask for it to be stopped, and if it is not done he ought not to get off."

The precedents in this State are uniform and numerous and are collected in the opinion of *Mr. Justice Walker* in *Morrow v. R. R.,* 134 N. C., 92, which case is cited and approved in *Whitfield v. R. R., ante,* 236. Nor has the plaintiff stated facts which bring him within any recognized exception to the rule, as in *Johnson v. R. R.* or *Nance v. R. R., supra.*

The allegation "that before the plaintiff jumped from said car (360) it became evident to him that said conductor was not going to stop

said train" is inconsistent with the idea that plaintiff was misled. The plaintiff alleges that he had been twice informed by the conductor that under his orders he could not stop at McFarlan. Although at the time plaintiff alighted from the train he avers he was standing within a few feet of the conductor, he did not deem it necessary to inquire of the conductor if he had changed his purpose, but evidently preferred to take the chance of serious injury rather than be carried by. Upon his own allegations the plaintiff was not invited by the conductor to alight or given any assurance or suggestion that it would be safe for him to do so.

The conductor was standing in the side door of the car, evidently signaling for the engineer not to stop, as is shown by the immediate increase of speed felt by plaintiff before he jumped. The plaintiff could not reasonably interpret that as a signal to jump, for he realized immediately and before he jumped that the speed was increasing and not decreasing. He should have remained on the car and not have risked life and limb by leaping from it.

2. Nevertheless, the plaintiff has stated a cause of action, and although the complaint as drawn fails to set out any substantial damage (except such as ensued from the plaintiff's own unwarranted act in jumping off, and for which he cannot recover), yet he may recover nominal damages.

The plaintiff avers that the train he boarded as a passenger "was scheduled to receive and deliver passengers at its station in the village of McFarlan," and that he tendered the full fare to that place, which the conductor refused to receive because he had orders not to stop there. A carrier of passengers who advertises the schedules of its train to stop at certain stations for the purpose of receiving and discharging passengers is required by law to stop at such stations. It is a part of the contract with the passengers when he enters the train. 2 Hutchison Carriers, sec. 1110; *Thomas v. R. R.*, 122 N. C., 1006. Some overruling neces-
(361) sity might excuse the carrier for passing by a regular station, but the burden would be on the carrier to show it.

In a case somewhat similar, when the carrier failed to stop at a regular station, the Supreme Court of Louisiana says: "It would be an unreasonable construction of the contract of carrying passengers that the defendant company should know the objects and purposes of each passenger boarding the train, and an implied contract should spring from such imputed knowledge. The contract was to carry the plaintiff safely to Burke station and then put her off with safety to her person and effects. The defendant company violated the contract, etc. The plaintiff has failed to show definitely the amount of pecuniary loss sustained. There was, however, a violation of the contract." The Court then goes on to hold that the plaintiff may recover at least nominal damage.

So, in our case, although the complaint fails to specify any actual damage sustained, except those personal injuries the plaintiff brought on himself, yet the plaintiff may recover nominal damage for the breach of the contract in defendant's failing to stop the train at a regular station advertised on its pubished schedules. Fetter on Carriers, sec. 536.

Reversed.

Cited: *Baker v. R. R.*, 150 N. C., 564; *Owens v. R. R.*, 152 N. C., 439; *Carter v. R. R.*, 165 N. C., 254.

(362)

FESTUS BEASLEY v. ABERDEEN AND ROCKFISH RAILROAD COMPANY.

(Filed 15 April, 1908.)

1. Railroads—Rights—Owner of Fee—Ouster.

A railroad company, which has entered on the lands of another and constructed its road, cannot be ousted by the owner of the land or stayed in operating its railroad thereon, when such is being done in pursuance of the power and authority contained in its charter and rightfully exercised under the general law applicable.

2. Railroads—Charter Rights—Condemnation Proceedings—Damages—Statutory Methods.

When the damages sought by the owner of the land against a railroad company using the same for railroad purposes authorized under its charter and in accordance with law would necessarily be included in an assessment in condemnation proceedings under a statute, the statutory method of redress provided either by the charter or under the general law must be followed, if open to him as well as the railroad company.

3. Same—Wrong Invasion—Permanent Damages—Statute.

When a railroad company is acting within its lawful right in operating its road, but unlawfully goes upon or invades the proprietary rights of the owner of the land in so doing, the wrong must, under the present law (Revisal, sec. 394), be redressed by the award of permanent damages.

4. Same—Issues.

In an action brought against a railroad company by the owner on account of its wrongful invasion of his land by taking the same for railroad purposes the court should submit an issue as to permanent damages, this being the proper method of adjustment now required by the statute (Revisal, sec. 394).

5. Damages, Permanent, Include What—Separate Issues.

As a rule, the term "permanent damages" includes those for the entire injury done to the property, present, past, and prospective; but when the issues have been divided and answered by the jury, so that one relates to the past and the other to present and prospective, the amount may be added together and a judgment awarded for the permanent damages recoverable.

6. Same—Successive Actions—Retraxit.

When it appears from the record that "plaintiff did not ask for judgment on the issue as to permanent damages," and this did not evidence his intention to enter a *retraxit* as to such, but simply that he desired to test his right to maintain successive actions for his alleged wrong, a judgment for permanent damages upon the award of the jury should have been rendered.

(363) APPEAL from *Long, J.*, at February Term, 1908, of CUMBERLAND.

Plaintiff alleged and offered evidence tending to show that he was the owner and in possession of a tract of land on either side of defendant railroad company's land, including same within its boundaries; that about three years ago, a short while before the institution of this suit, defendant entered on the land of plaintiff and constructed its railroad and has since been operating same; that defendant has the power of eminent domain granted to it by its charter, but has never acquired a right of way by condemning the land under such power, but that it entered, built, and is operating the road along an old right of way formerly acquired and used by a corporation known as the Enterprise and Improvement Company, which had the power and had acquired the right to operate a tramway (see former opinion in *Beasley v. R. R.*, 145 N. C., p. 272); that the construction and operation of said road caused damage to plaintiff's land, to recover which this action is brought.

Defendant admitted having constructed its road along the right of way of the said Enterprise and Improvement Company, claimed the right to do so, and made denial as to the other allegations of the complaint. When the cause was called for trial the plaintiff tendered an issue: "What damage, if any, is plaintiff entitled to recover of defendant for the wrongful and unlawful acts of defendant complained of?" and excepted to the court's refusal to submit the issue. The court submitted issues, and the verdict thereon was as follows:

1. Is the plaintiff the owner of the slip of land referred to in the complaint and as alleged in the complaint? Answer: "Yes."

(364) 2. What damage, if any, is the plaintiff entitled to recover of the defendant for alleged wrongful trespasses up to the time of this trial? Answer: "Ten dollars."

3. What permanent damages, if any, have been done to the plaintiff's land by the defendant in running its tracks and permanently using a portion of the plaintiff's land for its alleged right of way? Answer: "Forty dollars."

On the verdict and facts otherwise stated the court rendered judgment as follows:

The jury having responded to the issues as they appear of record in favor of the plaintiff upon the first and second issues, and having ascertained his damages for trespasses alleged in his complaint up to the time of trial to be $10, it is now, upon motion of counsel, considered and adjudged that the plaintiff recover of the defendant said sum and the costs of the action, to be taxed by the clerk."

The plaintiff stated that he did not ask for judgment upon the third issue for permanent damages. As that issue had been asked for by the defendant, his Honor submitted it in deference to the opinion of *Justice Connor,* on file, having been requested to do so by defendant's counsel. The court submitted the issue, but as the plaintiff's complaint did not ask this relief and as defendant's answer did not ask for this relief, the court declined to sign judgment on the third issue. Plaintiff excepted and appealed.

Sinclair & Dye and J. Sprunt Newton for plaintiff.
Robinson & Shaw for defendant.

HOKE, J., after stating the facts: Where a railroad corporation has entered on the land of another and constructed its road and is operating same, and, having the power of eminent domain, has not exceeded the ultimate rights of appropriation contained in the power nor violated the restrictions imposed upon it by its charter or the general law, such company cannot be ousted from the land by action of ejectment instituted by the owner nor subjected to successive and repeated actions (365) of trespass by reason of the user and occupation of the property.

If the damages sought would necessarily be included in an assessment in condemnation proceedings regularly had, the owner must pursue the statutory method of redress provided either by the charter or under the general law, if such method is open to him as well as the company. This has been uniformly held with us. *McIntire v. R. R.,* 67 N. C., 278; *R. R. v. Ely,* 95 N. C., 77; *Dargan v. R. R.,* 131 N. C., 623. And if the injuries complained of amount to an invasion of the proprietary rights of the owner not covered by such assessment, the wrong must under the present law be redressed by the award of permanent damages. *Stack v. R. R.,* 139 N. C., 366; *Lassiter v. R. R.,* 126 N. C., 509; *Beach v. R. R.,* 120 N. C., 502.

This, we think, is the correct interpretation of the statute on the subject enacted in 1895, chapter 224, and brought forward in the Revisal, sec. 394, as follows: "2. No suit, action, or proceeding shall be brought or maintained against any railroad company by any person for damages caused by the construction of said road, or the repairs thereto, unless such suit, action, or proceeding shall be commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property." Prior to the enactment of this statute, when an injury was caused by a structure permanent in its character, erected and maintained in the exercise and furtherance of its chartered rights and duties by a *quasi*-public corporation having the power of eminent domain, in an action to recover for such injury an award of permanent damages could be required at the instance of either party to the controversy. *Parker v. R. R.*, 119 N. C., 677; *Ridley v. R. R.*, 118 N. C., 996. And in the case of railroads the statute referred to has made this course compulsory. *Cherry v. Canal Co.*, 140 N. C., 422. (366) The court, therefore, very properly framed and submitted an issue addressed to the question of permanent damages. While the privilege and duty of suggesting such issues as they consider relevant and necessary may in the first instance rest with the parties litigant, it is the duty of the court always to see that the proper issues material and determinative of the question involved in the litigation are submitted and responded to by the jury. *Strauss v. Wilmington*, 129 N. C., 99. And this issue as to permanent damages being the one required by the statute as determinative, the issue tendered by plaintiff was properly rejected and that for permanent damages substituted.

These damages, then, having been ascertained and established, judgment should have been entered in plaintiff's favor for the whole amount of the recovery on both issues; for, while as a rule the term "permanent damages" signifies the entire injury done to the property, and would ordinarily include damages for such wrong, past, present, and prospective, if it appears that in ascertaining the amount these items have as a matter of fact been divided and determined on separate issues, as in this instance, the verdict will not on that account be disturbed, but judgment entered for the whole sum. *Ridley v. R. R.*, 124 N. C., 37.

For the purpose of this action a judgment may be properly defined as the conclusion of the law on the facts regularly and properly established in the course of a judicial proceeding; and these facts having been established by the verdict, the judgment should be entered on the facts as found, for we do not understand or interpret the statement in the judgment, "That plaintiff did not ask for judgment on the issue as to per-

manent damages," to mean that plaintiff intended to enter a *retraxit* as to such amount, but simply that he desired to test his right to maintain successive actions for his alleged grievance. In permitting a recovery on this judgment we must not be understood as holding that in a claim for damages, which would be certainly and necessarily (367) included in an award in condemnation proceedings, any other than the statutory method of redress is open to the proprietor; for, as stated, our authorities are clearly to the contrary. But in the present instance, as the question was not raised by defendant, and it does not of a certainty appear but that other elements of damage may have been considered, we have determined to allow and direct that judgment be entered for plaintiff for the entire amount of his recovery on both issues, and it is so ordered.

Let this be certified, that judgment be entered on the verdict in plaintiff's favor for $50. The costs of the appeal will be taxed against the appellant.

Modified and affirmed.

Cited: Porter v. R. R., 148 N. C., 565; *Willis v. White,* 150 N. C., 203; *Pickett v. R. R.,* 153 N. C., 150; *Roberts v. Baldwin,* 155 N. C., 281; *McMahan v. R. R.,* 170 N. C., 458; *Perry v. R. R.,* 171 N. C., 39.

F. B. PERRY v. WILLIAM PERRY, EXECUTOR.

(Filed 15 April, 1908.)

Appeal and Error—Questions for Jury.

When the examination of the record on appeal discloses a controversy largely of fact, fairly and clearly presented to the jury upon the law, the verdict will not be disturbed.

B. C. Beckwith for plaintiff.
Peele & Maynard for defendant.

PER CURIAM. This is an appeal from a justice of the peace, tried at October Term, 1907, of WAKE, *Long, J.* The plaintiff recovered judgment for $125 for breach of a contract in respect to the cultivating of a crop on the testator's farm, from which defendant appealed.

We have examined and considered the several exceptions set out in the record to the reception and rejection of evidence, as well as to parts of his Honor's charge. The evidence discloses a controversy largely

(368) of fact and which appears to have been fairly and clearly presented to the jury, who have decided the matter adversely to the defendant, and we see no just reason to disturb the verdict. We find in the record no error of sufficient importance to warrant us in directing another trial.

Affirmed.

ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY v. ATLANTIC AND NORTH CAROLINA COMPANY.

(Filed 15 April, 1908.)

1. Contracts—Assignable Exceptions.

As a general rule, executory contracts of an ordinary kind are now assignable, except that contracts involving a personal relation or a contract imposing liabilities which by express terms or by the nature of the contracts themselves import reliance on the personal credit, trust, or confidence in the other party cannot be assigned.

2. Same—Ratification.

The restriction in the assignment of contracts ordinarily arises or exists for the benefit of the other party thereto, and where such party assents to and ratifies the assignment the same will be upheld.

3. Same—Benefit Received.

A contract to furnish cordwood to a railroad company to be used for its wood-burning engines, when from its character it is not restricted in its performance between the parties, is assignable by that company to its lessee company taking over and operating its railroad; and when the lessee has used a part of the wood furnished under the contract assigned, and afterwards changed its locomotives to coal burners so as not to need more, it is liable to the lessor for the full damages which the lessee has caused by its refusing to receive the balance of the wood to have been furnished thereunder.

4. Contracts—Interpretation—Intent—Entire Instrument—Words — Different Meaning.

The object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract; and in written contracts which permit of construction this intent is to be gathered from a perusal of the entire instrument; and while in arriving at this intent words are *prima facie* to be given their ordinary meaning, this rule does not obtain when the context or admissible evidence shows that another meaning was intended.

5. Same—Timber—Cordwood—Lease—Lessor and Lessee.

A railroad company using wood-burning locomotives leased its property, etc., to another company for a term of ninety-one years and more, including "all lands and interest in lands, timber rights, and contracts now owned by the lessor"; *Held*, the operative words of the lease in-

cluded within their meaning executory contracts then existing with third persons to furnish cordwood for lessor's locomotives, it appearing that there were not other timber contracts outstanding and that the significance of the words employed, taken with the testimony, evidenced that contracts to furnish cordwood were those intended to be thereby embraced.

6. Same — Lease—Covenants—Breach—Measure of Damages—Defense Tendered—Suit—Expense Incurred.

The lessor and lessee railroad companies covenanted in the lease upon the part of the latter that it would "indemnify and save harmless the lessor road from any and all damages which may be recovered from or against it" by reason of its failing in its duties and obligations arising under the lease; upon the part of the former to immediately give notice to the lessee of such suits and actions: *Held*, the lessee is responsible in damages to the lessor for the principal, interest, and costs of a judgment recovered against it in a suit brought upon a contract which the lessee had assumed, and caused by the failure or refusal of the lessee to perform, together with moneys expended by the lessor for reasonable attorney's fees therein incurred, when the defense had been duly tendered and refused.

7. Lease—Construction—Contracts Assigned—Primary Liability — Covenant Against Debts.

Under a lease from one railroad company to another of its railroad, etc., by which the lessee company operated the leased railroad, an executory contract between the lessor road and a third person was assigned, under which the lessor was to be furnished cordwood for its wood-burning engines: *Held*, the assignment of the contract established as between the parties to the lease a primary liability on the part of the defendant lessee, and the obligations of that contract would not by any fair or correct interpretation be included under the later stipulation of the lease, "that the lessee shall not be liable for any debt of the lessor at that date."

8. Attorney and Client—Confidential Communications—What Are Not Such.

The testimony of one who had been of counsel for one of the parties to a lease is not objectionable when it was to a fact necessarily known to both parties, brought out during the negotiations concerning the lease, and could in no sense be considered a confidential communication.

APPEAL from *Lyon, J.*, at November Term, 1907, of CRAVEN. (370)

A jury trial having been formally waived by the parties, the court heard the testimony and found the facts as follows:

1. The plaintiff is a corporation duly organized and existing under the laws of North Carolina.

2. The defendant is a corporation duly organized and existing under the laws of North Carolina.

3. On 1 September, 1904, the plaintiff made, duly executed, and delivered a lease to the Howland Improvement Company. A copy of said lease is hereto annexed and made a part of these findings of fact.

4. The defendant succeeded to the rights and liabilities of the said Howland Improvement Company under said lease.

5. Previous to the execution of said lease the plaintiff used in its locomotives for the transportation of freight and passengers over its railroad wood as fuel, and for the purpose of supplying itself with a sufficient quantity of wood the plaintiff had purchased timber lands and standing timber and had entered into contracts with several persons for cutting timber, among others one B. W. Ives, for the cutting and delivery to plaintiff of 15,000 cords of wood; and in pursuance of said contract the said Ives, prior to the date of said lease, had cut and delivered large quantities of said wood to plaintiff, and at the time of the execution of said lease the contract between plaintiff and Ives was in regular course of performance by both parties thereto.

6. When the defendant took over the property of the plaintiff under the said lease all of the locomotives which it received were what (371) are known as "wood burners," and it was necessary to have an adequate supply of wood as fuel for said locomotives, and the defendant used in its railroad operations only those locomotives for several months, and used up large quantities of wood as fuel, including a portion of the wood cut and delivered to plaintiff by said Ives under said contract.

7. Some months after defendant had been in the operation of said railroad under the said lease it changed the locomotives from "wood burners" to "coal burners."

8. After the lease the defendant refused to carry out the wood contract with Ives or to take any wood from him under and in pursuance of said contract between the plaintiff and said Ives; thereupon the said Ives demanded of the plaintiff that it carry out said contract, and upon the failure of the plaintiff to perform said contract the said Ives, on 28 December, 1904, brought suit against the plaintiff for the breach of said contract.

9. Upon the institution of said suit the plaintiff notified the defendant to come in and defend the same, which the defendant declined to do, and the plaintiff undertook the defense of said suit and did defend it to the best of its ability and at considerable expense and cost, but judgment was finally awarded, both in the Superior and Supreme Courts, against the plaintiff and in favor of said Ives for the sum of $8,106.90, with interest and costs. In addition to said amount, the plaintiff was forced to pay the following amounts: Interest on said amount, $216.16; cost, Superior Court, $104.60; cost, Supreme Court, $23.55; attorney's fee, $700; amounting in all at the time of said payment to the sum of $9,147.21.

10. The defendant knew of the existence of said contract at the time

of the said lease, as shown by the paper-writing itself and the testimony of Howland, Davidson, and Bryan.

11. Said contract was assignable and was duly assigned by the plaintiff to the defendant and was broken by the defendant.

12. Said contract between the plaintiff and B. W. Ives was not (372) in writing, nor was there any writing concerning same at the time of the making of the lease to the defendant.

13. The referee held that the defendant is liable to the plaintiff for the amount set out in paragraph 9 above, and that judgment be entered in favor of the plaintiff and against the defendant accordingly.

The portions of the lease referred to in the third finding of fact, pertinent to this inquiry, are as follows:

"Now, therefore, for and in consideration of the several sums of money, rents, covenants, agreements, and stipulations hereinafter specified and agreed to be paid, kept, and performed by the Howland Improvement Company, the said lessor, namely, The Atlantic and North Carolina Railroad Company, has demised, let, hired, farmed out, and delivered, and by these presents doth demise, let, hire, farm out, and deliver to the said lessee, namely, The Howland Improvement Company, the entire railroad of the lessor, with all its franchises, privileges, rights of transportation, works, property, including among other things its superstructure, roadbed, and rights of way incident thereto, situated in the State of North Carolina and extending from Morehead City, in the county of Carteret, to the city of Goldsboro, in the county of Wayne, in the said State; and also all depots, houses, shops, piers, wharves, water fronts, water privileges, buildings, fixtures, engines, cars, and railroad equipment, and all franchises, rights and privileges and other things, if any, of whatsoever kind and nature, to the said lessor belonging and necessary, incident, and appurtenant to the free, easy, and convenient operation of the said railroad leased hereby and now or heretofore used in that behalf; and also including the property situated in the said Morehead City known as the Atlantic Hotel, with all its rights, privileges, hereditaments, and appurtenances, and the furniture, fixtures, equipments, and appliances now therein or used therewith, and also all lands and interests in lands, timber, timber rights, and contracts now owned by the lessor, for the full term of ninety-one (91) years (373) and four (4) months from and after the first day of September, 1904, and to be fully ended, commencing the first day of September, 1904."

And, further, a covenant of indemnity as follows:

"And the lessee further covenants to and with the lessor, its successors and assigns, to idemnify and save harmless the said lessor against and

from any and all damages which may be recovered from or against it, according to law, by reason of any failure of the said lessee, its agents, employees, successors or assigns to perform in all things, or its or their violation of their duties and obligations, whereby the lessor may become liable to any party injured or sustaining injury in his or her person, reputation, or property; and the lessor on its part covenants to and with the lessee that whenever any suit or action shall be instituted against it, the said lessor, for any causes of action for which the lessee would be liable to the lessor under the terms of this lease, the lessor will immediately give due notice and tender defense of such suit or action to the lessee, such notice to be given to the resident agent of the lessee at either of the following named places, to wit, Morehead City, New Bern, Kinston or Goldsboro, all in the State of North Carolina."

And further: "It is further agreed between the parties that all cash on hand and all bills and accounts receivable, due and payable to the lessor at the date this lease goes into effect shall not pass by this conveyance, nor shall the lessee be liable for any debts of the said lessor at said date."

On the findings of fact and conclusions of law there was judgment for plaintiff, and defendant excepted and appealed.

George Rountree and P. M. Pearsall for plaintiff.

Aycock & Daniels, Simmons, Ward & Allen, and Moore & Dunn for defendant.

(374) HOKE, J., after stating the case: The contract by reason of which this recovery was had and its effect and binding force as between the original parties were construed and determined in *Ives v. R. R.*, 142 N. C., 131, and it was there held that the contract was for the cutting and delivery to the present plaintiff on its right of way a specified amount of cordwood, and was not therefore within the statute of frauds requiring that contracts concerning land should be in writing. The judgment obtained by Ives in that case having been paid off and discharged, the plaintiff instituted this action to recover of the present defendant the amount of that judgment and the cost and reasonable expense incurred in defending the suit.

Such recovery is resisted on the grounds chiefly (1) that the contract in question was not assignable; (2) that as a matter of fact it was not assigned. But we are of opinion that neither position can be sustained.

While at common law the rights and benefits of a contract, except in the case of the law merchant and in cases where the crown had an interest, could not be transferred by assignment, a doctrine which Lord

Coke attributes to the "wisdom and policy of the founders of our law in discouraging maintenance and litigation, but which Sir Frederick Pollock tells us is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between the debtor and creditor," the rule in its strictness was soon modified in practical application by the common-law courts themselves and more extensively by the decisions of the courts of equity; and the principles established by these cases have been sanctioned and extended by legislation until now it may be stated as a general rule that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that actions for breach of same can be maintained by the assignee in his own name.

The general doctrine as to the assignability of rights is very well (375) stated in 3 Pomeroy Eq. Jur., sec. 1275, as follows:

"*What Things in Action Are or Are Not Assignable.*—It becomes important, then, in fixing the scope of the equity jurisdiction, to determine what things in action may thus be legally assigned. The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor as assets, or continue as liabilities against the representatives of a decedent debtor, are in general thus assignable; all which do not thus survive, but which die with the person of the creditor or of the debtor, are not assignable. The first of these classes, according to the doctrine prevailing throughout the United States, includes all claims arising from contract, express or implied, with certain well defined exceptions; and those arising from torts to real or personal property and from frauds, deceits, and other wrongs whereby an estate, real or personal, is injured, diminished, or damaged. The second class embraces all torts to the person or character, where the injury and damage are confined to the body and the feelings; and also those contracts, often implied, the breach of which produces only direct injury and damage, bodily or mental, to the person, such as promises to marry, injuries done by the want of skill of a medical practitioner contrary to his implied undertaking, and the like; and also those contracts, *so long as they are executory,* which stipulate solely for the special *personal* services, skill, or knowledge of a contracting party."

And an interesting and well considered article by Prof. Frederick C. Woodard on the assignability of contracts will be found in 18 Harvard Law Review, 23. There is an exception, as indicated in the last part of this citation from Pomeroy, to the effect that executory contracts for personal services involving a personal relation or confidence between the parties cannot be assigned. Lawson on Contracts, sec. 355. And another, equally well established and well-nigh as broad as the rule itself,

(376) is that executory contracts imposing liabilities or duties which in express terms or by fair intendment from the nature of the liabilties themselves import reliance on the character, skill, business standing or capacity of the parties cannot be assigned by one without the assent of the other. This last exception and the reason upon which it rests are stated by *Justice Gray,* delivering the opinion in *Delaware v. Diebold,* 133 U. S., p. 488, as follows: "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his right and his obligations, cannot be assigned without the consent of the other party to the original contract," citing *Arkansas Co. v. Belden Co.,* 127 U. S., 379. And the same principle is stated in Clark on Contracts, 364: "It may be said generally that anything which involves a right of property is assignable, with the exception that rights, when coupled with liabilities under an executory contract for personal service or under contracts otherwise involving personal credit, trust or confidence, cannot be assigned."

It is contended that by reason of those exceptions stated in the authorities referred to, the contract before us was not assignable so as to impose liability of performance on defendant lessee; but we think the position is not well taken. In the first place, the exception noted arises for the protection of the other party, and if such party assents, as he did in this instance, the restriction no longer exists. But, apart from this, it will be noted that the exception referred to does not arise or apply when the contract is entirely objective in its nature, and gives clear indica-
(377) tion that the personality of the other contracting party was in no way considered. Anson on Contracts, p. 288; Clark on Contracts, p. 360. And this limitation imposed on the exception itself is applied and extended in numerous and well considered decisions of courts of the highest authority. *Horner v. Wood,* 23 N. Y., 350; *Devlin v. City,* 63 N. Y., 8; *New York v. R. R.,* 113 N. Y., 311; *Lantern Co. v. Stiles,* 135 N. Y., 209; *St. Louis v. Clement,* 42 Mo., 69; *Galey v. Mellon,* 172 Pa. St., 433; *Tolhurst v. Cement Co.,* H. L. App. Cases (1893), p. 414; *Wagon Co. v. Lea,* 5 L. R. Q. B., 1879-1880, 149.

In *Devlin v. New York, supra,* the general principle we are discussing is stated and applied as follows:

"1. Where an executory contract is not necessarily personal in its character, and can, consistent with the rights and interests of the adverse

party, we fairly and sufficiently executed as well by an assignee as by the original contractor, and where the latter has not disqualified himself from a performance of the contract, it is assignable.

"2. The assignment by the contractor with a municipal corporation for work is not against public policy so long as the corporation retains the personal obligation of the original contractor and his sureties; and in the absence of anything in the statute which authorized the work prohibiting it, such an assignment is valid. It does not terminate the contract or authorize the corporation to repudiate it.

"3. Accordingly held that an assignee of a contract for street cleaning, made between the corporation of the city of New York and another under authority of the act entitled 'An act to enable the supervisors of the county of New York to raise money by tax for city purposes and to regulate the expenditure thereof,' etc. (ch. 509, Laws 1860), could maintain an action against the city for money due thereon and for damages resulting from a repudiation of the contract and an interference on the part of the city authorities, preventing a further performance." (378)

In *Wagon Co. v. Lea, supra, Chief Justice Cockburn,* delivering the opinion, discusses the principle as follows: "We entirely concur in the principle on which the decision in *Robson v. Drummond* (1) rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which consequently cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these wagons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the wagons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus, if without going into liquidation or assigning these contracts the company had entered into a contract with

any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the wagons in repair. While fully acquiescing in the general principle just referred to, we must take care
(379) not to push it beyond reasonable limits. And we cannot but think that in applying the principle the Court of Queen's Bench, in *Robson v. Drummond* (1), went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done whether it is done by the immediate party to the contract or by some one on his behalf. In all these cases the maxim, *Qui fact per alium facit per se,* applies."

It will be noted here that while the case of *Robson v. Drummond,* frequently cited in support of the position that contracts imposing liabilities cannot be assigned, is not overruled, there is decided intimation that it has gone too far in the application of this principle, and there is doubt if *Ice Co. v. Potter,* 123 Mass., 28, is not subject to the same criticism. Certainly neither one of these cases can, it seems to us, be supported, except on the theory that there were terms in the contract importing reliance on the personal skill, business standing or methods of the other contracting party. A correct application of the principle established by these cases leads to the conclusion that the contract in question was assignable. It was an ordinary business contract for the delivery of so much cordwood on the lessee's right of way, not requiring or importing any special reliance on Ives' skill or business qualifications. It could be performed as well by one man as another. As a matter of fact, there is testimony to the effect that it was to be done in this instance by convicts and that quarters had already been constructed for their protection and accommodation while doing the work. As said by *Justice Walker* in the opinion in *Ives v. R. R., supra,* "It was a contract of employment in the sense that it was to be performed by means of personal labor, but
(380) not in the sense that it was expected or intended that it should be performed by Ives." Nor did the credit or business responsibility of the original parties affect the matter one way or the other; not that of Ives, for the wood was not to be paid for till it was delivered, and so the defendant assignee was fully protected; nor that of the assignor, for unless Ives had agreed to accept the defendant's responsibility in stead and place of the assignor, making it a new contract by way of novation, the assignor would, notwithstanding the assignment,

still remain liable. *Crane v. Kildorf,* 91 Ill., 567; *Martin v. Orndorff,* 22 Iowa, 447. And see the article of Professor Woodard, *supra,* wherein it is shown that the assent of the other party to an assignment does not always necessarily import that the assignor is relieved of liability.

This, ordinarily, is all the books mean when they state the proposition in general terms that a contract imposing liability cannot be assigned; that the assignment of such a contract does not, as a rule, relieve the assignor from responsibility. It may be well to note that we are speaking of the assignment of the contract and not of the transfer of the property about which parties may have contracted. In the last case it is a generally accepted doctrine that, in the absence of an agreement, express or implied, a party who buys property from a vendee, to whom the owner has contracted to sell it, does not, as a rule, come under personal obligation to the owner to pay the purchase price. *Adams v. Wadhams,* 40 Bar., 225; *Comstock v. Hitt,* 37 Ill., 542. We have so held in effect at the present term in *Biggers v. Matthews, ante,* 299.

The contract in question here, being for the delivery of so much cordwood on defendant's right of way, may be classed with a contract of sale of a given quantity of staple goods having a known market value, and, under the principle established by the authorities referred to, we hold that it was assignable, so as to impose on defendant the obli- (381) gation to pay for the wood when delivered according to its terms.

And we are also of the opinion that by the terms of the lease the contract was, and was intended to be, assigned. The operative words of the lease are that the parties of the "first part do demise, let, hire, farm out, and deliver to the said lessee, etc., the franchise, property, etc., of the lessor for the full term of ninety-one years and four months from and after the first day of September, 1904." And the descriptive words as to the property passed included the franchise, works, property, right of way, etc., appertaining to the railroad; also the Atlantic Hotel property, with all its rights, privileges, hereditaments, and appurtenances, and the furniture, etc., used therewith; and, in reference to the matter now before us, "also all lands and interests in lands, timber, timber rights and contracts now owned by the lessor," etc. There was testimony to the effect, and it was found as a fact by the trial judge:

"5. That previous to the execution of said lease the plaintiff used in its locomatives for the transportation of freight and passengers over its railroad wood as fuel, and for the purpose of supplying itself with a sufficient quantity of wood the plaintiff had purchased timber lands and standing timber and had entered into contracts with several persons for cutting timber, and among others one B. W. Ives, for the cutting and delivering to plaintiff of 15,000 cords of wood; and in pursuance of said

contract the said Ives, prior to the date of said lease, had cut and delivered large quantities of said wood to plaintiff, and at the time of the execution of said lease the contract between plaintiff and Ives was in regular course of performance by both parties thereto.

"6. That when the defendant took over the property of the plaintiff under the said lease all of the locomotives which it received were what are known as 'wood burners,' and it was necessary to have an adequate supply of wood as fuel for said locomotives; and that the defendant used in its railroad operations only those locomotives for several
(382) months and used large quantities of wood as fuel, including a portion of the wood cut and delivered to plaintiff by said Ives under said contract.

"7. That some months after defendant had been in the operation of said railroad under the said lease it changed the locomotives from 'wood burners' to 'coal burners.'"

It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract, and that in written contracts which permit of construction this intent is to be gathered from a perusal of the entire instrument. In Paige on Contracts, sec. 1112, we find it stated: "Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole." And while in arriving at this intent words are *prima facie* to be given their ordinary meaning, this rule does not obtain when the "context or admissible evidence shows that another meaning was intended." Paige, sec. 1105. And further, in section 1106 it is said that the context and subject-matter may affect the meaning of the words of a contract, especially if in connection with the subject-matter the ordinary meaning of the term would give an absurd result. Again, as said by *Woods, J.*, in *Merriam v. United States*, 107 U. S., 441, "In such contracts it is a fundamental rule of construction that the courts may look to not only the language employed, but to the subject-matter and surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." And in Beach on Modern Law Contracts, sec. 702, the author says: "To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects they had in view. The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have." Applying these accepted
(383) rules of construction, and considering the facts and attendant circumstances established by the parol testimony, which was prop-

erly received for the purpose indicated (*Ivey v. Cotton Mills,* 143 N. C., 189; *Ward v. Guy,* 137 N. C., 397), we are of the opinion that the contract with Ives for the cutting and delivering of the cordwood came within the descriptive terms of the lease and was assigned to the lessee as stated. It is true that the terms "demise" and "let" are usually applied to leases and conveyances of real estate, but they both contain the idea of a grant; and when, as in this instance, the parties have used them as the operative words applied to a transfer of timber rights and contracts, passing such interest for ninety-one years and more, by fair interpretation and considering the nature of the interests, the parties could only have intended an assignment. And the term "contracts" in the descriptive words must have included this contract with Ives to cut cordwood. Referring to the parol testimony competent for the purpose stated, this and another contract with Overman of like nature were all the contracts of this kind they had. The terms "land," "timber," and "timber rights" included all the standing timber, and these two contracts to cut cordwood were the only interests on which the words could operate. The evidence, too, further shows that these two contracts were brought to the attention of the lessee before the contract was entered into; that the one here in question was being carried out by Ives at the time of the lease, and its benefits were for a short while accepted by the lessee. We do not attach any importance to the words "now owned by the vendors," at the conclusion of the descriptive words. The rights and benefits of a contract like this are considered as property, and the term "owned by them" is not inapt as a part of the description. *Thurber v. LaRoque,* 105 N. C., 306.

And so, as to the words "timber," ordinarily this term applies to timber fitted for structural purposes, but it would be entirely improper to give it that significance when the testimony shows that the entire purpose of these holdings and contracts concerning them was to sup- (384) ply cordwood for the operating purposes of the railroad. And we think it a fair surmise, permissible in view of the facts and attendant circumstances, that if the lessee had not decided to change its engines from wood to coal burners this litigation would never have arisen.

If we are correct in our position that the contract was assignable, and that as a matter of fact it was assigned, then we are of opinion that plaintiff has the undoubted right to recover of the defendant the amount of the judgment, together with the cost and reasonable attorney's fees incurred in resisting the suit instituted by Ives. Though the lessee may have repudiated any and all obligations to Ives by reason of this contract, the lessor was not thereby relieved of the obligation to do what was reasonably required to resist recovery. *Tillinghast v. Cotton Mills,* 143

N. C., 268; *Bowen v. King,* 146 N. C., 385. And defendant's obligation, we think, arises by the express covenant of the lease, in which it is evidently contemplated that resistance to such suits should be made whenever the facts and conditions offered reasonable grounds of defense. One of the stipulations of the lease (page 47, record) provides as follows: "And the lessee further covenants to and with the lessor, its successors and assigns, to indemnify and save harmless the said lessor against and from any and all damages which may be recovered from or against it, according to law, by reason of any failure of the said lessee, its agents, employees, successors or assigns to perform in all things, or its or their violation of their duties and obligations whereby the lessor may become liable to any party injured or sustaining injury in his or her person, reputation, or property; and the lessor on its part covenants to and with the lessee that whenever any suit or action shall be instituted against it, the said lessor, for any causes of action for which the lessee would be liable to the lessor under the terms of this lease, the lessor will (385) immediately give due notice and tender defense of such suit or action to the lessee; such notice to be given to the resident agent of the lessee at either of the following named places, to wit: Morehead City, New Bern, Kinston, or Goldsboro, all in the State of North Carolina."

When the defendant bought and took an assignment of this contract for the delivery of so much cordwood on its right of way, and thus acquired the right to enforce performance by Ives or recover damages for its breach, it assumed the liability to pay for it when delivered. It could not take over the benefits of the contract without bearing its burdens. Defendant took the contract *cum onere* (*R. R. v. Bank,* 42 Neb., 469; *Smith v. Rodgers,* 14 Ind., 224); and having in the stipulations quoted agreed to "save lessor harmless from any and all recovery that may be had against the lessor by reason of the failure of the lessee and its assigns to perform in all things their duties and obligations," the liability to repay the amount comes within the express terms of the covenant of indemnity; and, having duly notified the lessee of the institution of the Ives suit and "tendered the defense," the reasonable expenses of such defense may also be recovered. The words of this stipulation, "to indemnify against any and all damages which may be recovered against it, according to law, by reason of its failure to perform in all things the duties and obligations, whereby the lessor may become liable," etc., are broad enough to include this obligation to Ives. And if it were otherwise—if, as defendant contends, the covenant was only intended to apply to the charter obligations of these companies—the result would be the same; for while, as heretofore stated, the lessor company was not relieved of the obligations under this contract unless Ives had agreed to accept

the lessee in discharge of the former as between these parties, the lessor and lessee, the force and effect of the assignment were to establish in any event primary liability in the lessee; and under the general equitable principles of *indebitatus assumpsit* the lessor, having been forced to pay, can recover of the lessee the amount of this enforced re- (386) covery. Keener on Law Quasi Contracts, p. 396; 15 A. & E. Enc., 1108.

In the citation from Keener, *supra,* it is said: "It may be stated as a general proposition that a plaintiff can recover against a defendant as for money paid to his use to the extent that the claim paid by the plaintiff should have been paid by the defendant." This primary liability of the assignee is well brought out in the case of *Cutting Packing Co. v. Packers' Exchange,* 86 Cal., 574, reported in 10 L. R. A., p. 396. In that case, speaking of the obligation of parties to an imperfect assignment as between themselves, *Works, J.,* for the Court, said: "We therefore think it plain that, as the plaintiff, as assignor, was still bound to Blackwood to pay the price stipulated in the contract, notwithstanding the assignment, and as the defendant, as assignee, assumed such obligations, the plaintiff, as between it and defendant, stood in the nature of a surety for the latter for the performance of the obligation. If this be correct, it then follows that from the assignment an implied contract arose between the plaintiff and defendant whereby the latter became bound to the former to receive and pay for the apricots according to the terms of the original contract." While this ruling was made to depend to some extent on a section of the California Code, the statute itself is only an embodiment of the generally accepted doctrine applicable to the facts indicated.

The assignment of the Ives contract having established as between the parties a primary liability on the part of the defendant lessee, the obligations of that contract would not by any fair or correct interpretation be included under the later stipulation of the lease, "that defendant shall not be liable for any debt of the lessor at that date." This obligation, by the force and effect of the lease and assignment, had become the debt primarily of the lessee. And for the same reason the doctrine stated in general terms by Mr. Elliott in his valuable work on railroads (section 461), to which we were referred by counsel, (387) "that a lessee, under an authorized lease, is not liable on the contracts of the lessor in the absence of a stipulation to that effect," does not apply here. This is true when the lessee takes over the franchise and ordinary property of the lessor, without more; but in the case before us the lessee has taken the contract, thereby imposing on itself the obligation as a primary liability. And this distinguishes the present case

from that of *Pennsylvania Co. v. R. R.*, 108 Pa., 621. In that decision it was held that an oral agreement by the lessee company to give an annual pass in consideration of a release of a right of way through an owner's land was not binding on the lessee. The decision was put on the ground that, while the right of way which had been obtained by the lessor company passed under the lease, there was no connection between the two so as to make them concurrent and dependent stipulations, and therefore in taking over the road, including the right of way, there was not any implied agreement to make good the oral promise to give a pass. The opinion (on page 629) proceeds as follows: "But the parol agreement to provide a pass was no part of the release; the latter was an executed contract, absolute and unconditional in its terms, and the transfer of it, in the absence of an express provision to the contrary, carried with it to the transferee no legal responsibility to the former. Each, it is true, was the consideration of the other, but they were distinct and independent; one secured a right, whilst the other evidenced a debt of the company." This decision will certainly not extend or apply to the facts presented here, where, as stated, a primary liability of the lessee company was assumed and established by taking over a contract having mutual and dependent stipulations.

The objection to the testimony of one who had been of counsel for Howland, the original lessee, as to the fact that the Ives contract was mentioned and referred to at the time of taking the lease, is with-
(388) out merit. This was a fact necessarily known to both parties, brought out during their negotiation concerning the lease, and could in no sense be considered a confidential communication. Weeks on Attorneys, 289; Wigmore Evidence, 2311, 2312; 23 A. & E., 67; *Elliott v. Elliott,* 92 N. W., 1008, citing with approval *Hills v. State,* 61 Neb., 598, reported in 57 L. R. A., 155.

After giving the case most careful consideration, we find no error in the record, and the judgment below must be

Affirmed.

Cited: Younce v. Lumber Co., 148 N. C., 36; *Price v. Griffin,* 150 N. C., 527; *Bailey v. Bishop,* 152 N. C., 386; *Refining Co., v. Construction Co.,* 157 N. C., 280; *Bank v. Justice, ib.,* 376; *Sanitarium Co. v. Ins. Co., ib.,* 555; *Winslow v. White,* 163 N. C., 32; *Herring v. Lumber Co., ib.,* 486; *Simmons v. Groom,* 167 N. C., 275; *Bank v. Furniture Co.,* 169 N. C., 181; *McMahon v. R. R.,* 170 N. C., 459; *Bank v. Redwine,* 171 N. C., 67.

STATE EX REL. JOHN W. ETCHISON ET AL. v. JAMES McGUIRE.

(Filed 17 April, 1908.)

Appeal and Error—Order Making Parties—No Prejudice to Appellant Appearing—Premature Appeal.

Orders of the lower court making additional parties to an action are usually discretionary, and an appeal therefrom will be dismissed as prematurely taken when it does not appear in what manner the rights of the appellant are prejudiced.

APPEAL by plaintiff from *Justice, J.*, at Spring Term, 1907, of DAVIE.

T. B. Bailey and A. T. Grant, Jr., for plaintiff.
Watson, Buxton & Watson and E. L. Gaither for defendant.

BROWN, J. The plaintiffs except to and appeal from an order of *Justice, J.*, at September Term, 1907, of DAVIE, directing that W. A. Bailey be made a party defendant and that a summons issue, returnable to the following term. The defendant moves to dismiss the appeal in this Court upon the ground that it is premature and we are of opinion that, under the authorities, the motion must be allowed.

There may be cases, where the injury to a party's right is (389) manifest, in which this Court will entertain such an appeal, but the wrong done these plaintiffs by the order has not been made plain to us. The Court has said: "It can very rarely happen that making an additional party will be a serious prejudice, and hence such orders are usually discretionary and not reviewable." *Bernard v. Shemwell,* 139 N. C., 447; *Tillery v. Candler,* 118 N. C., 889, and cases cited; The Code, sec. 273.

Appeal dismissed.

JAMES BRIGGS v. DURHAM TRACTION COMPANY.

(Filed 22 April, 1908.)

1. Street Railways — Carriers — Negligence—Prima Facie Case—Burden of Proof—Accident.

While the proof that plaintiff was injured in a collision upon defendant's track between two of its cars moving in opposite directions makes out such a case of *prima facie* negligence as alone entitles plaintiff to go to the jury, it does not create an irrebuttable presumption of negligence,

but shifts the burden of proof so as to require the defendant to show that the collision was the result of an accident which reasonable prudence and foresight could not prevent.

2. Street Railways — Carriers — Negligence—Not Insurers—High Degree of Care.

A street car company is not an insurer of its passengers, and it is only liable for damages arising from its negligence in not exercising such a high degree of care, skill, and diligence in operating its cars as is consistent with the practical operation of its business.

3. Street Railways—Negligence—"Act of God."

When the collision between the two street cars in which the injury occurred was an accident due directly and exclusively to neutral causes, without human intervention, which by no human foresight, pains or care reasonably to have been expected could have been prevented, the street car company is not responsible, as such arose by an act of God.

4. Street Railways—Negligence—Accident—Proximate Cause—Questions for Jury.

When it was admitted that the injury complained of was caused by a collision between two cars of defendant street car company, and no contributory negligence was alleged, it was error in the lower court in his charge to the jury to cut the defendant off from going to the jury upon any feature of the case except the fact of injury and the proximate cause, the latter not being in dispute, under evidence tending to show that the injury resulted from an accident which reasonable prudence and foresight could not have prevented. Under conflicting evidence the question was one for the jury.

5. Street Railways — Negligence — Headlights, Absence of — Not Negligence Per Se.

While street cars are required to be provided with headlights to be used while running in the dark, the question as to their thus running without them being negligence necessarily depends upon surrounding circumstances, and is not under all circumstances negligence *per se.*

6. Same—Leaving Pass Switch—Uncertainty of Lights.

When a conductor of a street car left a pass switch at night, when the cars are required to use headlights, with knowledge that under the existing weather conditions the steadiness of the current used in lighting could not be relied on, and in consequence thereof his was unlighted, and if the jury find that on that account, without due care for the safety of the passengers, a collision was caused with a car moving on the same track in an opposite direction, it was such an omission of duty by the conductor not to remain at the switch as would constitute actionable negligence on the part of the defendant street car company.

APPEAL from *Webb, J.*, at January Term, 1908, of DURHAM.

The court submitted these issues:

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

2. What damage, if any, has plaintiff sustained? Answer: "Five hundred dollars."

From the judgment rendered defendant appealed.

Giles & Sykes for plaintiff.
Manning & Foushee for defendant.

BROWN, J. Plaintiff sues to recover damages for an injury (391) alleged to have been sustained by him in a collision between two of defendant's electric cars on its track in Durham on 19 December, 1906. Concerning the immediate cause of the collision and its effect upon him the plaintiff testified: "After traveling about twenty minutes the car I was on collided with another car. The lights on the car were on when I got on, and then they went off. The car stopped; then presently the lights came on again, and this kept up until the time of the collision. There were no lights on the car at the time of the collision Both of the cars were coming down hill, as near as I can remember. There were three, four, or five people on the car. When the collision occurred I was sitting on the right-hand side, and it flung me on the other side, and I fell and struck my back against the seat. I was thrown from the right-hand side to the left-hand side, across the aisle, and was struck about the middle of the back, on the backbone. Did not see any lights on the other car."

The defendant offered evidence tending to prove that the cause of the collision was the extinguishment of the lights; that all electric cars are lighted by electricity generated at the power-house; that on this occasion its cars, wires, brakes, and line were in good condition, but that a heavy sleet falling on the wires kept the trolley pole from making connection with the overhead trolley wire, or rather that the electric current could not get from the wire to the trolley pole on account of the sleet. This caused the car to stop until the heat from the electric current could melt the sleet on the wire. When this was done the lights would come on the car and the car would go forward until the sleet again stopped it. Consequently the progress of the car was slow and the lights were first on and then off. There was a passing switch on Alston Avenue. After waiting on the switch some twenty minutes, the car plaintiff was on went on towards East Durham to see what had become of the car from East Durham and assist it to get back to the car barn. The car from East Durham was in the same condition as the car bound (392) for East Durham. The motorman was on the front platform, looking for the other car, and the conductor on each car was standing on the steps of the front platform, looking around the vestibule to the

front, watching for the other car. At the time of the collision the east-bound car had stopped and the west-bound car was coming down a slight grade, without any current on, at the rate of 4 or 5 miles an hour. There was a slight jar.

The court charged the jury, if they should find from the evidence that at the time of the collision it was a dark night and that the defendant had no lights on its cars, and should further find that said collision occurred in the way and manner testified to by defendant's witnesses, then the defendant was guilty of negligence, and the jury should answer the first issue "Yes." provided they should further find that such negligence was the proximate cause of the plaintiff's injury, if they should find by the greater weight of evidence that he was injured. To this charge the defendant excepted, as well as to the refusal of his Honor to give the instructions tendered. We are of opinion that the exceptions are well taken.

While the proof that plaintiff was injured in a collision upon defendant's track between two of its cars moving in opposite directions makes out such a case of *prima facie* negligence as alone entitles the plaintiff to go to the jury, it does not create an irrebuttable presumption of negligence. It only shifted the burden of proof to defendant, requiring it to go forward with its proof and prove, if it could, that the collision was the result of an accident which reasonable prudence and foresight could not prevent. *Overcash v. Electric Co.*, 144 N. C., 573; *Winslow v. Hardwood Co., ante*, 275. The law exacts of a street railway company a high degree of care, skill, and diligence in operating its cars, as far as is consistent with the practical operation of its business, but it is only liable for negligence at last, and it is not an insurer of the safety of its (393) passengers. "A carrier of passengers must exercise the care of a very cautious person surrounded by the same circumstances." Nellis Street R. R. Acc. Law, 123; *Bosqui v. R. R.*, 131 Cal., 390. But a common carrier, as well as an individual, is excused from responsibility for injuries which are caused by the act of God, which has been well defined by the learned counsel for defendants in their prayer for instruction to be "any accident due directly and exclusively to neutral cause without human intervention, which by no human foresight, pains, or care reasonably to have been expected could have been prevented."

The charge of the learned judge practically cut the defendant off from going to the jury upon any feature of the case except the fact of injury and the proximate cause. The latter is not in dispute. If the plaintiff was injured at all it was in this admitted collision, and as he is not charged with contributing to his injury, there can be no other cause for it. The circumstances under which the defendant's cars were running

on this occasion, with the lights first on and then off, may or may not render it liable for negligence, according to the view the jury shall take as to what was the duty of defendant's agents and conductors under such conditions. Under the evidence it was in this case essentially a question for the jury to determine.

The learned annotator in a note to *McGee v. R. R.*, 26 L. R. A., 301, says: "It would seem to be a fair deduction from all the authorities that the question of running a street car of any kind in the dark without a headlight should be left to the decision of a jury." In that case it was held to be not negligence *per se* under any and all circumstances.

We do not mean to intimate an opinion that electric cars should not be provided with headlights. On the contrary, we think they should.

But whether it is negligence to run the car at all in the dark when the light is not burning must necessarily depend upon (394) circumstances.

If the conductor of the car in which plaintiff was a passenger left the pass switch on Alston Avenue with knowledge that under weather conditions the steadiness of his current could not be relied on, in consequence of which his car was frequenty unlighted, and if the jury should find that under such existing conditions reasonable prudence and due care for the safety of his passengers required him to remain at the switch, it was his duty to do so, and such omission of duty would constitute actionable negligence if it caused a collision.

New trial.

HATTIE G. KYLES v. SOUTHERN RAILWAY COMPANY.

(Filed 22 April, 1908.)

1. Judgment—Nonsuit—Evidence, How Considered—Questions for Jury.

In consideration of the question as of nonsuit upon the evidence the courts will accept the evidence in the most favorable light to the plaintiff, and if there is any evidence, or if different minds can draw different conclusions, it is the duty of the trial judge to submit the case to the jury.

2. Dead Bodies—Unlawful Mutilation—Widow—Right of Action.

When a widow is living with her husband at the time of his death she has, nothing else appearing, a right of action superior to that of the next of kin for the unlawful mutilation of the remains of her deceased husband.

3. Dead Bodies—Quasi Property—Wrongful Mutilation—Actionable.

While dead bodies are not recognized at common law as property, they are *quasi* property, and wrongful mutilation thereof is actionable.

4. Same — Evidence — Punitive Damages, When Recoverable—Wantonness and Malice.

In a suit by the widow punitive damages are recoverable for defendant's breach of duty in knowingly permitting the mutilated and dismembered body of deceased to remain upon or along its track in an unprotected condition, to be repeatedly run over by its trains, when it was from a willful, wanton, or malicious motive.

5. Same—Evidence Insufficient.

There is no evidence of a willful, wanton, or malicious motive on the part of the defendant or its employees when it appears that the deceased, who was killed by one of defendant's engines, was permitted to remain along defendant's track and was repeatedly run over and mutilated, and when it was done at night or under such conditions as to cause the employees not to be aware thereof.

6. Same.

Evidence that the section master manifested some impatience at the prospect of guarding the remains held incompetent.

(395) APPEAL by plaintiff from *Justice, J.*, at November Term, 1907, of IREDELL. The facts are stated in the opinion.

Armfield & Turner and H. P. Grier for plaintiff.
L. C. Caldwell for defendant.

CLARK, C. J. The complaint alleges (1) the careless and negligent mutilation of the dead body of plaintiff's husband by continuously running its train back and forth over it for nearly twenty-four hours after the killing, the body all this time lying exposed on the track between the rails; (2) the willful, wanton, and reckless mutilation of the dead body of plaintiff's husband by above recited conduct; (3) for negligent failure to gather up his remains for burial, in that a portion of his remains were not sent home, but lay alongside the track for four days, till gathered up by relatives, who carried them home, reopened the grave and buried these remains with those which had been sent by the defendant company. There is no allegation of wrongful death or negligent killing, in which case the cause of action is created by the statute and is vested in the personal representative. Revisal, 59; *Killian v. R. R.*, 128 N. C., 261.

As the court below granted a nonsuit, if there is any evidence of either of the matters alleged, whether of willful and wanton or merely negligent misconduct, the nonsuit must be set aside, as they are not separate causes of action, and it is not necessary to discuss the testimony
(396) further than to ascertain if there is evidence of the cause of action to submit the case to the jury. Matters in defense or in exculpation have no place here, but should be heard on the new trial below.

Was there any evidence of mutilation of the dead body of the deceased

except that incident to the killing? If so, his Honor erred in not submitting the case to the jury. In considering this question the courts will accept the evidence in the most favorable light to the plaintiff, and if there is any evidence or if different minds can draw different conclusions, it is the duty of the trial judge to submit the case to the jury. *House v. R. R.*, 131 N., 103; *White v. R. R.*, 121 N. C., 484; *Wittkowsky v. Wasson*, 71 N. C., 454; *Moore v. R. R.*, 128 N. C., 455. The body was found on the defendant's track—head, pool of blood, hair, eyeballs, etc., near the 4-mile post from Salisbury; arms and legs 75 yards farther in direction of Salisbury, and the body 250 or 275 yards from head in the same direction; hair, blood, and parts of body along track, inside and outside of the rails, for some distance; and evidence that body was dragged and knocked from one side of the track to the other; hair on angle bars or nuts where the rails are joined. The body was stripped of its head, legs, and arms and all clothing; overcoat found near the place, torn and cut; a piece of it was found 1 mile east of the body, and a pocket west of Statesville, 27 miles therefrom, in a different direction. The drawers were picked up on the track one-fourth of a mile west from body. Between 9 o'clock on the evening of the 19th and 6 o'clock on the afternoon of the 20th the body and its fragments lay strewn up and down the track between the rails and were run over by every passing train. During this time fifteen or more trains passed over the defendant's track—six or more during the night and six or more during the day—after the defendant's agent discovered the body, and one train was seen to strike the body as it lay upon the track. The watch that the deceased wore was mashed, and the hands pointed to 7½ minutes (397) to 9 o'clock. Train No. 12 passed the 4-mile post going towards Salisbury and the scene of the killing about this time, with a full headlight. The track was straight for 1 mile each way and no object was discovered upon the track, as the engineer swore. Train No. 35, from Salisbury, passed No. 12 near that city, and passed the 4-mile post a few minutes thereafter. This last train evidently struck the deceased first. That the body was further mutilated is shown by the fact that the headless body was 250 or more yards east of the 4-mile post; the drawers were found 1¼ miles west; a part of the overcoat a mile east; pocket of overcoat 27 miles west; arms 75 yards east and on north side of track; legs still further east and on the south side of track; head near the 4-mile post, and hair all along down the track on angle bars; trunk all rolled up in cinders and dirt, and mangled and mutilated beyond recognition. A dozen or more trains passed over the body, as already stated, and one was seen to strike it. This evidence of all these things can hardly be reconciled with the theory that *only one train struck the deceased.*

The evidence indicates rather that the body was struck after death by different trains going east and west, and that it and parts thereof were thrown hither and thither, backwards and forwards, by the passing trains going in opposite directions. This was an infringement upon the legal right of the plaintiff to have the body for burial in the condition in which it was when life became extinct. To hold otherwise would be a violation of "rights and duties recognized by the laws and usages of society as growing out of the natural relations of human beings to each other and the divine and human laws which bind society together." *Thayer, J.*, in *Fox v. Gordon*, 16 Phila. (Pa.), 185.

All the employees of the defendant who participated in the mutilation of the body were retained in the defendant's employment. This
(398) was a ratification, and it cannot be heard to say that the act was unauthorized. 12 A. & E. (2 Ed.), 36 *et seq.*

The nonsuit, however, it seems, was granted, not on the ground of lack of evidence to support the allegations of fact in the complaint, but on the ground that they did not constitute a cause of action. As this is the first time that such cause of action has been presented in the history of this Court, it is proper to review somewhat the authorities elsewhere which sustain the proposition that mutilation of a dead body entitles the surviving husband or wife (and if none, the next of kin) to recover compensatory damages for the mental anguish caused thereby, and, in addition, punitory damages, if such conduct was willful and wanton or in recklessness of the rights of others.

The right to the possession of a dead body for the purpose of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin, and when the widow was living with her husband at the time of his death her right to the possession of the husband's body for such purpose is paramount to the next of kin. *Larson v. Chase*, 47 Minn., 307. A widow has a right of action for the unlawful mutilation of the remains of her deceased husband. *Larson v. Chase, supra;* 28 Am. State, 270; *Foley v. Phelps*, 37 N. Y. Supp., 471.

While a dead body is not property in the strict sense of the common law, yet the right to bury a corpse and preserve its remains is a legal right which the courts will recognize and protect, and any violation of it will give rise to an action for damages. 8 A. & E. (2 Ed.), 834, and cases cited; 13 Cyc., 280, and cases cited. While the common law does not recognize dead bodies as property, the courts of America and other Christian and civilized countries have held that they are *quasi* property and that any mutilation thereof is actionable. *Larson v. Chase, supra.*

This is not an action for the negligent killing of the deceased,

but an action by the widow [8 A. & E. (2 Ed.), 838, and cases (399) cited] for the willful, unlawful, wanton, and negligent mutilation of his dead body. She was entitled to his remains in the condition found when life became extinct; and for any mutilation incident to the killing the defendant would not be liable, but it is liable in law for any further mutilation thereof after death, if done either willfully, recklessly, wantonly, unlawfully, or negligently. *Larson v. Chase, supra; Foley v. Phelps, supra; R. R. v. Wilson,* 123 Ga., 62; *Lindh v. R. R.* (Minn.), 7 L. R. A. (N. S.), 1018. Where the rights of one legally entitled to the custody of a dead body are violated by mutilation of the body or otherwise, the party injured may in an action for damages recover for the mental suffering caused by the injury. Perley Mortuary Law, 20; *Renihan v. Wright,* 125 Ind., 536; *Larson v. Chase, supra; Hole v. Bonner,* 82 Texas, 33.

In *Larson v. Chase,* 47 Minn., 311, it is said, discussing this cause of action: "Where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is the direct, proximate and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental, as, for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction substantial damages are allowed for mental sufferings, although there be no proof of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained of constitutes a violation of some legal right of the plaintiff which always in contemplation of law causes injury, he is entitled to recover all damages which are the proximate and natural conse- (400) quence of the wrongful act. That mental suffering and injury to the feelings would be the ordinary and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument." This case cites *Meagher v. Driscoll,* 99 Mass., 281, where a father recovered damages for mental anguish in digging up and removing the body of his child. *Chase v. Larson, supra,* is quoted and followed by many cases, among them *Foley v. Phelps,* 37 N. Y. Supp., 471. "Where the injury inflicted upon the plaintiffs was an unlawful and unwarranted interference with the right of decent burial, and such conduct was wanton or malicious or the result of gross negligence or reckless disregard of the rights of others, exemplary damages may be awarded." *Wright v. Hollywood,* 112 Ga., 884. This whole sub-

ject is fully reviewed, with full citation of authorities sustaining the right of action for compensatory damages for reckless indifference to the rights of others, by *Judge Dodge* in the late case (1905) of *Koerber v. Patek,* 123 Wis., 462-467. In *Lombard v. Lennox,* 155 Mass., 70, it is said: "If the ordinary and natural consequence of the tort is to cause an injury to the feelings of the plaintiff, and if the acts are done willfully or with gross carelessness of the rights of the plaintiff, damages may be recovered for mental sufferings." To same purport, 1 Sedg. Dam. (8 Ed.), secs. 43-47; 1 Suth. Dam., secs. 95 *et seq.* The defendant also owed the plaintiff the duty to gather the body and its fragments and prepare the same for burial, and negligent failure to do so was an infringement upon her legal rights, and therefore actionable. *Commonwealth v. Susquehanna Coal Co.,* 5 Kulp, 195 (Pa. cases, 1889); *Scott v. Riley,* 40 Leg. Int., 382 (Pa. case). Parts of the body were left along the track and gathered up by the father on the Monday following.

It is no answer to such negligence or indifference to say that the defendant did not remove the body from the track because the (401) section master was waiting for the coroner. Humanity and decency required that the body and its scattered members should be reverently picked up, laid off the track in some near-by spot and sheltered by a covering from the sun and flies and dust and irreverent eyes, and protected from the dogs by some better agency than, according to the testimony, the volunteer aid of small boys attracted thither by curiosity, but who showed more respect for humanity than those who represented this defendant. On this condition of affairs being reported to the proper official, he should have seen that such steps were promptly taken as were required by decency and the respect shown in all civilized communities to the dead. It could in no wise aid the investigation of the coroner to expose the headless body on the track beneath the passing trains, becoming bergrimed with cinders and dust beyond recognition, nor was there excuse for leaving the other portions of the body uncollected and scattered up and down the track, and for days even after a part of the body was sent home. Besides, there was negligence in keeping the body for eleven hours waiting for a coroner, when Salisbury was only 4 miles distant. The president of the defendant company was unfortunately killed on its tracks not long since. Was his body thus kept on the track to be run over by passing trains all day long, waiting for the coroner?

The above facts, if sustained on the trial, will entitle the plaintiff to recover damages for mental anguish for such indignities to the body of her husband, and punitive damages also, if the jury find that such conduct was willful and wanton or in reckless indifference to the rights and feelings of the plaintiff and to their own duties. The jury should, how-

ever, be cautioned (as in actions for delay in delivery of telegrams concerning sickness and death) to carefully dissociate this from the plaintiff's grief at learning of the death of her husband, for this action does not concern that phase of the case. Nor is the plaintiff entitled to recover anything for grief at seeing the condition of the body in the coffin. She knew, or her friends should have told her, of the (402) condition of the remains, and she herself is to blame that she chose to look in upon them. It may have been a natural impulse, but the defendant is not responsible for the mental anguish resulting therefrom.

Respect for the dead is an instinct that none may violate. The democracy of death is superior to the command of kings. Rizpah became forever famous among her kind when she defied the King of Israel, who would treat the bodies of her dead with contempt. Sophocles has immortalized Antigone, who vindicated the like sentiment of human nature as a higher law than that of her sovereign.

The deceased may have moved in the humbler walks of life, but to the plaintiff he was husband and the father of her children. It was her right, old as time, as broad as humanity, and as deep as the heart of man, that his mortal remains should be treated with due respect. So far as the defendant, through its agents, recklessly, willfully, or negligently failed to do this, it has violated her rights under the law. What damages will compensate her for the mental anguish the defendant's conduct has caused her, and what would be proper punitory damages for the recklessness, negligence, or indifference of its agents (if proven), is a matter for a jury of her countrymen to determine, subject to the supervision of a just judge, that an excessive sum be not assessed.

This action is brought by the widow of an employee of the Southern Railway Company. It is brought against the corporation and not against any of its employees. Employees of railroads render arduous and usually faithful service and are subject to many dangers, some of which cannot be avoided and some that can and should be. That they render faithful service when living is no excuse for indignities to their bodies when dead. The engineers on these passing trains could not risk their trains by stopping without orders. The responsibility for keeping this body on the track, with the attendant and revolting details, rests not with them, but on some one "higher up."

HOKE, J., concurring. (403)

BROWN, J., concurring: While I am of opinion that his Honor erred in sustaining the motion to nonsuit, the grounds upon which I base this

conclusion are entirely different from those stated in the opinion of the Court.

The plaintiff claims damage of the defendant:

(1) For that the servants of the defendant, its engineers, willfully, wantonly, and brutally mutilated the dead body of her husband.

(2) For the negligent failure to gather up his remains and prepare the same for burial.

A most careful examination of the record convinces me that there is no evidence to support the first allegation, either as against the engineers, the section master, or any other employee of the defendant.

I should be loth to charge any man with the willful, wanton, and brutal mutilation of the dead, much less those men who daily take their lives in their hands for our benefit and who belong to a profession whose unpretending, self-sacrificing heroism has been immortalized in song and story. Many of them, in endeavoring to save the lives of those committed to their care, have held an unfaltering hand upon the lever when they knew they were rushing onward to certain death. Many humble heroes of the throttle have, like Jim Bludsoe,

> "Held her nozzle ag'in' the bank
> 'Til the last galoot's ashore."

and then died at the post of duty that others, whom they did not even know, might live.

The evidence, to sustain such an accusation and against such men, should be clear, not only as to fact of mutilation, but that the engineers of the defendant did it willfully, wantonly, and therefore knowingly.

(404) The evidence taken on the trial was all introduced by the plaintiff, and, as I read it, there is nothing to show a willful and wanton mutilation upon the part of any engineer of the defendant or any other employee of the defendant. It is admitted that the deceased was not killed through any negligence of defendant's servants, and no claim is made for such negligent killing.

The evidence tends to prove that plaintiff's husband, Robert Kyles, an employee of defendant, left Statesville on 19 January, 1905, on defendant's train for Landis, Cabarrus County, and that he intended to stop off somewhere that night *en route* to visit his aunt. It seems to be conceded that the deceased never reached Salisbury, and it appears that he was killed somewhere near the 4-mile post from Salisbury. At that point blood, brains, and hair were first discovered on the rail. Farther down the trunk of the body was found, rolled over and lying in between the rails and almost unrecognizable as that of a human being. The watch

of the deceased was found near the 4-mile post, mashed in and the hands stopped at 7½ minutes to 9. The engineer, Keever, of train No. 12, testifying for plaintiff, states that his train passed this spot at 8:53 p. m.; that his electric headlight was shining, and that he neither saw nor struck any one on the track, and if he had struck a man with the pilot of his engine he would have known it. There is no evidence that the deceased was struck by any engine, and the condition of the body repels that theory. All the evidence tends to prove that the body was not thrown from the track by the pilot, but that the fragments of the body—limbs, blood, hair, and clothing—were carried eastward for a mile or more from the point on the track where the evidence of his death was first seen. It was on an east-bound train that the deceased left Statesville on the evening of the 19th, and it is a most reasonable and in fact about the only legitimate inference to draw from the facts and circumstances in evidence that the deceased fell from the train upon which he was traveling, between the cars, and, becoming entangled in the machinery under the cars, was ground up and his body crushed (405) and dismembered in the running gear and rods under the cars, and his flesh and blood scattered for some distance along the track. It would require only a second or two to do this at the usual speed of a passenger train.

Assuming that during the night defendant's engines passed over the remains as they lay scattered along the track between the rails, it was ignorantly done upon the part of the engineers. It cannot be said to have been wantonly and willfully done unless knowingly done. There is not a *scintilla* of evidence that any engineer of defendant knew that the scattered *debris* of a human body were anywhere on the track until next morning. The only part of the remains found between the rails (nothing was found on the rails except blood and hair) was the trunk of the body, with an arm doubled up under it, and a hand and a foot and legs. The body was rolled over, lying in between the rails, in an unrecognizable mass. The witnesses testified that "it was a mighty hard matter to tell what the body was by itself." The legs were equally as difficut to recognize and were 100 yards west from the trunk. All the evidence shows that if the engineers ran over these remains during the night, they not only did it ignorantly, but that no human eye could have discovered from the cab window of a rushing engine what they were.

As to the actual mutilation by passing engines during the day, after the remains were discovered to be those of a human being, there is hardly a scintilla of evidence, and absolutely nothing to indicate wanton and willful injury.

After the body was discovered next day the witnesses testify that the

passing trains were stopped and passed slowly over the body without touching it, except in one intance. One witness states that in passing over the dead trunk between the rails an engine rod on one engine touched the shoulder, but did not cut or mutilate it. Why these remains were allowed to remain on the track all day is best explained by plaintiff's witness, J. M. Rice, who says:

(406) "Q. Why was it you did not take his body off the track before that?

"A. We did not think we had any right to move it. People said not to move it until the coroner got there. Some said move it and others don't until the coroner comes.

"Q. And after the coroner came the remains that had been found up to that time were picked up and taken to Salisbury?

"A. Yes, sir."

The persons who insisted on not touching the remains until the coroner came were the citizens of the neighborhood, and they were governed by what we all know to be a very prevalent error as to the requirements of the law. I fully agree with the learned counsel for plaintiff that the defendant owed the plaintiff the duty to gather the body of her husband and its fragments found on its track and to decently protect and prepare them for burial. A negligent failure to do so is an infringement of the plaintiff's rights and therefore actionable. Therefore, if the section master negligently permitted the remains to be exposed on the track and failed to properly care for them, the defendant would be liable to plaintiff in damages for such actual physical, including mental, suffering as she sustained by reason of the knowledge thereof, notwithstanding the fact that the section master acted in good faith and under a mistaken sense of duty.

If there was any evidence that the section master refused to remove the remains from a willful, wanton, or malicious motive, I should say that, in addition to actual or compensatory damages, punitive damages would be allowable, in the discretion of the jury. But there is no such evidence in the record. It is perfectly evident from the testimony of Rice and other witnesses that the section master failed to remove the body out of deference to the prevalent opinion that the coroner must first be sent for. Accordingly, as testified to by L. A. Rice, the section master left one of his men in charge of the body and went at once to Salisbury for the coroner and returned some time before the coroner arrived.

(407) The declarations of the section master manifesting some impatience at the prospect of spending the night guarding the remains while waiting for the coroner were properly excluded. After the coroner

arrived the remains were gathered up, under his direction, properly cared for, and carried to Salisbury on the next train.

The details of this dreadful occurrence are well calculated to shock any one and to disturb that judicial serenity and impartiality with which all cases should be considered. But I am glad to say, for humanity's sake, that a careful examination and mature consideration of the record convince me that, while the section master erred in his duty through an honest mistake, there is no evidence of willful, wanton, intentional, or reckless brutality upon the part of any one.

I think the judgment of nonsuit should be set aside and a new trial ordered along the lines laid down in this opinion, and it is so ordered.

CONNOR, J., concurs in the opinion of BROWN, J.

Cited: Woods v. Tel. Co., 148 N. C., 8; *Dermid v. R. R., ib.*, 198 *Floyd v. R. R.*, 167 N. C., 56, 62; *Harrison v. R. R.*, 168 N. C., 348; *s. c.*, 171 N. C., 752.

WALL-HUSKE COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 22 April, 1908.)

1. Legislative Powers—Penalty Statutes—Carriers—Failure to Transport.

It is within the power of the Legislature to impose penalties for unreasonable delay by carriers in transporting intrastate freight.

2. Penalty Statutes—Carriers—Failure to Transport—Intermediate Points—Car Lots—Distributing Point.

When a car-load intrastate shipment necessarily is transferred without breaking bulk from one road of the carrier's system to another thereof at a general distributing point in the carrier's system in order to reach destination, the carrier is allowed thereat the statutory time for transportation at such point as an intermediate point. (Revisal, sec. 2632.)

3. Penalty Statutes—Carriers—"Transport"—Initial Point—Time Allowed.

Under Revisal, sec. 2632, the carrier is allowed two days at the initial point for the transportation of freight instead of the one day allowed by general statute (Revisal, sec. 887).

4. Penalty Statutes—Carriers—"Transport"—Terminal Point—End of Transportation—Time Computed—Warehousemen.

The time that transportation ceases, under the meaning of Revisal, sec. 2632, is when the duty of the carrier as a warehouseman commences, or when the car-load had been transported and the consignee notified. Therefore it was error in the lower court to hold that the transportation ceased when the car-load was placed by the carrier within the yard limits of

the point of destination, and also that the last day on that account was not to be charged against the carrier in computing the time for transportation. (Chapter 461, Laws 1907.)

5. Penalty Statutes — Carriers — "Transport" — Terminal Points — Sundays — Time Computed.

In a suit for penalty against the carrier for failure to transport freight under Revisal, sec. 2632, the defense that the last day, being Sunday, should not be counted, under Revisal, sec. 887, is unavailable when it is made to appear that the delay chargeable began to run and to be counted from the Saturday preceding; for the charge for delay having once begun to run, it continues to run without deduction for Sunday or holidays.

6. Penalty Statutes — Carriers — "Transport" — "Ordinary Time" — Questions for Jury.

The question of "ordinary time" for the transportation of freight by the carrier, in a suit for a penalty for failure to transport, under Revisal, sec. 2632, is a question of fact for the jury.

(408) APPEAL from *Justice, J.*, at March Term, 1908, of FORSYTH, by both sides. The facts are stated in the opinion.

L. M. Swink for plaintiff.
Manly & Hendren for defendant.

CLARK, C. J. It is well settled by this Court that the General Assembly is entirely within its powers in imposing penalties for unreasonable delay in the transportation of intrastate freight. *Connor, J.*, in *Stone v. R. R.*, 144 N. C., 223, says: "The validity of such legislation has been uniformly sustained in State and Federal courts," and quotes with
(409) approval from 9 Rose's Notes, 26, that the question is "too well settled to be longer the subject of controversy."

The passage of the statute is a declaration of the lawmaking department that its enactment and the imposition of penalties upon common carriers is necessary to protect shippers and great business interests of the State against unreasonable delay in transportation.

The sole function of this department of the Government is to ascertain and construe the true meaning and intent of the Legislature from the language used.

The plaintiff was consignee of a shipment, less than a car-load, from High Point, N. C., to Winston-Salem, N. C. The shipment was delivered to the railway company at High Point on 14 January, 1907, arrived at the yards of defendant in Winston-Salem on 19 January, 1907. It was unloaded at defendant's warehouse on 22 January and notice of its arrival given to plaintiff on 23 January. The distance from High Point to Winston-Salem is admitted to be 44 miles.

The railroad yards at Winston-Salem are about 2½ miles in length and have a track mileage of some 5 or 6 miles. No one seemed to know in what portion of the yards this shipment was placed upon its arrival, and it remained on the yards from 19 January to 22 January. The plaintiff in the meantime repeatedly phoned and asked to be notified of the arrival of this shipment. It was in evidence that two days—not more than three—was a reasonable time for transportation of freight from High Point to Winston-Salem, including stoppages.

Upon the facts his Honor directed the jury to answer the issue "$12.50," holding that the penalty for delay in transportation ceased upon the arrival of the train carrying the shipment in the freight yard of its destination.

The shipment was made in a car loaded to go through from High Point to Winston-Salem without breaking bulk. It moved via Greensboro, which is a general distrbuting point for the several (410) roads of the defendant's system. At that point this car, which came in from High Point on the defendant's main line, was shifted and put into the local train on the line from Greensboro to Winston.

The shipment was received at High Point on 14 January, and, after being carried 44 miles, the plaintiff at Winston was notified of its arrival at that place on 23 January, and the goods were delivered to it on that day. The goods were thus in custody of the defendant ten days and were transported 44 miles—less than 4½ miles per day.

Under the statute the defendant was entitled to two free days at the initial point, High Point, instead of one day allowed by general statute in computation of time. Revisal, sec. 887; *Davis v. R. R.*, 145 N. C., 207. Though the goods were not transferred by breaking bulk at Greensboro, which would have made it an "intermediate" point, under *Davis v. R. R., supra,* the car was taken out of the train on the main line and shunted into the train on the local line. This, we think, equally makes Greensboro an "intermediate" point, entitling the defendant to the allowance of two free days. In addition, his Honor should have told the jury to allow the ordinary average running time of freight trains for that distance. *Walker, J., Davis v. R. R., supra.* If this should be found to be one day there would be an allowance of five days for the 44 miles. Chapter 461, Laws 1907, prescribes that Revisal, sec. 2632, "shall be construed to require the delivery at its destination within the time specified," *i. e.,* within the five days, which would have been on Friday, 18 January, and the plaintiff is entitled to recover for five days delay, beginning with Saturday, 19 January, *i. e.,* one day at $12.50 and four days at $2.50 each (Revisal, sec. 2632), making $22.50.

The court erred in holding that when the defendant got its train within the yard limits at Winston-Salem the transportation
(411) ceased. The test, according to the ruling of this Court in *Alexander v. R. R.*, 144 N. C., 93, 98, citing with approval and following *Hilliard v. R. R.*, 51 N. C., 341, is when the railroad shifts its responsibility for carriage from that of common carrier to warehouseman. When it becomes a warehouseman and liable as a warehouseman transportation ceases, and not before. It did not become liable as a warehouseman until it had unloaded its freight at its warehouse at Winston-Salem, and the penalty accrued under the facts in this case ceased when it had so transported the freight and notified the consignee of such delivery, which was on 23 January.

The defendant insists that the goods arrived on the yard at 2:30 p. m., 19 January, Saturday, and it could not deliver on Sunday, and that day should not be counted. It is true that when freight in due time should arrive on Sunday it cannot be delivered that day, even if it arrives, and such "last day, being Sunday, shall not be counted." Revisal, sec. 887. But here (1) if five days was the proper allowance, the goods should have arrived and have been delivered on Friday, and the time of delay chargeable against the defendant began to run and be counted with Saturday; (2) as a matter of fact the goods did not arrive, were not placed in the warehouse, till 22 January (Tuesday), and they were not delivered till Wednesday, 23d. The goods should have been delivered on Friday, 18th (if one day is found by the jury to cover ordinary running time). Every day's delay after Friday is time chargeable to defendant by the words of the statute, just as interest or any other computation of time, once begun to run, runs according to the calendar, without deduction of Sundays or holidays. The default having begun, the calendar, the course of the sun, measures its duration, not to exceed (by the terms of the statute) thirty days.

In the defendant's appeal there was error in the judge not leaving it to the jury to find the time of ordinary actual movement of a
(412) freight train for the 44 miles. *Jenkins v. R. R.*, 146 N. C., 178. It is probably not more than one day, and the total time would, if so, be five days; but he also erred in the plaintiff's appeal in counting arrival of goods as being the date of arrival in the yards, whereas the transportation was not terminated before the goods were taken out of the car and placed in the warehouse; and by the terms of the statute (ch. 461, Laws 1907) the time allowed for transportation, *i. e.*, actual running time for freight trains between those two points, plus two days at initial point, plus two days at each "intermediate" point (if any), must embrace within them the day of delivery, if goods are applied for, and

for every day beyond that the common carrier incurs the penalty prescribed by the statute.

In both appeals there is

Error.

Cited: Collection Agency v. R. R., post, 593; *Mfg. Co. v. R. R.,* 152 N. C., 668, 669; *Mfg. Co. v. R. R., ib.,* 845.

B. F. THOMPSON, ADMINISTRATOR OF H. V. THOMPSON, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 22 April, 1908.)

1. Appeal and Error—Rules of Supreme Court—Assignment of Error—Practice.

Under Rules of the Supreme Court, 19 (subdiv. 2) and 27, the assignments of error on questions of evidence should set out the testimony so that their relevancy can be seen; and on the rulings of the court or some other matters occuring at the trial, the ruling itself or the attendant facts and circumstances should be so stated that their bearing on the controversy can be perceived to some extent in reading the assignments themselves.

2. Same—Dismissal.

A statement purporting to be assignments of error appearing in the record just after the statement of case on appeal, setting forth in general terms that the appellant excepted to the rulings of the court, as appeared in certain numbered exceptions of record taken on the trial, such exceptions themselves not being sufficiently or properly stated, in excluding evidence, and "to a judgment of nonsuit as noted in the forty-seventh exception," is not definite enough for the Court to consider on appeal or to be referred to the clerk to be put in the prescribed shape therefor, and the appeal should be dismissed, under Rule 20, as not in compliance with Rules 19 and 27.

CONNOR, J., dissenting, *arguendo.*

APPEAL by plaintiff from *Webb, J.,* at December Term, 1907, (413) of ANSON.

The action was to recover damages for the alleged negligent killing of plaintiff's intestate. Forty-seven exceptions were entered during the progress of the trial, the last being a motion to dismiss as in judgment of nonsuit, which was allowed by the court. In apt time motion was made in this Court to dismiss the appeal for noncompliance with the rules of

Court as to the assignment of errors. The rules applying to the subject, being Rule 19, subdiv. 2, and Rule 27, appear in 140 N. C.

The statement purporting to be an assignment of errors, appearing just after the statement of case on appeal and offered as a compliance with the rules referred to, is as follows:

1. The rulings of the court in excluding the evidence as noted in the first exception, second exception, third exception, fourth exception, fifth exception, sixth exception, seventh exception, eighth exception, ninth exception, tenth exception, eleventh exception, twelfth exception, thirteenth exception, fourteenth exception, fifteenth exception, sixteenth exception, seventeenth exception, eighteenth exception, nineteenth exception, twentieth exception, twenty-first exception, twenty-second exception, twenty-third exception, twenty-fourth exception, twenty-fifth exception, twenty-sixth exception, twenty-seventh exception, twenty-eighth exception, twenty-ninth exception, thirtieth exception, thirty-first exception, thirty-second exception, thirty-third exception, thirty-fourth exception, thirty-fifth exception, thirty-sixth exception, thirty-seventh exception, thirty-eighth exception, thirty-ninth exception, fortieth ex-
(414) ception, forty-first exception, forty-second exception, forty-third exception, and forty-fourth exception.
2. To the ruling of the court as noted in the forty-fifth exception.
3. To the ruling of the court as noted in the forty-sixth exception.
4. To the judgment of nonsuit as noted in the forty-seventh exception.

Robinson & Caudle for plaintiff.
J. D. Shaw, Murray Allen, and J. A. Lockhart for defendant.

HOKE, J., after stating the facts: The first portion of Rule No. 27, which is in substance taken from the statute (Revisal, sec. 591), provides as follows: "Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exception not thus set out or filed and made a part of the case or record shall be considered by this Court, other than exceptions to the jurisdiction or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment." Subdivision 2, Rule 19, is as follows: "All the exceptions relied on, grouped and numbered, shall be set out

immediately after statement of case on appeal." And Rule 20, establishing the method by which Rule 19 may be enforced, is as follows: "If any cause shall be brought on for argument and the above regulations shall not have been complied with, the case shall be dismissed or (415) put to the end of the district or the end of the docket, or continued, as may be proper. If not dismissed, it shall be referred to the clerk or some other person to put the record in the prescribed shape, for which an allowance of $5 will be made to him, to be paid in advance in each case by the appellant, or the appeal will be dismissed."

These rules (19 and 20) refer to exceptions which have been properly assigned for error in accordance with Rule 27 and the section of the statute (Revisal, sec. 561), and the proper observance of all of them is required for the orderly and efficient disposition of causes on appeal. They will not usually be complied with by making a short excerpt from the stenographer's notes, incomplete in themselves and giving no indication of their real bearing upon the question involved. In the excitement of a *nisi prius* trial and the hurry and confusion that sometimes attend it counsel not improperly note many exceptions which on reflection they will readily see can have no possible effect on the result. And it is required that in making a statement of these cases on appeal, which can be done in more deliberate circumstances and after examination and further reflection, they will only assign for error those exceptions which may in some way have operated to their client's prejudice. If the exception be to a ruling of the court on a question of evidence, the testimony should be to set out that its relevancy can be seen. And if the exception is to some other ruling of the court or some other matter occurring at the trial, the ruling itself or the attendant facts and circumstances should be so stated that its bearing on the controversy could be perceived to some extent in reading the assignment itself. And when the exceptions have been properly assigned and have become a part of the case on appeal, they should be numbered and grouped and their placing in the record given, in compliance with subdivision 2, Rule 19; for this, like Rule 27, refers to exceptions which are designed and intended to be appellant's assignments of error. Just what will be considered in all (416) cases a compliance with this requirement cannot be laid down with any great exactness, nor should it be harshly or arbitrarily enforced, and the Court must rely to a great extent upon the good sense and intelligence of counsel and the commendable disposition they have always shown in aiding the Court to a proper consideration of their causes on appeal.

Speaking of this rule, in 2 Pleadings and Practice, p. 943, we find it treated as follows: "Just what will constitute a sufficiently specific

assignment must depend very largely upon the special circumstances of the particular case; but always the very error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is. The assignment must be so specific that the Court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary."

Rules 19 and 20 are framed in accordance with the principle indicated in this citation, and it will be noted that, while the appeal may in proper cases be dismissed, if the defect is not of a serious character, but one that could be readily corrected, provision is made by which this last course may be pursued. With a desire to impress the importance of these rules upon counsel and to invoke their assistance and support in making them efficient and workable, we repeat what is said concerning them in *Lee v. Baird,* 146 N. C., 362: "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 in an intelligent consideration of the questions presented and to a determination of controversies on their real merits.

(417) 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 deliverence 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, subdiv. 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. The counsel for the 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 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."

Applying what has been said here to the present case on appeal, it will be readily seen that there has been no compliance with the rules we have been discussing. To ascertain the exceptions which are material and

their bearing on the questions at issue would require a prolonged and careful study of the entire case. To refer the case to the clerk to be reformed and corrected would entail upon that officer an amount of labor which would be entirely unreasonable and which in the time allowed him for the work might result in grave injustice to the appellant himself or to the appellee, or both.

For the reason given we are of opinion that the appeal should be dismissed, and it is so ordered.

Appeal dismissed.

CONNOR, J., dissenting: I regret to dissent from a decision of (418) the Court in regard to a question of practice, and have heretofore refrained from doing so. I do not question the wisdom of the statute or the propriety of the rule requiring reasonable certainty in the assignment of errors. I concur in the reasons so well stated by *Mr. Justice Hoke* in defense and explanation of the rule. I think that, giving to it a fair construction, the appellant has assigned with sufficient certainty the alleged error "to the judgment of nonsuit." I am not able to see how it could be made more definite. At the conclusion of the evidence the defendant made a motion in the nature of a demurrer to the evidence to dismiss the action, for that, assuming all of it to be true, no actionable wrong is shown. This motion may by way of argument be supported by a number of reasons. The court, without assigning any reason, sustained the motion. How is the plaintiff to do more than except and assign as error that the motion for judgment of nonsuit was sustained? It is well settled and not infrequently the case in this Court that the judgment below may be sustained upon a reason entirely different from that urged or adopted in the Superior Court. The entire record is open to the appellee to find any reason to sustain the judgment. I have not in my experience at the bar or on the bench seen any other method of assigning error upon appeal from a judgment of nonsuit, nor could I, if called upon, suggest any other form in which to do so. The fact that a large number of other errors are not assigned in accordance with the rule should not bar the appellant from having his valid assignment considered. Each exception and assignment of error is separate and distinct and their validity is in no wise interdependent. Another reason which brings me to the conclusion that the appeal should not be dismissed is that the form in which the assignment is made cannot mislead counsel for the appellee or impose any additional burden on this Court. I cannot understand how a demurrer to the evidence or for the judgment of nonsuit can be reviewed otherwise than by sending to this Court the entire evidence bearing upon the cause of action. Again, I think that upon a fair (419)

interpretation of the rule we should not dismiss appeals, but refer the record "to the clerk or some other person to put in proper shape." The right of appeal is secured by the Constitution, and, while the Legislature or this Court in their proper spheres may regulate the manner, time, etc., in which causes shall be brought to this Court, we should not, except in cases clearly outside the rules, refuse to determine "matters of law or legal inference" when presented to us in substantial accordance with the rules. I shall hereafter regard the practice as settled, hoping that counsel will be careful to conform to the rule. While I must confess my inability to perceive how assignments of error to judgment upon demurrer to the evidence are to be made more specific, I am quite sure that the learned and experienced counsel who practice in this Court will discover a method of doing so to conform to the opinion of my learned brethren.

Cited: *Smith v. Mfg. Co.*, 151 N. C., 262; *Pegram v. Hester*, 152 N. C., 766; *Jones v. R. R.*, 153 N. C., 422; *McDowell v. Kent, ib.*, 558; *Morse v. Freeman*, 157 N. C., 388; *Keller v. Fiber Co., ib.*, 576; *Barringer v. Deal*, 164 N. C., 249; *Wheeler v. Cole, ib.*, 380; *Porter v. Lumber Co., ib.*, 396; *Register v. Power Co.*, 165 N. C., 235; *Carter v. Reeves*, 167 N. C., 132.

BANK OF BENSON v. J. W. JONES ET AL.

(Filed 22 April, 1908.)

1. Principal and Surety — Creditor's Representations — Additional Surety — Discharge of Surety.

Persons signing a note as surety upon faith in the creditor's representation that another will sign as cosurety, leaving the note with the creditor for that purpose, are not bound thereon to such creditor upon the failure of, the fulfillment of the representation. (*Bank v. Hunt* 124 N. C., 171, cited and distinguished.)

2. Same—Principal and Surety—Substituting Invalid Note—Old Note Surrendered—Failure of Consideration—Liability of Surety.

When the sureties on a note signed with their principal a second note at the request of the creditor, under an unfulfilled agreement with him that another should also sign as surety, and the second note was left with the creditor, who delivered the first note to the principal, the liability of the sureties on the first note was not discharged by reason thereof, as there was nothing of value given in lieu of the first note, the second one being void.

3. Negotiable Instruments—New Note—Presumption of Renewal—Principal and Surety—Discharge of Surety—Burden of Proof.

A new note given for an antecedent debt evidenced by note raises the presumption that it was not intended as an extinguishment; and when

the sureties thereon contend that satisfaction was intended, so as to discharge their liability, the burden of proof is upon them to show that it was so intended.

CONNOR, J., dissenting, *arguendo;* WALKER, J., concurring in dissenting opinion.

APPEAL by defendant from *Jones, J.,* at March Term, 1907, of (420) JOHNSTON.

Pou & Brooks, Godwin & Townsend, and J. H. Pou for plaintiff.
E. S. Abell, W. A. Stewart, and B. C. Beckwith for defendants.

CLARK, C. J. The defendants Allen and Hudson were sureties upon a note executed 1 May, 1904, by defendant Jones to plaintiff for $2,948.45. On 4 January, 1905, the said Allen and Hudson were asked by plaintiff's cashier to sign a new note for $3,091.56, which they testified that they agreed to do on condition that one C. T. Johnson (who was not on the former note) would also sign as surety, and if he did not, they would not sign; that they signed the note upon that agreement and left it with said cashier; that C. T. Johnson has not signed said note; that the cashier; however, held the old note till the directors accepted the new note, whereupon he surrendered the note of 1 May, 1904, to Jones, the principal therein. The plaintiff in its replication contended that the note of 4 January, 1905, was merely a renewal of the note of 1 May, 1904, though the latter had been surrendered, and if the renewal note of 4 January, 1905, was invalid for the reason above stated, recovery could be had for the principal and interest of the note of 1 May, (421) 1904.

The court announced at the conclusion of the evidence that he would charge the jury that, if they believed the evidence, both notes represented the same indebtedness, and inasmuch as C. T. Johnson had not signed the first note his failure to sign the second note would not discharge the sureties, Allen and Hudson; whereupon they submitted to judgment and appealed. The court entered judgment upon the first note for $2,599.27, with interest from 15 March, 1906, being the sum due thereon, deducting credits. "Where a person has become surety upon faith of the creditor's representation that another will become cosurety, he is not bound if that other person does not join, and in equity it makes no difference that the guaranty was under seal." Pollock Cont., 470. This case differs from *Gwyn v. Patterson,* 72 N. C., 189; *Barnes v. Lewis,* 73 N. C., 138, and *Bank v. Hunt,* 124 N. C., 171, for in each of those cases the agreement was between the principal and surety, and its breach could not affect the creditor. Here the contract was between the

creditor and the surety. Its breach therefore absolved the sureties from any liability upon the second note. *Cowan v. Baird,* 77 N. C., 202; 1 Brandt Suretyship (3 Ed.), secs. 449, 451.

But the note of 1 May, 1904, set up in the replication, was not paid by the inchoate and incomplete note of 4 January, 1905. "When a new note is given for an antecedent debt the presumption is that it was not intended as an extinguishment unless there be proof that such was the intention." *Hyman v. Devereux,* 63 N. C., 627, citing numerous authorities. Here, upon the defendants' own contention and evidence, there was nothing given in lieu of the first note, the inchoate note of 4 January, 1905, being incomplete and void. The position of the creditor and the liability of the defendants were in no wise changed, and the unadvised surrender of the first note before the second was perfected did not
(422) pay off nor cancel the first note. His Honor properly held that the burden of proving payment or discharge was on defendants. If the new note had been perfected with an additional surety, this would have presented a different case. This would have been a new contract in discharge of the old, unless an intention to hold the second as additional security had been shown.

No error.

CONNOR, J., dissenting: The record, for the purpose of presenting my views, presents the following case: The plaintiff bank held a note dated 1 May, 1904, due 1 December, 1904, for $2,958.45, against defendant Jones as principal and Allen and Hudson, sureties. On 4 January, 1905, after the maturity of the note, the cashier of the bank notified the sureties that something must be done about it. Defendants Allen and Hudson said that they would sign again, or renew, if one C. T. Johnson would also sign as surety (Johnson was not on the note); but that if he would not sign, they would not do so. The cashier said that Johnson would sign. The parties, at the request of the cashier, went to the bank for the purpose of signing a new note. The defendant sureties asked where Johnson was. The cashier told them it was all right; Johnson would come and sign the note. The parties thereupon signed a new note, due 4 February, 1905, for $3,091.56, being the amount of the first note, with interest included to maturity. Jones, the principal, asked for the other note. The cashier said that he would have to submit the new note to the board of directors; it would meet that night; if they accepted the note he would surrender the other one to Jones the next day. Relying upon this statement, the note was left with the cashier, who on the next day surrendered it to Jones. Johnson did not sign the new note. There is nothing in the record showing why he did not sign or that the cashier

endeavored to have him do so or that defendants had any notice of his failure to do so. On 3 March, 1905, plaintiff bank brought suit on the new note against all the defendants. The complaint sets up the note as the sole cause of action, making no reference to the old (423) note. Jones, the principal, filed no answer, and judgment by default was taken against him for $3,091.56 and interest from 1 February, 1905. At the return term, March, 1905, the defendants Allen and Hudson filed an answer setting up the foregoing facts as a defense. The case was continued as to them. At December Term, 1905, plaintiff filed a reply denying the new matter set up in the answer and averring that if it were true the new note was given in renewal of the note of 1 May, 1904, for $2,958.45, and that the defendants Allen and Hudson were still liable thereon. The plaintiff demanded "judgment as prayed for in the complaint." The reply was filed 2 January, 1906. Defendants Allen and Hudson filed an answer to so much of the reply as referred to the old note, alleging that the note of 4 January, 1905, was given, and received by plaintiff, in full payment and discharge of the said note of 1 May, 1904, and in accordance therewith the said note was surrendered to the principal, Jones. They reaffirmed their allegation that they signed said note 4 January, 1905, upon the distinct understanting with the cashier of plaintiff that Johnson would sign, and that without such understanding and agreement they would not have signed it. They tendered issues upon the allegations and introduced evidence tending to sustain their contention. At the conclusion of the evidence his Honor announced that he would instruct the jury that, if they believed the evidence, "the plaintiff was entitled to judgment for the amount unpaid and evidenced by the two notes, respectively." The defendants excepted. Judgment was thereupon rendered against the defendants Allen and Hudson, upon the note of 1 May, 1904, for $2,958, less certain credits therein, from which they appealed.

I am constrained to dissent from the opinion of his Honor and the majority of this Court. Was plaintiff entitled to judgment on the note of 1 May, 1904? It is the settled doctrine of this Court that the measure of liability of a surety is fixed by the terms of his con- (424) tract, and "that he is entitled to stand upon the letter of his contract, and his undertaking is to be construed strictly in his favor and is not to be extended by implication or inference beyond its scope or terms." 27 A. & E. Enc., 441. It is also settled by the authorities cited in the opinion of the *Chief Justice* that if a surety sign a note in the presence of an agent of the obligee, with the understanding that he is not to be thereby bound unless another person shall also sign as surety, he is not liable unless the note is signed by such other person. It is con-

tended that, conceding this to be the law, when a note is taken in renewal of another there is presumption that it is not a payment. *Hyman v. Dexereux,* 63 N. C., 627, is relied upon to sustain this view. It is undoubtedly true, as held by this Court in that and many other cases, that taking a new note for one secured by mortgage does not discharge the mortgage "unless there is proof that such was the intention." *Collins v. Davis,* 132 N. C., 106. It is also true that "courts of equity will, to accomplish the ends of justice, keep alive a security which in form has been surrendered." In *Wilson v. Jennings,* 15 N. C., 90, it was held that a note given by one of the partners for a partnership debt did not *of itself* discharge the original demand. *Daniel, J.,* said: "It was not pretended that the individual note of Thompson was agreed to be taken by plaintiffs in discharge of the partnership debt, and a note given even by all the partners would not extinguish the original undertaking to pay for the goods delivered, like a bond or *judgment taken for the same.*" It is also held that a draft received for goods sold and delivered is not a discharge of the debt, but the plaintiff, *upon surrendering the same* or proving its loss, may sue for the price of the goods. *Mauney v. Coit,* 86 N. C., 463. In that case the jury found upon a specific issue that the draft was taken as collateral security only. In *Cotton Mills v. Cotton Mills,* 115 N. C., 475, it was found that a draft was given for a large amount
(425) on an open account. The draft was accepted, but not paid. The plaintiff, without surrendering the draft, undertook to split up the account and obtain judgment before a justice. *McRae, J.,* said: "That the sum of $2,975.82 included in the draft was merged into it, and, while said draft was in existence and *not delivered up to the acceptor,* the said draft amounted to a payment and satisfaction, *if it was so intended,* of so much of the open account, is well settled," citing *Mauney v. Coit* and *Wilson v. Jennings, supra;* also *Spear v. Atkinson,* 23 N. C., 262, wherein the plaintiff was not permitted to recover on the original debt because he did not tender or offer to surrender the bill of exchange given for it. In *Bank v. Hollingsworth,* 135 N. C., 556, citing *Lee v. Fountain,* 10 Ala., 755; 44 Am. Dec., 505, we held that if there were any facts tending to show that the note was received in payment of the debt, it became a question for the jury. The defendants distinctly allege and introduce evidence strongly tending to prove that the new note was given and accepted in payment and discharge of the old one; that the bank undertook to have a new and additional surety to sign, and surrendered the old note to Jones, the principal. This contention is further sustained by the conduct of the plaintiff. It sues on the new note, and when defendants Allen and Hudson set up the matter by way of discharge and defense it takes judgment against the principal, thus merging its cause

of action on all preceding sureties into a judgment. Certainly this was evidence fit for the consideration of the jury tending to rebut the presumption that it was the intention of the parties that the old note was to remain in force as an obligation against the sureties. If the jury had found that the new note was given and accepted by the plaintiff in discharge of the old one, the parties would then have been at issue on the matter set up by way of defense to the new note. But do not the facts of record, as matter of law, operate to discharge the old note? Eliminating, for the purpose of considering this question, all matters in controversy, we have this condition: The note is given 4 January, (426) 1905, by the principal and sureties for the amount of the old note, with interest and discount. The old note is surrendered, and for thirty days certainly no action could be brought. At the end of the time an action is brought against all of the parties and judgment taken against the principal. How, with any regard to the contractual legal rights of the parties, can a creditor recover a judgment against the principal on one note, thereby merging his cause of action, and recover a judgment against the sureties on another note, which has been surrendered and destroyed, as a cause of action against the principal? The suggestion is so novel that it is impossible to find authority. It seems that the statement of the proposition carries its answer. The sureties had a right to demand, before judgment passed against them, that the note be surrendered and filed or its loss accounted for. This the plaintiff cannot do because it has surrendered the note and destroyed its cause of action. Their principal is discharged and they are held. When the bank surrendered the old note, with the understanding and agreement that it would procure Johnson's signature as surety, the transaction, so far as the sureties were concerned, was complete. It was not inchoate. They had complied with their contract, and the bank had undertaken to procure Johnson's signature, without which defendants expressly refused to sign. In this condition of the transaction the bank could not recover on the new note, because there was an express condition attached to the liability, the performance of which the bank had undertaken, to wit, Johnson's signature. Of course, if the bank had any valid equitable ground for asking relief from its performance of the condition, it was open to it in this action by way of reply to the new matter set up in the answer. This was an equitable counterclaim and should have been pleaded and sustained by proof: as, for instance, if Johnson had suddenly died or been rendered incapable of signing by some providential cause. (427)

It may be suggested that the signature of Johnson was not a condition precedent to defendant's liability on the new note, or a condition subsequent, the failure to perform which would release them, but a

collateral undertaking on the part of the bank entitling the defendants to damages for its breach. In that view, if Johnson was solvent and the bank failed to perform its collateral contract, it would seem that the measure of damages for the breach would be one-third of the new note, that sum presenting the liability of each surety as between themselves if Johnson had signed. This view may be presented upon defendants' evidence and upon the theory that the plaintiff was pursuing its remedy on the old note.

For the reasons stated I am unable to see any theory upon which the defendants can be held upon the old note. That a court of equity will in certain cases reinstate a bond or other security surrendered as canceled by accident, mistake, or by fraud of the obligor is well settled; but there is no suggestion of any such equity, except that the reply states that the old note was surrendered by mistake.

In any aspect of the case the question of fact raised by the answer should have been submitted to the jury. It is no sufficient answer to say that the defendants are not hurt. Their right is legal and grows out of their contract. Besides, they are hurt. If Johnson had signed they would have sustained but one-third each of the loss. Courts should construe contracts and enforce them, and not make new ones for parties to meet hard cases. The equitable power of the court is ample to relieve against fraud, mistake, or oppression. I think there should be a new trial.

WALKER, J., concurs in dissenting opinion.

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(428)

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

(Filed 22 April, 1908.)

1. Railroads—Streets, Use of, for Unlawful Purposes — Abutting Owner — Rights and Remedies.

In addition to the general rights of citizens to the use of a street, an abutting owner has rights peculiar to his ownership, and for an unlawful invasion thereof by another's using the streets for unlawful purposes, such as are not embraced within those of a highway, he may maintain an action in his own right, irrespective of the ownership of the fee in the street.

2. Same—Municipal Powers.

As against the rights of abutting owners the municipal authorities have no power to grant to a railroad company an easement to lay its track upon and operate its trains over the streets of a town, even though the title to the streets be in the town.

3. Same—Estoppel in Pais.

An injunction will not lie against the operation by a railroad company of its train upon a street of a city at the suit of an abutting owner who bought the land long after the conditions existed or who waited an unreasonable time before invoking injunctive relief against injury to his property caused by the construction and operation of the spur railroad.

4. Same—Intervening Rights.

It would be inequitable to enjoin a railroad from properly using its tracks on the city street, with the consent of the city authorities, at the suit of an abutting owner who has waited until the railroad company has expended much money and labor thereon before objecting or seeking this remedy, and when the rights of the public have intervened.

5. Railroads—Municipal Powers—Abutting Owner—Damages—Independent Action—Limitation of Actions.

When an abutting owner has established his right to sue as such for the damages sustained by him peculiar to his ownership, he is barred by the statute of limitations, although the town is not barred for obstructing the street.

6. Railroads — Revisal, Sec. 394 — Damages, Permanent—Limitation of Actions—First Substantial Injury.

Under Revisal, sec. 394, subsec. 2, providing that no suit, etc., shall be brought or maintained by any person for damages caused by the construction of a railroad, etc., unless commenced within five years after the cause of action accrues, etc., the time at which the action accrues is not necessarily counted from the construction of the railroad, but from the first substantial injury which was thereby caused to rights of property incident to the construction of the road.

7. Same—Damages Not Permanent—Measure of Damages.

While an action for damages sustained by the construction and operation of a railroad may be barred under Revisal, sec. 394, subsec. 2, if suit be not brought therefor within five years against a railroad for the use of the street for railroad purposes, this rule does not apply to cases where the damages are not of a permanent kind, but which arise from an unlawful use of the street by a spur track for depot purposes or the loading or unloading of cars and the placing of engines thereon so as to become a nuisance to the owner. The damages recoverable are confined to those sustained within three years prior to the institution of the action.

APPEAL from *Neal, J.*, at October Term, 1907, of EDGECOMBE. (429)

This action is brought and prosecuted for the purpose (1) of enjoining the defendant from using and operating engines and cars over its tracks and spur tracks on certain streets in the town of Tarboro; (2) for damages alleged to have been sustained by the laying of the tracks and spur tracks and operating locomotive engines and cars over same; (3) for damages alleged to have been sustained by reason of the

negligent and unlawful use of the tracks, constituting a private nuisance, to plaintiff's injury.

A jury trial in respect to the first cause of action having been waived, the court found the following facts: On 23 September, 1760, Joseph Howell conveyed to James Moir and five other persons a tract of land lying and being in Edgecombe County, on the south side of Tar River and described by metes and bounds, containing 150 acres. The consideration named in the deed is five pounds proclamation money of the Province of North Carolina. On 24 September, 1760, the said James Moir and the other grantees named in said deed executed unto the said Joseph Howell a bond under seal in the penal sum of "£2,000 proclamation money." The condition of the bond recited that the said land was
(430) to be laid out for "the building and erecting of a town therein"; that they had received authority to lay out in lots the said land, "excepting one lot where the said Howell House now stands and the graveyard and 50 acres for commons for the use of said town, and to dispose of the same lots, not exceeding one-half acre to a lot, . . . and to take subscription for the same at £2 proclamation money for each lot." Streets were to be laid off not exceeding 80 feet in width, etc. The said land was laid off into lots and streets, and a portion thereof, at least 50 acres, was reserved for the use of the town as a commons for the use of the public, and a map thereof was made and recorded in the office of the register of deeds, etc.

On 30 November, 1760, the said land so laid off "was constituted, erected, and established a town, to be called Tarboro, by act of the Governor, Council, and Assembly." The map or plat was declared by act of Assembly "to be held and deemed the plan and bounds of said town." The present town of Tarboro has by successive acts of the General Assembly succeeded to the rights, duties, and liabilities of the said corporation, trustees, etc. The common so reserved was covered with large oak and other trees, used and dedicated to the public for park purposes. By act of the General Assembly, passed 27 December, 1852, the commissioners of said town were authorized to lay off into lots and streets, in conformity with the plan of said town as then established, the whole or any portion of the common, as then existing, lying on the western side thereof, between the inhabited portion thereof and Hendricks Creek, the western portion of said town, and to sell such lots at public sale. Pursuant to said act the commissioners laid off into lots and streets that portion of the common described in said statute. Albemarle Avenue runs north and south; Wilson Street runs east and west, crossing the avenue; Hendricks Street runs west of and parallel with the said avenue; all of which fully appears by reference to the plat filed in the rec-

ord. The streets are 70 feet wide and were duly laid off and (431) dedicated to the use of the public. The lot formed by the intersection of Albemarle Avenue and Wilson Street, known as Lot 122, was sold by the commissioners pursuant to the provisions of said act. By successive conveyances the title vested in plaintiff, 1 February, 1872. It is described in the deed to him as "bounded on the north by Wilson Street, on the east by Williamston and Tarboro Railroad, south by St. John Street, west by the new street, being Lot 122 in the plat of the town." The boundary called "Williamston and Tarboro Railroad" is now Albemarle Avenue, and the "new street" is now Hendricks Street. "The location of plaintiff's lot was desirable as a residence, the surroundings pleasant, easy of access, and the air in and about said lot pure, wholesome, and uncontaminated; the said lot commanded an unobstructed view and use of said street and the common lying directly north and northeast of it on the opposite side of Wilson Street." There are large shade trees and a magnolia on the sidewalk.

The Williamston and Tarboro Railroad Company was incorporated by the General Assembly, by chapter 139, Laws 1860. By successive acts of the General Assembly the defendant corporation has succeeded to and acquired all of the rights, privileges, etc., of said company. (See *Staton v. R. R.,* 144 N. C., 135.) The road of the defendant was constructed in 1870, prior to the time plaintiff purchased. The defendant entered upon the said street and built its track as indicated in said ordinance, and is using it as a railroad under and by virtue of all of its and predecessors' chartered rights and privileges and by virtue of the town ordinance passed as follows:

"At a call meeting this day. Present all the commissioners. Ordered that the ordinance of the town of 3 December, 1869, be amended 'so as to allow the Williamston and Tarboro Railroad Company to construct their road track from Tar River along and through Hen- (432) dricks Street to the Little Creek north of the town commons.' "

Little Creek is the northern terminus of the original Howell deed to the town of Tarboro, and the nearest point is about 85 yards north and in front of plaintiff's premises. The land on the north side of Little Creek was private property, and the railroad was extended across Little Creek to make connection with the Rocky Mount branch of the Wilmington and Weldon Railroad.

In the year 1889, without the consent of the plaintiff, the defendant constructed and has since so maintained and operated a steam railroad spur track leading from Albemarle Avenue, north of Wilson Street, curving diagonally across that portion of the common opposite plaintiff's premises and lying on the opposite side of Wilson Street, continu-

ing diagonally across Wilson Street in front of plaintiff's premises and down said street to a point west of said premises on Wilson Street; and thereafter, in 1902, and without the consent of this plaintiff, it constructed and has since so maintained and operated a steam railroad spur track branching from said curved track at a point on Wilson Street in front of plaintiff's premises, crossing said street diagonally, crossing plaintiff's sidewalk and continuing diagonally across and along Hendricks Street on the westerly side of plaintiff's premises. The first spur track was to a cotton factory one-quarter of a mile away, and the other to the electric power house owned by the town. These spur tracks were built and constructed by virtue of and under the same rights as the main line, save in this, that the ordinance for the spur tracks was passed immediately prior to the construction thereof. Since said road was constructed and within recent years there has been a material increase in the traffic on said road.

Under the charter of the town of Tarboro as it existed on 25 May, 1869, there was no provision authorizing and empowering the town commissioners to make any disposition of public streets other than that provided for in the general or public laws and in chapter 9 of an
(433) act of the General Assembly of North Carolina passed 30 November, 1760.

The town of Tarboro, under its charter and amendments thereto, had at the time the spur tracks were built no authority to use its streets for railroad purposes unless such authority was conferred by the general public statute (Revisal, ch. 73).

His Honor, upon the foregoing facts, was of the opinion that plaintiff was barred of any relief except for nuisances committed within three years prior to the commencement of the action. Plaintiff excepted.

The plaintiff introduced the following evidence on the issue as to nuisances: The track on Albemarle Avenue is within 25 feet of sidewalk. The spur track is 90 feet from residence, 105 feet from front door. The house fronts east and north; second spur track on west side of house. Railroad runs diagonally across Hendricks Street into the water-works and electric light plant of the town, on the north, east, and west of plaintiff's residence. No depot there. "Prior to 26 September, 1906 (date of summons), they were allowing cars of all sorts to remain on that spur track and unloading theatrical troupes, circuses, and fertilizers. They allowed these people to stay there quite a while; allowed vacant cars to remain there, which were frequently slept in by negroes. They allowed engines to remain there at night, and the escaping steam made a great noise. Plaintiff would complain and the engineer would not move the engine. He said he came down there for his meals; it was near his house

and it was for his convenience. Then plaintiff complained to the agent and used every means he could to get it away. . . . At night steam was up and escaping, and continuing to remain there all night long and at all hours of the night. Next morning the fire in the engine would be started from 3 to 5 o'clock. Plaintiff's family were continuously kept awake, but they became accustomed to the noises, etc. . . . Wood, coal, and almost every conceivable thing were kept there. Some fortilizers were unloaded and left on the side of the cars. (434) Sometimes wood was sawed and left there. Cars were left and remained there, and various kinds of tramps slept in them, sometimes for days." Agent said he would do the best he could. Negro minstrel troupes have been unloaded there; also dog and pony shows. Carnivals would stay there for a week, making noises at night, sometimes being drunk and fighting. Carnival paraphernalia would be thrown out, such as old bedding, on the sidewalk. "They leave a little of everything there—iron piping, telephone poles, bricks, rocks, and sometimes hay, corn, and oats." They frequently had cars right on the corner across the sidewalk. Cars sometimes ran off; curve very sharp. There is talking and cursing by the hands trying to get the engine and cars on the track. Cars sometimes stall there. There are two freight depots in Tarboro—one north and the other south of residences. Sparks and smoke from engine stopping in front of house on spur track injured shade trees. Plaintiff estimates damage to his property at $5,000, caused by the "manner in which the road has been managed." . When circuses were unloaded in front of the house whiskey bottles would be on the sidewalk and dirty bags piled on sidewalk "right in front of door." Plaintiff's family have lost sleep and become nervous from noises, etc.

At the conclusion of plaintiff's testimony defendant moved for judgment of nonsuit. Motion allowed. Plaintiff excepted and appealed.

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

CONNOR, J., after stating the facts: It will be convenient to dispose of the several phases of this appeal in the order in which they are presented by the well considered brief of the counsel for plaintiff. It may be conceded that the legal title to the soil over which the streets of the town of Tarboro are laid out is in the municipality. The (435) deed from Howell to Moir and others vested it in them, and by successive acts of the Legislature it has passed to and remains in the corporation. The corporation holds the title in trust for the citizens and public to use and enjoy as public highways or streets, subject to the con-

trol of the town authorities, as prescribed by the charter and public laws contained in Revisal, ch. 73. The title is impressed with a further trust, subject, however, to the rights of the public, for the use and benefit of the owners of lots abutting on said streets. *Moose v. Carson,* 104 N. C., 431, and other cases. The rights of the original purchaser of the lots attaching by virtue of the trusts declared in the bond executed by Moir and others passed with the title to the lots as appurtenant thereto, and in respect to plaintiff's lot vested in him. Cases may be found in other courts in which the right of an abutting owner to sue for damages sustained by reason of the use of streets is made to depend upon the ownership of the soil over which the street is laid out and established. Whatever distinctions in this respect may have been made by the courts in regard to the rights of abutting owners to redress for special injuries sustained have been generally abandoned. *White v. R. R.,* 113 N. C., 610, in which the cases and views of eminent authors are stated with clearness and force by *Shepherd, C. J. Tate v. Greensboro,* 114 N. C., 392; *Brown v. Electric Co.,* 138 N. C., 533; 27 A. and E. Enc., 181. Of course, we must not be understood as referring to actions for damages or compensation by reason of additional burdens imposed upon property condemned or dedicated by the owner to a public use, as in *Phillips v. Tel. Co.,* 130 N. C., 513, and *Hodges v. Tel. Co.,* 133 N. C., 225. In such cases the owner of the soil maintains an action for compensation for additional burdens imposed for public purposes. In addition to the rights of the plaintiff to the use of the streets as a member of the
(436) municipality or a citizen of the town, he has as an abutting owner of the lot rights peculiar to such ownership. *Burwell, J.,* in *Tate v. Greensboro, supra,* says: "It is not to be denied that the abutting proprietor has rights as an individual in the street in his front as contradistinguished from his rights therein as a member of the corporation or one of the public." For an invasion of his rights as a member of the corporation—that is, to the use of the streets—he must seek redress through the corporate authorities or, upon their refusal to act, by an action in behalf of himself and all other members or citizens. *Merrimon v. Construction Co.,* 142 N. C., 539. If the street is obstructed he may sue for any special damage sustained by himself different in character from other citizens, as in *Downs v. High Point,* 115 N. C., 182; *Mfg. Co. v. R. R.,* 117 N. C., 579. Plaintiff in this appeal sues for an alleged injury by which he claims to have sustained special damages, different in character from such as are sustained by other citizens. That he may maintain the action, unless barred by the statute of limitations, is clear. 27 A. and E. Enc., 183, in which it is said: "If he has suffered special injury from the use of the street by the railroad his remedy is by an

action for damages." Lewis Em. Dom. (2 Ed.), 240. Mr. Abbott, in the last edition (3 Ed.) of his work on Municipal Corporations (sec. 843), referring to the authorities cited in the first edition, says: "Since then it has become very firmly established that the abutter, though he has not the fee in the street, has certain private rights of access, light and air, which are as much property as the lot itself; and, also, that any interference with such rights by a use which is not within the legitimate purpose of a highway is a taking within the Constitution." *White v. R. R., supra.* Without multiplying authorities, we may with safety say that with us and the majority of other courts the principle is established that, without regard to the ownership of the fee in the soil, an abutting owner may maintain an action for any unlawful interference with or invasion of his rights incident to his ownership. (437) We think it equally well settled that the municipal authorities have no right or power, certainly as against abutting owners, to grant to a railroad company an easement to lay its track upon and operate its trains over the streets of the town. It is immaterial whether the title of the street is in the municipality or the abutting owner. If in the former, it is a breach of the trust reposed in the authorities; and if in the latter, it is an additional burden. In either case damages or compensation will be awarded appropriate to the injury sustained. The law as held by us and sustained by the weight of authority is thus stated by *Shepherd, C. J.*, in *White v. R. R., supra:* "The principle, then, being established that the use of a street for steam railroads is not a legitimate use of the street for public purposes, it must, of course, follow that the city has no right in the exercise of its usual and ordinary powers relating to its highways to authorize the entry and occupation of the same by the defendant, and that the bare license of the city can afford no justification for the infringement of the rights of the plaintiff." Mr. Lewis (Em. Dom., sec. 111) says: "To us it seems so clear that a railroad is foreign to the legitimate use of a highway that we have never been able to understand how a court could reach a contrary conclusion." After an exhaustive discussion of the decisions of various courts, he concludes: "It can now be safely said that the weight of authority is in support of the text." We do not deem it necessary or pertinent to the decision of this appeal to consider or discuss the effect of the action of the municipal authorities in granting an easement to the defendant, or to those to whose rights it has succeeded, in the streets upon the right of the plaintiff as a citizen of the town. He is not suing for an invasion of such rights or for the occupation of any portion of the street or its use in the operation of its trains. He sues for special damages to his property abutting upon the street. Conceding that the original entry upon the streets, the

(438) construction of the road, and the operation of the trains were with the consent of the municipal authorities, and that to the extent of the authority to do so they granted the easement over the street, we do not perceive how this can affect the plaintiff's rights in this action. The authorities are uniform to the effect that neither the municipal authorities nor the Legislature can confer an easement or right to use the street as against the property of the citizen without providing for compensation. The question was considered by us in *Brown v. Electric Co., supra,* and the authorities examined. We are content to abide by what was said in that case.

The defendant says that, conceding a cause of action accrued to plaintiff or to those from whom he purchased the property for the interference with their rights as abutting owners, he is barred by the lapse of time and the statute of limitations. It is clear that the Williamston and Tarboro Railroad Company or its successors could under the grant of the right of eminent domain have condemned a right of way over Albemarle Avenue, and by paying compensation or permanent damages to the abutting owners have acquired the right to construct and operate its road pursuant to the rights, privileges, and franchises conferred in the charter. The owners of the property would not have been entitled to an injunction to restrain such condemnation or use. Whatever may have been the rights of the owner of the property in 1870, when the road was constructed along Albemarle Avenue, it is clear that the plaintiff, having purchased the property after the road was constructed and while it was being operated, will not be allowed to enjoin its use in a proper manner. The spur track was constructed in 1889 and has been in use seventeen years. The map and the statutes put in evidence show that the defendant's road between Tarboro and Plymouth constitutes part of a system of railroads; that to enjoin the use of the track over Albemarle Avenue would destroy property of immense value and seriously interfere (439) with and, until a new connection be made involving the construction of a new iron bridge over Tar River, render it impossible for the defendant to perform its duties to the public. That the public would in many ways be seriously injured is manifest. Courts never enjoin the construction or use of public utilities and improvements at the suit of private individuals unless the damage is both serious in amount and irreparable in character. *Navigation Co. v. Emry,* 108 N. C., 133. It is a sufficient answer to the demand for an injunction that plaintiff has by his inaction for so long a period permitted an expenditure of large sums, not only in the construction of the road, but in connections, bridges, and otherwise, both by the defendant and others, rendering it inequitable to destroy the value of the property and impose the immense inconvenience

which would result from restraining the use thereof. In regard to the spur track while the reasons are not so conclusive, we can see from the map and the evidence that to prevent its use in a proper way—that is, as a passage to and from the electric light plant and water-works of the town—would seriously affect public interests. If plaintiff regarded the injury to his property by the construction of the spur track serious and irreparable he should have objected to it before or at the time it was constructed. He may not wait seventeen years and then invoke the equitable power of the court. The plaintiff says that while he may not have injunctive relief, he is entitled to his action for damages sustained by reason of the invasion of his rights of access, air, light, shade trees, quiet and rest of his family and himself; that the construction of the road along Albemarle Avenue and of the spur tracks and the running of the trains have seriously injured him in these respects. To this demand defendant pleads the statute of limitations. The plaintiff insists that, as by the provisions of section 389 of Revisal no right can be acquired to an exclusive use of the streets by lapse of time against the municipality, this defense is not open to defendant. It is undoubtedly (440) true, as said by *Mr. Justice Avery* in *Moose v. Carson, supra,* "No one can acquire, as a general rule, by adverse occupation as against the public, the right to a street or square dedicated to the public use." In that case the plaintiffs claimed title to the soil dedicated as a street. It was held that they could not recover. The defendants were claiming as abutting owners by virtue of the dedication. The learned justice says: "The plaintiffs have shown no such title as would warrant the Court in granting a writ of possession. If the fee were vested in the town, which is not conceded, there would still be wanting in the plaintiff, its grantee, the right to prevent possession and occupancy of a street dedicated to the public." *Conrad v. Land Co.,* 126 N. C., 776; *Clark v. Hughes,* 134 N. C., 457. In *S. v. R. R.,* 141 N. C., 736, the city of New Bern was enforcing an ordinance by indictment for obstructing the street. The Court held that by granting the license to defendant to construct its track on the street the city did not surrender its power or right to control its use. What effect the action of the municipal authority in passing the several ordinances may have upon its right to maintain actions, or plaintiff's right to sue for injuries sustained by him as a citizen of the town, are not presented, and we express no opinion in regard to them. The plaintiff here sues, not by virtue of any rights claimed under or in privity with the town, but he asserts that, without regard to the action of the town authorities, the defendant by constructing and operating its road has committed a trespass upon his property rights. We hold that the ordinances relied upon by defendant to justify

its conduct do not affect the plaintiff's rights, and that, notwithstanding such ordinances, whether treated as licenses or grants of easements, he may maintain his action. Having thus successfully asserted his right against both the municipal authorities and the defendant justifying under them, he may not claim immunity from the operation of a
(441) statute of limitations by reason of a statute conferring such immunity upon the town.

It is not necessary for us to discuss the interesting question raised by defendant's counsel, whether by the construction and operation of the road over Albemarle Avenue for more than twenty years the defendant has acquired as against plaintiff an easement or right to do so. The origin and extent of the use as the basis for a presumption of a grant presents interesting questions not free from difficulty. They are indicated in the opinion of *Mr. Justice Avery* in *Emry v. R. R.*, 102 N. C., 209 (232). It was in consequence of this difficulty and to prevent railroad companies owing duties to the public from being subjected to successive actions for trespasses of the character charged in this action that the Court found it necessary to treat the cause of action as accruing on the date of the first substantial injury and to require that permanent damages be assessed. Repeated actions for diverting water over lands not condemned for rights of way by the construction and repairs of the road were frequently brought, and it was found impracticable for the companies to protect themselves and keep their roads in safe and proper condition to meet the demands imposed upon them for the public. The question was thoroughly discussed and the authorities cited and reviewed by *Mr. Justice Avery* in *Ridley v. R. R.*, 118 N. C., 996. The attention of the Legislature having been directed to the subject, an act was passed at the session of 1895 and with the amendment thereto constitutes section 394, Revisal. Subsection 2 provides: "No suit, action, or proceeding shall be brought or maintained against any railroad company by any person for damages caused by the construction of said road or the repairs thereto, unless such suit, action, or proceeding shall be commenced within five years after the cause of action accrues," etc. In *Ridley's case, supra,* it is held that the cause of action accrues, not necessarily at the time the road is constructed, but "when the first injury was sustained." In *Beach v. R. R.*, 120 N. C., 498, the question was carefully considered,
(442) and, although the Court was divided upon certain aspects of the case, there was no difference of opinion in regard to the following language used by the present *Chief Justice* in a dissenting opinion: "Since the act of 1895 (ch. 224) all damages accruing from the construction of a railroad must be sued for within five years and the entire amount recovered in one action." In *Lassiter v. R. R.*, 126 N. C., 507,

Douglas, J., says: "Railroads are *quasi*-public corporations charged with important public duties which in their very nature necessarily invoke the power of eminent domain, and therefore the courts with practical unanimity have created a species of legal condemnation by the allowance of so-called 'permanent damages.' . . . The provision in the act of 1895 incidentally providing for a statutory easement, rather by implication than direct terms, seems to us to be in effect little more than a legislative affirmation of the rule already enunciated in other jurisdictions and adopted in *Ridley v. R. R.,* which was decided a year after the act was passed." In *Stack v. R. R.,* 139 N. C., 366, it was held that the cause of action was barred after five years from the time that any "substantial injury was done." It is true that in these decisions the damage sued for was ponding water. We can see no reason why the same construction should not be given the statute in all cases where damage is claimed for injuries in the nature of a nuisance or invasion of rights of property incidental to the construction of the road. Certainly the same reasons exist. It would be not only productive of great injustice, but it would seriously impair the ability of railroads to discharge their duties to the public, if, whenever they found it necessary to increase the number of daily trains or the size of their engines or change the kind of fuel used, they should be subjected to actions based upon the suggestion that they had increased the extent of the original suer. As we held in *Thomason v. R. R.,* 142 N. C., 318, when the right to construct a railroad is acquired by any means known to the law the right to (443) operate the road attaches, and this right is not confined to the needs or necessities at the time of the acquisition, but "to such further demands as may arise from the increase of its business and the proper discharge of its duty to the public." *R. R. v. Olive,* 142 N. C., 257; *Beasley v. R. R.,* 145 N. C., 272.

If the plaintiff had sued when he sustained the injury he would have recovered permanent damages in the same manner as if the right to construct the road was condemned. Lewis Em. Dom., sec. 653. We concur with his Honor that the plaintiff is barred of his action for damages by reason of the construction and operation of the road, both as to the main track and the spur track constructed in 1889. We do not perceive that any damage is shown by the spur track of 1902. If there be any, it will be open to plaintiff to show on another trial.

We are thus brought to consider the exception to his Honor's ruling upon the issue directed to the alleged nuisance in the manner of using and operating the trains and cars on the track. Assuming that as against the plaintiff the defendant has the right to use the tracks in the manner and to the same extent as if acquired by condemnation or by the payment

of permanent damages, does the evidence, which must be regarded for this purpose as true and open to inferences therefrom most favorable to plaintiff, show a nuisance of the right or *quasi* easement? Was defendant doing a lawful thing in a lawful way? We had occasion to consider the rights and liabilities of railroad companies in using their tracks near to dwelling-houses in *Thomason v. R. R.*, 142 N. C., 300-318. The principle which we deduced from our own and the decisions of other courts is thus stated: "The powers conferred upon a railroad company by its charter must be exercised in a lawful way—that is, in respect to those who suffer damage, with due regard to their rights. When exercised in an unreasonable or negligent way, so as to injure others in the (444) enjoyment of their property, the injury is actionable." In that case, in the plaintiff's appeal, the tracks and side-tracks were altogether on the right of way acquired by defendant. The only question involved upon the complaint and demurrer was whether there was an unlawful user. In the defendant's appeal the jury found upon sufficient allegation that there was a negligent use of a spur track by the company amounting to an actionable nuisance. We gave the question careful consideration and cited in the opinion the best considered authorities. In the light of those decisions and the later one of *Taylor v. R. R.*, 145 N. C., 400, we do not find any evidence of a nuisance in the use and operation of defendant's trains over Albemarle Avenue. That is a portion of the main track. The greater increase of trains, more cars and heavier engines, making more noise and smoke, are incident to the use of the road and should have been anticipated by plaintiff when he purchased the property and for more than thirty years acquiesced in its use. The case in this respect comes clearly within the principle announced in *Thomason v. R. R.*, in plaintiff's appeal.

In regard to the uses to which the spur track has been put, as described in plaintiff's testimony, we find more difficulty. It is not found why the spur track was constructed, nor are the ordinances set out under which it was placed as it is. The answer alleges that it was constructed for the purpose of permitting heavy goods and freight to be delivered to merchants and, at the request of the town, for the purpose of reaching its electric light plant. It is not very material what the purpose was, so far as the plaintiff is concerned. It would seem that if the town authorities intended to permit the use of the common and the streets for a depot or discharging point it should clearly appear, so that abutting owners and citizens interested should have opportunity to be heard in opposition thereto. The placing of a spur track from the main line to an electric light plant, in which all the people of the (445) town are interested and which would involve but limited use, is

quite a different matter from placing it on the common preserved with so much wise foresight by the original donor more than a century ago for the uses and purposes testified by plaintiff. In addition to the authorities cited in *Thomason v. R. R., supra,* the industry of counsel, with additional investigation on our part, has discovered some other decided cases in line with what we there said and more directly applicable to the facts in this appeal. In *R. R. v. Angel,* 41 N. J. Eq., 316, the plaintiff sought to enjoin defendant company from so using its track laid along Bridge Avenue in the city of Camden as to create a private nuisance. It appeared that the track was laid by authority conferred by the Legislature and the common council of the city. It was shown that the company used the track in front of complainant's dwelling for the purpose of distributing cars, making up freight trains and keeping locomotives and cars laden with live stock standing thereon, etc. *Dixon, J.,* said: "The fact that these nuisances are continuous and materially diminish the comfort of complainants in their residence makes the case a proper one for an equitable remedy by injunction, unless defendant can justify its conduct." To the first suggestion, that it was authorized to so use its track, the Court, after noting the language of the acts and ordinances, said: "In our judgment, they indicate that those rights are such as pertain to the use of the avenue for the purposes of a way, not for the purposes of a station yard. The primary privilege given is that of passage; this and its reasonable incidents cover the whole scope of the grant. The right of storing engines and cars, either for a longer or shorter period, the right of making up or breaking up trains are not embodied in such a concession. These are strickly station and terminal purposes, and by providing for station yards the Legislature has indicated its purpose that business of that nature should be transacted there. We do not say that the company may not under any circumstances do upon its roadway what ought commonly to be done in its yards, (446) for no doubt unforeseen occurrences may sometimes render such acts almost indispensable, and then other less urgent rights of the public at large must give way. . . . Having a right of passage there, it used its tracks as though they were within its terminal yards, and so used them constantly in everyday concerns." The judge further said that if such right was conferred by the Legislature and common council, it was invalid as against plaintiff's rights. The injunction to the extent of the nuisance was granted. In *Frankle v. Jackson,* 30 Fed., 399, *Brewer, J.,* said: "Although a railroad may not be liable in damages for the occupation of a street and the running of its trains thereon in a customary, reasonable, and proper manner, . . . it may still be liable to damages

for any unreasonable, improper, illegal, and wrongful use of its tracks. The right to use a street for the running of trains gives no right to establish a repair shop thereon." In *R. R. v. Church,* 102 Fed., 85, it was held that a grant to a railroad company to operate and maintain a railroad on a public street does not carry by implication the right to erect and maintain a water tank in the street. The general and we may say universally accepted doctrine, as announced in the cases cited, is illustrated and discussed. *R. R. v. Lillyett,* 1 L. R. A. (N. S.), 49. In *Mahody v. R. R.,* 91 N. Y., 148, *Andrews, C. J.,* conceding the right of the city authorities to grant a surface railway company the use of its streets, says: "It cannot, however, be questioned that a street cannot be converted into a yard for the storing or deposit of cars to the injury of adjoining owners. An unreasonable use of the street by a street railway may doubtless afford a right of action to property owners specially injured thereby." *Thompson v. R. R.,* 51 N. J. L., 42. In *R. R. v. Patterson,* 67 Ill. App., 351, the plaintiff in error was permitted to
(447) recover for improper use of a switch in front of his house. Without repeating the evidence, we think it sufficient to entitle the plaintiff to have the issue as to the manner in which defendant was using the spur track submitted to the jury under proper instructions. While it is difficult to draw the line with precision in each case between the lawful use of the track and its unlawful use, constituting an actionable nuisance, we think that in several respects the evidence would warrant a jury in finding that the defendant has used the spur track for other than legitimate purposes. There can be no question upon the evidence that the rights of the plaintiff and his family are seriously interfered with by such use as is made of the spur track. The nuisance alleged is not permanent. It does not arise from the construction, but the use of the spur track. The measure of damages would therefore be confined to such as were sustained within three years prior to the institution of the action. As the question is not before us, we forbear discussing it further than to quote from Joyce on the Law of Nuisances, sec. 260: "In case of a nuisance caused by the operation of a railroad in an unlawful manner the damage should only be for the injury caused by such unlawful operation of the road, and should not include an allowance for any injury caused by the lawful operation, the latter injury being declared to be *damnum absque injuria.*" If the defendant violated the town ordinance in regard to the speed of its train, the plaintiff has his remedy by applying to the municipal authorities or to a justice of the peace for a warrant for a misdemeanor. If the use of the spur track in violation of the rights of the plaintiff be continued, he is entitled to injunctive relief.

The judgment of his Honor on the first and second cause of action is affirmed. The judgment of nonsuit on the cause of action for damages for alleged unlawful use of the spur track as a nuisance is set aside and a new trial awarded. The issue and evidence will be confined to the allegation that defendant has within three years prior to the commencement of this action so used the spur track and the street in (448) violation of its duty as to constitute a nuisance, by which plaintiff has sutained special damage as an owner of the dwelling and premises abutting on the street.

Partial new trial.

Cited: *Willis v. White,* 150 N. C., 203; *Griffin v. R. R., ib.,* 314; *Elizabeth City v. Banks, ib.,* 412; *State Co. v. Finley, ib.,* 728; *Butler v. Tobacco Co.,* 152 N. C., 419; *Pickett v. R. R.,* 153 N. C., 150; *Waste Co. v. R. R.,* 167 N. C., 342; *S. v. R. R.,* 168 N. C., 111; *Clark v. R. R., ib.,* 417; *Kirkpatrick v. Traction Co.,* 170 N. C., 479; *McMahon v. R. R., ib.,* 459.

MARY B. SMITH, BY HER NEXT FRIEND, A. F. SMITH, v. THE NORTH CAROLINA RAILROAD COMPANY.

(Filed 22 April, 1908.)

1. Railroads—Duty to Passengers—Negligence—Train at Full Stop—Contributory Negligence—Nonsuit—Questions for Jury.

A railroad company is held to a high degree of care in providing at its regular stations places where passengers may alight with safety from its trains. Therefore, when the evidence tended to show that plaintiffs, passengers on defendant's train, were thrown therefrom, when at a full stop at their place of destination, by two sudden jerks of the engine while they were on the platform hesitating to alight at a dangerous place they knew not to be the regular stopping place, but which was the only stopping place used at that station on that trip, it was error in the lower court to sustain defendant's motion as of nonsuit upon the evidence upon the ground of contributory negligence. (*Shaw v. R. R.,* 143 N. C., 312, cited and distinguished.)

2. Railroads—Stopping Places for Passengers—Duty of Railroad.

The obligations of a railroad company to provide a place of safety for passengers at its regular stations is not performed by stopping their trains before they reach their usual place or in stopping at such place with cars on parallel tracks so close together that by the projection of cars over the rail passengers, in order to enter or alight from trains, are forced into a crowded passway, where the slightest motion of either train or a rush of passengers themselves is not unlikely to result in painful and at times serious or even fatal injuries.

SMITH *v.* R. R.

APPEAL from *Councill, J.*, at September Term, 1907, of ALAMANCE.

There was evidence on the part of plaintiff tending to show that on or about 7 June, 1906, the plaintiff and her sister were passengers
(499) on defendant's train, going from Hillsboro to Mebane, N. C., the last being a schedule stop of the train; that plaintiff entered the second-class car (the train being crowded in the first-class cars), in company with her sister, and that she had a ticket to go to Mebane, N. C., that the conductor on the train took up her ticket; that when the train stopped at Mebane, where she lived and where she knew the locality, it did not stop at the place usually used for passengers to alight, but about 50 yards east thereof; that plaintiff, after the train stopped, got up from the seat and went with her sister to the platform of the car to alight, when she discovered that box cars were on a side-track on the north side and a train with engine attached was on the south side of the car in which she had arrived; that the side-tracks were close to the track on which was the car she was on (one witness said about 6 feet between the rails); that no one of the train crew was there to assist her to alight, and that it was not the place to alight, as she was well acquainted with the ground; that passengers are usually received and discharged on the south side of the track where the depot is situated; that when she reached the platform the local train began to move east along by where she stood on the platform; that she hesitated to attempt to alight there, and while she was standing there, not over a half a minute, the train on which she was began to move slowly toward the station, and she supposed it was going to pull up to the place to alight, and instead it increased in speed and, by jerking, threw her and her sister off and injured them.

At the close of the plaintiff's evidence, on motion made in apt time, a nonsuit was ordered, and plaintiff excepted and appealed.

Long & Long for plaintiff.

W. B. Rodman, J. H. Pou, and Parker & Parker for defendant.

(450) HOKE, J., after stating the facts: A common carrier is charged with the duty of carrying passengers to the point of their destination and there affording them fair and reasonable opportunity to alight from the cars and depart from their train yards or depot grounds in safety. In Hutchison on Carriers, sec. 928, speaking of these obligations, the author says: "It is the duty of railway companies as carriers of passengers to provide platforms, waiting-rooms, and other reasonable accommodations for such passengers at the station upon such road at which they are in the habit of taking on and putting off passengers, Their public profession as such carriers is an invitation to the public to

enter and to alight from their cars at their stations, and it has been held that they must not only provide safe platforms and approaches thereto, but they are bound to make safe, for all persons who may come to such stations in order to become their passengers or who may be put off there by them, all portions of their station grounds reasonably near to such platforms and to which such persons may be likely to go; and for not having provided such stational accommodations and safeguards railway companies have frequently been held liable for injuries to such persons." And in section 1117: "The passenger is entitled, not only to be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping." And further, in section 1118: "When the conveyance has reached the destination of the passenger the carrier must exercise the highest degree of practicable care, diligence, and skill in affording the passenger sufficient time and opportunity to alight; and if the usual sufficient time be not given him to alight, and he is compelled to go on to the next station, or if a sudden start of the conveyance be made whilst he is in the act of alighting, and an injury is occasioned to him thereby, it will be negligence in the carrier, for the consequences of which he will be responsible." And Moore on Carriers states the same doctrine, as follows (section 38): "It is the duty of the servants of a carrier of passengers, especially when in charge of (451) a railroad train, to stop it a reasonable time to allow passengers to board or alight with safety; and, in the absence of contributory negligence on the part of the passengers, the carrier is liable for injuries resulting from a failure to perform this duty. . . . The duty resting upon a carrier involves the obligation to deliver its passenger safely at his desired destination, and that involves the duty of observing whether he has actually alighted before the car is started again. If the conductor fails to attend to this duty and does not give the passengers time enough to get off before the car starts, it is necessarily this neglect of duty which is the primary and proximate cause of the accident, if injury be occasioned thereby to the passenger. It is not a duty due a person solely because he is in danger of being hurt, but it is a duty owed to a person whom the carrier had undertaken to deliver and who was entitled to be delivered safely by being allowed to alight without danger."

As in other duties looking to the safety of their passengers, carriers are held to a high degree of care in respect to these obligations, and such duties are in no sense performed by stopping before they reach their usual place or in stopping before or at such place, with cars on paralled tracks so close together that by the projection of the cars over the rails

passengers, in order to enter or alight from trains, are forced into a crowded passway, where the slightest motion of either train or a rush of the passengers themselves is not unlikely to result in painful and at times serious or even fatal injuries.

An application of these principles to the facts presented gives clear indication that defendant was guilty of a negligent breach of duty in reference to plaintiff, a passenger on one of its trains, and there is no testimony to justify the ruling that as a matter of law plaintiff was guilty of contributory negligence. This is not a case which comes within the principle on which *Shaw v. R. R.*, 143 N. C., 312, was made (452) to rest, that a passenger who was injured by reason of going out on a platform while the train was in motion, in violation of a rule of the company posted in pursuance of the statute, was barred of recovery. In the case before us the train had come to a stop, the only one it intended to make at the station, and the plaintiff had gone out on the platform with a view of alighting, and before she was given opportunity to do so the train started, and by reason of two sudden jerks plaintiff was thrown from the train and injured. The facts bring the case more nearly within the decision of *Darden v. R. R.*, 144 N. C., 1, and must be determined on the principles of that well considered opinion, as far as the same apply.

There was error in directing a nonsuit.

Reversed.

Cited: *Roberts v. R. R.*, 155 N. C., 84; *Kearney v. R. R.*, 158 N. C., 527, 530, 534; *Fulghum v. R. R., ib.*, 561; *Leggett v. R. R.*, 168 N. C., 367.

LUTHER H. CHERRY ET AL. v. JOHN ROY WILLIAMS.

(Filed 22 April, 1908.)

1. Nuisance—Hospitals—Menace to Health — Evidence Sufficient—Restraining Order.

When it is made to appear by plaintiff's evidence that a hospital is about to be erected for the purpose of treating tuberculosis and other contagious or infectious diseases upon lands adjacent to plaintiff's, in the residential portion of a thickly settled vicinity, so as to import serious menace to the health of plaintiff's family and that of the owners and occupants of adjacent property, a restrainig order upon his application should be continued to the hearing.

2. Same—Evidence in Reply—Insufficient.

Supporting evidence offered in reply is not sufficient which is general in its terms and made without reference either to the special locality or in the special manner in which the particular hospital is to be constructed and carried on.

3. Same—Actual Construction Not Restrained.

The use of a hospital for the treatment of diseases so as to be a serious menace to the health of adjacent owners and occupants may be restrained, while the actual construction, without the use, will not be.

ACTION heard on return to a temporary restraining order before (453) *Webb, J.*, at January Term, 1908, of GUILFORD.

The complaint alleged and there was evidence tending to show:

1. That the plaintiffs are residents and citizens of the county and State aforesaid, and reside on Chestnut Street in the city of Greensboro.

2. That the defendant Dr. John Roy Williams is a practicing physician, residing in said city, on said street, and is the owner of a lot fronting 50 feet in width on said Chestnut Street and running back a distance of something over 200 feet in depth from said street.

3. That the defendant John Roy Williams is now erecting on the said lot owned by him a building to be used as a sanatorium for the treatment of tuberculosis and other infectious and contagious diseases, and has also, as these plaintiffs are advised and believe, entered into a contract for the erection of a number of small cabins or pesthouses for the treatment of tuberculosis and other diseases, and he is now engaged in the construction and erection of said buildings on said lot for the treatment of tuberculosis and other diseases aforesaid for his individual gain.

4. That the plaintiff Luther H. Cherry is the owner of a lot adjoining the said lot of the said Williams, of the same size, between which there is no obstruction or protection, and that the said Cherry, who has a wife and children, lives within 100 feet of the said lot on which are being erected the buildings aforesaid; that the plaintiffs N. J. Bakke, J. W. Case, G. A. Hood, J. T. Wade, W. B. Young, and others are also owners of lots on the same street, located within a few feet of the said lot on which the said Williams is erecting the buildings aforesaid.

5. That the said lot of the said Williams is located in a thickly populated section of the city and on the said street, where not only plaintiffs but a large number of other people reside, and that the erection and use of said buildings for the purpose aforesaid are in viola (454) tion of the rights of the plaintiffs, and if permitted to be erected and completed and used for the purposes aforesaid will work irreparable and permanent injury and loss to the plaintiffs.

6. That the plaintiffs are advised and believe that the disease or dis-

eases for the treatment of which said buildings are being erected are infectious and contagious and a menace to the public health, and if defendant is permitted to use said buildings for the treatment of said disease or diseases the health of the plaintiffs and the public will be endangered thereby, and that consequent loss of health and life will follow the construction and use of said buildings for the treatment of such disease or diseases as the defendant has determined to treat in said buildings.

7. That the plaintiffs are suffering or about to suffer not only irreparable injury in the matter aforesaid, but they are also forced to sustain irreparable and permanent loss by the depreciation of their property located in close proximity to the said lot by reason of the location of said buildings on the said lot of defendant for said purposes, and by reason of the further fact that the defendant is, as plaintiffs are advised and believe, insolvent and utterly unable to respond in damages for the injury and loss which they have already sustained and will continue to sustain.

8. That if the defendant is permitted to complete said buildings and to use them for the purpose of treating tuberculosis and other diseases, the plaintiffs and their neighbors who reside on the same street will be made to suffer loss and permanent injury, unless the court intervenes for their protection and restrains the defendant from the continuance of his work in the erection of said buildings, and that the private injury resulting therefrom is greatly in excess of any benefit to be derived therefrom.

Defendant, admitting his purpose to construct and use buildings for the treatment of consumptives, and at the place indicated, offered (455) a large amount of evidence, including affidavits of specialists eminent in their profession and in the treatment of tuberculosis in hospitals and otherwise, to the effect that "a sanatorium for the treatment of consumptive patients located in the city of Greensboro, properly maintained and conducted, would not be a menace to the health of the community in which it is situated nor to the public health; that such sanatoriums are conducted in large and populous cities all over the country where the climate is suitable for the patients, and that experience has shown that such sanatoriums are not a menace to the public health, but rather a benefit"; that the proposed locality is not thickly populated, and consumption is not a contagious or an infectious disease, and that defendant is qualified to conduct the proposed sanatorium properly and intelligently.

On considering the evidence offered by plaintiffs and defendant, the restraining order was continued to the hearing, in terms as follows: "This cause coming on to be heard, and being heard upon the complaint

and affidavits herein filed, and it appearing to the court from the complaint and affidavits of the plaintiffs in this cause that the defendant is now erecting on the lot described in the complaint buildings to be used for the treatment of tuberculosis and other infectious and contagious diseases, and that said buildings are a menace to the public health and threaten to cause irreparable and permanent injury and loss to the plaintiffs; and, further, that the plaintiffs are entitled to have the defendant John Roy Williams temporarily restained from the continuance of his work in the erection of said buildings," it was ordered that the restraining order heretofore issued be continued to the hearing. Defendant excepted and appealed.

G. S. Bradshaw, King & Kimball, and Douglas & Douglas for plaintiffs.

Stedman & Cooke for defendant.

HOKE, J., after stating the facts: The authorities in this State (456) will uphold the position that, when there are facts in evidence which give good reason to believe that the owner of property in the residential portion of a thickly settled vicinity is about to devote it permanently to a use which imports serious menace to the health of the owners and occupants of adjacent property, such user should be restrained until the facts on which the rights of the parties depend can be properly determined at the final hearing. The conditions suggested, if established, come well within the definition of an actionable nuisance, and if there is a well grounded apprehension that neighbors will be unreasonably exposed to serious danger from a disease of the nature of consumption the injunction should be continued to the hearing. The injury threatened in such case would be irreparable.

As said by *Justice Walker,* in *Durham v. Cotton Mills,* 141 N. C., 615 "When injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate."

Courts are properly very reluctant to interfere with the enjoyment of property by the owner, and there is a line of cases in this State, and they are in accord with established doctrine, to the effect that when the owner of the property is about to engage in an enterprise which may or may not become a nuisance, according to the manner in which it may be conducted, courts will not usually interfere in advance to restrain such an undertaking, and especially when the apprehended injury is "doubtful or contingent or eventual"; but these decisions will very generally be

found to obtain in causes where the apprehended injury was threatened by reason of some industrial enterprise which gave promise of benefit to the community, affecting rather the comfort and convenience than the health of adjoining proprietors and giving indication that ade-
(457) quate redress might in most instances be afforded by an award of damages, as in *Simpson v. Justice,* 43 N. C., 115; *Hyatt v. Myers,* 71 N. C., 271; *Hickory v. R. R.,* 143 N. C., 451, to which we were referred by counsel for defendant. But, so far as we have examined, whenever this principle has been apparently applied with us to cases which threatened serious injury to health, and injunctive relief was denied complainant, it will be found either that there was some defect in the proof offered by plaintiff or such proof was successfully controverted by defendant, or there were other conditions present which required the application of some other principle than that which defendant here invokes for his protection. Thus, in *Ellison v. Comrs.* 58 N. C., 57, bill in equity to restrain the placing of a cemetery so as to threaten the healthfulness of plaintiff's dwelling, injunction was refused on the ground that the evidence did not tend necessarily to establish that the proposed cemetery would bring about the apprehended result, and further on the ground that "plaintiff had voluntarily put himself by the site of the ground selected for this establishment." And accordingly in the very next volume of the reports (*Clark v. Lawrence,* 59 N. C., 83) it was said that where it was made to appear that a proposed cemetery would endanger the life and health of an adjoining owner, an injunction should be granted, and *Judge Battle,* delivering the opinion of the Court and referring to *Ellison v. Comrs., supra,* said: "The same principle which would excite into activity the restraining power of the court, where the health of the community or of an individual member of it is in danger of being destroyed or impaired by a mill-pond, will be equally ready to interpose its protection when a similar danger is threatened from the establishment of a cemetery in a city or town or very near the dwelling-house of a private person. . . . This, we think, was recognized in the case of *Ellison v. Comrs., supra,* though the decision in that case,
(458) on account of its peculiar circumstances, was adverse to the application for injunction." And in *Vickers v. Durham,* 132 N. C., 880, being a case for injunction against discharging sewage of the city of Durham on property so as to threaten the health of complainant's family, relief was denied in part on the ground that the testimony of the complainant failed to controvert that of defendant as to the efficiency of the disinfecting plant of the city; and the fact that the present right to dump the sewage was of great public importance was also allowed weight

in the conclusion arrived at. Thus *Montgomery, J.*, for the Court, said: "So it appears from everything in the case that the complaint of the plaintiff is based solely upon an apprehension of injury. None of the witnesses of the plaintiff professed to know anything concerning the plant for disinfection or the methods of purification. The plaintiff is simply afraid that he may be injured by something of which he has no theoretical knowledge and with which he has no practical experience. On the other hand, the affidavits filed by the defendant are made by prominent and experienced scientists, and one of them has in several instances seen the practical results of the plan proposed by the city of Durham to dispose of its sewage. In *Dorsey v. Allen,* 85 N. C., 358; 39 Am. Rep., 704, this Court said: 'When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the Court will refrain from interfering.' We think that still the correct rule, though there may be, and are, some expressions to the contrary in *Marshall v. Comrs.,* 89 N. C., 103. In addition to what we have said above, the great importance to the city of Durham of the public work which it is trying to carry out would make us hesitate before we would interfere by injunction." And in *Durham v. Cotton Mills,* 141 N. C., 615, *Walker, J.,* refers to the failure on the part of the complainant to offer available evidence which would have gone far towards establishing the injury complained of if it had been in his favor.

But where the special conditions referred to, and to some extent relied upon in these cases, do not exist, and there are facts in (459) evidence which tend to establish with reasonable certainty that there is a well grounded apprehension of irreparable injury to complainant's health by reason of the threatened and unwarranted use of adjacent property, the decisions in this State are to the effect that such user should be restrained till the hearing. Thus, as far back as *Bell v. Blount,* 11 N. C., 384, being a bill to prevent the erection of a milldam, on the ground that there was reasonable certainty that such a structure threatened the health of citizens living near, the Court held "that, while the object of a bill is to prevent the erection of that which will be productive of injury serious and irreparable if erected, this Court will pass upon the question and interpose its authority to prevent the threatened injury." And in *Raleigh v. Hunter,* 16 N. C., 12, this being a bill to enjoin the maintenance of a milldam, on the ground that it injuriously affected the health of the inhabitants of the town, it was held that the suit was well brought, and *Henderson, J.,* delivering the opinion of the Court, said: "Where the right infringed is of a doubtful character, as the right of view over another's ground, there a court of equity will order the right to be established at law before it will grant an injunction, in the mean-

time staying the owner of the land from closing up the view; but here the rights infringed upon are of a character not in the least doubtful—the health and comfort of the relators and others for whom they act."

In *Eason v. Perkins,* 17 N. C., 38, the principle of these last two cases was affirmed, and that case was distinguished on the ground that it appeared that the mill in question was a great public benefit, and as the injury was only threatened to one family, the private right under the special circumstances there prevailing should yield to the public good.

And a similar decision was made for like reason in *Daughtry v.*
(460) *Warren,* 85 N. C., 136. Again, in *Clark v. Lawrence,* 59 N. C., 83, it was held that when it was made to appear with reasonable certainty that the health of adjacent residents would be affected by the erection of a cemetery, equity would interfere, though in that case a preliminary restraining order was refused on the ground that the evidence did not come up to the requirements so as to bring the case within the principle.

The doctrine announced in these cases in our own Court is supported by well considered decisions in other jurisdictions. *Gilford v. Hospital,* 1 N. Y. Supp., p. 448; *Baltimore v. Impr. Co.,* 87 Md., 352; *Coke v. Burge,* 9 Ga., 425; *Goldsmith v. Impr. Co.,* 1 L. R. Eq. Cases, 1865-66. These and other authorities, too, indicate that it is not practicable to lay down a general rule so clearly defined that its proper application can always be readily made, and each case to some extent must be made to depend upon its own special facts and circumstances. Thus, in *Gilford v. Hospital, supra,* it is said: "The learned counsel have cited many adjudications and the subject is thoroughly treated in Wood's Law of Nuisance. It seems unnecessary to specify cases, because each one differs from most others in facts. In *Ross v. Butler,* 19 N. J. Eq., 294, the Court states a correct conclusion: 'In fact, no precise definition can be given. Each case must be judged of by itself.' In Wood's text-book it is well said, in section 9: 'The locality, the condition of property, and the habits and tastes of those residing there, divested of any fanciful notions or such as are dictated by "dainty modes and habits of living," is the test to apply in a given case. In the very nature of things there can be no definite or fixed standard to control every case in any locality. The question is one of reasonableness or unreasonableness in the use of property, and this is largely dependent upon the locality and its surroundings.' To my mind the hospital is not a reasonable use of property, considering the locality and surroundings."

(461) In the case at bar there is evidence on the part of plaintiff, direct, positive, and specific, that the erection and use of a hospital in that particular locality, in the manner and for the purpose pro-

posed, will be a source of real danger to the lives and health of numbers of people living in that vicinity; and, while the affidavit of defendant himself makes specific response, a large portion of the supporting evidence offered by defendant is very general in its terms and made without reference either to the special locality or to the special manner in which the particular hospital is to be constructed and carried on.

If defendant desires to proceed with the construction of his buildings and risk the results of the trial, the restraining order may be modified to that extent, but any and all use of the buildings for the purposes indicated should be restrained to the hearing, and the judgment of the court below in that respect is affirmed.

Modified and affirmed.

Cited: McManus v. R. R., 150 N. C., 661; *Little v. Lenoir,* 151 N. C., 418; *Berger v. Smith,* 160 N. C., 214.

SOUTHERN AUDIT COMPANY v. M. G. MCKENZIE, TREASURER.

(Filed 22 April, 1908.)

1. Constitutional Law—Legislative Powers—County Commissioners—County Funds—Power Given Other County Agencies.

The Legislature has constitutional power to provide a board of audit and finance for a particular county and to direct that payment of an expert accountant authorized thereunder be made by the county treasurer as a charge against the county's public funds, upon an order made by said board in a certain prescribed manner. Such power is derived under Article VII, sec. 2, of the State Constitution, providing that the county commissioners shall have control of the county's finances "as may be prescribed by law," taken in connection with section 14 thereof, giving full power to the General Assembly to modify, etc., the provisions of this article and to substitute others, etc.

2. County Treasurer—Refusal to Pay County Funds—Proper Order—Mandamus.

Upon refusal of a county treasurer to pay from the public funds of a county an order made on him by a board of audit and finance for the payment of moneys authorized and prescribed by a legislative enactment a *mandamus* will lie.

3. Mandamus—Jurisdiction—Chambers—No Money Demand—County Treasurer.

A judge of the Superior Court has jurisdiction at chambers, and it is his duty to hear and determine proceedings for a *mandamus* to compel the payment by a county treasurer, admitting he had funds sufficient,

of an order made by a county board of audit and finance under authority of a legislative enactment. This was not a money demand within the meaning of Revisal, sec. 824, as there were no issues of fact to be tried by a jury.

4. Mandamus—Duty of County Treasurer.

It is not within the power of a county treasurer to refuse to pay moneys upon a proper order when he has funds sufficient and applicable, and his knowledge as to whether they were due to the one to whom payment was ordered is immaterial in proceedings for a *mandamus* to compel him to pay.

5. Board of Audit and Finance—Authority to Employ Expert—Scope of Employment.

When the act creating a board of audit and finance for a county provides for their compensation for only ten days in any one year at a certain sum per day, and general power is given it to employ an expert accountant and fix his compensation, to be paid from the public funds, etc., it is not thereby required that his work be performed within the time limit prescribed for the members of the board or that his compensation be limited to any particular amount *per diem*.

6. Mandamus—Alternate Writ Unnecessary, When—Peremptory Writ—Supreme Court.

When upon the proceedings for a *mandamus* the defendant has already had a full opportunity for showing cause why a peremptory writ should not issue, which cause was held sufficient by the lower court, but reversed on appeal, and there is no practical use of an alternate writ, the defendant having set up in his answer every reason why a peremptory writ should not issue, such writ may be adjudged by the Supreme Court to issue from the proper judge of the Superior Court upon application at chambers.

APPEAL from *Jones, J.*, at chambers, from ROBESON, 19 December, 1907.

(463) This action was brought for a *mandamus*. The summons was returned before the judge at chambers on 7 December, 1907.

By chapter 488, Laws 1907, the Legislature created a "Board of Audit and Finance of Robeson County," consisting of three members, to investigate and report upon the condition of the finances of the county, to examine the accounts of the county officers, and to perform other duties therein enumerated. It is further provided in said act as follows (section 9): "Said board of audit and finance shall have power, if necessary, to employ counsel to prosecute any public officer or to advise it upon matters of law: *Provided*, that the total compensation for attorney's fees shall not exceed the sum of one hundred dollars ($100) in any one year. Said board shall also have power and authority, if necessary, to employ an expert accountant to assist in any of its inquiries and investigations as herein provided." Section 11: "That the compensation of said board

and the expenses and disbursements thereof as herein provided shall be paid out of the public funds of the county of Robeson upon the order of the chairman of the said board of audit and finance, attested by the secretary of said board; and the Treasurer of Robeson County is hereby *authorized and directed* to pay the same upon presentation to him, and charge the same against the public funds of Robeson County." Section 10 provides that the members of the board shall receive as compensation for their services $5 per day for not more than ten days in any one year.

The plaintiff, a corporation, was employed by the said board as an expert accountant and served as such for sixty-four days, for which service the board allowed it as compensation the sum of $960 and issued an order to the defendant as treasurer of the county to pay it that amount. The treasurer refused to pay the order, and the plaintiff thereupon brought this action. In the complaint it alleges substantially the foregoing facts. The defendant answered the complaint (464) and admitted that the order had been issued and that he had funds in his hands sufficient to pay the same. He denies having any knowledge or information sufficient to form a belief as to whether the board employed the plaintiff as an expert or as to whether it performed any services as such or as to the amount due it for any such service. He avers that the board of county commissioners has never passed upon the claim of the plaintiff or ordered it to be paid, and that he has no authority to pay the same until it is audited and allowed by the commissioners, but that he was notified and instructed by the said commissioners not to pay an order of the board of audit and finance issued to any one for services rendered as an expert accountant under the said act, and that plaintiff's agent was duly notified of this instruction. He further avers "that he has been further instructed by said board to defend this action and he has filed this answer for the sole purpose of protecting the public funds of the county of Robeson, under his instructions, and for the further purpose of determining and having settled the power and authority of the said board of audit and finance of the county of Robeson to direct the payment of orders out of the public funds of Robeson County without the approval of the board of commissioners of said county, and also for the purpose of protecting himself from possible liability on account of any payment which should be made by him under such order; that this answer is filed for the purpose of determining the legality of the said order, and not otherwise. If the court holds the said order to be proper and lawful and that the same should be paid by this defendant out of the public funds of the county of Robeson, the same will be promptly paid and all the orders of the court carried out."

When the cause came on for hearing before the judge, upon the plain-

tiff's motion for a *mandamus* and the defendant's motion to dismiss the action, he made the following order:

(465) "This cause coming on to be heard, and being heard upon the written motions of defendant filed and the pleadings and affidavits, the motion of defendant to dismiss the action is denied, but the motion to transfer the cause at chambers to the Superior Court in term is allowed, when and where the defendant will appear and show cause why a peremptory *mandamus* shall not issue compelling the defendant to make payment of plaintiff's claim set out in the complaint."

The plaintiff excepted and appealed.

Morrison & Whitlock for plaintiff.
McIntyre, Lawrence & Proctor for defendant.

WALKER, J., after stating the case: The first question to be considered is the one raised in the defendant's answer, that the act of 1907 creating a board of audit and finance is in violation of Article VII, sec. 2, of the Constitution, which provides that the county commissioners shall have general supervision and control of the finances of the county "as may be prescribed by law." It is therefore insisted that the Legislature had no power to authorize the payment of money by the county treasurer to any one except upon the order of the commissioners. The answer to this contention is that the supervision and control of the commissioners must by the express terms of section 2, Article VII, be exercised "as may be prescribed by law," and section 14 of the same article provides that "The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article and substitute others in their place, except sections 7, 9, and 13." Section 14 has recently been construed in *Smith v. School Trustees,* 141 N. C., at p. 157, in which *Justice Hoke,* for the Court, says: "The language of section 14 is very broad in its scope and terms, and the Supreme Court in construing the section has declared that it is not necessary, to effect changes in municipal government, that an act for the purpose should be

(466) general in its operation or that it should in terms abrogate one article or substitute another in its stead, but that an act of the General Assembly making such change, and local in its operation, must be given effect under this amendment, if otherwise valid." After declaring this as a principle of construction the Court, in *Harris v. Wright,* 121 N. C., 179, further holds as follows: "In 1875 a constitutional convention amended Article VII in these words: 'The General Assembly shall have full power by statute to modify, change, or abrogate any and all the provisions of this article and substitute others in their place,

except sections 7, 9, and 13.' Thus was placed at the will and discretion of the Assembly, the political branch of the State Government, the election of court officers, the duty of county commissioners, the division of counties into districts, the corporate power of districts and townships, the election of township officers, the assessment of taxable property, the drawing of money from the county or township treasury, the entry of officers on duty, the appointment of justices of the peace, and all charters, ordinances, and provisions relating to municipal corporations." The act is therefore valid as being within the legislative power.

When the plaintiff seeks relief by *mandamus* "other than the enforcement of a money demand," the statute requires that the summons shall be returnable before a judge of the Superior Court at chambers or in term, on a day to be specified, not less than ten days after a service of the summons and complaint upon the defendant, at which time the court, except for cause shown, shall proceed to hear and determine the matter, both as to the law and the facts, provided that if an issue of fact is raised by the pleadings it shall on motion of either party be referred to a jury. Revisal, sec. 824. If the relief asked by the plaintiff in this case was not the enforcement of a money demand, the judge had jurisdiction of the case at chambers, and it was his duty to hear and determine the case, and his order transferring it to term was consequently erroneous.

It is evident that the transfer was not made for the purpose (467) merely of continuing the case to be heard at a more convenient time for good cause shown, but because the judge was of the opinion that he could not take cognizance of the case at chambers except for the purpose of making the transfer. In this ruling there was error. In *Martin v. Clark,* 135 N. C., 178, we held that the judge had jurisdiction at chambers of an application for a *mandamus* to compel a county treasurer to pay an order of the county commissioners out of a specific fund which was designated in the order, it not being a money demand within the meaning of The Code, sec. 623; Revisal, sec. 824. The reason assigned for the decision is that the treasurer is a ministerial officer, who is charged with the duty of holding the public funds and paying them out on the warrant of the commissioners. "The commissioners have audited and allowed the claim and having issued a warrant for its payment by the treasurer out of a specific fund, it is his duty to do so, provided he has such funds in his hands applicable to such claim." In that case there was a transfer of the cause by order to term, but for the declared purpose of trying certain issues raised by the pleadings. This was, of course, held to be proper, as it was according to the express terms of the statute. In our case, however, there is no issue of fact to be tried. All the facts necessary to entitle the plaintiff to the relief demanded have

been admitted. It is true, the defendant denies that he has any knowledge or information sufficient to form a belief as to whether the particular services to pay which the order was issued were in fact rendered, but it is immaterial whether he has such knowledge or not. "It cannot be within the power or duty of the treasurer of the county to refuse to pay a county order issued by the board of commissioners, because he does not think it a just or lawful claim, or for any other reason, which has been passed upon by the board and within its power to act." *Martin v. Clark*, 135 N. C., 180. Indeed, the defendant admits that he has suffi-
(468) cient funds in his hands with which to pay the claim, and that he filed his answer for the purpose of ascertaining what is his legal duty in the premises and to protect himself against a wrongful payment. He cannot attack the order collaterally by merely denying that he has any knowledge of the transactions upon which it was based, no fraud or other illegality being alleged. The act requiring the board of audit and finance to determine what the compensation of the expert should be, and, in the absence of any sufficient averment that they have acted beyond their power or that the order was fraudulently or improperly obtained, their decision is at least *prima facie* correct, if not conclusive. It certainly cannot be impeached by a mere technical denial that the services in payment of which it was given were in fact rendered.

The fact that the members of the board of audit and finance are allowed by the act compensation for only ten days in any one year at $5 a day does not require that the work of the expert accountant employed by the board shall be performed within that time, or limit his compensation to any particular amount *per diem* not exceeding ten days. The general power is given to employ an expert accountant and fix the compensation for his services, to be paid from the public funds, and for which an order may be issued by the board directly to the treasurer and without the supervision or approval of the county commissioners. As the official conduct of the county commissioners and the management of the affairs of the county by them were within the scope of the investigation permitted to be made by the board of audit and finance, the Legislature perhaps thought it wise or at least prudent that the compensation of the accountant should not be subject to their control. Independence of them by the board of audit and finance seems to have been considered by the Legislature as essential to a due execution of the purpose which prompted the passage of the act. Whatever may have been the motive
of the Legislature (and with that we have nothing to do), it is
(469) plain to us that the meaning of the act is what we have herein declared it to be.

As all the facts essential to a recovery by the plaintiff were admitted,

the judge should have proceeded to determine the case at chambers, and his failure to do so was error. There would be no practical use in issuing an alternative writ, for the defendant has already had a full opportunity for showing cause why a peremptory writ should not issue, as he has filed an answer assigning every reason he can why such a writ should not be awarded. His reasons being insufficient, the plaintiff is entitled to a peremptory writ of *mandamus,* and may apply for the same to the judge in the county of Robeson by motion at chambers, upon giving the proper notice.

Error.

Cited: *Coleman v. Coleman,* 148 N. C., 301.

W. L. WATSON, TRUSTEE IN BANKRUPTCY OF W. W. MILLS COMPANY, v. PROXIMITY MANUFACTURING COMPANY.

(Filed 22 April, 1908.)

PLAINTIFF'S APPEAL.

1. Bankruptcy—Trustee—Estoppel.

A trustee in bankruptcy is estopped by the acts of the bankrupt, in the absence of fraud, and bound by his conduct and agreements to the same extent the bankrupt would have been bound before the adjudication.

2. Corporations—Principal and Agent—Loan Apparently to Officer—Liability of Corporation—Evidence Aliunde—Presumptions.

It is competent to show by evidence *aliunde* that a loan apparently made to an officer of a corporation was in fact made to the corporation. Therefore, when it appears from the evidence that the plaintiff corporation urgently requested a loan of money of defendant, which was refused, and at or about the same time its president and treasurer, and owner of most of its stock, went to defendant and secured from it the loan upon his individual note and collateral, under such facts and circumstances as to reasonably infer that the loan was for his corporation and that he was acting for it, the latter will be bound to its payment.

3. Corporations—Principal and Agent—Loan Apparently to Officer—Liability of Corporation—Presumptions—Surrender of Collaterals—Application of Funds.

When M. had entered into a contract with defendant to furnish a large quantity of lumber for the building of its mills, and subsequently he formed a corporation for the purpose of continuing this business, of which he was president and treasurer and owner of nearly all of the stock; and subsequently when the plaintiff corporation, being in need of money to carry out the contract which with the consent of the defendant it had assumed, applied to defendant for a loan and was refused, but at

or about that time it was made upon the application of M., the president, upon his personal note and collateral: *Held*, (1) that the defendant had a right to suppose that the loan was for the corporation and in aid of the contract in the performance of which the defendant was greatly interested; (2) that at the maturity of the loan it was reasonable for defendant to charge the amount against the account for lumber furnished by the plaintiff corporation at the request of the president and surrender to him his personal note and collaterals; (3) that it was not incumbent upon defendant to see to the application of the funds derived from the loan in order to charge the plaintiff corporation therewith.

4. Same—Ratification.

Evidence of ratification by a corporation of the act of its president, who practically controlled it, in directing it to be charged with his personal note given to defendant for moneys advanced inferentially for the benefit of the corporation, is sufficient which tends to prove that defendant acted in good faith in taking the credit and surrendering to the president his personal note and securities; that at the time the president and his corporation were both solvent; that defendant was credited with the amount by the bookkeeper of plaintiff corporation, and moneys were had of defendant upon the strength of the credit; all the members of the corporation had notice of it, it was never questioned in subsequent dealings and no demand was made on account thereof until after both the president and his corporation were adjudicated bankrupts.

5. Corporations—Power of President, Express or Implied.

The management of the entire business of a corporation may be intrusted to its president, either by express resolution of the directors or by acquiescence in a course of dealing.

APPEAL from *Long, J.*, at October Term, 1907, of WAKE.

This is a civil action, brought by plaintiff as trustee in bank-
(471) ruptcy of the above named corporation to recover of defendant a large balance alleged to be due on an account for lumber furnished defendant, and for damages alleged to have been sustained by the bankrupt for a breach of a part of said contract relating to maple flooring, etc. The cause was referred to R. H. Battle, Esq., who heard it and made his findings of fact and law, and duly reported the same, together with the evidence taken. Plaintiff and defendant filed exceptions to the report, which were heard at October Term, 1907, of the Superior Court of Wake County, by *Long, J.*, who overruled all the exceptions, confirmed the report, and rendered judgment against defendant for the sum of $1,632.60, with interest from 1 August, 1904. Both plaintiff and defendant excepted and appealed. The plaintiff excepted to the ruling of the referee allowing the defendant credit for an item of $10,000, the facts concerning which are stated in the opinion of the Court.

R. C. Strong and R. N. Simms for plaintiff.
King & Kimball and J. H. Pou for defendant.

BROWN, J., after stating the facts: It appears from the findings of the referee that on 3 September, 1902, the defendant contracted with W. W. Mills for the delivery by said Mills of a large quantity of lumber for the construction of a factory. The defendant shortly thereafter advanced Mills $10,000 to assist him in carrying out his contract, which was repaid by lumber shipped to defendant by Mills and by the bankrupt corporation after it was created. About the end of 1902 W. W. Mills caused to be organized a corporation by the name of W. W. Mills Company, with an authorized capital stock of $200,000. Of this amount $190,000 was issued to W. W. Mills and $5,000 to R. D. Godwin. W. W. Mills was president and treasurer, and in the absence of directors and when no special meeting was held he was allowed and did exercise the power of making such contracts as to him seemed wise. No (472) act of Mills was ever questioned by the company. Fifty shares of stock were issued each to Godwin and Woollet without payment and to qualify them to act as officers of the corporation. Neither ever paid for this stock. Mills conveyed to this corporation his entire lumber manufacturing plant—property, contracts, and business. The defendant making no objection, the W. W. Mills Company undertook to complete the performance of the contract for the delivery of the lumber. There appears to have been much delay upon the part of the Mills Company in making deliveries during 1903, occasioned evidently by lack of available money to push its business. On 28 July, 1903, the W. W. Mills Company wrote to defendant and asked as "an accommodation" an advance of "a few thousand by return mail," saying they had to meet calls for ten or twelve thousand "first of the week." On the same day W. W. Mills, president and treasurer, in person, went to Greensboro to see Ceasar Cone, president of defendant company. He obtained an advance of $10,000, giving his personal note, with stock in the Carolina Trust Company as collateral, to secure this advance. When the note fell due W. W. Mills, the president and treasurer of his corporation, directed that the amount be charged to said company as a payment by defendant upon the lumber contract. This was done and the note canceled and the collateral delivered to W. W. Mills. On 22 December, 1903, Godwin, secretary for the Mills Company, in partial settlement with defendant, gave to defendant a statement of account, which showed a credit to defendant of this $10,000. The ledger of the W. W. Mills Company showed that defendant was credited 11 January, 1904, with $10,000, and it is not denied that this is the disputed item or the "second ten thousand" loaned 28 July, 1903. The W. W. Mills Company and W. W. Mills have been adjudicated bankrupts and the plaintiff, W. L. Watson, appointed trustee in bankruptcy. Both the referee and the court be-

(473) low held that defendant was entitled to a credit for this $10,000.

The correctness of this ruling is the sole point presented by plaintiff's appeal. It is contended by the defendant that the trustee stands in the shoes of the bankrupt and represents only the creditors in existence at the time of bankruptcy, and that the trustee can assert no right which the bankrupt could not assert. Under the authority of well considered cases we are of opinion that the trustee is estopped by the acts of the bankrupt and bound by its conduct and agreements to the same extent that the bankrupt would be bound before the adjudication, especially in view of the fact that there is no suggestion, much less evidence, of fraud in the transaction of 11 January, 1904, when the defendant was regularly credited on the books of the seller with this $10,000 item. There was not only no purpose to defraud any creditor of the bankrupt, but there appears to be no creditor in existence who extended credit until some time subsequent to that date. *Thompson v. Fairbanks,* 196 U. S., 296; *Hewitt v. Berlin Co.,* 194 U. S., 296; *R. R. v. Hurley,* 153 Fed., 503; Loveland on Bankruptcy, p. 436; *In re Mfg. Co.,* 152 Fed., 152; *Engle's case,* 105 Fed., 818. Therefore it follows, in the absence of any finding of fraud, that if the W. W. Mills Company could not recover the $10,000 and is bound by its act in giving credit therefor, the plaintiff, its trustee in bankruptcy, is likewise bound and cannot recover.

We think that the exception of the plaintiff to the ruling of the referee and of the court below confirming it cannot be sustained.

1. Upon the facts found by the referee, as well as from the uncontradicted evidence, the inference appears to us to be plain that the money was borrowed for the benefit of the bankrupt and not for W. W. Mills personally. The course of dealing in respect to the contract shows that the defendant had advanced $10,000 to W. W. Mills to assist him

(474) in performing it, and that when his lumber business was incorporated the corporation took over the contract and repaid a large part of such advance. It is plain from the evidence that the company during the spring and summer of 1903 was in great need of cash to carry on its business. Its secretary writes to the defendant: "We have been running without money recently, until we have about dried up and there is not much left of us. However, we keep trying to do." It was not Mills personally who wrote the letter to defendant of 28 July asking for an advance loan of "a few thousand by return mail" in order to meet urgent demands on the company, but it was the W. W. Mills corporation, by its secretary. The matter was so pressing that the president and treasurer, W. W. Mills, followed the letter at once and went to Greensboro to negotiate the loan, evidently for his company and not for himself. As the defendant refused to advance the Mills Company anything further

on open account, it is a fair inference that in order to obtain the money Mills hypothecated his own note and secureties for the benefit of the corportation, of which he was practically owner. That the corporation received the benefit of it is evidenced by the fact that on 22 December, 1903, Godwin, secretary, rendered a statement of account crediting the defendant with this $10,000, and on the strength of it drew more money; and also by the fact that the credit to the defendant is entered by the bookkeeper on the ledger of the Mills Company. It is competent to show by evidence *aliunde,* and we think it fully proven, that the loan was in truth made to the company and not to Mills, although in form to the latter. 7 Thompson Corp., sec. 8402; *Jones v. Williams,* 37 L. R. A., 682. Thompson, at the end of paragraph 8402, says: "A contract made by the holder of a majority or most of the shares of a corporation, without disclosing that the person signing the contract acted as agent for the corporation, may nevertheless be shown by evidence *aliunde* to have been intended as a corporate contract, and should be specifically enforced in equity as against such corporation." Again, "Although (475) the form of the transaction may be such as to indicate that it is the individual debt of the president of a corporation, yet if in point of fact the money was advanced for the use of the corporation, to be repaid out of its funds, it will be bound to make it good." Section 8412. *Lafferty v. Hall,* 19 Ky. L., 1777; *Staples v. Bank,* 66 N. W., 314. When Mills appeared at Greensboro, supplementing by his presence the company's written request for the loan, the defendant had the right to suppose that the loan was for the company and in aid of the contract in the performance of which the defendant was greatly interested. And when the debt fell due and Mills directed that it be charged up to the corporate account it was entirely reasonable that the defendant should do as directed—surrender the collateral and not question Mills' authority. He combined in himself the four attributes of president, treasurer, general manager, majority stockholder, and actually sole stockholder. The powers of such a person are set out in Thompson, 8556, who says: "A stranger dealing with the corporation is not affected by secret restrictions upon his (such manager's) powers of which he has no notice. In short, the powers of one who has been appointed general manager of the business of a corporation are, in America, generally understood to be coextensive with the general scope of its business. He has, for example, the implied power to dispose of its property in the ordinary course of its business. A person dealing with the corporation through him may safely act on the assumption of his possessing this power, in the absence of anything indicating a want of it." The management of the entire business of a corporation may be intrusted to its president either by express

resolution of the directors or by their acquiescence in a course of dealing. *Jones v. Williams, supra.* The evidence discloses not only that all of Mills' acts were acquiesced in by his two associates in the corporation, but that Mills was the corporation and the corporation was Mills.
(476) He controlled the business as absolutely after its incorporation as he did before.

2. It is contended that there is no evidence that the corporation actually received the money advanced by the defendant or any benefit from it. While we think there is evidence that it did, yet the authorities hold as matter of law that the defendant was not bound to see that Mills applied the money to the relief of the company's needs or to the purposes for which it was obtained. We think we have shown that from all the evidence and findings the loan was first applied for directly by the corporation, acting through its secretary, for corporate purposes, and that the negotiation was conducted by Mills, its president and treasurer, in person, for the corporation, to a successful conclusion. As he was the treasurer and president, as well as in effect sole owner of the corporation, the defendant was authorized to pay him the money. There was no one else authorized to receive it. The fact that in order to obtain the advance for the company as applied for in its letter Mills was required to put up his own individual securities does not make it any the less a corporate obligation or a transaction for and in behalf of the corporation. In reference to this Judge Thompson says: "One who lends money to a corporation through its principal officer on the pledge of its security as collateral is not bound to see that the money is applied to the corporation purposes, nor is he put upon inquiry as to whether it is a transaction of the corporation or of its officer, from the fact that the individual note of the officer is offered as additional security." Thomp. Corp., sec. 8412. Having advanced the money at the request of the corporation for the evident purpose of enabling it to perform its contract with defendant, and having paid the money to its treasurer, it was not incumbent on the defendant, in order to charge the corporation, to follow the fund any further. *Loan Co. v. Gas Co.*, 42 N. Y. Supp., 781; *Long Island Co. v. R. R.*, 65 Fed., 455. As said in the *Buffalo case,* "The corporation was then present at the time of the transaction and received
(477) the money through its representative and by means of the statement that the funds were desired for corporate purposes. In contemplation of law, therefore, the funds came into possession of the company; and that being the case, the plaintiff was under no obligation to see to it that the moneys were applied to the purposes for which the obligations were issued, and consequently it is not responsible for their misapplication."

3. The act of Mills in directing the defendant to charge up the $10,000 to his corporation was fully ratified, as shown by the facts found by the referee, and his findings are fully sustained by the evidence. The referee finds and the evidence proves that the defendant acted in entire good faith in taking the credit and in surrendering the securities deposited by Mills; that at that time he and his corporation were both solvent and that the defendant had no knowledge of the state of account between Mills and his company. The defendant was credited with the sum on the books of the corporation by its bookkeeper and a statement containing such credit exhibited to defendant and $3,000 more drawn by the secretary from defendant on the strength of it. All the members of the corporation had notice of the credit and assented to it, and it was never questioned by the Mills Company or any member of it during the subsequent dealings with defendant, and no demand was ever made on account thereof until after the corporation and Mills himself were both adjudicated bankrupts. It would seem that if the act of Mills needed ratification, it has been fully ratified and adopted by the company and all its members. *Jones v. Williams,* 37 L. R. A., 688; Thompson on Corporations, secs. 5249, 5250, and 5251.

We concur with the court below in overruling the plaintiff's exception to the report of the referee, and upon the plaintiff's appeal the judgment is

Affirmed.

The cost of this appeal will be taxed against the plaintiff.

Cited: *Bank v. Oil Co.,* 157 N. C., 306, 314; *Fountain v. Lumber Co.,* 161 N. C., 37.

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DEFENDANT'S APPEAL.

Appeal and Error—Exceptions to Findings of Fact.

When the exceptions to the report of a referee and to the order of the judge confirming it are directed to correct finding of fact upon competent evidence and to correct conclusions of law arising therefrom, the judgment below will be affirmed.

PER CURIAM. The defendant filed a number of exceptions to the report of the referee embodying its contentions: First, that the maple flooring contract was rescinded in January, 1904, and that no damages can be claimed for not taking the portion then undelivered. Second, that it is entitled to hold the 2 per cent discount on money advanced to pay freight. Third, that it is entitled to damages sustained by failure of W. W. Mills and W. W. Mills Company to complete delivery of all of the lumber under contract of 3 September, 1902, by 1 December, 1903.

We find no exceptions to the rulings of the referee upon matters of evidence. Fifteen of defendant's exceptions are to the findings of fact and four to the conclusions of law of the referee. We think, upon an examination of the record, that there is evidence to support all the findings of fact. Having made such findings, the conclusions of law reached by the referee upon such facts are correct. The matter as disclosed by defendant's appeal seems to be almost entirely one of fact. We find no error in the ruling of the Superior Court overruling the exceptions and confirming the report.

The costs of this appeal will be paid by defendant.

Judgment affirmed.

W. J. WITTY v. J. R. BARHAM ET AL.

(Filed 22 April, 1908.)

1. Deeds and Conveyances—Execution—Husband and Wife—Feme Covert—Abandonment—Evidence.

In an action of ejectment by a purchaser under trust deeds executed by a *feme covert*, when the defense is that the husband had not executed the deeds with her, the deeds were competent as evidence in making out plaintiff's chain of title. The question of their effect was a subsequent matter and presented the real point at issue.

2. Same—Corroborative Evidence—Husband's Absence and Subsequent Marriage—Certificate of Marriage.

When the question of the validity of a deed of a *feme covert* in which the husband did not join depends upon whether or not the husband had not previously abandoned her, evidence is competent which tends to show the long-continued absence of the husband, and, as corroborative of evidence that he had subsequently been married, the certificate of such marriage.

3. Same—Wife's Destitute Circumstances.

To support the validity of trust deeds made by a *feme covert* without the execution of her husband, upon the question of abandonment, evidence of her extreme destitution at the time of their execution and that it was necessary for her to mortgage her land at the time in order to procure means of living was not incompetent.

4. Same—Pleadings—Evidential Matters.

The question of abandonment affecting the validity of a deed made by a *feme covert* without her husband joining therein is evidential matter, and arises only when objection is made thereto, and it is not required to be set up by plea.

5. Same—Transactions With Deceased—Husband an Interested Witness—Daughter Cannot Corroborate.

The husband is an interested witness in the event of the action, though not a party, when a trust deed made by his deceased wife is being attacked for the want of his joining therein; and upon the question of abandonment his evidence to the effect that his wife said to him she would give him a horse if he would leave and stay was incompetent. (Revisal, sec. 1631.) The testimony of the daughter that she heard the conversation to that effect would be the "indirect testimony of an interested witness as to a transaction or communication with deceased," and also incompetent.

6. Husband and Wife—Abandonment—Within the State.

To constitute abandonment it is not necessary that the husband should *leave the State, under Revisal, sec. 1631.*

7. Husband and Wife—Agreement to Separate Not Abandonment—Subsequent Conduct and Abandonment.

A separation by consent of husband and wife does not constitute abandonment. But when the evidence establishing a long and unbroken absence of the husband thereafter, without communication; that the wife was destitute and was compelled to mortgage her land for her own support; that the husband in the meantime married and had lived consecutively with two other women, abandonment was proved.

ACTION tried before *Ferguson, J.,* and a jury, at June Term, (480) 1907, of ROCKINGHAM.

Defendants appealed.

Scott & Reid for plaintiff.
Manly & Hendren and C. O. McMichael for defendants.

CLARK, C. J. Ejectment by purchaser at sale under trust deeds executed by Martha Daniel of Rockingham County, in 1892, 1893, and 1894, without the joining therein or written assent of her husband, Charles G. Daniel, to whom she had been married in 1882. They had one child born alive, but since dead. The husband left her in 1883 and did not thereafter reside with her. He married Esther Lyerly, in Rowan County, in 1891, and, she dying in a few months, he married still another wife, in Rowan, in 1894, with whom he is still living and by whom he has six children. In 1900 Martha Daniel died. The defendants are her children by a former marriage.

The introduction of the deeds in trust in making out chain of title was proper, and indeed necessary. The question of their effect was a subsequent matter and presents the real point in the case. Charles G. Daniel testified to his continuous absence from his wife from 1883 and to his two subsequent marriages above stated. The certified copy of the marriage

license of Charles G. Daniel and Esther Lyerly and of the certifi-
(481) cate of marriage between them was competent to corroborate his evidence to that effect. Besides, there was the written agreement of counsel that this record should be admitted, to avoid, we presume, the expense of summoning witnesses. The evidence of the extreme destitution of Martha Daniel at the time of the execution of these deeds in trust, and that it was necessary for her to mortgage her land in order to procure means of living, while not necessary evidence, was certainly not incompetent. Nor was it necessary to allege in the complaint that Martha Daniel executed the deeds in trust without the written assent of her husband, because abandoned by him. That was evidential matter, arising only when objection was made to the validity of the deeds. This was not an equitable matter requiring to be set up by plea, like under influence or fraud in the treaty, but went to the legal validity of the deed, like mental incapacity to execute it or fraud in the *factum,* which can be put in evidence, though not pleaded. *Alley v. Howell,* 141 N. C., 113. The defendants did plead that the husband did not assent in writing to the trust deeds, but it was not necessary.

The witness Charles G. Daniel testified that he and his wife "could not get along together. She told me she would give me a horse if I would leave and stay. I took the horse. I cannot say why she gave me the horse, unless it was to get rid of me. I left because I thought she did not want me there after she made me the offer she did." The court, on motion of plaintiff, properly struck out this evidence as abnoxious, under Revisal, sec. 1631. *Bunn v. Todd,* 107 N. C., 266. While the witness was not a party to the action, he is a "person interested in the event of the action," since if the plaintiff is defeated of recovery by the invalidity of the deeds in trust the husband is entitled to the enjoyment of the lands for life as tenant by the curtesy.

The court also properly excluded the testimony of one of the defend-
(482) ants offered to prove that she heard the aforesaid conversation between her mother and said Charles G. Daniel, as that would be the "indirect testimony of an interested witness as to a transaction or communication with the deceased." *Stocks v. Cannon,* 139 N. C., 60. Such witness would have been competent to testify to "any substantive and independent fact" that was not "a communication or personal transaction" with the deceased, as, in *Gray v. Cooper,* 65 N. C., 183, that the deceased had possession and use of the slaves, or (*March v. Verble,* 79 N. C., 19) that the deceased had owned but one bull since the war, and his value, and the numerous cases which hold that an interested witness can prove the handwriting of the deceased, but not that she saw him sign the paper sued on. *Davidson v. Bardin,* 139 N. C., 2.

But had the evidence not been incompetent under Revisal, sec. 1631, it would have been irrelevant and its exclusion proper. Revisal, sec. 2117, provides: "Every woman whose husband shall abandon her or shall maliciously turn her out of doors shall be deemed a free trader so far as to be competent to contract and be contracted with, and she shall have power to convey her personal estate and her real estate without the assent of her husband." This statute was held constitutional (*Hall v. Walker,* 118 N. C., 377) and has been cited as authority. *Brown v. Brown,* 121 N. C., 10; *Finger v. Hunter,* 130 N. C., 531; *Smith v. Bruton,* 137 N. C., 81. To constitute abandonment it is not necessary that the husband should leave the State. *Vandiford v. Humphrey,* 139 N. C., 65.

It is true that if husband and wife live separately by consent, that is not abandonment. But the evidence here that the husband left his wife in 1883, never thereafter visited her or communicated with her, that she was without means of support and in great destitution, was compelled to mortgage her land, and that the husband in the meantime married and lived consecutively with two other women, fully established abandonment, which would in no wise be controverted by showing that the day he left home his wife consented to his leaving and even gave him (483) a horse to go. That would show that he did not abandon her that day. But his subsequent conduct—the long years of unbroken absence and silence, without any contribution to his wife's support in her great destitution, and his two subsequent marriages during her lifetime—unquestionably proves abandonment, full, complete, and absolute, though it should be shown that the husband originally left home with his wife's consent. It does not appear whether there have been any criminal proceedings instituted for bigamy.

No error.

Cited: *Harrell v. Hagan,* 150 N. C., 244; *S. v. Toney,* 162 N. C., 637; *S. v. Smith,* 164 N. C., 479; *Grissom v. Grissom,* 170 N. C., 99.

STATE EX REL. NORTH CAROLINA CORPORATION COMMISSION AND HART-WARD HARDWARE COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 22 April, 1908.)

1. Appeal and Error—Corporation Commission—Appeal Will Lie, When—Procedure.

Unless given in express terms, an appeal will only lie from orders and rulings of the Corporation Commission when such orders affect some right or interest of the parties to the controversy.

2. Appeal and Error—Penalty Statutes—Corporation Commission—Rules—Jurisdiction—Orders, How Enforcible—Appeal Will Not Lie, When—Procedure.

The Corporation Commission has no power to enforce its orders and decrees by final process issuing directly therefrom, and for such purpose resort must be had to ordinary courts, either by independent proceedings or in proper instances by process issued in cases carried before such courts of appeal. Therefore, when on complaint made by a consignee of goods investigation was had and award made that a rule of the commission had been violated by the railway and that a penalty provided by such rule should be paid, and further that the rules of the Corporation Commission made for protection of shippers in such cases should be observed and obeyed, no appeal lies from such ruling, as the statute and rules themselves already require obedience, and consequently no right or interest of the parties was in any way affected.

3. Same—Power to Investigate—Suit for Penalty.

The statute itself requiring that all lawful rules of the Corporation Commission should be obeyed, and the penalty allowed by the rule in this instance being only recoverable by action in a court of a justice of the peace, the only effect of the proceedings and orders made was to inform the commission on the subject-matter of the complaint and to enable it to intelligently determine whether suit should be entered by the commission for the larger penalty of $500 allowed by statute for disobedience of its lawful rules and orders; and, no appealable order having been made, the proceedings both in the Superior and Supreme Courts are *coram non judice*, and will be dismissed on motion.

(484) THIS was a proceeding instituted before the Corporation Commission at the instance of Hart-Ward Company, consignees, against the Southern Railway Company, brought by appeal of defendant company before the Superior Court of WAKE County, where, on issues framed and submitted, it was tried before *Long, J.*, and a jury, at October Term, 1907, of said court.

It was made to appear that the Corporation Commission, acting under power expressly conferred upon it by the statute (Revisal, sec. 1100), established the following rule, same being known as Rule No. 8, and set forth in Circular No. 36 in the report of 1905: "When any railroad company fails to deliver freights at the depot or to place loaded cars at an accessible place for unloading within forty-eight hours (not including Sundays and legal holidays), computed from 7 o'clock a. m. the day after the arrival of same, the shipper or consignee shall be paid $1 per day for each day or fraction of a day said delivery is so delayed: *Provided*, the railroad company may require the payment of freight before delivery." That the Hart-Ward Company, consignees of certain freight shipped over the railroad of defendant company from Greensboro, N. C., made complaint before the commission that said rule had been violated, to

their injury to the amount of $2 for two days wrongful delay, in violation of the damage rule.

Thereupon the commission caused citation to issue to defendant (485) company and instituted the present inquiry as to said alleged wrong. Hearing was had, witnesses summoned and examined, and judgment was entered by a majority of the commission as follows:

"This cause coming on to be heard upon exception by defendant, the defendant being represented by Messrs. Busbee & Son and the complainant by Mr. Frank Ward, the commission is of the opinion that such exception should be overruled.

"The Corporation Commission is authorized by section 1100 of the Revisal of 1905 to make rules governing railroad companies in the placing of cars for loading and unloading and in fixing the time limit for delivery of freight after same shall have been received by the transportation companies for shipment. Under this statute (section 1100, Revisal of 1905) the Corporation Commission made the following rule: 'When any railroad company fails to deliver freight at the depot or to place loaded cars at an accessible place for unloading within forty-eight hours (not including Sundays and legal holidays), computed from 7 o'clock a. m. the day after the arrival of the same, the shipper or consignee shall be paid $1 per day for each day or fraction of a day said delivery is so delayed: *Provided,* the railroad company may require the payment of freight before delivery.' Complainant alleges that this rule has been violated.

"While the Corporation Commission has no power to render a judgment for payment of money, it is its duty to enforce its rules and orders, and the power to do so is conferred by section 1086 of the Revisal of 1905.

"The investigation in this case was for the purpose of ascertaining whether the rule of the commission had been violated, and if so, what recompense the defendant should make for the wrong or injury.

"The finding of the commission is to the effect that the defendant should pay complainant $1. The argument on behalf of the defendant fails to convince the commission that any error was committed at the former hearing. (486)

"It is ordered that all of the exceptions be and they are hereby overruled."

Commissioner Rogers dissented on the ground that the material facts had not been proven.

Defendant company excepted to the judgment of the commission and appealed to the Superior Court of Wake County, in term, where it was tried before *Long, J.,* and a jury, at October Term, 1907.

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

1. Did the consignee send for and request of the defendant the delivery of the contents of the car every day after notification until they were delivered? Answer: "Yes."

2. Was the consignee diligent in trying to get its freight? Answer: "No."

3. Did the defendant's delivery clerk mislead the consignee or its agent as to the car not being in place for delivery of the freight, and was the plaintiff thus prevented from unloading the car on 1 November? Answer: "Yes."

4. When was the phone message given by the defendant to the plaintiff showing the same placed for delivery? Answer: "November 3d."

And on said issues judgment was rendered as follows:

"This cause coming on to be heard before the undersigned and a jury, upon the whole record in the cause, and being heard, and the court having submitted the issues set out in the record to the jury, and the jury having made the answers thereto as appear in the record, and it appearing that the cause has been brought to this court upon exceptions by the defendant company, numbered one, two, three, and four, as set out in the record: It is therefore considered and adjudged by the court that the Corporation Commission had the power, under the provisions of section 1100 of the Revisal of 1905, to make the ruling introduced in
(487) evidence in the trial of this cause, to wit: 'When any railroad company fails to deliver freight at the depot or to place loaded cars at an accessible place for unloading within forty-eight hours (not including Sundays and legal holidays), computing from 7 o'clock a. m., the day after the arrival of the same, the shipper or consignee shall be paid $1 per day for each day or fraction of a day said delivery is so delayed: *Provided,* the railroad company may require the payment of freight before delivery.'

"It is further considered and adjudged that the Corporation Commission, under the laws, has the power to make an investigation as to whether or not such rule has been violated, and in this case did not exceed its power in making such investigation.

"The commission, in its judgment, at the conclusion thereof, uses the following language: 'The commission is of the further opinion that the complainants are entitled to recover demurrage one day to the amount of $1, and the defendant, the Southern Railway Company, is hereby ordered to pay that sum to the Hart-Ward Hardware Company.' The court does not interpret this portion of the judgment to mean that it was the purpose of the Corporation Commission to issue an execution and collect the said dollar from the defendant, but that it was the intention of the Cor-

poration Commission, after making said finding and order, to leave the plaintiff to its remedy for the collection of the same in the proper court.

"It is further ordered and adjudged by the court, upon the whole record, that the prayer of the defendant asking that the order of the commission be revoked and vacated be and the same is denied, and the plaintiff is left to pursue such remedy as it may be advised under the order and findings made by the Corporation Commission.

"It is further considered and adjudged that the defendant pay the costs of this appeal, to be taxed by the clerk."

From this judgment the defendant company, having excepted, appealed to the Supreme Court.

R. N. Simms for plaintiff. (488)
F. H. Bushbee & Son for defendant.

HOKE, J., after stating the facts: The Court is of opinion that there was no appealable order made in this cause by the Corporation Commission, and, this being true, we are not in a position to make authoritative deliverance on the important and interesting questions indicated in the record and which were so learnedly argued by counsel. As to the Supreme and Superior Courts, the proceedings are *coram non judice.* Whether the Legislature may or may not have the constitutional right to confer on the commission jurisdiction of questions strictly judicial in their nature, a persual of the act creating the commission clearly shows that this legislation nowhere confers upon the commission the power to enforce its orders and decrees by final process issuing directly from themselves. They are given in general terms power to supervise and control the *quasi*-public corporations of the State to an extent necessary to carry into effect the provisions of the law, and may establish reasonable rules and regulations in furtherance of this purpose. They may institute investigations with a view of ascertaining if the valid orders, rules and regulations made by them are being complied with, and in carrying out this duty they have the power to compel the attendance of witnesses, require the examination of parties and other persons, and compel the production of books, papers, etc. But for the enforcement of their orders by final process resort must be had to the ordinary courts of the State, either by independent proceedings or by process issued in causes carried before such courts by appeal.

Thus, in section 1080, Revisal 1905, the right to a *mandamus* to enforce a valid order is given in causes which have been carried to the Superior Court by appeal. In section 1081 they may appeal by independent proceedings for *mandamus* to enforce a valid order (489)

from which no appeal has been taken. In sections 1086 and 1087 power is given under certain circumstances by action to recover penalties for violation of rules and regulations made by them. And, no doubt, when conditions require, resort could be had to other actions appropriate and necessary to the enforcement of the law. Elliott on Railroads, secs. 697, 698. In reference more particularly to the case at bar, by section 1100, Revisal, the commission in express terms is given the power to make "rules, regulations and rates governing demurrage and storage charges by railroad companies and as to the placing of cars and in fixing time limits for delivery of freights after same have been received for shipment." And it is conceded that the relators (the hardware company), if they were specially injured by reason of a violation of the rules made in pursuance of this power, could by action before a justice of the peace or other courts having jurisdiction recover for the injury. But the commission is not given the power to entertain such a suit or to enforce a judgment that such a claimant might be entitled to recover.

This is the view held by the commission itself, as shown by the terms of their order, as follows: "While the Corporation Commission has no power to render a judgment for the payment of money, etc., it is their duty to enforce their rules and orders, and the power to do so is given in section 1086, Revisal 1905," etc. And the learned judge who presided at the hearing in the Superior Court held the same view, as indicated by the issues submitted and the judgment rendered. And this being the correct position, there is nothing contained in this order from which an appeal could lie. True, the terms of the statute giving the right of appeal are very broad (Revisal, sec. 1074): "From all decisions or determinations made by the Corporation Commission any party affected thereby shall be entitled to an appeal." But this, we think, must necessarily (490) mean from a decision which affects or purports to affect some right or interest of a party to the controversy and in some way determinative of some material question involved. Section 1086, Revisal, to which reference is made in the order of the commission as the section under and by virtue of which it acted in the premises, provides as follows: "If any railroad company doing business in this State by its agents or employees shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officers thereof, if residing in the State, or if not, to the manager or superintendent or secretary or treasurer, if residing in the State, or if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by the commission, shall not be made within thirty days from the time of such notice, such company

shall incur a penalty for each offense of $500." Under this section and section 1064, making more specific provisions in reference to investigations, the commission had the undoubted right and it was eminently proper for them to institute an inquiry and inform themselves as to whether the complaint of the hardware company was grounded in truth. They were not required to institute an action for this penalty simply because a citizen feeling himself aggrieved had made a complaint before them. They did right to investigate the matter for themselves, but the end of such investigation was simply to afford them information and enable them to act intelligently in determining whether they would sue for the penalty of $500 given by the statute.

Their position in reference to this suit could derive no additional force from the fact that they ordered that their rules be observed. This had already been made pursuant to section 1100 and penalty imposed for disobedience. The statute itself requires obedience to these lawful rules. The right to enter judgment for the penalty claimed by (491) Hart-Ward Company not having been given, the only other result of the investigation was to give the commission information. No right or interest involved was in any manner affected, and, as heretofore stated in our opinion, no appealable order has been made.

Appeal dismissed.

S. R. FOWLE & SON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 April, 1908.)

1. Negligence — Defective Flues—"Stovepipe"—City Ordinance — Interpretation.

A city ordinance providing that, "whenever any *stovepipe* used in any building in its corporate limits shall pass through a wall, partition, flooring, or ceiling," it shall be inclosed in brick where it so passes and separated from contact with such wall, partition, flooring, or ceiling by brickwork not less than 4 inches in thickness and not permitted to be nearer the woodwork than 2 inches, etc., refers to a metal pipe, and has no application to earthen or terra-cotta flues into which the pipe is inserted.

2. Same—Notice.

Where the evidence established the fact that the defendant used a terra-cotta or earthen flue instead of a brick flue in carrying the smoke from a stovepipe used in its building, and a city ordinance prohibited the use of a stovepipe for the purpose unless protected by brickwork from the woodwork of the building, it was error in the judge to instruct the jury, in an action for damages alleged to have been thereby caused, to find for

the plaintiff upon the question of negligence, if he had shown by the greater weight of evidence that the fire originated from a pipe or flue constructed contrary to the provisions of the ordinance, there being no evidence that the fire originated from any defect in the stovepipe.

3. Same—Competent Builder, Reliance Upon—Maintenance.

In an action for damages alleged to have been occasioned by fire from the faulty construction of a flue through the roof of the building, when the evidence was conflicting, it was error in the judge to refuse to instruct the jury that "If you find the flue in question was constructed by a competent builder, of safe material, in a safe manner, and was not negligently permitted to become defective, the maintenance of the flue was not negligence, even if the fire originated therefrom."

(492) APPEAL from *O. H. Allen, J.*, at October Term, 1907, of BEAUFORT.

The plaintiffs allege that the defendant erected and maintained in the town of Washington, N. C., a freight depot, warehouse, and office, one end of which extended over the water of Pamlico River 24 feet, supported by piles, and the other end fronting on Main Street. Said building was 154 feet long, 77 feet wide, and 11 feet between floor and joints. The cars ran alongside the building for the purpose of receiving and unloading freight. Near the end extending over the water was a "slip," into which boats entered to receive and unload freight. At this point there were large doors. Plaintiffs allege that the arrangement made in said building for protection against fire originating from a stove used in the office was negligent and dangerous; that the flue was negligently constructed and maintained in violation of the ordinance of the town; that the warehouse was in such close proximity to the buildings of plaintiffs and other persons that defendant was compelled to take notice of the danger to them by fire if its property was burned; that by reason of the negligent construction and dangerous condition of the flue the warehouse caught fire and was burned on 8 February, 1902, and the fire communicated to and destroyed plaintiff's property, to their damage more than $5,000.

The defendant denied all allegations of negligence in the premises, and the case was submitted to the jury upon the issue thus raised by the pleadings.

The testimony tended to show that in the warehouse, on one side thereof, an office was "cut off," by boarding up, for the use of defendant's agents and clerks. Hanby, a witness for defendant, thus describes
(493) the manner in which it was constructed and the flue placed. Witness was in charge of the building during the year 1892 or 1893. He says: "The office ceiling was seven-eights tongue-and-grooved material, and the joists were 2 by 8. On top of the joists we had 2-inch

boards, with a hole sufficiently large for the pipe to go in and leave a little space of three-eighths or half an inch all round as clear space. We cut a hole through the ceiling and left three-eighths of an inch clear space all round. We set the pipe in mortar on the boards and kept on in the usual way of putting pieces up and putting some mortar round them. We placed a collar round the flue where it passed through the roof. I think the flue extended 3 or 3½ feet above the roof. This flue was made of fire-clay, the same as furnace brick. The inside diameter of the flue was 6 inches and it was 1 inch thick. The flue was perfectly stable, steady, and secure. The flue extended below the ceiling 1½ inches or 1¼ inches. Around the lower part of the base of the flue we used the heaviest tin we had, and riveted it together and made a collar to fit around the flue tight, not specially as a protection against fire, but to keep people from shoving it out, and the collar was also intended to prevent cracking when expansion took place." After the witness had testified to his experience, the court held he had qualified himself as an expert.

Q. "Take a fire-clay flue constructed as you have described the construction of this flue. I ask you whether it was a safe flue." A. "Perfectly safe."

Mr. Johnson testified to the same in regard to the construction of the office and the flue. He says that a hood was placed over the flue.

Mr. Harding, a witness for plaintiffs, says that he is a carpenter. "Prior to the fire I had occasion to examine the flue leading from the office through the ceiling and roof. The agent asked me to stop a leak. I went on top of the roof and found that one of the jars or (494) pieces about 2 feet long was split. The crack was about the size of a pencil. Water would go through the crack and down on the stove. I do not know how far the crack extended below the roof, but it extended the length of the section. I told the agent that he would have to have a tinner, that the jar was broken and he needed a new one." This witness gave it as his opinion that terra-cotta flues, such as this, were not safe. He did not remember how long this examination was before the fire. He recommended that Mr. Phillips be employed to fix the flue.

Mr. Phillips was introduced by defendant and testified as to the condition of the flue and the work which he did upon it. After describing its construction and condition, he says: "I bought a new flue from Mallison's, which was similar to the old flue which I took out. In fact, it was just like it, as near as I can tell. I bought three new sections. I constructed the lower section just as it had been put in before." He described the flue and the work which he did upon it at much length. Some of the witnesses speak of the flue as terra-cotta and others as fire-clay.

C. F. Bland, a witness for defendant, says that he was assistant agent at Washington at the time of the fire. The office had been enlarged and the stove set about midway. When Phillips repaired the flue a new stove was put in. It seems that the pipe rested on the stove, went up and into the flue, extending some few inches above the ceiling. Witness discovered the fire about 4:40 o'clock in the afternoon. The Old Dominion steamer left the slip about 4 o'clock. The steamer *Myers* came in after she left. "The fire was called to my attention by a colored man named James Knight. The fire had died down in the stove and the office was getting cool, and I had sent the man out to get a scuttle of coal. He came in with the coal and called my attention to the fire, and I looked through a crack in the ceiling and saw a blaze of fire above the ceiling. (495) The blaze was about 2½ feet from the flue and next to the river, being about southwest from the flue. As near as I could see, the blaze was in the roof. At that point I should say the roof was about 14 or 18 inches above the ceiling. It was a very small blaze when I discovered it. We used hard coal in the stove. This coal makes practically no blaze. I do not think I have ever seen sparks coming from it." He testified that there was before the fire a charred place in the ceiling, caused by the stovepipe settling down and coming out of the flue. This was about two months before the fire. It was fixed securely and was in secure condition at time of fire.

J. G. Chauncey, a witness for plaintiffs, testified that the warehouse had openings at each end and in the west side, next to the slip which separated it from the Old Dominion warehouse. The end was next to Main Street and it extended back beside the slip to the river. There were railroad tracks in the warehouse. "When I reached the warehouse the fire did not seem to have been burning long, and I saw a blaze a foot or 18 inches above the office ceiling. The flue from the stove went up straight. The blaze I saw was close by the flue. . . . It was a terra-cotta pipe which ran through the ceiling. This terra-cotta flue was 6 or 6⅛ inches. The flue went from the office up through the ceiling and through the roof. There appeared to be 3 or 4 feet of the flue between the roof and the office ceiling. From what I saw, the fire looked like it was right around the pipe, but I cannot say positively." This witness also testified in regard to an explosion caused by some powder in the warehouse. He says that they used all possible means to prevent the fire spreading to plaintiffs' property. There were other buildings between the warehouse and plaintiffs' property which were burned. Upon cross-examination he says: "When I got to the building I did not see any fire in the roof; all I saw was near the top of the office. . . . This (496) flue seemed to be of fire-brick, but harder. I gave notice to this

company of the town ordinance prohibiting the use of the stovepipe, and carried the notice direct to them and directed them to move the pipe." He was chief of the fire department.

Mr. Bragaw, for plaintiffs, testified that he was a fire insurance agent. Flue was in the southwest corner of office. The flue went through the ceiling of the office and the roof of the warehouse. "I should judge there was a space between ceiling and roof of 2 feet." He says that when he saw the fire it was "just beyond top of office." He gave it as his opinion that terra-cotta flues are not safe—are liable to crack under the effect of heat and cold.

Mr. S. R. Fowle, one of the plaintiffs, testified in regard to the value of property, amount of loss, etc. He says that he has had experience in building, using terra-cotta flues. They are not safe—subject to crack from heat and cold.

Dr. Tayloe, witness for plaintiffs, says that he first saw the fire and gave the alarm. "At that time smoke was emerging from under roof, before the blaze broke through. I saw the smoke emerging from near the flue."

Defendant's agent denied that any notice was given them by Mr. Chauncey of the ordinance. There was much other evidence, and several witnesses expressed different opinions in regard to the safety of flues. There was testimony *pro* and *con* regarding the probability of fire in steamers in the slip. This is not material, in the view taken by the Court. The plaintiffs introduced the following ordinance:

"*Be it ordained,* That whenever any stovepipe used in any building in the corporate limits of the town shall pass through any wall, partition, flooring, or ceiling, said stovepipe shall be inclosed within brick where it passes through such wall, partition, flooring, or ceiling, and shall be separated from contact with such wall, partition, flooring, or ceiling by brickwork not less than 4 inches in thickness, and such stovepipe shall not be permitted to be nearer to any wood in such building (497) than 2 inches at any point. Any violation of this ordinance shall subject the offender to a fine of $10, and the stovepipe used in such building in violation of this ordinance shall be torn down by the policemen of the town."

Defendant objected and excepted. There was a verdict for plaintiffs. Judgment. Appeal. The exceptions are discussed in the opinion.

Bragaw & Harding and Ward & Grimes for plaintiffs.
Small, McLean & McLean for defendant.

CONNOR, J. The defendant requested his Honor to instruct the jury that the city ordinance introduced by the plaintiffs did not apply to the

conditions disclosed by the evidence; that the evidence did not disclose the case of a stovepipe passing through any wall or ceiling within the language or meaning of the ordinance. As we understand the testimony, the stovepipe rested upon or was attached to the stove in defendant's office and extended up to and entered the flue of terra-cotta or fire-clay. The flue rested upon and, in some way not very clearly described, extended 1¼ or 1½ inches below the ceiling. At the entrance the pipe was held steadily in position by a tin collar. All of the testimony shows that the hole cut in the ceiling was larger than the flue and the space filled in with mortar. The flue into which the pipe entered passed through the roof, extending above it 3⅛ feet, and was "capped" or covered with a "hood." The ordinance was evidently intended to prohibit a custom, which experience has taught to be dangerous, of passing stovepipes through walls and ceilings of wood. The word "stovepipe" is well understood to refer to pipe made of either sheet iron or heavy tin, which usually connects the stove with the chimney or flue, made either of brick or fire-clay or terra-cotta. The evident purpose of the ordinance was to require that when a stovepipe passed through the ceiling it
(498) should be separated from the wood in the manner directed. The testimony of the witness who constructed the flue and adjusted the pipe excludes the idea that the latter passed through the ceiling, within the terms or meaning of the ordinance. The distinction between a stovepipe and a flue is clearly recognized by the act of 1905, ch. 506, secs. 17 and 20. His Honor was evidently of the opinion that the word "pipe" included both the flue and the metal pipe. He said to the jury: "If the plaintiff has shown by the greater weight of the evidence that the fire originated from the pipe or flue, and that the flue was constructed in a manner that was in violation of the town ordinance, your answer should be 'Yes.'" He further said in this connection that by "pipe" he meant "either earthen or metallic." In this view of the ordinance the jury were compelled to find that the defendant had violated its terms. If the "earthen" flue must enter brickwork not less than 4 inches in thickness, etc., it was manifest that the terms of the ordinance were not complied with. We cannot concur with his Honor's construction of the ordinance. We find but one witness who speaks of the stovepipe extending into the flue above the ceiling. Mr. Bland says that the pipe settled and the joints overlapped; that the result was that the lower side of the ceiling became charred, and he pushed the pipe up so that it extended beyond the ceiling about 6 inches; this, of course, being separated from the wood by the walls of the flue and the collar. There is no suggestion by any witness that the flue was not carefully and properly constructed and secured, or that the pipe was not properly secured therein. But if the

pipe was not separated from the wood in the manner required by the ordinance the defendant insisted that there was no evidence that the fire originated at the place where the stovepipe entered the flue, and that therefore such condition was not the proximate cause of the fire. His Honor told the jury that before they could fix liability upon defendant on account of the violation of the ordinance they must find that it was the proximate cause thereof. The first witness who saw the (499) fire from the outside was Dr. Tayloe, who says: "The smoke was emerging from under the roof before the blaze broke through from near the flue." Mr. Chauncey says: "I saw a blaze a foot or 18 inches above the office ceiling, close by the flue." Mr. Bland says that the fire had died down in the stove and the office was getting cool; that he had sent a man out to get a scuttle of coal; that he came in with the coal, and before putting it on the fire he called witness's attention to the fire; that he looked through a crack in the ceiling and saw a blaze above the ceiling, about 2 feet from the flue; that, as near as he could see, the blaze was in the roof, which was about 14 or 18 inches above the ceiling; that they used hard coal in the stove. The colored man, Knight, who brought in the coal, corroborated Mr. Bland. In this respect we find no contradictory testimony. Mr. Bragaw says "the fire seemed to be making from the space over the office towards the slant of the roof." We fail to find any evidence locating the fire at the point where the stovepipe entered the flue. From the uncontradicted testimony of Mr. Bland, corroborated by the colored man, Knight, and the natural evidence, it is difficult to see how the fire could have originated by heat communicated by the stovepipe at the point of entrance into the flue. The construction of the flue, resting upon the ceiling, would have protected the upper side of the ceiling, and if the heat from the stovepipe had been sufficient to ignite the wood it would have first appeared on the lower, unprotected side. Again, all of the plaintiffs' evidence—every witness who expressed the opinion that terra-cotta or fire-clay flues are unsafe—gave as a reason: "They will crack from heat or cold, and from water when they are hot." This is the language of Mr. Fowle, Mr. Bragaw, and Mr. Chauncey. Not one suggests that the heat from the stove would communicate fire through them. His Honor charged the jury: "If you shall find from the evidence that the ordinance introduced in evidence by (500) the plaintiffs had been in force since 3 December, 1900, in the town of Washington at the time of the fire, and was passed for the purpose and intention to prevent the catching of buildings on fire in the corporate limits of the town and the spreading of such fire to adjacent buildings, and that the defendant used and operated its flue in violation of such ordinance, this would constitute negligence on the part of the

defendant; and if this negligence was the proximate cause of the plaintiff's injury—that is to say, if the fire caught from defendant's building by reason of the manner in which they were using their flue in violation of the ordinance, and the fire, by natural cause and effect and under such conditions of wind and other surroundings as a reasonable man could have anticipated and under the conditions that existed at the time of the fire, in fact, caught—then the defendant would be liable for such damages as resulted to the plaintiff therefrom." Defendant excepted.

The ordinance did not prescribe the manner in which defendant should use and operate its flue, but the manner in which the stovepipe should pass through the ceiling. We think, however that may be, there was error in leaving to the jury the question of proximate cause in that connection. As we have said, we find no evidence that the fire originated at the point of connection between the stovepipe and the flue. Thus eliminating the ordinance from the case, the question arises whether there was any evidence of negligence in the use of the flue—that is, whether the flue made of terra-cotta or fire-clay was reasonably safe, or, as his Honor correctly said to the jury, whether a man of ordinary prudence, having due regard to the safety of his own and the property of others, would use the flue (described by the witnesses) in the manner and at the place which they were used by defendant. Defendant insists that there is no evidnence tending to show negligence in this respect, and that his Honor should have granted the motion for judgment of
(501) nonsuit. It is conceded that these flues were prior to the passing of the ordinance in general use in Washington. Mr. Chauncey says that he has taken out of houses since that time 300 of these flues. He says the objection to them is that "when heat was on them they would burst." Mr. Bragaw, who is in the insurance business, says that his opinion, backed by observation, is that fire-clay flues are not a proper precautionary measure against fires on any premises—they are liable to crack. Mr. Fowle says that he has built many houses for himself and others, that he has observed them for ten years, and that he has been taking these flues out "lately." Mr. Harding, a carpenter, examined the flues some years ago and found one of them cracked, and advised the defendant's agent that he "needed a new one." Mr. Phillips says that he took out the old or cracked flues and put in new ones. This was about a year or eighteen months before the fire. A number of defendant's witnesses—mechanics and builders—express the opinion that the terra-cotta flue is safe for the use to which it was put. This contradictory testimony was properly submitted to the jury. There is also evidence tending to show that defendant's agent was notified to take the flues out. This is denied. The evidence is competent upon the question of notice to

defendant that the flue was not safe, if the jury so find. The first question to be settled by the jury is whether the fire originated from cracks in the flue. There is no direct evidence that there were any such cracks. The only evidence in that respect is that some eighteen months before the fire one section of the flue was found to be cracked and taken out; that a new flue of the same kind was put in. The learned counsel for plaintiffs strongly urged before us the view that by reason of the length of the building, its extension resting on piles 24 feet over the water, the striking of steamboats upon its side in the slip, the running of cars and heavy trucks, the building was caused to vibrate and loosen the sections of the flue or to break it. The defendant, on the other hand, (502) argues that the fire was caused by sparks from the steamboats, etc. It is extremely difficult to fix with any degree of certainty how many fires originate. Different theories are advanced in almost every instance. The defendant requested his Honor to instruct the jury: "If you find that the flue in question was constructed by a competent builder and of safe material and in safe manner, and that the defendant did not negligently permit the same to become defective, then the court instructs you that the maintenance of the flue so constructed was not negligence, and this would be true even if you should further find that the fire originated from the flue. If you should so find, you should answer the first issue 'No.'"

The court declined to charge the jury as requested, and the defendant excepted.

We think defendant was entitled to this instruction. It correctly states the measure of duty which the law imposes upon the owners of buildings. Persons constructing and using buildings are compelled to rely upon the judgment of competent builders, of those who by reason of skill and experience are fit and competent to be consulted and intrusted with the erection of buildings, with arrangement for fires therein, and it may be relied upon with that degree of safety which the law requires. If the jury found the conditions involved in the instruction, we think that no negligence can be attributed to defendant. In *Parker v. Moore,* 91 N. C., 275, the stovepipe was run through the wall and "the fire originated where it passed through the wall." It was not protected in any way. The distinction between the cases is manifest. The only evidence of negligence which we find in the record is the opinion of witnesses that the terra-cotta or fire-clay flue is liable to crack from heat and cold. A number of witnesses express the opinion that they are safe means of carrying off the smoke from stovepipes. As we have said, there is no direct evidence that the defendant's flue was cracked, and if so, that defendant's agent had any notice thereof. There may be (503)

circumstances and conditions from which a jury could infer such defect and knowledge. For the errors pointed out there must be a New trial.

Cited: Rich v. Electric Co., 152 N. C., 694.

DAVIDSON DEVELOPMENT COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 29 April, 1908.)

1. Railroads — Carriers —"Order; Notify"— Rights of Consignor—Wrongful Delay in Shipment—Rights of Consignee—Possession of Bill of Lading—Damages.

Ordinarily a consignor of goods to a railroad company for shipment to his own order, "notify" a proposed vendee, may dispose of them as he desires; but such right does not exist when the carrier has given a bill of lading for the goods, which was indorsed and forwarded with draft attached to the proposed vendee, who paid the draft and received the bill of lading without notice before the goods could have reached their destination in the ordinary course of shipment.

2. Railroads — Carriers —"Order; Notify"— Rights of Consignee—Holder of Bill of Lading—Shipment Delayed—Liability of Carrier.

A railroad company which has issued its bill of lading for goods shipped to plaintiff's order, "notify" a proposed vendee, is liable as well as the consignor in damages for delay to the vendee, who, before the goods could have arrived in the ordinary course of shipment, has paid a draft attached to the bill of lading and received the bill of lading without notice of a subsequent diversion of the shipment made by the consignor, especially when the railroad company had notice of the consignee's rights, as evidenced by requiring the consignor to give a bond of indemnity.

3. Railroads—Carriers—Delay in Shipment—Damages—Consequential Damages—Knowledge of Carrier.

In an action to recover damages for delay in the shipment of brick to be used in constructing a store, the value of the rental of the store arising on a contract with third persons cannot be considered as an element of damages when there is no evidence that the defendant railroad company was aware of the purpose for which the brick were shipped.

4. Same—Measure of Damages.

When the evidence in a suit against a railroad company for damages in delay in shipment of brick shows, without more, that the brick were received by the defendant for shipment, and that an unreasonable delay occurred therein, the measure of plaintiff's loss is the interest during the delay on the amount plaintiff had invested in the shipment.

DEVELOPMENT CO. *v.* R. R.

APPEAL from *Justice, J.*, at November Term, 1907, of DAVIDSON. (504)

By the testimony offered on the part of plaintiff, and admissions of defendant company, it was made to appear that, in compliance with an order from plaintiff, John T. Watson on 28 June, 1906, delivered to the defendant at Danville, Va., two car-loads of brick, taking therefor a bill of lading to his order, "Notify W. H. Phillips, Lexington, N. C.," who was secretary and treasurer of plaintiff company. Said Watson drew a draft for $110.25, the price of the brick, on the plaintiff company, and attached thereto the bill of lading and forwarded the same through the banks to Lexington. On 29 or 30 June W. H. Phillips, as secretary and treasurer of the plaintiff company, paid the draft and received the bill of lading.

On 29 June, and while the cars were still on the yard of the defendant at Danville, Va., Watson requested the defendant to divert the cars to another customer of his. In pursuance of this request the defendant diverted the shipment, taking from said Watson a bond to indemnify defendant for any loss or damage by reason of said diversion, and in consequence thereof the plaintiff did not receive them, and it was three weeks later before the brick could be replaced.

The plaintiff was constructing at Lexington a three-story brick building, and the brick were ordered to be used in that building. The plaintiff was unable to get the desired kind of brick elsewhere, and was delayed in the completion of its building for three weeks, this being the wrong complained of. Prior to the time in question the plaintiff had the building rented to responsible persons to the amount or sum of over $250 per month, said rent to begin upon completion of the building. (505)

At the time of the delay the plaintiff had invested $20,000, the lot being worth $5,000 and the building as it then stood $15,000. This money was idle for the period of delay, and the plaintiff was paying interest upon it.

There was no evidence other than that afforded by the order itself that the defendant at the time of the delivery to it by Watson of the brick knew for what they were to be used, nor did the defendant have any information or knowledge that the plaintiff was constructing any building or had any capital invested or would in any way suffer any special damages.

The court held that on the facts (1) the defendant was liable; (2) that the correct amount of damages was the rental value of the building for the three weeks wrongful delay, to wit, three-fourths of $250, or $187.50.

Defendant excepted to both rulings. Verdict and judgment for $187.50, and defendant appealed.

E. E. Raper and W. H. Phillips for plaintiff.
Manly & Hendren for defendant.

HOKE, J., after stating the facts: There is no question of the position insisted on by defendant, that the consignor of goods who has shipped them to his own order may divert them from their original destination, and as a general rule this is not changed by the fact that they are shipped with directions to notify a given person, the proposed vendee. Under such an arrangement, without more, the goods remain the property of the original owner, and he has the right to dispose of them as he desires. This right, however, as between the parties, does not exist when the carrier has given a bill of lading for the goods which has been indorsed and forwarded, with draft attached, to the proposed vendee and such vendee has paid the draft and taken over the bill of lading with-
(506) out notice and before the goods would have reached their original destination in the ordinary course of shipment.

In Hutchison on Carriers, sec. 193, the position is stated as follows: "When there has been no agreement to ship the goods which will make the delivery of them to the carrier a delivery to the consignee and vest the property in him, the shipper may, even after the delivery to the carrier and after the bill of lading has been signed and delivered or after the goods have passed from the possession of the initial carrier into that of a succeeding one, alter their destination and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee first named or to some one for his use." And Moore on Carriers, sec. 11, is to like effect: "A carrier, in delivering goods to a party claiming them without requiring him to produce the bill of lading, always assumes the risk of the bill's having been previously transferred to an innocent purchaser. Where a common carrier delivers goods intrusted to him for carriage without production of the bill of lading describing the goods, it is liable in trover for their value to a *bona fide* holder of such bill taken for value before the delivery of the goods at destination, even where it delivered the goods to the shipper at an intermediate point."

Instances of the doctrine in its practical application will be found in *Bank v. R. R.*, 132 Mo., 492; *Ratzer v. R. R.*, 64 Minn., 245. It does not clearly appear from the evidence whether the vendee paid the draft and obtained the bill of lading before or after the order to divert the shipment of the goods was given; but while this might be of importance in an action for the goods themselves between the claimant, the original vendee, and an innocent purchaser for value, as between such claimant and the carrier and the shipper, the bill of lading taken and held under the cir-

cumstances indicated imports ownership. As said by *Robinson, J.*, delivering the opinion of the Court in *Bank v. R. R., supra,* "In issuing these bills of lading, defendant said to the business and (507) commercial world: 'We hold 20 cars of grain delivered to us by the Courier Commission Company, which will be retained by us for the company or its assigns, by indorsement in writing, and none of the grain therein will be delivered to any one except on the surrender and cancellation of those bills of lading.' And now, after thus announcing to the world these facts by the issuance of its bills of lading, which are symbols of the property in its custody and the muniments of title thereto in the hands of the holder thereof, can it afterwards say to the holder of these symbols, which represent and stand for the property itself, 'True, we said that we had the property and that we would hold it, subject to be delivered only to the holder of the instruments issued by us, but we ought not now to be held to that agreement because we have carelessly but in good faith delivered the same to the original shipper'? or, what is the same, at its request, rebilled the grain to another point without this State, not requiring the production, surrender, and cancellation of the original shipper's order bills of lading."

On the facts, therefore, the plaintiff had a clear right to recover for the damages suffered by reason of the wrongful delay in the shipment, either against the carrier or the shipper, for there is no claim or testimony tending to show that in ordering a new supply of brick the parties expected or intended an adjustment or surrender of plaintiff's claim for damages for the injury he had suffered. It is evident, too, that defendant did not act in ignorance of plaintiff's rights or of its own obligation, for before defendant would obey the directions of the shipper to divert the goods it required a bond of indemnity.

We are of opinion, however, that there was error on the part of the court as to the amount of damages which plaintiff is entitled to recover on the facts as they are now presented. Damages of the kind claimed in this action, *i. e.*, consequential damages, are only recoverable when they are the natural and probable consequence of the car- (508) rier's default. Hale on Damages, 256. And ordinarily such damages are only considered natural and probable when they may be reasonably supposed to have been in contemplation of the parties at the time the contract was made. Wood's Mayne on Damages, 18; *Neal v. Hardware Co.*, 122 N. C., 104. It may be, as suggested in *Tillinghast v. Cotton Mills,* 143 N. C., 274, that if the contract is still in the course of performance, as in continuing contracts of carriage, knowledge brought home to the parties during the continuance of the contract relation and in time to have prevented or reduced the damages might affect the result.

But such a modification of the general rule is not called for here, as the amount of damage would be the same in either event. And for wrongful delay in the shipment of goods having a market value the damage usually supposed to be in contemplation is the difference in the value of the goods at the time when they should have been and were delivered. In other cases the value of the user of the goods may be recovered if they are in condition to use, and, in the absence of any appreciable loss from either source, the interest on the money invested in the goods themselves for the time of the wrongful delay would be the correct measure of compensation. This being the amount recoverable under the general rule, if plaintiff seeks to recover other and additional damages by reason of special circumstances a knowledge of these circumstances should be brought home to the other party. As we have said in *Tillinghast v. Cotton Mills, supra,* "if the plaintiff seeks to recover different and additional damages arising by reason of special circumstances, he is required to show that defendant had knowledge of these circumstances and of a kind from which it could be fairly and reasonably inferred that the parties contemplated that they should be considered as affecting the question of damages." Instructive cases, showing the application of this principle, will be found in *Matthews v. Express Co.,* 138 Mass., 55; *R. R. v.* (509) *Ragsdale,* 46 Miss., 458; *Horne v. R. R.,* L. R., C. P., 71, 72, 583.

In the case at bar there are no facts or circumstances shown which would entitle plaintiff to a greater amount of damages than the interest on the value of the two car-loads of brick for the time of the wrongful delay. There was no evidence offered that defendant company was aware that the brick were to be used in a building of any special size or kind, or a wrongful diversion would work the delay which resulted. So far as it reasonably appeared to defendant, the brick were ordered for the trade, and, in the absence of any testimony as to change in the value of the brick, the interest on the amount invested in the shipment for the three weeks, as heretofore stated, is the measure of plaintiff's loss for which defendant can be held responsible. In the cases chiefly relied on by plaintiff (*Neal v. Hardware Co., supra,* and *Rocky Mount Mills v. R. R.,* 119 N. C., 693) the character of the shipments was held to be evidence of notice of special circumstances tending to make the damage claimed in those cases the natural and probable result of the wrongful delay on the part of the carrier.

There is error, to defendant's prejudice, and a new trial is awarded.

Error.

Cited: Furniture Co. v. Express Co., 148 N. C., 90; *Peanut Co. v. R. R.,* 155 N. C., 150, 156, 162; *Myers v. R. R.,* 171 N. C., 194.

(510)

UNITED STATES FIDELITY AND GUARANTY COMPANY
v. A. F. MESSICK GROCERY COMPANY.

(Filed 29 April, 1908.)

Principal and Surety—Default of Principal—Payment by Surety—Justices of the Peace—Jurisdiction.

Upon the payment of a debt by a party secondarily liable therefor, he is substituted in equity to the rights of the creditor, and may sue thereon, as the creditor could have done, without any actual or legal assignment, under the doctrine that equity considers that as done which should have been done. Therefore, when the amount is $200 or less, a suit by a surety for the recovery of money misappropriated by his principal, which he has paid, is within the jurisdiction of a justice of the peace, certainly where the creditor has made a written assignment of the debt to the surety, making the latter both the legal and equitable owner of the debt, and the action when brought in the Superior Court should be dismissed.

APPEAL from *Justice, J.*, at March Term, 1908, of FORSYTH.

This action was brought in the Superior Court to recover the sum of $147 alleged to be due by the defendant to the plaintiff by reason of a payment made by the latter to the Southern Cotton Oil Company under a bond of indemnity to secure the faithful performance of the duties of J. W. Morisey as agent of the oil company. For the purpose of disposing of this appeal we need only set forth substantially the allegations of the plaintiff as made in his complaint, and the facts which the evidence tended to prove, as stated in the brief of its counsel.

The material facts alleged in the complaint are these: The plaintiff is a corporation duly authorized to become surety on fiduciary, judicial, and other bonds, and it was during the years 1903 and 1904 and is now engaged in the business of making such bonds by becoming surety on the same. During the years 1903 and 1904 J. W. Morisey was living in Winston, N. C., and acting as the agent for the Southern Cotton Oil Company in the sale of lard and other products of the said (511) oil company, and Morisey executed a bond for the faithful accounting for all property and the payment of all moneys recieved by him as the agent of the oil company, and the plaintiff became surety on said bond to the oil company.

The defendant A. F. Messick Grocery Company had been dealing for some time prior to 1903 and 1904 and during said years with Morisey as agent of the oil company, and had been buying the lard of the oil company from Morisey as its agent, and the course of dealing between Morisey and the defendant had been that the lard was sold by Morisey for the account of the oil company, and remittances were made direct by A. F. Messick Grocery Company to the oil company at its office in

Savannah, Ga., and Morisey had no authority to receive payment for the sale of the products of the oil company, nor did the defendant have any right to pay him for such sales, as the defendant well knew. During the spring of 1904 the defendant A. F. Messick Grocery Company bought from J. W. Morisey, agent of the oil company, 35 tubs of lard, containing 60 pounds each, of the value of $147, and paid therefor direct to Morisey the said $147 instead of remitting to the oil company, as had been the custom between the parties and as it knew was required by the oil company. This method of payment was resorted to by Morisey that he might appropriate the said $147 belonging to the cotton oil company to his own use, which he did, and never accounted for the same to his principal, but converted it to his own use, and during the summer of 1904 was a defaulter in a large amount, and committed suicide.

The defendant well knew that it had no right or authority to pay Morisey the cash instead of remitting to the oil company, and it had notice of Morisey's fraudulent purposes in thus using the property of his principal for his own purposes, and well knew that Morisey was a man of no property and was insolvent. At the time of his death Morisey was
(512) indebted to the oil company for money and property of said company misappropriated by him in the sum of $770.53, in which was included the $147, the value of the lard sold to the defendant, as heretofore set out. On 13 February, 1905, the plaintiff, as surety on the bond of Morisey to the oil company, had to pay and did pay the sum of $770.53 to said company, it being the amount for which said Morisey was liable.

The material facts which the testimony tended to prove were as follows: Morisey, during the years 1903 and 1904, was the agent of the oil company at Winston, N. C., for the sale of commodities consigned to him by the said company, and as such agent entered into a bond for $1,000 for the faithful discharge of his duties, with the plaintiff as surety. Morisey had no right or authority as such agent to collect or receive payment for the goods of the Southern Cotton Oil Company sold by him, and this was known to the defendant. In the month of March, 1904, the defendant bought 35 tubs of lard consigned by the Southern Cotton Oil Company to Morisey and paid him for said lard $147.

At the time of Morisey's death "he was short in his account with the oil company 12,760 pounds of lard, equal in value to $770.53," which amount the surety company on 13. February, 1905, paid the oil company, and in which amount of $770.53 was included the $147 paid by A. F. Messick Grocery Company to Morisey.

At the close of the evidence the court, on motion of the defendant, dismissed the action, and the plaintiff appealed.

Lindsay Patterson for plaintiff.
L. M. Swink and Manly & Hendren for defendant.

WALKER, J., after stating the case: The only question to be considered in this case is whether the action was properly brought in the Superior Court, or is it one of which a justice of the peace has jurisdiction? The plaintiff contends that it can recover only under the equitable doctrine of subrogation, as when it paid the amount of Morisey's (513) defalcation to the oil company it acquired the rights of the latter company as against its agent, Morisey, by subrogation. Even if it did, the cause of action which the oil company had at law against Morisey, and which the plaintiff thus acquired, was not converted into one in equity. The plaintiff has the right to sue Morisey at law in the same manner as the oil company could have done before the payment to it was made, although the right to do so was passed to the plaintiff by virtue of an equitable assignment to it. The rights acquired by subrogation do not depend upon a written assignment of the claim. Upon payment by the party who is secondarily liable for a debt to the creditor he is substituted to all the rights of the latter as against the party primarily liable, and may sue upon the debt as the creditor could have done, without any actual or legal assignment of it. Equity considers that as done which should be done. *Ins. Co. v. R. R.*, 132 N. C., 75; *Cunningham v. R. R.*, 139 N. C., 427. This is a familiar principle and has been applied in several cases by this Court. In *Markham v. McCown*, 124 N. C., at p. 166, the Court said: "It must be admitted that a justice of the peace has no jurisdiction *to declare an equity or to enforce an equitable lien*, while on the other hand it seems to us that it must be admitted that a justice of the peace has the jurisdiction to enforce the collection of money which *equitably belongs to a party*. The distinction between the two is clear to our minds." So, in *Walker v. Miller*, 139 N. C., 448, it was held that while a justice of the peace has no power to administer an equity, the owner of an equitable title may sue in a justice's court, citing *Lutz v. Thompson*, 87 N. C., 334. The same distinction between an equitable cause of action and an equitable assignment of a legal cause of action is recognized and enforced in *Nimmocks v. Woody*, 97 N. C., 1, where it is said that the equitable assignee can maintain an action upon the implied promise of the original debtor to pay back the money (514) which the plaintiff had been compelled to pay for his benefit.

But in this case there was a written assignment to the plaintiff of the claim of the oil company against its agent, Morisey, so that the plaintiff has acquired both the legal and equitable title. Why, therefore, should not a justice of the peace have jurisdiction of the action? Besides, the

plaintiff is not seeking to be subrogated to the rights of the oil company in any action against it. The subrogation has already been effected and has been followed, as we have said, by an actual assignment of the claim.

It was not necessary for the plaintiff to charge fraudulent collusion between its agent and the defendant, and none was established. It admits that the agent had authority to sell the goods, but no authority to collect the money, which should have been remitted directly by the defendant to the plaintiff, and that the defendant had knowledge of these facts. The defendant acquired title to the goods, as the agent had authority from the plaintiff to sell them, and if the defendant wrongfully paid the agent it is still liable to the plaintiff for the price of the goods. But if the agent had the authority both to sell the goods and to collect the purchase price, as contended by the defendant's counsel upon the evidence, then the defendant is not liable. In any view of the case, we think there was no error in the ruling of the court.

No error.

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(515)

F. L. WILLIAMSON v. LAFAYETTE HOLT.

(Filed 29 April, 1908.)

Contracts — Sales — Vendor and Vendee—False Representations—Quality—Caveat Emptor.

Representations made by the seller of the capacity of an ice plant known by the purchaser to be second-hand, and who had knowledge that it had been unsuccessfully operated and also of other facts and circumstances indicative of its actual condition, and to whom, being a mechanic, full opportunity for investigation had been given before purchasing, are not available as a defense by way of counterclaim because of their being false, in an action to recover the amount of a bond given for the purchase price. In such instances the doctrine of *caveat emptor* applies.

APPEAL from *Councill, J.*, and a jury, at September Term, 1907, of ALAMANCE.

This is an action to recover $1,050, the amount of a bond given by the defendant on 29 February, 1904, for an ice plant. Defendant in his answer admitted the execution of the bond, but denied any liability upon it, and set up a counterclaim on the ground that it was obtained by false and fraudulent representations as to the condition and capacity of the plant.

(519) When the evidence was closed, the court, on motion of the plaintiff's counsel, gave judgment for the amount of the note, and the defendant appealed.

Z. V. Taylor and Parker & Parker for plaintiff.
W. H. Carroll and Long & Long for defendant.

WALKER, J. The evidence in the record is quite voluminous, but fortunately it is not necessary to state even the substance of it in order to a correct understanding of the case. At the time of the sale of the plant the plaintiff stated to the defendant that if he would make some repairs it would turn out about 4,400 pounds of ice a day. There was also evidence that the plant had produced as much as that before the sale. The defendant lived in Burlington, where the ice plant was. Before he and Nicholson purchased it they made two visits to the ice factory for the purpose of making an examination of the plant. The evidence of the defendant himself shows that he was a machinist and the plaintiff a grocer, and that he and Nicholson were permitted both times to make a free and full investigation for themselves of the condition of the plant, and, besides, that he knew it was second-hand when it was brought to Burlington, it having been in use for some time. As a machinist he had furnished new valves and other parts for it when it was originally installed. That the plant was not in good condition at the time he and Nicholson bought it had come to his knowledge before the time of the purchase. The few extracts selected at random from the evidence as contained in the record and set out in our statement of the case will serve to show more definitely whether or not the defendant was influenced by any fraudulent representation of the plaintiff to make the purchase. There was evidence to the effect that the defendant and Nicholson sold the plant to the Burlington Ice Company at $2,500, which was the price they gave for it, and received in payment of the (520) purchase money stock of that company, the par value of which was equal to that amount, and which they took at that valuation; that the Burlington Ice Company was afterwards placed in the hands of a receiver, at the instance of the defendant, and that the plant was sold, and bought by Nicholson.

In the view we take of this case it falls directly within the decision of the Court in *Cash Register Co. v. Townsend,* 137 N. C., 652. In that case *Justice Brown,* for the Court (at p. 655), says: "All the authorities are to the effect that where the false representation is an expression of commendation or is simply a matter of opinion, the courts will not interfere to correct errors of judgment. *Walsh v. Hall,* 66 N. C., 236. The law will not give relief unless the misrepresentation be of a subsisting fact. *Hill v. Gettys,* 135 N. C., 375. What has been called 'promissory representations,' looking to the future as to what the vendee can do with the property, how much he can make on it and, in this case, how much he

can save by the use of it, are on a par with false affirmations and opinions as to the value of property, and do not generally constitute legal fraud. Benjamin on Sales (7 Ed.), 483 *et seq.; Gordon v. Parmelee,* 2 Allen (Mass.), 212; *Long v. Woodman,* 58 Me., 52, and cases cited. Mr. Clark, in his work on Contracts, states in substance that commendatory expressions or exaggerated statements as to value or prospects, or the like, as where the seller puffs up the value and quality of his goods or holds out flattering prospects of gain, are not regarded as fraudulent in law. (Pages 332-334.) It is the duty of the purchaser to investigate the value of such expressions of commendation. He cannot safely rely upon them. If he does he cannot treat it as fraud, either for the purpose of maintaining an action of deceit or for the purpose of rescinding a contract at law or in equity. *Saunders v. Hatterman,* 24 N. C., 32; 14 A. and E. Enc., (2 Ed.), 34, and cases cited. Mr. Kerr, in his work on Fraud and
(521) Mistakes (at p. 83), says: 'A misrepresentation, to be material, should be in respect of an ascertainable fact as distinguished from a mere matter of opinion. A representation which merely amounts to a statement of opinion goes for nothing, though it may be true, for a man is not justified in placing reliance on it.' Again, 'A man who relies on such affirmation made by a person whose interest might so readily prompt him to invest the property with exaggerated value does so at his peril and must take the consequences of his own imprudence.'" There the alleged false or fraudulent representation consisted in a statement by the plaintiff's agent to the defendant that the use of a cash register would save the expense of employing a bookkeeper, and it was held not to be such a fraudulent representation as would avoid the contract of sale, it being nothing more than "dealer's talk" when puffing his wares.

It is difficult to see how the defendant was deceived by the plaintiff into buying the ice plant, when he at the time had full knowledge of facts in regard to the condition of the plant, which should at least have put him on his guard and stimulated greater inquiry. He was himself a machinist, and employed Hyatt, who was an expert, to operate the plant. He had free access to the premises for the purpose of making any desired investigation, and if he was not satisfied with his own ability to discover defects, if there were any, he might easily have enlisted the services of Hyatt or some one else having greater knowledge of the matter than he had for that purpose. It does seem from the evidence that the means were at hand by which he could have ascertained the exact condition of the plant, if he had wished to be better informed, before making the purchase. He knew that the plant had been "given up" because it would not make ice or that its output had not been equal to its full capacity. The statement of the plaintiff was evidently intended to be the expression

of an opinion as to how much ice the plant would make if put in good condition, and the evidence shows that it was so understood by defendant at the time. It is said in Benjamin on Sales (7 Ed.), (522) at p. 483: "Fraudulent promises as to the future, as to what the vendee could do with the property, how much he could make on it etc., do not constitute legal fraud." The same idea is expressed more fully in *Gordon v. Parmelee,* 84 Mass. (2 Allen), 213, where the Court says: "The alleged false statements concerning the productiveness of the land and its capacity to furnish support for cattle constituted no defense to the notes. They fall within that class of affirmations which, although known by the party making them to be false, do not, as between vendor and vendee, afford any ground for a claim of damages, either in an action on the case for deceit or by way of recoupment in a suit to recover the purchase money. They come within the principle embodied in the maxim of the civil law, *Simplex commendatio non obligat.* Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmations concerning the value of land or its adaptation to a particular mode of culture or the capacity of the soil to produce crops or support cattle are, after all, only expressions of opinion or estimates founded on judgment, about which honest men might well differ materially. Although they might turn out to be erroneous or false, they furnish no evidence of any fraudulent intent. They relate to matters which are not peculiarly within the knowledge of the vendor and do not involve any inquiry into facts which third persons might be unwilling to disclose. They are, strictly speaking, *gratis dicta.* The vendee cannot safely place any confidence in them, and if he does he cannot make use of his own want of vigilance and care in omitting to ascertain whether they were true or false as the basis of his claim for damages in reduction of the amount which he agreed to pay for the property." *Long v.* (523) *Woodman, supra,* furnishes another equally strong statement of the rule: "To entitle a party to maintain an action for deceit by means of false representations he must, among other things, show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts or to the condition of things as then existent. It is not every misrepresentation relating to the subject-matter of the contract which will render it void or enable the aggrieved party to maintain

his action for deceit. It must be as to matters of fact substantially affecting his interest, not as to matters of opinion, judgment, probability, or expectation. *Hazard v. Irwin,* 18 Pick., 95. An assertion respecting them is not an assertion as to any existent fact. The opinion may be erroneous; the judgment may be unsound; the expected contingency may never happen; the expectation may fail. An action of tort for deceit in the sale of property does not lie for false and fraudulent representations concerning profits that may be made from it in the future." The following cases also sustain the doctrine: *Halton v. Noble,* 83 Cal., 7; *So. Dev. Co. v. Silva,* 125 U. S., 247; *Mooney v. Miller,* 102 Mass., 217; *Pedrick v. Porter,* 87 Mass. (5 Allen), 324. The test of whether there has been merely an expression of opinion or the positive statement of a fact depends not so much upon the absence or presence of an express assertion based on personal knowledge as upon the character of the statements alleged to be true. 14 A. and E. Enc. (2 Ed.), p. 36. A statement taking the form of an expression of opinion may sometimes constitute actionable fraud, while one more positive and implying knowledge of the facts may not have that effect in law. 14 A. and E. Enc. (2 Ed.), p. 33 *et seq.*

We do not decide, therefore, that a party cannot be liable for a false representation because it is promissory in form, though in sub-
(524) stance the assertion of a fact as existing. If he makes a statement which is calculated to deceive the other party, and which he knows to be false, and thereby intentionally misleads the latter, to his prejudice, it may amount to such an affirmation of a fact as to constitute actionable fraud or deceit, although the statement may be seemingly a mere expression of opinion, or what is sometimes called a promissory representation. 14 A. and E. Enc. (2 Ed.), 36, and note 5.

The case of *May v. Loomis,* 140 N. C., 350, cited by the appellant in support of his contention, is not in point, and therefore not an authority in his favor. In that case there was the representation of a fact, false within the knowledge of the party who made it, which was calculated and intended to deceive, and not the mere expression of an opinion.

In our case the evidence does not disclose any taint of fraud in the negotiations between the parties for the sale by the plaintiff and the purchase by the defendant of the ice plant. The doctrine of *caveat emptor* applies, for the defendant had been put upon inquiry by his knowledge of the facts, and he was given full opportunity to investigate for himself, which he undertook to do. In *Cash Register Co. v. Townsend,* 137 N. C., 658, it is said: "When the purchaser undertakes to make an investigation of his own, and the seller does nothing to prevent this investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresenta-

tions," citing *Jennings v. Broughton,* 5 De Gex M. and G., 126; *Development Co. v. Silva,* 125 U. S., 259.

We conclude from what has been said that the court was right in giving judgment for the plaintiff.

No error.

Cited: County v. Construction Co., 152 N. C., 30; *Bank v. Brown,* 160 N. C., 25.

(525)

C. W. PARKER v. J. B. FENWICK AND WIFE.

(Filed 29 April, 1908.)

1. Deeds and Conveyances—Title to Wife—Fraud on Creditors—Burden on Wife—Husband Indebted to Wife—Intent to Defraud—Questions for Jury.

In an action to subject the real property of the wife to payment of her husband's debt, upon the ground that he had supplied the purchase price, had negotiated for the purchase of the land and had title made to the wife pending plaintiff's suit for the collection of a debt, there was evidence upon the one hand tending to show that the wife had received the money from an independent source, the husband had borrowed it and while insolvent had paid the purchase price for the land in repayment of the money borrowed; upon the other hand, that the male defendant had declared he would not pay plaintiff's debt, and that the purchase money paid for the land was his own and received from his sister's estate: *Held,* (1) the burden of proof was upon *feme* defendant to show that her husband owed her a valid debt as contended, and one for which she could maintain an action and enforce payment; (2) that, notwithstanding the debt was valid, if the transaction was made with the intent to hinder, delay, or defraud the plaintiff in the recovery of his debt, participated in by the wife, or she knew of this purpose, her deed would be void; (3) that it was for the jury to find the facts under the evidence and correct instructions from the court.

2. Same—Verdict of Jury—No Fraud Found—Wife's Notice or Knowledge Eliminated.

In a suit brought by the husband's creditors to set aside for fraud a deed made to the wife, when the jury has found that the husband has paid the purchase price of lands to which he had directed title to be made to his wife as a repayment to her of money's he had borrowed, without intent to hinder, delay, or defraud his creditors, the question of notice or knowledge of the wife is eliminated.

3. Deeds and Conveyances—Deed to Wife—Fraud on Creditors—Declarations, When Competent.

The declarations of a husband affecting the validity of a deed made under his directions to his wife and attacked by his creditors upon the

ground of fraud are competent evidence when made before the transaction and incompetent when made thereafter, as to the rights of the wife.

(526) APPEAL by plaintiff from *Moore, J.*, at September Term, 1907, of FORSYTH.

This action was brought by plaintiff against defendant J. B. Fenwick and his wife, Katherine, for the purpose of subjecting certain real property, or a portion of the purchase money paid therefor, to the payment of a judgment recovered against the male defendant. The pleadings and verdict of the jury disclose the following facts:

Plaintiff recovered a judgment against defendant Fenwick for $625 on 11 September, 1905. While the action in which said judgment was rendered was pending plaintiff sued out and levied upon a house and lot in Salem, N. C., a warrant of attachment. The property was conveyed by W. H. Clinard to the *feme* defendant, 15 February, 1904, in consideration of $1,200. Of this amount $725 was paid by the *feme* defendant and $500 borrowed by her from the Wachovia Loan and Trust Company, secured by mortgage. The property was by an arrangement made between the parties sold and the mortgage debt paid. The balance of the purchase money, some seven hundred dollars, is held by James S. Dunn to await the determination of this action. The plaintiff alleges that the $725 paid was the property of the male defendant and was transferred to his wife with intent to defraud plaintiff, and that his intent and purpose were known to and participated in by her. The jury found that at the time the money was paid to *feme* defendant her husband was insolvent. The jury found against plaintiff on the allegation of fraud. For the purpose of establishing this allegation plaintiff introduced evidence tending to show declarations of Fenwick made to the receiver of certain property involved in the first suit that he expected to get some money from his father's estate; that he did not intend to pay plaintiff's debt; "that he was going to put the money where they could not get it"; that during the month of February, 1904, Mrs. Fenwick deposited in

(527) bank sums aggregating about $1,200; that defendant Fenwick received from his sister's estate about $1,200, which he turned over to his wife; that this was the same money deposited by Mrs. Fenwick; that defendant Fenwick contracted for the purchase of the house, Clinard not knowing Mrs. Fenwick in the transaction; that the deed was made to her by his direction. Plaintiff offered to introduce certain letters written by Fenwick to Dunn, who had the property in charge for the purpose of renting, bearing date from 1 May to 10 July, 1905. These letters, upon Mrs. Fenwick's objection, were excluded. Plaintiff excepted.

Defendants introduced evidence tending to show that Mrs. Fenwick received from her husband's father $550 as a bridal present; that she made some $480 from a store which she owned and conducted, and some $300 saved out of money given her for family expenses by dispensing with servants and doing her own work; that Fenwick borrowed from his wife $1,200 and repaid same from amount received from his sister's estate. Both defendants testified in regard to these transactions. They also testified that the amount deposited in the bank by Mrs. Fenwick was the same money paid her by her husband in discharge of the amounts borrowed; that the $725 paid on the purchase money of the house by Mrs. Fenwick was derived from this source. There was evidence tending to contradict defendants' testimony.

Plaintiff requested the court to instruct the jury to answer the issue in regard to the alleged fraud "Yes." This was refused, and plaintiff excepted.

The court instructed the jury: "If you find from the evidence the $725 or any other amount which you may find of the purchase price of this property was contributed by J. B. Fenwick and title to the property taken in the name of his wife, Katherine Fenwick; and you further find that at the time J. B. Fenwick was owing this plaintiff this debt, the law presumes that this transfer of money to the defendant Katherine Fenwick was voluntary and void as to this plaintiff, and Katherine Fenwick must satisfy you by a preponderance of this evidence (528) that her husband actually owed her a debt."

The court gave the following prayer in response to the request from the defendants: "If the jury find from the evidence that at the time at which J. B. Fenwick turned over to his wife the money coming to him from Maryland he owed his wife an amount equal in amount of that placed in the bank to her credit, and this was done as a payment of a debt really due his wife, he had a right to pay this debt to the exclusion of other debts, and the transfer, if in good faith and with no intent to defraud, would be valid, and in such case the wife's deed would be good as against plaintiff, and the third issue should be answered 'No' and the fourth issue 'No.'" Plaintiff excepted to these instructions.

His Honor explained the matters in controversy to the jury and charged them at length in regard to the general principles of law applicable thereto. Plaintiff noted exceptions to portions of the charge pertaining to other issues, which, in view of the answer to the one directed to the allegation of fraud, are immaterial. The court rendered judgment for the *feme* defendant upon the verdict. Plaintiff excepted and appealed.

L. M. Swink for plaintiff.
Watson, Buxton & Watson for defendants.

CONNOR, J. The plaintiff's right to recover was dependent upon sustaining his averment that the defendant Fenwick transferred the amount received from his sister's estate to his wife voluntarily or, if in payment of an indebtedness, with an actual intent on his part, known to her, to defraud his creditors. It was shown that defendant Fenwick owed plaintiff $725 and that he was insolvent at the time the money was transferred or, as he claims, paid to his wife. These conditions imposed upon the feme defendant the burden of showing that her husband owed
(529) her a valid debt—one for the recovery of which she could have maintained an action against him and enforced payment—and that the money was received by her in discharge of said debt. *Satterwhite v. Hicks,* 44 N. C., 106, and many other cases. This is too well settled and too consistent with reason and common honesty to require the citation of authority. His Honor so instructed the jury, and in the general instruction further said: "If the jury shall find from the evidence that J. B. Fenwick was insolvent and was owing the plaintiff $725 and interest, that the plaintiff had a suit pending in this court for the collection of his debt, and under such circumstances transferred this money to his wife in payment of his debt to her, but with intent to hinder, delay, or defraud the plaintiff in the recovery of his debt, and the wife participated in this purpose of his, or if she knew it was being done by him to hinder or delay the plaintiff in collecting his debt, then this transfer would be fraudulent, even though he actually owed his wife the money." This, we think, measures up to the standard required by the law. The other phase of the question is presented by the charge given in response to the request of defendants. The jury having found that Fenwick did not contribute the $725 to the purchase of the property with intent to hinder, delay, or defraud his creditors, no question of notice or knowledge on the part of his wife arose. We do not well see how his Honor could have instructed the jury, as a matter of law, to answer the issue for the plaintiff. If Mrs. Fenwick received the amount claimed as a bridal present it was her separate personal estate. The same is true in respect to the amount which she claims to have made in conducting a store. These two sums aggregate more than the amount invested in the lot, rendering it unnecessary for us to consider the effect of the testimony in regard to the amount which she claims to have saved from her household expenses. If she loaned to her husband the money received as a bridal present and the profits from her business, he
(530) thereby became indebted to her and had the legal right to pay her

the debt, which she could enforce in an action against him. *George v. High,* 85 N. C.,.99. It was for the jury to say what the real truth of the matter was. The judge put the burden upon the defendants and they carried it successfully to the verdict.

The declarations of the husband prior to the payment of the money were properly admitted. After that they were incompetent. He could not, after paying her the money and after the lot was conveyed to her, affect her rights by *ex parte* declarations. Upon an examination of the entire record we find

No error.

E. M. DODSON AND WIFE, LOUISA, v. N. J. FULK AND W. E. NIXON, EXECUTORS OF BRYSON FULK.

(Filed 29 April, 1908.)

1. Executors and Administrators—Wills—Advancements.

While the doctrine of advancements strictly arises in cases of intestacy, it is frequently necessary to construe equivalent terms expressed in a will.

2. Same—Amount Specified in Will—Not Open to Contradiction.

When the testator declares in his will that none of his children, who are beneficiaries thereunder, be required to account, except *feme* plaintiff, for a specified sum, it is not open to plaintiffs to show that as a matter of fact she had received from her testator more than that sum, or less, or that she received nothing at all.

3. Same—Disposition of Advancement—Issues—Immaterial.

In an action by plaintiff and her husband to recover of her testator's executors her distributive share of his estate it was established by the verdict that *feme* plaintiff was required to account, under the will, for an advancement of $500; that plaintiffs were indebted to the executors in the sum of $868, evidenced by their bond and secured by mortgage on *feme* plaintiff's real estate: *Held,* (7) the bond for payment of $868 secured by the mortgage raised the presumption that it was a debt in favor of the estate, and in the absence of evidence to the contrary the *feme* plaintiff must pay it, at least to the value of property included in the mortgage; (2) that *feme* plaintiff must account for the $500 as required by the will; (3) that an issue found in favor of *feme* plaintiff that the $500 went into a business in which her husband was a partner is irrelevant to the inquiry.

APPEAL from *Moore, J.,* at August Term, 1907, of SURRY. (531)

The action was brought by plaintiffs to recover the amount due *feme* plaintiff, Louisa Dodson, *nêe* Fulk, as the distributive share of her father's estate, from defendants, who are his executors. Defendants, admitting their obligation to account and pay plaintiff the amount

found to be due, answer and allege that at the time of the testator's death *feme* plaintiff was indebted to testator in the sum of $868 by the joint and several bonds of *feme* plaintiff and her husband, secured by deed of trust on real property of *feme* plaintiff, and no part of said debt had been paid except the interest to 26 August, 1902, and $5 paid 8 October, 1904. Defendants further answered and claimed that before any amount is paid *feme* plaintiff on her demand, she shall also be required to account for the sum of $500, according to the direction of her father's will, which provides as follows:

"Fifth. That none of my children or grandchildren be required to account for anything that I have advanced to them, except that Louisa E. Dodson and E. M. Dodson or their children are or shall be required to account for $500, with interest, from the date I advanced it, at 6 per cent."

And defendants answer that the $500 mentioned in this item of the testator's will referred to $500 which had been advanced by testator to E. M. Dodson, coplaintiff, to be used in the business of which said E. M. Dodson was a member and for which the testator held the firm note of Dodson Bros.

Feme plaintiff replied, denying that she knew anything of this debt or that she was in any way responsible for same, and claiming that the $868 note embraced and included the advancement referred to in item 5 of the will.

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

1. Is the indebtedness represented by the $500 note, dated 14 November, 1898, from Dodson Bros. to Bryson Fulk, the advancement for which the plaintiffs are required to account by the fifth item of the will of Bryson Fulk, deceased? Answer: "Yes."

2. In what sum are the plaintiffs indebted to the defendants as executors of Bryson Fulk, deceased? Answer: "Eight hundred and sixty-eight dollars, with interest from 26 August, 1902, less $5 paid 7 October, 1904."

3. What is the amount due and unpaid on the $500 note made by Dodson Bros. to Bryson Fulk? Answer: "Five hundred dollars, with interest from 14 November, 1902."

There was judgment in favor of the estate to foreclose the mortgage securing the $868 note, and that plaintiff account to the estate for $500 before recovering her distributive share. Plaintiffs excepted and appealed.

W. F. Carter for plaintiffs.

Watson, Buxton & Watson for defendants.

HOKE, J., after stating the case: There are circumstances which permit the reception of parol testimony in matters concerning wills and the contents thereof, and especially in reference to the intent of the testator in the case of advancements. For while the doctrine of advancements strictly arises only in case of intestacy, it is frequently necessary to construe this or equivalent terms when used in the will itself. In our opinion, however, the facts of this appeal do not call for or permit any application of the principle referred to. In the fifth item of the will of Bryson Fulk, father of *feme* plaintiff, it is provided as follows:

"Fifth. That none of my children or grandchildren be required to account for anything that I have advanced to them, except that Louisa E. Dodson and E. M. Dodson or their children are or shall be required to account for $500, with interest, from the date I ad- (533) vanced it, at 6 per cent."

Here is an express declaration on the part of the testator that before the feme plaintiff is permitted to share in the distribution of his estate she shall account for $500 and interest, and it is not open to plaintiffs to show that as a matter of fact she received more than that sum or less, or that she received nothing at all. Gardner on Wills, p. 573; *Blacknall v. Wyche,* 23 N. C., 94; *In re Goblies' Will,* 10 N. Y. Supp., 18; *Estate Eichelberger,* 135 Pa. St., 160; *Callendar v. Woodard,* 52 S. W., 756.

The plaintiff, then, is required to account for $500 as directed by the will, and there is no evidence whatever that the $500 referred to is included in the $868 bond held by the testator against *feme* plaintiff and her husband. Being in the form of a bond for payment of money, and secured by a deed of trust on *feme* plaintiff's land, the presumption is that it is a debt and to be dealt with as such (1 A. and E., 778), and the testimony all tends to uphold the presumption. There seems to have been a dispute between the parties as to whether the $500 mentioned in item 5 of the will referred to that amount of money which the testator had at some time advanced to the firm of Dodson Bros., of which plaintiff E. M. Dodson was a member, and an issue was submitted to determine the matter, the verdict therein being for defendant; but neither the issue itself nor the ruling of the court in deciding it is relevant to the inquiry. The *feme* plaintiff must pay the debt of $868, at least to the value of the property included in the deed of trust, because to that extent she is legally bound for it. And she must account for the $500 because the will requires her to do it; and it is not relevant to any question involved in this suit whether the $500 went into the firm of Dodson Bros. or not.

There is no error to plaintiff's prejudice, and the judgment of the court below is

Affirmed.

(534)

W. G. WRIGHT AND WIFE v. THE FRIES MANUFACTURING AND POWER COMPANY.

(Filed 29 April, 1908.)

1. Street Railways—Moving Car—Person Entering Upon Track—Negligence—Duty of Company.

The duty required of the employees of a street car company on seeing a person enter at a place of danger upon its track in front of a rapidly moving car is to exercise ordinary care, give signals, lower the speed, and, if it appears reasonably necessary, stop the car. If the car is properly equipped and the equipment used with reasonable promptness and care, the company will not be liable.

2. Same—Instructions.

The driver of a wagon upon which the plaintiff was riding, in order to pass another vehicle, reined his wagon onto the street car track. Looking back through his covered wagon he saw a car approaching, and backed his team from the track so as to throw the back of the wagon upon it, and the alleged injury to plaintiff was caused by the car striking the wagon. There was evidence that the motorman rang his gong and attempted to bring the car to a full stop, but before he could do so it struck the wagon: *Held*, it was error in the lower court to charge the jury, in effect, that it was the duty of the motorman to stop the car at once when he saw the wagon would not clear the track, and within the distance testified to, if this could have been done without danger to the occupants of the car, and that the mere ringing of the gong was not sufficient.

3. Appeal and Error—Nonsuit—Instructions Not Considered.

Upon an appeal from sustaining a motion as of nonsuit upon the evidence it is not ordinarily necessary to pass upon the refusal of a requested instruction upon the evidence.

APPEAL from *Moore, J.*, at September Term, 1907, of FORSYTH.

This action was brought by the *feme* plaintiff to recover damages for personal injuries.

The court submitted these issues:

1. Was the plaintiff M. C. Wright injured by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

(535) 2. What amount of damages, if any, is the plaintiff M. C. Wright entitled to recover? Answer: "Two hundred dollars."

From the judgment rendered the defendant appealed. The facts are stated in the opinion of the Court.

Lindsay Patterson for plaintiffs.

Manly & Hendren and Watson, Buxton & Watson for defendant.

BROWN, J. The *feme* plaintiff claims to have been injured in a collision between defendant's electric street railway car and the wagon in which she was riding, on 28 August, 1903. There was evidence tending to prove that plaintiff was in a covered wagon driven by her son, going up Liberty Street in the city of Winston; that defendant's car was going up the same street at the speed of 6 miles an hour; that in order to pass the vehicle of a Mrs. Tesh the driver of the wagon reined his team to the left and onto the street railway track. Looking back through his covered wagon and seeing the car coming, he backed his team off the track, and in so doing threw the rear end of his wagon back on the track. There was evidence tending to prove that the motorman rang his gong and attempted to bring his car to a full stop, but before he could do so the car struck the end of the wagon and shoved it forward some 5 or 6 feet, and that *feme* plaintiff was injured. There was also evidence tending to prove that she received no injury. At the request of plaintiff, his Honor gave several prayers for instruction, two of which are as follows:

"If the jury find from the evidence that the motorman saw the wagon on defendant's track 35 or 40 feet ahead of the car, with the rear end of the wagon turned towards the car, it was the duty of the said motorman to at once stop the car in order to prevent a collision with the wagon, if it could have been stopped within that distance by the exercise of ordinary care and without danger to the occupants of the car, and if the motorman failed to do so the defendant would be guilty of (536) negligence." Again: "If the jury find from the evidence that the car was within 35 or 40 feet from the wagon, and that the motorman saw that the driver of the wagon was not turning off the track, it was not sufficient for the motorman to merely ring the gong, but it was his duty to stop the car if it could have been done by the exercise of ordinary care and without danger to those on the car."

We think these instructions are erroneous, and in deference to the earnest argument of the learned counsel for plaintiffs we have carefully scanned the charge to see if the error was cured, as in *Wilson v. R. R.*, 142 N. C., 333, in any other portion of his Honor's instructions. We fail to see that it was. These instructions determine as a matter of law that it was the duty of the motorman to stop his car when within 35 or 40 feet of a vehicle on the track.

It would be almost impossible to operate a street railway system with any sort of expedition if this "hard and fast rule" were adopted as a standard of duty. This subject is fully discussed in *Davis v. Traction Co.*, 141 N. C., 134-140, where it is held: "If a car is moving at a lawful speed—that is, not an excessive rate of speed—and a person enters upon the track, the defendant is required to exercise ordinary care—give sig-

nals, lower the speed and, if it appears *reasonably necessary,* stop the car. If the car is properly equipped and the equipment used with reasonable promptness and care the defendant will not be liable."

The defendant requested his Honor to instruct the jury that there was no evidence of negligence and to direct them to answer the first issue "No." As this question is not presented upon a motion to nonsuit, the sustaining of which would dismiss the action, it is not necessary that we should pass on it, as the evidence may not be the same upon another trial.

New trial.

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(537)

W. H. SHELBY v. CHARLOTTE ELECTRIC RAILWAY, LIGHT AND POWER COMPANY.

(Filed 29 April, 1908.)

1. Pleadings—Distinct Defenses—Demurrer.

When two separate and distinct defenses are pleaded the plaintiff may demur to one of them. Revisal, sec. 435.

2. Pleadings — Distinct Defenses — Demurrer — Appeal Fragmentary — Dismissed.

An appeal from the refusal of the court to sustain a demurrer of plaintiff to one of two separate and distinct defenses is fragmentary and will be dismissed. It is otherwise when a demurrer to one defense is sustained, or the demurrer to whole defense is overruled.

3. Pleadings—Distinct Defenses—Demurrer Overruled—Objections and Exceptions.

When the plaintiff demurs to one of two separate and distinct defenses and the demurrer is overruled, the plaintiff should note an exception and the trial proceed upon both.

APPEAL by plaintiff from an order of *Moore, J.,* overruling demurrer to the answer, at January Term, 1908, of MECKLENBURG.

The facts are stated in the opinion.

Stewart & McRae for plaintiff.
Tillett & Guthrie for defendant.

CLARK, C. J. The defendant pleaded in its answer two separate and distinct defenses. The plaintiff demurred to one of them, as he had a right to do. Revisal, sec. 435. The demurrer was overruled, and the plaintiff appealed. This is obnoxious to the rule forbidding frag-

mentary appeals. An appeal from a ruling upon one of several issues will be dismissed. *Hines v. Hines,* 84 N. C., 122; *Arrington v. Arrington,* 91 N. C., 301.

The plaintiff should have noted his exception and the judge should have proceeded with the trial upon both issues. If both issues or only the issue as to this defense were found with the plaintiff he would not need to appeal as to this ruling. If the other defense were (538) found against the plaintiff, ordinarily he would not need to review the order overruling the demurrer as to this, but should he desire to do so the overruling the demurrer as to this issue can be as well reviewed on appeal from the final judgment. It is true that the plaintiff will have to try this issue, but, aside from the presumption that the judge ruled rightly, it is better practice that the issue raised by the second defense should be tried, even unnecessarily, than that an action should thus be cut in two and hung up in the courts till it is determined, after much delay, on appeal, whether two issues or one should be tried. It is better to try both, and after final verdict and judgment pass upon the validity of the defense demurred to, if the result is such as to make the plaintiff still desirous to review it, which he will not be if he gain the case, nor if he lose on the other issue without ground of exception thereto.

If this demurrer to one defense had been sustained a different situation would be presented and an appeal would lie at once, for to try the case on one defense might cause a verdict and judgment against the defendant, which might be defeated if the other defense were passed on. That would "affect a substantial right," and hence an appeal lies. Revisal, sec. 587. Whereas no harm would result from trying both defenses on issues as to each, since the exception to submitting this issue can be reviewed in passing upon the appeal from the final judgment. Judgment on appeal could then be entered without requiring a new trial.

It is true that when a demurrer to the whole cause of action or the whole defense is either overruled or sustained, an appeal lies. *Comrs. v. Magnin,* 78 N. C., 181; *Ramsay v. R. R.,* 91 N. C., 418; *Frisby v. Marshall,* 119 N. C., 570; *Clark v. Peebles,* 122 N. C., 163. Such appeal is not fragmentary, but affects the entire action. Indeed, in *Comrs. v. Magnin, supra,* the Court questioned whether an appeal lay even in such case. The refusal of motions to dismiss for want of (539) jurisdiction or that the complaint does not state a cause of action, even though they go to the whole action, are not such demurrers as permit an appeal. *Burrell v. Hughes,* 116 N. C., 430; *Joyner v. Roberts,* 112 N. C., 111; *Sprague v. Bond,* 111 N. C., 425. To allow appeals in such cases would admit of infinite abuse and vexation and delay to plaintiffs. Whether an appeal lies at once, or whether an exception should be

noted, to be reviewed on appeal from the final judgment, is a matter dependent almost entirely upon balancing inconveniences, and whether the class of orders to which the particular judgment belongs ordinarily requires suspension of all proceedings till it is reviewed. If no "substantial right is affected" by the delay (Revisal, sec. 587), ordinarily the exception should be noted and carried up for review on appeal from the final judgment.

Hence, fragmentary appeals like this, and premature appeals and appeals from interlocutory judgments, usually are not tolerated. It can prejudice neither party to have the issue as to the second defense found by the jury (plaintiff's exception being noted) at the same time the issue as to the other defense is found. With all the parties before the court, and the facts fully brought out, a correct conclusion is more likely to be reached by both judge and jury.

Appeal dismissed.

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(540)

W. O. JONES ET AL. v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

(Filed 29 April, 1908.)

1. Insurance—Renewable Term Plan—Convertible—Level Rates—Premium Specified—After Last-named Age—Higher Rates—"&c."

Plaintiff applied for and received from defendant company a policy of life insurance for three months only, payable at death, upon the "quarterly renewable term plan with participating premiums." The provisions contained in the policy were that the company would renew and extend the insurance during each successive quarter from its date upon the payment at stipulated times in each successive year during the life of the insured of the premium for the actual age attained, in accordance with a schedule rate attached, less the return premiums indorsed; that after the insured attained the age of 60 years the policy could be exchanged for one on the level or uniform plan at the unchanging rate for the then actual age attained. The level premium referred to was given in columns from the ages of 60 to 65 years, inclusive, for annual, semi-annual, and quarterly premiums, and at the bottom the words "&c., &c., &c.," appeared. In construing the policy, when there was no contention of fraud: *Held*, (1) that the level premium rates are based upon a steadily rising premium at the actual cost of the hazard at the attained age at each renewal, and that the words "&c., &c., &c.," mean "and so on" in increasing rates in proportion to the ordinary rate when changed to a level rate after the age for which the last rate was indorsed; (2) that the level premium rates to be paid by the insured after the age and rate last given are readily capable of determination in the same mode as those under that age.

2. Insurance—Premiums—Paid With Knowledge, Not Recoverable.

Voluntary payments of premiums made by the insured with full knowledge of the facts cannot be recovered by him.

APPEAL by defendant from *Long, J.*, at October Term, 1907, of WAKE.

Shepherd & Shepherd and T. M. Argo for plaintiffs.
James H. Pou, C. B. Aycock, and J. N. Holding for defendant.

CLARK, C. J. The jury found all issues of fraud against the (541) plaintiff, and found upon the other issues submitted that plaintiff ratified and acquiesced in the policy issued to him; that he did not demand a settlement before suit; that he made only two payments of premiums under protest; that the defendant has continuously carried on business in this State since August, 1887, maintained an agent herein, in all respects complied with chapter 62, Laws 1899, and became domesticated in this State. The plaintiff did not appeal as to the verdict. Nothing remains except to declare the meaning of the contract.

On 10 August, 1887, plaintiff applied to defendant for a policy, as follows:

"I hereby apply to the Provident Life Assurance Society of New York for an insurance of ten (10) thousand dollars, payable at my death, upon the quarterly renewable term plan, with participating premiums," etc.

And the defendant issued such a policy for three months only, and it contained the following terms and provisions:

"And the said society further agrees to renew and extend this insurance during each successive quarter year from date hereof, upon the payment, on or before the first days of November, February, May, and August in each successive year during the life of the insured, of the premiums for the actual age attained, in accordance with the schedule rate printed on the back of this policy on each one thousand dollars insured, less the return premiums indorsed thereon.

"SEC. 5. This form of policy may be exchanged at any time after the insured attains the age of sixty years for one on the level or uniform premium plan, for the same amount, at the unchanging rate for the then actual age attained, as printed below.

"Level premiums to secure $1,000 payable at death. Other amounts in the same proportion.

(542)

Age.	*Annual.*	*Semiannual.*	*Quarterly.*
60	$61.54	$31.96	$16.62
61	64.64	33.60	17.47
62	68.04	35.38	18.40
63	71.69	37.28	19.40
64	75.58	39.30	20.44
65	79.75	41.48	21.59
	&c.	&c.	&c."

The plaintiff got the kind of policy he asked for, and his evidence shows that he understood it. The verdict, from which he does not appeal, settles that he was not imposed upon. The policy is somewhat peculiar. It is not the usual life policy with a level premium, but it has more of the characteristics of a fire insurance policy, renewable from time to time, and in force (like a fire policy) only when thus renewed, but with an express agreement for a gradual increase of premium at each renewal in proportion to the increased hazard of the risk.

In short, the plaintiff simply insured his life for three months at a time, with the right to renew at the beginning of each succeeding three months, without medical examination, by paying the premium for the attained age. As this attained age increased every year, so the premiums must and did increase every year. He was taking out a policy each quarter at his increased age and paying cost for the insurance. When his premiums paid more than the cost, this excess was returned to him in dividends—sometimes in cash, at other times as credits on premiums. In addition to the right to renew every quarter his same policy, plaintiff had the option to exchange this policy (which of necessity would cost more and more the longer he lived, and if he lived to great age would become burdensome, because he would be paying the natural-rate premiums for old men) at any time after he attained the age of 60 years for a level-premium policy, and a table of the rates for a level-

(543) premium policy, beginning with age 60, was attached to his policy. Plaintiff now claims that this policy became automatically a level-premium policy at the age of 65, without such exchange. He bases this contention upon the fact that the rates indorsed, while rising with each quarterly period up to 65, ceased then to be named.

As the policy carried no reserve, was only a quarterly term policy, and all parts of the premiums not actually used as expenses and to pay death losses had been returned to plaintiff, and plaintiff's policy contained a clause allowing him to change to a level-premium policy at a specified and higher rate, we must conclude that plaintiff's claim is not based

upon his policy, but is in opposition thereto. The plaintiff made no application to exchange for a level-rate policy under the option given. The words "&c., &c., &c.," as to such rates, mean "and so on" in increasing ratio, if the ordinary rate was changed to a level rate after reaching 65, for which age the last rate was indorsed.

The figures were not set out as to renewal rates to be charged after 65, doubtless because in a renewable policy of this kind, based on the actual cost of the hazard *at the attained age,* few, if any, would care to renew after the age of 65 was reached. It would be more reasonable to argue, from the failure to indorse on the policy any rates of renewal after 65, that the company would insure no one after that age, than that the figures ceasing indicated that the premiums would automatically, without any express provision in the policy, change to a level rate. There is nothing to countenance the latter contention. The whole structure of the policy and nature of the contract are againt it. They are based upon a steadily rising premium at the usual cost of the hazard at the attained age at each renewal. For the relief of those who might wish to continue insurance after 65 without the rapid increase of premium after that age there is a special provision authorizing a change from a rising premium to a level rate at and after 60 years of age. Of (544) this provision the plaintiff did not avail himself. The level rate thus indorsed for those changing to a level rate at 60 is much higher than the ordinary (rising) rate at 65, which the plaintiff is now contending would become automatically the level rate after 65. If plaintiff's contention was well founded, the provision for a level rate after 60 would be both useless and contradictory. The plaintiff contended that he insured on an agreement with the general agent that the premiums should never exceed that for 65 years, but the jury, in response to the second issue, found this not to be so.

The plaintiff could not recover the premiums paid voluntarily with full knowledge of the facts. It is well settled that a voluntary payment of money with knowledge of all the facts cannot be recovered, even where there was neither debt nor liability. *Adams v. Reeves,* 68 N. C., 134; *Comrs. v. Comrs.,* 75 N. C., 241. The plaintiff admits that he knew every fact that he now knows when he made the payments after 1900, and the jury finds that no protest was made till 1 November, 1906, which was repeated 1 February, 1907.

The premiums to be paid after the insured arrived at 65 years, though not indorsed upon the policy, are readily capable of determination in the same mode as those under that age. His Honor erred in construing the policy to restrict the premiums after 65 to the same amount as those

indorsed for that age. The jury having negatived all the allegations of fraud, upon the verdict judgment should be entered in favor of the defendant.

Reversed.

Cited: *S. c.*, 150 N. C., 377, 381.

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(545)

C. S. McARTHUR v. E. A. GRIFFITH, ADMINISTRATOR, ET AL.

(Filed 6 May, 1908.)

1. Parties—Executors and Administrators—Heirs—Real Estate—No Privity.

There is no privity of interest between the administrator of deceased and his widow and heirs at law in the deceased's real estate, and it was not error of the judge in the lower court to permit the widow and heirs at law to become parties to and fully defend a suit affecting their interest in deceased's lands.

2. Cloud on Title—Action—Heirs—Pleadings—Judgment—Estoppel.

A judgment in an action brought by the widow and heirs at law to remove a cloud upon their title to land descended to them, wherein it was adjudicated that a note secured by a mortgage had been fully paid and discharged, may be successfully pleaded in bar to an action subsequently brought to foreclose by the administrator of the mortgage creditor.

3. Cloud on Title, What is—Equity Jurisdiction.

When a lien by mortgage appears by record to be valid upon lands descending to the widow and heirs at law, but which was paid by their intestate, it is a cloud upon their title within the jurisdiction and province of a court of equity to remove, and their cause of action will therein lie for that purpose; otherwise when such adverse claim of title appears to be void upon its face.

4. Removal of Causes—Venue, Objection to—Waiver.

An objection that a suit was instituted in the wrong county relates to the venue and not to the jurisdiction. In the absence of a written demand that the suit be removed to the proper county before the time to answer has expired (Revisal, sec. 425), the objection will be deemed as waived.

5. Same—Pleadings.

A prayer in the answer that proceedings be stayed by injunction until an issue in a similar suit between the same parties in another county be determined is not a written demand for the removal of the cause, but if otherwise it would be deemed as waived when the cause was proceeded with to judgment without exception.

MCARTHUR *v.* GRIFFITH.

APPEAL from *Ferguson, J.*, at November Term, 1906, of DAVIDSON.

This action was brought to foreclose a mortgage given by J. P. Hannah, on 5 March, 1895, to secure a note for $2,230.73 executed by him to R. M. McArthur. The parties waived a jury trial, and the presiding judge, with their consent, found the following facts: (546)

1. That R. M. McArthur is dead and C. S. McArthur is his administratrix. J. P. Hannah is also dead and E. A. Griffith is his administrator.

2. In August, 1903, E. A. Griffith, as administrator of J. P. Hannah, filed his petition in Davidson County before the clerk of the Superior Court against the widow and heirs at law of J. P. Hannah, seeking to sell the land of his intestate in that county to pay the debts of his intestate, among others the debt to C. S. McArthur, administratrix of R. M. McArthur. The defendants answered that the debt had been fully paid and satisfied by J. P. Hannah in his lifetime. Upon joining issue the case was transferred to the civil-issue docket for trial before a jury. Pending the cause, C. S. McArthur, administratrix of R. M. McArthur, was made party plaintiff by order of the court, and she filed a complaint and the defendants filed an answer thereto. At November Term, 1905, of Davidson Superior Court the plaintiffs submitted to a voluntary nonsuit.

3. On 14 November, 1905, after judgment of nonsuit was entered, the widow and heirs of J. P. Hannah, defendants in this action, commenced an action in Davidson County Superior Court against C. S. McArthur, administratrix of R. M. McArthur, and in their complaint alleged the execution of the note and mortgage, and also that the same had been fully paid by J. P. Hannah in his lifetime, and prayed that they be canceled and the cloud upon their title be thus removed. The defendant in that case filed an answer denying payment.

4. At November Term, 1906, the case came on for trial before *Judge Ferguson* and a jury, and, a verdict having been returned for the plaintiffs to the effect that the debt had been paid and the mortgage thereby satisfied, it was adjudged by the court that the note and mortgage be surrendered by the defendant and canceled.

5. The present action was brought in Forsyth County, on 27 (547) November, 1905, to collect the note and for foreclosure of the said mortgage, and a complaint and answer filed. The defendants herein, except the administrator, pleaded the judgment in Davidson Superior Court in bar of this action. The administrator, E. A. Griffith, failed to answer, but by leave of the court the other defendants, the widow and heirs of J. P. Hannah, were made parties defendant and filed an answer.

Upon the foregoing facts, the court being of the opinion that the plain-

tiff is estopped, it was adjudged that the plaintiff take nothing by this action, and that defendants go without day and recover of the plaintiff their costs, to be taxed by the clerk. Plaintiff excepted and appealed.

J. S. Grogan for plaintiff.
Watson, Buxton & Watson for defendants.

WALKER, J., after stating the case: The order of the court by which the widow and heirs of J. P. Hannah were permitted to become defendants and to answer the complaint was a proper one. The administrator, E. A. Griffith, had failed to answer and resist the plaintiff's recovery of a satisfied claim which the latter sought to have paid again by subjecting the land which belonged to the widow and heirs, and which the ancestor of the latter had mortgaged to secure the original debt, to the payment of the alleged debt. Why the administrator refused to plead or to perform his plain duty as a fiduciary we were not told. It is manifestly just that under such circumstances the heirs and widow should be given the opportunity to resist the foreclosure of the mortgage and to prevent the land from being applied to the payment of a debt which does not exist. It has been expressly so held. *Bevers v. Park,* 88 N. C., 446; *Speer v. James,* 94 N. C., 417; *Tilley v. Bivens,* 112 N. C., 348. In the cases cited the heir was allowed to plead the statute of limitations. Why not be permitted to show in defense of their right to the land, (548) freed the encumbrance, that the debt had actually been paid?

In *Shewne v. Vanderbout,* 1 Russell and Milne, 347, the Court permitted a residuary legatee to defend in a creditor's suit, and in *Steele v. Steele,* 64 Ala., 438, it was held that the heir is at liberty to dispute any and every debt that may be presented against the estate of his ancestor, and may set up every defense thereto which is legally sufficient. The decision rests upon the ground that there is no privity between the administrator and the heir, and hence the former cannot bind the latter by either his admissions or omissions; that while by omitting to plead the statute or by an express promise to pay he could revive a claim so as to charge the personal assets, he has no such power over the real assets, which descend directly to the heir, as to whom all his acts are *res inter alios acta.* The case last mentioned was cited with approval in *Bevers v. Park, supra.* In the latter case the Court says that the object of the proceeding by the creditor is to deprive the heirs of their land, and it is but reasonable that they should be permitted to resist the suit and save their land, if legally possible. And if they had the right to resist it why should they not be allowed to avail themselves of all the rules of pleading, practice, and evidence necessary for the purpose?

The judgment recovered in the Superior Court of Davidson County in the suit between the widow and heirs at law of J. P. Hannah, as plaintiffs, and the present plaintiff, as defendant, constitutes a complete bar to the plaintiff's recovery in this suit. The rule is that a question once determined between the parties cannot again be brought in question, and the former decision may be relied upon as an estoppel, or, more properly speaking, a bar, to any action that may thereafter be tried involving the same point. "A judicial determination of the issues in one action is a bar to a subsequent one between the same parties having substantially the same object in view, although the form of the latter and the precise relief sought is different from the former." *Lumber Co. v. Lumber Co.,* 140 N. C., 437; *Edwards v. Baker,* 99 N. C., 258; *Tuttle* (549) *v. Harrill,* 85 N. C., 456. The issue in the Davidson County suit was whether the debt had been paid, and the issue here is precisely the same, although the position of the parties on the record is reversed.

The widow and heirs of J. P. Hannah had the right to bring the action to remove the cloud from their title. 7 Cyc., 255, 256, and 6 Cyc., 319, 320, and notes. Equity interferes to remove clouds upon title, because they embarrass the owner of the property clouded and tend to impede his free sale and disposition of it. *Byne v. Vivian,* 5 Vesey, 604; *Ward v. Dewey,* 16 N. Y., 531; *Bissell v. Kellogg,* 60 Barbour, 629. A cloud upon title is in itself a title or encumbrance, apparently valid, but in fact invalid. It is something which, nothing else being shown, constitutes an encumbrance upon it or a defect in it—something that shows *prima facie* the right of a third party either to the whole or some interest in it, or to a lien upon it. 2 Cooley Taxation (3 Ed.), p. 1448; *Detroit v. Martin,* 34 Mich., 170. When the claim, which is a lien if in force, appears to be valid on the face of the record, and the defect or invalidity can only be made to appear by extrinsic evidence, particularly if the proof of it depends upon oral testimony, it generally presents a case invoking the aid of a court of equity to remove it as a cloud upon the title. *Crocke v. Andrews,* 40 N. Y., 547; *Sanxay v. Hunger,* 42 Ind., 44; 2 Story Eq. Jur. (13 Ed.), secs. 698, 699, 700. If, on the other hand, the title be void on its face—if it be a nullity, a mere *felo de se,* when produced—so that an action based upon it will fall of its own weight, as has been said, then the title of the party is not considered as necessarily clouded thereby. *Busbee v. Macy,* 85 N. C., 329; *Busbee v. Lewis,* 85 N. C., 332; *Browning v. Lavender,* 104 N. C., 69; *Thompson v. Etowah Iron Co.,* 91 Ga., 538; *Lick v. Ray,* 43 Cal., 83. This equity is also enforced for the reason that the proof of the party upon which he relies to show the invalidity of the encumbrance may be lost by lapse of (550)

time. *Browning v. Lavender, supra.* The widow and heirs of J. P. Hannah properly brought their action to have the note and mortgage canceled, so as to remove the cloud from their title. *Byerly v. Humphrey,* 95 N. C., 151; *Murray v. Hazell,* 99 N. C., 168. The doctrine relating to cloud upon title is founded upon true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding the same to retain it, since he can only do so with some sinister or wrongful design. If it is a negotiable instrument it may be used for a fraudulent or improper purpose. If it is a deed purporting to convey lands, which creates an apparent encumbrance, its existence in an uncanceled state necessarily is calculated to throw a cloud over the title. 2 Story Eq. Jur. (13 Ed.), sec. 700, and notes.

Whether the action was properly brought in the Superior Court of Davidson County or should have been brought in the Superior Court of Forsyth County is a question we need not decide. It relates to the venue or place of trial, and not to the jurisdiction. If the action was not brought in the proper county it could be tried therein, unless the defendant, who is the plaintiff in this action, demanded in writing, before the time for answering expired, that the trial be had in the proper county. Rev., 425. This he did not do, as we think, and the objection to the *venue* was thereby waived. *Leach v. R. R.,* 65 N. C., 486; *Lafoon v. Shearin,* 91 N. C., 370; *Cloman v. Staton,* 78 N. C., 235; *McMinn v. Hamilton,* 77 N. C., 300. His counsel contends that the demand was made in the answer. If it was so made it might perhaps have been sufficient in respect to time. *Rankin v. Allison,* 64 N. C., 673; *Shaver v. Huntley,* 107 N. C., 623. But we do not consider what is stated in the answer and relied on by the defendant, for the purpose was in law a sufficient demand for the removal of the cause. We quote from the
(551) answer: "Wherefore the defendants pray that the plaintiff's action be dismissed and that the plaintiff be restrained by injunction from any proceeding whatsoever against the defendants until after the determination of the issues joined in Forsyth County against E. A. Griffith, administrator of J. P. Hannah, deceased, is determined." This is clearly not a prayer for the removal of the cause, but for a stay in the prosecution of any action until the Forsyth suit should be determined. Besides, if the application was made, and in proper form, it was not pressed, the court was not requested to pass upon it, no exception was taken to any ruling of the court in regard to it, and there was no appeal from the judgment rendered in the case. If made, therefore, at all, it was clearly abandoned.

We conclude that his Honor, *Judge Justice,* took the right view of the case upon the facts found by him, and correctly held that the judgment in the Davidson suit barred the plaintiff's recovery in this action.

Affirmed.

A. H. MOOSE v. A. CROWELL, ADMINISTRATOR.

(Filed 6 May, 1908.)

Bonds—Acknowledgment by Obligor—Payments—Evidence—"Signed, Sealed, and Delivered."

Evidence that defendant's intestate, who could neither read nor write, acknowledged the bond sued on as her own and made payments thereon for a long series of years, which were duly entered as credits, is sufficient to go to the jury as tending to prove that the bond was "signed, sealed, and delivered" by the obligor or by her authority.

APPEAL by defendant from *Moore, J.,* at January Term, 1908, of CABARRUS.

Adams, Armfield, Jerome & Maness for plaintiff. (522)
Montgomery & Crowell for defendant.

CLARK, C. J. Action on a bond alleged to have been executed by defendant's intestate. She could not write. *Non est factum* was pleaded. There was evidence by several witnesses that she said that the note was hers, that she said her son Henry wrote the note for her, and that she had been seen to make payments on it and direct credits therefor to be entered on the bond.

The only defense relied on is that, this being a bond, there was not sufficient evidence to go to the jury to prove that it was "signed, sealed, and delivered" by the obligor or by her authority. *Wester v. Bailey,* 118 N. C., 193, held that it was sufficient if the party afterwards acknowledged it as his bond, for the acknowledgment, if believed, is of execution, including delivery, and the seal imports consideration. *Angier v. Howard,* 94 N. C., 27. This subsequent acknowledgment here was express and accompanied by repeated payments for a long series of years, and duly entered as credits on the bond by the intestate's direction. This distinguishes this case from *McKee v. Hicks,* 13 N. C., 379, and *Kime v. Brooks,* 31 N. C., 218, which are relied on by the defendant. In refusing the motion for nonsuit there was

No error.

(553)

F. D. FORRESTER & CO. v. SOUTHERN RAILWAY COMPANY.

(Filed 6 May, 1908.)

1. Railroads—Carriers—Suitable Cars—Failure to Furnish—Liability of Carrier.

A railroad company, by accepting for shipment a car-load of fruit, contracts that it will transport it to destination with due diligence and in good condition, except as to such damage as might be incident to freight of this character, and includes in that contract the furnishing of a ventilated car when usual or reasonably necessary.

2. Same—Measure of Damages.

When it is shown by the evidence that a ventilated car was the only reasonable means by which the defendant railroad could transport at that season of the year a car-load of fruit for the shipper; that it failed to furnish this character of car, and furnished only a box car, upon which plaintiff loaded his fruit, and in consequence the damage complained of was occasioned, the measure of damages is the actual loss in value to the fruit being in an improper car, and not the interest on the difference between the value of the fruit at the initial and terminal points for the period elapsing incident to the delay in settlement. The rule where the carrier fails to ship and the shipper retains the goods distinguished.

3. Same—Knowledge of Shipper.

When a railroad company fails in its duty to furnish the shipper a ventilated car for transporting his fruit, and furnishes a box car instead, the company is not relieved from liability solely by the fact that the shipper knew his fruit was forwarded in a box car.

APPEAL from *Ferguson, J.*, at January Term, 1908, of WILKES.

This action is to recover damages growing out of a shipment of dried apples from Wilkesboro, N. C., to Richmond, Va. The court submitted this issue, without objection or exception:

"What damage, if any, is plaintiff entitled to recover of the defendant?" Answer: "One hundred and eighty-four dollars and forty-seven cents."

(554) From the judgment rendered the defendant appealed.

The facts are stated in the opinion.

Finley & Hendren and O. C. Dancy for plaintiff.

Manly & Hendren and W. W. Barber for defendant.

BROWN, J. We need only consider the question of damage raised by the refusal of the court to give defendant's prayers for instruction:

"1. That the plaintiff was not entitled to recover any sum other than nominal damages. 2. That plaintiff was not entitled to recover any sum save the interest on the difference between the value of the fruit at Wilkesboro and the value at Richmond for the period elapsed incident to the delay in settlement." We fully agree with the learned counsel for defendant that, where goods are tendered to a common carrier for shipment and the latter fails to ship and the shipper retains his property, the rule of damage is the difference between the market value of the goods at the shipping point and at the point of destination, less freight charges, allowing a reasonable time for transportation. But that rule does not apply to the facts of this case. The fallacy in the argument for the defendant is in assuming that there were two contracts, whereas in law and fact there was only one. The contract between plaintiff and defendant was not that defendant should furnish a ventilated car, but that the defendant would transport the apples to Richmond with due diligence and in good condition, except such damage as might naturally be incident to such freight. The agreement to procure a ventilated car was no part of the contract, for the evidence shows that by ventilated cars is the only safe means of carrying dried fruit at that season of the year. It is the duty of the carrier to furnish suitable cars for shipment of the particular commodity undertaken to be conveyed. 4 Elliott on Railroads, 1475. If the carrier fails to furnish such cars, and injury results to the goods from the defect, the carrier is liable. 4 Elliott, *supra,* 1448; *R. R. v. Strain,* 81 Ill., 504.

In this instance the defendant shipped the fruit in an ordinary (555) box car, and it was injured in consequence. The defendant had sent a proper car for its transportation, but through a mistake of an agent the ventilated fruit car was loaded with brick and sent off. The fact that plaintiff knew that his fruit was shipped in a box car will not relieve the defendant from liability, nothing else appearing. *R. R. v. Marshall,* 74 Ark., 597; *R. R. v. Pratt,* 89 U. S., 123. In the last named case the Supreme Court of the United States said: "It is said that Pratt was aware of the defective condition of the car; that he volutarily made use of it, and that the risk of loss by its use thus became his and ceased to be that of the company. The judge charged the jury that it was the duty of the carrier to furnish a suitable vehicle of transportation; that if he furnished unfit or unsafe vehicles he is not exempted from responsibility by the fact that the shipper knew them to be unsafe and used them, and that nothing less than a direct agreement by the shipper to assume the risk would have that effect. . . . The authorities sustain the position taken by the judge at the trial."

We think his Honor properly refused the defendant's prayers, and that he was right in charging the jury that the defendant was liable for such injuries to the fruit as it sustained by reason of shipment in an unsuitable car.

No error.

Cited: *Lucas v. R. R.*, 165 N. C., 267.

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(556)

HARRY STARNES, BY HIS NEXT FRIEND, W. S. STARNES, v. THE ALBION MANUFACTURING CO.

(Filed 6 May, 1908.)

1. Minors, Unlawful Employment of—Constitutional Law—Parent and Child—Public Good—Revisal, Sec. 3362.

Revisal, sec. 3362, making the employment of children under 12 years of age by certain factories or manufacturing establishments a misdemeanor, is constitutional and valid and not in contravention of the fourteenth amendment to the Constitution of the United States as an unlawful restriction of the right of the parent to the labor of the child, it being for the purpose of promoting the general welfare by protecting minors from injury by overwork, from liability to injury by machinery in large manufacturing plants, and by facilitating their attendance at school.

2. Minors, Unlawful Employment of—Negligence per se—Revisal, Sec. 3362.

It is negligence *per se* for a factory or manufacturing plant to employ a child under 12 years of age to work therein, when in violation of Revisal, sec. 3362. (*Rollins v. Tobacco Co.*, 141 N. C., 300; *Leathers v. Tobacco Co.*, 144 N. C., 330, cited and approved.)

3. Minors, Unlawful Employment of—Evidence—Negligence—Causal Connection—Proximate Cause.

Defendant manufacturing company employed a child under 12 years of age to work in its establishment, in violation of Revisal, sec. 3362. His duties were to sweep out spinning room and make bands, but on the day in question he went to another part of the factory, as he had frequently done before, to see his father, who was running a carding machine. When the father was twenty steps distant, tending another machine, the child attempted to pick a piece of cotton off the card and got his hand caught and injured in the cylinder of one of the machines in his father's charge: *Held*, (1) there was a direct causal connection between the unlawful employment of the child and the injuries sustained by him, for which the defendant is liable, occasioned by his being employed on the premises, where he was subject, through childish carelessness incident to his years,

to tamper with dangerous machinery; (2) there was no error in the lower court refusing to instruct the jury upon the doctrine of proximate cause at defendant's request.

ACTION to recover damages for personal injury, tried before (557) *Moore, J.*, and a jury, at March Term, 1908, of MECKLENBURG.

The court submitted these issues:

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

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: "No."

3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: "Three thousand dollars."

From the judgment rendered the defendant appealed.

Stewart & McRae for plaintiff.

Burwell & Cansler and R. S. Hutchison for defendant.

BROWN, J. It seems to have been admitted that the plaintiff was employed by defendant to work in its cotton factory, and that he was assigned to the spinning room on the second floor; that his duties were to sweep out the spinning room and to make bands; that plaintiff performed such duties from September, 1906, the date of his employment, until 5 January, 1907, when he was injured. On that day he went down on the lower floor, as he had frequently done before, to see his father, who was running the carding machines. While there plaintiff got his hand caught and injured in the cylinder of one of the machines in charge of his father in endeavoring to pick a piece of cotton off the card. At the time his father was some twenty steps distant, tending another machine.

The plaintiff introduced evidence tending to prove that at the date of his injury he was not quite 10 years of age, and that when he was hired to defendant by his father the defendant's agent and superintendent knew he was under 12 years of age.

Defendant offered evidence tending to contradict these allegations as to age and knowledge, and to prove that the boy was taken in the factory upon his father's representation as to age and under the (558) belief that he was over 12 years of age.

In the view we take of the case it is unnecessary to consider defendant's first, second, and fourth assignments of error, relating to exceptions to evidence. If the rulings of his Honor were erroneous they worked no injury to plaintiff.

The contentions of defendant may be summarized as follows:

1. That Rev., 3362, is violative of Article I, section 17, of the State Constitution, as well as the Fourteenth Amendment to the Constitution of the United States. (*a*) The act deprives the citizen of his property rights without due process of law. (*b*) The act denies to certain citizens the equal protection of the law.

2. That the court erred in holding that a violation of the statute by employing plaintiff, knowing him to be under 12 years of age is negligence *per se*.

3. That the court erred in refusing the defendant's prayer for instructions, as follows: "Unless the jury are satisfied by a preponderance of the evidence that the plaintiff at the time of the injury was engaged in the work for which he was employed, then his employment, though contrary to law, was not the proximate cause of his injury, and the jury will answer the first issue 'No.'"

The act in question was considered by this Court in the recent cases of *Rollins v. Tobacco Co.*, 141 N. C., 300, and *Leathers v. Tobacco Co.*, 144 N. C., 330. The constitutionality of the law was not called in question, and therefore not discussed in the opinion of the Court. It was assumed, and we think correctly so, that the law is well within the police power of the State and violates none of the fundamental rights of the parent.

We do not understand the learned counsel for the defendant to deny to the Legislature the general power to regulate the employment of children, but we understand his argument to be that the act is void
(559) because it fails to designate the kind of labor which is prohibited to children under the age fixed by the statute.

Child-labor laws have been adopted in nearly all the States of this Union and Canada and are in force in nearly all the governments of Europe and of the Australian continent. They are founded upon the principle that the supreme right of the State to the guardianship of children controls the natural rights of the parent when the welfare of society or of the children themselves conflicts with parental rights. In this country their constitutionality, so far as we can ascertain has never been successfully assailed. The supervision and control of minors is a subject which has always been regarded as within the province of the legislative authority. How far it shall be exercised is a question of expediency, which it is the province of the Legislature to determine.

The contitutional guaranty of the liberty of contract does not apply to children of tender years or prevent legislation for their protection. "So far as such regulations control and limit the powers of minors to contract for labor, there has never been," says Mr. Tiedeman, "and never can be any question as to their constitutionality. Minors are the

wards of the Nation, and even the control of them by parents is subject to the unlimited supervisory control of the State." 1 Tiedeman State and Fed. Con., p. 325.

Another eminent writer says: "The constitutionality of legislation for the protection of children or minors is rarely questioned, and the Legislature is conceded a wide discretion in creating restraints. Even the courts, which take a very liberal view of individual liberty and are inclined to condemn paternal legislation, would concede that such paternal control may be exercised over children, especially in the choice of occupations, hours of labor, payment of wages, and everything pertaining to education, and in these matters a wide and constantly expanding legislative activity is exercised." Freund Police Power, sec. 259.

We do not think the Fourteenth Amendment in any way limits (560) the power of the State to regulate in good faith the labor of minors. Speaking of the scope of this amendment and its effect upon the police power of the States, the Supreme Court of the United States says, in *Barbier v. Connolly,* 113 U. S., 27: "But neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

In another case the same tribunal says: "This Court has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding State police regulations which were enacted in good faith and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." *Patterson v. Kentucky,* 97 U. S., 501.

The statute we are considering appears to have been framed in good faith and for the purpose of promoting the general welfare by protecting minors from injury by overwork, from liability to injury by machinery in large manufacturing plants, and by facilitating their attendance at schools. It is not an undue restriction of the right of the parent to the labor of the child, assuming that he has such right, when opposed to the general welfare. It does not close to him all fields of employment for his child, but only those in factories and manufacturing establishments where the child is more likely to be injured in health or body, or from his childish carelessness, as in this case, than in many other useful employments. In California a statute prohibiting the employment of children under fourteen years of age "in any mercantile institution, office, laundry, manufactory, workshop, restaurant, or apartment house" was held not to be in conflict with the Fourteenth Amendment. *Ex*

(561) *parte Spencer,* 86 Pac., 896. In that statute there are certain exceptions and regulations which are unnecessary to notice, as they do not conflict with the principle decided, that such legislation does not come within the purview and scope of the Fourteenth Amendment and is well within the police power of the State.

The right to the labor of the child is not a vested right in the parent, nor is it of any more importance than the right to control its education. Both are subject to the paramount power of the State when it deems it necessary to exercise it for the general good.

Upon this idea compulsory education laws have been enacted in a large number of States, and their constitutionality has been sustained where drawn in question. *S. v. Bailey,* 157 Ind., 324; Freund, *supra,* sec. 264.

As to the second contention, it is decided squarely against the defendant in the recent case of *Leathers v. Tobacco Co., supra,* where it is held, not only that a cause of action accrues to the child, if injured, but that it is negligence *per se,* and not merely evidence of negligence, to violate the statute.

The writer can add nothing to the well considered opinion of *Mr. Justice Connor* in that case, and we find nothing in the well prepared brief of defendant which induces us to reverse it. This brings us to consider defendant's third contention, a matter not fully determined in the *Leathers case,* and which may be thus stated: That the plaintiff cannot recover, because the employment of him, although willfully and knowingly done in violation of the statute, was not the proximate cause of his injury, inasmuch as he did not receive the injury while in the discharge of the duties to which he was assigned.

It is true that the plaintiff was not engaged in performing his duties in the spinning room and had gone to the lower floor, where the carding machines were, and got his hand caught in one and badly cut. Under such circumstances there are respectable courts which hold that the injury is not the proximate result of a violation of the statute,
(562) because not received in performing the work the child was assigned to do, and that therefore the employer is not liable.

We are not impressed with the persuasive authority of those precedents and are not inclined to follow them. To do so would, in our opinion, unduly restrict the liability of the employer and would be contrary to the evident intention of the Legislature.

The act was designed not only to protect the health, but the safety of children of tender age from the indiscretion and carelessness characteristic of immature years. One who knowingly and willfully violates its provisions is not only guilty of an indictable offense, but he commits a

tort upon the rights of the child and should be judged as a culpable wrongdoer and not as one guilty of mere negligence. The injury done the child is a willful wrong and does not flow from the negligent performance of a lawful act. The distinction between the two is well stated by *Mr. Justice Walker* in *Drum v. Miller,* 135 N. C., 208.

We think that the breach of the statute constitutes actionable negligence wherever it is shown that the injuries were sustained as a consequence of the wrongful employment of the child in the factory, in violation of the law. In this case we think there is a direct causal connection between the unlawful employment of the plaintiff and the injuries sustained by him. By employing this boy of 10 years in violation of the law the defendant exposed him to perils in its service which, though open to observation, he by reason of his youth and inexperience could not fully understand and appreciate. "Such cases," says Judge Cooley, "must frequently occur in the employment of infants." Torts, p. 652.

In touching on the liability for mere negligence independent of a statute making such employment a crime, Mr. Watson says: "The defendant will be liable for negligence, though it is the act of a child injured, which is proximate to his own injuries, if such act (563) is of a character to be expected of a child and in accordance with the usual indiscretion and errors of judgment characteristic of immature years." We do not mean to hold that the employer violating the act would be liable in damages for every fatality that might befall the child while in its factory. For instance, had the plaintiff died of heart disease, or from a stroke of paralysis, or been seriously injured by the willful and malicious act of a workman in knocking him against a machine, or injured from some cause wholly disconnected from the unlawful employment, the defendant could not be liable in damages simply on account of the employment in violation of the statute. But we do hold that the employment, when willfully and knowingly done, is a violation of the statute, and that every injury that reasonably and naturally results is actionable. In this case the connection between the employment and the injury is that of cause and effect, and brings the defendant within the operation of the statute. It had no right to employ the boy. While in its employment and on its premises, in tampering, through childish carelessness incident to his years, with dangerous machinery, he was injured. Had he not been employed he would in all probability not have been on its premises and not exposed to the temptation to meddle with dangerous instruments.

We think the wisdom of such legislation is strongly illustrated by the facts of the present case. We find very few decisions in point, but there are two decided by the Supreme Court of Tennessee which fully sustain

our views and commend themselves strongly by their force of reason to our judgment. *Queen v. Coal Co.*, 95 Tenn., 464; *Wire Co. v. Green*, 108 Tenn., 161.

No error.

Cited: *Rich v. Electric Co.*, 152 N. C., 693, 694; *Pettit v. R. R.*, 156 N. C., 127; *In re Alderman*, 157 N. C., 513; *Ledbetter v. English*, 166 N. C., 128; *McGowan v. Mfg. Co.*, 167 N. C., 194.

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(564)

E. L. MARTIN v. T. B. KNIGHT, ADMINISTRATOR.

(Filed 6 May, 1908.)

1. Pleadings—Unlisted Solvent Credits—Recovery.

A defense to an action for the recovery upon certain bonds and due bills, that they had not been listed for taxation, under Revisal, sec. 5219, subdiv. 11, with a view to evade payment of taxes, must be set up in the answer. In the absence of such allegation it was not error in the judge to refuse to submit an issue relative thereto.

2. Pleadings—Unlisted Solvent Credits—Defense—Recovery Postponed.

A failure to list a solvent credit pursuant to section 5219 does not prevent a recovery in an action thereon, but postpones the recovery of *judgment* until it is listed and the taxes are paid.

3. Evidence—Nonexpert—Paper-writings—Comparisons—Questions for Jury.

A witness, having testified that he was acquainted with the handwriting of the person alleged to have signed the paper in controversy, may, after expressing an opinion in regard to it and being shown a writing conceded to be genuine, show the two papers to the jury, and by making comparisons between them, explain and point out to the jury the similarity or difference, as the case may be. (*Outlaw v. Hurdle*, 46 N. C., 150, and cases following it, discussed.)

4. Evidence—Solvent Credits—Tax Books and Lists—Incompetent.

In an action against an administrator upon certain bonds and due bills of his intestate, wherein forgery is alleged, the tax books and original tax lists are incompetent as evidence for the purpose of showing that they were not listed as solvent credits, as they can furnish no information upon which an inference could be drawn in regard to the contention.

APPEAL from *Ferguson, J.*, at May Term, 1907, of STOKES.

Plaintiff sued the original administratrix of W. L. Fallen, deceased, for the recovery of the amount due on a bond and due bill set forth in the complaint. The administratrix having died, Thomas B. Knight

was appointed administrator *de bonis non* and made party defendant. Plaintiff alleged that defendant's intestate, on 16 November, 1896, executed his bond, under seal, obligating himslf to pay plaintiff, (568) six months after date, $2,000, with interest from date; that no part of said bond had been paid save the sum of $40, 13 February, 1897; that on 9 April, 1897, said intestate executed his due bill to plaintiff for the sum of $225 for borrowed money, and that no part thereof had been paid. Plaintiff set forth other indebtedness, which was eliminated by the verdict of the jury. Defendant denied the execution of either bond or due bill, and denied the averment that they had not been paid.

At the proper time defendant tendered the following issue: "Did the plaintiff fail or refuse to list for taxation the $2,000 note described in the complaint with the view to evade the payment of the taxes thereon?" He tendered an issue in the same form in regard to the due bill. His Honor declined to submit the issues, and defendant excepted.

The following issues were submitted to the jury:

1. Did the defendant's intestate execute the $2,000 note sued on, as alleged?

2. Has the whole or any part thereof been paid?

Similar issues were submitted in regard to the due bill. Plaintiff introduced a number of witnesses who testified in regard to the business relations between plaintiff and defendant's intestate. Several witnesses testified that they were acquainted with Fallen's handwriting, and that the signatures to the note and due bill were in his handwriting, and that the "body" of the note was in plaintiff's handwriting. On cross-examination, other papers "purporting to be in Fallen's handwriting" were shown the witnesses, and they were examined in regard to certain letters on the several papers and asked their opinion respecting their similarity, etc. H. T. Pratt, a witness for plaintiff, was shown the note and requested to look at the letter "L" in the signature of W. L. Fallen and the "L" in the name of E. L. Martin on the body of the note and give his opinion whether the two letters were not in the same handwriting. To this question he answered: "I can see a difference (566) in the two letters." He was then asked to "point out to the jury your points of difference." The defendant's counsel asked the witness to take the exhibit or paper to the jury box and point out to them the difference. To this plaintiff's counsel objected. His Honor sustained the objection. Defendant excepted. The same request was made in regard to other witnesses, and exceptions noted to the ruling of his Honor. The bond and due bill were introduced in evidence.

Defendant introduced a number of witnesses, who testified in regard to the business relations between plaintiff and his intestate, tending to

show that defendant's intestate did not execute the note and due bill, nor owe the amount named therein. Among other witnesses introduced by defendant was Dr. J. H. Ellington, who testified that he was acquainted with the handwriting of Fallen. He was shown several papers, and expressed the opinion that they were in his handwriting. He was then shown the bond, and expressed the opinion that the signature was not in Fallen's handwriting. The following questions were asked Dr. Ellington: "I ask you to look at the letter 'L' in the signature of W. L. Fallen to the bond and say if in your opinion the letter 'L' in the name of E. L. Martin in the body is in the same handwriting." Plaintiff objected. Sustained. Defendant excepted. "Please look at the 'L' in the name of W. L. Fallen at the end of the bond and at the letter 'L' in the name of E. L. Martin in the body of the bond and say in your opinion whether or not they are alike." "Very much alike." The witness was then asked to take the papers and "show the jury why you think they are alike." The plaintiff objected. Sustained. Defendant excepted.

The defendant introduced James A. Scales, who testified that he was register of deeds of Rockingham County. Plaintiff lives in said county.

Witness was custodian of the original tax list. The lists from (567) 1896 to 1905 were burned when the courthouse was destroyed.

"I have with me the original tax list of E. L. Martin for 1906. I have here the tax books of my county for 1897, 1898, 1899, 1900. The original abstracts or lists for three years were burned." The defendant proposed to prove by the introduction of the tax books for the years 1897-1900 that E. L. Martin did not list for taxation a $2,000 note or a $225 due bill. The court declined to admit the tax books, and defendant excepted.

The defendant offered in evidence the original tax abstract for the year 1906 in order to prove that no such note or due bill was listed. This was also excluded upon plaintiff's objection. Defendant excepted. There was no exception to his Honor's instructions to the jury. Verdict for plaintiff. Motion for new trial, for errors in refusing to submit issue tendered by defendant and rejecting testimony. Motion denied. Judgment. Appeal by defendant.

Watson, Buxton & Watson, J. D. Humphreys, and Lindsay Patterson for plaintiff.

Manly & Hendren, C. O. McMichael, and Scott & Reid for defendant.

CONNOR, J., after stating the facts: The defendant's exception to his Honor's refusal to submit the issue in regard to the tax list is based upon the contention that, by Revisal, sec. 5219, subdiv. 11, and Laws 1907, ch.

258, sec. 32, a failure to list with a view to evade the payment of taxes on solvent credits prevents their recovery by an action at law or suit in equity in the courts of the State until they are listed and taxes paid thereon. The matter involved in the issue is not set up or pleaded in the answer as a bar to the action, and was not therefore issuable. Only matters alleged and denied or new matter alleged in the answer by way of defense are to be submitted to the jury by specific issues. Without passing upon the question whether the failure to list the note and due bill for taxation, "with a view to evade the payment of taxes (568) thereon," is an affirmative defense which must be set up in the answer, or whether it may be taken advantage of upon the general denial, we entertain no doubt that, unless pleaded, it may not be made the subject of an issue. As has been frequently said by this Court, issues arise upon the pleadings. It will be observed that the statute does not make the failure to list solvent credits an absolute bar to their recovery, but provides "that they shall not be recoverable . . . until they have been listed and taxes paid thereon." It would seem that the failure to list does not destroy the cause of action, but postpones recovery thereon until they are listed and the tax thereon is paid. It would be but fair to bring the matter to the attention of the court by some appropriate pleading, to the end that the creditor may either list and pay the tax or show that the "note, claim, or other evidence of debt" is not "subject to assessment and taxation," as for instance that it is not solvent, or that plaintiff was himself indebted in a larger amount than all of his solvent credits [Revisal, secs. 5219 (5), 5227], or that for any other reason he was not required to list and pay tax thereon. It was not the purpose of the Legislature to release the debtor for failure to list by the creditor, but to postpone the recovery of the debt, if subject to taxation, until the tax is paid. It is not clear that the liability to assessment is to be tried by the jury. It may be more convenient for the court to inquire into it. We note the suggestion that instead of delaying the trial the court proceed to judgment and order a stay of execution until the debt is listed and the tax paid thereon. This provision has recently been placed in our revenue law and, so far as we are advised, has not before been brought to the attention of the Court. Its interpretation is not before us, and we forbear saying more than is necessary to a decision of the exception. His Honor correctly declined to submit the issue.

Plaintiff introduced H. T. Pratt, who testified that he was acquainted with the handwriting of Fallen. He was shown the note and the due bill, and testified that the signatures were "those of Fallen." (569) The body of the note was in the handwriting of the plaintiff E. L. Martin. This, we understand, was conceded. Defendant, upon cross-

examination, asked the witness to look at the letter "L" in the signature and at the same letter in the body of the note and say whether they were not the same handwriting. He answered: "I can see a difference in the two." He was asked to point out to the jury the difference. The defendant's counsel asked the witness to take the note to the jury box and point out to the jury the difference. Plaintiff objected. His Honor sustained the objection, and defendant excepted. Dr. Ellington, a witness for defendant, having testified that he was acquainted with Fallen's handwriting, was asked to examine the same letter in the body of the note and in the signature. He said: "They are very much alike." In his cross-examination he was shown a paper, "No. 1," by plaintiff, containing W. L. Fallen's signature in two places. The witness testified that the first signature was in Fallen's handwriting; the other was not. Upon redirect examination defendant's counsel asked him to take the paper and show the jury why he did not think that the signatures were in the same handwriting. This was objected to and the objection sustained by his Honor. Defendant excepted. The question presented upon these exceptions, and others of the same character in the record, is whether, under examination in chief or cross-examination, a nonexpert witness, having testified that he was acquainted with the handwriting of the person alleged to have signed the paper in controversy, may, after expressing an opinion in regard to it and being shown a writing conceded to be genuine, show two papers to the jury and by making comparisons between them explain and point out to the jury the similarity or difference, as the case may be. Defendant's counsel insist that this question has not heretofore been decided by this Court. Plaintiff's counsel insist, on the con-
(570) trary, that it is within the rule laid down in *Outlaw v. Hurdle,* 46 N. C., 150, and the cases following it. If this is true, defendant's counsel say that the decision in that and other cases is not sound in reason and is out of line with the overwhelming weight of authority. The question is one of much practical importance in the trial of issues involving the genuineness of handwriting, and should, so far as judicial decision can do so, be put at rest in our practice. It must be conceded that the decisions in *Outlaw v. Hurdle, supra,* and *Fuller v. Fox,* 101 N. C., 119, are not in harmony with decided cases in other courts or the law as laid down in the best approved works on the law of evidence. In an exhaustive note to *University v. Spalding,* 71 N. H., 163 (62 L. R. A., 817), it is said that comparison of handwriting by the jury is allowed in every State save North Carolina and Louisiana, and our own decisions are said to be "unique." Mr. Wigmore, in an exhaustive note citing cases from every court in the Union, regards the question as unsettled in this State. We have given to our decisions a careful examination, with

a view of learning how this Court reached and has apparently adhered to a conclusion which, with the single exception named, appears to be at variance with the opinion of every other court in the country. The rules regarding the admissibility of evidence have for their purpose the ascertainment and establishment of truth. The courts have, in response to the demands of a constantly advancing civilization and enlightened jurisprudence, relaxed the rigid rules of evidence which formerly prevailed, and given to the jury all of the light and information possible to aid them in coming to a correct verdict. In no department of jurisprudence has there been more intelligent, enlightened progress than that made pertaining to the law of evidence. This is seen in both judicial decisions and treatises by thoughtful, scholarly authors, frequently resulting in remedial legislation. Prior to the passage of Lord Denman's act in England, no person interested in the controversy was permitted to testify, although, most illogically, if during the trial he (571) surrendered his interest or executed a release he became at once a competent and credible witness. This wise and strangely belated statute was not adopted in this State until 1866. It was not until 1879 that a person charged with a crime, although a mere misdemeanor, involving at most a small fine, was permitted to testify, while after the act of 1866 he could be heard as a witness in his own behalf in a suit involving his entire estate. Persons convicted of certain crimes were incompetent, and negroes not permitted to testify against white persons. Juries were permitted and compelled to grope about in the dark, guessing at verdicts, when frequently persons within the call of the court, able and anxious to aid them, were excluded from causes neither sound in reason nor sustained by experience. Gradually, and probably in that respect wisely, the courts and, when they failed, the legislatures have removed the restrictions and permitted persons to testify without regard to interest or crime, relying upon that most certain test of truth, cross-examination, and the saving common sense and experience of the jury to weigh the testimony, sift out the false and take the true, to guide them to a verdict. In accordance with this trend of thought, which has done so much to remove reproach from the administration of justice, we think it our duty, when called upon by the arguments of learned counsel, to reëxamine any rule of evidence, test its soundness in the light of a larger experience, a broader view and the best thought of judges in other courts. If, in obedience to precedents since reviewed and reversed, any rule of evidence has been adopted which is found to be unsound and unsuited to reaching the best results, we should, with caution and a full recognition of the principle of *stare decisis,* not hesitate to review the opinions and bring the law into harmony with the best matured thought upon the subject.

The question in regard to the right of the jury to compare handwriting in the trial of cases wherein the genuineness of a paper-
(572) writing or signature is involved first arose in this Court in 1853. *Outlaw v. Hurdle,* 46 N. C., 150, was tried before *Judge Manly,* afterwards an associate justice of this Court, and the parties were represented by the most eminent counsel in the State. *Pearson, J.,* in opening his opinion, says: "This case, as well on account of the amount involved as by reason of the many points made upon the trial, has excited much interest and called for a high degree of ability on the part of the judge who presided." The verdict was for the propounders, and the *caveators* appealed. It appears that, among other reasons assigned by the *caveators* for attacking the will, which was holograph, was, it began with the words, "It is my wish and desire," etc., whereas, they alleged, the testator always "contracted the words 'it is' so as to make them 'it's.'" In this connection the *caveators* introduced a number of letters written by deceased, in which he wrote "it's" for "it is." These letters, together with others introduced by propounders, were submitted to the jury without objection. The question of the right to have the jury examine the letters was not presented in any exception, and therefore not argued. It seems that no question was made in regard to the action of the judge in this respect. This is of importance, in view of the manifest care with which the trial was conducted by court and counsel. *Pearson, J.,* says: "The *caveators* had a right to prove that the deceased always in writing contracted the words, . . . but they had no right to put the letters of the deceased into the hands of the jury, and, as it seems to us, his Honor has committed an error in favor of the *caveators* in allowing the letters to be looked at by the jury, and in telling them that, as they had a right to look at the letters for one purpose, there was no help for it, they might make a comparison of handwriting. This shows that it was wrong to allow the jury to see the letters at all. A jury is to *hear* the evidence and not to *see* it." The judgment was affirmed. But one author-
(573) ity is cited by the Court—*S. v. Girkin,* 23 N. C., 121. A reference to that case discloses that it was an indictment for "biting off the ear of the prosecutor." No question of handwriting or comparison of anything was presented or suggested. We are not able to perceive how it was in any way related to the question of comparison of handwriting or the function of the jury. In view of the fact that the question had not been raised before 1853, and of the further fact that no point was made about it in the trial of *Outlaw v. Hurdle,* wherein every debatable question was raised and discussed, we think it not improbable that, as said by the editor of the sixteenth edition of Greenleaf on Evidence, "The practice of proving handwriting by submitting specimens to the jury was

originally orthodox and unquestioned." The controversy, which has been carried on in the English and American courts for so many years, and "which has resulted in such a contrariety of opinion," is not whether comparison of handwriting may be made by the jury, but what papers may be used as the basis for comparison, and the competency of witnesses, expert and nonexpert, to do so. That question is not involved in this appeal. In *Doe v. Newton,* 31 E. C. L., 328, *Denman, C. J.,* said: "There being two documents in question in the case, one of which is known to be in the handwriting of the party, the other alleged but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness." All of the judges wrote opinions. Following *Outlaw v. Hurdle* is *Otey v. Hoyt,* 48 N. C., 407. This was an action on a bond. For the purpose of proving the execution a number of witnesses were introduced, who testified that they knew the handwriting of Norcott, the testator of defendant. A careful examination of the statement of the case shows that there was no suggestion that any papers be shown the jury or that they be permitted to compare any handwriting. It is true that in sustaining the ruling of the court excluding evidence of a witness it is said: "Writings in general (574) are not properly submitted to the inspection of the jury; if used on the trial of a case they may be read to them," citing *Outlaw v. Hurdle, supra. Watson v. Davis,* 52 N. C., 178, was an action of *assumpsit* upon an open account. No writing was in evidence and no question of handwriting involved. The judge permitted the jury to take the account with them, defendant excepting. *Pearson, J.,* said: "The jury ought to make up their verdict upon evidence offered to their senses, *i. e.,* what they see and hear in the presence of the court, and should not be allowed to take papers which have been received as competent evidence into the jury room, so as to make a comparison of handwriting or draw any other inference which their imaginations may suggest." In *Burton v. Wilkes,* 66 N. C., 604, the judge handed the jury as they retired a memorandum or "slip of paper" containing some calculations. The question of handwriting was not presented. *Boyden, J.,* disposes of the exception by saying: "We think his Honor was in error in delivering 'Exhibit E' to the jury," citing *Outlaw's case* and *Watson's case, supra.* In *Yates v. Yates,* 76 N. C., 142, there was no suggestion of comparison of handwriting by the jury. It was held that a witness who had qualified himself as an expert in regard to handwriting could compare the signature in controversy with one admitted to be genuine and express an opinion based upon such comparison. *Rodman,* J., said: "This was permissible under the decision in *Outlaw v. Hurdle.* The general practice seems to be more liberal than was approved in that case." The learned justice cites Green-

leaf on Evidence and several cases. In *Williams v. Thomas,* 78 N. C., 47, the point presented was whether the judge was in error in handing papers used on the trial to the jury, appellant excepting. We find no *decision* other than *Otlaw v. Hurdle, supra,* in which the question involved in this appeal is presented. We have seen in what manner the question arose and the consideration given to it. With all of the
(575) weight to which the opinion of the great *Chief Justice* is entitled, it cannot be claimed that the question was either presented or decided in the sense in which *authorities* are made, closing the question to consideration otherwise than by overruling the *case.* The course pursued by the judge was not made the basis of any exception, but was treated as "orthodox and unquestioned." The judgment appealed from was affirmed. Tested by those well settled rules by which appellate courts are guided in respect to precedents and authorities, it would seem that the question was an open one. We find, however, that it was fully presented and decided in *Fuller v. Fox,* 101 N. C., 119. *Mr. Justice Davis,* after conceding that the law was not uniform, proceeds to say: "But in most of the states, and with rare exception, when there is not statutory regulation upon the subject, the law is held to be as laid down by *Gaston, J.,* in *Pope v. Askew,* 23 N. C., 16." When we turn to this case we find that no such question was presented or decided. The action was for writing and publishing a libel. For the purpose of proving that defendant wrote the letter, plaintiff offered to show his handwriting by a witness who was not an expert and who did not qualify himself to express an opinion, having no knowledge of defendant's handwriting. He had received a letter *purporting* to have been written by defendant, but knew nothing more about it. Thereupon plaintiff offered to show by another witness that he had heard defendant say that he wrote the letter received by the witness. D. M. Alexander, a witness for plaintiff, had undertaken to show defendant's signature to some contract. The first witness was then asked to compare the handwriting in the contract, the letter addressed to him, and the alleged libelous letter, and give his opinion whether they were written by the same person. Three witnesses for defendant swore that they knew defendant's handwriting, and expressed the opinion that the letter in controversy was not in his handwriting.
One of these witnesses also expressed the opinion that the letter to
(576) plaintiff's witness, except the signature, was not in defendant's handwriting. The papers were not given to the jury. After being out some time they returned and asked for them; the court declined to permit them to be taken, whereupon some question was raised by the jury in regard to the testimony of a witness about certain letters in the contract, and the letters to one of the witnesses. The court permitted the

jury, in its presence and "for this special purpose," to compare the particular letters referred to. The decision is based upon the failure of plaintiff's witness to qualify himself to express an opinion, and the further fact that neither of the papers used as a basis of comparison was admitted to be genuine. No reference is made to the action of the jury, the opinion concluding with the statement: "We see no legitimate reason for which either of the instruments was received in evidence. It is worthy of note that *Judge Pearson,* in *Outlaw v. Hurdle,* does not cite the case as authority, but does cite *Gerkins' case,* decided at the same term. *Judge Gaston's* opinion is based upon *Doe v. Suckermore,* 5 Adol. and Ellis, 31 E. C. L., 406, which makes no reference to the question under discussion. *Pope v. Askew* was cited by *Nash, C. J.,* in *McKonkey v. Gaylord,* 46 N. C., 94, upon the qualification of a witness to express an opinion in regarding to handwriting. This was at the same term at which *Outlaw v. Hurdle* was decided; thus, we think, indicating that the Court did not regard *Judge Gaston's* opinion as having any relation to the question under discussion in that case. *Pope v. Askew* has been frequently cited upon the question of opinion evidence in regard to handwriting. Munroe's Cited Cases. The learned justice also cites *Rowell v. Fuller,* 59 Vermont, 688, and says "that in most of the cases relied on by counsel for defendant the papers permitted to go to the jury for inspection and comparison were such as were in evidence in the cause for other purposes, or such as were first passed upon by the court and adjudged to be genuine." A careful reading of the able opinion of *Taft, J.,*
in that case, sustains the language of *Judge Davis* in regard to (577)
the standard of comparison, but expressly holds that when such
papers are offered as a standard for comparison they should be submitted to the jury for inspection. He says: "Let the court determine whether the signature is a genuine one or not. If not genuine, exclude it from the jury; if genuine, let it be used by them in comparison with the disputed one." The only question discussed was whether the court should pass upon the genuineness of the writing as a standard for comparison. That, when found to be so, it should be submitted "as a standard of comparison with the one in dispute," is said to be the rule. We have called attention to the language of the learned justice in *Fuller v. Fox* and the cases cited by him to show that, as in other cases, the court has inadvertently confused the question of standard of comparison, the competency of the witness to express an opinion, with the right of the jury, after these preliminary questions are passed upon, to see the paper for the purpose of comparison. This tendency is noted by Professor Wigmore in his note to section 578, Greenleaf Evidence (16 Ed.), wherein he says: "So far as proof by similarity was allowed at all, no discrimination was

made against submitting specimens to the jury." Defendant's counsel proposed to have the witnesses who had testified that they knew Fallen's handwriting and expressed their opinion in regard to the genuineness of the signature, and who also expressed opinions in regard to the similarity of the letter "L" in the body of the note and the signature, to show the note to the jury and point out to them the difference or similarity. It is difficult to see why they should not be permitted to do so, unless the *decisions* in *Outlaw v. Hurdle* and *Fuller v. Fox* prohibit it. It is clear that no other decision does so. We think that in the light of those decisions the witnesses could show to the jury the paper upon which the note and the disputed signature are written, and explain to them their reasons for saying that there was or was not a difference between
(578) the letter "L" in the body of the note and in the signature. For the purpose of explaining their testimony and the situation of persons or objects it is well settled that maps, diagrams, drawings, or photographs may be used. *S. v. Whiteacre,* 98 N. C., 753; *S. v. Wilcox,* 132 N. C., 1120; Greenleaf Ev., 419. On a question of paternity the child may be shown to the jury, and they may, for the purpose of making comparison in respect to resemblance, see the parents and child. *S. v. Woodruff,* 67 N. C., 89. In *Hampton v. R. R.,* 120 N. C., 534, a photograph was rejected, but in *Davis v. R. R.,* 134 N. C., 300, we followed the dissenting opinion of the present *Chief Justice,* sustained by the overwhelming weight of authority, so the jury may, if the judge think they will better understand the matter in controversy, view the premises. To restrict the witness to an explanation and description of loops, curves, lines, shades, etc., etc., found in two letters which he is comparing, concealing from the jury the very object about which he is talking, seems to us both unreasonable and unsafe as a means of enlightening them. The purpose of the evidence is to aid the jury. Why convey information through the sense of hearing and exclude the sense of seeing? Can it be doubted for a moment that they would receive a clearer, more intelligent view of the matter in controversy if permitted to have the explanation made with the aid of their sight? We know from experience that arguments in this Court are illuminated and our apprehension of the matter in controversy made clearer by maps in cases involving questions of boundary, or models and photographs in cases involving the management of machinery or the situation of parties. It was supposed in the past that the average juror was not sufficiently intelligent—educated—to comprehend the fine shades of difference in handwriting. Whatever may be thought of the soundness of the reason in the past, it is manifest that it has but little force at this time. As education and intelligence
(579) have increased and the methods of illustration improved, the

capacity of the "average man" to write and pass upon the handwriting of others has advanced. It may be that language used by this Court in several of the cases cited and discussed by us is capable of a construction which would prohibit the course of examination proposed by the defendant. If so, we think such language was not accurate or not necessary to the decision of the question involved in such cases—that the jury could not take the papers into the jury room for the purpose of comparison. It is true that the Court said, in *Outlaw v. Hurdle,* that the jurors must *hear* and not *see* evidence. The expression is rather more epigrammatic than accurate. This is shown by the language of the same judge in *Watson v. Davis,* in which he says: "The jury ought to make up their verdict upon the evidence of their senses, *i. e.,* what they *see* and *hear* in the presence of the court." The real point *decided* in these and other cases is that the jury may not take the papers with them into the jury room for the purpose of making the comparison. It is not necessary that in this appeal we bring the correctness of the decisions in that respect into question. We simply decide the question presented by the exception—that the witnesses should have been permitted to take the note to the jury and show to them the genuine and disputed parts, explaining to them their reasons for saying that they were or were not different. It may be that the reason of the thing would carry us further. That question is not necessary and would not be proper to discuss here. In England the subject is regulated by statute. 28 and 29 Vict., ch. 18. In many of our States statutes have been enacted prescribing the practice.

The English statute is the result of the largest experience and observation by judges and lawyers. It is well guarded against dangerous experiment, but opens the door to safe, reliable information. A discussion of its provisions may be found in 3 Taylor on Ev., sec. 1869, etc. In construing the New York statute, *Van Brunt, P. J.,* says: "There- (580) fore, it is apparent that the submission of a writing to a jury must be in connection with the testimony of witnesses in regard to the validity or authorship of the various handwritings, and that, independent of the examination of witnesses, such handwritings cannot be submitted to the jury for the purpose of arbitrary comparison by them. In other words, the handwritings can only be inspected by the jury in aid of the testimony of witnesses in reference to the authorship of the handwritings in question." *People v. Pinckney,* 67 Hun., 428. With this limitation upon the right of the jury to examine and compare handwriting, we can see no reasonable ground for withholding it. The subject is of sufficient importance to justify the attention of the Legislature. The questions regarding the competency of witnesses to testify in regard to handwrit-

ings, and the standard of comparison, are settled by a number of well considered decisions, the last being *Tunstall v. Cobb,* 109 N. C., 316. While there was a dissenting opinion in regard to the application of the law in that case, the Court was unanimous as to the general rule. The opinion of *Mr. Justice Avery* in that respect adopts the generally received doctrine in this and many other States. It has been followed in this State. *Lowe v. Dorsett,* 125 N. C., 301; *Ratliff v. Ratliff,* 131 N. C., 425. We do not question the decisions cited and commented upon, in which the judge permitted the jury to take into the jury room papers, etc., used on the trial. We have cited them for the purpose of distinguishing them from the facts in this appeal. The defendant's exceptions to the refusal of his Honor to permit the witness to show the jury the papers and point out to them points of difference or similarity in regard to which they have expressed opinions are sustained.

Defendant proposed to introduce tax books and original lists for the purpose of showing that no note or due bill was listed by plaintiff for taxation. While the record does not so state, we assume from the (581) argument that it was proposed to show that no solvent credits were listed by plaintiff for the years to which the proposed list related. Tax lists have been admitted in actions for the recovery of land to show that the party against whose claim they were used did not list the land, and draw from the failure to do so the inference that he was not claiming to own it. *Thornburg v. Mastin,* 93 N. C., 259; *Austin v. King,* 97 N. C., 339; *Allen v. McLendon,* 113 N. C., 319; *Bernhardt v. Brown,* 122 N. C., 587. On a question of insolvency, *Shober v. Wheeler,* 113 N. C., 370; to show the value of personal property, *Daniels v. Fowler,* 123 N. C., 35. In these cases the law required that the property, number of acres, name of tract, etc., be stated on the list; that the personal property be valued by the taxpayer. While the Court has always referred to this class of evidence as of a "low order," it has admitted it as declarations of the party. In regard to solvent credits a different rule prevails. The solvent credits of the citizen which are "subject to assessment and taxation" are the notes and other evidence of debts owing to him, less the amount of *bona fide* collectible debts which he owes as principal debtor. These are to be deducted from the credits, and only the amount in excess listed. The name of the debtor or the amount of any specific debt is not to be listed. Revisal, secs. 5217-5219. The blank sent to the commissioners by the State Auditor (section 5216), which the taxpayer is to fill up, sign, and swear to, does not provide for any schedule of credits; no space or column is provided therefor; hence the lists would furnish no information and constitute no ground for drawing an inference in regard to the solvent credits of the plaintiff. They would

not prove any fact throwing light upon the issue. If the plaintiff owed debts in excess of the amount due him he would list no solvent credits. It is clear that a paper-writing or record containing no information upon which an inference could be drawn in regard to the matter in controversy is irrelevant and inadmissible for any purpose. The exceptions to his Honor's refusal to permit the introduction of the tax (582) list must be disallowed. We have examined the entire record and find no merit in the other exceptions. For the error pointed out in regard to proof of the disputed handwriting there must be a

New trial.

Cited: Nicholson v. Lumber Co., 156 N. C., 66; *Boyd v. Leatherwood*, 165 N. C., 616; *Bank v. McArthur*, 168 N. C., 55; *Hyatt v. Holloman, ib.*, 388; *Lupton v. Express Co.*, 169 N. C., 674.

J. R. HENDERSON v. R. L. ELLER.

(Filed 6 May, 1908.)

1. Pleadings—Evidence—Relief—Wrong Remedy Sought—Parties—Nonsuit.

In an action demanding judgment for title to and possession of land, when it appears from the pleadings, taken in connection with the evidence, that a direct action to charge the land with an indebtedness should have been brought, and no motion to amend the pleadings was made, a motion as of nonsuit upon the evidence was properly allowed.

2. Judgments—Nonsuit—Another Action—Limitations of Actions.

When a motion as of nonsuit upon the evidence is sustained the plaintiff may bring another action within one year.

APPEAL from *Ferguson, J.*, at January Term, 1908, of WILKES.

The plaintiff alleged that he was the owner in fee and entitled to the possession of the land in controversy, and that the defendant was wrongfully in possession and unlawfully withholding it from him.

A motion as of nonsuit upon the evidence was sustained in the lower court upon the ground that the pleadings, taken in connection with the evidence, developed that defendant's title was attacked for fraud, and that a direct action to charge the land with an indebtedness to plaintiff should have been brought, to which other necessary parties should be made. The plaintiff made no motion to amend his pleadings. From the judgment sustaining the motion the plaintiff appealed.

(583) *W. W. Barber for plaintiff.*
Finley & Hendren for defendant.

PER CURIAM. The court below allowed the motion of the defendant to nonsuit plaintiff upon the ground that under the form of the pleadings, taken in connection with the evidence, a direct action to charge the land with the indebtedness should have been brought, to which all necessary parties should be made.

As no motion to amend the pleadings was made, his Honor properly sustained the motion. Plaintiff may bring another action within one year. *Tussey v. Owen, ante,* 335.

Affirmed.

Cited: Lumber Co. v. Harrison, 148 N. C., 334.

JOHN W. STEWART ET AL. v. F. T. LOWDERMILK AND WIFE.

(Filed 6 May, 1908.)

Adverse Possession—Color of Title—Mortgage—Deeds and Conveyances—Ripening Title—Verbal Sale—Evidence.

Defendants, claiming lands under seven years color of title, showed a mortgage from H. to B. in 1894, and conveyance from B. to them in 1900, The action of plaintiffs was begun against them in 1905. There was testimony that defendant's possession commenced in 1900 and that it was taken over from C., who had it in 1898 as lessee of B. C. immediately succeeded R., who had been in possession two or three years under verbal bargain and sale from B.: *Held,* (1) that the mortgage from H. to B. was "color," and the deed from B. to defendants tended to ripen title of the latter by virtue of seven years possession under known and visible boundaries; (2) that the possession of R. under the verbal bargain and sale from B., from whom defendant claimed, was evidence of "color," inuring to the benefit of the defendants as tending to show title in B.

APPEAL by plaintiffs from *Ferguson, J.,* and a jury, at October Term, 1907, of MECKLENBURG. The facts are stated in the opinion.

Lawrence Wakefield and W. C. Newland for plaintiffs.
Jones & Whisnant for defendants.

(584) CLARK, C. J. The defendants claim under color of title and seven years possession. They showed a mortgage from one Hayes to J. M. Bean, 20 January, 1894, and a conveyance from Bean to defend-

ants, 25 August, 1900. This action began 6 September, 1905. The defendants' witnesses testified that the defendants had been in possession since some time in 1900; that they took over possession from Jesse Coffey, who had gone into possession late in the fall of 1898 as lessee of Bean, and that Coffey immediately succeeded Robbins, who had been in possession two or three years under a verbal bargain and sale from Bean.

The plaintiff contends:

1. That a mortgage is not color of title. But in this State it conveys the legal title, and the mortgagee in possession necessarily has color of title at least.

2. The plaintiffs further contend that the defendants cannot show seven years possession under color of title, since Robbins' possession was under a mere verbal bargain and sale from Bean. That would be true if the defendants were claiming under Robbins; but they are claiming under Bean, and the possession of Robbins was under Bean as a tenant at will.

His Honor charged the jury that "they would consider the mortgage from Hayes to Bean as color of title; also deed of Bean to defendant as tending to ripen defendant's title by virtue of seven years possession under known and visible lines and boundaries." He also charged the jury: "You will consider the evidence tending to show the possession of Robbins as being that of Bean and inuring to the benefit of the defendants for the purpose of ripening their title by virtue of seven years possession under known and visible lines and boundaries.

The plaintiffs excepted to each of these instructions, but there was

No error.

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(585)

D. A. BARKLEY v. SOUTH ATLANTIC WASTE COMPANY.

(Filed 6 May, 1908.)

1. Employer and Employee—Duty of Employer—Safe Place to Work—Scaffold—Material and Construction.

The employer owed a duty to the employee, who was injured while engaged in the course of his employment to work upon a scaffold which he (the employer) had had another to build for the purpose, to exercise due care in selecting materials reasonably suitable and safe for its construction, and to see that it was constructed in a reasonably safe manner.

2. Same—Evidence—Nonsuit.

When there is evidence that a lofty scaffold, upon which an employee was instructed by defendant to do certain work, was built of old and scorched material; that it was knotty, and the injury complained of was

caused by the breaking of a piece of timber at a knot, it was sufficient to be submitted to the jury upon the question of defendant's negligence, and thereunder it was error to sustain a motion as of nonsuit upon the evidence.

3. Same—Contributory Negligence—No Evidence.

When the employee was directed by his employer to do certain work upon a scaffold which had been erected by another delegated by the employer, and when it was shown that the employee was injured owing to faulty material used, and had been assured by the foreman of the employer that the scaffold was safe, he having been unacquainted with either the character of construction or the quality of the material, no question of contributory negligence was presented.

4. Employer and Employee—Principal and Agent—Respondeat Superior—Safe Place to Work.

When the defendant employer delegates to another the building of a scaffold upon which an employee is to work in the course of his duties, he is responsible for the manner in which the scaffold is built.

ACTION to recover damages for personal injuries received by the breaking of a scaffold on which plaintiff was at work, tried before *Ferguson, J.*, and a jury, at October Term, 1907, of MECKLENBURG.

At the conclusion of plaintiff's evidence the defendant moved to nonsuit, which motion was allowed, and plaintiff appealed. The facts are stated in the opinion.

(586) *J. F. Newell, J. D. McCall, and Brevard Nixon for plaintiff.*
Morrison & Whitlock for defendants.

BROWN, J. The plaintiff offered evidence tending to prove that he was a carpenter in defendant's service, and at the time of the injury was at work in a warehouse. On 8 June, Mr. Michael, foreman of the carpenters, came for plaintiff and ordered him to go into the factory, which had been damaged by fire and was being repaired, and to "ceil the overhead and case up the joists and truss beams." Plaintiff states: "Mr. Michael came after me at the wareroom; told me that the scaffold that I would find was already constructed up there, and when I got there I found the scaffold built up on the side of some boxes or bins that were in the building prior to the fire." Plaintiff states that he did not assist in building the scaffold, and only casually examined it when he went on it; that he asked Michael if the scaffold was all right, and he said "it was, and to go ahead." Plaintiff further says: "The scaffold ran clear across the building. I worked on the other end maybe a day or two, and then the last day (the evening I got hurt) Mr. Michael told me to put the molding around this joist or truss, and get a man to help me,

and I got Mr. Austin. I cut the molding and would nail up one end. Mr. Austin would nail the molding on while I would cut another piece to go around, and this was possibly between 5 and 6 o'clock in the evening; and the last piece I cut, I cut it and shoved it back to Mr. Austin. He was on this scaffold, a piece from me—I don't know what distance—and I asked him how did it fit. He said all right, and I said nail it. I started to nail my end, holding it up so, and the thing broke and went from under me. I had been on this particular scaffold when it fell just about a minute—not over a minute on that particular place until I stepped on there and fell." Plaintiff further says: "The end I had been working on was pretty well floored all along; this end, that I came around here on and that broke down and fell, I don't know how (587) much floor was on it."

In the view we take of this case it is unnecessary to consider whether the plaintiff was injured by the negligence of a fellow-servant. Assuming the standard of duty which defendant owed plaintiff to be as stated in the elaborate brief of the learned counsel for defendant—that "the only duty the defendant owed the plaintiff in regard to the scaffold was to exercise ordinary care in the selection of his fellow-servants and to furnish a sufficient quantity of fit and suitable material out of which he and his fellow-servants could construct the scaffold"—we think his Honor erred in sustaining the motion to nonsuit. The defendant owed to its employees who were directed to work on this scaffold the duty to exercise due care in selecting materials reasonably suitable and safe for its construction. 2 Labatt, sec. 614; Bushwell on Personal Injuries, secs. 193, 391, 392; *Brewing Co. v. Wood,* 27 Ky. Law, 1012; 4 Thompson Neg., sec. 3957, note 30; *Stanwick v. Butler,* 93 Wis., 430; *Phœnix Bridge Co. v. Castleberry,* 131 Fed., 181. If defendant delegated the performance of this duty to Michael, it is responsible for the manner in which he discharged it. *Tanner v. Lumber Co.,* 140 N. C., 475; *Avery v. Lumber Co.,* 146 N. C., 592; *McCarthy v. Claflin,* 99 Maine, 290. The evidence of witness Wooten is to the effect that the scaffold was built of old material that was scorched in the fire when the building was burned. There is also evidence that the wood was knotty and that the piece which gave way was broken at a knot. These facts, if true, do not *per se* constitute negligence, but we think they are some evidence to be considered by the jury as bearing upon the inquiry as to whether the defendant exercised reasonable care in selecting material suitable for the construction of a lofty scaffold upon which its servants were required to work.

We fail to see any evidence of contributory negligence. The plaintiff took no part in selecting the material or in erecting the scaffold, and knew nothing of the character of the material out of which (588)

it was constructed. The scaffold was a completed instrument and supposed to be safe when plaintiff was directed to work upon it. The fact that he made only a casual examination does not make plaintiff culpable. He had a right to rely upon the assurance of the foreman that the scaffold was safe, as he was unacquainted with either the character of the construction or the quality of the material. *Liedke v. Moran,* 43 Wash., 428; *Ingram v. R. R.,* 99 S. W., 666 (Ky.); *Swanson v. Jenks,* 92 N. Y., 382; *Standard Oil Co. v. Bowker,* 141 Ind., 12.

The judgment of nonsuit is set aside and a new trial is ordered.

New trial.

Cited: Cotton v. R. R., 149 N. C., 230; *Barkley v. Waste Co., ib.,* 287; *West v. Tanning Co.,* 154 N. C., 48; *Terrell v. Washington,* 158 N. C., 290; *Alley v. Pipe Co.,* 159 N. C., 330; *Steele v. Grant,* 166 N. C., 645; *Smith v. R. R.,* 170 N. C., 186; *Deligny v. Furniture Co., ib.,* 203; *Yarborough v. Greer,* 171 N. C., 336.

WELD, COLBURN & WILCKENS v. LAMARGUERITE SHOP COMPANY.

(Filed 13 May, 1908.)

Husband and Wife—Business Conducted by Wife—Husband or Other Agent —Liability of Wife.

Revisal, sec. 2118, is for the purpose of preventing a married woman from conducting her business through her husband or any other agent so as to mislead her creditors into believing they are dealing with the person legally responsible in advancing credit to the husband or other agent, and from concealing her identity and coverture to that end. Therefore, goods knowingly sold to and upon the responsibility of the wife, who was not a free trader, by the agent of the creditor, who knew the husband and was by him referred to the wife, with whom he made the contract in her own behalf, are not within the mischief intended to be suppressed by the statute, so as to charge the *feme covert* or her property.

APPEAL from *Moore, J.,* at March Term, 1908, of MECKLENBURG.

This action was brought to recover the price of goods sold and delivered by the plaintiff to the defendant. The defense was that the (589) business was conducted by Mrs. Caroline J. Ramsey, who is a married woman, and that she was and is the sole proprietor of the business and owner of the stock of goods in the store. The question in the case was whether the business had been so conducted as to constitute

Mrs. Ramsey a free trader within the provisions of the Revisal, sec. 2118. The issues submitted to the jury, with the answers thereto, were as follows:

1. Was George C. Ramsey, on or about 16 October, 1906, as husband of Carolina Jones Ramsey, conducting for her a business under the name of the LaMarguerite Shop Company, without displaying a sign at such place showing her Christian name and the fact that she was a *feme covert?* Answer: "Yes."

2. Was said indebtedness contracted in the course of said business? Answer: "Yes."

3. In what amount, if any, is the defendant indebted to the plaintiff? Answer: "Fifty-one dollars and fifty cents, interest from 27 May, 1907."

Miles Pegram, a witness for the plaintiff, testified: "On or about 16 October, 1906, I was traveling salesman of the plaintiff. I went to the millinery store in the city of Charlotte known as LaMarguerite Shop, for the purpose of selling some goods, and found G. C. Ramsey, the husband of the *feme* defendant, in the storeroom, with his hat off. I knew G. C. Ramsey, the husband of the *feme* defendant, and knew he was a drummer and only in Charlotte occasionally. I knew that Mrs. Caroline Jones Ramsey was in charge of the business, and understood that she either owned it or owned an interest in it. I mentioned the matter of selling goods to Mr. Ramsey, and he said he thought they could use the goods, but that Mrs. Ramsey did the selecting of goods. Mr. Ramsey called Mrs. Ramsey from the back part of the store, where she was engaged in work, and Mrs. Ramsey came forward and selected the goods and gave me an order therefor, for the price of which this suit was instituted. Mr. Ramsey gave me shipping directions and three (590) New York references, and I think he said I must ship the goods to the LaMarguerite Shop Company. The foregoing was all the conversation had at that time. I know nothing else about Mr. Ramsey's conducting the business. I am not now working for the plaintiff company and do not know of my own knowledge whether the bill for the goods is due and unpaid or not. I saw the goods in the store some time after the date I sold them, and Mrs. Ramsey said they were good goods. I heard Mrs. Ramsey swear before the justice of the peace, when this case was tried, that Ramsey did not help conduct the business and had no interest whatsoever. Mr. and Mrs. Ramsey were man and wife at the time the goods were sold, and I knew it at that time. There was a sign on the store window with the words 'LaMarguerite.'" Plaintiff rested here.

The defendants G. C. Ramsey and his wife, Caroline J. Ramsey, testified, in substance, that Mrs. Ramsey was the sole owner of the stock of

goods and business, and conducted the business herself and not through her husband as an agent. It is not necessary to set forth this evidence at length.

The defendants in apt time moved to nonsuit the plaintiff. The motion was overruled, and they excepted. Judgment was rendered upon the verdict, and the defendants appealed.

Thomas W. Alexander for plaintiff.
Morrison & Whitlock for defendants.

WALKER, J., after stating the case: The plaintiff seeks to charge the *feme* defendant with the payment of the debt contracted by her, upon the ground that her business was conducted by her husband for her, and that, under the provisions of the Revisal, 2118, she thereby became a free trader and liable for the debt as if she had been a *feme sole.* It is provided by the statute in question that "If any married woman shall conduct her business through her husband or any other agent, or if
(591) any husband or agent of any married woman shall conduct such business for her without displaying the Christian name of such married woman and the fact that she is a *feme covert,* by a sign placed conspicuously at the place wherein such business is conducted," she shall be deemed and treated as a free trader, and the property purchased and used in the business, as to creditors, shall be liable for the debts contracted in the course of the business by the person in charge of the same.

The statute was evidently passed for the purpose of preventing a married woman from conducting her business by her husband or any other agent in such a way as to mislead her creditors by inducing them to believe that they are dealing with a person legally responsible for any debts contracted in course of the business, and concealing her identity and the fact that she is a married woman, who is protected by her coverture from their payment.

We do not think there is any evidence in this case which brings it within either the letter or the mischief of the statute. The plaintiff's own witness testified that when he sold the goods he knew the husband was a drummer and in Charlotte only occasionally, and that he further knew that Mrs. Ramsey was in charge of the business, and he understood that she either owned it or owned an interest in it; that she selected the goods and gave him the order for them. In the face of this evidence it can hardly be successfully contended that the mere fact of the husband being in the store at the time of the sale and his statements to Mr. Pegram are sufficient to carry the case to the jury for the purpose of charging Mrs. Ramsey personally and her property with the payment of the debt. The

facts being established that she was in charge of the business, to the knowledge of Mr. Pegram, agent of the plaintiff; and that she selected the goods and gave the order for them, or, in other words, that she made the contract of purchase herself, take the case entirely out of the words of the statute and show conclusively that it is not within (592) the mischief intended to be suppressed. How could the plaintiff be deceived as to the character of the business or as to the management of it by Mrs. Ramsey as proprietress, when its agent admits that he had full knowledge of all the material facts and was not himself misled? Such a case as is disclosed by the proof was surely not within the contemplation of the Legislature. There is no evidence to show that the entry in the telephone book was made by the authority of Mrs. Ramsey. Indeed, what evidence there is upon that question tends strongly to show that it was not. Besides, the agent of plaintiff testified that he sold the goods upon her order, and that she was at the time in charge of the business. Upon a review of the whole case we conclude that there was not sufficient evidence to be submitted to the jury within the rule established by this Court. *Byrd v. Express Co.*, 139 N. C., 273. The motion to nonsuit should have been sustained.

Reversed.

CLARK, C. J. Not controverting that the Court has placed the proper construction upon the statute, it is an anomaly that may well call for legislative consideration, if a married woman carrying on business herself is not liable for articles purchased in its conduct, but is liable if she has the aid or agency of her husband in buying the same articles.

NOTE.—This is now corrected by chapter 109, Laws 1911.

Cited: *Stout v. Perry*, 152 N. C., 313; *Scott v. Ferguson, ib.*, 348.

(593)

BLUE RIDGE COLLECTION AGENCY v. SOUTHERN RAILWAY COMPANY.

(Filed 13 May, 1908.)

1. Railroads—Carriers—Revisal, Sec. 2632—"Intermediate Points."

In shipments of less than car-load lots a point where they are ordinarily transferred from one car to the other in transit, at a junctional point on the same road, is an intermediate point, within the meaning of Revisal, 2632.

2. Same—Arrival on Sunday—Delivery.

When the carrier was allowed two days time for a shipment at an intermediate point (Revisal, 2632), and therefore could not deliver it before Sunday, delivery on the next succeeding day was a compliance with the law. (Revisal, 2839.)

ACTION to recover a penalty, under Rev., 2632, for delay in transporting a safe from Thomasville, N. C., to Hickory, N. C., tried before *Ward, J.*, at October Term, 1907, of CATAWBA.

From the judgment rendered the defendant appealed.

S. J. Ervin for defendant.
Plaintiff not represented in this Court.

BROWN, J.. The evidence tended to show that the safe was delivered to the defendant at Thomasville, N. C., on Tuesday, 22 January, 1907, for transportation to Hickory, N. C., and that this safe arrived at Hickory on 30 January. Salisbury, according to the evidence, is an intermediate point, within the meaning of the act, between Hickory and Thomasville. The defendant was entitled to two days at such intermediate point. *Wall-Huske Co. v. R. R., ante,* 407.

As the defendant is entitled to a deduction of two days at the intermediate point, the safe could not have arrived at Hickory in time for delivery before Sunday. The defendant, under section 2839 of the Revisal, was not required to make delivery on Sunday, and delivery on the succeeding day is in compliance with law.

(594) His Honor erred in not making these deductions. The judgment is reduced by them to $15, and it is so modified.

Let the costs be taxed against plaintiff and defendant equally.

This ruling renders it unnecessary to consider the interesting brief and argument of the learned counsel for defendant, in which he asks us to reconsider the judgment in *Watson v. R. R.,* 145 N. C., 236, in regard to excluding Sundays in all cases. A recent discussion of the subject will also be found in *Sully v. R. R.,* 76 S. C., 173.

Modified and affirmed.

BANK OF NORTH WILKESBORO AND S. J. GENNINGS v. WILKESBORO HOTEL COMPANY.

(Filed 13 May, 1908.)

1. Principal and Surety—Judgment, Assignment of—Payment by Surety.

When a surety pays a judgment rendered against his principal and himself, without having it assigned to some third person for his use, the judgment is canceled as to both, and a motion for leave to issue execution (Revisal, 620) should not be granted.

2. Principal and Surety—Judgment—Payment by Surety—Statutory Remedy—Constitutional Law—Legislative Power.

Revisal, sec. 2842, providing that a surety who shows that he has paid out money upon a judgment against his principal and himself may have a citation issued to the principal by the clerk to show cause why execution should not be awarded him therefor, is constitutional.

3. Same—Substantial Compliance.

A notice issued by a court of competent jurisdiction, served upon the secretary and treasurer of a corporation, to show cause why an execution should not be awarded in favor of a surety who has paid a judgment against the corporation and himself, which sets out the date and amount of the judgment, the relation of the parties, that the surety has actually expended money in payment of said judgment, and that the principal has not reimbused him, is a compliance with section 2842, Revisal.

4. Same—Surplusage.

While, under Revisal, sec. 2842, the court may not revive a dormant judgment against the principal and the surety, an order otherwise valid is not rendered void by the addition of the words "that the judgment heretofore rendered is hereby revived, to the end that excution may be issued." The last sentence will be regarded as surplusage.

5. Same—Jurisdiction—"Clerk of Court"—Interpretation.

The jurisdiction, under Revisal, sec. 2842, is conferred upon the clerk by virtue of Revisal, sec. 352, providing that "the words 'Superior Court' or 'court' mean the clerk of the Superior Court, unless otherwise specifically stated, or unless reference is made to a regular term of the court."

6. Principal and Surety—Judgment—Payment by Surety—Execution—Notice to Show Cause—Time—Statutory Provision—Implied.

Revisal, sec. 2842, giving the surety, who has paid a judgment rendered against himself and his principal, the right to have an execution awarded against his principal, will be strictly construed. The time of notice not being specified, a reasonable time must be given. Ten days is sufficient, under Revisal, sec. 877.

7. Principal and Surety—Revisal, Sec. 2842—Judgments—Motion to Set Aside—Defense Shown—Insufficiency.

Parties moving to set aside an order for irregularity, made under Revisal, sec. 2842, must set out their defense.

(595) MOTION to revive judgment, heard by *Ferguson, J.*, at January Term, 1908, of WILKES.

On 4 March, 1895, the Bank of Wilkesboro recovered judgment against the Wilkesboro Hotel Company, principal, and S. J. Gennings, surety, for $757, interest and cost. Execution was issued thereon and the amount, with commissions, etc., paid by said Gennings, 6 September, 1895. The execution was duly returned, showing payment. Some time thereafter, the date not appearing, the Bank of Wilkesboro made an assignment of the judgment to said Gennings. This appears on the judgment docket. On 2 September, 1901, upon motion of Gennings, based upon his affidavit, a notice was issued by the clerk of the Superior Court to the Wilkesboro Hotel Company, reciting the foregoing facts and directing said defendant to show cause on a day named "why
(596) execution should not issue on said judgment," etc. This notice was served on Milton McNeill, secretary and treasurer. On the return day, 12 September, 1901, the clerk of said court made an order reciting the foregoing facts and finding as a fact that the judgment had not been paid; that defendant failed to appear and show cause why the motion should not be granted; that Gennings had exhibited a receipt showing the payment of the judgment by him. The order concluded: "It is therefore considered, ordered, and adjudged by the court that S. J. Gennings recover of the Wilkesboro Hotel Company the sum of $837.12 and cost of this proceeding, and that the judgment heretofore rendered in this case is hereby revived, to the end that execution may be issued for the above amount in favor of said S. J. Gennings, surety as aforesaid." No execution had issued on said judgment since 1895. Milton McNeill, secretary of the Wilkesboro Hotel Company, did not inform any of the stockholders or other persons interested in the said company or its property that said notice had been served on him. The said company had ceased to transact any business and had not for several years held a stockholders' meeting. Said company had not dissolved. The clerk issued an execution, on 12 September, 1901, on said judgment, and the sheriff levied it upon certain personal property as the property of said company. On 2 October, 1901, J. R. Henderson and J. R. Combs, stockholders of said company, filed an affidavit before the said clerk setting out certain facts, but not alleging that said judgment had been paid by said Gennings, as the basis for a motion which was then made before said clerk to set aside and vacate said order of 12 September, 1901, upon the ground of excusable mistake or neglect. It is not necessary at this point to set out the facts alleged in said affidavit. The clerk, upon hearing the motion, made an order setting aside the judgment theretofore rendered by him, "exercising the dis-

cretion vested by law." He did not find any facts as the basis of this order. He gave to the movers twenty days in which to file their answer, 4 October, 1901. From this order Gennings appealed to (597) the October Term of the Superior Court. At the special term, 1902, of said court counsel for Gennings moved the judge presiding to set aside and vacate the order of the clerk of 4 October, 1901. Counsel for the stockholders moved the judge to dismiss the appeal for that it had not been prosecuted with diligence. His Honor, *Judge Winston,* refused to dismiss the appeal. The stockholders excepted. The judge found the facts set out in the record and, being of the opinion that the motion should be heard by the resident judge or the judge holding the courts of the district, refused the motion by counsel for Gennings, to which they duly excepted. The appeal was not docketed on the civil-issue docket, but the papers in the cause have been on file since 4 October, 1901. At the October Term, 1906, his Honor, *Judge Bryan,* directed the cause to be placed on the civil-issue docket to be heard on its merits. Defendants excepted. At the January Term, 1908, his Honor, *Judge Ferguson,* heard the cause and made an order reciting, among other things, that it was a "proceeding brought by S. J. Gennings, a surety for defendant company, in the judgment in *Bank v. Hotel Co.,* under Rev., 2848, before the clerk of this court, and it appearing further that said clerk, on 12 September, 1905, rendered judgment in favor of S. J. Gennings, plaintiff, and adjudging and finding as a fact that S. J. Gennings has as such surety paid on said judgment the sum of $837.12 for the benefit of the defendant, and awarding him judgment for that amount," etc. His Honor, being of the opinion that he had no authority to set aside the judgment of 12 September, 1901, vacated said order and adjudged "that the said S. J. Gennings be and he is hereby remanded to his rights under the judgment," etc. From this judgment Henderson and Combs appealed, assigning errors. No answer was filed in accordance with the order of the clerk of 12 September, 1901.

J. W. McNeill and F. B. Hendren for plaintiffs. (598)
W. W. Barber and T. B. Finley for defendant.

CONNOR, J. This proceeding has had a long and tedious journey through the court, coming to us in a somewhat different aspect from that in which it began its career. The original notice to defendant company was evidently intended as a basis for a motion for leave to issue execution pursuant to section 620, Revisal. The difficulty with which the surety, Gennings, was confronted consisted in the fact that upon payment by him of the execution in 1895 the judgment was canceled and

satisfied. In *Sherwood v. Collier,* 14 N. C., 380, it is held that the payment by the surety of the judgment against the principal and himself cancels it as to both. If the surety wishes to keep it in force he must have it assigned to a stranger for his benefit. In *Peebles v. Gay,* 115 N. C., 38, all of the cases are cited by *MacRae, J.,* and the conclusion thus stated: "It was early laid down by our Court that the only way for a surety to preserve the lien of the judgment against his principal in his own favor was, upon payment by him of the sum, to have the judgment assigned to a trustee for his use. If he permitted the judgment to be satisfied without any assignment, the remedy of subrogation is lost." So, in *Briley v. Sugg,* 21 N. C., 366, it is held that an assignment to the surety who pays the judgment against his principal and himself operates as a payment. *Daniel, J.,* says: "Notwithstanding the plaintiff did not intend to extinguish the judgment by paying Anderson the amount, yet in a court of law and in a court of equity it would have that effect." *Hodges v. Armstrong,* 14 N. C., 253. It is held by many courts, and Mr. Brandt says it "is the better opinion," that when the surety does not intend to pay the judgment equity will subrogate him, without an assignment and remedies of the creditor, by appointing a trustee. Brandt on Suretyship, sec. 342, and notes. The question is not presented here,

(599) because, upon the motion before the clerk, no equities can be administered. If the effect of the clerk's order is simply to grant leave to issue execution upon the judgment it cannot be sustained. There was no valid subsisting judgment upon which an execution could issue.

The counsel for Gennings, appreciating the difficulty confronting him, relies upon section 2842, Revisal, and insists that he is entitled to the relief therein provided. This section of the Revisal, which was enacted in 1797 and has been in force in this State since that time, provides: "That any person who may have paid money for or on account of those for whom he became surety, upon producing to the Superior Court or any justice of the peace having jurisdiction of the same a receipt, and showing that an execution has issued and he has satisfied the same, and making it appear by sufficient testimony that he has laid out and expended any sum of money as the surety of such person, may move the court or justice of the peace for judgment against his principal for the amount which he has actually paid, a citation having previously issued against the principal to show cause why execution should not be awarded; and should not the principal show sufficient cause, the court or justice shall award execution against the estate of the principal." The interpretation of this statute does not appear to have been before this Court. It has been referred to in opinions wherein it is held that it

affords a cumulative remedy to sureties, but does not preclude them from equitable remedies. We find that a similar statute exists in other States. With the exception of *Smith v. Smith,* 1 How. (Miss.), 202, it has been held constitutional. The only objection urged against it in that case was that it made no provision for trial by jury of the issues which could be raised. In a later case (*Dibrell v. Dandridge,* 51 Miss., 55) a statute very much of the same character was before the Court. It was held that, being in "derogation of the common law," it should be strictly construed, and "the person claiming the benefit of it must bring himself clearly within its provisions." The statute provided that (600) the payment of a judgment by the surety should operate as an assignment. In *Pait v. Pait,* 19 Ala., 712, *Chilton, J.,* does not question its validity, and holds that the notice given, "although exceedingly informal," complies with the "substantial requirement of the statute." The statute in Alabama is substantially like ours. In *Ayers v. Lewellin,* 3 Leigh (30 Va.), 660, a similar statute was sustained, the only question being its interpretation. They are generally held to be constitutional (Brandt on Suretyship, sec. 782), but are strictly construed *Ib.,* 783. In *Brown v. Wheeler,* 3 Ala., 287, it is held that when a statute gives a summary remedy to a surety and no provision is made for notice, the principal is entitled to reasonable notice. We can perceive no constitutional objection to the statute. The liability of the principal to the creditor having been fixed by judgment, the only question open to him on the motion for summary judgment and execution is payment to the surety, or other matter discharging him from liability, or the statute of limitations. We do not see how the proceeding differs in any substantial respect from the motion by the judgment creditor for leave to issue execution after three years from the last execution. Revisal, sec. 620. Upon that motion the judgment debtor may plead judgment, satisfaction, or the statute of limitations. *McLeod v. Williams,* 122 N. C., 451. While it is true the notice to defendant contemplates the issuing of an execution, it sets out the date and amount of the judgment, the relation of the parties, and that "Gennings has actually paid out and expended said sum of money in payment of said judgment, and that said hotel company has not reimbursed him for this amount," etc. The notice fixes a day—ten days after its service—to show cause, etc. It substantially complies with the statute. It was served on the secretary and treasurer of the corporation, as found by the clerk and by *Judge Winston.* The order or judgment recites all the facts required to be found by the statute, and concludes: "It is hereby considered and adjudged by the court that S. J. Gennings recover of the (601) Wilkesboro Hotel Company the sum of $837.12 and cost of this

proceeding." The court further adjudges "that judgment heretofore rendered in this case is hereby revived, to the end that execution may be issued," etc. This portion of the judgment is surplusage and in no manner affects the validity of the judgment proper. Has the clerk jurisdiction to enter a judgment for the recovery of money? By section 352, Revisal, it is provided that when jurisdiction or power is conferred or duties imposed, and "the words 'Superior Court' or 'court' are used, they mean the clerk of the Superior Court, unless otherwise specially stated, or unless reference is made to a regular term of the court." It has never been doubted that it was competent for the Legislature to confer such jurisdiction upon the clerk. Trial by jury is secured by directing the cause to be transferred to the civil-issue docket for the trial of *issues* of fact raised by the pleadings. We can see no good reason for making a distinction between the jurisdiction conferred by section 2842 and section 620. It is suggested that the statute does not require notice to issue before judgment is rendered. The arrangement of the sentences is peculiar—"a citation having previously issued to show cause why execution should not be awarded." Reading the entire statute, we are of the opinion that these words, properly construed, require notice. If this is not a permissible construction, section 877 of the Revisal provides that in all cases when a motion is heard upon notice ten days shall be allowed. When a statute confers power upon a judicial tribunal or an administration agency to render judgment or make an order affecting rights of person or property, and no provision is made for notice, the court will require a reasonable notice, fixed, as we have seen, at ten days, this being the time within which a summons is required to be served before the first day of the term. Certain stockholders of defendant moved the clerk to set aside the judgment, setting forth in an affidavit the grounds (602) of the motion. Waiving the question whether they had a right to make the motion—whether it should not have been done by some officer of the corporation—we do not find that they set out any defense to the motion for judgment. It does not deny the fact of payment by Gennings of the judgment, or allege that he has been paid the amount. It sets up a default on the part of Milton McNeill in notifying them of the motion or making a defense, but does not aver that he had any defense. It sets out certain facts, if true, which they suggest would make it inequitable for Gennings to enforce the judgment against some of the property of the corporation. This would not constitute any valid defense to his recovering judgment against the corporation. However this may be, we concur with his Honor, *Judge Ferguson,* that the clerk "had no authority to set aside the judgment of 12 September, 1901." *Maxwell v. Blair,* 95 N. C., 317. It will be observed that, although the

clerk's order of 4 October, 1901, gave the movers leave to file an answer, they have not done so. If the claim of Gennings was bound by the statute of limitations the defense should have been made by answer. Upon a careful examination of the entire record we concur with his Honor that the order of 4 October, 1901, setting aside the judgment of 12 September, 1901, should be vacated. The judgment is so modified that an execution, when issued, be upon that judgment and not the original judgment, which, as we have seen, has been satisfied by the payment made by Gennings.

Modified and affirmed.

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(605)

W. M. SMITH, ADMINISTRATOR OF JAMES WRIGHT, v. THE ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY.

(Filed 13 May, 1908.)

1. Witnesses—Cross-examination—New Matter.

The cross-examination of an adversary's witness is not confined to matters about which the witness has testified on his examination in chief, but may extend to and include any matter relevant to the inquiry.

2. Witnesses—Party May Show Contradiction, When.

While it is not ordinarily permissible in a party to assail or disparage the character of his own witness, or to ask questions having only this end in view, it is always open to such party to show that the facts are otherwise than as stated by his witness; and this may be done by the testimony of other witnesses, from other statements of the same witness, and, at times, by the facts and attending circumstances themselves —the *res gestæ*.

3. Same—Conflicting Statements—Veracity—Questions for Jury.

In a suit to recover damages for the negligent killing by defendant of plaintiff's intestate it was admitted that a shifting engine used by the intestate in the course of his employment was not equipped with a grab-iron running across its front. Witness for plaintiff testified on examination in chief that plaintiff's intestate stepped on the foot-board and reached for the grab-iron or whatever he could catch, and he did not know why he did not catch the grab-iron; and, on cross-examination, that he had warned plaintiff's intestate that his engine was not equipped with one: *Held*, the credibility of the testimony was for the jury, and they could accept or reject all or any part thereof as it might convey to their minds the imprint of truth.

4. Employer and Employee—Rules of Employer—Orders—Intent—Waiver.

In an action for damages for the alleged negligent killing of plaintiff's intestate, when contributory negligence is relied upon as a de-

fense and, the evidence tends to establish that the intestate was acting in disobedience of the orders of his vice-principal, given for the protection of employees, the order, to be effective, must have been given and received with the expectation and intent that it should be observed, and, as in the case of rules, it was open to the parties to show that no such intent existed, or that, by the attitude of the parties and their conduct concerning it, the order as a rule had been waived or abrogated.

5. Same—Questions for Jury—Knowledge of Employer, Expressed, Implied. In an action for damages for the alleged negligent killing of plaintiff's intestate there was evidence tending to show that the intestate, while engaged as one of a switching crew, was at some previous time warned by the conductor that a shifting engine did not have the usual grab-iron running across its front, and also as to the danger in getting aboard the engine in the manner in which the intestate did at the time of the injury; that the intestate acted in this respect as all the other hands engaged in this business were accustomed to act, including the conductor himself, and that in the present instance the conductor was standing on the footboard in full view and gave no warning: *Held*, it was not error for the lower court to instruct the jury, that, while a violation of a known rule of the railroad company made for employees' protection and safety, when the proximate cause of the injury, would usually bar a recovery, it is not so when the rule is habitually violated, to the actual knowledge of the vice-principal or employer, under such conditions as to fix them with implied knowledge.

(604) APPEAL from *Moore, J.*, and a jury, at January Term, 1908, of MECKLENBURG.

There was evidence on the part of plaintiff tending to show that in January, 1906, the intestate, engaged in his employment as one of a switching crew, was run over and fatally injured on the yard of defendant company, from which injury he soon thereafter died. D. H. Plott, a witness for plaintiff, among other things, testified in substance that on the night of the occurrence witness was conductor in charge of the switching crew of which deceased was then a member, and intestate, in the line of his employment, had thrown the switch and then took his position in front of the slowly moving engine, stepped on the footboard, reached for the grab-iron and, not catching anything, fell back on the track and was run over and injured as stated. The witness further testified as follows: "After Jim Wright threw the switch he stepped about 3 or 4 feet from the outside between the two rails and stopped in front of the engine, between the rails, to get on. The engine was moving at the rate of between 2 and 3 miles an hour—not very fast. As we moved toward him he stepped on the footboard. I was on the
(605) footboard, on the engineer's side—on the west side as the engine headed south. He stepped on the footboard and reached up as usual to catch the grab-iron or something, whatever he could. He did not

catch anything and fell backwards in front of the moving train, and was run over and both legs cut off. I don't know why Wright did not catch the grab-iron. A switch engine usually has a grab-iron extending across over the top of end sill, 4 or 5 inches high. The grab-iron is usually on top of end sill, and by stepping on footboard you can catch grab-iron. The engine we were using that night had a flag at each corner. There was no grab-iron running across the front of that engine on top of end sill." The witness further said that this had been a road engine, changed for purposes of a switch engine by removing the cowcatcher and putting a footboard in front, and had no grab-iron, and that deceased at the time was acting in the line of his duty, and that brakemen in the performance of this duty properly took the position which was taken by the deceased on this occasion, and witness had done the same thing himself when engaged in this work.

A witness by the name of L. J. Snipes was asked as to the customary position and method of brakemen in that yard in performing the duty in which the deceased was engaged at the time, and said: "Always stand out in front, hold up one foot and let the footboard pick you up. Sometimes you stand on the rail, sometimes on the end of cross-tie, and sometimes on track, between rails. You catch from the end of tie if the footboard is in good condition. Grab-iron is supposed to be there to catch to." It further appeared that at the time deceased stepped on the footboard he had a lantern in one hand and a brake stick in the other, and the witness Snipes testified that both were supposed to be used by switchmen when engaged in this duty. Defendant offered no evidence.

On the issue as to contributory negligence the court charged the jury that the intestate was required to act with due care and circumspection, and left it to them to determine whether on the facts (606) and circumstances indicated the intestate was in the exercise of such care at the time; and declined to charge, as requested by defendant, that on the entire evidence, if believed, the intestate was guilty of contributory negligence.

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

Burwell & Cansler and Stewart & McRae for plaintiff.
W. B. Rodman for defendant.

HOKE, J., after stating the facts: It was admitted on the argument that defendant company was negligent in failing to provide an engine properly equipped for the work in which the intestate was engaged, and it is urged for error that the court declined to charge as requested by

defendant on the issue as to contributory negligence, and this chiefly on the following statements appearing in the cross-examination of the plaintiff's witness, D. H. Plott:

"You made a statement immediately after this accident, did you not?

"A. Yes.

"Q. I will ask you if in this statement you did not say this: 'The footboard was in good shape. This negro knew as well as I do that there were no grab-irons on this engine. I had warned him half a dozen times and told him to be careful.' "

(Plaintiff objected to this question because he has offered no testimony to prove that his intestate was ignorant of the fact that his engine was not equipped with grab-irons, and because witness has not sworn that the plaintiff's intestate knew that there were no grab-irons on the engine, or that he had warned said intestate that there were none, and that he should be careful on that account. Objection overruled. Plaintiff excepts.)

(607) "A. Yes; I made that statement.

"Q. I will ask you now if you had not warned Wright numbers of times that there were no grab-irons on this engine and to be careful."

(Plaintiff objects. Objection overruled. Plaintiff excepts.)

"A. Yes; I had warned him.

"Q. That is the statement you made, is it not?

"A. Yes; that is my signature to it.

"Q. Did you not state at the time that 'I told this negro at least a dozen times not to stand on the track and get on an engine as he did last night' ?"

(Plaintiff objects. Objection overruled. Plaintiff excepts.)

"A. Yes; I told him that. There was a footboard on the rear of this engine. We were going down to get out of the way of No. 35."

It is the rule with us that the cross-examination of an adversary's witness is not necessarily confined to matters about which the witness has testified on his examination in chief, but may extend to and include any matter relevant to the inquiry. *S. v. Allen,* 107 N. C., 805; *Sawrey v. Murrill,* 3 N. C., 397. This, too, seems to be the rule recognized and followed in the English courts, though there is much conflict of authority on the question in this country. An interesting discussion of the subject will be found in Professor Wigmore's work on Evidence, secs. 1885 to 1890, inclusive, in which the author gives decided intimation that the doctrine as it obtains in this State is supported by the better reason. The evidence, then, must be considered and dealt with as if it had come from plaintiff's witness, and this though it was in no way responsive to the testimony given in chief and may tend only to support an affirmative

defense. We do not conclude, however, as claimed by defendant, that because this is true the testimony of the witness must be taken as importing absolute verity, nor that the plaintiff is thereby pre- (608) cluded from insisting on any position which may contradict or in any way antagonize the statements made by his witness. While it is accepted doctrine that one who offers a witness "presents him as worthy of belief," and except, perhaps, where an examination is required by the law, as in the cases of subscribing witnesses to wills and deeds (*Williams v. Walker,* 2 Rich. Eq., 294; 46 Am. Dec., 53), a party will not be allowed to disparage the character or impeach the veracity of his own witness, nor to ask questions or offer evidence which has only these purposes in view, it is always open to a litigant to show that the facts are otherwise than as testified to by his witness. *S. v. Mace,* 118 N. C., 1244; *Chester v. Wilhelm,* 111 N. C., 314. And this he may do, not only by the testimony of other witnesses, but from other statements of the same witness, and at times by the facts and attending circumstances of the occurrence itself, the *res gestæ. Becker v. Koch,* 104 N. Y., 394.

In the present case, on his examination in chief, the witness Plott had stated in reference to this occurrence that "he stepped on the footboard and reached up as usual to catch the grab-iron or something, whatever he could." And again: "I do not know why Wright did not catch the grab-iron. A switch engine usually has a grab-iron extended across the top or end sill, 4 or 5 inches high." The statement brought out in the cross-examination, as we interpret it, nowhere intimates that any present warning was given by the witness that the engine was defective. The testimony is to the effect that at some previous time or times such warning had been given and the intestate directed to be careful, and from the facts attending the occurrence, as given by the witness in his examination in chief, the jury might have concluded that the witness, in his written statement, had been mistaken as to the engine, or that it was so long before the intestate could have reasonably inferred that the defect had been remedied, or they may have determined to reject (609) it altogether as unworthy of credit. The credibility of testimony is for the jury, and it is theirs to accept or reject all or any part of the witness's testimony, as it may convey to their minds the impress of truth. *S. v. Hill,* 141 N. C., 769; *S. v. Green,* 134 N. C., 658.

Again, while the statements made in this cross-examination are evidence on the issue as to contributory negligence, and were so submitted to the jury as a separate and complete defense, which the defendant's position seeks to make them, these statements chiefly derive what force and significance they may have from the fact that they tend to establish that the intestate at the time of the occurrence was acting in disobedience

of orders which the conductor at some previous time, and when acting as vice-principal, had given for the employees' protection. It does not clearly appear from the evidence that the conductor, when the alleged previous order and warnings were given, was then acting as vice-principal towards the intestate or giving an order to govern his future conduct; but if this be conceded, and the directions and warnings given by the conductor at some previous time should be allowed the force and effect of a rule of the company made for the employees' protection, it should be subject to the same limitation as a rule. It must be an order given and received with the expectation and intent that it should be observed; and, as in the case of rules, it was open to the parties to show that no such intent existed—that it was simply talk, and, by the attitude of the parties and their conduct concerning it, that the order as a rule had been waived or abrogated. In that aspect the statements made in this cross-examination were fairly submitted to the jury in the full and comprehensive charge of the court.

Among other things said by the court in reference to these orders having the force and effect of rules made by the company, the judge below said: "Now, I give you that instruction, gentlemen of the jury, (610) subject to the modification that the effect of an order given by Plott (who, if you believe the evidence, was a superior of the plaintiff's intestate) was the same as a rule promulgated by the railroad company itself, and that such an order could be waived by the defendant as well as a rule made by the railroad company itself could be waived.

"The law is that the violation of a known rule of the company made for an employee's protection and safety, when the proximate cause of such employee's injury, will usually bar a recovery. This is only true, however, of a rule which is alive and in force, and does not obtain where a rule is habitually violated, to the knowledge of the employer or of those who stand toward the employer in the position of vice-principal, or when a rule has been violated so frequently and openly and for such a length of time that the employer could by the use of ordinary care have ascertained its nonobservance."

This was a correct statement of the law as to the effect of this order of the vice-principal having the force and effect of a rule of defendant company, and the facts in evidence fully sustain the verdict rendered under the charge. While the conductor may at some previous time have warned the intestate as to the defect in the engine and the position taken by the intestate in getting aboard, the evidence shows that the intestate on this occasion acted as all the other hands engaged in this business were accustomed to act, including the conductor himself; and in support of this position it further appeared that in the present instance the con-

ductor himself was standing on the footboard in full view and gave no warning and made no protest. The intestate might have concluded that his superior's previous speech concerning this work was not expected or intended to be obeyed.

The facts of this case are in many respects similar to those presented and considered in *Biles v. R. R.*, 139 N. C., 528; *Coley v. R. R.*, 128 N. C., 534; and a correct application of the principles declared in those decisions will sustain and justify the recovery had by (611) plaintiff in the present action.

No error.

Cited: Crawford v. R. R., 150 N. C., 623; *Lynch v. Johnson*, 171 N. C., 623.

IRA SWINSON ET AL. v. TOWN OF MOUNT OLIVE ET AL.

(Filed 13 May, 1908.)

1. Constitutional Law—Municipal Taxation—Necessaries—Without Vote of People—Legislative Powers.

The Legislature has the constitutional authority to authorize a municipal corporation to create a debt for necessary purposes without a vote of the people.

2. Same—Market House.

A market house is a necessity for a town, in the sense that the Legislature may authorize a municipal corporation to incur a debt to provide one without a vote of the people.

3. Same—Legislative Restrictions.

There is no limitation upon town taxation for necessary purposes except that imposed by statute, general or special.

4. Same—Interpretation.

While by some sections of a legislative act a town may be restricted in its tax levy for ordinary purposes, the various sections of the act relating to the subject must be construed together, so as to give effect to such others as authorize an additional levy for special purposes.

APPEAL by plaintiff from *W. R. Allen, J.*, at chambers, at April Term, 1908, of WAYNE. The facts are stated in the opinion.

J. D. Langston for plaintiffs.

H. B. Parker, Jr., for defendants.

CLARK, C. J. This is an action to restrain the defendant, the town of Mount Olive, from issuing $6,000 in bonds "to build and own a town hall and market house," without a vote of the people. The Gen-
(612) eral Assembly, by section 49, chapter 201, Private Laws 1905, specially empowers the defendant to issue bonds for that purpose.

The General Assembly can authorize a municipal corporation to create a debt, without a vote of the people, for necessary purposes. Const., Art. VII, sec. 7; *Fawcett v. Mount Airy,* 134 N. C., 125; *Wilson v. Charlotte,* 74 N. C., 748. A market house was held to be a necessary expense for a town. *Smith v. New Bern,* 70 N. C., 14; *Wade v. New Bern,* 77 N. C., 460.

It is true that section 28, chapter 201, Private Laws 1905, restricts the tax levy by Mount Olive for town purposes to 50 cents on the $100, but that is for ordinary purposes and does not apply to the interest or principal of indebtedness for the special purposes enumerated in section 49 of same act. See, also, section 52, which recognizes this distinction. The three sections must be read together. There is no limitation upon town taxation for necessary purposes save that imposed by statute, general and special. *French v. Wilmington,* 75 N. C., 477; *Young v. Henderson,* 76 N. C., 420.

Judgment refusing the restraining order is

Affirmed.

Cited: Hightower v. Raleigh, 150 N. C., 571; *LeRoy v. Elizabeth City,* 166 N. C., 96.

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(613)

LENOIR REALTY AND INSURANCE COMPANY v. DAVID M. CORPENING.

(Filed 13 May, 1908.)

1. Courts—Jurisdiction—Amount of Possible Recovery.

The jurisdiction of the Superior Court is dependent upon the amount for which, in the most favorable aspect for plaintiff, judgment could be rendered upon the facts set out in the complaint.

2. Courts—Jurisdiction—Waiver—Supreme Court.

When the action arises solely upon contract the question of jurisdiction may not be waived, and may be raised in the Supreme Court for the first time.

3. Same—Breach of Contract—Amount of Recovery—Judgment Demanded.

When the cause of action in the complaint is the breach of contract of defendant to make a deed to land to a purchaser the plaintiff had pro-

cured thereunder; that the land was sold for $4,000 and it was entitled to an agreed commission of 5 per cent, including all costs of sale, the Superior Court has no jurisdiction, as the action did not sound in tort and the amount of the recovery could not exceed $200, though a judgment of $500 was demanded, including costs of advertising in a sum not named.

APPEAL from *Ward, J.*, at November Term, 1907, of CALDWELL.

J. E. Mattocks and T. B. Lewis, trading under the name of plaintiff, sued for recovery of damages for breach of contract, alleging that defendant had entered into a contract in writing, made a part of the complaint, whereby he authorized them to sell, and, upon finding a purchaser, agreed to make title to a tract of land owned by him. For the service rendered in making sale plaintiff was to receive a compensation of 5 per cent. The minimum amount at which plaintiff was authorized to sell was $3,800 ($4,000 to be charged). Plaintiff alleged that it found a purchaser for the land, at the price of $4,000, who was ready, willing, and able to pay that amount, but that defendant refused to execute a deed according to the terms of his contract. It is alleged that, by the refusal of defendants to convey the land to the purchaser, (614) plaintiff has sustained $200 damages and the loss of the same amount of commissions; that they had expended a large amount, not named, in advertising, etc. Judgment for $500 is demanded.

Defendant answered, denying that he had violated the terms of his contract. The answer also raised the question of jurisdiction. Upon hearing the evidence his Honor rendered judgment of nonsuit. Plaintiff appealed.

Jones & Whisnant for plaintiff.

A. A. Whitener, W. A. Self, and Mark Squires for defendant.

CONNOR, J. The plaintiff is confronted with the fact that in no possible aspect of the complaint can it recover more than $200. The commission for making sale was to be 5 per cent. This included all expenses and payment for services rendered in making sale. The amount for which the sale was made was $4,000, hence the commissions could not exceed $200. It is too well settled to admit of controversy that the jurisdiction is fixed by the amount for which in the aspect most favorable for plaintiff judgment could be rendered upon the facts set out. *Frœlich v. Express Co.*, 67 N. C., 1. It is also settled that the objection to the jurisdiction can be raised for the first time in this Court. It is constitutional and may not be waived. It is true that in some cases the plaintiff may waive the contract and sue in tort, as in *Bowers v. R. R.*, 107 N. C., 721. This is not one of the cases. The refusal of defendant to

execute a deed is simply a breach of his contract, as if he had promised to pay plaintiff $200 for services rendered. Calling it a tort does not make it one. Without passing upon the exception to the judgment of nonsuit, we are compelled to dismiss the action because the Superior Court had no jurisdiction. It is so ordered.

Dismissed.

Cited: *Wooten v. Drug Co.*, 169 N. C., 67.

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(615)

CLARENCE CALL AND JOEL TRIPLEY v. N. H. ROBINETT AND S. J. BARNETT.

(Filed 13 May, 1908.)

1. State's Lands—Entry—Description—Notice, Sufficiency of—Collateral Attack.

A description in an entry of State's lands reading "640 acres, adjoining the lands of J. T., A. C., *beginning on the southwest corner of J. T. 50-acre tract*, known as the C. lands, and running various courses for complement," is not too vague, and is capable of location by survey. (*Grayson v. English*, 115 N. C., 358; *Fisher v. Owens*, 144 N. C., 649, cited and approved.)

2. Same—Vagueness—Insufficiency.

A description in a second entry upon the State's unimproved lands, "640 acres in a certain county, lying on specified waters in E. Township, adjoining lands of S. G. A. and others, *beginning on a stake in S. G. A.'s line*, and running various courses for complement," is too vague to give notice of lands intended to be appropriated.

3. State's Lands — Entry — Vagueness — Survey — Grant—Valid as Against State.

After the survey and issuance of a grant by the State to vacant lands, the entry cannot be collaterally attacked for vagueness. When the land is not sufficiently identified by the entry, the entry is not void, and a defect may be cured by the survey, so as to make the grant issued in pursuance thereof valid as against the State.

4. State Lands—Entry—Conformity with Grant—Question for Proper Officers—Binding Upon State—Collateral Attack.

The question whether the grant by the State of her vacant lands corresponds to the entry is one for the officers empowered to issue the grant, and is not open to attack by a stranger to the title or by a subsequent claimant under the State.

5. State's Lands—Entry Made Certain by Survey—Sufficient—Second Entry.
When there are two enterers upon the State's vacant land, if the first entry is too vague, but the enterer make his entry certain by survey before the second entry, it is sufficient notice, and the courts will not declare him a trustee for the first enterer. (The difference between this and the cases in which the courts will declare a second enterer a trustee for the first discussed and distinguished by CONNOR, J.)

6. State's Lands—Entry—Notice—Vagueness—Parol Evidence—Inadmissible.
When the entry upon the State's vacant land is too vague to give notice of the land intended to be appropriated, it may not be aided by parol evidence.

APPEAL from *Ward, J.*, at October Term, 1907, of WILKES. (616)

Action for trespass. Plaintiff claims under entry dated 6 February, 1901, "640 acres on the waters of Elk Creek, adjoining the lands of Joel Triplett, A. C. Cowles, and others, beginning on the southwest corner of Joel Triplett's 50-acre tract, known as the Cox lands, and running various courses for complement." Warrant issued 18 February, 1901. Grant from State, containing description by metes and bounds, 12 November, 1903. Defendant claims under entry made 28 January, 1902, "640 acres of land in said county, lying on the waters of Stony Fork, in Elk Township, adjoining the lands of S. G. Anderson and others, beginning on a stake in S. G. Anderson's line and running various courses for complement." Warrant issued 12 February, 1902. Grant describing land by metes and bounds issued 8 September, 1904. It was conceded that the survey upon plaintiff's entry was made prior to that under defendant's entry. His Honor held that defendant's entry was too vague and indefinite to afford notice. Defendant excepted and proposed to introduce parol evidence of facts by which to fix plaintiff with notice of his claim prior to survey under his (plaintiff's) entry. His honor held that if the proposed evidence was true, it did not affect plaintiff's title. Defendant excepted.

At the conclusion of the evidence his Honor instructed the jury to answer the issue as to title for plaintiff. There was judgment for plaintiff for $1. Defendant appealed.

W. W. Barber and R. Z. Linney for plaintiff.
Manly & Hendren for defendant.

CONNOR, J., after stating the facts: Defendant proposed to (617) attack the grant under which plaintiff claimed, for that the entry was vague, indefinite, and incapable of location by survey—that it was a "shifting entry," and the survey did not cover the lands indicated in the entry. We are inclined to the opinion that the entry complies with

the requirement of the statute. It fixes with reasonable certainty the beginning point—refers to the waters of Elk Creek and adjoining lands. The case decided by this Court illustrating the entries which are too vague, and those capable of location by survey, are cited and discussed by *Mr. Justice Avery* in *Grayson v. English,* 115 N. C., 358, and in *Fisher v. Owens,* 144 N. C., 649. If, however, the entry is vague after the survey and issuance of a grant by the State, it is not open to defendant to attack it. In *Currie v. Gibson,* 57 N. C., 25, *Pearson, J.,* said: "When the terms of description in which an entry is made are so vague as not to identify any lands, the entry is not void, and the defect may be cured by the survey, so as to make the grant which issues in pursuance thereof valid as against the State." It cannot be attacked collaterally. *Dosh v. Lumber Co.,* 128 N. C., 84. The cases in which a grant may be attacked collaterally, treated as void upon its face, are pointed out in *Holley v. Smith,* 130 N. C., 85. The learned counsel for defendant insists that a grant which is not supported by an entry is void. If this be conceded it does not aid the defendant, because the grant from the State recites, as the statute requires, that there was an entry. The description in the grant is full and complete. Whether it corresponded to the entry was a question to be decided by the officers who were empowered to issue the grant. A stranger to the title, as in this aspect of the case defendant must be regarded, cannot attack the grant. It seems that it is valid against the State—certainly it is so as against a stranger—and, it would seem equally clear, as against a subse-
(618) quent claimant under the State. The cases cited by defendant do not militate against this view.

The defendant says, conceding that the legal title passed to plaintiff by the entry, survey, and grant, he is entitled to have him declared a trustee for his benefit. It is well settled that when an entry is made, and subsequent thereto another person lays an entry and takes a grant, he acquires the title, and the grantee will be declared a trustee for the first enterer; the reason of this being that the first entry entitled the enterer to a prior right or equity to call for the legal title upon complying with the statute, and the second enterer took subject to this prior claim or equity, the entry being notice thereof. The defendant is confronted with two difficulties in this aspect of the case: First, his entry is subsequent to that under which plaintiff claims. Second, his entry is too vague and indefinite to give any notice. It is always held that, to entitle the first enterer to have the grantee declared a trustee, his entry must be sufficiently definite to put the second enterer upon notice. In *Johnston v. Shelton,* 39 N. C., 85, *Ruffin, C. J.,* says that if the first entry is too vague to put the second enterer upon notice, equity will not aid him.

This is a different question from that which we first discussed. There the survey makes the vague entry certain, and the State accepts it and issues the grant. Here the question of notice of the first entry controls the rights of the parties. If the first enterer makes his entry certain by survey before the second entry, it is sufficient. So, in *Munroe v. McCormick,* 41 N. C., 85, *Pearson, J.,* says: "When one makes an entry so vague as not to identify the land, such entry does not amount to notice and does not give any priority of right as against another individual who makes an entry, has it surveyed, and takes out a grant." Tested by the decided cases cited in *Grayson v. English* and *Fisher v. Owens, supra,* we think defendant's entry too vague to afford notice. It is a "floating entry," without any definite beginning point. "A stake in S. G. Anderson's line" is about as vague as it is possible to (619) make it. It calls for no single point from which a survey could be made, and gives no other *indicia* for that purpose. The description in *Johnston v. Shelton,* 39 N. C., 85, was: "Beginning on the line dividing the counties of Haywood and Macon, at or near Lowe's bear pen, on the Hogback Mountains," etc. It was held too indefinite to affect a second enterer. The discussion by *Ruffin, C. J.,* is, as usual, clear and strong. We could not hope to add anything of value to what he says. We concur with his Honor that the defendant's entry was too vague to give notice of the land intended to be appropriated. Defendant seeks to fix plaintiff with notice by parol evidence of what defendant intended to claim. It has not, so far as our own and the investigation of counsel goes, been decided whether the parol evidence is competent to fix a second enterer with notice of a former vague entry. The intimation in *Johnston v. Shelton, supra,* is against defendant's contention. In *Fisher v. Owens, supra,* it is said: "A number of expressions are used by the judges indicating the opinion that the only notice which will be sufficient to protect a vague, indefinite entry is a survey, and, as said by *Judge Pearson,* the good sense of this principle is manifest." We concur with his Honor that in any point of view there was no evidence of notice in this case which entitles the defendant, if otherwise entitled, to have plaintiff adjudged a trustee. Plaintiff, having the first entry, the first survey, and the first grant, is the owner of the land. The judgment of his Honor was correct and must be

Affirmed.

Cited: Babb v. Mfg. Co., 150 N. C., 140; *Lovin v. Carver, ib.,* 711; *Cain v. Downing,* 161 N. C., 597; *Wallace v. Barlowe,* 165 N. C., 677.

(620)

A. L. BENNETT v. THE CAROLINA MANUFACTURING COMPANY.

(Filed 13 May, 1908.)

1. Negligence—Safe Appliances—Evidence—Testimony as to Facts, Not Opinion.

When plaintiff contends that the negligent failure of defendant to furnish a safety shield, in general use, to a buzz planer at which he was employed to work was the cause of his hand getting caught in the machinery and inflicting the injury complained of, it is incumbent on him to prove, and it is competent for him to testify, not as his opinion, but as to the facts within his own knowledge, that the shield had been upon the planer and was taken off by defendant's overseer, under his objection, to save time; that with the proper use of the shield his hand could not have been caught, explaining why, and that he would have used it properly. (*Marks v. Cotton Mills*, 135 N. C., 287, cited and distinguished.)

2. Same—Nonsuit—Some Evidence.

A motion as of nonsuit upon the evidence will not be sustained in an action for personal injury occasioned to plaintiff in operating, in the course of his employment, a buzz planer of defendant, when there is evidence tending to show that the use of the buzz planer without a shield is unsafe, and that the defendant's overseer had taken away the shield to save time, under plaintiff's objection that it was dangerous to do so.

APPEAL from *Ferguson, J.*, at November Term, 1907, of MECKLENBURG.

The following issues were submitted:

1. Was the plaintiff injured by the negligence of the defendant? Answer: "Yes."

2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: "No."

3. Did the plaintiff assume the risk of being injured in the way he was injured while operating said machine? Answer: "No."

4. What damage is plaintiff entitled to recover? Answer: "Two thousand two hundred dollars."

From the judgment rendered the defendant appealed.

(621) *Burwell & Cansler and Stewart & McRae for plaintiff.*
Tillett & Guthrie for defendant.

BROWN, J. The plaintiff's hand was badly injured while operating a buzz planer in defendant's factory. The plaintiff offered evidence tending to prove that the planer was equipped with a safety shield, which he was in the habit of using; that such was in general use on such machines, and that he used the shield "pretty much all the time." Plaintiff gives

this account of why he did not have the shield when injured: "Martin, the foreman, asked me several times what it was for, and I picked it up and he told me to put it away. Then he asked me again what it was for, and I picked it up and put it on the machine and explained how it worked, and he said, 'Isn't that in the way in doing rabbeting and little work on the machine?' I said, 'Yes; it will take two or three minutes to take it off and put it on, but it is better than to tear some man's hand up and disable him for life.' He took it up and carried it upstairs, and I did not see it any more. I told him it would take two or three minutes to take it off and put it on, but it was better to do that than to disable some man for life."

The following questions were allowed over defendant's objection:

"Q. If you had had that shield on there, could your hand have hit the knives when it slipped off the piece of plank?

"A. No, sir; that safety guard would have the knives all covered over, with the exception of about an inch or an inch and a quarter of space where the knives cut the edge of the plank. It would be impossible for a man to get his hand in there unless he stuck it right down in that little crack.

"Q. If you had had this guard while you were doing that work, would you have had it on the machine?

"A. Yes, sir."

We think the exceptions untenable. It was incumbent on plaintiff to prove that the absence of the shield was the immediate cause of his injury, and to do so he must prove that if he had had the (622) shield he would have used it in the kind of work he was doing at the time he was injured, and that the use of it would have prevented the injury.

This differs very materially from the evidence ruled out in *Marks v. Cotton Mills,* 135 N. C., 287. In that case the witness was permitted to give an opinion as to whether the cog-wheels should not have been covered, in an endeavor on the part of plaintiff to prove negligence.

In this case the planer had been covered and, according to plaintiff's evidence, the shield taken away by the foreman to save time.

The plaintiff was testifying to a fact within his own knowledge and experience as to the efficacy of the shield as a protection, and was not giving an opinion. *Shaw v. Mfg. Co.,* 146 N. C., 235; *R. R. v. Blaker,* 64 L. R. A., 81; *Stewart v. R. R.,* 141 N. C., 265.

The motion to nonsuit was properly overruled. Although the matter was in dispute, yet there was evidence to go to the jury that the use of buzz planers without shields is unsafe and constitutes negligence upon the part of the master. In this particular the plaintiff's contention in

that respect is fortified very strongly by evidence tending to prove that the particular planer furnished by defendant had a shield which would protect the operator from just such an injury as plaintiff sustained, and that it was removed, against plaintiff's objection, by defendant's foreman, to save time.

We find nothing in the record upon which to base the defense of contributory negligence or assumption of risk. It is now settled that the servant does not assume the risk of injury arising from his master's negligence.

We think the charge of his Honor is free from substantial error, and that the contentions of the parties were fully and fairly explained to the jury.

No error.

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(623)

W. M. MORROW v. SOUTHERN RAILWAY COMPANY.

(Filed 20 May, 1908.)

1. Railroads—Crossing Signals—Trespasser—Evidence—Negligence Per Se, When Not.

The failure of the employees of a railroad company to give crossing signals at a public crossing does not constitute negligence *per se*, when the injury complained of occurred to a pedestrian while using the track at a different place, but is only evidence of negligence under certain conditions.

2. Same—Questions for Jury.

The duty of a railroad company's employees to give crossing signals is to those who have a right to cross its tracks at places for that purpose, and not to those who use the track for pedestrian purposes at other places; but when it appears that the injury complained of occurred in the night-time, that the engine causing it had no headlight, and there was evidence tending to show that no crossing signals were given of the approach of the train at a near-by crossing, and that people in the vicinity were accustomed to walk where the injury occurred, the evidence should be submitted to the jury, on the question of negligence upon the part of the railroad company, as to whether the train was carefully operated at the time of the injury, or whether proper warnings were given in a reasonable time to avoid it.

3. Appeal and Error—Instructions—Error in Part.

When it does not appear upon what theory or findings of fact a jury has rendered its verdict under a charge incorrect in part, error in any one of the instructions which may have influenced the jury upon the question involved entitles the appellant to a new trial.

CLARK, C. J., dissenting, *arguendo*.

MORROW *v.* R. R.

APPEAL from *Peebles, J.*, at December Term, 1907, of BURKE.

The plaintiff alleged and introduced evidence to prove that he was walking along and near the track of the defendant company in the town of Highland, just below and east of Hickory, when he was struck and badly injured by an engine pulling a train of the defendant, which was running, six hours late, at a high rate of speed. There was evidence in the case tending to show the following facts: That the plaintiff was using the track of the defendant for his own convenience as (624) a walkway, and when he saw the train approaching him he stepped from the track, but, not having reached a place of safety in time, he was struck by the engine and injured. The headlight of the engine had been extinguished, and the engineer gave no signal of the approach of his engine. Five hundred yards west of Highland there was a crossing used by the employees of a funiture factory and even by the public generally, and 250 yards still farther west there was a street crossing within the corporate limits of Hickory. By reason of the darkness, it being midnight, and the absence of a headlight, the plaintiff could not see the engine as it came towards him. No signals, by bell or whistle, were given at the crossings. There was other evidence that tended to show that there was a headlight, and that without one the train could be seen by the plaintiff or any one on the track a sufficient distance for him to leave the track in time to avoid any injury. The different phases of the evidence were presented to the jury by the court, with instructions as to the law, except in the particulars hereinafter mentioned.

The defendant requested the court to charge the jury as follows: "The purpose aimed at in requiring that the whistle shall be sounded or the bell rung on approach of an engine and train to a highway crossing is to give notice to travelers on such highway of the approach of the train to such crossing. If, therefore, you find from the evidence that the plaintiff was walking on or along the defendant's ordinary track, not at a highway crossing or other place where he had a right to be, then the defendant was not required either to sound its whistle or ring its bell at the highway crossing west of the point where the plaintiff was injured, in order to give him notice of the approach of its engine or train to such highway crossing, and such failure would not constitute negligence, if you should find there was such failure." This instruction was given, but with this addition, "unless you shall find from the evi- (625) dence that the engine had no headlight."

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

A. A. Whitener and W. A. Self for plaintiff.

S. J. Ervin for defendant.

WALKER, J., after stating the case: The defendant excepted to the amendment of the instruction and insisted that it should have been given as it was asked. In this view we concur, and think the judge erred in so modifying the instruction as to make its application to the case depend upon the presence of a headlight. It was clearly the duty of the defendant to run its train in a prudent manner and with such appliances as are approved and in general use, as a headlight, as will enable persons on its track to know of the approach of the train, if they exercise due care by looking and listening. If the train is no operated that it cannot be seen or heard in time for persons on the track, not at a crossing, to escape therefrom and avoid injury, then the defendant's engineers should give such signal by bell or whistle, and sometimes perhaps by both, as may be reasonably sufficient to warn persons on the track of the approach of the train. *Edwards v. R. R.*, 132 N. C., 99.

The duty of the railroad company is to give reasonable and proper warnings for the protection of travelers on a highway when trains are approaching, and a traveler may be said to have the right to presume that this duty will be performed, but this does not discharge him from the duty to exercise care for his own safety. If the defendant fails to give such signals as the circumstances reasonably require to warn a traveler on a highway which crosses the track, and the latter is injured by reason thereof, and has not proximately contributed to his own injury by failing to look and listen, or, in other words, to exercise the care of a prudent man, there is actionable negligence, and he may recover
(626) for the injury. The warning should, of course, be given at a sufficient distance to be effectual for the purpose intended. 9 A. and E. Enc., 413. The omission to give the signal at a crossing does not, as we have stated, relieve the traveler on the highway of the duty, as a prudent man, to look and to listen. *Cooper v. R. R.*, 140 N. C., 209. "Both parties are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform this duty." *Improvement Co. v. Stead*, 95 U. S., 161. But it is held, as we think, by the great weight of authority that the duty to give signals near crossings of the approach of trains does not exist in favor of persons walking along the track or parallel with and dangerously near the same, when such pedestrians are on or near the track between the crossings; and the failure to give crossing signals, as to them, is not negligence *per se*, but is only evidence of negligence in proper cases. The principle will be found stated with clearness in 8 A. and E. Enc., 409, 410, the cases being collected in the notes. A person walking on a railroad track or so near thereto as to be in dan-

ger of being struck by a passing train cannot complain of any breach of duty which the railroad company did not owe to him. Travelers on a highway which crosses a railroad track have the right to use the highway, and are therefore entitled to notice of the approach of trains to the crossing, but pedestrians using the track as a walkway cannot claim that the same duty of giving warning near crossings is due to them, for they are not using the highway. *Randall v. R. R.*, 109 U. S., 478. But the fact that no such warning was given, while not negligence *per se* as to the pedestrian using the track for his own convenience, may be evidence of negligence as to him in the operation of the train, when it is run in the night-time without a headlight, and prudence requires a warning to be given. There was evidence in this case that the plaintiff, (627) when he was injured, was where people in the vicinity were accustomed to walk, and under the circumstances he was entitled to notice of the approach of the train, if there was no headlight and it was so dark that he could not see it in time to leave the track. *Purnell v. R. R.*, 122 N. C., 832; *Heavener v. R. R.*, 141 N. C., 245; *McIlhany v. R. R.*, 122 N. C., 995; *Lloyd v. R. R.*, 118 N. C., 1010. He alleged that no warning by bell or whistle was heard by him; and the fact that there was no signal given for the crossing, if such was the fact, is some evidence to be considered by the jury as to whether the train was carefully operated at the time of the injury, and as to whether proper warning was given to him of the approach of the train, though it was not *conclusive* upon the question of negligence, so as to justify an instruction from the court clearly implying that if there was no headlight on the engine it was negligence not to give the usual signals for the crossings. If the plaintiff was a mere trespasser on the track, using it for his own convenience or without any license or permission of the company, express or implied, he certainly is not entitled to rely on a crossing signal, as the company owed no duty to him other than to enable him, by its careful operation of the train with respect to the place where he was hurt, to escape danger. Its failure to have a headlight, so that he could see the train as it approached, was negligence as to him. If he actually saw the train or heard it as it approached him, and failed to clear the track, if he had reasonable time to do so, he was guilty of negligence which defeats his recovery. The doctrine is thus stated in *Williams v. R. R.*, 135 Ill., 491: "In order to a recovery for negligence, it is not sufficient to show that the defendant has neglected some duty or obligation existing at common law or imposed by statute, but it must be shown that the defendant has neglected a duty or obligation which it owes to *him* who claims damages for the neglect. The duty of railroad companies to ring a (628) bell or sound a whistle on a train approaching a highway crossing

is intended for the protection or benefit of travelers upon the public highway and passengers upon the passing train, and the place indicated is the intersection of a railroad with a public highway." It may be tersely expressed thus: If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie in favor of the plaintiff, even if there is a breach of the duty. Sh. and Redf. on Neg. (4 Ed.), sec. 8; Bish. on Noncontract Law, sec. 446. *Reid v. R. R.*, 140 N. C., 146, which was cited by the plaintiff's counsel in support of their contention, is not in point, as there the injured person was on the highway or street, where she had the right to be. In *Fulp v. R. R.*, 120 N. C., 525, there was a nonsuit, and it would have been correct to hold that the failure to give the proper signals for the crossing was evidence of negligence, but in fact the decision turned upon an erroneous instruction that if a signal given at the usually safe distance would not have aroused the plaintiff's intestate, who was lying drunk upon the track, there was no negligence, which excluded from the consideration of the jury the duty of the defendant to avail itself of the last clear chance to save the life of the intestate. In other cases where it has been held that a failure to give the proper signal of the approach of a train to a crossing is negligence, it will be found either that the injured party was attempting to cross the track on a public highway or that there were other facts and circumstances which actually controlled the decision of the Court without necessarily involving the principle herein discussed. *Stewart v. R. R.*, 136 N. C., 385, is the only case where any very clear intimation as to the law upon this question is given, and it was in favor of the view we take in this case.

If the plaintiff was where he had a right to be when he was injured, it may be that the conduct of the defendant in operating its train constituted actionable negligence, within the principle laid down in
(629) *Read v. R. R., supra,* and the cases therein cited, and also in *Heavener v. R. R., supra.* But we are unable to say upon what theory or under which part of the charge of the court the verdict was based, and therefore error in any one of the instructions which may have influenced the jury entitles the defendant to a new trial. *Tillett v. R. R.*, 115 N. C., 663; *Williams v. Haid,* 118 N. C., 481; *Edwards v. R. R.*, 132 N. C., 99. The cases we have cited relate to conflicting instructions, but the principle upon which they were decided applies with equal force to a case of this kind, when it is impossible to determine upon which of the instructions the jury proceeded in finding their verdict.

New trial.

CLARK, C. J., dissenting: The defendant's train was running at night, six hours late, and at a high rate of speed. The instruction, as modified by the judge, is that if the engine was running under such circumstances, without a headlight, it was negligence not to give notice to plaintiff on the track of the approach of the train or engine by either sounding the whistle or ringing the bell at the highway crossing west of the point where the plaintiff was struck; otherwise if there was a headlight. Even though the plaintiff was on the track, he was surely entitled to *some* notice of the approach of the train.

In *Willis v. R. R.*, 122 N. C., 905; *Powell v. R. R.*, 125 N. C., 374, and *Hord v. R. R.*, 129 N. C., 306, it was held negligence not to give one on the track notice by blowing the whistle or ringing the bell at the customary places. Here, at the request of defendant, the court charged the opposite of this—that failure to blow the whistle or ring the bell at the crossing was not negligence as to the plaintiff unless the defendant was running its engine without a headlight.

The court might well have told the jury that running a train at night, six hours out of schedule and at a high rate of speed, without a headlight, was negligence. The absence of a headlight when dark (630) enough is always held negligence. *Willis v. R. R., supra.* It was in the defendant's favor that the court below held that the absence of a headlight under such circumstances could be supplied by giving the customary signals at the crossing near by. There is no error of which the defendant can complain. The jury found there was no contributory negligence.

Cited: *Beach v. R. R.*, 148 N. C., 167; *Strickland v. R. R.*, 150 N. C., 8; *Norris v. R. R.*, 152 N. C., 512; *Exum v. R. R.*, 154 N. C., 418; *Shepherd v. R. R.*, 163 N. C., 520; *Talley v. R. R., ib.*, 581; *Hill v. R. R.*, 166 N. C., 596; *Powers v. R. R., ib.*, 601; *McNeill v. R. R.*, 167 N. C., 399; *Treadwell v. R. R.*, 169 N. C., 700; *Davis v. R. R.*, 170 N. C., 587.

JOHN BROOKS ET AL. v. DAN SHOOK ET AL.

(Filed 20 May, 1908.)

Evidence—Admissions—Declarations, Incompetent.

When, in locating a corner of land in ejectment proceedings, plaintiff was asked on cross-examination, for the purpose of a *quasi* admission, if B., the one under whom he claimed, was present at the time of a certain survey, which was negatived by his answer, it was incompetent on redirect examination for the witness to state that on that occasion B. said the true corner was not there, but where plaintiff now claims, as this was his testimony of a declaration made by B. in his own interest.

APPEAL by plaintiff from *Cooke, J.*, at May Term, 1907, of BUNCOMBE.

Zebulon Weaver and F. W. Thomas for plaintiff.
Frank Carter, H. C. Chedester, and Wells & Swain for defendant.

CLARK, C. J. Ejectment, the crucial question being the location of a certain corner. The plaintiff, on cross-examination, was asked if George Brooks (now long deceased), under whom his title was derived, was not present when the survey was made from the corner now claimed by defendant. The witness replied that he was, and "objected to the (631) survey and said, 'You are running from the wrong point.'" The object of the question was, of course, to get a *quasi* admission against the interest of George Brooks, and the answer of the witness completely negatived such admission. The plaintiff excepts because, on redirect examination, he was not allowed to state that George Brooks on that occasion further said that the true corner was where the plaintiff now claims. This was a declaration in his own interest, and incompetent. The plaintiff relies on the principle that, the defendant having called out part of a conversation, he is entitled to the balance. But the defendant did not call for any conversation. He sought to get the benefit of a *quasi* admission from the presence of George Brooks at the former survey and his not making objection. The witness having answered that George Brooks did make objection, saying this was the wrong point, there is no reason why the plaintiff should be allowed to go further and bring out evidence of declarations of George Brooks in his own favor as to where the corner really was. It is enough that the witness negatived any inference from George Brooks' presence that he admitted that it was at this place.

No error.

L. B. HARRIS v. DUDLEY LUMBER COMPANY.

(Filed 20 May, 1908.)

1. Deeds and Conveyances—Devises—Innocent Purchasers for Value—Suits—Parties—Strangers.

When under a registered deed the grantee conveyed the land to an innocent purchaser for value, the defendant in the present suit, and thereafter suit was brought by an adverse claimant under a will, who was therein decreed to be the owner, the decree, unappealed from, is conclusive as between the parties, but has no effect upon the present defendant, who was not a party thereto and who obtained a prior title.

2. Deeds and Conveyances—Registration—Notice—Wills, Book of.

No notice, however full and explicit, can supply the place of registration, and the statute as to registration (Revisal, sec. 980) does not apply to wills. Therefore it is not necessary to examine the book of wills to see if the grantor of lands has devised them, or a part thereof, to another, and actual notice thereof will not affect the title conveyed by a registered deed. (The question of ademption or revocation and of election discussed by CLARK, C. J., and held inapplicable.)

ACTION for trespass, tried before *Ward, J.*, and a jury, at (632) November Term, 1907, of CALDWELL. Plaintiff appealed.

Mark Squires for plaintiff.
Jones & Whisnant for defendant.

CLARK, C. J. On 1 February, 1892, R. A. Harris executed to E. R. Harris a deed for 83 acres of land, which was registered 29 March, 1892. On the death of R. A. Harris, in December, 1892, E. R. Harris, his son, qualified as executor, being so named in his will, which had been made in 1884. By the terms of the will 39 acres of aforesaid 83 acres were devised to L. B. Harris, his brother. In July, 1903, by deed duly registered, E. R. Harris conveyed the timber on the 83-acre tract and also timber upon other lands to the defendant, who cut it in 1906. In September, 1905, L. B. Harris began his action against E. R. Harris to remove cloud on his title to that part of the 83 acres, *i. e.*, 39 acres, embraced in the devise to him, and at January Term, 1907, obtained a decree declaring plaintiff to be the owner of the lands devised to him. This action was begun 14 February, 1907, against the defendant for cutting the timber on said 39 acres. The defendant pleaded in defense that it was a *bona fide* purchaser for value, without notice of plaintiff's claim.

The court held that the plaintiff was not the owner of the timber which had been cut off the 39 acres, and the exception to this ruling is the only point presented.

(633) In this there was no error. The decree of January, 1907, unappealed from, is conclusive as between L. B. Harris and E. R. Harris, but has no effect upon the defendant, who was not a party thereto and obtained its title prior thereto. E. R. Harris obtained title to the land by deed from his father in February, 1892, and when the defendant took its deed from E. R. Harris there was no subsequent conveyance or encumbrance from E. R. Harris registered. It was not required to examine the book of wills to see whether R. A. Harris had attempted to devise to L. B. Harris a part of the land which he had conveyed to E. R. Harris. Concurring opinion in *Allen v. Allen,* 121 N. C., 335.

Even if the defendant had received notice of such fact, nothing but a prior conveyance or encumbrance duly registered could affect the conveyance to the defendant. No notice, however full and explicit, can supply the place of registration. *Blalock v. Strain,* 122 N. C., 280, and cases cited. Besides, the statute as to registration (Revisal, sec. 980) does not apply to wills. *Bell v. Couch,* 132 N. C., 346. The registration of a will is not notice.

It is not necessary to decide the point; but if it were, it admits of question whether, even as between L. B. Harris and E. R. Harris, the latter, in 1892, was put to his election. The deed to the latter in 1892 was an ademption or revocation of the devise of the same land written in the will in 1884, and it would seem that the will should be construed as revoked as to said tract. However, we do not pass upon the point. It is certain that if L. B. Harris had the equity to enforce election against his brother the decree to that effect obtained in January, 1907, in an action begun in September, 1905, could not affect the title of the defendant, whose deed from E. R. Harris was registered in July, 1903.

Affirmed.

Cited: Cooley v. Lee, 170 N. C., 22.

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(634)

C. M. BURNS v. T. R. TOMLINSON.

(Filed 20 May, 1908.)

1. Contracts, Wagering—Futures—Evidence.

In an action upon contract for damages for failure to deliver cotton at a future time, when the price had become higher, and the defense was that it was a gambling contract, or "futures," forbidden by Revisal, sec. 1689, in reply to which plaintiff testified he expected actual delivery, it was error in the lower court to exclude evidence offered in behalf of de-

fendant that neither he nor plaintiff expected actual delivery; that it was a dealing in futures and not a *bona fide* sale; that their course of dealings had been in futures; that another person stated in the presence of plaintiff and fendant at the time of the execution of the contract that it could be closed out by either party by paying the difference, which was not denied, and that the transaction occurred in a "bucket shop."

2. Same—Transactions Prior to 1905.

This transaction occurred prior to the enactment of chaper 538, Laws 1905, and only so much of Revisal, sec. 1689, applies as was embraced in chapter 221, Laws 1889.

APPEAL by defendant from *Webb, J.,* at October Term, 1907, of ANSON.

Robinson & Caudle, J. A. Lockhart, and J. T. Bennett for plaintiff.
McLendon & Thomas and J. W. Gulledge for defendant.

CLARK, C. J. This is an action to recover a loss of $1,264.05 upon a contract made by defendant 16 February, 1905, to deliver to the plaintiff during October, 1905, 100 bales of cotton at 7½ cents. Cotton was higher in October, and the defendant did not deliver. The defendant pleaded in his verified answer that this was a gambling contract, or "future," forbidden by the act of 1889, now Revisal, sec. 1689. This cast upon the plaintiff the "burden to prove by proper evidence, other than any written evidence thereof, that the contract sued upon is a lawful one in its nature and purposes." Revisal, sec. 1691. The placing the burden of proof is in the legislative power, even in criminal cases. (635) *Connor, J.,* in *S. v. Barrett,* 138 N. C., 630, which is a very full and conclusive discussion of the point; *S. v. Hinnant,* 120 N. C., 787; *S. v. Surles,* 117 N. C., 726; *S. v. Burton,* 113 N. C., 655. This feature in this particular statute was sustained in *S. v. McGinnis,* 138 N. C., 730.

The plaintiff testified that he expected the defendant to make actual delivery of the cotton; that he did not buy the cotton for his cotton mill; that he had bought and sold a great many contracts on which he did not receive and deliver cotton; that the defendant was a speculator in cotton; that up to this default the defendant had paid him for all his transactions; that he (the plaintiff) had speculated a great deal in cotton.

The defendant testified that the contract was purely speculative. In this conflict of evidence it was error to exclude the defendant's testimony that the contract was made in a "bucket shop," and that contracts for "futures" were made in that place. This, taken with the other evidence, might have thrown some light on the nature of the transaction. It was also error to refuse to permit the defendant to answer the question

whether or not he expected to deliver the cotton, and whether or not the plaintiff expected to receive actual delivery of the cotton. The court also excluded testimony offered that another person stated in the presence of plaintiff and defendant at the time of the execution of the contract that it could be closed out by either party by paying the difference. The court also erroneously excluded evidence of conversation between the parties on a subsequent date as to the contract. The court also refused to permit the defendant to answer the question whether this "was an actual contract to deliver cotton or a future contract." The court further refused to permit the defendant to answer questions tending to show a course of dealing in "futures" between the plaintiff and defendant extending over several years and down to this
(636) time without any actual delivery of cotton. Exceptions were taken in apt time.

It can require no elaborate discussion to hold that the above evidence was competent to aid the jury in determining whether this was a *bona fide* contract or a sale of a "future" forbidden by law. The plaintiff himself testified that he did not buy in the ordinary course of his business as a cotton manufacturer for use in his mill. He is not therefore excepted out of Revisal, sec. 1689, and by virtue of Revisal, secs. 1690 and 1691, *prima facie* this was a "future contract," and but for plaintiff's testimony that he expected actual delivery the court might have directed a nonsuit. Certainly it was error to refuse to permit the defendant to testify that neither he nor the plaintiff expected actual delivery, and that this was a dealing in futures and not a *bona fide* sale, and to prove also that the course of dealings between them for years had been trading in futures; that the transaction was made in a "bucket shop" and that the remarks made at the time in the hearing of the parties, and not denied by plaintiff, indicated that this was a deal in "futures." It is not necessary to consider the other exceptions. The jury should have had the aid of the excluded testimony in passing upon the "true inwardness" and nature of this transaction.

This transaction, unlike that set out in plaintiff's appeal in this case, occurred prior to the enactment of chapter 538, Laws 1905, and we have not been inadvertent to the fact that only so much of Revisal, sec. 1689, applies as was embraced in chapter 221, Laws 1889. *S. v. Clayton,* 138 N. C., 732.

New trial.

(637)

MRS. A. D. WILKIE ET AL. v. THE NATIONAL COUNCIL, JUNIOR ORDER UNITED AMERICAN MECHANICS OF THE UNITED STATES, NORTH AMERICA.

(Filed 20 May, 1908.)

1. Insurance Order—Evidence—Policy and Death—Burden of Proof.

In an action upon a life insurance policy the burden of proof is upon the insurance company to show nonpayment of dues or other matters to avoid the policy, when the certificates of insurance and the death have been shown.

2. Same.

When a life insurance order is defending a suit upon a policy on the grounds of nonpayment of dues, the burden of proof being upon it, evidence by the proper officers is competent tending to show that the insured had been dropped from the rolls prior to his death upon official notice; the relation of the constitution and by-laws to the subject, a matter of record evidenced by a copy, by testimony and matters of record that the insured failed to pay his dues and was not in good standing at the time of his death; and that entries were made to this effect by the proper officer in the records of the lodge.

APPEAL by defendant from *Peebles, J.*, at August Term, 1907, of RUTHERFORD.

McBrayer, McBrayer & McRorie for plaintiffs.
Gallert & Carson for defendant.

CLARK, C. J. Action upon a certificate of insurance for $500. The certificate contains a condition "that the said C. D. Wilkie is now and shall be at the time of his death a beneficial member in good standing of a subordinate council and affiliating with the National Council of said order, and also a member in good standing of the Funeral Benefit Department of said National Council, in Class B, in accordance with the laws of said National Council and of his State and subordinate council now in force or hereafter adopted prior to said death."

The defendant pleaded said condition in its answer, and, fur- (638) ther, that said Wilkie was not such beneficial member in good standing at his death, he being at that date more than eight months in arrears in the payment of his dues, and that by a provision of the constitution and by-laws of the defendant when a member was thirteen weeks in arrears he became in *bad standing and nonbeneficial,* and that the said Wilkie had at the time of his death been duly and regularly dropped from its rolls by the defendant for that cause, and was not a member in good standing.

The court properly held that, the certificate of insurance being shown, and the death, the burden was on the defendant to show nonpayment of dues or other matter to avoid the policy. *Doggett v. Golden Cross,* 126 N. C., 477. The defendant thereupon introduced the deposition, properly taken, of Stephen Collins, secretary and manager of the Beneficiary Degree and Funeral Benefit Department of the National Council. The court sustained plaintiff's objection to the interrogatory to Collins in said deposition whether Wilkie was a member in good standing, and also to Collins' reply that he was not, having been dropped from the rolls prior to his death upon an official notice, under seal, from the local lodge to which Wilkie had belonged. The court also sustained plaintiff's objection to the interrogatory to this witness, and his reply, as to the constitution and by-laws of defendant governing nonpayment of dues and losing good standing, though the witness produced a copy of the book as evidence. The witness stated that whether a member was in good or bad standing was not a matter of opinion, but a matter of fact shown by the records of the local council. The defendant thereupon introduced the financial secretary of the local lodge, and offered to show by him, and also by the records of the lodge, which he had with him, that Wilkie had failed to pay his dues and was not in good standing at the time of his death. Both inquiries were ruled out. The defendant
(639) then offered to show by the recording secretary of said local lodge that Wilkie was not in good standing at his death; also that the witness had officially and in the mode prescribed by the regulations of the defendant sent to Collins, the secretary and manager of the National Council, the notice to drop Wilkie prior to his death from the rolls for nonpayment of dues, which notice had been referred to in Collins' deposition. This evidence in both particulars was excluded by the court.

The defendant then offered the clerk of the financial secretary of the local lodge, with the records of such lodge, and offered to show that the entries therein as to C. D. Wilkie and nonpayment of dues by him were made by witness. This was excluded. The defendant excepted in apt time to each rejection of evidence as above.

It is clear that error was committed, for which the defendant is entitled to a

New trial.

Cited: Harris v. Jr. O. U. A. M., 168 N. C., 359.

D. S. HILDEBRAND v. G. W. VANDERBILT.

(Filed 20 May, 1908.)

1. Liens for Labor and Materials—Lien Lost—Personal Action Against Owner.

The lien provided for a laborer or material man, under Revisal, sec. 2028, can be acquired without filing, if a statement of the amount due is rendered the owner, under Revisal, sec. 2022; and when the lien thus acquired is lost by not bringing suit within six months [Revisal, secs. 2027, 2033 (4)], an action can be maintained against the owner personally for his failure in his "duty to retain from the money due the contractor a sum not exceeding the price contracted for," etc. Revisal, sec. 2021.

2. Same—Limitation of Actions Pleaded by Owner for Contractor.

When the owner is sued by a laborer or material man in time, and subsequently, after the statute had run in favor of the contractor, he was made a party and filed no answer, the owner cannot plead the statute of limitation for the contractor in his own behalf, the plea being personal to the contractor.

3. Liens for Labor and Materials—Lost Liens—Judgment, Amount of—Adjustment of Claims.

The laborer or material man can only recover of the owner his *pro rata* part of that sum which the owner is required to "retain from the contractor then due" (Revisal, sec. 2021), this *pro rata* to be determined after consideration by the court below of all the claims of laborers, etc., against the contractor—their priorities, validity, etc.; and a judgment fixing the owner with a liability greater than that demanded for the satisfaction of the plaintiff's claim, without making the other like claimants parties, must be remanded and reformed.

4. Liens for Labor and Materials—Lost Liens—Judgment to Pay Into Court—Irregular Execution.

A judgment rendered against the owner and in favor of material men, etc., which requires the owner to pay any sum into court, is irregular. The judgment should fix the amount due, for which an execution may issue.

APPEAL by defendant from *Cooke, J.*, at May Term, 1907, of (640) BUNCOMBE.

Craig, Martin & Winston for plaintiff.
Merrimon & Merrimon for defendant.

CLARK, C. J. The plaintiff sued to recover the value of certain brick furnished by him to the defendant Hugill, a contractor, who used them in constructing certain buildings for the defendant Vanderbilt.

The jury found that Hugill was indebted to plaintiff for said brick $360; that plaintiff gave notice of said indebtedness to defendant Vanderbilt 1 October, 1900; that at that time said Vanderbilt was indebted to Hugill under said contract $780; that Vanderbilt, without cause, terminated the contract; that after paying for completion of the building, with proper regard to economy, there was due by Vanderbilt to Hugill $1,500. It appearing that there were other debts due by Hugill for material, etc., judgment was rendered that the plaintiff recover of the defendant Hugill $360, with interest from 1 October, 1900; also, that defendant Vanderbilt is indebted to Hugill in the sum of $1,500, with interest from 1 June, 1901, and he was ordered to pay that sum
(641) into court immediately for the use of the parties heretofore adjudged to be entitled thereto.

This action was begun 1 June, 1901. By virtue of Revisal, sec. 2028, the lien of a laborer or material man must be filed in twelve months, but by Revisal, sec. 2022, it can be acquired without filing if a statement of the amount due is rendered the owner. However acquired, the lien is lost if action thereon is not begun in six months. Revisal, secs. 2027, 2033 (4). The plaintiff, not having begun this action within six months after giving the statement of his claim to the owner, on 1 October, 1900, has no lien, but he can maintain this action against the owner personally, under Revisal, sec. 2021, which makes it the "duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for," to be paid to the laborer, mechanic, or material man whenever an itemized statement of the amount due him is furnished by either of such parties or the contractor.

Hugill was not originally made a party to this action. When brought in as a party, March Term, 1905, he filed no answer, but the defendant Vanderbilt obtained leave and amended his own answer to plead the three years statute of limitations. He could not plead the statute himself, having been sued in June, 1901, and he cannot plead it for Hugill, for the plea is personal to Hugill.

The judgment ascertaining the debt due by Hugill to plaintiff is affirmed. The rest of the judgment is irregular and must be reformed. As between plaintiff and Vanderbilt the amount due by the latter to Hugill is fixed by the verdict at $360 and interest—not at $1,500, for the plaintiff recovers, not by virtue of a lien, but under Revisal, sec. 2021, which requires the owner to "retain from the money *then* due" contractor. The plaintiff is only entitled to recover of Vander-
(642) bilt his *pro rata* part of that sum (not exceeding his judgment against Hugill), this *pro rata* to be determined after consideration by the court below of all the claims of laborers, mechanics, and ma-

terial men against Hugill in this matter, their priorities, validity, etc. No such data is before us, and the case must go back to reform the judgment according to this opinion. It is also irregular and without warrant of law to require defendant to "pay into court" any sum. The judgment fixes the amount due, and execution—not contempt proceedings—issues if not paid.

The other claimants not being parties to this action, the finding that Vanderbilt is indebted to Hugill $780 is not binding between Vanderbilt and the other claimants. They should all have been brought into this action and their rights and *pro rata* recovery determined as on a creditor's bill. The costs of this Court will be divided. Judgment modified and case

Remanded.

Cited: *Hardware Co. v. Schools,* 151 N. C., 512.

CHARLES M. BRUCE, TRUSTEE, ET AL. v. CAROLINA QUEEN CONSOLIDATED MINING COMPANY AND FRANK W. BOYD.

(Filed 20 May, 1908.)

1. Trusts and Trustees—Bondholders—Action to Foreclose—Defenses of Caretaker.

One who was put in possession of mortgaged real property of a corporation as a caretaker cannot resist a possessory action brought by the trustee in behalf of the bondholders, when the corporation makes neither defense nor objection, nor contests in its own right the validity of the mortgage.

2. Procedure—Reference—Trial by Jury Waived.

When it appears of record that no exception was entered to a reference of the cause, and that the parties unmistakably signified their consent in writing, a subsequent demand for a jury trial cannot be considered.

3. Corporations—Liens for Labor—Caretaker.

A caretaker cannot acquire a lien upon the real property of a corporation he has taken charge of under agreement that he was to receive for his services the use thereof and pay the taxes thereon and take care of the property of the company without charge.

4. Same—Statute Not Complied With—Requirements.

To constitute a lien under the statute for work and labor done for a corporation, it must not only be actual work and labor done, but it must be done under a contract to that effect, and the statute in regard to filing such liens must be complied with.

(643) ACTION to recover of the defendant Boyd possession of the lands and mining property belonging to the defendant corporation. The cause was referred to Referee M. Silver, by consent. The referee made his report, and the matter was heard by *Peebles, J.*, at December Term, 1907, of BURKE, who overruled all exceptions to the report of the referee and confirmed his report.

The defendant Frank W. Boyd appealed.

Avery & Ervin and J. T. Perkins for plaintiffs.

W. S. Pearson, J. M. Mull, and R. L. Huffman for defendants.

BROWN, J., after stating the facts: 1. The evidence supports the finding that this defendant was placed in possession and charge of the land belonging to the defendant mining company as a caretaker by the officers of the corporation. As the action is brought against him by the trustee of the mortgage bondholders of the mining corporation to recover possession of the land, to which the corporation does not object and files no answer, it is elementary that the defendant Boyd can no more contest his title than he could that of the corporation itself, whose officers employed him and placed him in charge of its property.

The action is brought by Bruce, trustee of the bondholders under a mortgage, which the corporation does not contest, for the possession of the property and for an accounting from Boyd for alleged profits received by him from the property. Being a mere agent or caretaker, it does not lie in his mouth to contest the validity of a mortgage admitted by

(644) the corporation who hired him. The referee and his Honor very properly sustained the demurrer to his amended answer.

2. The demand for a jury trial cannot be entertained. Not only does the said defendant ask for a reference in his answer of June Term, 1906, but when a reference was ordered at December Term, 1906, it was in express terms a reference by consent. The defendant's counsel not only did not note any exception to the order of reference, but in unmistakable terms signified their consent in writing. It is now too late to demand a jury trial upon any issue. *Nissen v. Mining Co.*, 104 N. C., 309; *Driller Co. v. Worth*, 117 N. C., 518.

3. The only other question presented in the record which we deem necessary to consider is as to whether Boyd has any lien on the property for his services as caretaker. The referee finds in substance that the corporation agreed to pay Boyd $25 per month for his services, and that on 1 January, 1888, this contract terminated, and that Boyd continued in possession for the corporation as caretaker for the use of the farming lands and sawmill, under the following resolution of the directors of 17 February, 1888:

"On motion of Dr. Lighthill, it was voted to give to Mr. Frank Boyd the use of the farming lands and saw mill if he will pay the taxes on the company's property and take care of the property of the company without any charge."

Even if the corporation owed this defendant anything for his services in taking care of the property, under our decisions he would have no lien on the property for work and labor done, had he complied with the statute and filed his alleged lien with the proper officer. To constitute a lien for work and labor done, it must not only be actual work and labor done, but it must be done under a contract for actual work and labor. *Moore v. R. R.*, 112 N. C., 236; *Cook v. Ross*, 117 N. C., 193; *Brayhill v. Gaither*, 119 N. C., 443; *Nash v. Southwick*, 120 N. C., 459. But this question is entirely eliminated by the finding of the referee, supported by the evidence, that this defendant during his incum- (645) bency of the property has applied all the proceeds of the farming lands and the rents and toll gold and the proceeds of his own working of the mines to his own use, and is actually indebted to the corporation in the sum of $300 for tan-bark and timber cut, sold, and appropriated by him. We are of opinion that his Honor properly overruled the exceptions and confirmed the report of the referee.

The judgment of the Superior Court is

Affirmed.

Cited: *Alexander v. Farrow*, 151 N. C., 323.

C. M. BURNS v. T. R. TOMLINSON.

(Filed 20 May, 1908.)

1. Contracts, Illegal — Pleadings — Verified Plea of "Futures" — Burden of Proof.

When defendant pleads in a verified answer that a contract, the subject of suit, for buying and selling cotton was void for being one for "futures," the burden of proof is upon plaintiff to show that it was a lawful one, *i. e.*, that actual relivery was intended by the parties, and not merely that either had the privilege of calling therefor. Revisal sec. 1691.

2. Contracts, Illegal—"Futures"—Evidence, "Prima Facie."

When damages are sued for in an action upon a contract for buying and selling cotton, and the plea of invalidity because the contract was for "futures" is set out in the verified answer, proof that the commodity was

not actually delivered at the date of the contract and that one of the parties agreed to secure or deposit "margins" constitutes *prima facie* evidence of a contract declared void by Revisal, sec. 1689.

3. Contracts, Illegal—"Futures"—Damages, Subsequent Promise to Pay.
A subsequent promise made by one of the contracting parties to the other to repay him for loss arising from a contract for "futures" is void.

4. Contracts, Illegal—"Futures"—Principal and Agent—Status of Agent.
An agent for a principal to a contract made in violation of Revisal, sec. 1689, as to "futures," cannot recover for any loss he may have sustained on account thereof, as such act of agency would be in violation of Revisal, sec. 3824, making it a misdemeanor.

(646) APPEAL by plaintiff from *Webb, J.*, at October Term, 1907, of ANSON.

Robinson & Caudle, J. A. Lockhart, and J. T. Bennett for plaintiff.
McLendon & Thomas and J. W. Gulledge for defendant.

CLARK, C. J. The plaintiff seeks to recover $1,920 paid by him to Robert Moore & Co., of New York, "on 100 bales of cotton, October delivery, bought and sold for account of plaintiff." The following is Moore & Co.'s statement, rendered 25 September, 1905:

April 27, sold 100 Bspc.....	$ 7.29	
Aug. 28, bo't 100 Bspc.....	11.10	
		$1,905
Charges brokerage, buying and selling.....		15
Net debit		1,920

The defendant, in his verified answer, pleaded that the above transaction was void, being a contract for "futures." Upon such plea made, Revisal, sec. 1691, provides that the burden is upon the plaintiff to prove that the transaction was a lawful one, which means, of course, that actual delivery was intended by both parties, and not merely that either "had the privilege" of calling for actual delivery.

Revisal, sec. 1690, further provides that proof that the commodity was not actually delivered at the date of the contract, and that one of the parties agreed to secure or deposited "margins," shall constitute "*prima facie* evidence of a contract declared void by Revisal, sec. 1698."

(647) The evidence of the plaintiff did not tend to rebut this *prima facie* case, and his Honor properly told the jury that, if they believed the evidence, the plaintiff could not recover, and to answer the

issue "Nothing." The plaintiff's evidence is that he authorized the defendant to telegraph in his name to Moore & Co., New York, to sell 100 bales of cotton, October delivery; that no cotton was delivered then nor in October; that he (plaintiff) kept up the margins; that he does not know whether or not the defendant intended to deliver the cotton; that the contract was closed out in August and he paid Moore & Co. $1,920, the loss on it. The defendant did not thereafter promise to repay such loss, and if he had done so the promise would be void. *Embrey v. Jamison,* 131 U. S., 336; *Kahn v. Walton,* 46 Ohio St., 195; *Everingham v. Meighan,* 55 Wis., 354; *Garsed v. Sternberger,* 135 N. C., 502.

Our statute (Laws 1889, ch. 221, now Rev., 1689) "to suppress and prevent certain kinds of vicious contracts" provides that no party "or agent of such party, directly or remotely connected with such contract in any way whatever, shall have or maintain any cause of action on account of any money or other thing of value paid, advanced, or hypothecated by him in connection with or on account of such contract or agency." And certainly the courts could not aid the plaintiff to a recovery, when Revisal, sec. 3824, makes it a misdemeanor, punishable by fine and imprisonment, to aid directly or indirectly in making or furthering such contract, and even "to do any act or aid in any way in this State in the making or furthering such contract so made in another State." *S. v. Clayton,* 138 N. C., 732.

The same case is here presented as was fully discussed and decided, with citation of authorities, in *Garsed v. Sternberger, supra.*

No error.

Cited: *Annuity Co. v. Costner,* 149 N. C., 297; *Rodgers v. Bell,* 156 N. C., 382; *Cobb v. Guthrie,* 160 N. C., 315; *Pfeifer v. Israel,* 161 N. C., 412; *Holt v. Wellons,* 163 N. C., 129.

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(648)

D. T. CURRIE v. WILLIAM GILCHRIST.

(Filed 20 May, 1908.)

1. Deeds and Conveyances—"Lappage"—"Color" of Title—Adverse Possession—Evidence.

When there are two claimants to land under different grants, which include a part of the land in both, thus causing a "lappage," the *locus in quo* being embraced therein, there is "color" of title in the junior grantee, and if he can show thereunder adverse possession for seven years it will bar the right of entry of the other party.

2. Same—Occupation—Presumption.

When the junior grantee claims title against the senior grantee of lands embraced in the "lappage" caused by the description in their grants by reason of adverse possession under "color," and has introduced evidence tending to show the possession, his possession, by contruction of law, extends to the boundaries of his deed or grant upon which he relies, and is not confined to so much thereof as may have been in his actual occupation and possession, if the senior grantee had no actual possession of the "lappage."

3. Deeds and Conveyances—"Lappage"—"Color" of Title—Evidence—Adverse Possession, Character of.

When the junior grantee claims title by adverse possession under "color" in the "lappage" of lands caused by the description in his own and the deed of the senior grantee, his possession must be of such character and so continuous as to indicate to the other proprietor the intention of claiming the land beyond the admitted boundaries, and upon competent evidence the question is one for the jury, under proper instructions from the court as to the legal effect of the possession.

4. Same—Evidence—Instructions.

When the senior grantee has had no actual possession of the "lappage," and there is evidence on the part of the junior grantee that he has held adversely to the senior grantee a "lappage" of lands in the descriptions of their grants, it is error in the trial judge to charge the jury that the latter is deemed in law to be in possession of the entire tract covered by his title, except as to so much thereof as the former may have had in his actual occupation and possession.

5. Evidence—Questions for Jury.

When there is more than a scintilla of evidence the question is for the jury, and a motion as of nonsuit is properly refused.

6. Deeds and Conveyances—Boundaries—Description—Number of Acres.

While ordinarily the number of acres mentioned in a deed constitutes no part of the description, yet when C., in an action for possession, claims that his lands extend beyond a certain line to and including the lands claimed by G., and there is at least some doubt as to the true location of his lands respecting it, evidence is competent to show that the land occupied by C. on his own side of the line and within his alleged boundaries contained a greater number of acres than that called for in his deed.

(649) APPEAL by plaintiff from *Webb, J.*, at October Term, 1907, of SCOTLAND.

M. L. John, J. A. Lockhart, and Adams, Jerome & Armfield for plaintiff.

J. G. McCormick, McLean & McLean, and Rountree & Carr for defendant.

WALKER, J. This is an action brought to recover the possession of land. The plaintiff alleged that he is the owner of a tract of land which was granted by the State, 4 December, 1828, to John Purcell, lying on both sides of Jordan's Creek, and showed the grant and mesne conveyances connecting him with the same, and that the defendant is in possession of a part of the said tract which lies southwest of the creek. The defendant claimed title under a grant to Duncan McLaurin, dated 31 March, 1842, and mesne conveyances by which any title acquired by said grant was vested in his father, John Gilchrist, and then by descent in him. There was evidence tending to show that the Purcell grant and the McLaurin grant covered in part the same land, which is the *locus in quo*. The defendant contended that if the McLaurin grant did not pass the land to the grantee by reason of the fact that the State had already divested itself of the title by the prior grant to John Purcell in 1628 (*Berry v. Lumber Co.*, 141 N. C., 386), the McLaurin grant and the mesne conveyances, and especially the deed of Ferdinand McLeod to John Gilchrist, constituted color of title, and the defendant (650) relied upon this color and adverse possession to show title in himself. He also asserted that he and those under whom he claims had been in adverse possession of the disputed land for twenty years, and thereby he acquired title to the *locus in quo*, whether he had any clear color of title or not. At the request of the plaintiff, the court charged the jury as follows:

"1. The court charges you that if William Gilchrist and those under whom he claims have been in possession of the lands in dispute—that is, the lands on the southwest side of Jordan's Creek, which are claimed by plaintiff—for twenty years before the commencement of this action, up to known and visible lines and boundaries, adversely to all other persons, then this would vest the title in fee simple in said lands in William Gilchrist, and this would be so whether William Gilchrist and those under whom he claims did or did not have any deed for the said land.

"2. If you should find from the evidence that John Gilchrist, the father of William Gilchrist, was in the possession of said land for four or five years prior to his death, and that after his death and from the time thereof continuously the widow and heirs at law of John Gilchrist were in the possession of said lands, and thereafter and continuously since William Gilchrist and his tenants or those under him have been in the possession thereof, cultivating the lands under cultivation, getting wood and straw therefrom and in other ways exercising acts of ownership and dominion over it, all of them using it as aforesaid up to Jordan's Creek and from Stewart's line to Laurel Hill Church, this would vest the title in fee simple in said lands in William Gilchrist, the plaintiff

cannot recover, and you should answer the first issue 'No' and the fourth issue 'Nothing.'

"3. If the defendant William Gilchrist, or those under whom he claims, have been in possession of the lands in dispute—that is, the lands on the southwest side of Jordan's Creek—under known and visible
(651) lines and boundaries and under colorable title for seven years, adversely to all parties, before the commencement of the action, the plaintiff cannot recover, and you should answer the first issue 'No' and the fourth issue 'Nothing.'"

The court further charged the jury as follows: "Where a party introduces a grant from the State and a connected chain of title from the State to him, he is deemed in law to have possession coextensive with his title, and is constructively in possession of all land embraced in his boundaries, unless he is ousted by the actual possession of a part of the land by the personal occupation of another, when his possession would not extend to the land in the actual occupation of such adverse claimant; and if you should find from the greater weight of the evidence that the plaintiff's grant and deeds cover the land in controversy, and that the plaintiff Currie was in possession of the land embraced in his grant and deeds and actually occupied a part of said lands on the northeast side of Jordan's Creek, then he is deemed in law to be in possession of the entire tract covered by his title, except as to so much thereof as the defendant may have in his actual occupation and possession."

The defendant excepted to this instruction. As we think there was error in the last instruction, and that it was calculated to mislead the jury upon the law as to the effect of possession by one of the parties of a part of the lappage, where there is an interference between the boundaries of the title as claimed by the respective parties, we need not consider the other questions presented, except the motion to nonsuit, which will be adverted to later.

The charge of the court, to which we have referred as being erroneous, confines the adverse possession of the defendant and those under whom he claims to the land actually occupied by him and them—that is, to the land of which they had a *pedis possessio*. The principle thus stated by the court is not correct with regard to a lappage where one of the
(652) parties is in the actual possession of a part under color of title. In such a case, if the party claiming under the senior title is not in possession of any part of the lappage and his adversary has been in actual possession of a part under a deed which defines his boundaries and is color of title, the law extends his possession to the whole of the lappage, and if he retains the possession for the time required by the statute, seven years, and it is adverse, it will bar the right of entry of the other

party and defeat his recovery. If in this case the plaintiff's paper title embraces the *locus in quo* and there has been no sufficient adverse possession of the lappage by either party, the plaintiff would have the better right, as the law adjudges the possession and the right of possession to be in him who has the better title. *Cohoon v. Saunders,* 29 N. C., 189; *Gaylord v. Respess,* 92 N. C., 553; *Straughan v. Tysor,* 124 N. C., 229; *Flanner v. Butler,* 131 N. C., 151; *Drake v. Howell,* 133 N. C., 162. But even if the defendant has what is sometimes called the junior paper title, and he can avail himself of the same as color, as is the case here, then if he has had adverse and continuous possession of the lappage or a part thereof for seven years prior to the bringing of this action, and the plaintiff has had no actual possession of any part thereof, the possession of the defendant by construction of law is extended to the boundaries of the deed or grant upon which he relies as color, and ripens his imperfect title into a good and perfect one. The lappage in such a case is regarded as practically a separate and distinct tract, so that the color of title of the defendant will ripen into a perfect title by a sufficient adverse possession, the same as if he had a separate deed for that part of the land, there being, of course, no possession, as we have said, by the owner of the senior title. We think the decisions of this Court clearly sustain these views. The principle is clearly stated in *Williams v. Miller,* 29 N. C., 186, by *Chief Justice Ruffin:* "As the case stands upon the exception, it is to be assumed that the line of the Williams grant was (653) where the plaintiff claimed, and where, indeed, the defendant admitted it to be; but it is to be assumed also that the line of the defendant's grant was where he claimed it to be, and where the plaintiff denied it to be; so that in point of fact there was, according to the expression that has come into common use, a lapping of the grants upon each other. In such a case the law has been held in many cases to be that if one of the claimants be seated on that part, and the other not, the possession of the whole interference is in the former exclusively, possession of part of the land included in both deeds being possession of all of it. As the defendant thus had the possession for seven years of the whole of the land covered by both grants, he acquired a good title to the whole, though his was the junior grant," citing *Green v. Harman,* 15 N. C., 158; *Dobbins v. Stephens,* 18 N. C., 5; *Carson v. Burnett, ib.,* 546; *Williams v. Buchanan,* 23 N. C., 535. The rule has been often stated by this Court and in somewhat different phraseology. Thus, in *Dobbins v. Stephens, supra,* it is said that "If neither claimant be in actual possession of the land covered by both deeds, the seizin is in the owner, but if one of them be seated on that part, and the other not, then the possession of the whole interference is in the former; but if both have actual possession of it, the

possession of the whole is in neither, that of the owner extending by virtue of his title to all not actually occupied by the other, and that of the latter being limited to his actual occupation. So the rules have been long understood, as expressed in *Den v. Herman,* 15 N. C., 158." And in *Williams v. Buchanan, supra, Judge Gaston* formulates the principle thus: "The case, then, is one of a senior and a junior deed interfering in part with each other, or, in common parlance, lapping upon each other. The law in that case is undoubtedly as his Honor stated it—that if neither of the parties contending under these deeds has had an actual *pedis positio* on the part comprised within both deeds, but each
(654) grantee is settled on that part which is claimed only by himself, the law adjudges the possession of the lap or part included within both deeds in him who has the elder deed or better right; but if neither be actually settled on the part included within both deeds, the law adjudges him to be in the exclusive possession thereof." We may therefore take it to be settled by this Court by a long and unvarying line of decisions that if the person who claims under the elder title have no actual possession on the lappage, such possession, although of a part only, by him who has the junior title, if adverse and continued for seven years, will confer a valid title for the whole of the interference, the title being out of the State. *Kerr v. Elliott,* 61 N. C., 601; *Howell v. McCracken,* 87 N. C., 399; *Asbury v. Fair,* 111 N. C., 251; *Boomer v. Gibbs* 114 N. C., 76. If each of the parties is in possession of some part of the lappage, the possession of the true owner or the one having the older title extends to all of the land embraced by the interference which is not actually occupied by the one claiming under the junior title. *McLean v. Smith,* 106 N. C., 172; *Asbury v. Fair, supra.* If the possession taken under the junior title is of a portion of the land so very minute that the true owner, even in the exercise of ordinary vigilance, might remain ignorant that it included his land or might fairly mistake the character of the possession and the intention of the occupant, it may fairly be doubted if the disseisin should be allowed to extend beyond the actual occupancy. The possession so taken, it would seem, should be of as much, in connection with the circumstances of the entry, as will reasonably indicate to the other proprietor and to the jury that the intention is to usurp a possession beyond the admitted boundaries and to make open claim under the junior title to the land covered by both, and that it is not merely a possession taken under a mistake or misapprehension as to the true dividing line. In such a case—that is, when the possession is wrongful only to an inconsiderable extent and with the limita-
(655) tion stated—the disseisor should not have the benefit of it, at least beyond its actual bounds. *Green v. Harmon, supra.* It will

generally be a question for the jury, under proper instructions from the court as to the legal effect of such a possession. The possession, to be adverse, should, of course, be denoted by the exercise of acts of dominion over it in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner and not merely of an occasional trespasser. *Williams v. Buchanan, supra; Gudger v. Hensley,* 82 N. C., 482; *Baum v. Shooting Club,* 96 N. C., 310; *Staton v. Mullis,* 92 N. C., 623; *Simpson v. Blount,* 14 N. C., 134.

Applying the foregoing principles to the facts of the case, we are constrained to think the court erred in its last instruction to the jury. The defendant contended, and there was evidence to show, that his northeast boundary and the southwest boundary of the plaintiff's land were at Jordan's Creek. Even if the plaintiff's contention was correct that his lower boundary was southwest of Jordan's Creek, then if there was evidence to show, and the instructions of the court concede that there was, that the defendant's northeast boundary was Jordan's Creek or the line indicated on the map as extending from 14 to K, there was a lappage of the two titles, and the instruction of the court was therefore not only contrary to the principle established in the law of boundary which we have stated, but was calculated to mislead the jury as to the legal effect of the possession upon which the defendant relied to ripen his color of title. The court clearly ignored the contention of the defendant and the evidence which supported it, and assumed that there was only evidence to establish the boundary according to the plaintiff's contention. This was a positive error and not a mere omission to charge upon a phase of the case presented by the evidence, where no instruction was asked as to it. According to the evidence and the contentions of (656) the respective parties, there was a lappage, and the instruction was certainly not correct, as the statement of a rule of law, if there was. As an abstract proposition it was correct, but as applied to the facts of the case, as the jury may have found them to be, it was not. For this error we order a new trial.

Upon the motion to nonsuit the plaintiff we need only say that there was more than a *scintilla* of evidence as to the location of the boundaries described in the grant and deeds upon which the plaintiff relied to show title. The evidence was perhaps not very satisfactory and may not be convincing, but that is a matter for the consideration of the jury and not for us to pass upon.

As to the testimony offered by the defendant to the effect that there is more land above or northeast of Jordan's Creek and within the plaintiff's alleged boundaries than is mentioned in his deed—about 15 acres

more—we can only say that in the present state of the proof this evidence should have been admitted, because there was at least some doubt as to the true location of the plaintiff's land. "Ordinarily the number of acres mentioned in a deed constitutes no part of the description, especially when there are specifications and localities given by which the land may be located; but in doubtful cases it may have weight as a circumstance in aid of the description, and in some cases, in the absence of other definite descriptions, may have a controlling effect." *Whitaker v. Cover,* 140 N. C., 280; *Harrell v. Butler,* 92 N. C., 20; *Baxter v. Wilson,* 95 N. C., 137. We do not think the plaintiff's location of his boundaries was so certain and unmistakable as to exclude evidence of this kind, but at the next trial the case may be different, and what we have said must be restricted to the facts as they now appear.

New trial.

Cited: Simmons v. Box Co., 153 N. C., 261; *Pheeny v. Hughes,* 158 N. C., 465; *Stewart v. McCormick,* 161 N. C., 627; *Ray v. Anders,* 164 N. C., 313; *Reynolds v. Palmer,* 167 N. C., 455; *Land Co. v. Floyd,* 171 N. C., 547.

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ABANDONMENT. See Husband and Wife.

ADMISSIONS. See Pleadings; Evidence.

ADVANCEMENTS. See Wills.

ADVERSE POSSESSION.

1. *Lower Proprietor—Incidental Easement—Reciprocal Easement—Limitation of Action.*—When the upper proprietor in the exercise of his right determined to abandon an artificial waterway or structure, which he had maintained on his own premises without invading the rights of the lower proprietor, but from which the lower proprietor had been incidentally benefited, the lower proprietor can acquire no right of easement in the continuance of the waterway or structure by lapse of time, there being no reciprocal easement in his favor to support the plea of adverse possession, and therefore nothing upon which a grant can be presumed. *Canal Co. v. Burnham*, 41.

2. *Chain of Title—Common Source—Evidence—Pleadings.*—When plaintiff claimed the *locus in quo* from the defendants in possession, and failed to establish his claim of title, and seeks to recover by showing that he and defendants claimed under W. as a common source, and that defendants were estopped to deny title therein, it was proper for the court below not to allow the plaintiff, under defendant's objection, to put in evidence a part of a sentence of the answer alleging that W., the ancester of defendants, was in open, notorious, and adverse possession, under known and visible lines and boundaries, when such destroys the sense in which the entire admission is made and perverts its meaning. *McCaskill v. Walker*, 195.

APPEAL AND ERROR.

1. *Second Appeal—Rehearing of First Appeal.*—Upon a second appeal in the same cause of action the appellant may not have a rehearing of matters disposed of in the first appeal. *Gerock v. Telegraph Co.*, 1.

2. *Case on Appeal Not Served.*—In the absence of case on appeal duly served, the Supreme Court cannot pass upon the correctness of the charge of the judge below, sent up with the judgment appealed from, continuing, without the consent of the parties litigant, the motions upon verdict rendered to a subsequent term. *Clothing Co. v. Bagley*, 37.

3. *No Case—Motion to Dismiss—Motion to Affirm.*—A motion to dismiss because there is no case on appeal must be denied. The proper motion is to affirm the judgment below. *Wallace v. Salisbury*, 58.

4. *No Case—Motion to Dismiss—Supreme Court—Inspecting Record Ex Mero Motu.*—When there is no motion to affirm the judgment below and the appeal is not properly constituted in the Supreme Court, it is the duty of the Court, *ex mero motu*, to inspect the record proper for errors. *Ibid.*

5. *Injunction—Case on Appeal—Exception to Judgment Below.*—On appeal from an order granting or refusing an injunction, the pleadings

APPEAL AND ERROR—*Continued.*

and the affidavits constitute the record proper, and no "case on appeal" is necessary, as the facts are reviewable by the Supreme Court, and the mere fact of appeal is itself an exception to the only action of the judge—the judgment. *Ibid.*

6. *Stay Bond—No Statutory Provision—Bond Given—Constitutional Law.* When there is no provision in the statute for staying execution on appeal from a court of competent jurisdiction—in this case a justice of the peace—it is doubtful whether, under our present constitutional judicial system, the act is constitutional; but when it appears that the stay bond was actually given, the Supreme Court will not dismiss the suit, as no right of the defendant has been denied. *St. George v. Hardie*, 88.

7. *Assignment of Error—Abandoned—Brief.*—An assignment of error, on appeal to the Supreme Court, not stated in the brief of appellant will be deemed abandoned. *Brown v. R. R.*, 136.

8. *Appeal Dismissed—Entry of Appeal—Noting an Exception.*—When an appeal is dismissed in the Supreme Court as premature, the entry will be regarded as equivalent to "noting an exception." *Gray v. James*, 139.

9. *Contentions of Fact.*—When the case on appeal to the Supreme Court discloses only a contention upon the facts which have been found by the jury, upon proper evidence and issues, and under correct instructions, there is nothing upon which error can be based. *Meadows v. Wharton*, 178.

10. *Jurisdiction of Parties—Supreme Court—Record Examined.*—When the question is properly presented, the Supreme Court will examine the entire record on appeal to ascertain if jurisdiction of the parties to an action commenced before a justice of the peace has been acquired. *Rutherford v. Ray*, 253.

11. *Objections and Exceptions, When Necessary.*—Questions relating to procedure, admissibility of evidence, and the like can only be reviewed on appeal in the Supreme Court when objections and exceptions are taken at the time. *Ibid.*

12. *Agreement of Parties—Harmless Error—Costs on Appeal.*—When the lower court is in error in instructing the jury not to answer an issue as to damages, and the amount thereof is agreed upon in the Supreme Court, the agreement will make the error harmless, but the appellee will be taxed with the cost on appeal. *White v. Carroll*, 330.

13. *Supreme Court—Superior Court Refusing to Obey Mandate—Mandamus.*—Whenever the court below refuses to obey the mandate of the Supreme Court as contained in its opinon disposing of the case on appeal, the proper remedy is by *mandamus;* but when at a subsequent term the Superior Court eventually did as directed, when the opinion was certified down and received by it, the error is cured. *Tussey v. Owen*, 335.

14. *Judgment—Nonsuit—Another Action—Supreme Court.*—When on appeal a case is ordered to be dismissed by the Superior Court on a motion to nonsuit upon the evidence, the Superior Court is without authority to allow an amendment or to proceed contrary to the opinion, but the plaintiff may bring another action within twelve months after the judgment of nonsuit. *Ibid.*

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15. *Questions for Jury.*—When the examination of the record on appeal discloses a controversy largely of fact, fairly and clearly presented to the jury upon the law, the verdict will not be disturbed. *Perry v. Perry*, 367.

16. *Order Making Parties—No Prejudice to Appellant Appearing—Premature Appeal.*—Orders of the lower court making additional parties to an action are usually discretionary, and an appeal therefrom will be dismissed as prematurely taken when it does not appear in what manner the rights of the appellant are prejudiced. *Etchison v. McGuire*, 388.

17. *Rules of Supreme Court—Assignment of Error—Practice.*—Under the Rules of the Supreme Court 19 (subdiv. 2) and 27 the assignments of error on questions of evidence should set out the testimony so that their relevancy can be seen; and on the rulings of the court or some other matters occuring at the trial, the ruling itself or the attendant facts and circumstances should be so stated that their bearing on the controversy can be perceived to some extent in reading the assignments themselves.—*Thompson v. R. R.*, 412.

18. *Dismissal.*—A statement purporting to be assignments of error appearing in the record just after the statement of case on appeal, setting forth in general terms that the appellant excepted to the rulings of the court, as appeared in certain numbered exceptions of record taken on the trial, such exceptions themselves not being sufficiently or properly stated, in excluding evidence, and "to a judgment of nonsuit as noted in the forty-seventh exception," is not definite enough for the Court to consider on appeal or to be referred to the clerk to be put in the prescribed shape therefor, and the appeal should be dismissed, under Rule 20, as not in compliance with Rules 19 and 27. *Ibid.*

19. *Exceptions to Findings of Fact.*—When the exceptions to the report of a referee and to the order of the judge confirming it are directed to correct findings of fact upon competent evidence and to correct conclusions of law arising therefrom, the judgment below will be affirmed. *Watson v. Mfg. Co.*, 478.

20. *Corporation Commission—Appeal Will Lie, When—Procedure.*—Unless given in express terms, an appeal will only lie from orders and rulings of the Corporation Commission when such orders affect some right or interest of the parties to the controversy.—*Hardware Co. v. R. R.*, 483.

21. *Pleadings — Distinct Defenses — Demurrer — Appeal, Fragmentary — Dismissed.*—An appeal from the refusal of the court to sustain a demurrer of plaintiff to one of two separate and distinct defenses is fragmentary and will be dismissed. It is otherwise when a demurrer to one defense is sustained or the demurrer to whole defense is overruled. *Shelby v. R. R.*, 537.

22. *Pleadings—Distinct Defenses—Demurrer Overruled—Objections and Exceptions.*—When the plaintiff demurs to one of two separate and distinct defenses, and the demurrer is overruled, the plaintiff should note an exception and the trial proceed upon both. *Ibid.*

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23. *Instructions—Error in Part.*—When it does not appear upon what theory or finding of fact a jury has rendered its verdict under a charge incorrect in part, error in any one of the instructions which may have influenced the jury upon the question involved entitles the appellant to a new trial. *Morrow v. R. R.*, 623.

ASSAULT. See Limitations.

ATTORNEY AND CLIENT. See Special Proceedings; Evidence.

Confidential Communications—What Are Not Such.—The testimony of one who had been of counsel for one of the parties to a lease is not objectionable when it was to a fact necessarily known to both parties, brought out during the negotiations concerning the lease, and could in no sense be considered a confidential communication. *R. R. v. R. R.*, 368.

BANKRUPTCY.

1. *Contracts—Preferences—Principal and Agent—Partnership—Evidence—Demurrer.*—"Equity regards that as done which ought to be done." Defendant and Y. entered into an agreement to form a corporation for mercantile purposes. With this in view, Y. bought goods, commenced business, and thereafter requested defendant to pay for its part of the merchandise, which it did. The business was chartered, but not incorporated. Y. sent a bill of sale of the merchandise to defendant without its suggestion, in value equaling the amount paid by defendant. In an action by the trustee in bankruptcy of Y. to recover the amount as a fraudulent preference: *Held*, (1) there was no evidence to establish the relationship of debtor and creditor nor of partnership; (2) there was no evidence of fraud or a preference, under the bankrupt act; (3) the court should, upon the foregoing evidence introduced by the trustee in bankruptcy have sustained a demurrer and dismissed the action. *Godwin v. Cotton Mills*, 227.

2. *Trustee—Estoppel.*—A trustee in bankruptcy is estopped by the acts of the bankrupt, in the absence of fraud, and bound by his conduct and agreements to the same extent the bankrupt would have been bound before the adjudication. *Watson v. Mfg. Co.*, 469.

BURDEN OF PROOF.

1. *Prima Facie Case.*—In accordance with whether the party upon whom is the burden of issue has made a *prima facie* case, or with other pertinent conditions of the evidence, the burden of proof may shift from one party to another, or back again; but when the burden of proof shifts from the party originally bearing it, it is not required of the other party to disprove by the preponderance of the evidence. *Winslow v. Hardwood Co.*, 275.

2. *Evidence—Admissions—Instructions—Issues.*—While the burden of the issue is upon the defendant setting up contributory negligence as a defense, it was error in the court below to so instruct the jury when plaintiff's evidence established negligence on his part. Then the question becomes one of proximate cause alone, when there is evidence of defendant's negligence. (The question of appropriate issues in such cases discussed and proper issues sugeted by CONNOR, J.) *Wagner v. R. R.*, 315.

CARRIERS OF GOODS. See Railroads.

1. *Penalty Statutes—Transportation—Revisal, 2632—Constitutional Law —Commerce Clause.*—Revisal, sec. 2632, by its language applies only to the transit of goods carried by railroad companies from and to points within the State, and therefore questions relating to its constitutionality respecting the commerce clause of the Federal Constitution are not pertinent to the inquiry thereunder. *Marble Co. v. R. R.*, 53.

2. *Evidence — Transportation — Revisal, 2632—Interstate Commerce—Action Dismissed.*—When it does not appear from the evidence, in a suit for the recovery of a penalty against a railroad company, under Revisal, 2632, concerning delays in transit of certain goods from a point in Georgia to a point in North Carolina, whether the alleged delay occurred in Georgia, South or North Carolina, the judgment in plaintiff's favor in the court below will be reversed, and the action dismissed. *Ibid.*

3. *Penalty Statutes—Actual Transit—Interstate Commerce.*—An action to recover a penalty under Revisal, sec. 2632, for a delay alleged to have occurred in the actual transit of goods shipped by rail from a point within the State to a point without the State cannot be sustained. (See *Davis v. R. R.*, 145 N. C., 207, and *Ice Co. v. R. R.*, 147 N. C., 66) *Ice Co., v. R. R.*, 61.

4. *Penalty Statutes—Instructions—Transportation—Verdict, Directing*—It is error in the court below to charge the jury to find a certain sum for plaintiff, if they believe the evidence, in an action for the recovery of a penalty, under Revisal, sec. 2632, for the alleged failure of a railroad company to transport goods. The question of delay and the ascertainment of the amount of the recovery are questions for the jury under proper instructions. *Ibid.*

5. *Penalty Statutes—Transportation—Points Within State—Through Another State.*—A penalty under Revisal, 2632, cannot be recovered for the failure of a railroad company to transport freight within a reasonable time, when the initial and terminal points are within the State, but the shipment necessarily passes into another State *in transitu.* (App. *Marble Co. v. R. R.*, 147 N. C., 53.) *Ice Co. v. R. R.*, 66.

6. *Delayed in State—Recovery—Quœre.*—As to whether a penalty is recoverable under Revisal, sec. 2632, for failure of a railroad company to transport freight from and to points within the State, necessarily through another State *in transitu*, when the delay is shown to have occurred here, at the initial or terminal point, *quœre. Ibid.*

7. *Penalty Statutes—Length of Delay Admitted—Questions for Jury.*—In an action to recover a penalty for failure of a railroad to transport freight under Revisal, 2632, it is for the jury, in proper instances, to ascertain the amount recoverable, and not a question of law for the court. (App. *Davis v. R. R.*, 145 N. C., 207.) *Ibid.*

8. *Penalty Statutes—Transportation—Consignor—Party Aggrieved.*—When the consignor had agreed with the consignee that the latter was only required to pay for the intrastate shipment when it reached its destination, the consignor may maintain his action for delay *in transitu* (Revisal, 2632), as the party aggrieved. *Davis v. R. R.*, 68.

CARRIERS OF GOODS—*Continued.*

9. *Penalty Statutes—Transportation—Constitutional Law.*—The provision of Revisal, sec. 2632, imposing a penalty upon railroad companies for failure in their duty to transport goods, is constitutional and valid. *Ibid.*

10. *Penalty Statutes—Transportation—Issues.*—In an action against a railroad company under Revisal, 2632, for a penalty for failure in its duty to transport freight, an issue is objectionable when it is the only one and in the following language: "What amount, if any, is the plaintiff entitled to recover of the defendant on account of the failure to promptly ship the car-load of lumber?" *Ibid.*

11. *Same.*—An issue which presupposes a failure on defendant's part in its duty to transport freight, in an action for penalty, Revisal, 2632, is objectionable. (Attention is called to the proper issues as suggested in *Hamrick v. R. R.*, 146 N. C., 185.) *Ibid.*

12. *Penalty Statutes—Transportation—Ordinary Time—Verdict, Directing—Instructions—Evidence—Questions for Jury.*—In an action for the recovery of a penalty under Revisal, 2632, it was for the jury to find what was "ordinary" time, under the surrounding circumstances, and whether the defendant transported freight within such time; also, the amount of recovery after allowing for the "lay days," etc., provided by the statute. Hence, it was error for the court below to instruct the jury, if they believed the evidence, to answer the issue in a certain way or in a sum certain. *Ibid.*

13. *Penalty Statutes—"Filing" Claim—Paying Claims—Oral Demand.*—A penal statute is to be strictly construed, and the provisions of Revisal, sec. 2634, imposing a penalty upon common carriers failing to adjust and pay a claim within a specified time, etc., after the *filing* of such claim with the agent, etc., is not complied with when oral demand is made, as such cannot be filed under the ordinary acceptance of the word and does not afford the carrier the protection that a written demand would give. *Thompson v. Express Co.*, 343.

14. *Legislative Powers—Penalty Statutes—Failure to Transport.*—It is within the power of the Legislature to impose penalties for unreasonable delay by carriers in transporting intrastate freight. *Wall-Huske Co. v. R. R.*, 407.

15. *Penalty Statutes—Failure to Transport—Intermediate Points—Car Lots—Distributing Point.*—When a car-load intrastate shipment necessarily is transferred without breaking bulk from one road of the carrier's system to another thereof at a general distributing point in the carrier's system in order to reach destination, the carrier is allowed thereat the statutory time for transportation at such a point as an intermediate point. (Revisal, 2632.) *Ibid.*

16 *Penalty Statutes—"Transport"—Initial Point—Time Allowed.*—Under Revisal, sec. 2632, the carrier is allowed two days at the initial point for the transportation of freight instead of the one day allowed by general statute (Revisal, 887). *Ibid.*

17. *Penalty Statutes—"Transport"—Terminal Point—End of Transportation—Time Computed—Warehousemen.*—The time that transportation ceases, under the meaning of Revisal, 2632, is when the duty of the carrier as a warehouseman commences, or when the car-

CARRIERS OF GOODS—*Continued.*

load has been transported and the consignee notified. Therefore, it was error in the lower court to hold that the transportation ceased when the car-load was placed by the carrier within the yard limits of the point of destination, and also that the last day on that account was not to be charged against the carrier in computing the time for transportation. (Ch. 461, Laws 1907.) *Ibid.*

18. *Penalty Statutes — "Transport" — Terminal Points — Sundays — Time Computed.*—In a suit for penalty against the carrier for failure to transport freight, under Revisal, 2632, the defense that the last day, being Sunday, should not be counted, under Revisal, sec. 887, is unavailable when it is made to appear that the delay chargeabe began to run and to be counted from the Saturday preceding; for the charge for delay having once begun to run, it continues to run without deduction for Sundays or holidays. *Ibid.*

19. *Penalty Statutes—"Transport"—"Ordinary Time"—Questions for Jury.* The question of "ordinary time" for the transportation of freight by the carrier, in a suit for a penalty for failure to transport, under Revisal, sec. 2632, is a question of fact for the jury. *Ibid.*

20. *"Order, Notify"—Rights of Consignor—Wrongful Delay in Shipment—Rights of Consignee—Possession of Bill of Lading—Damages.*—Ordinarily a consignor of goods to a railroad company for shipment to his own order, "notify" a proposed vendee, may dispose of them as he desires; but such right does not exist when the carrier has given a bill of lading for the goods, which was indorsed and forwarded with draft attached to the proposed vendee, who paid the draft and received the bill of lading without notice before the goods could have reached their destination in the ordinary course of shipment. *Development Co. v. R. R.*, 503.

21. *"Order, Notify"—Rights of Consignee—Holder of Bill of Lading—Payment—Shipment Delayed—Liability of Carrier.*—A railroad company which has issued its bill of lading for goods shipped to plaintiff's order, "notify" a proposed vendee, is liable as well as the consignor in damages for delay to the vendee, who, before the goods could have arrived in the ordinary course of shipment, has paid a draft attached to the bill of lading and received the bill of lading without notice of a subsequent diversion of the shipment made by the consignor, especially when the railroad company had notice of the consignee's rights, as evidenced by requiring the consignor to give a bond of indemnity. *Ibid.*

22. *Same—Measure of Damages.*—When the evidence in a suit against a railroad company for damages in delay in shipment of brick shows, without more, that the brick were received by the defendant for shipment, and that an unreasonable delay occurred therein, the measure of plaintiff's loss is the interest during the delay on the amount plaintiff had invested in the shipment. *Ibid.*

23. *Suitable Cars—Failure to Furnish—Liability of Carrier.*—A railroad company, by accepting for shipment a car-load of fruit, contracts that it will transport it to destination with due diligence and in good condition, except as to such damage as might be incident to freight of this character, and includes in that contract the furnishing of a ventilated car when usual or reasonably necessary. *Forrester v. R. R.*, 553.

CARRIERS OF GOODS—*Continued.*

24. *Same—Measure of Damages.*—When it is shown by the evidence that a ventilated car was the only reasonable means by which the defendant railroad could transport at that season of the year a car-load of fruit for the shipper; that it failed to furnish this character of car and furnished only a box car, upon which plaintiff loaded his fruit, and in consequence the damage complained of was occasioned, the measure of damages is the actual loss in value to the fruit being in an improper car, and not the interest on the difference between the value of the fruit at the initial and terminal points for the period elapsing incident to the delay in settlement. The rule where the carrier fails to ship and the shipper retains the goods distinguished. *Ibid.*

25. *Same—Knowledge of Shipper.*—When a railroad company fails in its duty to furnish the shipper a ventilated car for transporting his fruit, and furnishes a box car instead, the company is not relieved from liability solely by the facts that the shipper knew his fruit was forwarded in a box car. *Ibid.*

26. *Revisal, Sec. 2632—"Intermediate Points."*—In shipments of less than car-load lots, a point where they are ordinarily transferred from one car to the other in transit, at a junctional point on the same road, is an intermediate point, within the meaning of Revisal, 2632. *Collection Agency v. R. R.*, 593.

27. *Same—Arrival on Sunday—Delivery.*—When the carrier was allowed two days time for a shipment at an intermediate point (Revisal, 2632), and therefore could not deliver it before Sunday, delivery on the next succeeding day was a compliance with the law, Revisal, 2839. *Ibid.*

CARRIERS OF PASSENGERS. See Railroads.

1. *Contract—Evidence—Rights of Passengers—Stateroom—Nonsuit.*—When the evidence discloses that plaintiff purchased from defendant a berth on its steamship, and the suit was brought for damages alleged to have arisen from the wrongful refusal of defendant to furnish a whole stateroom, with two berths in it, which was totally unoccupied, a motion as of nonsuit was properly sustained. *Basnight v. R. R.*, 169.

2. *Negligence—Passenger—Invitation to Alight—Platform—Warnings—Contributory Negligence.*—It is *prima facie* negligence for a passenger to voluntarily ride on the platform of a rapidly moving train; and while he has the right to presume that the next stop made after a station is called is at such station the defendant is not liable in damages for his stepping from the train on a dark night under such circumstances, whereby the injury was incurred, when by being on the platform he was prevented from hearing the conductor call out that the station had not yet been reached, and for the passengers to keep their seats. *Wagner v. R. R.*, 315.

3. *Same—Evidence—Instructions.*—When there is evidence that the plaintiff was negligent in his voluntarily riding upon the platform of defendant's train, and that by riding there he could not have heard the warning of the conductor for passengers to "keep their seats," etc., and in consequence the plaintiff stepped from the train on a dark

CARRIERS OF PASSENGERS—*Continued.*

night and was injured, it was error in the court below to omit to charge thereon in his instructions to the jury upon the liabilities arising from the fact that the station had previously been called and the right of plaintiff to act upon the assumption that the next stop was his destination. *Ibid.*

4. *Same.*—An instruction, based upon the evidence as to defendant's having placed notices in the car warning passengers from riding on the platform (Revisal, 2628), is erroneous which leaves out an independent defense against the paintiff's action, that by so doing the plaintiff was prevented from hearing a warning called out in the coach which would have prevented the injury. *Ibid.*

5. *Negligence—Evidence—Scintilla—Question for Jury.*—When it appeared from the plaintiff's evidence, in an action to recover damages for the negligent killing by the defendant railroad company of plaintiff's intestate, that the car upon which plaintiff's intestate was usually employed was derailed, owing to the unsound condition of the track, together with other circumstantial evidence; that he was thereon at the time of the derailment; that he was well and left home in the morning for the usual purpose of the trip as a railway postal clerk and returned home on the afternoon of the same day sick, nervous, and exhibiting signs of serious injury; and when from the testimony of his attending physician it appeared that immediately thereafter he had such symptoms and bruises on his body as to indicate the conditions from which his death soon afterwards resulted, it was error in the court below to sustain defendant's motion for judgment as of nonsuit upon the evidence, it being more than a scintilla and sufficient to take the case to the jury. *Cox v. R. R.*, 353.

6. *Pleadings—Demurrer—Rights of Passenger—Contributory Negligence—Contract, Breach of—Nominal Damages.*—The complaint alleges that the plaintiff was a passenger on defendant's passenger train scheduled to stop at his destination, and tendered the conductor the money or fare thereto, and was informed by the conductor that the train would not stop there on that trip; that it was impossible to do so. At plaintiff's urgent solicitation the conductor repeatedly refused to stop the train, for the reason given. The plaintiff, in the presence of the conductor, got upon the steps of the car and informed the conductor that he was bound to stop. The train slackened its speed and the conductor "threw up his hand," which plaintiff understood was given for him to jump, and he did jump, but after he felt the train gathering speed, and was injured, the signal being to the engineer to go ahead: *Held,* (1) that under such allegations the plaintiff was guilty of contributory negligence that would bar recovery for actual damages. (2) that for the breach of defendant's duty to stop the train according to its schedule it was answerable in nominal damages; (3) that a demurrer to the complaint should not have been sustained. *Owens v. R. R.*, 357.

7. *Street Railways—Carriers—Negligence—Prima Facie Case—Burden of Proof—Accident.*—While the proof that plaintiff was injured in a collision upon defendant's track between two of its cars moving in opposite directions makes out such a case of *prima facie* negligence as alone entitles plaintiff to go to the jury, it does not create an irrebuttable presumption of negligence, but shifts the burden of proof

CARRIERS OF PASSENGERS—*Continued.*

so as to require the defendant to show that the collision was the result of an accident which reasonable prudence and foresight could not prevent. *Briggs v. Traction Co.*, 389.

8. *Street Railways—Carriers—Negligence—Not Insurers—High Degree of Care.*—A street car company is not an insurer of its passengers, and it is only liable for damages arising from its negligence in not exercising such a high degree of care, skill, and diligence in operating its cars as is consistent with the practical operation of its business. *Ibid.*

9. *Street Railways — Negligence—"Act of God."*—When the collision between two street cars in which the injury occurred was an accident due directly and exclusively to neutral causes, without human intervention, which by no human foresight, pains, or care reasonably to have been expected could have been prevented, the street car company is not responsible, as such arose by an act of God. *Ibid.*

10. *Street Railways — Negligence—Accident—Proximate Cause—Questions for Jury.*—When it was admitted that the injury complained of was caused by a collision between two cars of defendant street car company, and no contributory negligence was alleged, it was error in the lower court in his charge to the jury to cut the defendant off from going to the jury upon any feature of the case except the fact of injury and the proximate cause, the latter not being in dispute, under evidence tending to show that the injury resulted from an accident, which reasonable prudence and foresight could not have prevented. Under conflicting evidence the quetion was one for the jury. *Ibid.*

11. *Street Railways—Negligence—Headlights, Absence of—Not Negligence per se.*—While street cars are required to be provided with headlights to be used while running in the dark, the question as to their thus running without them being negligence necessarily depends upon surrounding circumstances, and is not under all circumstances negligence *per se*. *Ibid.*

12. *Same—Leaving Pass Switch—Uncertainty of Lights.*—When a conductor of a street car left a pass switch at night, when the cars are required to use headlights, with knowledge that under the existing weather conditions the steadiness of the current used in lighting could not be relied on, and in consequence thereof his car was unlighted, and the jury find that on that account, without due care for the safety of the passengers, a collision was caused with a car moving on the same track in an opposite direction, it was such an omission of duty by the conductor to remain at the switch as would constitute actionable negligence on the part of the defendant street car company. *Ibid.*

13. *Duty to Passengers—Negligence—Train at Full Stop—Contributory Negligence—Nonsuit—Question for Jury.*—A railroad company is held to a high degree of care in providing at its regular stations places where passengers may alight with safety from its trains. Therefore, when the evidence tended to show that plaintiffs, passengers on defendant's train, were thrown therefrom, when at a full stop at their destination, by two sudden jerks of the engine while they were on the platform hesitating to alight at a dangerous place they knew not to be the regular stopping place, but which was the only stop-

CARRIERS OF PASSENGERS—*Continued.*

ping place used at that station on that trip, it was error in the lower court to sustain defendant's motion as of nonsuit upon the evidence upon the ground of contributory negligence. (*Shaw v. R. R.*, 143 N. C., 312, cited and distinguished.) *Smith v. R. R.*, 448.

14. *Stopping Places for Passengers—Duty of Railroad.*—The obligation of a railroad company to provide a place of safety for passengers at its regular stations is not performed by stopping its trains before they reach their usual place or in stopping at such place with cars on parallel tracks so close together that by the projection of cars over the rail passengers, in order to enter or alight from trains, are forced into a crowded passway, where the slightest motion of either train or a rush of passengers themselves is not unlikely to result in painful and at times serious or even fatal injuries. *Ibid.*

15. *Street Railways—Moving Car—Person Entering Upon Track—Negligence—Duty of Company.*—The duty required of the employees of a street car company on seeing a person enter at a place of danger upon its track in front of a rapidly moving car is to exercise ordinary care, give signals, lower the speed, and, if it appears reasonably necessary, stop the car. If the car is properly equipped and the equipment used with reasonable promptness and care, the company will not be liable. *Wright v. Mfg. Co.*, 534.

16. *Same—Instructions.*—The driver of a wagon upon which the plaintiff was riding, in order to pass another vehicle, reined his wagon onto the street track. Looking through his covered wagon, he saw a car approaching, and backed his team from the track so as to throw the back of the wagon upon it, and the alleged injury of plaintiff was caused by the car striking the wagon. There was evidence that the motorman rang his gong and attempted to bring the car to a full stop, but before he could do so it struck the wagon: *Held*, it was error in the lower court to charge the jury, in effect, that it was the duty of the motorman to stop the car at once when he saw the wagon would not clear the track, and within the distance testified to, if this could have been done without danger to the occupants of the car, and that the mere ringing of the gong was not sufficient. *Ibid.*

CITIES AND TOWNS. See Ordinances.

1. *Lands—Ingress and Egress—Street Improvements.*—The plaintiff's right of ingress and egress to and from his lot is subject to the right of the defendant town to grade and repair its streets in a reasonably careful manner. *Jones v. Henderson*, 120.

2. *Street Improvements—Negligence—Pleadings—Demurrer.*—A complaint alleging that the defendant town negligently and unskillfully graded its street so as to injure the plaintiff's ingress and egress to and from his lot situated thereon sets out a cause of action good against a demurrer. *Ibid.*

CITY ORDINANCE. See Ordinances.

CLAIM AND DELIVERY.

Action in Superior Court—Revisal, Sec. 1995.—When parties, landlord and tenant, have an adequate remedy by claim and delivery, but do not resort to it, they may bring an action in the Superior Court to determine the matters in controversy. Revisal 1905. *Talbot v. Tyson*, 273.

COLLATERAL ATTACK. See Constitutional Law, 12; State's Lands, 1, 4; Evidence, 3; Special Proceedings, 1, 2; Jurisdiction, 6. 10.

COLOR OF TITLE.

1. *Deeds and Conveyances—Purchaser at Foreclosure Sale—Deed—Limitation of Actions—Adverse Possession.*—When the purchaser of lands at a foreclosure sale enters into possession under a deed of definite description, such is color of title in him and those claiming under him, and becomes indefeasible at the expiration of seven years adverse possession. *Sutton v. Jenkins*, 11.

2. *Deeds and Conveyances—Tenants in Common—Unity of Possession Destroyed—Deeds—Evidence of Title.*—The *feme* plaintiff claimed, as tenant in common with defendant, her part of the land in controversy, under a deed from a common grantor. Defendant denied cotenancy, and established the fact that the unity of possession had been destroyed by subsequent deeds: *Held*, that plaintiff can establish her title by showing seven years adverse possession under the conveyance, as color, through which she claimed as tenant in common. *Ibid.*

3. *Adverse Possession—Mortgage—Deeds and Conveyances—Ripening Title—Verbal Sale—Evidence.*—Defendants, claiming lands under seven years color of title, showed a mortgage from H. to B. in 1894, and conveyance from B. to them in 1900. The action of plaintiffs was begun against them in 1905. There was testimony that defendants' possession commenced in 1900 and that it was taken over from C., who had it in 1898 as lessee of B. C. immediately succeeded R., who had been in possession two or three years under verbal bargain and sale from B.: *Held*, (1) that the mortgage from H. to B. was "color," and the deed from B. to defendants tended to ripen title of the latter by virtue of seven years possession under known and visible boundaries; (2) that the possession of R. under the verbal bargain and sale from B., from whom defendants claimed, was evidence of "color," inuring to the benefit of defendants as tending to show title in B. *Stewart v. Lowdermilk*, 583.

4. *Deeds and Conveyances—"Lappage"—Adverse Possession—Evidence.* When there are two claimants to land under different grants, which include a part of the land in both, thus causing a "lappage," the *locus in quo* being embraced therein, there is "color" of title in the junior grantee, and if he can show thereunder adverse possession for seven years it will bar the right of entry of the other party. *Currie v. Gilchrist*, 648.

5. *Same—Occupation—Presumption.*—When the junior grantee claims title against the senior grantee of lands embraced in the "lappage" caused by the description in their grants, by reason of adverse possession under "color," and has introduced evidence tending to show the possession, his possession, by construction of law, extends to the boundaries of his deed or grant upon which he relies, and is not confined to so much thereof as may have been in his actual occupation and possession, if the senior grantee had no actual possession of the "lappage." *Ibid.*

6. *Deeds and Conveyances—"Lappage"—Evidence—Adverse Possession, Character of.*—When the junior grantee claims title by adverse pos-

COLOR OF TITLE—*Continued.*

session under "color" in the "lappage" of lands caused by the description in his own and the deed of the senior grantee, his possession must be of such character and so continuous as to indicate to the other proprietor the intention of claiming the land beyond the admitted boundaries, and upon competent evidence the question is one for the jury, under proper instructions from the court as to the legal effect of the possession. *Ibid.*

CONDEMNATION PROCEEDINGS.

Railroads—Charter Rights—Damages—Statutory Methods.—When the damages sought by the owner of the land against a railroad company using the same for railroad purposes authorized under its charter and in accordance with law would necessarily be included in an assessment in condemnation proceedings under a statute, the statutory method of redress provided either by the charter or under the general law must be followed, if open to him as well as the railroad company. *Beasley v. R. R.*, 362.

CONSIDERATION. See Deeds and Conveyances.

1. *Contracts—Antecedent Account.*—A written promise by one to pay the debt of others, that "he would pay their bill as soon as the dryklin gets in operation," refers to an account stated and antecedent, and such is not enforcible for the lack of valuable consideration. *Supply Co. v. Finch*, 106.

2. *Contracts—Bought Editorials—Immoral Consideration—Public Policy.* A contract with the editor of a newspaper that he was to be paid by defendant railroad company for his editorial is based on an immoral consideration, and not enforcible. *King v. R. R.*, 263.

3. *Same—Carrying Municipal Bond Issues.*—Compensation cannot be recovered upon a contract to aid in carrying an election for a bond issue. Such contract is against public policy and void. *Ibid.*

4. *Same—Pleadings—Demurrer—Good and Unlawful Considerations.*—A demurrer to a complaint in a suit brought for the recovery of the value of services rendered should be sustained when the alleged considerations are immoral and against public policy or so mixed up with them as to poison the whole. *Ibid.*

5. *Deeds and Conveyances—Uses and Trusts—Femes Covert—Probate Defective—Quitclaim—Registration—Seizin.*—E., the owner of land, joined with her husband in the conveyance thereof, and after the death of her husband executed and delivered another deed to the same parties for the land, which expressly referred to the first deed, stating in the premises that it was executed to carry out more effectually the intention and purpose thereof, and reciting that it was made in consideration of said premises and one dollar: *Held*, (1) that as the first deed of E. was in effect, as recited in the premises of the second deed, after the death of her husband, she was the owner of the land in fee, and the fact that the deed from herself and husband was void because of a defect in the probate would not affect the interests thereunder acquired as between the parties, as the second deed was sufficient to pass the title; (2) that the registration laws now take the place of livery of seizin, and, when they are complied with, a failure of consideration between

CONSIDERATION—*Continued.*

the parties under the first deed did not operate to defeat the vesting of the use. (The nature and effect of a quitclaim deed operating as an estoppel discussed by WALKER, J.). *Bryan v. Eason*, 284.

6. *Principal and Surety—Substituting Invalid Note—Old Note Surrendered—Failure of Consideration—Liability of Surety.*—When the sureties on a note signed with their principal a second note at the request of the creditors under an unfulfilled agreement with him that another should also sign as surety, and the second note was left with the creditor, who delivered the first note to the principal, the liability of the sureties on the first note was not discharged by reason thereof, as there was nothing of value given in lieu of the first note, the second one being void. *Bank v. Jones*, 419.

7. *Contracts, Illegal—"Futures"—Damages, Subsequent Promise to Pay* —A subsequent promise made by one of the contracting parties to the other to pay him for loss arising from a contract for "futures" is void. *Burns v. Tomlinson*, 645.

CONSTITUTION OF NORTH CAROLINA. (For accuracy, reference should be had to the appropriate subject-matters.)

Art. I, sec. 17. Selection by a commission of persons qualified to act as pilots, under a statutory provision, does not violate the Constitution. *St. George v. Hardie*, 88.

Art. I, sec. 17. A statute making it a misdemeanor to employ children under a certain age in certain factories is valid. *Starnes v. Mfg. Co.*, 556.

Art. V, sec. 3. The provision for assessment of railroad property by the Corporation Commission is constitutional. *R. R. v. New Bern*, 165.

Art. VII, secs. 2 and 14. Does not prevent the Legislature creating a board of audit and finance for a certain county, and clothing it with certain pertinent powers. *Audit Co. v. McKensie*, 461.

CONSTITUTIONAL LAW. See Pilots; Taxation.

1. *Legislative Powers — County Commissioners — County Funds — Power Given Other County Agencies.*—The Legislature has constitutional power to provide a board of audit and finance for a particular county and to direct that payment of an expert accountant authorized thereunder be made by the county treasurer as a charge against the county's public funds, upon an order made by said board in a certain prescribed manner. Such power is derived under Article VII, sec. 2, of the State Constitution, providing that the county commissioners shall have control of the county's finances "as may be prescribed by law," taken in connection with section 14 thereof, giving full power to the General Assembly to modify, etc., the provisions of this article and to substitute others, etc. *Audit Co. v. McKensie*, 461.

2. *Minors, Unlawful Employment of—Parent and Child—Public Good—Revisal, Sec. 3362.*—Revisal, sec. 3362, making the employment of children under 12 years of age by certain factories or manufacturing establishments a misdemeanor, is constitutional and valid and not in contravention of the Fourteenth Amendment to the Constitution of the United States as an unlawful restriction of the right of the

CONSTITUTIONAL LAW—*Continued.*

parent to the labor of the child, it being for the purpose of promoting the general welfare by protecting minors from injury by overwork, from liability to injury by machinery in large manufacturing plants, and by facilitating their attendance at school. *Starnes v. Mfg. Co.*, 556.

CONTRACTS.

1. *Interpretation—No Ambiguity—Questions for Court.*—The interpretation of a written contract, not ambiguous in its terms, is for the court, and should not be submitted to the jury. *Young v. Lumber Co.*, 26.

2. *Same — Independent Contractor — Terms of Contract — Questions for Jury.*—When the language of a written contract establishes, as a matter of law, the relation of an independent contractor between the parties, the only question to be submitted to the jury, in an action against the owner of the land for damages sustained by a third person, by the act of the independent contractor, is whether at the time of the alleged injury such contractor was working under and pursuant to the terms of the contract, or whether he was in truth acting in the capacity of an employee of the owner. *Ibid.*

3. *Independent Contractor—Written Instrument—Pleadings—Evidence.*—When the defense to an action to recover damages for personal injury is that the person who caused the injury complained of was an independent contractor, a written agreement tending to prove that fact may be introduced in evidence, though not set up in answer. *Ibid.*

4. *Guarantor of Payment—How Established.*—The obligation of one as guarantor of payment must be evidenced and established by written agreement or some written note or memorandum signed by him or some person duly authorized to sign for him. (Revisal, 974.) *Supply Co. v. Finch.* 106.

5. *Future Account.*—Letters from an alleged guarantor are insufficient to establish a continuing guaranty of payment, which declined payment of a future account, the alleged guarantor therein stating his rule to be that he only paid out such amounts as the debtor had placed sufficient funds to his credit in the bank to meet. *Ibid.*

6. *Antecedent Account—Consideration.*—A written promise by one to pay the debt of others, that "he would pay their bill as soon as the dry-kiln gets in operation," refers to an account stated and antecedent, and such is not enforcible for the lack of a valuable consideration. *Ibid.*

7. *Evidence—Rights of Passengers—Staterooms—Nonsuit.*—When the evidence discloses that plaintiff purchased from defendant a berth on its steamship, and the suit was brought for damages alleged to have arisen from the wrongful refusal of defendant to furnish a whole stateroom, with two berths in it, which was totally unoccupied, a motion as of nonsuit was properly sustained. *Basnight v. R. R.*, 169.

8. *Breach—Condition Precedent—Legal Excuse—Liability.*—A party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract or some legal excuse for a nonperformance, when the stipulations are not concurrent. *Corinthian Lodge v. Smith*, 244.

CONTRACTS—*Continued.*

9. *Executory — Conditions Precedent — Strict Compliance — Liability.*— When the conditions imposed upon the plaintiff, in an action to recover of defendant damages for his nonperformance of an executory contract, are in the nature of conditions precedent, a strict compliance therewith may be insisted on by defendant in bar of a recovery. *Ibid.*

10. *Same—Waiver.*—Plaintiff and defendants entered into an executory contract that defendants would rent a store in a building of plaintiff's, then under construction, to be completed, heated with steam heat and ready for occupation by 1 January following. The building was not completed when contracted to be, and for some time after 1 January was heated by two stoves. Plaintiff informed defendants in December that the store would not be ready by 1 January. Defendants were merchants, doing a retail business, for which the store was to have been used: *Held*, (1) that plaintiff could not recover damages on account of defendants' refusal to take the store when not completed as and at the time agreed upon; (2) that the information given beforehand that the store would not be completed 1 January does not affect the question, in the absence of some act or thing done by the defendants amounting to a waiver of their right of demand for a strict performance of the contract. *Ibid.*

11. *Bought Editorials — Immoral Consideration — Public Policy.*—A contract with the editor of a newspaper that he was to be paid by defendant railroad company for his editorials is based on an immoral consideration, and not enforcible. *King v. R. R.*, 263.

12. *Carrying Municipal Bond Issue.*—Compensation cannot be recovered upon a contract to aid in carrying an election for a bond issue. Such contract is against public policy, and void. *Ibid.*

13. *Same—Pleadings—Demurrer—Good and Unlawful Considerations.*—A demurrer to a complaint in a suit brought for the recovery of the value of services rendered should be sustained when the alleged considerations are immoral and against public policy or so mixed up with them as to poison the whole. *Ibid.*

14. *Sale of Goods—Implied Warranty—Breach—Latent Defect—Damages.* —The selling of an article carries an implied warranty that it is merchantable and can lawfully be sold by the purchaser in his locality if bought for resale; and when the prohibitive quality is latent and could not have reasonably been detected by ordinary observation, the seller is liable upon the implied warranty for such damages as were the direct and natural consequence of the breach. *Mfg. Co. v. Davis*, 267.

15. *Executory—Personal Employment to Cut Timber—Vested Interest.*— An executory contract made by the owner of land, by which another person is to cut the timber on a stipulated piece, is a contract of personal employment, vesting no interest in the land or the standing timber in the employee. *Biggers v. Matthews*, 299.

16. *Standing Timber — Sale to Third Person — Breach — Compensatory Damages.*—For a breach of such contract on the part of the owner of the land, by selling it to a third person, such owner is liable for

CONTRACTS—*Continued.*

compensatory damages. The purchaser takes title to the land, with the standing timber, free from any right or claim of the person with whom the contract to cut was made, and is not liable to him for damages sustained by reason of the purchase. *Ibid.*

17. *Liability of Third Person.*—B., the owner of timberland, contracts with C. to cut the timber thereon. A., with knowledge of said contract, purchases the land and standing timber from B., for the purpose of preventing the timber from being cut. *Held*, A is not liable to C. for damages sustained by reason of the breach of the contract made by the owner with C. *Ibid.*

18. *Assignment Unaccepted — Amount Unascertained — Revocation — Defense—Consent of Assignee.*—An order or request by one on his debtor to pay over to another an unascertained amount, which was not accepted, is revocable and not binding except as to the amounts actually paid thereunder; and it cannot be set up as a defense in a suit for an unpaid balance due, especially when the legal representatives of the assignee come into court and ask that judgment below in favor of the assignee be affirmed. *Ives v. Lumber Co.*, 306.

19. *Liens—Chattel Mortgages—Correction—Parol Evidence—Mutual Mistake.*—To correct a written chattel mortgage given to secure plaintiff for merchandise sold and delivered to defendant while conducting a mercantile business, so as to embrace after-acquired goods, the proof must be clear and convincing that the true intention of the parties was not expressed in the mortgage, and that description of the property now claimed was omitted by mutual mistake, in such manner as not to vary the terms of the written instrument. The evidence of W., the president of the plaintiff company, who was not present at the time the mortgage was given, that defendant afterwards told him it was for goods "he had bought or might buy," and that "he had never denied the mortgage," is insufficient. *White v. Carroll*, 330.

20. *Assignable—Exceptions.*—As a general rule, executory contracts of an ordinary kind are now assignable, except that contracts involving a personal relation or a contract imposing liabilities which by express terms or by the nature of the contracts themselves import reliance on the personal credit, trust, or confidence in the other party cannot be assigned. *R. R. v. R. R.*, 368.

21. *Same—Ratification.*—The restriction in the assignment of contracts ordinarily arises or exists for the benefit of the other party thereto, and where such party assents to and ratifies the assignment the same will be upheld. *Ibid.*

22. *Same—Benefit Received.*—A contract to furnish cordwood to a railroad company to be used for its wood-burning engines, when from its character it is not restricted in its performance between the parties is assignable by that company to its lessee company taking over and operating its railroad; and when the lessee company has used a part of the wood furnished under the contract assigned, and afterwards changed its locomotives to coal burners so as not to need more, it is liable to the lessor in full damages the lessor has sustained by refusal of lessee to receive the balance of the wood to have been furnished thereunder. *Ibid.*

CONTRACTS—*Continued.*

23. *Interpretation—Intent—Entire Instrument—Words—Different Meaning.*—The object of all rules of interpretation is to arrive at the intention of the parties, as expressed in the contract; and in written contracts which permit of construction this intent is to be gathered from a perusal of the entire instrument; and while in arriving at this intent words are *prima facie* to be given their ordinary meaning, this rule does not obtain when the context or admissible evidence shows that another meaning was intended. *Ibid.*

24. *Same — Timber — Cordwood — Lease—Lessor and Lessee.*—A railroad company using wood-burning locomotives leased its property, etc., to another company for a term of ninety-one years and more, including "all lands and interest in lands, timber rights, and contracts now owned by the lessor": *Held*, the operative words of the lease included within their meaning executory contracts then existing with third persons to furnish cordwood for lessor's locomotives, it appearing that there were no other timber contracts outstanding and that the significance of the words employed, taken with the testimony, evidenced that contracts to furnish cordwood were those intended to be thereby embraced. *Ibid.*

25. *Same — Lease — Covenants — Breach — Measure of Damages—Defense Tendered—Suit—Expense Incurred.*—The lessor and lessee railroad companies covenanted in the lease upon the part of the latter that it would "indemnify and save harmless the lessor road from any and all damages which may be recovered from or against it" by reason of its failing in its duties and obligations arising under the lease; upon the part of the former, to immediately give notice to the lessee of such suits and actions: *Held*, the lessee is responsible in damages to the lessor for the principal, interest and costs of a judgment recovered against it in a suit brought upon a contract which the lessee had assumed, and caused by the failure or refusal of the lessee to perform, together with moneys expended by the lessor for reasonable attorney's fees therein incurred, when the defense had been duly tendered and refused. *Ibid.*

26. *Lease — Construction—Contracts Assigned—Primary Liability—Covenant Against Debts.*—Under a lease from one railroad company to another of its railroad, etc., by which the lessee company operated the leased railroad, an executory contract between the lessor road and a third person was assigned, under which the lessor was to be furnished cordwood for its wood-burning engines: *Held*, the assignment of the contract established as between the parties to the lease a primary liability on the part of the defendant lessee, and the obligations of that contract would not by any fair or correct interpretation be included under the later stipulation of the lease "that the lessee shall not be liable for any debt of the lessor at that date." *Ibid.*

27. *Wagering—Futures—Evidence.*—In an action upon contract for damages for failure to deliver cotton at a future time, when the price had become higher, and the defense was that it was a gambling contract, or "futures,' forbidden by Revisal, 1689, in reply to which plaintiff testified he expected actual delivery, it was error in the lower court to exclude evidence offered in behalf of defendant that neither he nor plaintiff expected actual delivery; that it was a dealing in futures and not a *bona fide* sale; that their course of dealings

CONTRACTS—*Continued.*

had been in futures; that another person stated in the presence of plaintiff and defendant at the time of the execution of the contract that it could be closed out by either party by paying the difference, which was not denied, and that the transaction occurred in a "bucket shop." *Burns v. Tomlinson*, 634.

28. *Same—Transactions Prior to 1905.*—This transaction occurred prior to the enactment of chapter 538, Laws 1905, and only so much of Revisal, 1689, applies as was embraced in chapter 221, Laws 1889. *Ibid.*

29. *Contracts, Illegal—Pleadings—Verified Plea of "Futures"—Burden of Proof.*—When defendant pleads in a verified answer that a contract, the subject of suit, for buying and selling cotton was void for being one for "futures," the burden of proof is upon plaintiff to show that it was a lawful one, *i. e.*, that actual delivery was intended by the parties, and not merely that either had the privilege of calling therefor. Revisal, 1691. *Burns v. Tomlinson*, 645.

30. *Contracts, Illegal—"Futures"—Evidence, "Prima Facie."*—When damages are sued for in an action upon a contract for buying and selling cotton, and the plea of invalidity because the contract was for "futures" is set out in the verified answer, proof that the commodity was not actually delivered at the date of the contract and that one of the parties agreed to secure or deposit "margins" constitutes *prima facie* evidence of a contract declared void by Revisal, 1689. *Ibid.*

31. *Contracts, Illegal—"Futures"—Damages, Subsequent Promise to Pay.*—A subsequent promise made by one of the contracting parties to the other to repay him for loss arising from a contract for "futures" is void. *Ibid.*

32. *Contracts, Illegal—"Futures"—Principal and Agent—Status of Agent.*—An agent for a principal to a contract made in violation of Revisal, 1689, as to "futures," cannot recover for any loss he may have sustained on account thereof, as such act of agency would be in violation of Revisal, 3824, making it a misdemeanor. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See Measure of Damages.

1. *Moving Train — Evidence — Nonsuit.*—The contributory negligence of plaintiff in attempting to board a train moving at the rate of 15 miles an hour will bar his recovery, in the absence of evidence making the case an exception to the general rule, and a judgment as of nonsuit on the evidence, on proper motion, should have been allowed. *Whitfield v. R. R.*, 236.

2. *Railroads — Negligence—Passenger—Invitation to Alight—Platform—Warnings.*—It is *prima facie* negligence for a passenger to voluntarily ride on the platform of a rapidly moving train; and while he has the right to presume that the next stop made after a station is called is at such station, the defendant is not liable in damages for his stepping from the train on a dark night under such circumstances, whereby the injury was incurred, when by being on the platform he was prevented from hearing the conductor call out that the station had not yet been reached and for the passengers to keep their seats. *Wagner v. R. R.*, 315.

CONTRIBUTORY NEGLIGENCE—*Continued.*

3. *Same — Evidence — Instructions.* — When there is evidence that the plaintiff was negligent in his voluntarily riding upon the platform of defendant's train, and that by riding there he could not have heard the warning of the conductor for passengers to "keep their seats," etc., and in consequence the plaintiff stepped from the train on a dark night and was injured, it was error in the court below to omit to charge thereon in his instructions to the jury upon the liabilities arising from the fact that the station had previously been called and the right of plaintiff to act upon the assumption that the next stop was his destination. *Ibid.*

4. *Same.*—An instruction, based upon the evidence as to defendant's having placed notices in the car warning passengers from riding on the platform (Revisal, sec. 2628), is erroneous which leaves out an independent defense against the plaintiff's action that by so doing the plaintiff was prevented from hearing a warning called out in the coach, which would have prevented the injury. *Ibid.*

5. *Evidence—Burden of Proof—Admissions—Instructions—Issues—Proximate Cause.*—While the burden of the issue is upon the defendant setting up contributory negligence as a defense, it was error in the court below to so instruct the jury when plaintiff's evidence established negligence on his part. Then the question becomes one of proximate cause alone, when there is evidence of defendant's negligence. (The question of appropriate issues in such cases discussed and proper issues suggested by CONNOR, J.) *Ibid.*

6. *Railroads—Negligence—General Rule—Recovery Barred.*—As a general rule, a person who enters on a railway track in front of a train he knows to be approaching is guilty of such negligence as will bar recovery for injury he may thereby sustain, though the agents and employees of the road may have been negligent as to signals or other warnings to indicate the approach of the train. *Royster v. R. R.*, 347.

7. *Same.*—The contributory negligence of the plaintiff will bar recovery in a suit against a railroad company when, under his own evidence, it appears that he was not an employee of the company, and in assuming to act for an employee attempted at night to signal a train he knew to be approaching by placing a lighted lantern on the track; that he went to a place of safety, then back upon the track, without first looking or listening for the train, and was injured, though the employees of the company on the engine may not have blown the whistle, rung the bell, or have had the headlight of the locomotive lighted. In such instances a judgment as of nonsuit upon the evidence was properly allowed. *Ibid.*

CORPORATIONS.

1. *Sued by Officer—Services—Quantum Meruit—Express Promise.*—An officer of a corporation cannot sue his company upon *quantum meruit* for services rendered. In order to sustain an action he must prove an express promise. *Caho v. R. R.*, 20.

2. *Same—Resolution by Directors—Nudum Pactum.*—A resolution of a board of directors authorizing payments to an officer of the corporation for past services, unsupported by a promise to pay for

CORPORATIONS—*Continued.*

them before they were rendered, is *nudum pactum*, and will not support an action for recovery. *Ibid.*

3. *Sued by Officer — Services — Promise of Stockholders Enforcible — Faud.*—The express promise of the stockholders to pay a stipulated price to one to perform services as president and attorney is valid, binding and enforcible upon the corporation, when not in fraud of the rights of creditors. *Ibid.*

4. *Power of President, Express or Implied.*—The management of the entire business of a corporation may be intrusted to its president, either by express resolution of the directors or by acquiescence in a course of dealing. *Watson v. Mfg. Co.*, 469.

5. *Liens for Labor—Caretaker.*—A caretaker cannot acquire a lien upon the real property of a corporation he has taken charge of under agreement that he was to receive for his services the use thereof and pay the taxes thereon and take care of the property of the company without charge. *Bruce v. Mining Co.*, 642.

6. *Same—Statute Not Complied With—Requirements.*—To constitute a lien under the statute for work and labor done for a corporation, it must not only be actual work and labor done, but it must be done under a contract to that effect, and the statute in regard to filing such liens must be complied with. *Ibid.*

COUNTY COMMISSIONERS. See County Treasurer.

License to Sell Liquor — Elections — Presumptions of Validity — Conclusive—Trial by Jury.—There is a final and conclusive presumption in favor of the correctness of the result of an election as declared by the proper officials, until the issues raised by the pleadings have been tried and disposed of before the jury; and in the meanwhile an injunction will not lie against the county commissioners for the issuance of license to sell liquor, under allegations of defects and vital irregularities in an election held upon the question of prohibition, and denied by the answer. *Wallace v. Salisbury*, 58.

COUNTY TREASURER.

Constitutional Law — Legislative Powers — County Commissioners — County Funds—Power Given Other County Agencies.—The Legislature has constitutional power to provide a board of audit and finance for a particular county and to direct that payment of an expert accountant authorized thereunder be made by the county treasurer as a charge against the county's public funds, upon an order made by said board in a certain prescribed manner. Such power is derived under Article VII, sec. 2, of the State Constitution, providing that the county commissioners shall have control of the county's finances "as may be prescribed by law," taken in connection with section 14 thereof, giving full power to the General Assembly to modify, etc., the provisions of this article and to substitute others, etc. *Audit Co. v. McKensie*, 461.

DAMAGES. See Telegraph Companies.

1. *Drainage—Overflow Waters—Natural Drainage—Lower Tenant—Upper Tenant—Obstruction—Right to Remove Obstructions.*—Plaintiff had

DAMAGES—*Continued.*

the right of possessing and operating Dismal Swamp Canal, and of constructing a cross canal to draw the water of Lake Drummond into the main canal in aid of navigation. It ascertained that this water was no longer required for such purpose. In widening and deepening its main canal it closed the mouth of the cross canal, causing the overflow waters of the lake, which this canal had carried for forty years or more, to go to some extent onto defendant's land, causing injury thereto: *Held*, the defendants have no right of action for such injury when it appears that this was the natural direction of the waters of the lake, and the lands of defendants did not naturally drain into the cross canal; nor had the defendants acquired any right or privilege of such drainage, by user or otherwise. *Canal Co. v. Burnham*, 41.

2. *Public Nuisance—Damages—Proximate Cause.*—When the plaintiff sues for special damages by reason of a public nuisance, he must show as an essential element in his cause of action that such nuisance was the proximate cause of his injury. When upon his own evidence he fails to do so, the court should enter judgment of nonsuit. *McGhee v. R. R.*, 142.

3. *Same—Evidence—Punitive Damages, When Recoverable—Wantonness and Malice.*—In a suit by the widow punitive damages are recoverable for defendant's breach of duty in knowingly permitting the mutilated and dismembered body of deceased to remain upon or along its track in an unprotected condition, to be repeatedly run over by its trains, when it was from a willful, wanton, or malicious motive. *Kyles v. R. R.*, 394.

4. *Railroads—Carriers—Delay in Shipment—Consequential Damages—Knowledge of Carrier.*—In an action to recover damages for delay in the shipment of brick to be used in constructing a store, the value of the rental of the store arising on a contract with third persons cannot be considered as an element of damages when there is no evidence that the defendant railroad company was aware of the purpose for which the brick were shipped. *Development Co. v. R. R.*, 503.

DEAD BODIES.

1. *Unlawful Mutilation—Widow—Right of Action.*—When a widow is living with her husband at the time of his death she has, nothing else appearing, a right of action superior to that of the next of kin for the unlawful mutilation of the remains of her deceased husband. *Kyles v. R. R.*, 394.

2. *Quasi Property—Wrongful Mutilation—Actionable.*—While dead bodies are not recognized at common law as property, they are *quasi* property, and wrongful mutilation thereof is actionable. *Ibid.*

3. *Same—Evidence—Punitive Damages, When Recoverable—Wantonness and Malice.*—In a suit by the widow punitive damages are recoverable for defendant's breach of duty in knowingly permitting the mutilated and dismembered body of deceased to remain upon or along its track in an unprotected condition, to be repeatedly run over by its trains, when it was from a willful, wanton, or malicious motive. *Ibid.*

DEAD BODIES—*Continued.*

4. *Same—Evidence Insufficient.*—There is no evidence of a willful, wanton, or malicious motive on the part of defendant or its employees when it appears that the deceased, who was killed by one of defendant's engines, was permitted to remain along defendant's track and was repeatedly run over and mutilated, and when it was done at night or under such conditions as to cause the employees not to be aware thereof. *Ibid.*

5. *Same—Evidence Incompetent.*—Evidence that the section master manifested some impatience at the prospect of guarding the remains held incompetent. *Ibid.*

DEEDS AND CONVEYANCES.

1. *Title—"Good-faith Contention"—Timber—Cutting Restrained—Hearing.*—In an action to try title to timber lands and to restrain cutting the timber, it having been found as a fact by the judge below "that there is a good-faith contention on both sides, based upon evidence constituting a *prima facie* title," it was proper for him to forbid either party from cutting the timber until final determination of the suit. *Sherrod v. Battle*, 10.

2. *Reciprocal Conveyances—No Consideration—Title—Different Source—Estoppel.*—Reciprocal conveyances of the same land between plaintiff and defendant, made at the instance and for the benefit of the former, without consideration, no money passing, vest, but do not rest the title, and do not operate as an estoppel upon the defendant in claiming the lands under a different source of title. *Sutton v. Jenkins*, 11.

3. *Mortgage Sale—Tenants in Common—Unity of Possession—Relationship Destroyed.*—When the land upon which the plaintiff and defendant are tenants in common is sold, under the lien of a subsisting mortgage, to a third person, who acquires the title and possession, and conveys the remainder to one of them, the unity of possession, and thereby the relation of tenants in common, is destroyed. *Ibid.*

4. *Tenants in Common—Relationship Destroyed—Title—Different Source.*—There is nothing in the policy of our law which prohibits the defendant, who held under a former deed from his father, with his sister, the lands in controversy as tenants in common, from taking under the deed from his father the same land, acquired by his father at a sale of the land under a prior subsisting mortgage. *Ibid.*

5. *Tenants in Common—Unity of Possession Destroyed—Deeds—Evidence of Title.*—The *feme* plaintiff claimed, as tenant in common with defendant, her part of the land in controversy, under a deed from a common grantor. Defendant denied cotenancy, and established the fact that the unity of possession had been destroyed by subsequent deeds: *Held*, that plaintiff can establish her title by showing seven years adverse possession under the conveyance, as color, through which she claimed as tenant in common. *Ibid.*

6. *Chain of Title—Presumptive Possession.*—Plaintiff, claiming lands by virtue of paper title from A. against defendants in possession, must show a connected chain of title before the provisions of Revisal,

DEEDS AND CONVEYANCES—*Continued.*

sec. 386, as to presumptive possession, will apply. *McCaskill v. Walker*, 195.

7. *Chain of Title — Common Source — Adverse Possession—Evidence—Pleadings.*—When plaintiff claimed the *locus in quo* from the defendants in possession, and failed to establish his chain of title, and seeks to recover by showing that he and defendants claimed under W. as a common source, and that defendants were estopped to deny title therein, it was proper for the court below not to allow the plaintiff, under defendants' objection, to put in evidence a part of a sentence of the answer alleging that W., the ancestor of defendants, was in open, notorious, and adverse possession, under known and visible lines and boundaries, when such destroys the sense in which the entire admission is made and perverts its meaning. *Ibid.*

8. *Adverse Possession — Chain of Title — Common Source — Evidence — Pleadings.*—When defendant's answer alleges adverse possession in A., insufficient in itself in point of duration to ripen the title, but that his with their adverse possession would do so, such allegation introduced in evidence would not avail plaintiff upon showing that the deed of A. was a chain in their paper title, as the defendants cannot be said to claim under A. *Ibid.*

9. *Married Women—Probate of Certificate for Registration.*—Since 1868 it has been necessary to the validity of a conveyance of land by a married woman for the probate court to adjudge that the certificate of the probate officer was "in due form and according to law." Revised Code, ch. 37; Revisal, secs. 999, 1001. *Johnson v. Lumber Co.*, 249.

10. *Chain of Title—Defective Probate—New Trial.*—Refusal of the court below to hold in rebuttal of plaintiff's chain of paper title that a certain deed therein was invalid for want of a proper adjudication and certificate by the probate court, when the probate of a married woman to a conveyance of land was not certified (since 1868) in due form and according to law, would be error, and a new trial in proper instances would be awarded. *Ibid.*

11. *Married Women—Probate—Commissioner of Deeds—Seal.*—When the copy of the certificate of the commissioner of affidavits for the State of North Carolina of the separate examination and acknowledgment of a married woman to a conveyance of lands situated here concludes, "Given under my hand and seal," the presumption is that the seal was affixed to the original, though not appearing in the copy. The seal, however, is not required to be registered, under Revised Code, ch. 21, sec. 2. *Ibid.*

12. *Contemporaneous Indorsements—Construction.*—A deed and two indorsements thereon, executed contemporaneously, each bearing the signature and seal of the grantors, and duly probated and registered together, must be considered as intended for one deed. *Bryan v. Eason*, 284.

13. *Femes Covert — Husband's Subsequent Execution — 1857 — Void Probate.*—The probate of a deed made by a *feme covert* in 1857 of her lands is defective when her acknowledgment and privy examination were taken before the execution by her husband was proved. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

14. *Quitclaim — No Title — Grantor Not Estopped.* — A grantee is not estopped to show that no interest passed to him under a quitclaim deed when the grantor is not estopped to show it. Estoppels must be mutual. *Ibid.*

15. *"Lappage"—"Color" of Title—Adverse Possession—Evidence.*—When there are two claimants to land under different grants, which include a part of the land in both, thus causing a "lappage," the *locus in quo* being embraced therein, there is "color" of title in the junior grantee, and if he can show thereunder adverse possession for seven years it will bar the right of entry of the other party. *Currie v. Gilchrist*, 648.

16. *Same — Occupation — Presumption*—When the junior grantee claims title against the senior grantee of lands embraced in the "lappage" caused by the description in their grants by reason of adverse possession under "color," and has introduced evidence tending to show the possession, his possession, by construction of law, extends to the boundaries of his deed or grant upon which he relies, and is not confined to so much thereof as may have been in his actual occupation and possession, if the senior grantee had no actual possession of the "lappage." *Ibid.*

17. *"Lappage" — "Color" of Title — Evidence—Adverse Possession, Character of.*—When the junior grantee claims title by adverse possession under "color" in the "lappage" of lands caused by the description in his own and the deed of the senior grantee, his possession must be of such character and so continuous as to indicate to the other proprietor the intention of claiming the land beyond the admitted boundaries, and upon competent evidence the question is one for the jury, under proper instructions from the court as to the legal effect of the possession. *Ibid.*

18. *Same—Evidence—Instructions.*—When the senior grantee has had no actual possession of the "lappage," and there is evidence on the part of the junior grantee that he has held adversely to the senior grantee a "lappage" of lands in the descriptions of their grants, it is error in the trial judge to charge the jury that the latter is deemed in law to be in possession of the entire tract covered by his title, except as to so much thereof as the former may have had in his actual occupation and possession. *Ibid.*

DEMAND, ORAL. See Penalty Statutes.

DEMURRER. See Pleadings; Evidence.

1. *Pleadings—Distinct Defenses.*—When two separate and distinct defenses are pleaded the plaintiff may demur to one of them. Revisal, sec. 435. *Shelby v. R. R.*, 537.

2. *Pleadings—Distinct Defenses—Appeal, Fragmentary—Dismissed.*—An appeal from the refusal of the court to sustain a demurrer of plaintiff to one of two separate and distinct defenses is fragmentary and will be dismissed. It is otherwise when a demurrer to one defense is sustained or the demurrer to whole defense is overruled. *Ibid.*

3. *Pleadings—Distinct Defenses—Overruled—Objections and Exceptions.* —When the plaintiff demurs to one of two separate and distinct de-

DEMURRER—*Continued.*

fenses and the demurrer is overruled, the plaintiff should note an exception and the trial proceed upon both. *Ibid.*

EMPLOYER AND EMPLOYEE.

1. *Respondeat Superior—Employment.*—The doctrine of *respondeat superior* does not apply when the brakeman, not on duty, but being permitted by the conductor to ride to his home on the train, at the request of the conductor goes to the agent at a station for some flowers for him and is injured in boarding the moving train as it left the station. *Whitfield v. R. R.*, 236.

2. *Duty of Employer—Safe Place to Work—Scaffold—Material and Construction.*—The employer owed a duty to the employee, who was injured while engaged in the course of his employment to work upon a scaffold which he (the employer) had had another to build for the purpose, to exercise due care in selecting materials reasonably suitable and safe for its construction, and to see that it was constructed in a reasonably safe manner. *Barkley v. Waste Co.*, 585.

3. *Same—Evidence—Nonsuit.*—When there is evidence that a lofty scaffold, upon which an employee was instructed by defendant to do certain work, was built of old and scorched material; that it was knotty, and the injury complained of was caused by the breaking of a piece of timber at a knot, it was sufficient to be submitted to the jury upon the question of defendant's negligence, and thereunder it was error to sustain a motion as of nonsuit upon the evidence. *Ibid.*

4. *Same — Contributory Negligence — No Evidence.*—When the employee was directed by his employer to do certain work upon a scaffold which had been erected by another delegated by the employer, and when it was shown that the employee was injured owing to faulty material used, and had been assured by the foreman of the employer that the scaffold was safe, he having been unacquainted with either the character of construction or the quality of the material, no question of contributory negligence was presented. *Ibid.*

5. *Rules of Employer—Orders—Intent—Waiver.*—In an action for damages for the alleged negligent killing of plaintiff's intestate, when contributory negligence is relied upon as a defense, and the evidence tends to establish that the intestate was acting in disobedience of the orders of his vice-principal, given for the protection of employees, the order, to be effective, must have been given and received with the expectation and intent that it should be observed, and, as in the case of rules, it was open to the parties to show that no such intent existed, or that, by the attitude of the parties and their conduct concerning it, the order as a rule had been waived or abrogated. *Smith v. R. R.*, 603 .

6. *Same—Questions for Jury—Knowledge of Employer, Expressed, Implied.*—In an action for damages for the alleged negligent killing of plaintiff's intestate there was evidence tending to show that the intestate, while engaged as one of a switching crew, was at some previous time warned by the conductor that a shifting engine did not have the usual grab-iron running across its front, and also as to the danger in getting aboard the engine in the manner in which the intestate did so at the time of the injury; that the intestate acted

EMPLOYER AND EMPLOYEE—*Continued.*

in this respect as all the other hands engaged in this business were accustomed to act, including the conductor himself, and that in the present instance the conductor was standing on the footboard in full view and gave no warning: *Held*, it was not error for the lower court to instruct the jury that, while a violation of a known rule of the railroad company made for employees' protection and safety, when the proximate cause of the injury, would usually bar a recovery, it is not so when the rule is habitually violated, to the actual knowledge of the vice-principal or employer, or under such conditions as to fix them with implied knowledge. *Ibid.*

EVIDENCE.

1. *Judgment Roll Not Introduced—Presumption of Validity—Cannot be Attacked.*—When the judgment roll under which defendant's grantor obtained title is referred to only by the title, and the judgment roll is not set out in the evidence, the proceedings will be presumed as valid, and may not successfully be attacked as void for the want of proper parties. *Sutton v. Jenkins*, 12.

2. *Privileged Communications—Statements to Physician—Competency.*—At common law, communications between patients and their attending physicians were not regarded privileged. In an action to recover damages for physical injury alleged to have been inflicted on plaintiff by reason of a defective jackscrew furnished to him by defendant, evidence of the attending physician that plaintiff told him, upon his inquiry, that "he was raising the engine with a jackscrew, and he kicked it or wrung it out, he could not tell which, causing the engine to roll back and crush his arm," etc., is competent as a matter of right, and not excluded by Revisal, 1621, it having been admitted or clearly established by other testimony that plaintiff's arm had been crushed by the defendant's engine having fallen upon it. *Smith v. Lumber Co.*, 62.

3. *Damages—Declarations, When Competent—Personal Injury—Subsequent Suffering.*—While the declaration of the plaintiff, in a suit for damages for personal injury, is not competent evidence when given by another witness, it is not objectionable when given by the plaintiff in person, and he will be permitted to testify that since the injury was inflicted he had suffered from extreme nervousness and "nightmares." *Brown v. R. R.*, 136.

4. *Damages—Declarations, When Competent—Personal Injury—Subsequent Suffering—Expert.*—Evidence is competent tending to show that, since the injury complained of, and not before, the plaintiff has suffered from nervousness and excessive "nightmares," as corroborative of the expert evidence of a physician regarding the effects of the bodily injury received. *Ibid.*

5. *Measure of Damages—Easements.*—In an action for permanent damages to land, claimed by reason of construction of a telephone line, the measure of damages is the difference in value before and that after the burden was imposed upon it, and, while it were better form to ask witness the value of the land in each event, it is not reversible error to permit him to testify directly to the amount of the damages. *Wade v. Telephone Co.*, 219.

EVIDENCE—*Continued.*

6. *Same—Opinion Evidence.*—While it is essentially a matter of opinion, in an action to recover permanent damages, for witness, who knows the land, to testify to the value of plaintiff's land upon which defendant has constructed its telephone line, and the effect upon such value by improvements upon the one hand or burdens upon the other, it is not objectionable as "opinion evidence." The jury may give it such weight as they think it entitled to, in connection with the intelligence of the witness, his means of observation, and all the other circumstances attending his testimony. *Ibid.*

7. *Same—Instructions—Corporations—Easements—Harmless Error.*—An instruction upon the measure of damages, in an action against defendant corporation to recover permanent damages to land occasioned by the construction of its telephone lines, that the jury will consider the value of the "franchise of the company," is harmless error when it appears that his Honor's meaning was the value of the easement or privilege acquired over plaintiff's land, and the plaintiff was not prejudiced. *Ibid.*

8. *Contracts—Bankruptcy—Preferences—Principal and Agent—Partnership—Demurrer.*—"Equity regards that as done which ought to be done." Defendant and Y. entered into an agreement to form a corporation for mercantile purposes. With this in view, Y. bought goods, commenced business, and thereafter requested defendant to pay for its part of the merchandise, which it did. The business was chartered, but not incorporated. Y. sent a bill of sale of the merchandise to defendant without its suggestion, in value equaling the amount paid by defendant. In an action by the trustee in bankruptcy of Y. to recover the amount as a fraudulent preference: *Held*, (1) there was no evidence to establish the relationship of debtor and creditor nor of partnership; (2) there was no evidence of fraud or a preference, under the bankrupt act; (3) the court should, upon the foregoing evidence introduced by the trustee in bankruptcy, have sustained a demurrer and dismissed the action. *Godwin v. Cotton Mills*, 227.

9. *Opinion—Speed of Train.*—The "opinion" of the witness as to the speed of a moving train at the time he was endeavoring to get aboard is competent evidence. *Whitfield v. R. R.*, 236.

10. *Contributory Negligence—Moving Train—Nonsuit.*—The contributory negligence of plaintiff in attempting to board a train moving at the rate of 15 miles an hour will bar his recovery, in the absence of evidence making the case an exception to the general rule, and a judgment as of nonsuit on the evidence, on proper motion, should have been allowed. *Ibid.*

11. *Attorney and Client—Original Authority—Continuance Presumed—Scope of Authority.*—The presumption is that generally the authority of an attorney to represent his client continues until there is evidence of its having been revoked; and it appearing that such original authority existed, without more, his motion in the original cause to set aside the judgment on the ground that it was void cannot successfully be attacked for the want of such authority. *Bank v. Peregoy*, 293.

12. *Opinion—Result of Knowledge and Observation.*—In an action for recovery for services rendered in cutting logs under a part perform-

EVIDENCE—*Continued.*

ance of a contract, under the contention that defendant wrongfully refused to permit plaintiff to cut more and to furnish sufficient rafting gear required, which he had agreed to furnish as a part consideration of the contract, it was competent for witness to testify that the rafting gear actually furnished was not "sufficient," not as a matter of opinion, but the result of knowledge and observation. *Ives v. Lumber Co.*, 306.

13. *Same.*—An instruction, based upon the evidence as to defendant's having placed notices in the car warning passengers from riding on the platform (Revisal, 2628), is erroneous which leaves out an independent defense against the plaintiff's action that by so doing the plaintiff was prevented from hearing a warning called out in the coach, which would have prevented the injury. *Wagner v. R. R.*, 315.

14. *Liens—Chattel Mortgages—Parol Mortgage—Proof.*—In an action to engraft upon a written chattel mortgage a lien by parol upon after-acquired merchandise in defendant's store the plaintiff's evidence tended to show that the defendant gave to B. the written mortgage on his stock of goods to secure him, B., for a debt due. Afterwards the defendant gave the written mortgage to B. to secure a debt he owed to plaintiff. W., the president of the plaintiff company, was absent at this time, and upon the trial testified that defendant afterwards told him that the written mortgage given to B. was to secure his company for goods he "had bought or might buy," and that he "never denied the mortgage in all conversations they had had." It further appeared that plaintiff requested further security and defendant declined to give it: *Held*, (1) the evidence was insufficient to establish the parol lien that the provisions of the written mortgage were thereby extended to after-acquired goods in the store; (2) that the expressions used by defendant, as testified to by W., by reasonable intendment referred to the fact that the written mortgage was to secure under its terms goods which defendant had bought or might buy from plaintiff. *White v. Carroll*, 330.

15. *Liens—Chattel Mortgages—Correction—Contracts—Parol Evidence—Mutual Mistake.*—To correct a written chattel mortgage given to secure plaintiff for merchandise sold and delivered to defendant while conducting a mercantile business, so as to embrace after-acquired goods, the proof must be clear and convincing that the true intention of the parties was not expressed in the mortgage, and that description of the property now claimed was omitted by mutual mistake, in such manner as not to vary the terms of the written instrument. The evidence of W., the president of the plaintiff company, who was not present at the time the mortgage was given, that defendant afterwards told him it was for goods "he had bought or might buy," and that "he had never denied the mortgage," is insufficient. *Ibid.*

16. *Same—Punitive Damages, When Recoverable—Wantonness and Malice.*—In a suit by the widow punitive damages are recoverable for defendant's breach of duty in knowingly permitting the mutilated and dismembered body of deceased to remain upon or along its track in an unprotected condition, to be repeatedly run over by its trains, when it was from a willful, wanton, or malicious motive. *Kyles v. R. R.*, 394.

EVIDENCE—*Continued.*

17. *Same—Evidence Insufficient.*—There is no evidence of a willful, wanton, or malicious motive on the part of defendant or its employees when it appears that the deceased, who was killed by one of defendant's engines, was permitted to remain along defendant's track and was repeatedly run over and mutilated, and when it was done at night or under such conditions as to cause the employees not to be aware thereof. *Ibid.*

18. *Same.*—Evidence that the section master manifested some impatience at the prospect of guarding the remains held incompetent. *Ibid.*

19. *Transactions with Deceased—Husband an Interested Witness—Daughter Cannot Corroborate.*—The husband is an interested witness in the event of the action, though not a party, when a trust deed made by his deceased wife is being attacked for the want of his joining therein; and upon the question of abandonment his evidence to the effect that his wife said to him she would give him a horse if he would leave and stay was incompetent. (Revisal, 1631.) The testimony of the daughter that she heard the conversation to that effect would be the "indirect testimony of an interested witness as to a transaction or communication with diseased," and also incompetent. *Witty v. Barham,* 479.

20. *Negligence.*—Where the evidence established the fact that the defendant used a terra-cotta or earthern flue instead of a brick flue in carrying the smoke from a stovepipe used in its building, and a city ordinance prohibited the use of a stovepipe for the purpose unless protected by brickwork from the woodwork of the building, it was error in the judge to instruct the jury, in an action for damages alleged to have been thereby caused, to find for the plaintiff upon the question of negligence, if he had shown by the greater weight of evidence that the fire originated from a pipe or flue constructed contrary to the provisions of the ordinance, there being no evidence that the fire originated from any defect in the stovepipe. *Fowle v. R. R.,* 491.

21. *Deeds and Conveyances—Deed to Wife—Fraud on Creditors—Declarations, When Competent*—The declarations of a husband affecting the validity of a deed made under his directions to his wife and attacked by his creditors upon the ground of fraud are competent evidence when made before the transaction and incompetent when made thereafter, as to the rights of the wife. *Parker v. Fenwick,* 525.

22. *Amount Specified in Will—Not Open to Contradiction.*—When the testator declares in his will that none of his children, who are beneficiaries thereunder, be required to account, except *feme* plaintiff, for a specified sum, it is not open to plaintiffs to show that as a matter of fact she had received from her testator more than that sum, or less, or that she received nothing at all. *Dodson v. Fulk,* 530.

23. *Bonds—Acknowledgment by Obligator—Payments—"Signed, Sealed and Delivered."*—Evidence that defendant's intestate, who could neither read nor write, acknowledged the bond sued on as her own and made payments thereon for a long series of years, which were duly entered as credits, is sufficient to go to the jury as tending to prove that the bond was "signed, sealed, and delivered" by the obligator or by her authority. *Moose v. Crowell,* 551.

EVIDENCE—*Continued.*

24. *Nonexperts — Paper-writings — Comparisons — Questions for Jury.*—A witness, having testified that he was acquainted with the handwriting of the person alleged to have signed the paper in controversy, may, after expressing an opinion in regard to it and being shown a writing conceded to be genuine, show the two papers to the jury and, by making comparisons between them, explain and point out to the jury the similarity or difference, as the case may be. (*Outlaw v. Hurdle*, 46 N. C., 150, and cases following it, discussed.) *Martin v. Knight*, 564.

25. *Safe Place to Work—Nonsuit.*—When there is evidence that a lofty scaffold, upon which an employee was instructed by defendant to do certain work, was built of old and scorched material; that it was knotty, and the injury complained of was caused by the breaking of a piece of timber at a knot, it was sufficient to be submitted to the jury upon the question of defendant's negligence, and thereunder it was error to sustain a motion as of nonsuit upon the evidence. *Barkley v. Waste Co.*, 585.

26. *Same—Contributory Negligence—No Evidence.*—When the employee was directed by his employer to do certain work upon a scaffold which had been erected by another delegated by the employer, and when it was shown that the employee was injured owing to faulty material used, and had been assured by the foreman of the employer that the scaffold was safe, he having been unacquainted with either the character of construction or the quality of the material, no question of contributory negligence was presented. *Ibid.*

27. *Witnesses—Cross-examination—New Matter.*—The cross-examination of an adversary's witness is not confined to matters about which the witness has testified on his examination in chief, but may extend to and include any matter relevant to the inquiry. *Smith v. R. R.*, 603.

28. *Witnesses—Party May Show Contradiction, When.*—While it is not ordinarily permissible in a party to assail or disparage the character of his own witness, or to ask questions having only this end in view, it is always open to such party to show that the facts are otherwise than as stated by his witness; and this may be done by the testimony of other witnesses, from other statements of the same witness, and, at times, by the facts and attending circumstances themselves —the *res gestæ*. *Ibid.*

29. *Same—Conflicting Statements—Veracity—Questions for Jury.*—In a suit to recover damages for the negligent killing by defendant of plaintiff's intestate it was admitted that a shifting engine used by the intestate in the course of his employment was not equipped with a grab-iron running across its front. Witness for plaintiff testified on examination in chief that plaintiff's intestate stepped on the footboard and reached for the grab-iron or whatever he could catch, and he did not know why he did not catch the grab-iron; and, on cross-examination, that he had warned plaintiff's intestate that his engine was not equipped with one: *Held*, the credibility of the testimony was for the jury, and they could accept or reject all or any part thereof as it might convey to their minds the imprint of truth. *Ibid.*

30. *State's Lands—Entry—Notice—Vagueness—Parol Evidence Inadmissible.*—When the entry upon the State's vacant land is too vague to

EVIDENCE—*Continued.*

give notice of the land intended to be appropriated, it may not be aided by parol evidence. *Call v. Robinett*, 616.

31. *Admissions—Declarations, Incompetent.*—When, in locating a corner of land in ejectment proceedings, plaintiff was asked on cross-examination, for the purpose of a *quasi* admission, if B., the one under whom he claimed, was present at the time of a certain survey, which was negatived by his answer, it was incompetent on redirect examination for the witness to state that on that occasion B. said the true corner was not there, but where plaintiff now claims, as this was his testimony of a declaration made by B. in his own interest. *Brooks v. Shook*, 630.

32. *Questions for Jury.*—When there is more than a scintilla of evidence the question is for the jury, and a motion as of nonsuit is properly refused. *Currie v. Gilchrist*, 648.

33. *Deeds and Conveyances—Boundaries—Description—Number of Acres.* While ordinarily the number of acres mentioned in a deed constitutes no part of the description, yet when C. in an action for possession, claims that his lands extend beyond a certain line to and including the lands claimed by G., there is at least some doubt as to the true location of his lands respecting it, evidence is competent to show that the land occupied by C. on his own side of the line and within his alleged boundaries contained a greater number of acres than that called for in his deed. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

1. *Controversy—Collectors.*—It is no excuse for plaintiff not bringing an action, under Revisal, sec. 59, within one year, etc., to show that there was a controversy over the administration. A collector should have been appointed for the purpose of suit. *Gulledge v. R. R.*, 234.

2. *Same—Disposition of Advancement—Issues—Immaterial.*—In an action by plaintiff and her husband to recover of her testator's executors her distributive share of his estate it was established by the verdict that *feme* plaintiff was required to account, under the will, for an advancement of $500; that plaintiffs were indebted to the executors in the sum of $868, evidenced by their bond and secured by mortgage on *feme* plaintiff's estate: *Held*, (1) the bond for the payment of $868 secured by the mortgage raised the presumption that it was a debt in favor of the estate, and in the absence of evidence to the contrary the *feme* plaintiff must pay it, at least to the value of property included in the mortgage; (2) that *feme* plaintiff must account for the $500 as required by the will; (3) that an issue found in favor of *feme* plaintiff that the $500 went into a business in which her husband was a partner is irrelevant to the inquiry. *Dodson v. Fulk*, 530.

EXPERT, AUTHORITY TO EMPLOY. See Municipal Corporations.

FRAUDS, STATUTE OF.

Lands—Contract to Convey—Agreement as to Profits—Parol Evidence.—Plaintiffs and defendant entered into a written contract that the former should convey to the latter certain lands for the sum of $1,500, with the further agreement by parol, not reduced into writ-

FRAUDS, STATUTE OF—*Continued.*

ing or intended so to be, that defendant, as a part of the consideration for the contract, was to sell the land at a profit beyond that sum and divide it. Defendant accordingly induced plaintiffs to convey the lands to him, and thereafter sold them at a profit. *Held*, (1) evidence of the oral agreement did not tend to contradict or vary the written instrument; (2) the oral agreement, if established, was enforcible as to the profits already made, did not affect a conveyance of lands, and was not within the provision of the statute of frauds. *Brown v. Hobbs*, 73.

HEADLIGHTS. See Negligence.

HEARING IN DIFFERENT COUNTY. See Jurisdiction.

HEIRS. See Estates.

1. *Parties — Executors and Administrators — Real Estate—No Privity.*— There is no privity of interest between the administrator of deceased and his widow and heirs at law in the deceased's real estate, and it was not error of the judge in the lower court to permit the widow and heirs at law to become parties to and fully defend a suit affecting their interest in deceased's lands. *McArthur v. Griffith*, 545.

2. *Cloud on Title—Action—Pleadings—Judgment—Estoppel.*—A judgment in an action brought by the widow and heirs at law to remove a cloud upon their title to land descended to them, wherein it was adjudicated that a note secured by a mortgage had been fully paid and discharged, may be successfully pleaded in bar to an action subsequently brought to foreclose by the administrator of the mortgage creditor. *Ibid.*

HOSPITALS. See Nuisance.

HUSBAND AND WIFE.

1. *Deeds and Conveyances — Execution — Feme Covert—Abandonment—Evidence.*—In an action of ejectment by a purchaser under trust deeds executed by a *feme covert*, when the defense is that the husband had not executed the deeds with her, the deeds were competent as evidence in making out plaintiff's chain of title. The question of their effect was a subsequent matter and presented the real point at issue. *Witty v. Barham*, 479.

2. *Same — Corroborative Evidence — Husband's Absence and Subsequent Marriage—Certificate of Marriage.*—When the question of the validity of a deed of a *feme covert* in which the husband did not join depends upon whether or not the husband has not previously abandoned her, evidence is competent which tends to show the long-continued absence of the husband, and, as corroborative of evidence that he had subsequently been married, the certificate of such marriage. *Ibid.*

3. *Same — Wife's Destitute Circumstances.*—To support the validity of trust deeds made by a *feme covert* without the execution of her husband, upon the question of abandonment, evidence of her extreme destitution at the time of their execution and that it was necessary for her to mortgage her land at the time in order to procure means of living was not incompetent. *Ibid.*

4. *Same—Pleadings—Evidential Matters.*—The question of abandonment affecting the validity of a deed made by a *feme covert* without her

HUSBAND AND WIFE—*Continued.*

husband joining therein is evidential matter, and arises only when objection is made thereto, and it is not required to be set up by plea. *Ibid.*

5. *Abandonment—Within the State.*—To constitute abandonment it is not necessary that the husband should leave the State, under Revisal, sec. 1631. *Ibid.*

6. *Agreement to Separate Not Abandonment — Subsequent Conduct and Abandonment.*—A separation by consent of husband and wife does not constitute abandonment. But when the evidence established a long and unbroken absence of the husband thereafter, without communication; that the wife was destitute and was compelled to mortgage her land for her own support; that the husband in the meantime married and had lived consecutively with two other women, abandonment was proved. *Ibid.*

7. *Deeds and Conveyances—Title to Wife—Fraud on Creditors—Burden on Wife—Husband Indebted to Wife—Intent to Defraud—Questions for Jury.*—In an action to subject the real property of the wife to payment of her husband's debt, upon the ground that he had supplied the purchase price, had negotiated for the purchase of the land and had title made to the wife pending plaintiff's suit for the collection of a debt, there was evidence upon the one hand tending to show that the wife had received the money from an independent source, the husband had borrowed it and while insolvent had paid the purchase price for the land in repayment of the money borrowed; upon the other hand, that the male defendant had declared he would not pay plaintiff's debt, and that the purchase money paid for the land was his own and received from his sister's estate: *Held*, (1) the burden of proof was upon *feme* defendant to show that her husband owed her a valid debt as contended, and one for which she could maintain an action and enforce payment; (2) that, notwithstanding the debt was valid, if the transaction was made with the intent to hinder, delay or defraud the plaintiff in the recovery of his debt, participated in by the wife, or she knew of this purpose, her deed would be void; (3) that it was for the jury to find the facts under the evidence and correct instructions from the court. *Parker v. Fenwick*, 525.

8. *Same—Verdict of Jury—No Fraud Found—Wife's Notice or Knowledge Eliminated.*—In a suit brought by the husband's creditors to set aside for fraud a deed made to the wife, when the jury has found that the husband has paid the purchase price of lands to which he had directed title to be made to his wife as a repayment to her of moneys he had borrowed, without intent to hinder, delay or defraud his creditors, the question of notice or knowledge of the wife is eliminated. *Ibid.*

9. *Deeds and Conveyances—Deed to Wife—Fraud on Creditors—Declarations, When Competent.*—The declarations of a husband affecting the validity of a deed made under his directions to his wife and attacked by his creditors upon the ground of fraud are competent evidence when made before the transaction and incompetent when made thereafter, as to the rights of the wife. *Ibid.*

10. *Business Conducted by Wife—Husband or Other Agent—Liability of Wife.*—Revisal, sec. 2118, is for the purpose of preventing a married

HUSBAND AND WIFE—*Continued.*

woman from conducting her business through her husband or any other agent so as to mislead her creditors into believing they are dealing with the person legally responsible in advancing credit to the husband or other agent, and from concealing her identity and coverture to that end. Therefore, goods knowingly sold to and upon the responsibility of the wife, who was not a free trader, by the agent of the creditor, who knew the husband and was by him referred to the wife, with whom he made the contract in her own behalf, are not within the mischief intended to be suppressed by the statute, so as to charge the *feme covert* or her property. *Weld v. Shop Co.*, 588.

INITIAL POINT. See Penalty Statutes.

INJUNCTIONS.

Deeds and Conveyances — Title — "Good-faith Contention" — Timber — Cutting Restrained—Hearing.—In an action to try title to timber lands and to restrain cutting the timber, it having been found as a fact by the judge below "that there is a good-faith contention on both sides, based upon evidence constituting a *prima facie* title," it was proper for him to forbid either party from cutting the timber until final determination of the suit. *Sherrod v. Battle*, 10.

INSTRUCTIONS.

1. *Railroads—Penalty Statutes—Transportation—Verdict, Directing.*—It is error in the court below to charge the jury to find a certain sum for plaintiff, if they believe the evidence, in an action for the recovery of a penalty, under Revisal, sec. 2632, for the alleged failure of a railroad company to transport goods. The question of delay and the ascertainment of the amount of the recovery are questions for the jury, under proper instructions. *Ice Co. v. R. R.*, 61.

2. *Railroads—Penalty Statutes—Transportation—Ordinary Time—Verdict, Directing—Evidence—Questions for Jury.*—In an action for the recovery of a penalty under Revisal, 2632, it was for the jury to find what was "ordinary" time, under the surrounding circumstances, and whether the defendant transported freight within such time; also, the amount of recovery after allowing for the "lay days," etc., provided by the statute. Hence, it was error for the court below to instruct the jury, if they believed the evidence, to answer the issue in a certain way or in a sum certain. *Davis v. R. R.*, 68.

3. *Corporations — Easements — Harmless Error.* — An instruction upon the measure of damages, in an action against defendant corporation to recover permanent damages to land occasioned by the construction of its telephone lines, that the jury will consider the value of the "franchise of the company," is harmless error when it appears that his Honor's meaning was the value of the easement or privilege acquired over plaintiff's land, and the plaintiff was not prejudiced. *Wade v. Telephone Co.*, 219.

4. *Same—Presumptions—Prima Facie Case.*—When the plaintiff has made out a *prima facie* case the burden of proof shifts to the defendant, and the jury should be instructed that, giving due weight to the presumption which carries the issue to the jury, the plaintiff must in the end prove his case upon that issue by the greater

INSTRUCTIONS—*Continued.*

weight of the whole evidence, his own and that of defendant, when the latter has introduced any. *Winslow v. Hardwood Co.*, 275.

5. *Competent Builder, Reliance Upon — Maintenance.*—In an action for damages alleged to have been occasioned by fire from the faulty construction of a flue through the roof of the building, when the evidence was conflicting, it was error in the judge to refuse to instruct the jury that, "If you find the flue in question was constructed by a competent builder, of safe material, in a safe manner, and was not negligently permitted to become defective, the maintenance of the flue was not negligence, even if the fire originated therefrom." *Fowle v. R. R.*, 491.

6. *Street Railways—Negligence.*—The driver of a wagon upon which the plaintiff was riding, in order to pass another vehicle, reined his wagon onto the street car track. Looking back through his covered wagon, he saw a car approaching, and backed his team from the track so as to throw the back of the wagon upon it, and the alleged injury to plaintiff was caused by the car striking the wagon. There was evidence that the motorman rang his gong and attempted to bring the car to a full stop, but before he could do so it struck the wagon: *Held*, it was error in the lower court to charge the jury, in effect, that it was the duty of the motorman to stop the car at once when he saw the wagon would not clear the track, and within the distance testified to, if this could have been done without danger to the occupants of the car, and that the mere ringing of the gong was not sufficient. *Wright v. Mfg. Co.*, 534.

7. *Appeal and Error—Nonsuit—Instructions Not Considered.*—Upon an appeal from sustaining a motion as of nonsuit upon the evidence it is not ordinarily necessary to pass upon the refusal of a requested instruction upon the evidence. *Ibid.*

8. *Presumptive Possession of Lands — Evidence.* — When the senior grantee has had no actual possession of the "lappage," and there is evidence on the part of the junior grantee that he has held adversely to the senior grantee a "lappage" of lands in the descriptions of their grants, it is error in the trial judge to charge the jury that the latter is deemed in law to be in possession of the entire tract covered by his title, except as to so much thereof as the former may have had in his actual occupation and possession. *Currie v. Gilchrist*, 648.

INSURANCE.

1. *Application—Statements—Warranty—Misrepresentations—Effect.*—Under Revisal (Vol. II), sec. 4808, providing that statements or descriptions in applications for policies of life insurance, or in the policy itself, are to be representations and not warranties, and do not prevent a recovery unless material, it is not necessary to defeat a recovery that a material misrepresentation by the applicant must contribute in some way to the loss for which indemnity is claimed. *Bryant v. Ins. Co.*, 181.

2. *Application—Statements—Materiality.*—In an application for a policy of life insurance every fact stated will be deemed material, under Revisal (Vol. II), sec. 4808, which would materially influence the

INSURANCE—*Continued.*

judgment of the insurance company either in accepting the risk or in fixing the premium rate. *Ibid.*

3. *Application—Statements—Care of Physician—Relationship—Effect.*—When it appeared that the insured, in his application for a policy of life insurance, made a statement that he had not been under the care of a physician within twelve months next preceding its date, it was not necessary that he should have been bedridden to constitute the relationship; for if he was apprehensive as to his condition, though "up and around," within the time named, consulted a physician and intrusted his case to him, it would be a material representation, and, if false, would relieve the defendant from the obligation of the contract by reason of the death of the insured. *Ibid.*

4. *Same.*—Upon objection properly taken, it was error in the court below not to submit a determinative issue to the jury for their findings upon the truth of a statement made by the applicant that he had not been under the care of a physician within two years next preceding that time, when there was evidence by a witness (a doctor) to the effect that the insured, upon whose death the policy sued on matured, called at his office about five or six times within the two-year period; that he put him on creosote with strychnine and hypophosphites, and afterwards gave him cod liver oil and creosote and advice as to his surroundings, diet, etc. *Ibid.*

5. *Principal and Agent — Premium — Receipt — Ratification—Money Accepted.*—The company waived the following provisions in a policy of life insurance: "Premuims are payable at the home office, but at the pleasure of the company suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt, signed by the president," etc., when the money for the premium was paid the agent under different conditions and was remitted to and received by the company, which knew the purposes for which it was paid, and kept the money with such knowledge. *Matthews v. Ins. Co.*, 339.

6. *Same—Official Receipt.*—When the insurance company has received from the insured and retained the money for his premium on a life insurance policy paid to its agent, but the agent did not tender and the insured did not receive the "official" receipt therefor, it was the fault of the agent that he did not give the receipt in literal compliance with the requirement of the policy, and the company, by retaining the money for the premium, with notice, waived all irregularity as to the form of the receipt. *Ibid.*

7. *Premuim Notice—Foreign Statute Inapplicable—Harmless Error.*—When, under objection, the New York statute was introduced and admitted in evidence for the purpose of showing that notice of the maturity of premiums should have been given, it was harmless error, if error at all, when by a subsequent ruling of the court the law was held inapplicable, as the objection was eliminated from the case by the subsequent ruling. *Ibid.*

8. *Evidence—Witnesses—Statements—Corroborative.*—Testimony of witnesses that the beneficiary under a policy of life insurance sued on said to them that she had paid the premiums on the policy is com-

INSURANCE—*Continued.*

petent in corroboration of the testimony of the beneficiary to that effect, when it is relevant to the inquiry. *Ibid.*

9. *Renewable Term Plan—Convertible—Level Rates—Premium Specified — After Last-named Age — Higher Rates — "&c." —* Plaintiff applied for and received from defendant company a policy of life insurance for three months only, payable at death, upon the "quarterly renewable term plan, with participating premiums." The provisions contained in the policy were that the company would renew and extend the insurance during each successive quarter from its date upon the payment at stipulated times in each successive year during the life of the insured of the premium for the actual age attained, in accordance with a schedule rate attached, less the return premiums indorsed; that after the insured attained the age of 60 years the policy could be exchanged for one on the level or uniform plan at the unchanging rate for the then actual age attained. The level premium referred to was given in columns from the ages of 60 to 65 years, inclusive, for annual, semiannual, and quarterly premiums, and at the bottom the word "&c., &c., &c." appeared. In construing the policy, when there was no contention of fraud: *Held*, (1) that the level premium rates are based upon a steadily rising premium at the actual cost of the hazard at the attained age at each renewal, and that the words "&c., &c., &c." mean "and so on" in increasing rates in proportion to the ordinary rate when changed to a level rate after the age for which the last rate was indorsed; (2) that the level premium rates to be paid by the insured after the age and rate last given are readily capable of determination in the same mode as those under that age. *Jones v. Assurance Society*, 540.

10. *Premiums — Paid With Knowledge, Not Recoverable. —* Voluntary payments of premiums made by the insured with full knowledge of the facts cannot be recovered by him. *Ibid.*

11. *Insurance Order—Evidence—Policy and Death—Burden of Proof.—* In an action upon a life insurance policy the burden of proof is upon the insurance company to show nonpayment of dues or other matters to avoid the policy, when the certificate of insurance and the death have been shown. *Wilkie v. National Council*, 637.

12. *Same.*—When a life insurance order is defending a suit upon a policy on the ground of nonpayment of dues, the burden of proof being upon it, evidence by the proper officers is competent tending to show that the insured had been dropped from the rolls prior to his death, upon official notice; the relation of the constitution and by-laws to the subject, a matter of record evidenced by a copy, by testimony and matters of record that the insured failed to pay his dues and was not in good standing at the time of his death; and that entries were made to this effect by the proper officer in the records of the lodge. *Ibid.*

INTERMEDIATE POINT. See Penalty Statutes.

INTERSTATE COMMERCE. See Carriers of Goods.

INTERSTATE SHIPMENT. See Penalty Statutes.

INTERVENING RIGHTS. See Railroads.

INTOXICATING LIQUORS.

County Commissioners—License to Sell Liquor—Elections—Presumption of Validity Conclusive—Trial by Jury.—There is a final and conclusive presumption in favor of the correctness of the result of an election as declared by the proper officials, until the issues raised by the pleadings have been tried and disposed of before the jury; and in the meanwhile an injunction will not lie against the county commissioners for the issuance of license to sell liquor, under allegations of defects and vital irregularities in an election held upon the question of prohibition, and denied by the answer. *Wallace v. Salisbury*, 58.

ISSUES.

1. *Railroads—Penalty Statutes—Transportation.*—In an action against a railroad company under Revisal, 2632, for a penalty for failure in its duty to transport freight, an issue is objectionable when it is the only one and in the following language: "What amount, if any, is the plaintiff entitled to recover of the defendant on account of the failure to promptly ship the car-load of lumber?" *Davis v. R. R.*, 68.

2. *Same*—An issue which presupposes a failure on defendant's part in its duty to transport freight, in an action for penalty. Revisal, 2632, is objectionable. (Attention is called to the proper issues as suggested in *Hamrick v. R. R.*, 146 N. C., 185.) *Ibid.*

3. *Injunctions—Deeds and Conveyances—Sale Under Senior Mortgage—Affirmative Defense—Fraud and Deceit—Issues Irrelevant—Appeal Premature.*—Action by a junior mortgagee to enjoin the senior mortgagee from foreclosing upon all the land conveyed by his mortgage, and to require him to first sell so much as was not embraced in the junior mortgage. The defendant set up an affirmative defense, that more land had been conveyed in plaintiff's mortgage than intended, being thereto induced by plaintiff's fraud and deceit. Issues were submitted on affirmative defense, and from adverse judgment plaintiff appealed: *Held*, (1) the issue submitted was irrelevant to the inquiry; (2) the appeal was prematurely taken. *Gray v. James*, 139.

4. *Policies—Misrepresentation—Evidence.*—When there was evidence that the insured made a misrepresentation in his application for a policy of life insurance, that he had not been under the care of a physician within two years, such conditions, and other relevant facts and circumstances relating to the truth or falsehood of the statement should be determined by the jury upon a proper issue. *Bryant v. Ins. Co.*, 182.

5. *Burden of the Issue.*—The burden of the issue, in the sense of ultimately proving or establishing it, does not shift from the party upon whom it originally rested. *Winslow v. Hardwood Co.*, 275.

6. *Sufficinecy of.*—Issues are sufficient which enable the parties to present every material phase of the controversy. *Ives v. Lumber Co.*, 306.

7. *Same—Matters Evidential.*—Issues tendered upon matters merely evidential and not issuable should be refused. *Ibid.*

ISSUES—*Continued.*

8. *Same—Permanent Damages.*—In an action brought against a railroad company by the owner on account of its wrongful invasion of his land by taking the same for railroad purposes the court should submit an issue as to permanent damages, this being the proper method of adjustment now required by the statute (Revisal, sec. 394). *Beasley v. R. R.*, 362.

9. *Damages, Permanent, Include What—Separate Issues.*—As a rule, the term "permanent damages" includes those for the entire injury done to the property, present, past, and prospective; but when the issues have been divided and answered by the jury, so that one relates to past and the other to present and prospective, the amounts may be added together and a judgment awarded for the permanent damages recoverable. *Ibid.*

10. *Disposition of Advancement—Immaterial.*—In an action by plaintiff and her husband to recover of her testator's executors her distributive share of his estate it was established by the verdict that *feme* plaintiff was required to account, under the will, for an advancement of $500; that plaintiffs were indebted to the executors in the sum of $868, evidenced by their bond and secured by mortgage on *feme* plaintiff's real estate: *Held*, (1) the bond for the payment of $868 secured by the mortgage raised the presumption that it was a debt in favor of the estate, and in the absence of evidence to the contrary, the *feme* plaintiff must pay it, at least to the value of property included in the mortgage; (2) that *feme* plaintiff must account for the $500 as required by the will; (3) that an issue found in favor of *feme* plaintiff that the $500 went into a business in which her husband was a partner is irrelevant to the inquiry. *Dodson v. Fulk*, 530.

JUDGMENT CONTINUED. See Power of Court.

JUDGMENT ROLL. See Evidence,

JUDGMENT. See Judgments, Void; Jurisdiction.

1. *Special Proceedings—Lands, Sale of—Purchaser—Good Faith.*—An innocent purchaser in good faith, buying land sold under an order or judgment in special proceedings, is protected, if it appears upon the face of the record that the court had jurisdiction both of the parties and of the subject-matter. *Rackley v. Roberts*, 201.

2. *Justices of the Peace—Collateral Attack—Coverture—Innocent Purchasers.*—To successfully attack a judgment rendered by a justice of the peace collaterally, upon the ground of coverture, the fact of coverture must appear upon the face of the record in the former action upon which the judgment was rendered, or it must have been pleaded therein; especially so as against a stranger or an innocent purchaser for value under the execution upon the judgment. *Rutherford v. Ray*, 253.

3. *Justice's Court—Transcript—Jurisdiction Shown—Purchaser for Value.*—The transcript of a justice's judgment should show jurisdictional facts for the protection of purchasers of real property sold under execution thereon. When the transcript shows affirmatively that no jurisdiction had been acquired, the defense that the purchaser is one for value, etc., cannot be sustained. *Ibid.*

JUDGMENTS—*Continued.*

4. *Mortgagor and Mortgagee—Purchaser of Mortgaged Goods—Possessory Action—Inadequate Value of Mortgaged Goods—Judgment of Ownership—Costs.*—In a suit brought by mortgagees for the possession of certain goods embraced in their chattel mortgage against the defendant, who had subsequently bought them from the mortgagor, when it is found that the plaintiffs, mortgagees, were owners and entitled to possession, and that the goods would not bring the mortgage debt: *Held*, (1) it was not error in the court below to render judgment that plaintiffs, mortgagees, recover the goods embraced in this mortgage instead of for the possession and sale of the goods; (2) in the absence of tender of judgment by defendant (Revisal, 860) the plaintiffs should recover their costs of the action. *Phillips v. Little*, 282.

5. *Evidence—Nonsuit—Supreme Court—Direction to Dismiss Action.*—When in the Supreme Court the lower court is reversed for refusing a motion to dismiss upon the evidence as of nonsuit (Revisal, 539), it is in law equivalent to a direction to dismiss the action. *Tussey v. Owen*, 335.

6. *Appeal and Error—Supreme Court—Superior Court Refusing to Obey Mandate—Mandamus.*—Whenever the court below refuses to obey the mandate of the Supreme Court as contained in its opinion disposing of the case on appeal the proper remedy is by *mandamus;* but when at a subsequent term the Superior Court eventually did as directed, when the opinion was certified down and received by it, the error is cured. *Ibid.*

7. *Appeal and Error—Nonsuit—Another Action.*—When on appeal a case is ordered to be dismissed by the Supreme Court on a motion to nonsuit upon the evidence, the Superior Court is without authority to allow an amendment or to proceed contrary to the opinion, but the plaintiff may bring another action within twelve months after the judgment of nonsuit. *Ibid.*

8. *Nonsuit — Evidence, How Considered — Questions for Jury.*—In consideration of the question as of nonsuit upon the evidence the courts will accept the evidence in the most favorable light to the plaintiff; and if there is any evidence, or if different minds can draw different conclusions, it is the duty of the trial judge to submit the case to the jury. *Kyles v. R. R.*, 394.

9. *Cloud on Title—Action—Heirs—Pleadings—Estoppel.*—A judgment in an action brought by the widow and heirs at law to remove a cloud upon their title to land descended to them, wherein it was adjudicated that a note secured by a mortgage had been fully paid and discharged, may be successfully pleaded in bar to an action subsequently brought to foreclose by the administrator of the mortgage creditor. *McArthur v. Griffith*, 545.

10. *Principal and Surety—Judgment, Assignment of—Payment by Surety.*—When a surety pays a judgment rendered against his principal and himself, without having it assigned to some third person for his use, the judgment is cancelled as to both, and a motion for leave to issue execution (Revisal, 620) should not be granted. *Bank v. Hotel Co.*, 595.

JUDGMENTS—*Continued.*

11. *Same—Substantial Compliance.*—A notice issued by a court of competent jurisdiction, served upon the secretary and treasurer of a corporation, to show cause why an execution should not be awarded in favor of a surety who has paid a judgment against the corporation and himself, which sets out the date and amount of the judgment, the relation of the parties, that the surety has actually expended money in payment of said judgment, and that the principal has not reimbursed him, is a compliance with section 2842, Revisal. *Ibid.*

12. *Principal and Surety—Payment by Surety—Execution—Notice to Show Cause—Time—Statutory Provision—Implied.*—Revisal, sec. 2842, giving the surety, who has paid a judgment rendered against himself and his principal, the right to have an execution awarded against his principal, will be strictly construed. The time of notice not being specified, a reasonable time must be given. Ten days are sufficient, under the Revisal, sec. 877. *Ibid.*

13. *Principal and Surety—Revisal, Sec. 2842—Motion to Set Aside—Defense Shown—Insufficiency.*—Parties moving to set aside an order for irregularity, made under Revisal, sec. 2842, must set out their defense. *Ibid.*

14. *Same—Surplusage.*—While, under Revisal, sec. 2842, the court may not revive a dormant judgment against the principal and the surety, an order otherwise valid is not rendered void by the addition of the words "that the judgment heretofore rendered is hereby revived, to the end that execution may be issued." The last sentence will be regarded as surplusage. *Ibid.*

15. *Jurisdiction—Breach of Contract—Amount of Recovery—Judgment Demanded.*—When the cause of action in the complaint is the breach of contract of defendant to make a deed to land to a purchaser the plaintiff had procured thereunder; that the land was sold for $4,000 and it was entitled to an agreed commission of 5 per cent., including all costs of sale, the Superior Court has no jurisdiction, as the action did not sound in tort and the amount of the recovery could not exceed $200, though a judgment of $500 was demanded, including costs of advertising in a sum not named. *Realty Co. v. Corpening*, 613.

16. *Liens for Labor and Materials—Lost Liens—Judgment, Amount of—Adjustment of Claims.*—The laborer or material man can only recover of the owner his *pro rata* part of that sum which the owner is required to "retain from the contractor then due" (Revisal, 2021), this *pro rata* to be determined after consideration by the court below of all the claims of laborers, etc., against the contractor—their priorities, validity, etc.; and a judgment fixing the owner with a liability greater than that demanded for the satisfaction of the plaintiff's claim, without making the other like claimants parties, must be remanded and reformed. *Hildebrand v. Vanderbilt*, 640.

17. *Liens for Labor and Materials—Lost Liens—Judgment to Pay Into Court—Irregular Execution.*—A judgment rendered against the owner and in favor of material men, etc., which requires the owner to pay any sum into court, is irregular. The judgment should fix the amount due, for which the execution may issue. *Ibid.*

JURISDICTION. See Title.

1. *Contracts—Torts—Waiver—Money Had and Received to the Use of—Justice's Court.*—W. became responsible for the payment for a horse purchased by M. of F., with the agreement that the horse was to be returned by M. if it proved unsatisfactory. The horse was accordingly returned, and F. represented to W. that the trade had been made, and induced him to give his promissory note for $175, the purchase price, which was negotiated by F.: *Held,* (1) the jurisdiction of the cause of action by W. against F. rested upon the failure of the consideration of the contract, for money had and received to the use of W.; (2) the plaintiff could waive the tort and sue upon the contract; (3) the cause of action was within the jurisdiction of the justice of the peace. *Manning v. Fountain,* 18.

2. *Contracts—Principal and Agent—Suit—Real Party in Interest—Appeal and Error.*—It is necessary for plaintiff, to sustain an action upon contract, to bring a potential, actually existent defendant into court by process; and when it is admitted that the suit was against and that the summons was served upon the relief department, unincorporated and a mere agency of the railroad company, and the railroad company itself was not served or sued, the action will be dismissed in the Supreme Court (Rule 27) for defect of jurisdiction, *ex mero motu. Nelson v. Relief Department,* 103.

3. *Special Proceedings — Judgment — Lands, Sale of — Purchaser — Good Faith.*—An innocent purchaser in good faith, buying land sold under an order or judgment in special proceedings, is protected, if it appears upon the face of the record that the court had jurisdiction both of the parties and of the subject-matter. *Rackley v. Roberts,* 201.

4. *State Courts—Nonresident Defendants—Quasi in Rem.*—The courts of this State have jurisdiction of the persons of nonresident defendants to the extent required in proceedings *in rem* or *quasi in rem,* when personal service is made by complying with the requirements of Revisal, sec. 448, and the property is situated here. *Vick v. Flournoy,* 209.

5. *State Courts—Nonresident Defendants—Locus in Quo—Situs.*—A motion, by special appearance of nonresident defendants, to dismiss the action for want of jurisdiction of the person will not be granted in a suit to redeem lands and to enforce a contract solely in respect of the same, when the *locus in quo* is situated within the State and personal service was made in compliance with Revisal, sec. 448. *Ibid.*

6. *Justice's Court—Lands—Liens—Proceedings Quasi in Rem.*—A justice of the peace can acquire no jurisdiction of the person served with process in the wrong county by virtue of a lien filed on his land situated in the county in which the justice resides, upon the ground that the proceedings are *quasi in rem* and the judgment rendered affected the sale of the land under the lien upon it. *Rutherford v. Ray,* 253.

7. *Judgment — Justice's Court — Transcript — Jurisdiction Shown — Purchaser for Value.*—The transcript of a justice's judgment should show jurisdictional facts for the protection of purchasers of real

JURISDICTION—*Continued.*

property sold under execution thereon. When the transcript shows affirmatively that no jurisdiction had been acquired, the defense that the purchaser is one for value, etc., cannot be sustained. *Ibid.*

8. *Judgments, Void—Collateral Attack—Justice's Court—Jurisdiction of Parties.*—A judgment rendered by a justice of the peace upon a summons wrongfully issued to another county is void and may be collaterally attacked. *Ibid.*

9. *Claim and Delivery—Action in Superior Court—Revisal, Sec. 1995.*—When parties, landlord and tenant, have an adequate remedy by claim and delivery, but do not resort to it, they may bring an action in the Superior Court to determine the matters in controversy. Revisal, sec. 1995. *Talbot v. Tyson*, 273.

10. *Superior Courts—Hearing Cause in Another County—Orders—No Jurisdiction.*—A judge of the Superior Court, except by consent appearing of record, or where special statutory provisions have been made, has no jurisdiction to hear a cause or make orders therein in a different county from the one in which the action is pending. *Bank v. Peregoy*, 293.

11. *Same—Substantial Rights.*—The judge of the Superior Court has no jurisdiction, upon motion in the cause, to order a sale of lands in the hands of a receiver, affecting a substantial right and interest of the parties to the action, outside of the county wherein the action is pending. An order of sale may be made out of term, but a final order can be made only at the term of the court. *Ibid.*

12. *Appeal and Error—Penalty Statutes—Corporation Commission—Rules—Orders, How Enforcible—Appeal Will Not Lie, When—Procedure.*—The Corporation Commission has no power to enforce its orders and decrees by final process issuing directly therefrom, and for such purpose resort must be had to ordinary courts, either by independent proceedings or in proper instances by process issued in cases carried before such courts on appeal. Therefore, when on complaint made by a consignee of goods investigation was had and award made that a rule of the commission had been violated by the railway, and that a penalty provided by such rule should be paid, and further that the rules of the Corporation Commission made for protection of shippers in such cases should be observed and obeyed, no appeal lies from such ruling, as the statute and rules themselves already require obedience, and consequently no right or interest of the parties was in any way affected. *Hardware Co. v. R. R.*, 483.

13. *Same—Power to Investigate—Suit for Penalty.*—The statute itself requiring that all lawful rules of the Corporation Commission should be obeyed, and the penalty allowed by the rule in this instance being only recoverable by action in a court of a justice of the peace, the only effect of the proceedings and orders made was to inform the commission on the subject-matter of the complaint and to enable it to intelligently determine whether suit should be entered by the commission for the larger penalty of $500 allowed by statute for disobedience of its lawful rules and orders; and no appealable order having been made, the proceedings both in the Superior Court and Supreme Courts are *coram non judice*, and will be dismissed on motion. *Ibid.*

JURISDICTION—*Continued.*

14. *Principal and Surety—Default of Principal—Payment by Surety—Justices of the Peace.*—Upon the payment of a debt by a party secondarily liable therefor, he is substituted in equity to the rights of the creditor, and may sue thereon, as the creditor could have done, without any actual or legal assignment, under the doctrine that equity considers that as done which should have been done. Therefore, when the amount is $200 or less, a suit by a surety for the recovery of money misappropriated by his principal, which he has paid, is within the jurisdiction of a justice of the peace, certainly where the creditor has made a written assignment of the debt to the surety, making the latter both the legal and equitable owner of the debt, and the action when brought in the Superior Court should be dismissed. *Fidelity Co. v. Grocery Co.*, 510.

15. *"Clerk of Court"—Interpretation.*—The jurisdiction, under Revisal, sec. 2842, is conferred upon the clerk by virtue of Revisal, sec. 352, providing that "the words 'Superior Court' or 'court' mean the clerk of the Superior Court, unless otherwise specifically stated, or unless reference is made to a regular term of the court." *Bank v. Hotel Co.*, 595.

16. *Amount of Possible Recovery.*—The jurisdiction of the Superior Court is dependent upon the amount for which, in the most favorable aspect for plaintiff, judgment could be rendered upon the facts set out in the complaint. *Realty Co. v. Corpening*, 613.

17. *Courts—Waiver—Supreme Court.*—When the action arises solely upon contract the question of jurisdiction may not be waived, and may be raised in the Supreme Court for the first time. *Ibid.*

18. *Same—Breach of Contract—Amount of Recovery—Judgment Demanded.*—When the cause of action in the complaint is the breach of contract of defendant to make a deed to land to a purchaser the plaintiff had procured thereunder; that the land was sold for $4,000 and it was entitled to an agreed commission of 5 per cent., including all costs of sale, the Superior Court has no jurisdiction, as the action did not sound in tort and the amount of the recovery could not exceed $200, though a judgment of $500 was demanded, including costs of advertising in a sum not named. *Ibid.*

19. *Service—Summons—Nonresident Defendant—Seal of Clerk—Irregularity.*—A summons issued without the seal of the clerk of the court, personally served upon nonresident defendants (Revisal, 448), is an irregularity. *Vick v. Flournoy*, 209.

20. *Service—Summons—Nonresident Defendant—Seal of Clerk—Irregularity Cured.*—Objection made to the summons for that it was issued under Revisal, sec. 448, without the seal of the clerk of the court, to nonresident defendants, cannot be sustained when it appears that defendants have been actually notified of the time and place of the trial and informed of the nature and purpose of the action. Such defect may now be cured by the act of the clerk in supplying the seal pursuant to order properly made in the cause. *Ibid.*

JUSTICE OF THE PEACE. See Jurisdiction.

KILLING, WRONGFUL. See Limitation of Actions.

LABOR AND MATERIAL. See Liens.

LANDLORD AND TENANT.

Claim and Delivery—Action in Superior Court—Revisal, Sec. 1995.—When parties, landlord and tenant, have an adequate remedy by claim and delivery, but do not resort to it, they may bring an action in the Superior Court to determine the matters in controversy. Revisal, sec. 1995. *Talbot v. Tyson*, 273.

LAPPAGE OF LANDS. See Deeds and Conveyances.

LATENT DEFECT. See Contracts.

LEGAL EXCUSE. See Contracts.

LEGISLATIVE POWER. See Penalty Statutes; Constitutional Law.

LEGISLATIVE RESTRICTION. See Constitutional Law.

LESSOR AND LESSEE.

1. *Timber—Cordwood—Lease.*—A railroad company using wood-burning locomotives leased its property, etc., to another company for a term of ninety-one years and more, including "all lands and interests in lands, timber rights, and contracts now owned by the lessor": *Held*, the operative words of the lease included within their meaning executory contracts then existing with third persons to furnish cordwood for lessor's locomotives, it appearing that there were no other timber contracts outstanding and that the significance of the words employed, taken with the testimony, evidenced that contracts to furnish cordwood were those intended to be thereby embraced. *R. R. v. R. R.*, 368.

2. *Lease—Construction—Contracts Assigned—Primary Liability—Covenant Against Debts.*—Under a lease from one railroad company to another of its railroad, etc., by which the lessee company operated the leased railroad, an executory contract between the lessor road and a third person was assigned, under which the lessor was to be furnished cordwood for its wood-burning engines: *Held*, the assignment of the contract established as between the parties to the lease a primary liability on the part of the defendant lessee, and the obligations of that contract would not by any fair or correct interpretation be included under the later stipulation of the lease "that the lessee shall not be liable for any debt of the lessor at that date." *Ibid.*

LIENS. See Water and Water-courses; Jurisdiction; Mortgages, Chattel.

1. *Labor and Materials—Lien Lost—Personal Action Against Owner.*—The lien provided for a laborer or material man, under Revisal, sec. 2028, can be acquired without filing, if a statement of the amount due is rendered the owner, under Revisal, sec. 2022; and when the lien thus acquired is lost by not bringing suit within six months [Revisal, secs. 2027, 2033 (4)], an action can be maintained against the owner personally for his failure in his "duty to retain from the money due the contractor a sum not exceeding the price contracted for," etc. Revisal, sec. 2021. *Hildebrand v. Vanderbilt*, 639.

2. *Same—Limitation of Actions Pleaded by Owner for Contractor.*—When the owner is sued by a laborer or material man in time, and

LIENS—*Continued.*

subsequently, after the statute had run in favor of the contractor, he was made a party and filed no answer, the owner cannot plead the statute of limitation for the contractor in his own behalf, the plea being personal to the contractor. *Ibid.*

3. *Labor and Materials—Lost Liens—Judgment, Amount of—Adjustment of Claims.*—The laborer or material man can only recover of the owner his *pro rata* part of that sum which the owner is required to "retain from the contractor then due" (Revisal, sec. 2021), this *pro rata* to be determined after consideration by the court below of all the claims of laborers, etc., against the contractor—their priorities, validity, etc.; and a judgment fixing the owner with a liability greater than that demanded for the satisfaction of the plaintiff's claim, without making the other like claimants parties, must be remanded and reformed. *Ibid.*

4. *Labor and Materials—Lost Liens—Judgment to Pay into Court—Irregular Execution.*—A judgment rendered against the owner and in favor of material men, etc., which requires the owner to pay any sum into court, is irregular. The judgment should fix the amount due, for which an execution may issue. *Ibid.*

5. *Corporations—Liens for Labor—Caretaker.*—A caretaker cannot acquire a lien upon the real property of a corporation he has taken charge of under agreement that he was to receive for his services the use thereof and pay the taxes thereon and take care of the property of the company without charge. *Bruce v. Mining Co.*, 642.

6. *Same—Statute Not Complied With—Requirements.*—To constitute a lien under the statute for work and labor done for a corporation, it must not only be actual work and labor done, but it must be done under a contract to that effect, and the statute in regard to filing such liens must be complied with. *Ibid.*

LIMITATION OF ACTIONS.

1. *Deeds and Conveyances—Purchaser at Foreclosure Sale—Deed—Color—Adverse Possession.*—When the purchaser of lands at a foreclosure sale enters into possession under a deed of definite description, such is color of title in him and those claiming under him, and becomes indefeasible at the expiration of seven years adverse possession. *Sutton v. Jenkins*, 11.

2. *Deeds and Conveyances—Title Made to Husband—Trusts and Trustees.* When it appears that the *feme* plaintiff, with her husband, conveyed her land and took a mortgage to secure the purchase money, and the mortgage was foreclosed and the title to the land was procured by the husband to be made to himself, he thus acquires as her trustee, and the statute of limitations will begin to run against her from the date of his deed. *Ibid.*

3. *Assault—Damages—Agreement Not to Plead Statute.*—In an action to recover damages for an assault it is necessary for the plaintiff, in order to rebut the plea of the one-year statute of limitation [Revisal, sec. 397 (3) by forbearance on his part to sue, to show an agreement with defendant not to plead it, or some conduct on his part which would make it iniquitous for him to do so. Defendant's promise to

LIMITATIONS OF ACTIONS—*Continued.*

investigate the charges and his unaccepted request not to sue at all, without any reference to the statute, are insufficient. *Brown v. R. R.*, 217.

4. *Same—Writing—Quære.*—As to whether a promise not to plead the statute of limitations [Revisal, sec. 397 (3)] in an action to recover damages for an assault should be in writing, *quære. Ibid.*

5. *Easements—Highways—Permanent Damages.*—Revisal, sec. 1571, applies to the statute of limitations respecting defendant's constructing its telephone lines along a highway, and is not applicable when the action is for permanent damages otherwise occasioned to the use of plaintiff's land by the construction of telephone lines. *Wade v. Telephone Co.*, 219.

6. *Revisal, Sec. 59—Actions—Negligence—Killing—One Year—Condition Annexed.*—Under Revisal, sec. 59, giving a cause of action on account of the wrongful killing of intestate to the (executor) administrator or collector of decedent, the provision that suit should be brought within one year after such death is a condition annexed and must be proved by the plaintiff to make out a *prima facie* case, and is not required to be pleaded as a statute of limitation. *Gulledge v. R. R.*, 234.

7. *Same—Controversy—Executors and Administrators—Collectors.*—It is no excuse for plaintiff not bringing an action under Revisal, sec. 59, within one year, etc., to show that there was a controversy over the administration. A collector should have been appointed for the purpose of suit. *Ibid.*

8. *Railroads—Municipal Powers—Abutting Owner—Damages—Independent Action.*—When an abutting owner has established his right to sue as such for the damages sustained by him peculiar to his ownership, he is barred by the statute of limitations, although the town is not barred for obstructing the street. *Staton v. R. R.*, 428.

9. *Railroads—Revisal, Sec. 394—Damages, Permanent—First Substantial Injury.*—Under Revisal, sec. 394, subsec. 2, providing that no suit, etc., shall be brought or maintained by any person for damages caused by the construction of a railroad, etc., unless commenced within five years after the cause of action accrues, etc., the time at which the action accrues is not necessarily counted from the construction of the railroad, but from the first substantial injury which was thereby caused by rights of property incident to the construction of the road. *Ibid.*

10. *Same—Damages Not Permanent—Measure of Damages—Limitation of Actions.*—While an action for damages sustained by the construction and operation of a railroad may be barred under Revisal, sec. 394, subsec. 2, if suit be not brought therefor within five years against a railroad for the use of the street for railroad purposes, this rule does not apply to cases where the damages are not of a permanent kind, but which arise from an unlawful use of the street by a spur track for depot purposes or the loading or unloading of cars and the placing of engines thereon so as to become a nuisance to the owner. The damages recoverable are confined to those sustained within three years prior to the institution of the action. *Ibid.*

LIMITATIONS OF ACTIONS—*Continued.*

11. *Judgments—Nonsuit—Another Action.*—When a motion as of nonsuit upon the evidence is sustained the plaintiff may bring another action within one year. *Henderson v. Eller*, 582.

12. *Pleaded by Owner for Contractor.*—When the owner is sued by a laborer or material man in time, and subsequently, after the statute had run in favor of the contractor, he was made a party and filed no answer, the owner cannot plead the statute of limitation for the contractor in his own behalf, the plea being personal to the contractor. *Hildebrand v. Vanderbilt*, 639.

MANDAMUS. See Judgments.

1. *County Treasurer—Refusal to Pay County Funds—Proper Order.*—Upon refusal of a county treasurer to pay from the public funds of a county an order made on him by a board of audit and finance for the payment of moneys authorized and prescribed by a legislative enactment a *mandamus* will lie. *Audit Co. v. McKensie*, 462.

2. *Jurisdiction—Chambers—No Money Demand—County Treasurer.*—A judge of the Superior Court has jurisdiction at chambers, and it is his duty to hear and determine proceedings for a *mandamus* to compel the payment by a county treasurer, admitting he had funds sufficient, of an order made by a county board of audit and finance under authority of a legislative enactment. This was not a money demand within the meaning of Revisal, sec. 824, as there were no issues of fact to be tried by a jury. *Ibid.*

3. *Duty of County Treasurer.*—It is not within the power of a county treasurer to refuse to pay moneys upon a proper order when he has funds sufficient and applicable, and his knowledge as to whether they were due to the one to whom payment was ordered is immaterial in proceedings for a *mandamus* to compel him to pay. *Ibid.*

4. *Alternate Writ Unnecessary, When — Peremptory Writ — Supreme Court.*—When upon the proceedings for a *mandamus* the defendant has already had a full opportunity for showing cause why a peremptory writ should not issue, which cause was held sufficient by the lower court, but reversed on appeal, and there is no practical use of an alternate writ, the defendant having set up in his answer every reason why a peremptory writ should not issue, such writ may be adjudged by the Supreme Court to issue from the proper judge of the Superior Court upon application at chambers. *Ibid.*

MARRIED WOMEN. See Process; Deeds and Conveyances.

MEASURE OF DAMAGES.

1. *Telegraph Companies — Negligence — Evidence — Contributory Negligence—Proximate Cause.*—When the evidence tends to show that the defendant telegraph company negligently delayed the delivery of a message to the one in whose care it was sent, relating to the

MEASURE OF DAMAGES—*Continued.*

sickness of plaintiff's wife, and requesting him to come to her, so that the addressee lost an opportunity of sooner being with her, and there was a further delay on the part of the one in whose care the message was sent in delivering it to the addressee, causing plaintiff to miss the next opportunity of going, the only question presented is upon the measure of damages, not one of contributory negligence or proximate cause; and it was not error in the court below to refuse to instruct the jury that plaintiff could not recover. *Gerock v. Telegraph Co.*, 1.

2. *Declarations, When Competent — Personal Injury — Subsequent Suffering—Evidence.*—While the declaration of the plaintiff, in a suit for damages for personal injury, is not competent evidence when given by another witness, it is not objectionable when given by the plaintiff in person, and he will be permitted to testify that since the injury was inflicted he had suffered from extreme nervousness and "nightmares." *Brown v. R. R.*, 136.

3. *Declarations, When Competent — Personal Injury — Subsequent Suffering—Evidence—Expert.*—Evidence is competent tending to show that, since the injury complained of, and not before, the plaintiff has suffered from nervousness and excessive "nightmares," as corroborative of the expert evidence of a physician regarding the effects of the bodily injury received. *Ibid.*

4. *Telegraph Companies—Rights of Public, Invasion of.*—Nominal damages are awarded against a telegraph company for the violation or invasion of some legal right of its patron, and to determine such right, and when substantial damages are shown, the injured party can recover, on account of the wrongful act, compensation commensurate with the injury thereby sustained. *Hocutt v. Tel. Co.*, 186.

5. *Telegraph Companies — Negligence—Ordinary Care—Repeating Message — Substantial Damages — Avoidance of Injury — Questions for Jury.*—When the operator of defendant, erroneously supposing that a telegram had not been addressed to the correct destination, returned it to the sender, with the money sent to pay its toll, and afterwards asked the sender to send him the message again, so that he might transmit it as written, which she refused to do, and requested another person, as her agent, to have the message sent, it is for the jury to find whether the sender therein exercised ordinary care, after knowledge of the negligence of defendant's oprator, in not repeating the message, when requested by him to do so, or whether her agent exercised due care, and if not, whether except for such negligence on her part or on the part of her agent, the addressee would have received the telegram in time to have avoided the infliction of substantial damages. *Ibid.*

6. *Easements—Evidence.*—In an action for permanent damages to land, claimed by reason of construction of a telephone line, the measure of damages is the difference in value before and that after the bur-

MEASURE OF DAMAGES—*Continued.*

den was imposed upon it, and while it were better form to ask witness the value of the land in each event, it is not reversible error to permit him to testify directly to the amount of the damages. *Wade v. Telephone Co.*, 219.

7. *Same—Evidence—Opinion Evidence.*—While it is essentially a matter of opinion, in an action to recover permanent damages, for witness, who knows the land, to testify to the value of plaintiff's land upon which defendant has constructed its telephone line, and the effect upon such value by improvements upon the one hand or burdens upon the other, it is not objectionable as "opinion evidence." The jury may give it such weight as they think it entitled to, in connection with the intelligence of the witness, his means of observation, and all the other circumstances attending his testimony. *Ibid.*

8. *Same—Instructions—Corporations—Easements—Harmless Error.*—An instruction upon the measure of damages, in an action against defendant corporation to recover permanent damages to land occasioned by the construction of its telephone lines, that the jury will consider the value of the "franchise of the company" is harmless error when it appears that his Honor's meaning was the value of the easement or privilege acquired over plaintiff's land, and the plaintiff was not prejudiced. *Ibid.*

9. *Lease — Covenants — Breach—Defense—Tendered—Suit—Expense Incurred.*—The lessor and lessee railroad companies covenanted in the lease upon the part of the latter that it would "indemnify and save harmless the lessor road from any and all damages which may be recovered from or against it" by reason of its failing in its duties and obligations arising under the lease; upon the part of the former, to immediately give notice to the lessee of such suits and actions: *Held*, the lessee is responsible in damages to the lessor for the principal, interest, and costs of a judgment recovered against it in a suit brought upon a contract which the lessee had assumed, and caused by the failure or refusal of the lessee to perform, together with moneys expended by the lessor for reasonable attorney's fees therein incurred, when the defense had been duly tendered and refused. *R. R. v. R. R.*, 368.

10. *Same—Damages Not Permanent.*—While an action for damages sustained by the construction and operation of a railroad may be barred under Revisal, sec. 394, subsec. 2, if suit be not brought therefor within five years against a railroad for the use of the street for railroad purposes, this rule does not apply to cases where the damages are not of a permanent kind, but which arise from an unlawful use of the street by a spur track for depot purposes or the loading or unloading of cars and the placing of engines thereon so as to become a nuisance to the owner. The damages recoverable are confined to those sustained within three years prior to the institution of the action. *Staton v. R. R.*, 428.

MEASURE OF DAMAGES—*Continued.*

11. *Carriers—Delay in Shipment.*—When the evidence in a suit against a railroad company for damages in delay in shipment of brick shows, without more, that the brick were received by the defendant for shipment, and that an unreasonable delay occurred therein, the measure of plaintiff's loss is the interest during the delay on the amount plaintiff had invested in the shipment. *Development Co. v. R. R.*, 504.

12. *Ventilated Cars, Failure to Furnish.*—When it is shown by the evidence that a ventilated car was the only reasonable means by which the defendant railroad could transport at that season of the year a car-load of fruit for the shipper; that it failed to furnish this character of car, and furnished only a box car, upon which plaintiff loaded his fruit, and in consequence the damage complained of was occasioned, the measure of damages is the actual loss in value due to the fruit being in an improper car, and not the interest on the difference between the value of the fruit at the initial and terminal points for the period elapsing incident to the delay in settlement. The rule where the carrier fails to ship and the shipper retains the goods distinguished. *Forrester v. R. R.*, 553.

MINORS. See Process.

1. *Unlawful Employment of — Constitutional Law — Parent and Child—Public Good—Revisal, Sec. 3362.*—Revisal, sec. 3362, making it a misdemeanor for the employment of children under 12 years of age by certain factories or manufacturing establishments, is constitutional and valid and not in contravention of the Fourteenth Amendment to the Constitution of the United States as an unlawful restriction of the right of the parent to the labor of the child, it being for the purpose of promoting the general welfare by protecting minors from injury by overwork, from liability to injury by machinery in large manufacturing plants, and by facilitating their attendance at school. *Starnes v. Mfg. Co.*, 556.

2. *Unlawful Employment of—Evidence—Negligence—Causal Connection—Proximate Cause.*—Defendant manufacturing company employed a child under 12 years of age to work in its establishment, in violation of Revisal, sec. 3362. His duties were to sweep out spinning-room and make bands, but on the day in question he went to another part of the factory, as he had frequently done before, to see his father, who was running a carding machine. When the father was twenty steps distant, tending another machine, the child attempted to pick a piece of cotton off the card and got his hand caught and injured in the cylinder of one of the machines in his father's charge: *Held*, (1) there was a direct causal connection between the unlawful employment of the child and the injuries sustained by him, for which the defendant is liable, occasioned by his being employed on the premises, where he was subject, through childish carelessness incident to his years, to tamper with dangerous machinery; (2) there was no error in the lower court refusing to instruct the jury upon the doctrine of proximate cause, at defendant's request. *Ibid.*

MISTAKE OF DRAUGHTSMAN. See Mortgagor and Mortgagee.

MORTGAGES, CHATTEL.

1. *Liens — Parol Mortgage — Evidence — Proof.*—In an action to engraft upon a written chattel mortgage a lien by parol upon after-acquired merchandise in defendant's store the plaintiff's evidence tended to show that the defendant gave to B. the written mortgage on his stock of goods to secure him (B.) for a debt due. Afterwards the defendant gave the written mortgage to B. to secure a debt he owed the plaintiff. W., the president of plaintiff company, was absent at this time, and upon the trial testified that defendant afterwards told him that the written mortgage given to B. was to secure his company for goods he "had bought or might buy," and that he "never denied the mortgage in all conversations they had had." It further appeared that plaintiff requested further security and defendant declined to give it: *Held*, (1) the evidence was insufficient to establish the parol lien that the provisions of the written mortgage were thereby extended to after-acquired goods in the store; (2) that the expressions used by defendant, as testified to by W., by reasonable intendment referred to the fact that the written mortgage was to secure under its terms goods which defendant had bought or might buy from plaintiff. *White v. Carroll*, 330.

2. *Liens — Chattel Mortgages — Correction—Contracts—Parol Evidence—Mutual Mistake.*—To correct a written chattel mortgage given to secure plaintiff for merchandise sold and delivered to defendant while conducting a mercantile business, so as to embrace after-acquired goods, the proof must be clear and convincing that the true intention of the parties was not expressed in the mortgage, and that description of the property now claimed was omitted by mutual mistake, in such manner as not to vary the terms of the written instrument. The evidence of W., the president of the plaintiff company, who was not present at the time the mortgage was given, that defendant afterwards told him it was for goods "he had bought or might buy," and that "he had never denied the mortgage," is insufficient. *Ibid.*

MORTGAGOR AND MORTGAGEE, See Chattel Mortgages.

1. *Deeds and Conveyances—Mistake of Draughtsman — Evidence.*—When the defense to the foreclosure of a mortgage, in an action brought by the plaintiff's intestate, was that the mortgagee did not intend it to be operative after her death, and that through mistake of the draughtsman it did not therein so appear, the defendant's evidence fails to show such mistake when he testifies "that it was written in the terms directed by the mortgagee; that he read it over to her and she said it was as she wished." *Jones v. Norris*, 84.

2. *Deeds and Conveyances—Ambiguities — Construction.*—The use of the expression in a mortgage that it "is not collectible after my death" may, by parol, be shown to apply to the death of the mortgagee, as the word "my," taken in connection with the balance of the sentence, is ambiguous and incapable of a reasonable meaning. *Ibid.*

3. *Deeds and Conveyances — Evidence, Parol, Admissible, When.*—Parol evidence is competent, as not varying or contradicting the written instrument, to show that the words "my death" referred to the death of the mortgagee, when used in the following expression, contained in a mortgage: "If this mortgage is not settled before my death, afterwards it is not collectible." *Ibid.*

MORTGAGOR AND MORTGAGEE—*Continued.*

4. *Deeds and Conveyances—When Mortgage Becomes Unenforcible Under Its Terms—Note Secured—Evidence.*—When it is conceded that a mortgage is no longer enforcible, owing to the happening of the contingency under which it was to be inoperative, and it appears from a reasonable construction that the debt secured by it was included, the collection of the notes given as evidence of the mortgage debt is not enforcible between the parties. *Ibid.*

5. *Two Mortgages—Marshaling of Assets—Disputed Premises—Surplus—Appeal and Error.*—When in an action by the plaintiff, the junior mortgagee, to restrain the senior mortgagee from selling the smaller quantity of land embraced in his mortgage until or unless necessary, an affirmative defense is set up by the mortgagor, that a larger quantity of land was fraudulently induced by the plaintiff to be conveyed to him, and the issue was addressed to the affirmative defense and found adversely to plaintiff, an appeal will lie only from a judgment disposing of the surplus arising from the sale of the disputed premises, in the event such should become necessary and be made. *Gray v. James*, 139.

6. *Purchaser of Mortgaged Goods—Possessory Action—Inadequate Value of Mortgaged Goods — Judgment of Ownership — Costs.*—In a suit brought by mortgagees for the possession of certain goods embraced in their chattel mortgage against the defendant, who had subsequently bought them from the mortgagor, when it is found that the plaintiffs, mortgagees, were owners and entitled to possession, and that the goods would not bring the mortgage debt: *Held*, (1) it was not error in the court below to render judgment that plaintiffs, mortgagees, recover the goods embraced in this mortgage instead of for the possession and sale of the goods; (2) in the absence of tender of judgment by defendant (Revisal, sec. 860) the plaintiffs should recover their costs of the action. *Phillips v. Little*, 282.

7. *Adverse Possession—Color of Title—Mortgage—Deeds and Conveyances — Ripening Title — Verbal Sale — Evidence.*— Defendants, claiming lands under seven years color of title, showed a mortgage from H. to B. in 1894, and conveyance from B. to them in 1900. The action of plaintiffs was begun against them in 1905. There was testimony that defendants' possession commenced in 1900 and that it was taken over from C., who had it in 1898 as lessee of B. C. immediately succeeded R., who had been in possession two or three years under verbal bargain and sale from B.: *Held*, (1) that the mortgage from H. to B. was "color," and the deed from B. to defendants tended to ripen title of the latter by virtue of seven years possession under known and visible boundaries; (2) that the possession of R. under the verbal bargain and sale from B., from whom defendants claimed, was evidence of "color," inuring to the benefit of defendants as tending to show title in B. *Stewart v. Lowdermilk*, 583.

8. *Trusts and Trustees—Bondholders—Action to Foreclose—Defenses of Caretaker.*—One who was put in possession of mortgaged real property of a corporation as a caretaker cannot resist a possessory action brought by the trustee in behalf of the bondholders, when the corporation makes neither defense nor objection, nor contests in its own right the validity of the mortgage. *Bruce v. Mining Co.*, 642.

MUNICIPAL CORPORATIONS.

Board of Audit and Finance—Authority to Employ Expert—Scope of Employment.—When the act creating a board of audit and finance for a county provides for their compensation for only ten days in any one year at a certain sum per day, and general power is given it to employ an expert accountant and fix his compensation, to be paid from the public funds, etc., it is not thereby required that his work be performed within the time limit prescribed for the members of the board or that his compensation be limited to any particular amount *per diem*. *Audit Co. v. McKensie*, 461.

NEGLIGENCE. See Railroads; Street Railroads; Telegraph Companies.

1. *Telegraph Companies — Evidence — Principal and Agent — Prior Negligence—Nominal Damages.*—When there is evidence of negligence of a telegraph company prior to the time of the delivery of a telegram to the party in whose care it was sent, it is sufficient to support a verdict of at least nominal damages. *Gerock v. Telegraph Co.*, 1.

2. *Telegraph Companies—Evidence—Measure of Damages — Contributory Negligence—Proximate Cause.*—When the evidence tends to show that the defendant telegraph company negligently delayed the delivery of a message to the one in whose care it was sent, relating to the sickness of plaintiff's wife, and requesting him to come to her, so that the addressee lost an opportunity of sooner being with her, and there was a further delay on the part of the one in whose care the message was sent in delivering it to the addressee, causing plaintiff to miss the next opportunity of going, the only question presented is upon the measure of damages, not one of contributory negligence or proximate cause; and it was not error in the court below to refuse to instruct the jury that plaintiff could not recover. *Ibid.*

3. *Contracts—Independent Contractor—No Control—No Liability.*—In the absence of negligence in the selection of an independent contractor, or such inherent danger in the work to others as to impose the duty of absolute care, the owner of the premises is not liable for the acts of such independent contractor, he having no control over him or the selection of his servants, in the performance of the terms of the contract. *Young v. Lumber Co.*, 26.

4. *Same—Character of Work.*—Cutting standing timber trees on one's own land, not immediately adjacent to any public highway or residence, but near to a private path leading to a spring, is not inherently dangerous as to impose upon the owner the duty of absolute care for the safety of persons using the path. *Ibid.*

5. *Mooring Barge in Canal.*—It is actionable negligence on the part of the defendant to improperly moor a barge in its canal, so as to cause injury to plaintiff's vessel while it was being towed by defendant through its said canal. *Gillikin v. Canal Co.*, 39.

6. *Same—"Obstruction."*—A large barge, negligently moored to the bank of a canal, so that thereby it is drawn or floats out into the canal, causing injury to plaintiffs' vessel, inflicting serious damage, is within the meaning of the term "obstruction." *Ibid.*

7. *Explosives — Duty of Owner of Premises — Trespasser — Pistol Shot—Evidence — Nonsuit.*—Defendant construction company, engaged in building a railroad for defendant railway company, stored a quantity

NEGLIGENCE—*Continued.*

of dynamite, to be used in its operations, in a shanty on its right of way, near by a public highway. Plaintiff, passing near to the shanty, not knowing its contents, fired a pistol ball into a knot-hole in the shanty as a target, exploding the dynamite and injuring plaintiff: *Held*, (1) that defendant was not guilty of any breach of duty to plaintiff in the premises; (2) that the proximate cause of the explosion was the wrongful trespass by plaintiff in unlawfully shooting into the shanty; (3) that the court below should, upon plaintiff's evidence, have sustained a motion for judgment of nonsuit. *McGhee v. R. R.*, 142.

8. *Same.*—It is immaterial whether plaintiff was in the highway or on the right of way at the time he fired the pistol. In either place he became a trespasser by firing the ball into the shanty. *Ibid.*

9. *Same—Public Nuisance.*—If defendant's act constituted a public nuisance, he was liable to indictment, and to an action for damages by one who sustained special injury, of which such nuisance was the proximate cause. *Ibid.*

10. *Public Nuisance—Damages—Proximate Cause.*—When the plaintiff sues for special damages by reason of a public nuisance, he must show as an essential element in his cause of action that such nuisance was the proximate cause of his injury. When upon his own evidence he fails to do so, the court should enter judgment of nonsuit. *Ibid.*

11. *Trespasser—Explosives—Duty of Owner of Premises—Reasonable Precaution.*—The measure of duty which the owner of the premises owes to a trespasser is not to willfully injure him or to place a dangerous instrumentality on his premises, if he has reasonable cause to believe that a trespasser will come thereon and be injured—that is, to take reasonable precaution to prevent injury to an apprehended trespasser. *Ibid.*

12. *Railroads—Contributory Negligence—General Rule—Recovery Barred.* As a general rule, a person who enters on a railway track in front of a train he knows to be approaching is guilty of such negligence as will bar recovery for injury he may thereby sustain, though the agents and employees of the road may have been negligent as to signals or other warnings to indicate the approach of the train. *Royster v. R. R.*, 347.

13. *Same.*—The contributory negligence of the plaintiff will bar recovery in a suit against a railroad company when, under his own evidence, it appears that he was not an employee of the company, and in assuming to act for an employee attempted at night to signal a train he knew to be approaching by placing a lighted lantern on the track; that he went to a place of safety, then back upon the track, without first looking or listening for the train, and was injured, though the employees of the company on the engine may not have blown the whistle, rung the bell, or have had the headlight of the locomotive lighted. In such instances a judgment as of nonsuit upon the evidence was properly allowed. *Ibid.*

14. *Railroads — Evidence — Scintilla — Questions for Jury.* — When it appeared from the plaintiff's evidence, in an action to recover damages for the negligent killing by the defendant railroad company of

NEGLIGENCE—*Continued.*

plaintiff's intestate, that the car upon which plaintiff's intestate was usually employed was derailed, owing to the unsound condition of the track, together with other circumstantial evidence; that he was thereon at the time of the derailment; that he was well and left home in the morning for the usual purpose of the trip as a railway postal clerk and returned home on the afternoon of the same day sick, nervous, and exhibiting signs of serious injury; and when from the testimony of his attending physician it appeared that immediately thereafter he had such symptoms and bruises on his body as to indicate the conditions from which his death soon afterwards resulted, it was error in the court below to sustain defendant's motion for judgment as of nonsuit upon the evidence, it being more than a scintilla and sufficient to take the case to the jury. *Cox v. R. R.*, 353.

15. *Railroads — Pleadings — Demurrer — Rights of Passenger — Contributory Negligence — Contract, Breach of — Nominal Damages.* The complaint alleges that the plaintiff was a passenger on defendant's passenger train scheduled to stop at his destination, and tendered the conductor the money or fare thereto, and was informed by the conductor that the train would not stop there on that trip; that it was impossible to do so. At plaintiff's urgent solicitation the conductor repeatedly refused to stop the train, for the reason given. The plaintiff, in the presence of the conductor, got upon the steps of the car and informed the conductor that he was bound to stop. The train slackened its speed and the conductor "threw up his hand," which plaintiff understood was given for him to jump, and he did jump, but after he felt the train gathering speed, and was injured, the signal being to the engineer to go ahead: *Held*, (1) that under such allegations the plaintiff was guilty of contributory negligence that would bar recovery for actual damages; (2) that for the breach of defendant's duty to stop the train according to its schedule it was answerable in nominal damages; (3) that a demurrer to the complaint should not have been sustained. *Owens v. R. R.*, 357.

16. *Defective Flues—"Stovepipe" — City Ordinance — Interpretation.* — A city ordinance providing that, "Whenever any *stovepipe* used in any building in its corporate limits shall pass through a wall, partition, flooring, or ceiling," it shall be inclosed in brick where it so passes and separated from contact with such wall, partition, flooring, or ceiling by brickwork not less than 4 inches in thickness and not permitted to be nearer the woodwork than 2 inches, etc., refers to a metal pipe and has no application to earthern or terra-cotta flues into which the pipe is inserted. *Fowle v. R. R.* 491,.

17. *Same—Competent Builder, Reliance Upon—Maintenance.*—In an action for damages alleged to have been occasioned by fire from the faulty construction of a flue through the roof of the building, when the evidence was conflicting, it was error in the judge to refuse to instruct the jury that "If you find the flue in question was constructed by a competent builder, of safe material, in a safe manner, and was not negligently permitted to become defective, the maintenance of the flue was not negligence, even if the fire originated therefrom." *Ibid.*

18. *Railroads—Carriers—Suitable Cars—Failure to Furnish—Liability of Carrier.*—A railroad company, by accepting for shipment a car-load

NEGLIGENCE—*Continued.*

of fruit, contracts that it will transport it to destination with due diligence and in good condition, except as to such damage as might be incident to freight of this character, and includes in that contract the furnishing of a ventilated car when usual or reasonably necessary. *Forrester v. R. R.*, 553.

19. *Same—Knowledge of Shipper.*—When a railroad company fails in its duty to furnish the shipper a ventilated car for transporting his fruit and furnishes a box car instead, the company is not relieved from liability solely by the fact that the shipper knew his fruit was forwarded in a box car. *Ibid.*

20. *Minors, Unlawful Employment of—Negligence Per Se—Revisal, Sec. 3362.*—It is negligence *per se* for a factory or manufacturing plant to employ a child under 12 years of age to work therein, when in violation of Revisal, sec. 3362. (*Rollins v. Tobacco Co.*, 141 N. C., 300; *Leathers v. Tobacco Co.*, 144 N. C., 330, cited and approved.) *Starnes v. Mfg. Co.*, 556.

21. *Safe Appliances — Evidence — Testimony as to Facts, Not Opinion.* When plaintiff contends that the negligent failure of defendant to furnish a safety shield, in general use, to a buzz planer at which he was employed to work was the cause of his hand getting caught in the machinery and inflicting the injury complained of, it is incumbent on him to prove, and it is competent for him to testify, not as his opinion, but as to the facts within his own knowledge, that the shield had been upon the planer and was taken off by defendant's overseer, under his objection, to save time; that with the proper use of the shield his hand could not have been caught, explaining why, and that he would have used it properly. (*Marks v. Cotton Mills*, 135 N. C., 287, cited and distinguished.) *Bennett v. Mfg. Co.*, 620.

22. *Same—Nonsuit—Some Evidence.*—A motion as of nonsuit upon the evidence will not be sustained in an action for personal injury occasioned to plaintiff in operating, in the course of his employment, a buzz planer of defendant, when there is evidence tending to show that the use of the buzz planer without a shield is unsafe, and that the defendant's overseer had taken away the shield to save time, under plaintiff's objection that it was dangerous to do so. *Ibid.*

23. *Railroads — Crossing Signals—Trespasser—Evidence—Negligence Per Se, When Not.*—The failure of the employees of a railroad company to give crossing signals at a public crossing does not constitute negligence *per se*, when the injury complained of occurred to a pedestrian while using the track at a different place, but is only evidence of negligence under certain conditions. *Morrow v. R. R.*, 623.

NEGLIGENCE PER SE. See Negligence.

NEGOTIABLE INSTRUMENTS.

New Note—Presumption of Renewal—Principal and Surety—Discharge of Surety—Burden of Proof.—A new note given for an antecedent debt evidenced by note raises the presumption that it was not intended as an extinguishment; and when the sureties thereon contend that satisfaction was intended, so as to discharge their liability, the burden of proof is upon them to show that it was so intended. *Bank v. Jones*, 419.

NONSUIT.

1. *Explosives—Negligence—Duty of Owner of Premises—Trespasser—Pistol Shot—Evidence.*—Defendant construction company, engaged in building a railroad for defendant railroad company, stored a quantity of dynamite, to be used in its operations, in a shanty on its right of way, near by a public highway. Plaintiff passing near to the shanty, not knowing its contents, fired a pistol ball into a knot-hole in the shanty as a target, exploding the dynamite and injuring plaintiff: *Held*, (1) that defendant was not guilty of any such breach of duty to plaintiff in the premises; (2) that the proximate cause of the explosion was the wrongful trespass by plaintiff in unlawfully shooting into the shanty; (3) that the court below should, upon plaintiff's evidence, have sustained a motion for judgment of nonsuit. *McGhee v. R. R.*, 142.

2. *Principal and Agent—Warranty—Verdict, Directing—Counterclaim—Knowledge of Principal.*—The salesman of plaintiff sold to defendant certain goods called "Buchu Tonic," representing that it was non-alcoholic and that no license or tax would be required for its sale, and if so, his principal would pay it. The principal knew at the time of sale that the defendant was a general merchant at Rocky Point, N. C., and subsequently shipped the "tonic" to him. The "tonic" contained 32 per cent alcohol, was highly intoxicating, and required the payment of a license tax, which was duly demanded of defendant. In an action to recover of defendant the price of the "tonic": *Held*, (1) that it was error in the court below to direct a verdict in plaintiff's favor and against defendant's counterclaim for license tax paid by him; (2) that such was in the nature of a nonsuit upon the whole evidence as to the counterclaim; (3) that the knowledge of the agent of the facts and circumstances was the knowledge of the principal; (4) that by its subsequent shipment the plaintiff was fixed with such knowledge. *Mfg. Co. v. Davis*, 267.

3. *Judgment—Evidence—Supreme Court—Direction to Dismiss Action.* When in the Supreme Court the lower court is reversed for refusing a motion to dismiss upon the evidence as of nonsuit (Revisal, sec. 539), it is in law equivalent to a direction to dismiss the action. *Tussey v. Owen*, 335.

4. *Judgments—Another Action—Limitation of Actions.*—When a motion as of nonsuit upon the evidence is sustained the plaintiff may bring another action within one year. *Henderson v. Eller*, 582.

NUISANCE. See Explosives.

1. *Hospitals—Menace to Health—Evidence Sufficient—Restraining Order.* When it is made to appear by plaintiff's evidence that a hospital is about to be erected for the purpose of treating tuberculosis and other contagious or infectious diseases upon lands adjacent to plaintiff's, in the residential portion of a thickly settled vicinity, so as to import serious menace to the health of plaintiff's family and that of the owners and occupants of adjacent property, a restraining order upon his application should be continued to the hearing. *Cherry v. Williams*, 452.

2. *Same—Evidence in Reply—Insufficient.*—Supporting evidence offered in reply is not sufficient which is general in its terms and made with-

NUISANCE—*Continued.*

out reference either to the special locality or to the special manner in which the particular hospital is to be constructed and carried on. *Ibid.*

3. *Same—Actual Construction Not Restrained.*—The use of a hospital for the treatment of diseases so as to be a serious menace to the health of adjacent owners and occupants may be restrained, while the actual construction, without the use, will not be. *Ibid.*

ORDINANCE.

1. *Negligence—Defective Flues—"Stovepipe"—Interpretation.*—A city ordinance providing that, "whenever any *stovepipe* used in any building in its corporate limits shall pass through a wall, partition, flooring or ceiling," it shall be inclosed in brick where it so passes and separated from contact with such wall, partition, flooring, or ceiling by brickwork not less than 4 inches in thickness and not permitted to be nearer the woodwork than 2 inches, etc., refers to a metal pipe, and has no application to earthen or terra-cotta flues into which the pipe is inserted. *Fowle v. R. R.*, 491.

2. *Same—Notice.*—Where the evidence established the fact that the defendant used a terra-cotta or earthern flue instead of a brick flue in carrying the smoke from a stovepipe used in its building, and a city ordinance prohibited the use of a stovepipe for the purpose unless protected by brickwork from the woodwork of the building, it was error in the judge to instruct the jury, in an action for damages alleged to have been thereby caused, to find for the plaintiff upon the question of negligence, if he had shown by the greater weight of evidence that the fire originated from a pipe or flue constructed contrary to the provisions of the ordinance, there being no evidence that the fire originated from any defect in the stovepipe. *Ibid.*

PARTIES.

Executors and Administrators — Heirs — Real Estate — No Privity.— There is no privity of interest between the administrator of deceased and his widow and heirs at law in the deceased's real estate, and it was not error of the judge in the lower court to permit the widow and heirs at law to become parties to and fully defend a suit affecting their interest in deceased's land. *McArthur v. Griffith*, 545.

PARTNERSHIP.

1. *Prospective—Patent—Money Advanced—Work Done—Condition Precedent.*—Under a contract between the plaintiffs and defendants, that in consideration of moneys to be advanced by some and work to be done by others upon a machine invented by one of them and proposed to be patented, and in the event of its being patentable the article to be manufactured or sold, with a specified division of profits, a partnership was created as an executed agreement, and a stipulation that the plaintiffs were to erect or construct the machine and make certain advancements was not in the nature of a condition precedent or concurrent, but an obligation, for breach of which, if not properly explained, the plaintiffs could be held responsible, either as an item of charge in taking a partnership account or by way of counterclaim. *Gilbert v. Machine Co.*, 308.

PARTNERSHIP—*Continued.*

2. *Termination at Will—Purpose of Patent — Sale of Patent — Breach of Contract—Damages.*—When it appears that a partnership had been formed for the definite purpose of having patented and manufacturing a certain device, for the purpose of sharing in the profits, the partnership could not be terminated at the will of either partner, and this being established between the plaintiffs and defendants, the latter, without just cause and lawful excuse and in breach of the partnership agreement, having profitably disposed of the device and refused to account, an actionable wrong is done, for which plaintiffs can recover their portion of the profits as established by the partnership agreement. *Ibid.*

3. *Definite Purpose—Continuance—Termination.*—A partnership for the accomplishment of certain definite objects, but not expressly specifying any time for its continuance, is not a partnership at will within the meaning of the general rule, but is to be regarded as a partnership to continue until its purpose is accomplished or the impracticability thereof is demonstrated. *Ibid.*

PARTY AGGRIEVED. See Penalty Statutes.

PARTY IN INTEREST. See Principal and Agent.

PENALTY STATUTES. See Carriers of Goods.

1. *Railroads — Transportation—Consignor—Party Aggrieved.*—When the consignor had agreed with the consignee that the latter was only required to pay for the intrastate shipment when it reached its destination, the consignor may maintain his action for delay *in transitu* (Revisal, 2632), as the party aggrieved. *Davis v. R. R.*, 68.

2. *Railroads—Transportation—Constitutional Law.*—The provision of Revisal, sec. 2632, imposing a penalty upon railroad companies for failure in their duty to transport goods, is constitutional and valid. *Ibid.*

3. *Railroads—Transportation — Issues.*—In an action against a railroad company under Revisal, sec. 2632, for a penalty for failure in its duty to transport freight, an issue is objectionable when it is the only one and in the following language: "What amount, if any, is the plaintiff entitled to recover of the defendant on account of the failure to promptly ship the car-load of lumber?" *Ibid.*

4. *Same.*—An issue which presupposes a failure on defendant's part in its duty to transport freight, in an action for penalty (Revisal, 2632), is objectionable. (Attention is called to the proper issues as suggested in *Hamrick v. R. R.*, 146 N. C., 185.) *Ibid.*

5. *"Filing" Claim — Carriers — Paying Claims — Oral Demand.*—A penal statute is to be strictly construed, and the provisions of Revisal, sec. 2634, imposing a penalty upon common carriers failing to adjust and pay a claim within a specified time, etc., after the *filing* of such claim with the agent, etc., is not complied with when oral demand is made, as such cannot be filed under the ordinary acceptance of the word and does not afford the carrier the protection that a written demand would give. *Thompson v. Express Co.*, 343.

6. *Appeal and Error—Corporation Commission — Rules — Jurisdiction—Orders, How Enforcible—Appeal Will Not Lie, When—Procedure.*—

PENALTY STATUTES—*Continued.*

The Corporation Commission has no power to enforce its orders and decrees by final process issuing directly therefrom, and for such purpose resort must be had to ordinary courts, either by independent proceedings or in proper instances by process issued in cases carried before such courts on appeal. Therefore, when on complaint made by a consignee of goods investigation was had and award made that a rule of the commission had been violated by the railway and that a penalty provided by such rule should be paid, and further that the rules of the Corporation Commission made for protection of shippers in such cases should be observed and obeyed, no appeal lies from such ruling, as the statute and rules themselves already require obedience, and consequently no right or interest of the parties was in any way affected. *Hardware Co. v. R. R.*, 483.

7. *Same—Power to Investigate—Suit for Penalty.*—The statute itself requiring that all lawful rules of the Corporation Commission should be obeyed, and the penalty allowed by the rule in this instance being only recoverable by action in a court of a justice of the peace, the only effect of the proceedings and orders made was to inform the commission on the subject-matter of the complaint and to enable it to intelligently determine whether suit should be entered by the commission for the larger penalty of $500 allowed by statute for disobedience of its lawful rules and orders; and no appealable order having been made, the proceedings both in the Superior and Supreme Courts are *coram non judice*, and will be dismissed on motion. *Ibid.*

PILOTS.

1. *Appointment — Existing Office — Constitutional Law.*—The acts of the board of commissioners under chapter 625, Public Laws 1907, regulating pilotage, fees, etc., are not invalid for the reason that the statute directs the Governor to appoint them "on or before the 5th day of April, 1907," prescribes that the term of office shall begin 15 April, and the commissions were issued on 13 March, when it appears from the language of the statute that the office of commissioner had been created before the time of the appointment. (*Cook v. Meares*, 116 N. C., 582; *S. v. Shuford*, 128 N. C., 588, cited and distinguished.) *St. George v. Hardie*, 88.

2. *Same—Collateral Attack.*—When an office has been duly constituted by statute and the person therein has duly qualified, his appointment, upon the ground that it was not made when the statute directed, though otherwise valid, cannot be collaterally attacked. *Ibid.*

3. *Services Tendered—Fees—Constitutional Law.*—The State has a right, looking to the safety of persons and property, to regulate pilotage, and to provide for the payment to the pilot, under given conditions, of the same fee for services tendered and refused as he would have earned had the service been accepted and performed. *Ibid.*

4. *Statutory Regulation—Interpretation — Maritime Law.*—The statutes respecting pilotage are not in derogation of a common-law right, but a part of the maritime law, or the law of nations, and should be liberally construed. *Ibid.*

5. *Selection by Commission—Privileges and Monopolies—Constitutional Law.*—The selection by a commission of persons qualified to act as

PILOTS—*Continued.*

pilots is not violative of Article I, sections 7 and 31, of the State Constitution, prohibiting exclusive emoluments or privileges and monopolies. *Ibid.*

6. *Theretofore Commissioned, Continued — No Examination — Constitutional Law.*—The provisions of chapter 625, Public Laws 1907, regulating the appointment of pilots, and, among other things, providing, in effect, that those theretofore commissioned should be continued as such and need not be examined, etc., is constitutional and valid. *Ibid.*

7. *Statutory Regulation—Constitutional Law — No Rights Denied.*—The defendant cannot set up as a defense to the payment of pilot's fees, sued for by plaintiff, that the statute limiting the number of pilots is unconstitutional, when no right of his is denied and he merely seeks to avoid the payment of such fees to any one. *Ibid.*

8. *Same—Appeal and Error.*—When there is no provision in the statute for staying execution on appeal from a court of competent jurisdiction—in this case a justice of the peace—it is doubtful whether, under our present constitutional judicial system, the act is constitutional; but when it appears that the stay bond was actually given, the Supreme Court will not dismiss the suit, as no right of the defendant has been denied. *Ibid.*

9. *Statutes—Construction—Federal Constitution—Federal Powers—Silence of Congress—State Legislation.*—The construction of a statute should be such as would give it validity respecting such of its subject-matters relegated to the Federal Government as are not prohibited by the Federal Constitution and laws; and when Congress has been silent on some matters of which the Federal Constitution has given it jurisdiction, but not on others, a legislative enactment upon all such matters will be construed to mean all such as to which congressional legislation is silent. *Ibid.*

10. *Same.*—When the Federal statute provides that nothing therein "shall be construed to annul or affect any regulation established by the law of any State requiring vessels entering or leaving port of any such State . . . to take a pilot licensed or authorized by the laws of such State," etc., it is a recognition of the rights of a State to regulate pilots upon matters concerning which congressional legislation is silent, and as to such it is not prohibited by the Federal Constitution. *Ibid.*

11. *Regulations as to Weather Conditions — Constitutional Law.*—Section 15, chapter 625, Public Laws 1907, providing that vessels are not subject to pay pilotage inward from sea under certain weather conditions, is valid, when construed with the other sections of said chapter, being an incentive to render pilots vigilant. *Ibid.*

PLEADINGS.

1. *Joint Demurrer—Cause of Action Against One Defendant.*—When two defendants join in a demurrer to the complaint, and a good cause of action is stated as to one of them, the demurrer will be overruled. *Caho v. R. R.*, 20.

2. *Independent Contractor—Written Instrument — Evidence.*—When the defense to an action to recover damages for personal injury is that

PLEADINGS—*Continued.*

the person who caused the injury complained of was an independent contractor, a written agreement tending to prove that fact may be introduced in evidence, though not set up in the answer. *Young v. Lumber Co.*, 26.

3. *Allegations Sufficient.*—A cause of action is sufficiently set out in the complaint when the facts alleged apprise the defendant fully of the grievance asserted against him and the injury for which redress is demanded. *Gillikin v. Canal Co.*, 39.

4. *Same—Allegations, Specific—Motion.*—When the facts alleged in the complaint sufficiently state a cause of action, the defendant should move to have them set out more specifically, should he so desire. *Ibid.*

5. *Construction—Substantial Justice.*—Pleadings should be construed liberally, so that their effect may be determined, to the end that substantial justice may be done. (Revisal, 495.) *Jones v. Henderson*, 120.

6. *Cities and Towns — Street Improvements—Negligence—Demurrer.*—A complaint alleging that the defendant town negligently and unskillfullly graded its street so as to injure the plaintiff's ingress and egress to and from his lot situated thereon sets out a cause of action good against a demurrer. *Ibid.*

7. *Sufficiency—Specific Information.*—When by a liberal construction the complaint is sufficient, the defendant may proceed by motion, under Revisal, secs. 496 and 509, to require a more specific statement of the cause of action, so as to make his answer fully responsive. *Ibid.*

8. *Same — Chain of Title—Common Source—Adverse Possession—Evidence.*—When plaintiff claimed the *locus in quo* from the defendants in possession, and failed to establish his chain of title, and seeks to recover by showing that he and defendants claimed under W. as a common source, and that defendants were estopped to deny title therein, it was proper for the court below not to allow the plaintiff, under defendant's objection, to put in evidence a part of a sentence of the answer alleging that W., the ancestor of defendants, was in open, notorious, and adverse possession, under known and visible lines and boundaries, when such destroys the sense in which the entire admission is made and perverts its meaning. *McCaskill v. Walker*, 195.

9. *Evidence—Meaning Perverted.*—When a paragraph of a pleading states a proposition complete in itself as a whole, it cannot be "cut up" into different and distinct propositions so as to change its meaning from that which by reasonable construction the pleader has therein stated. *Ibid.*

10. *Adverse Possession — Chain of Title — Common Source — Evidence.*—When defendants' answer alleges adverse possession in A., insufficient in itself in point of duration to ripen the title, but that his with their adverse possession would do so, such allegation introduced in evidence would not avail plaintiff upon showing that the deed of A. was a chain in their paper title, as the defendants cannot be said to claim under A. *Ibid.*

11. *Same—Chain of Title — Adverse Possession—Evidence—Sufficiency.*—When plaintiff failed to connect his chain of paper title and seeks to

PLEADINGS—*Continued.*

introduce the answer as an admission that A., as a common source of title, held the *locus in quo* adversely, under known and visible metes and bounds, it was necessary for plaintiff to show that the adverse possession of A. was sufficient in time to ripen title in him. *Ibid.*

12. *Admissions — Evidence.*—When issuable matters are not controverted in the pleadings, it is unnecessary to introduce them in evidence; but when they are independent of and collateral to the issues raised, they are only available as evidence when properly introduced. *Ibid.*

13. *Special Proceedings—Sale of Lands—Independent Action to Set Aside Sale — Evidence — Nonsuit — Failure to Renew Motion—Appeal and Error—Fraud—New Trial.*—In an independent action to set aside a sale of lands under a former judgment in special proceedings defendants moved to nonsuit at the close of the plaintiff's evidence (Revisal, 539), but it did not renew the motion at the close of all the evidence. As fraud is alleged, which plaintiff may be able to show, a new trial was granted by the Supreme Court instead of dismissing the action. *Rackley v. Roberts*, 201.

14. *Admissions—Inconsistent Defenses.*—In an action for trespass for cutting timber, when the plaintiffs make the necessary allegation of title, which is denied by the answer, it is not an admission of plaintiffs' title for the answer to set up in addition a prayer for affirmative relief, "that the plaintiff be decreed a trustee for defendant's benefit." *Johnson v. Lumber Co.*, 249.

15. *Demurrer—Good and Unlawful Considerations.*—A demurrer to a complaint in a suit brought for the recovery of the value of services rendered should be sustained when the alleged considerations are immoral and against public policy or so mixed up with them as to poison the whole. *King v. R. R.*, 264.

16. *Principal and Agent—Warranty—Verdict, Directing—Counterclaim—Nonsuit—Knowledge of Principal.*—The salesman of plaintiff sold to defendant certain goods called "Buchu Tonic," representing that it was nonalcoholic and that no license or tax would be required for its sale, and, if so, his principal would pay it. The principal knew at the time of sale that the defendant was a general merchant at Rocky Mount, N. C., and subsequently shipped the "tonic" to him. The "tonic" contained 32 per cent alcohol, was highly intoxicating, and required the payment of a license tax, which was duly demanded of defendant. In an action to recover of defendant the price of the "tonic": *Held*, (1) that it was error in the court below to direct a verdict in plaintiff's favor and against defendant's counterclaim for license tax paid by him; (2) that such was in the nature of a nonsuit upon the whole evidence as to the counterclaim; (3) that the knowledge of the agent of the facts and circumstances was the knowledge of the principal; (4) that by its subsequent shipment the plaintiff was fixed with such knowledge. *Mfg. Co. v. Davis*, 267.

17. *Railroads—Demurrer—Rights of Passenger—Contributory Negligence—Contract, Breach of — Nominal Damages.*—The complaint alleges that the plaintiff was a passenger on defendant's passenger train scheduled to stop at his destination, and tendered the conductor the money or fare thereto, and was informed by the conductor that the

PLEADINGS—*Continued.*

train would not stop there on that trip—that it was impossible to do so. At plaintiff's urgent solicitation the conductor repeatedly refused to stop the train, for the reason given. The plaintiff, in the presence of the conductor, got upon the steps of the car and informed the conductor that he was bound to stop. The train slackened its speed and the conductor "threw up his hand," which plaintiff understood was given for him to jump, and he did jump, but after he felt the train gathering speed, and was injured, the signal being to the engineer to go ahead: *Held*, (1) that under such allegations the plaintiff was guilty of contributory negligence that would bar recovery for actual damages; (2) that for the breach of defendant's duty to stop the train according to its schedule it was answerable in nominal damages; (3) that a demurrer to the complaint should not have been sustained. *Owens v. R. R.*, 357.

18. *Evidential Matter — Abandonment.* — The question of abandonment, affecting the validity of a deed made by a *feme covert* without her husband joining therein, is evidential matter, and arises only when objection is made thereto, and it is not required to be set up by plea. *Witty v. Barham*, 479.

19. *Distinct Defenses—Demurrer Overruled—Objections and Exceptions.*— When the plaintiff demurs to one of two separate and distinct defenses and the demurrer is overruled, the plaintiff should note an exception and the trial proceed upon both. *Shelby v. R. R.*, 537.

20. *Cloud on Title—Action—Heirs—Judgment—Estoppel.*—A judgment in an action brought by the widow and heirs at law to remove a cloud upon their title to land descended to them, wherein it was adjudicated that a note secured by a mortgage had been fully paid and discharged, may be successfully pleaded in bar to an action subsequently brought to foreclose by the administrator of the mortgage creditor. *McArthur v. Griffith*, 546.

21. *Evidence—Relief—Wrong Remedy Sought—Parties—Nonsuit.*—In an action demanding judgment for title to and possession of land, when it appears from the pleadings, taken in connection with the evidence, that a direct action to charge the land with an indebtedness should have been brought, and no motion to amend the pleadings was made, a motion as of nonsuit upon the evidence was properly allowed. *Henderson v. Eller*, 582.

POWER OF COURT.

1. *Judgments Continued — Subsequent Term — Consent of Parties.*—The judge below has no power to continue motions for judgments upon or to set aside verdicts, to be passed upon by him at a subsequent term of court, without the consent of the parties litigant. *Clothing Co. v. Bagley*, 37.

2. *Same—Amendment of Record.*—It is practically an amendment of the record at a subsequent term when the judge finds, at the succeeeding term, that the parties litigant consented that motions respecting judgment at the former term should be continued. *Ibid.*

3. *Verdict Set Aside—Discretion.*—When the judge below sets a verdict aside, in his discretion, as being against the weight of the evidence, his action is not the subject of review upon appeal. *Ibid.*

PRINCIPAL AND AGENT. See Telegraph Companies.

1. *Seamen, Procuring—Accommodation—United States Revised Statutes, Vol. VI, p. 909.*—In an action to recover of defendant moneys advanced him in procuring seamen, no charge being made for services, the plaintiff being a ship broken, the defense will not be sustained that recovery cannot be had under 6 Revised Statutes of the United States, p. 909. *Maffitt v. Hammerland*, 52.

2. *Contracts—Suit—Real Party in Interest—Appeal and Error—Jurisdiction.*—It is necessary for plaintiff, to sustain an action upon contract, to bring a potential, actually existent defendant into court by process; and when it is admitted that the suit was against and that the summons was served upon the relief department, unincorporated and a mere agency of the railroad company, and the railroad company itself was not served or sued, the action will be dismissed in the Supreme Court (Rule 27) for defect of jurisdiction, *ex mero motu*. *Nelson v. Relief Department*, 103.

3. *Agency Proved — Declarations.*—When the agency has been proved without objection, declarations of the agent made while in the prosecution of the work are competent. *Brickell v. Mfg. Co.*, 118.

4. *Same.*—In an action wherein the defense was that the trespass sued on was committed by an independent contractor, declarations of the alleged independent contractor, made at the time, that "I am just carrying out the orders of the Camp Manufacturing Company (defendant), and nobody can stop me except orders" from that company, are competent, when testimony had been received, without objection, tending to establish the agency at that time. *Ibid.*

5. *Liability of Principal—Agent's Unauthorized Acts.*—One may unintentionally, by his conduct, become liable to innocent third persons who have parted with their property on account of the acts of another, whom he has permitted to act as his agent. *Metzer v. Whitehurst*, 171.

6. *Same—Evidence.*—Defendant sold his retail liquor business to one J. and continued to take out the license in his own name. Plaintiff, during this time, sold several invoices to J., but upon the occasion respecting the shipment in question there was conflicting evidence as to whether plaintiff told J. that he would not ship any more liquor upon his credit, but would do so upon the credit of defendant, as he then noticed the license to sell was in defendant's name, and J. assented. The shipment was made, charged, and invoiced to defendant, and, under a general order of defendant respecting such shipments, was delivered by the railroad agent to J.: *Held*, evidence sufficient to sustain a verdict for plaintiff.

7. *Agency to Sell—Warranty.*—Authority to an agent to sell goods is as a general rule authority to bind his principal by warranty. *Mfg. Co. v. Davis*, 267.

8. *Representations, Fraudulent—Inducing Sale.*—The principal is liable for the fraudulent representations of his agent, general or special, made by the agent in the course of his employment and to induce the sale of his goods, and acted upon. *Ibid.*

9. *Conversion—Evidence—Verdict, Directing.*—In an action for the defendant's wrongful and fraudulent conversion to his own use of

PRINCIPAL AND AGENT—*Continued.*

notes, liens, accounts, and cash collections of the plaintiff as its agent, it was error for the court below to direct a verdict upon the issue in defendant's favor, under evidence tending to show that defendant was plaintiff's agent and had organs in his hands for sale for it, and also, for collection, its notes and mortgages, and refused to account for them when repeatedly requested to do so. *Organ Co. v. Snyder*, 271.

10. *Same—Intent.*—The question of intent is not material in a civil action brought by the principal against his agent for wrongful and fraudulent conversion. Evidence of such breach of trust is sufficient. *Ibid.*

11. *Agency to Sell—Purchaser—Agent's Compensation—All Over a Fixed Price — Contract, Express.*—An agreement between principal and agent that the latter is employed to sell for the former a piece of property and to have all he could obtain for it over a certain price is a valid express contract as to the agent's compensation, and he is entitled to recover upon the contract in obtaining a purchaser "ready, able, and willing" to pay for the property. *Reams v. Wilson*, 304.

12. *Agency to Sell—No Time Limit—Revocation, Notice of.*—When a principal places his property with an agent to be sold, without specifying a definite time therefor, notice of revocation is necessary to terminate the agency, especially when there is an agreement to that effect. *Ibid.*

13. *Agency to Sell — Purchaser Procured — "Ready, Able, and Willing"— Evidence Sufficient.*—An agent to sell property of his principal can corroborate his evidence that his vendee was "ready, able, and willing" to comply with the sale by showing that his vendee soon after bought the property, from the one to whom the principal had sold, at the price agreed upon with the agent. *Ibid.*

14. *Corporations—Loan Apparently to Officer—Liability of Corporation— Evidence Aliunde—Presumptions.*—It is competent to show by evidence *aliunde* that a loan apparently made to an officer of a corporation was in fact made to the corporation. Therefore, when it appears from the evidence that the plaintiff corporation urgently requested a loan of money of defendant, which was refused, and at or about the same time its president and treasurer, and owner of most of its stock, went to defendant and secured from it the loan upon his individual note and collateral, under such facts and circumstances as to reasonably infer that the loan was for his corporation and that he was acting for it, the latter will be bound to its payment. *Watson v. Mfg. Co.*, 469.

15. *Corporations—Loan Apparently to Officer—Liability of Corporation— Presumption — Surrender of Collaterals — Application of Funds.*— When M. had entered into a contract with defendant to furnish a large quantity of lumber for the building of his mills, and subsequently he formed a corporation for the purpose of continuing this business, of which he was president and treasurer and owner of nearly all of the stock; and subsequently when the plaintiff corporation, being in need of money to carry out the contract which with the consent of the defendant it had assumed, applied to defendant for a loan and was refused, but at or about that time it was made upon

PRINCIPAL AND AGENT—*Continued.*

the application of M., the president, upon his personal note and collateral: *Held,* (1) that the defendant had a right to suppose that the loan was for the corporation and in aid of the contract in the performance of which the defendant was greatly interested; (2) that at the maturity of the loan it was reasonable for defendant to charge the amount against the account for lumber furnished by the plaintiff corporation at the request of the president and surrender to him his personal note and collaterals; (3) that it was not incumbent upon defendant to see to the application of the funds derived from the loan in order to charge the plaintiff corporation therewith. *Ibid.*

16. *Same—Ratification.*—Evidence of ratification by a corporation of the act of its president, who practically controlled it, in directing it to be charged with his personal note given to defendant for moneys advanced inferentially for the benefit of the corporation, is sufficient which tends to prove that defendant acted in good faith in taking the credit and surrendering to the president his personal note and securities; that at the time the president and his corporation were both solvent; that defendant was credited with the amount by the bookkeeper of plaintiff corporation, and moneys were had of defendant upon the strength of the credit; all the members of the corporation had notice of it, it was never questioned in subsequent dealings, and no demand was made on account thereof until after both the president and his corporation were adjudicated bankrupts. *Ibid.*

PRINCIPAL AND SURETY.

1. *Creditor's Representations—Additional Surety — Discharge of Surety.* Persons signing a note as surety upon faith in the creditor's representation that another will sign as cosurety, leaving the note with the creditor for that purpose, are not bound thereon to such creditor upon the failure of the fulfillment of the representation. (*Bank v. Hunt,* 124 N. C., 171, cited and distinguished.) *Bank v. Jones,* 419.

2. *Same—Substituting Invalid Note—Old Note Surrendered—Failure of Consideration — Liability of Surety.*—When the sureties on a note signed with their principal a second note at the request of the creditor, under an unfulfilled agreement with him that another should also sign as surety, and the second note was left with the creditor, who delivered the first note to the principal, the liability of the sureties on the first note was not discharged by reason thereof, as there was nothing of value given in lieu of the first note, the second one being void. *Ibid.*

3. *Default of Principal — Payment by Surety — Justices of the Peace — Jurisdiction.*—Upon the payment of a debt by a party secondarily liable therefor, he is substituted in equity to the rights of the creditor, and may sue thereon, as the creditor could have done, without any actual or legal assignment, under the doctrine that equity considers "that as done which should have been done." Therefore, when the amount is $200 or less, a suit by a surety for the recovery of money misappropriated by his principal, which he has paid, is within the jurisdiction of a justice of the peace, certainly where the creditor has made a written assignment of the debt to the surety, making the latter both the legal and equitable owner of the debt, and the action when brought in the Superior Court should be dismissed. *Fidelity Co. v. Grocery Co.,* 510.

PRINCIPAL AND AGENT—*Continued.*

4. *Judgment, Assignment of—Payment by Surety.*—When a surety pays a judgment rendered against his principal and himself, without having it assigned to some third person for his use, the judgment is canceled as to both, and a motion for leave to issue execution (Revisal, 620) should not be granted. *Bank v. Hotel Co.*, 594.

5. *Revisal, Sec. 2842—Judgment—Motion to Set Aside—Defense Shown—Insufficiency.*—Parties moving to set aside an order for irregularity, made under Revisal, sec. 2842, must set out their defense. *Ibid.*

PROCESS.

1. *Service — Summons — Nonresident Defendant—Seal of Clerk—Irregularity.*—A summons issued without the seal of the clerk of the court, personally served upon nonresident defendants (Revisal, sec. 448), is an irregularity. *Vick v. Flournoy*, 210.

2. *Service — Summons — Nonresident Defendant—Seal of Clerk—Irregularity Cured.*—Objection made to the summons for that it was issued under Revisal, sec. 448, without the seal of the clerk of the court, to nonresident defendants, cannot be sustained when it appears that defendants have been actually notified of the time and place of the trial and informed of the nature and purpose of the action. Such defect may now be cured by the act of the clerk in supplying the seal pursuant to order properly made in the cause. *Ibid.*

PROCESSIONING.

Clerk — Judgment — Appeal—Superior Court—Entire Case.—When it appears that after judgment by the clerk in proceedings for processioning an appeal has been taken, it is proper for the judge below to permit others having an interest in the *locus in quo* to come in as parties, upon motion, as the appeal carried the entire case into the Superior Court (Revisal, sec. 614), and the registration of deeds under which they claim after the proceedings had commenced does not affect the question. *Batts v. Pridgen*, 133.

PUBLIC POLICY.

1. *Contracts — Bought Editorials — Immoral Consideration.*—A contract with the editor of a newspaper that he was to be paid by defendant railroad company for his editorials is based on an immoral consideration and not enforcible. *King v. R. R.*, 263.

2. *Same — Carrying Municipal Bond Issue.*—Compensation cannot be recovered upon a contract to aid in carrying an election for a bond issue. Such contract is against public policy and void. *Ibid.*

3. *Same—Pleadings—Demurrer—Good and Unlawful Considerations.*—A demurrer to a complaint in a suit brought for the recovery of the value of services rendered should be sustained when the alleged considerations are immoral and against public policy or so mixed up with them as to poison the whole. *Ibid.*

QUESTIONS FOR COURT.

Contracts—Interpretation—No Ambiguity.—The interpretation of a written contract, not ambiguous in its terms, is for the court, and should not be submitted to the jury. *Young v. Lumber Co.*, 26.

RAILROADS. See Carriers of Goods; Carriers of Passengers; Taxation.

1. *Rights—Owner of Fee—Ouster.*—A railroad company, which has entered on the lands of another and constructed its road, cannot be ousted by the owner of the land or stayed in operating its railroad thereon, when such is being done in pursuance of the power and authority contained in its charter and rightfully exercised under the general law applicable. *Beasley v. R. R.*, 362.

2. *Charter Rights — Condemnation Proceedings — Damages — Statutory Methods.*—When the damages sought by the owner of the lands against a railroad company using the same for railroad purposes authorized under its charter and in accordance with law would necessarily be included in an assessment in condemnation proceedings under a statute, the statutory methods of redress provided either by the charter or under the general law must be followed, if open to him as well as the railroad company. *Ibid.*

3. *Same—Wrong Invasion—Permanent Damages—Statute.*—When a railroad company is acting within its lawful rights in operating its road, but unlawfully goes upon or invades the proprietary rights of the owner of the land in so doing, the wrong must, under the present law (Revisal, sec. 394), be redressed by the award of permanent damages. *Ibid.*

4. *Same—Issues.*—In an action brought against a railroad company by the owner on account of its wrongful invasion of his land by taking the same for railroad purposes, the court should submit an issue as to permanent damages, this being the proper method of adjustment now required by the statute (Revisal, sec. 394). *Ibid.*

5. *Successive Actions—Retraxit.*—When it appears from the record that "plaintiff did not ask for judgment on the issue as to permanent damages," this did not evidence his intention to enter a *retraxit* as to such, but simply that he desired to test his right to maintain successive actions for his alleged wrong, and a judgment for permanent damages upon the award of the jury should have been rendered. *Ibid.*

6. *Streets, Use of, for Unlawful Purposes—Abutting Owner—Rights and Remedies.*—In addition to the general rights of citizens to the use of a street, an abutting owner has rights peculiar to his ownership, and for an unlawful invasion thereof by another using the streets for unlawful purposes, such as are not embraced within those of a highway, he may maintain an action in his own right, irrespective of the ownership of the fee in the street. *Staton v. R. R.*, 428.

7. *Same—Municipal Powers.*—As against the rights of abutting owners the municipal authorities have no power to grant to a railroad company an easement to lay its track upon and operate its trains over the streets of a town, even though the title to the streets be in the town. *Ibid.*

8. *Same—Estoppel in Pais.*—An injunction will not lie against the operation by a railroad company of its train upon a street of a city at the suit of an abutting owner who bought the land long after the conditions existed or who waited an unreasonable time before invoking injunctive relief against injury to his property caused by the construction and operation of the spur railroad. *Ibid.*

RAILROADS—*Continued.*

9. *Same—Intervening Rights.*—It would be inequitable to enjoin a railroad from properly using its tracks on the city street, with the consent of the city authorities, at the suit of an abutting owner who has waited until the railroad company has expended much money and labor thereon before objecting or seeking this remedy, and when the rights of the public have intervened. *Ibid.*

10. *Municipal Powers—Abutting Owner—Damages—Independent Action—Limitation of Actions.*—When an abutting owner has established his right to sue as such for the damages sustained by him peculiar to his ownership, he may be barred by the statute of limitations, although the town is not barred from an action for obstructing the street. *Ibid.*

11. *Revisal, Sec. 394—Damages, Permanent—Limitation of Actions—First Substantial Injury.*—Under Revisal, sec. 394, subsec. 2, providing that no suit, etc., shall be brought or maintained by any person for damages caused by construction of a railroad, etc., unless commenced within five years after the cause of action accrues, etc., the time at which the action accrues is not necessarily counted from the construction of the railroad, but from the first substantial injury which was thereby caused by rights of property incident to the construction of the road. *Ibid.*

12. *Same—Damages Not Permanent—Measure of Damages.*—While an action for damages sustained by the construction and operation of a railroad may be barred under Revisal, sec. 394, subsec. 2, if suit be not brought therefor within five years against a railroad for the use of the street for railroad purposes, this rule does not apply to cases where the damages are not of a permanent kind, but which arise from an unlawful use of the street by a spur track for depot purposes or the loading or unloading of cars and the placing of engines thereon so as to become a nuisance to the owner. The damages recoverable are confined to those sustained within three years prior to the institution of the action. *Ibid.*

RECEIVERS.

1. *Objections and Exceptions—Appeal and Error.*—Where there is no exception taken at the time of or appeal from an order of court appointing a receiver, the receivership continues in full force. *Talbot v. Tyson*, 273.

2. *Appeal and Error — Allowance—Excessive—Wrong Principle.*—When the order of the court below allowing an amount to a receiver for services as such is appealed from, and there is no suggestion that the amount was excessive or based upon a wrong principle, the order will not be disturbed. *Ibid.*

REMOVAL OF CAUSES.

Venue, Objection to—Waiver.—An objection that a suit was instituted in the wrong county relates to the venue and not to the jurisdiction. In the absence of a written demand that the suit be removed to the proper county before the time to answer has expired (Revisal, 425), the objection will be deemed as waived. *McArthur v. Griffith*, 546.

REVISAL. (Reference should be made to the various subject-matters for accuracy.)

SEC.

59. Plaintiff must prove suit brought within year after death. Defendant need not plead it. *Gulledge v. R. R.*, 234.

352. The words "Superior Court" or "court" mean the clerk of the Superior Court, unless otherwise stated or reference is made to regular term. *Bank v. Hotel Co.*, 594.

386. Connected chain of title must be shown when claim is made to lands under paper title. *McCaskill v. Walker*, 195.

394. Award for permanent damages allowed for unlawful injury to lands for easement of railroad company. *Beasley v. R. R.*, 362.

394 (2). Suit for damages for construction of railroad must be brought within the statutory time from the first substantial injury, and this section applies to cases demanding permanent damages. *Staton v. R. R.*, 428.

397. Agreement must be shown to rebut the one-year statute of limitations in actions for damages in assault. As to writing, *quære*. *Brown v. R. R.*, 217.

435. A demurrer may be pleaded to one of two distinct defenses. *Shelby v. R. R.*, 437.

448. Jurisdiction of the person of nonresident, by publication, in proceedings *in rem* against property of foreign defendant situated here; summons without seal on foreign defendant is irregular, but is good when in proceeding *in rem* notice is given of nature and purpose of action. *Vick v. Flournoy*, 210.

495. Pleadings should be liberally construed. *Jones v. Henderson*, 120.

496. When complaint is insufficient to give information defendant may proceed by motion to make it so. *Jones v. Henderson*, 120.

509. When complaint is insufficient to give information defendant may proceed by motion to make it so. *Jones v. Henderson*, 120.

513. Former judgment pleaded as an estoppel or *res adjudicata* before final judgment, party must move the court within year. *Adams v. Joyner*, 77.

539. Lower court reversed for refusing motion to dismiss upon the evidence is equivalent to direction to dismiss action. *Tussey v. Owen*, 335.

539. Motion to nonsuit at close of plaintiff's evidence was made, but not renewed, and, as fraud was alleged, the Supreme Court did not dismiss, but granted new trial. *Rackley v. Roberts*, 201.

545. When suit is brought in the wrong county, objection to jurisdiction will be deemed as waived unless written demand for removal be made before expiration of time to answer. *McArthur v. Griffith*, 545.

587. When a demurrer to one of two separate defenses is sustained an appeal will lie. Otherwise, if not sustained, for then exception should be noted and trial proceeded with. *Shelby v. R. R.*, 437.

615. After appeal from judgment of the clerk in processioning proceedings, it is proper to permit others in interest to be made parties. *Batts v. Pridgen*, 133.

REVISAL—*Continued.*

SEC.

620. A judgment paid by a surety and not assigned to some third person is canceled as to both principal and surety. *Bank v. Hotel Co.*, 594.

824. The judge at chambers may hear and determine a *mandamus* to compel a county treasurer to pay over moneys under a lawful warrant, as no money demand is involved. *Audit Co. v. McKensie*, 462.

877. Notice to principal to show cause why execution on judgment should not issue in favor of surety, who has paid it, will be sufficient as to time when ten days are given. *Bank v. Hotel Co.*, 595.

974. Obligation of guarantor of payment must be established by writing. *Supply Co. v. Finch*, 106.

980. The statute requiring registration cannot be supplied by notice otherwise, however full; but it has no application to wills. *Harris v. Lumber Co.*, 631.

999. Probate officer must certify probate of married woman "was in due form and according to law." *Johnson v. Lumber Co.*, 249.

1001. Probate officer must certify probate of married woman "was in due form and according to law." *Johnson v. Lumber Co.*, 249.

1571. This action is not applicable to the assessment of permanent damages for easement of telephone companies. *Wade v. Telephone Co.*, 220.

1589. Action by person in interest may be brought to "quiet title." *Rutherford v. Ray*, 253.

1621. Communication to physician, in an action for personal injuries, not privileged when not within the scope of that required for treatment. *Smith v. Lumber Co.*, 62.

1631. An offer to the husband from the wife to give him a horse to leave her is incompetent upon the question of abandonment under this section, and it is not necessary for the husband to leave the State to constitute abandonment. *Witty v. Barham*, 479.

1689. Evidence that the transaction, as to buying and selling cotton, was had in a bucket shop and that plaintiff and defendant intended that it could be closed out at any time by either party paying the difference, is competent. *Burns v. Tomlinson*, 634.

1689. When the verified answer properly pleads invalidity of a cotton contract, proof that cotton was not delivered at date of contract and one of the parties was to put up margins makes a *prima facie* case of invalidity. *Burns v. Tomlinson*, 634.

1689. When the verified answer properly pleads invalidity of a cotton contract, proof that the commodity was not delivered at date of contract and agreement to deposit margins is *prima facie* evidence of invalidity. *Burns v. Tomlinson*, 645.

1691. The burden of proof is on plaintiff to show that contract to buy or sell cotton is valid when the verified answer alleges that it was for futures and void under the statute. *Burns v. Tomlinson*, 645.

1995. Landlord may not resort to claim and delivery against tenant, but may bring action in Superior Court. *Talbot v. Tyson*, 273.

REVISAL—*Continued.*

SEC.

2021. When the owner fails to retain from the money due the contractor the amounts due for labor and material, after notice according to section 2022, a judgment fixing the owner with liability should be reformed to make other like claimants parties, and the amount prorated among them. *Hildebrand v. Vanderbilt*, 640.

2022. Lien for labor and material can be acquired under the provisions of this section without filing under the provisions of section 2028. *Hildebrand v. Vanderbilt*, 639.

2027. Lien for labor and material acquired under section 2022 is lost if suit is not brought in six months. *Hildebrand v. Vanderbilt*, 639.

2028. Lien for labor and material furnished can be acquired without filing if statement of amount is rendered owner, under Revisal, sec. 2022. *Hildebrand v. Vanderbilt*, 639.

2033 (4). Lien for labor and material acquired under section 2022 is lost if suit is not brought in six months. *Hildebrand v. Vanderbilt*, 639.

2118. When goods are knowingly sold to the wife, upon her responsibility, by one referred to the wife by the husband, it is not within the mischief intended to be suppressed by the statute. *Weld v. Shop Co.*, 588.

2628. An instruction based upon the evidence as to posted warning against passengers riding on platform is improper which leaves out of consideration another and independent defense. *Wagner v. R. R.*, 315.

2632. An "intermediate" point of shipment in car lots is where cars are transferred from one road in carrier's system to another. Time of transportation computed. Question for jury. *Wall v. R. R.*, 407.

2632. Where less than car lots are ordinarily transferred from one car to another *in transitu*, it is an "intermediate" point within the meaning of the statute. When Sunday is counted in estimating ordinary time. *Collection Agency v. R. R.*, 593.

2632. Penalty against railroad applies only to intrastate shipments. *Marble Co. v. R. R.*, 53.

2632. In an action for penalty for delayed shipment, the question is for the jury. *Ice Co. v. R. R.*, 61.

2632. Penalty against railroad as to transportation through another State. Amount recoverable a question for jury. *Ice Co. v. R. R.*, 66.

2632. In intrastate shipments the party aggrieved is the one who pays therefor at destination. The act constitutional; proper issues; ordinary time. *Davis v. R. R.*, 68.

2634. Oral demand is not sufficient as filing a claim for penalty required by statute. *Thompson v. Express Co.*, 343.

2842. A statute providing that surety may have citation issued to principal to show cause why execution should not issue, etc., is constitutional. What notice is a compliance; what is a surplus. Jurisdiction of the clerk. Reasonable time must be given in notice. Parties moving to set order aside for irregularity must set up defense. *Bank v. Hotel Co.*, 595.

REVISAL—*Continued.*

SEC.

3362. A statute making it a misdemeanor to employ children under a certain age in certain manufacturing establishments is constitutional, and a violation thereof is negligence *per se*. *Starnes v. Mfg. Co.*, 556.

3824. When a cotton contract is void as wagering, an agent for one of the parties cannot recover. *Burns v. Tomlinson*, 645.

3996. It is sufficient if commissioners' report in proceedings for draining lands apportions work to be done by owners. *Adams v. Joyner*, 77.

4016. Former judgment in similar proceedings for draining lands pleaded. *Adams v. Joyner*, 77.

4017. It is sufficient if commissioners' report in proceedings for draining lands apportions the work to be done by owners. *Adams v. Joyner*, 77.

4808. Statutory statements in application for life insurance policies are representations, and, when false, do not prevent recovery unless material. They are deemed as material when of facts which will influence the company in issuing the policy. *Bryant v. Ins. Co.*, 181.

5219 (11). That certain evidences of indebtedness were not listed, in order to avoid taxation, etc., must be set up by answer in a suit to enforce collection. When proven, a recovery is not prevented, but judgment thereon postponed until they are listed and paid. *Martin v. Knight*, 564.

5290. This act, providing for assessment of railroad property by Corporation Commission, is constitutional. It includes main and side tracks, depot buildings and grounds, etc. *R. R. v. New Bern*, 165.

REVOCATION. See Contracts.

REVOCATION OF AGENCY. See Principal and Agent.

RIGHTS OF WAY. See Evidence; Taxation.

RIPARIAN RIGHTS. See Water and Water-courses.

ROADS AND HIGHWAYS.

Limitation of Actions—Easements—Highways—Permanent Damages.—Revisal, sec. 1571, applies to the statute of limitations respecting defendant's constructing its telephone lines along a highway, and is not applicable when the action is for permanent damages otherwise occasioned to the use of plaintiff's land by the construction of telephone lines. *Wade v. Telephone Co.*, 219.

SPECIAL PROCEEDINGS.

1. *Land, Sale of—Process—Irregularity—Minors—Married Women—Collateral Attack.*—A sale of lands under special proceedings, in the absence of service of summons upon a minor and married woman, a necessary party, cannot be attacked collaterally for irregularity in a separate and independent action, in the absence of fraud, when she was represented by attorney and a guardian *ad litem*, who defended in her behalf. The proceeding should have been by motion in the original cause. *Rackley v. Roberts*, 201.

SPECIAL PROCEEDINGS—*Continued.*

2. *Process—Minors—Appearance—Authority of Attorney—Collateral Proceedings.*—An independent action to set aside a sale of land formerly had under special proceedings will not lie for an alleged absence of service of process upon an infant defendant for whom an attorney and a guardian *ad litem* appeared and were recognized as such by the court in the original cause, as such appearance precludes in collateral proceedings an inquiry into the authority possessed by the attorney and guardian to represent her. *Ibid.*

SPECIFIC INFORMATION. See Pleadings.

SPIRITUOUS LIQUORS. See Intoxicating Liquors.

STATE COURTS. See Jurisdiction.

STATE'S INTEREST. See State's Lands.

STATE'S LANDS.

1. *Entry—Description—Notice, Sufficiency of—Collateral Attack.*—A description in an entry of State's lands reading "640 acres, adjoining the lands of J. T., A. C., *beginning on the southwest corner of J. T. fifty-acre tract*, known as the C. lands, and running various courses for complement," is not too vague, and is capable of location by survey. (*Grayson v. English*, 115 N. C., 358; *Fisher v. Owens*, 144 N. C., 649, cited and approved.) *Call v. Robinett*, 615.

2. *Same—Vagueness—Insufficiency.*—A description in a second entry upon the State's unimproved lands, "640 acres in a certain county, lying on specified waters in E. Township, adjoining lands of S. G. A. and others, *beginning on a stake in S. G. A.'s line*, and running various courses for complement," is too vague to give notice of lands intended to be appropriated. *Ibid.*

3. *Entry—Vagueness—Survey—Grant—Valid as Against State.*—After the survey and issuance of a grant by the State to vacant lands, the entry cannot be collaterally attacked for vagueness. When the land is not sufficiently identified by the entry, the entry is not void, and a defect may be cured by the survey, so as to make the grant issued in pursuance thereof valid as against the State. *Ibid.*

4. *Entry—Conformity with Grant—Questions for Proper Officers—Binding Upon the State—Collateral Attack.*—The question whether the grant by the State of her vacant lands corresponds to the entry is one for the officers empowered to issue the grant, and is not open to attack by a stranger to the title or by a subsequent claimant under the State. *Ibid.*

5. *Entry Made Certain by Survey—Sufficient—Second Entry.*—When there are two enterers upon the State's vacant land, if the first entry is too vague, but the enterer make his entry certain by survey before the second entry, it is sufficient notice, and the courts will not declare him a trustee for the first enterer. (The difference between this and the cases in which the courts will declare a second enterer a trustee for the first discussed and distinguished by CONNOR, J.) *Ibid.*

STREET IMPROVEMENT. See Cities and Towns.

STREET RAILWAYS. See Carriers of Passengers.

STREETS. See Railroads.

SUMMONS. See Process.

SUNDAYS. See Penalty Statutes.

SUPERIOR COURT. See Processioning; Jurisdiction.

SUPREME COURT. See Appeal and Error; Evidence; Mandamus; Jurisdiction.

TAXATION.

1. *Property—Assessments for Taxes—Ad Valorem—Corporation Commission—Constitutional Law.*—Revisal, sec. 5290, providing for the assessment of railroad property by the Corporation Commission, is not in conflict with section 3, Article V of the State Constitution, providing that such assessment be uniform and *ad valorem*. *R. R. v. New Bern*, 165.

2. *Railroads—Assessments—Corporation Commission, Property Assessed by—Constitutional Law.*—The roadbed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, etc., by reasonable interpretation and under constitutional powers, are included in the language of Revisal, sec. 5290, delegating to the Corporation Commission the power to assess railroad properties, and such are excluded from the powers of local tax assessors. *Ibid.*

3. *Pleadings—Unlisted Solvent Credits—Recovery.*—A defense to an action for the recovery upon certain bonds and due bills, that they had not been listed for taxation, under Revisal, sec. 5219, subsec. 21, with a view to evade payment of taxes, must be set up in the answer. In the absence of such allegation it was not error in the judge to refuse to submit an issue relative thereto. *Martin v. Knight*, 564.

4. *Pleadings—Unlisted Solvent Credits—Defense—Recovery Postponed.*—A failure to list a solvent credit pursuant to section 5219 does not prevent a recovery in an action thereon, but postpones the recovery of *judgment* until it is listed and the taxes are paid. *Ibid.*

5. *Evidence—Solvent Credits—Tax Books and Lists—Incompetent.*—In an action against an administrator upon certain bonds and due bills of his intestate, wherein forgery is alleged, the tax books and original tax lists are incompetent as evidence for the purpose of showing that they were not listed as solvent credits, as they can furnish no information upon which an inference could be drawn in regard to the contention. *Ibid.*

6. *Constitutional Law—Municipal Taxation—Necessaries—Without Vote of People—Legislative Powers.*—The Legislature has the constitutional authority to authorize a municipal corporation to create a debt for necessary purposes without a vote of the people. *Swinson v. Mount Olive*, 611.

7. *Same—Market House.*—A market house is a necessity for a town, in the sense that the Legislature may authorize a municipal corporation to incur a debt to provide one without a vote of the people. *Ibid.*

TAXATION—*Continued.*

8. *Same—Legislative Restrictions.*—There is no limitation upon town taxation for necessary purposes except that imposed by statute, general or special. *Ibid.*

TAX BOOKS. See Evidence.

TELEGRAPH COMPANIES.

1. *Negligence — Evidence — Principal and Agent — Prior Negligence — Nominal Damages.*—When there is evidence of negligence of a telegraph company prior to the time of the delivery of a telegram to the party in whose care it was sent, it is sufficient to support a verdict of at least nominal damages. *Gerock v. Telegraph Co.*, 1.

2. *Negligence —Damages —Instructions —Principal and Agent —Knowledge of Agent.*—In an action to recover for the negligent failure of a telegraph company to deliver a telegram from a wife to her husband informing him of her sickness, and in consequence of which she was caused mental anguish by his failure to come or to reply, it was not error in the court below to refuse to instruct the jury under the facts that there could be no recovery for mental suffering endured by the wife, for that at the time in question the husband telegraphed to his wife's father inquiring about her condition, of which the father neglected to inform her. *Ibid.*

3. *Principal and Agent—Evidence—Agency—Principal—Imputed Knowledge.*—Knowledge of any undisclosed fact or circumstance bearing upon matters in avoidance of the damages claimed, communicated to her father, is not imputed to plaintiff, in the absence of evidence of his agency. *Ibid.*

4. *Messages—Care of Another—Delivery.*—A delivery of a telegram to the person in whose care the sendee is addressed is, in law, a delivery to the sendee. *Ibid.*

5. *Telegram, Care of Another—Notice of Importance.*—It is not ordinarily the duty of a telegraph company to notify the one in whose care a telegram is sent of its importance. *Ibid.*

6. *Prior Negligence—Care of Another—Notice of Importance—Question for Jury.*—When prior negligence on the part of the telegraph company is established, which may cause an injury, whether it is the duty of the telegraph company to notify the one in whose care a telegram is sent of its importance, or it should be left as an open question to the jury whether the employee acted as a man of ordinary prudence would have acted in not doing so, *quære. Ibid.*

7. *Negligence—Two Messages—Question at Issue.*—When the complaint alleges damages on account of plaintiff's being prevented by negligence of defendant from attending the funeral of his deceased father, and there were two messages, one announcing the dying condition and the other the death, place of burial, etc., the real question at issue turns upon the second message. *Edwards v. Tel. Co.*, 126.

8. *Instructions, Incomplete—Special Delivery Charges.*—When prayers for special instructions in a suit against telegraph company for negligent delay in delivering a telegram, for which special delivery charges were claimed by defendant, stated that the addressee lived

TELEGRAPH COMPANIES—*Continued.*

5 or 6 miles from the telegraph office, and the evidence disclosed that it was not more than 4, it was not error of the court below to refuse to give them. *Ibid.*

9. *Instructions—Negligence—Office Hours.*—The following instruction as to the office of a telegraph company being closed at night was properly refused: "The company is not bound either to deliver, send, or receive a message after office hours, unless by course of dealing or custom it has waived such hours and a message so received may be held and delivered in a reasonable time after opening of office hours next day." *Ibid.*

10. *Instructions—Abstractions.*—When the prayer for instruction presents an abstraction, and not the material facts and legal conclusions therefrom involved in the proposition, its refusal is not reversible error. *Ibid.*

11. *Office Hours—Terminal Office—Special Delivery Charges Required—Service Message—Duty of Terminal Office.*—When it appears that the terminal office of transmission of a telegram received it after office hours, that a special delivery charge was necessary for delivery, and that the message could have been delivered the next morning had such charges been paid, it was the duty of the terminal office, when consistent with the office hours at the other points, to immediately wire back as to the extra charges, when that course would have secured such charges and enabled the defendant to deliver the message in time to avoid the injury the following morning. *Ibid.*

12. *Negligence in Delivery—Proximate Cause.*—When, notwithstanding the negligence of the defendant, the plaintiff could have taken a train and arrived in time for the funeral of his deceased father, and made no effort to do so, his negligence would be the proximate cause of the injury and would bar his recovery in a suit for the damages alleged on account of being prevented from attending the funeral. *Ibid.*

13. *Messages—Failure to Accept—Liability.*—A telegraph company is liable for nominal damages at least for negligent failure or refusal of its agent to receive for transmission a telegram properly addressed, with money to pay the necessary toll, whether such conduct on the part of the agent was a breach of contract or a tort. *Hocutt v. Tel. Co.*, 186.

14. *Same—Insufficient Defenses.*—When a telegram, properly addressed, is offered to the agent of a telegraph company, with the toll for its transmission, it is no defense, upon the question of the plaintiff's right to nominal damages for the failure to receive the message for transmission, that its agent had recently received a telegram from the addressee and erroneously supposed that the message in question was addressed to the wrong destination, and therefore returned the telegram, with the money, to the sender, with a note to that effect. *Ibid.*

15. *Rights of Public, Invasion of—Measure of Damages.*—Nominal damages are awarded against a telegraph company for the violation or invasion of some legal right of its patron, and to determine such right, and when substantial damages are shown, the injured party

TELEGRAPH COMPANIES—*Continued.*

can recover, on account of the wrongful act, compensation commensurate with the injury thereby sustained. *Ibid.*

16. *Negligence—Ordinary Care—Repeating Message—Substantial Damages—Avoidance of Injury—Questions for Jury.*—When the operator of defendant, erroneously supposing that a telegram had not been addressed to the correct destination, returned it to the sender, with the money sent to pay its toll, and afterwards asked the sender to send him the message again, so that he might transmit it as written, which she refused to do, and requested another person, as her agent, to have the message sent, it is for the jury to find whether the sender therein exercised ordinary care, after knowledge of the negligence of defendant's operator, in not repeating the message, when requested by him to do so, or whether her agent exercised due care, and, if not, whether, except for such negligence on her part or on the part of her agent, the addressee would have received the telegram in time to have avoided the infliction of substantial damages. *Ibid.*

17. *Avoidance of Injury—Duty of Sender.*—In order to recover of the defendant telegraph company substantial damages for its failure to transmit a telegram, it must appear in proper instances that the plaintiff, after she had knowledge of the defendant's negligence, exercised ordinary care to prevent the probable damage, if the telegram was finally delivered to the company too late to prevent such damages. *Ibid.*

TELEPHONE COMPANIES.

Partnership—Rates to Partnerships—Persons Entitled to Partnership Rates.—When the rates of charges by a telephone company fix a certain charge for telephone service for copartnerships, two persons having connecting offices and partners as to some, but not as to all matters of their vocation are entitled to the rate of charge allowed to copartners. *Manning v. Telephone Co.*, 298.

TENANTS IN COMMON.

1. *Deeds and Conveyances—Mortgage Sale—Unity of Possession—Relationship Destroyed.*—When the land upon which the plaintiff and defendant are tenants in common is sold, under the lien of a subsisting mortgage, to a third person, who acquires the title and possession, and conveys the remainder to one of them, the unity of possession, and thereby the relation of tenants in common, is destroyed. *Sutton v. Jenkins*, 11.

2. *Relationship Destroyed—Title—Different Source.*—There is nothing in the policy of our law which prohibits the defendant, who held, under a former deed from his father, with his sister the lands in controversy as tenant in common, from taking under the deed from his father the same land acquired by his father at a sale of the land under a prior subsisting mortgage. *Ibid.*

3. *Deeds and Conveyances—Unity of Possession Destroyed—Deeds—Evidence of Title.*—The *feme* plaintiff claimed, as tenant in common with defendant, her part of the land in controversy, under a deed from a common grantor. Defendant denied cotenancy, and established the fact that the unity of possession had been destroyed by

TENANTS IN COMMON—*Continued.*

subsequent deeds: *Held*, that plaintiff can establish her title by showing seven years adverse possession under the conveyance, as color, through which she claimed as tenant in common. *Ibid.*

TENANTS, UPPER AND LOWER. See Water and Water-courses.

TERMINAL POINT. See Penalty Statutes.

THIRD PERSONS, LIABILITY TO. See Contracts.

TIMBER. See Injunctions; Contracts.

TIME COMPUTED. See Penalty Statutes.

TITLE. See "Color" of Title; Deeds and Conveyances; Tenants in Common.

1. *Lands—Suits—Quieting Title—Removing Cloud Upon Title.*—Under Revisal, sec. 1589, a suit may be instituted by any person against any other person claiming an interest adverse to his title, for the purpose of quieting it or removing a cloud therefrom. *Rutherford v. Ray*, 253.

2. *Cloud on Title — Action — Heirs—Pleadings—Judgment—Estoppel.*—A judgment in an action brought by the widow and heirs at law to remove a cloud upon their title to land descended to them, wherein it was adjudicated that a note secured by mortgage had been fully paid and discharged, may be successfully pleaded in bar to an action subsequently brought to foreclose by the administrator of the mortgage creditor. *McArthur v. Griffith*, 545.

3. *Cloud on Title, What is—Equity Jurisdiction.*—When a lien by mortgage appears by record to be valid upon lands descending to the widow and heirs at law, but which was paid by their intestate, it is a cloud upon their title within the jurisdiction and province of a court of equity to remove, and their cause of action will therein lie for that purpose; otherwise when such adverse claim of title appears to be void upon its face. *Ibid.*

TITLE, CHAIN OF. See Deeds and Conveyances.

TITLE, COMMON SOURCE OF. See Deeds and Conveyances.

TITLE TO WIFE. See Husband and Wife.

TORTS.

1. *Contracts—Waiver—Money Had and Received to the Use of—Justice's Court—Jurisdiction.*—W. became responsible for the payment for a horse purchased by M. of F., with the agreement that the horse was to be returned by M. if it proved unsatisfactory. The horse was accordingly returned, and F. represented to W. that the trade had been made, and induced him to give his promissory note for $175, the purchase price, which was negotiated by F.: *Held*, (1) the jurisdiction of the cause of action by W. against F. rested upon the failure of the consideration of the contract, for money had and received to the use of W.; (2) the plaintiff could waive the tort and sue upon the contract; (3) the cause of action was within the jurisdiction of the justice of the peace. *Manning v. Fountain*, 18.

TORTS—*Continued.*

2. *Contracts—Torts—Waiver—Suit Upon Contract.*—When the breach of contract involves a tort, the plaintiff may waive the contract and recover damages for the tortious injury. *Ibid.*

TRANSACTIONS WITH DECEASED. See Evidence.

TRANSCRIPT. See Jurisdiction.

TRANSPORT. See Carriers of Goods; Penalty Statutes.

TRESPASSER. See Railroads; Explosives.

TRIAL BY JURY.

Waived—Procedure—Reference.—When it appears of record that no exception was entered to a reference of the cause, and that the parties unmistakably signified their consent in writing, a subsequent demand for a jury trial cannot be considered. *Bruce v. Mining Co.*, 642.

TRUSTEES. See Bankruptcy.

TRUSTS AND TRUSTEES. See Bankruptcy.

1. *Deeds and Conveyances — Title Made to Husband — Limitation of Actions.*—When it appears that the *feme* plaintiff, with her husband, conveyed her land and took a mortgage to secure the purchase money, and the mortgage was foreclosed and the title to the land was procured by the husband to be made to himself, he thus acquires as her trustee, and the statute of limitations will begin to run against her from the date of his deed. *Sutton v. Jenkins*, 11.

2. *Bondholders — Action to Foreclose — Defenses of Caretaker.*—One who was put in possession of mortgaged real property of a corporation as a caretaker cannot resist a possessory action brought by the trustee in behalf of the bondholders, when the corporation makes neither defense nor objection, nor contests in its own right the validity of the mortgage. *Bruce v. Mining Co.*, 642.

UNLAWFUL EMPLOYMENT. See Minors.

USES AND TRUSTS.

1. *Deeds and Conveyances—Construction—Shifting Uses — Habendum.*—An indorsement on a deed conveying the fee to lands to J. C. and J. V., reserving to the grantors a life estate, with the condition "that in the event either J. C. or J. V. should die leaving no issue living, then the survivor to inherit all the within described lands, with the conditions within stated," when construed with the deed as one instrument, establishes the maker's intent to convey, and does convey, an estate in fee to J. C. and J. V., with a shifting use to the survivor in case either should die without issue living at his death; and there is no repugnancy between the deed and the indorsement, whether the latter is considered as a last clause of the deed or as the *habendum*. *Bryan v. Eason*, 284.

2. *Limitation of Fee.*—By a shifting use expressed in a deed a fee may be limited after a fee. *Ibid.*

3. *Deeds and Conveyances—Femes Covert—Probate Defective—Quitclaim —Registration—Seizin—Consideration.*—E., the owner of land, joined

USES AND TRUSTS—*Continued.*

with her husband in the conveyance thereof, and after the death of her husband executed and delivered another deed to the same parties for the land, which expressly referred to the first deed, stating in the premises that it was executed to carry out more effectually the intention and purpose thereof, and reciting that it was made in consideration of said premises and $1: *Held,* (1) that as the first deed of E. was in effect as recited in the premises of the second deed after the death of her husband, she was the owner of the land in fee, and the fact that the deed from herself and husband was void because of a defect in the probate would not affect the interests thereunder acquired as between the parties, as the second deed was sufficient to pass the title; (2) that the registration laws now take the place of livery of seizin, and, when they are complied with, a failure of consideration between the parties under the first deed did not operate to defeat the vesting of the use. (The nature and effect of a quitclaim deed operating as an estoppel discussed by WALKER, J.) *Ibid.*

VACANT LANDS. See State's Lands.

VENDOR AND VENDEE.

Contracts — Sales — False Representations — Quality — Caveat Emptor.— Representations made by the seller of the capacity of an ice plant known by the purchaser to be second-hand, and who had knowledge that it had been unsuccessfully operated, and also of other facts and circumstances indicative of its actual condition, and to whom, being a mechanic, full opportunity for investigation had been given before purchasing, are not available as a defense by way of counterclaim because of their being false, in an action to recover the amount of a bond given for the purchase price. In such instances the doctrine of *caveat emptor* applies. *Williamson v. Holt,* 515.

VENUE. See Removal of Causes.

VERDICT SET ASIDE. See Power of Court.

VESTED INTERESTS. See Contracts.

VOTE OF THE PEOPLE. See Taxation.

WAGERING CONTRACTS. See Contracts.

WAIVER. See Jurisdiction; Employer and Employee; Removal of Causes; Contracts; Torts.

WANTONNESS. See Damages.

WARNINGS. See Carriers of Passengers.

WARRANTY. See Principal and Agent.

WATER AND WATER-COURSES.

1. *Upper and Lower Proprietors—Rights—Temporary Structure.*—When an upper proprietor of lands constructs and maintains for his own use and advantage an artificial waterway or structure affecting the flow of water, without invading the rights of the lower proprietor, for a temporary purpose or a specific purpose which he may at any time

WATER AND WATER COURSES—*Continued.*

abandon, the upper proprietor comes under no obligation to maintain the structure, though the incidental effect has been to confer a benefit on the lower tenant. *Canal Co. v. Burnham*, 41.

2. *Same—Drainage—Overflow Waters—Natural Drainage—Lower Tenant—Upper Tenant—Obstruction—Right to Remove Obstruction—Damages.*—Plaintiff had the right of possessing and operating Dismal Swamp Canal, and of constructing a cross canal to draw the water of Lake Drummond into the main canal in aid of navigation. It ascertained that this water was no longer required for such purpose. In widening and deepening its main canal it closed the mouth of the cross canal, causing the overflow waters of the lake, which this canal had carried for forty years or more, to go to some extent onto defendant's land, causing injury thereto: *Held*, the defendants have no right of action for such injury when it appears that this was the natural direction of the waters of the lake, and the lands of defendants did not naturally drain into the cross canal; nor had the defendants acquired any right or privilege of such drainage, by user or otherwise. *Ibid.*

3. *Same—Lower Proprietor—Incidental Easement—Reciprocal Easement—Limitation of Action—Adverse Possession.*—When the upper proprietor in the exercise of his right determined to abandon an artificial waterway or structure, which he had maintained on his own premises without invading the rights of the lower proprietor, but from which the lower proprietor had been incidentally benefited, the lower proprietor can acquire no right of easement in the continuance of the waterway or structure by lapse of time, there being no reciprocal easement in his favor to support the plea of adverse possession, and therefore nothing upon which a grant can be presumed. *Ibid.*

4. *Drainage—Revisal, 4016—Judgment Not Set Aside—Motion.*—In an action brought for the drainage of lands under Revisal, 4016 *et seq.*, the judgment upon motion thereafter made will not be set aside merely upon the ground that a similar proceeding had been prosecuted to judgment between several of the parties. *Adams v. Joyner*, 77.

5. *Judgment—Motion to Set Aside—When Made—Estoppel.*—If a former judgment in a similar proceeding has not been pleaded in an action for drainage of lands under Revisal, 4016, as an estoppel or *res adjudicata*, before final judgment, the party relying thereon must move the court within one year to set the judgment aside for excusable mistake or inadvertence. (Revisal, 513.) *Ibid.*

6. *Drainage—Statutes—Interpretation.*—While the various statutes for the drainage of swamp lands in Eastern North Carolina have not the same provisions in all respects, they have been collected and are to be found in Revisal, ch. 88, and should be construed to harmonize and constitute, with such variations, a system of drainage laws for the State, and are constitutional. *Ibid.*

7. *Drainage—Revisal, 4017—Commissioners' Report—Cost of Work—Apportioned.*—The cost of the work to be done in the drainage of lands under Revisal, 3996, is not required under section 4017, and cannot, for its uncertainty of amount, be set out in the report of the commis-

WATER AND WATER COURSES—*Continued.*

sioners appointed. It is a compliance with the statutes when the portion of the work to be done by the landowners is set out. *Ibid.*

8. *Same — Notice Required — Liens — Assessments.*—Before any specific amount may be adjudged against a landowner as a lien on his land, under proceedings for the drainage of lands, he is entitled to be heard, after notice, as to whether the assessment made by the commissioners was unjust or oppressive. *Ibid.*

9. *Drainage — Judgment — Oppressive Assessment.*—As to whether the judgment could be modified to meet the ends of justice regarding an oppressive assessment of costs against lands in a proceeding for drainage, *quære. Ibid.*

WATERS, OVERFLOW. See Water and Water-courses.

WILLS.

1. *Estates, When Determinable—Dying Without Lawful Heirs.*—Under a devise of an estate in fee to the daughters of the testator, after the life of the mother, determinable as to each daughter's share on her dying without leaving a "lawful heir," the event by which each interest is to be determined must be referred, not to the death of the devisor, but to that of the several takers of the estate in remainder, respectively, without leaving lawful issue. *Harrell v. Hagan*, 111.

2. *Estates, When Determinable — For Life—Limitations Over.*—A devise of an estate to the mother for life, and at her death or marriage to certain named daughters, and if either or all of said daughters die without leaving lawful heir, then to two sons, naming them, conveys an estate to the daughters after that to the mother has fallen in, which does not become absolute in the other daughters on the death of one of them without leaving such heir, but the determinable quality of each interest continues to affect such interest until the event occurs by which it is to be determined or the estate becomes absolute. *Ibid.*

3. *Devise—Heirs—Illegitimate Children.*—Under a devise of lands by the testator to his daughter, with a limitation over in the event she should die "without leaving a lawful heir," the illegitimate children of the daughter, born after the death of the testator, and surviving their mother, come within the descriptive words of the devise and take an absolute estate after her death. (Revised, ch. 30; Rule 9.) *Ibid.*

4. *Executors and Administrators—Advancements.*—While the doctrine of advancements strictly arises in cases of intestacy, it is frequently necessary to construe equivalent terms expressed in a will. *Dodson v. Fulk*, 530.

5. *Same—Disposition of Advancement—Issues—Immaterial.*—In an action by plaintiff and her husband to recover of her testator's executors her distributive share of his estate it was established by the verdict that *feme* plaintiff was required to account, under the will, for an advancement of $500; that plaintiffs were indebted to the executors in the sum of $868, evidenced by their bond and secured by mortgage on *feme* plaintiff's real estate: *Held*, (1) the bond for the payment

WILLS—*Continued.*

of $868 secured by the mortgage raised the presumption that it was a debt in favor of the estate, and in the absence of evidence to the contrary the *feme* plaintiff must pay it, at least to the value of property included in the mortgage; (2) that *feme* plaintiff must account for the $500 as required by the will; (3) that an issue found in favor of *feme* plaintiff that the $500 went into a business in which her husband was a partner is irrelevant to the inquiry. *Ibid.*

6. *Deeds and Conveyances — Devises — Innocent Purchasers for Value — Suits—Parties—Strangers.*—When under a registered deed the grantee conveyed the land to an innocent purchaser for value, the defendant in the present suit, and thereafter suit was brought by an adverse claimant under a will, who was therein decreed to be the owner, the decree, unappealed from, is conclusive as between the parties, but has no effect upon the present defendant, who was not a party thereto and who obtained a prior title. *Harris v. Lumber Co.*, 631.

7. *Deeds and Conveyances—Registration — Notice — Wills, Book of.*—No notice, however full and explicit, can supply the place of registration, and the statute as to registration (Revisal, 980) does not apply to wills. Therefore it is not necessary to examine the book of wills to see if the grantor of lands has devised them, or a part thereof, to another, and actual notice thereof will not affect the title conveyed by a registered deed. (The question of ademption or revocation and of election discussed by CLARK, C. J., and held inapplicable.) *Ibid.*

WILLS, INTERPRETATION OF. See Wills.

WITNESSES. See Evidence.

WRIT, PEREMPTORY. See Mandamus.

WRITTEN INSTRUMENTS. See Evidence.