ANNOTATIONS INCLUDE 173 N. C.

NORTH CAROLINA REPORTS

VOL. 150

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1908
(IN PART)
SPRING TERM, 1909

BY
ROBERT C. STRONG,
REPORTER.

ANNOTATED BY
WALTER CLARK

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(IN PART)
SPRING TERM, 1909

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FALL TERM, 1908

HENRY HILL v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 16 December, 1908.)

1. Evidence—Res Gestæ—Narrative—Hearsay.

When a conversation between witness and deceased as to the manner in which he was injured is not a part of the *res gestæ* it is hearsay and incompetent evidence, though a very brief interval of time had elapsed.

2. Evidence—Res Gestæ—Narrative—Declarations—Admissions.

When a personal representative has no personal knowledge of the cause of the death of his intestate, in an action for wrongful death, his declarations concerning it, or failure to deny a statement relative thereto, are not competent as evidence or as an admission.

3. Insurance—Evidence—Proof of Death—Affidavits—Prima Facie Case—Hearsay—Burden of Proof.

In an action to recover upon an accident policy of insurance which, by its terms, exempts the company from liability if the assured was killed while "entering or trying to enter or leave a moving" train, it being admitted that insured was killed from injuries received from being run over by a train, the proofs of death, in evidence, are *prima facie* true against the personal representative of the relevant matters stated in his own and the affidavits of others concerning the manner of the killing, whether he had seen the other affidavits or not, if they were authorized by him; and to impeach such matters as hearsay he must show error in the facts as stated, and not merely that they contained his own conclusion from hearsay evidence.

ACTION tried before *Peebles, J.*, and a jury, at May Term, (2) 1908, of BUNCOMBE.

Defendant appealed.

Julius C. Martin for plaintiff.
James H. Merrimon & James G. Merrimon for defendant.

CLARK, C. J. John Hill took out an accident policy for $1,000 in the defendant company. The policy provided that, though the assured came to his death by accident, yet if it occurred through certain specified means the defendant would not be liable. One of these provisions exempted the company from liability if the assured was killed, "entering or trying to enter or leave a moving conveyance using steam as a motive power." The answer admitted that the death occurred from injuries sustained in being run over by a railroad train, but the defendant contended that the assured received such injuries while trying to leave a railroad car while the train was in motion. There was no proof that the assured was seen on the car or was hurt in leaving it while in motion.

The defendant proved by a witness that just after a passenger train running twenty-five to thirty miles an hour had passed, he saw the deceased struggling and falling along beside the train; that witness ran there as quickly as he could, rolled the man over on his face and commenced to talk to him. The court properly excluded any evidence as to what the injured man stated as to how he had sustained his injury. Though the time which had elapsed was brief, the conversation was not a part of the *res gestæ*. It was not exclamatory but narrative, and therefore hearsay and incompetent. *Bumgardner v. R. R.*, 132 N. C., 440. In *Seawell v. R. R.*, 133 N. C., 515, the statements admitted were as to declarations made during the transaction and a part of the *res gestæ*, and not a narration. The same is true of *Means v. R. R.*, 124 N. C., 578. The evidence offered of declarations made a few minutes still later by the deceased as to the manner in which he had been injured were, of course, incompetent. The fact that the plaintiff had repeated
(3) one of these statements made to himself did not make it competent. It was merely hearsay still. A witness for plaintiff testified that he saw the train run over the assured—that it was running four or five miles an hour.

Declarations made by the plaintiff, the beneficiary of the policy, as to statements by the deceased of the manner in which he had been killed, and not denied by him, were incompetent. The plaintiff knew nothing of the matter, and no admission of the truth of the statements could be drawn from his failure to deny them.

Among the proofs of death which the plaintiff had filed with the defendant company was an affidavit by M. J. Hill, which stated that the assured "was on the train with his brother, Thomas Hill, and just after the train started John Hill stepped from the train and was caught by

his overalls and thrown under the car wheels, at about 8:30 A. M., on train No. 30, eastbound"; also an affidavit from plaintiff stating substantially the same. One Starnes testified that he got up said proofs, as agent for plaintiff, and sent them off, but that the plaintiff "did not see any of the proofs of loss except his own affidavit." His Honor thereupon excluded all such proofs except the plaintiff's affidavit. The plaintiff testified that he knew nothing about the manner in which the assured received his injuries, not being there at the time, except what others had told him. His Honor instructed the jury that the affidavit of plaintiff which had been filed as a proof of loss, standing alone, made out a *prima facie* case to show that John Hill exposed himself to extraordinary risk, and under the terms of the policy would reduce the recovery to $200; but if the jury believed the plaintiff's testimony, that he was not present when the assured sustained his injuries and knew nothing about the matter of his own knowledge, and the burden being upon the plaintiff to prove this, if the jury were satisfied by the greater weight that the affidavit was made by plaintiff without any knowledge on his part as to how the deceased sustained his injuries, the jury would be justified in answering the third issue "$1,000."

The proofs of loss, though not conclusive and irrebuttable by plaintiff, are *prima facie* true as against him. *Insurance Co.* (4) *v. Newton,* 22 Wall., 22; *Insurance Co. v. Rodel,* 95 U. S., 232. The burden was upon the plaintiff to show that a statement made in the proofs of loss was erroneous in fact. The plaintiff, having filed them, has vouched for their truth. He must show mistake. It is not sufficient to negative a statement therein made to show merely that the affiant made his affidavit as a conclusion from evidence—as hearsay—which would have been excluded if offered on the trial of an issue as to the fact stated. The plaintiff weighed the evidence and swore to the facts stated in his affidavit. He must show that there was error as to the fact—not merely that he relied upon hearsay statements. It was also error to strike out the other affidavits in the proofs of death upon the testimony of Starnes that he had sent them on, by plaintiff's authority, but the plaintiff had not seen them. Aside from the fact that the court was thus holding that Starnes' testimony was true, there is the further consideration that, these "proofs" having been filed by plaintiff's authority, the facts therein stated are to be taken as true against him, unless he show mistake, and that he must show that the facts stated in the "proofs" are not true.

Error.

CHARITY A. D. STRICKLAND, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 December, 1908.)

1. Evidence—Map—Hearsay.

A map offered in evidence for the purpose of showing a negligent killing by defendant railroad company's train of plaintiff's intestate while on defendant's railroad bridge is inadmissible when it was made some eighteen months after the occurrence, upon the statements of one not produced as a witness.

2. Railroads—Evidence—Scintilla.

Evidence of one who was hurrying across a railroad track at night, in front of a rapidly approaching train, that if the engine had a headlight he did not then see it, or afterwards, as he again looked, when the train was about two hundred yards away, is scarcely sufficient upon the question of whether the defendant was negligent in running its train at night without a headlight.

3. Railroads—Negligence—Evidence—Headlight—Causal Connection—Proximate Cause.

In order to recover damages against a railroad company for the killing of plaintiff's intestate by a train negligently running at night without a headlight, there must be some evidence that the negligent act of defendant was the proximate cause of the death.

4. Same—Contributory Negligence.

In a suit for damages against a railroad company for negligently killing plaintiff's intestate there was evidence tending to show that deceased was killed on a certain night, not far from the end of defendant's bridge, by one of defendant's trains coming from the other side; that immediately after deceased passed the witness, the witness heard the whistle of the approaching train and the rumble of the train upon the bridge, when he was not in as favorable a position to hear as the deceased; that the deceased stopped, turned as if hesitating to enter the pump house, where the witness worked, and then walked towards the approaching train in an upright position, apparently in full possession of his faculties, upon the ends of the cross-ties; that deceased could have looked up and have seen the train coming, as the track was level and the view unobstructed; that there was no headlight on the engine of the train: *Held*, upon this evidence, uncontradicted, the deceased was guilty of contributory negligence, the proximate cause of the injury.

5. Same.

The negligent running of a train at night without a headlight is not the proximate cause of the death of plaintiff's intestate, when it appears from the uncontradicted evidence that deceased was in full possession of his faculties, was on the defendant's track at night, at a time he knew the train was scheduled to pass, must have known the train was approaching, had opportunity to get off in time to avoid the injury after hearing the signals and warnings of its approach, and when the engineer could not under the circumstances have stopped the train in time to avoid the injury. *Clark v. R. R.*, 109 N. C., 451, cited and approved.

6. Contributory Negligence—Defense—Nonsuit.

While contributory negligence is a matter of defense, it is proper to nonsuit upon plaintiff's own evidence, when the proof of such defense is thereby fully made out.

ACTION tried before *Lyon, J.*, at March Term, 1908, of NASH, for the recovery of damages for the negligent killing of George W. Strickland.

At the conclusion of the plaintiff's evidence, and again at the (6) conclusion of all the evidence, the defendant moved to nonsuit, which motion was overruled, and the defendant excepted. The court submitted issues to the jury, which were found for plaintiff. From the judgment rendered the defendant appealed.

The facts are stated in the opinion of the Court.

Austin & Grantham and Battle & Cooley for plaintiff.

F. S. Spruill for defendant.

BROWN, J. The defendant's counsel bases his motion to nonsuit upon three grounds:

"(*a*) That there was no evidence of negligence on the part of the defendant.

"(*b*) That it was the duty of the court to instruct the jury, upon the uncontradicted evidence of the plaintiff, to answer the issue as to contributory negligence 'Yes.'

"(*c*) For that, even granting the negligence of the defendant, the plaintiff's intestate was also guilty of negligence upon the uncontradicted evidence of the plaintiff; and the court having no disputed evidence to find, the plaintiff's evidence clearly established the intestate's negligence, which was the concurrent cause of intestate's death, and therefore that the plaintiff could not recover."

The evidence of the plaintiff tends to prove that her husband was killed on Thursday night, 21 June, 1906, not far from the southern end of the defendant's bridge across Tar River, about one mile north of Rocky Mount.

Whether he was killed by passenger train No. 85, which crossed the bridge at 11 o'clock that night, going south, is left in doubt by the position of the body, the state of the undergrowth and conditions under which the body was found. But for the purposes of this appeal we assume that he was struck by the engine of train No. 85 and killed, as contended by the plaintiff.

There is no evidence whatever that the deceased was stricken or killed while on the bridge structure. All evidence in the record tends to prove that the body was found about seven yards south of the bridge abutments and when the evidence of defendant's witnesses, Davis and Fountain, is considered, that fact is established beyond question. (7)

The plat made by Wells, the surveyor, which was excluded by the court, proves nothing, as it was made some eighteen months after the casualty, and only upon the statements of one M. T. Strickland, who was not examined as a witness. Assuming that the witness Wells meant G. H. Strickland, there is nothing in his testimony which would warrant a jury in finding the deceased was killed on the bridge.

Upon the question of negligence it is contended that the engine of train No. 85 had no headlight burning, and that with a headlight the engineer could have stopped in time to save the deceased.

The only evidence of that relied upon by plaintiff is the testimony of Frank Whitley. He states that he crossed the track at 11 o'clock, at Shore's Crossing, some 400 or 500 yards south from the railroad bridge. The train passed a few minutes after he crossed the track. He noticed the train. It was 150 or 200 yards off when he crossed the track. If there was a headlight on it he could not see it. Witness does not say he was looking for a headlight, but was a casual passer, hurrying across the track in front of a rapidly approaching train. When it passed him he was going away from the track, and when he noticed it the train was 200 yards distant. Such negative testimony, standing alone, has scarcely probative force sufficient to establish any fact.

But assuming that the defendant's agents were guilty of negligence in respect to the headlight, there is no evidence that such negligence was the proximate cause of the death of the intestate. Had the headlight been burning, it would not have prevented the injury, either by warning the deceased or by enabling the engineer to discover his peril in time to stop.

The only witness examined whose testimony throws any light on the subject is plaintiff's witness, Robert Smith. He was standing in the door of the pumping station, 15 yards south of the bridge, at 11 o'clock P. M. He saw a tall man, supposed to be the deceased, in his shirt sleeves, "walking pretty slowly" towards the bridge, when he passed the pumping house, where he slowed up, as if he would come in, but went on. He was not walking on the track, but on the side "tiles" or
(8) ties. After he saw him witness stood in the door "just a minute," and turned around to his work; then as he turned back in the house, witness heard the train crossing the bridge. It was No. 85. The witness says "the man could look up and see the train coming." Witness had then just heard the engineer's signal blow for the station just before the train entered on the bridge.

If the deceased were in the possession of his faculties--and there is no evidence he was not—by exercising the most ordinary precaution he must have both seen and heard the train coming. In addition, he knew its schedule and that it was at that moment due at the bridge. The pump

hand heard it blow as deceased passed his station, and when it entered on the bridge he also heard its noise. At that time the deceased had barely passed the pump station, walking very slowly on the ends of the crossties. So the deceased had all the warning that any sane person needed. As he was not prostrate on the track, but walking upright towards the train and on the end of the ties, the engineer had the right to assume up to the last moment that the deceased saw or heard the approaching train and that he would step aside and save himself. There was nothing to prevent it, as the track was along the flat ground when deceased must have heard or seen the train approaching. Even the top of the abutments of the bridge are only six feet from the ground—not as tall as the deceased. *Stewart v. R. R.,* 136 N. C., 385; *Norwood v. R. R.,* 111 N. C., 236; *High v. R. R.,* 112 N. C., 385; *McAdoo v. R. R.,* 105 N. C., 140; *Clegg v. R. R.,* 132 N. C., 292; *Morrow v. R. R.,* 147 N. C., 623.

And when at last the engineer saw or might have seen that the deceased did not intend to stop, but was entering upon the bridge or trestle—if indeed he ever did enter upon it—it was impossible for him to have stopped his train before striking him. The dissenting opinion of the present Chief Justice in *Clark v. R. R.,* 109 N. C., 451, strongly presents this view and sustains fully the positions taken by defendant in this case.

In *Clark v. R. R.,* the deceased was actually killed midway the trestle, and the majority of the court held that there was some evidence tending to prove that the engineer by reasonable care could have seen his peril in time to stop. But both opinions recognize the rule (9) stated by *Justice Clark,* that "When the engineer sees a man, not known by him to be deaf, drunk or insane, walking on the track, he has ground to believe that on sounding the whistle the man will get off the track in time. He is not compelled to slacken the speed of the train on that account."

In this case, according to plaintiff's own evidence, the whistle was blown just as the train reached the bridge, and it was heard by the pump hand as deceased passed the pump station going in direction of the train, and almost immediately thereafter the pump hand heard the rumbling of the train as it entered on the bridge. The engineer, had he seen deceased, was not obliged to slacken speed, and had a right to suppose that he would step off the track, as he had every opportunity to do. Certainly the engineer had a right to suppose that no sane man would go on the bridge, when he must have known the rapidly moving train was about to enter it. As the bridge was only 192 feet long, all the testimony shows that the train could not have been stopped within that space.

Therefore it follows that, as deceased had knowledge of the approaching train and opportunity to step off the track, and as the engineer, had he seen him approaching, walking along the track, was not obliged to stop, the absence of a headlight, if it was absent, was not the proximate cause of the injury.

We might well stop here in the consideration of this case, but the proof of contributory negligence developed in the plaintiff's own evidence is so strong that, upon well-established principles, it must bar a recovery, even if there were no headlight. It is true that contributory negligence is a defense, but where proof of such defense is fully made out by plaintiff's own evidence, it may be availed of by motion to nonsuit.

As we have seen, the deceased was not on the bridge when the swiftly moving train approached it. No witness saw him nearer to it than ten or fifteen yards. His body was found twenty feet from its abutments on the south side, and it is admitted deceased was going north. He was neither drunk nor helpless, but supposedly in the full possession of his faculties, a trespasser upon defendant's track, facing a signboard
(10) warning him to keep off, and approaching a railway bridge, 192 feet long and 20 feet above water, for the purpose of crossing it at 11 o'clock at night, at a time when he knew the train was due and about to enter the bridge. As the deceased was sane, this was, *per se*, negligence of the most pronounced and unjustifiable kind. *Carter v. R. R.*, 135 N. C., 498; *Arrowood v. R. R.*, 126 N. C., 629; *Weeks v. R. R.*, 131 N. C., 78.

As he approached the bridge did the deceased know the train was coming? Number 85 was a regular train, usually on time, and due at that bridge at 11 o'clock P. M., the very time the deceased passed the pump station. He was so familiar with the running of defendant's trains that, according to the testimony of his wife, the plaintiff, "he knew the schedule of every regular train that ran over the railroad."

Did the deceased see or hear the train approaching? If he used his faculties he must have both seen and heard it. The track was straight, and plaintiff's witness Whitley saw the train coming 200 yards north from Shore's Crossing, which is 400 yards south of the bridge. This shows that the train could be seen some distance off. The plaintiff's witness Robert Smith heard the train blow about time deceased was opposite the pumping station, fifteen yards from the bridge, and in one minute thereafter he heard it enter on the bridge.

The deceased had a far better opportunity to both see and hear it than Smith, for deceased was on the end of the crossties, while Smith was in a house filled with the din of machinery. Before the deceased reached the bridge he knew the train was due there at that moment, and by the exercise of the most ordinary care, "by looking up," as plain-

tiff's witness says, he could have known it was actually on the bridge. If he entered on it under such circumstances he invited death, for the bridge is too short for the engineer to stop his train in time to save him had the engineer discovered or by due care could have discovered his peril. In fact, according to the evidence, the engineer could not have stopped his train, had he undertaken to do so before he entered upon the bridge, until he had passed some distance beyond the pump station, for the distance from the north abutment of the bridge and across the bridge to the pump station is only 243 feet, while the shortest (11) distance, according to the evidence, in which train No. 85 could have been stopped is one thousand feet—four times as great. So we see how impossible it is for the plaintiff to recover upon well-settled principles of law in any view of the evidence, whether the deceased was struck by the engine on the bridge structure, or on the track south of it, or on the approaches to the structure. Assuming that the engine had the most brilliant of headlights, and that the engineer actually could see through and beyond the bridge, and that he actually saw deceased as he slowly passed the pump station, having blown his whistle, as heard by Robert Smith, as the train entered the bridge, the engineer had a right to assume that the deceased heard it and would step aside. If the deceased, after the whistle blew, under such circumstances had entered the bridge, it was too late to stop the train..

It is not hard to account for the fact that the engineer did not know when his engine struck the deceased. The latter was not in the middle of the track and run over and his body torn and mangled by the train passing over it. But his body was found on the side of the track, and as he was walking on the end of the crossties, he was doubtless knocked off by some jutting part of the rushing engine as it passed him. The deceased was evidently hit suddenly on the head and knocked off the edge of the track, for his neck was broken as well as his right arm, which was next to the engine.

The evidence in this case presents one of those unfortunate catastrophies which excites sympathy for this unfortunate plaintiff, but upon her own showing we feel bound to exculpate the engineer and to hold, in accord with a long line of well-considered precedents, that the defendant company is not liable.

The court below erred in refusing motion to nonsuit. It is so ordered.

Reversed.

Cited: Champion v. R. R., 151 N. C., 198; *Snipes v. Mfg. Co.*, 152 N. C., 47; *Mitchell v. R. R.*, 153 N. C., 117; *Horne v. R. R., ibid.*, 241; *Wolfe v. R. R.*, 154 N. C., 572; *Zachary v. R. R.*, 156 N. C., 501; *Barnes v. Public Service Corporation*, 163 N. C., 366; *Johnson v. R. R., ibid.*, 443; *Horton v. R. R.*, 169 N. C., 115; *Hill v. R. R., ibid.*, 741.

(12)

D. A. POWELL AND WIFE v. THE CHAMPION FIBER COMPANY.

(Filed 22 December, 1908.)

1. Arrest—Restraint—Evidence Insufficient.

To constitute sufficient evidence of such personal restraint as will amount in law to an arrest it must be more than an unasserted purpose and intention; and when the evidence only tends to show that defendant's employees threatened the arrest of *feme* plaintiff's husband, in his absence, while she was on defendant's premises, and said they would give her the warrant of arrest and permit her to follow him, upon payment of two dollars on account of a stove her husband had bought and left in its house, which she accordingly paid, it does not constitute such restraint as will amount to an arrest in law, when she made no attempt to leave under circumstances altogether favorable.

2. Same—Principal and Agent—Corporations—Superintendent.

An agent authorized to collect for his principal has no implied authority, in his endeavor to collect, to arrest the debtor upon warrant, or put such restraint upon his wife as will amount to an arrest in law; and the principal is not responsible for such unauthorized or unratified acts. This principle applies to a corporation, as principal, acting through its superintendents as agents.

CLARK, C. J., dissenting, *arguendo.*

ACTION tried before *Peebles, J.*, and a jury, at November Term, 1907, of BURKE.

This action was brought by the *feme* plaintiff to recover damages for an alleged false and wrongful arrest and detention. S. Montgomery Smith and W. H. Reynolds were named as defendants in the summons, but were never served, and the case proceeded to trial as to the Champion Fiber Company. There was judgment of nonsuit at the conclusion of the evidence, and plaintiffs appealed.

E. B. Cline and A. A. Whitener for plaintiffs.
S. J. Ervin and Smathers & Morgan for defendants.

BROWN, J. The evidence tends to prove that D. A. Powell, the plaintiff's husband, was an employee of defendant company, lived in one of its houses and owed defendant $11 for a stove; that, becoming dissatisfied, he quit defendant's service, left the stove in the house he had
(3) lived in, packed his household goods in a wagon, and started walking ahead on the road to Canton, leaving his wife and child on the wagon to follow after him. The wagon not overtaking him, he turned back, and shortly thereafter met the wife following with the wagon.

The *feme* plaintiff testified that after her husband had gone on

ahead, leaving the wagon in the defendant's commissary yard, and after the wagon had stood there about two hours, "I spoke to Montgomery Smith first. He was close to the wagon, I was on the ground. I asked him why it was that he detained me, that the stove was in the house and there was nothing in the wagon that belonged to him. He said they did not loan out things to accommodate people. He then walked off and went back to the end of the wagon. Harry Reynolds came up."

At this point the court permitted plaintiff's counsel to state what they proposed to prove as further tending to show the liability of the defendant. Counsel stated that they proposed to show that Reynolds was assistant superintendent in charge of the commissary; that one Huggins Smith, the superintendent, and Reynolds had the paper writing marked "A" in their possession (the paper writing is a warrant for arrest of D. A. Powell, signed by R. L. Ray, J. P.); that they stopped Mrs. Powell in the yard and Reynolds told her in the presence of Smith that they were going to arrest her husband and send him to jail, and were going to hold her until the officers came back with her husband; that they then went and looked at the stove in the house and returned to the wagon, when Reynolds said if Mrs. Powell would pay $2 they would surrender her the warrant for her husband and she could go; that she paid the $2 (for the use of the stove, evidently) and drove on her way.

Upon intimation from the court that the plaintiff could not recover, she submitted to a nonsuit and appealed.

There are two reasons why the plaintiff can not recover of defendant upon this state of facts:

1. There is not sufficient evidence of such personal restraint as will amount in law to an arrest. Her person was not touched or her liberty restrained by any kind of force or show of force. The conduct of Smith and Reynolds was certainly not to be commended, but there is nothing in it to indicate any actual forcible detention of plaintiff. A mere unasserted purpose or intention to do so is not sufficient. In the (14) second edition of the American and English Encyclopedia of Law, vol. 12, p. 734, it is stated that, "In order to constitute an unlawful imprisonment where no force or violence is actually employed, the submission must be to a reasonably apprehended force, the circumstance merely that one considers himself restrained in person not being sufficient to constitute a false imprisonment unless there is in fact a reasonable ground to apprehend a resort to force upon an attempt to assert one's liberty." The evidence does not show that the *feme* plaintiff in this case in any way attempted to assert her liberty nor to cause her wagon to move, but that she waited without any reasonable apprehension of force, or else because her driver did not see fit to move the wagon.

It is held by all the authorities that the act relied upon as an unlawful

arrest in order to constitute false imprisonment must have been intended as such and so understood by the party arrested, or there can be no imprisonment. 12 A. & E. Enc., p. 736; where all the cases are collected.

The evidence does not show that the *feme* plaintiff considered herself under arrest, or that any such invasion of her personal liberty was put into effect. While Reynolds may have told the *feme* plaintiff he was going to detain her, he took no steps to do so. He and Smith at once walked off to the house and examined the stove and on their return settled the controversy. So far as the evidence discloses, Mrs. Powell could have driven off at any moment.

2. There is no allegation in the complaint, or any evidence to support such allegation had it been so alleged, that this tort was committed by Reynolds and Smith within the scope of their authority in furtherance of the master's business, or that the master ratified and affirmed their acts.

It was the duty of Smith to collect debts due the defendant, and if the husband was indebted to defendant, to use due diligence in collecting such debt, but he was not authorized to arrest the wife on account of the debt any more than a stranger.

The case, we think, comes within the principles so clearly stated by *Justice Hoke* in *Sawyer v. R. R.*, 142 N. C., 1, and by *Justices Walker* and *Connor* in their dissenting opinions in *Stewart v. Lumber Co.,*
(15) 146 N. C., 111 and 85. While the writer differed from his last-named brethren in the application of the law as laid down by them to the peculiar character of the *Stewart case,* which dealt with conditions and circumstances attending the operation of locomotive engines, their opinions and the authorities cited in them are convincing that, upon well-settled principles, the plaintiff can not recover of the defendant upon the facts of this case.

Affirmed.

CLARK, C. J., dissenting: This action is brought by the *feme* plaintiff (her husband being joined as plaintiff) against the defendant, a foreign corporation doing business at Sunburst, Haywood County, for false arrest, false imprisonment and forcible and illegal detention of her person. It was in evidence that her husband was in the employment of the defendant company; that he went to its superintendent and told him that he was unwilling to sign certain papers that the superintendent required, that he was going to leave, that a stove he had bought from the company the week before he had left in company's house, that he would pay for its use and wanted a settlement; that he applied twice the next day to superintendent for a settlement, but being unable to get it (he returned the key of his room, in which he had left the stove) and having boxed

up his household goods, he put them in the wagon to carry them to another town. Having put his wife and five-year-old child in the wagon to ride, he started on ahead on foot. It was a rainy day. When the wife was ready to start, the superintendent and assistant superintendent of the company detained the wagon, and would not let the *feme* plaintiff leave. There had been no warrant or any paper served on her or her husband.

The plaintiff further offered to prove that these two officers and another man, who was an employee of the defendant, told the *feme* plaintiff that they were going to arrest her husband and send him to Waynesville jail, and were going *to hold her* until the officer came back with her husband; that the assistant superintendent went and looked at the stove, and when he came back told Huggins, one of his employees, that if the *feme* plaintiff would pay $2, to give her the warrant and let (16) her go; that she then gave Huggins a $5 bill, he gave it to the assistant superintendent, who put it in the company's cash drawer and gave Huggins $3, who then suffered *feme* plaintiff to leave after having been detained two hours in the defendant's yard. When three men tell a defenseless woman they are going to "hold her" and she does not move, it is an illegal arrest.

On this evidence, the court intimating that plaintiff could not recover, she took a nonsuit and appealed. According to this evidence, the *feme* plaintiff with her child, wagon and household goods were detained for over two hours in the defendant's yard, against her will, by the two chief officers of the defendant, aided by an employee, and not permitted to leave till she paid the company a sum which these three men demanded of her. This detention was without any excuse. It is not contended that in her possession or in the wagon there was any property of the company. There was superior force—three men, two of them the highest officers, acting for the company, against a defenseless woman and child. She was "held up" for two hours until she was told the sum of money on payment of which she would be allowed to proceed, and until she paid it. Such conduct was false arrest and false imprisonment, because by force and without authority. 19 Cyc., 319. Forcing the *feme* plaintiff to pay the company money before she was allowed to depart was little short of "highway robbery," unexplained by any evidence. The defendant should have opportunity to show its version of this extraordinary occurrence, and the *feme* plaintiff is entitled to have a jury to pass upon the truth of the evidence.

"False imprisonment is simply any unlawful detention of the person." 12 A. & E., 721. One who "interferes with the freedom of locomotion of another" without legal authority does so at his peril. 19 Cyc., 320. If such interference is unlawful, "neither good faith nor provocation nor

ignorance of the law" (neither of which are here shown) is a defense in a civil action; but if there is malice it aggravates the damages. 19 Cyc., 319, 320; 12 A. and E., 724, and cases there cited. "Absence of malice is no defense in a civil action." *Neal v. Joyner,* 89 N. C., 287.

(17) The detention by mere threats or show of superior force, if unlawful, constitutes false imprisonment. *Martin v. Houck,* 141 N. C., 317.

There was evidence which, uncontradicted, made the corporation liable for the conduct of its officers. *Lovick v. R. R.,* 129 N. C., 427; *Kelly v. Traction Co.,* 132 N. C., 368. The detention was on its premises, by its officials, for the purpose of collecting money, which was paid into its treasury, and is there still, so far as the evidence shows.

C. C. HOSS v. HENRY PALMER.

(Filed 22 December, 1908.)

Appeal and Error—Premature—Nonsuit—Quantum of Damages.

A judgment as of nonsuit relates to the cause of action and not to the amount of damages; and when plaintiff takes a judgment of nonsuit and appeals, upon an intimation against his contention by the trial judge upon the quantum of damages the appeal will be dismissed.

ACTION tried before *Peebles, J.,* and a jury, at August Term, 1908, of CHEROKEE.

This action was brought to recover damages for the seduction of the plaintiff's daughter.

Among other issues, the plaintiff tendered the following: "What punitive or exemplary damages, if any, is plaintiff entitled to recover?"

After the examination of plaintiff in his own behalf had progressed for a considerable time, plaintiff's counsel asked him a question bearing upon the said issue, which was objected to by the defendant and sustained by the court, upon the ground that punitive damages could not be awarded to the plaintiff under the form of his complaint. Plaintiff excepted. Plaintiff then asked to be allowed to amend his complaint. Being satisfied from plaintiff's testimony that defendant was not the first man who had had sexual intercourse with plaintiff's daughter, the court, in the exercise of its discretion, declined to allow the amendment,

(18) and plaintiff excepted. In deference to the opinion of the court that the allegations contained in the complaint were not sufficient to allow a recovery of punitive damages, the plaintiff submitted to a nonsuit and appealed.

Dillard & Bell for plaintiff.
E. B. Norvell, Ben Posey, and J. D. Mallonee for defendant.

WALKER, J. This case is governed by *Merrick v. Bedford,* 141 N. C., 504, as will appear by the following language of the court in that case: "We think, furthermore, that according to plaintiff's brief and argument the adverse ruling complained of related solely to the issue of damages and not to the cause of action, upon the establishment of which the right to recover damages depends. Under the ruling, the plaintiff would have recovered some damages, much more than nominal. Under the decisions of this Court the plaintiff should have continued the trial, and, by noting exceptions properly, he would have been able to have this Court review every ruling made in the court below. We think the nonsuit was voluntary, premature, improvidently taken, and that under our decisions an appeal from a nonsuit under such circumstances will not lie." In *Hayes v. R. R.,* 140 N. C., 131, we said that "in order to avoid appeals based upon trivial interlocutory decisions, the right thus to proceed has been said to apply ordinarily only to cases where the ruling of the court strikes at the root of the case and precludes a recovery by the plaintiff." This case is not like *Davis v. Ely,* 100 N. C., 283, or *Hayes v. R. R., supra,* which were decided upon special facts and circumstances. The ruling of the court upon the evidence and the right to recover punitive or exemplary damages under the allegations of the complaint did not affect the plaintiff's right to recover, but only the quantum of damages. The judgment of nonsuit relates to the cause of action, and not to the amount of damages. If the court decides erroneously as to the law for assessing the damages, the plaintiff can except and have the ruling reviewed here upon an appeal from the final determination. *Midgett v. Manufacturing Co.,* 140 N. C., 361. The plaintiff's cause of action was left intact by the ruling of the court. A case could never be "tried out" or ended if, when an adverse ruling is (19) made as to an item of damage, the plaintiff should be permitted to test its correctness in this Court by a nonsuit and appeal.

The nonsuit was prematurely taken and, under the circumstances of this case, the appeal can not be entertained.

We do not pass upon the question as to the competency of the testimony, for it may not again be presented, and certainly not in this case.

Appeal dismissed.

Cited: Teeter v. Mfg. Co., 151 N. C., 603; *Gilbert v. Shingle Co.,* 167 N. C., 290; *Chandler v. Mills,* 172 N. C., 368; *Chambers v. R. R., ibid.,* 559.

N. J. LANCE AND WIFE v. JAMES H. RUMBOUGH.

(Filed 22 December, 1908.)

1. Deeds and Conveyances—Natural Boundaries—Courses and Distances—Controlling Calls.

When a deed calls for two natural boundaries at the same place, in this case a chestnut oak on the J line, and one of them (the oak) can be satisfactorily located, and as to the other (the J line) there is no evidence of its placing, the jury is guided by the natural boundary found and established, and the line will terminate at it, however wide of the course called for, or however short of or beyond the distance specified it may be.

2. Same—Survey in Contemplation of Deed.

While as a general rule a call in a deed to an established boundary of an adjoining tract of land will control course and distance, there is an exception when the boundary called for was not located at the time and a survey was made and agreed upon by the parties as establishing the lines and boundaries of the land subsequently and accordingly conveyed; and when there is evidence making for the grantor's contention, that the *locus in quo* fitted into the description of the deed, it is proper for the judge to charge the jury that if they so found the facts from the greater weight of evidence, to answer the appropriate issue for the plaintiff.

3. Issues—Sufficiency.

The issues were sufficient to present all matters relevant and necessary to the determination of the rights of the parties, and it was not error in the trial judge to submit those tendered in this case.

4. Notes—Uncertain Amount Due—Suit—Tender.

When the correct amount due by plaintiff on his notes, secured by mortgage, was neither admitted nor shown, and could not be ascertained until certain questions were determined in his suit involving the quantity of lands for the purchase price of which the notes were given, a tender of payment was unnecessary.

(20) ACTION tried by *Peebles,* J., and a jury, at May Term, 1908, of MADISON.

This action was brought to enjoin the defendants from selling certain land conveyed to the plaintiff Fannie E. Lance under a power of sale contained in a deed of trust, until the amount due on the debt secured by the said deed of trust, which was in dispute, could be ascertained. The land was conveyed to the *feme* plaintiff by deed with full covenants for $650; she paid $50 and, with her husband, executed the deed of trust to secure the balance of the purchase money. She alleged that the defendant, J. H. Rumbough, who sold the land to her, was not the owner of all the land conveyed by him.

The issues submitted to the jury, with the answers thereto, were as follows:

1. Did the defendants, J. H. and C. T. Rumbough, sell and convey to the plaintiff Fannie E. Lance the 21.8 acres of land lying south and southeast of the red line on the plat running from 1 to 2 to 3, as alleged in the complaint? Answer: "Yes."

2. What was the value of the 21.8 acres of land lying south and southeast of said line running from 1 to 2 to 3, at the time of the conveyance from the said defendants to the said Fannie E. Lance, if said land were conveyed to them? Answer: "$450."

3. What was the value of the 27.3 acres of land lying north of the red line 1, 2 and 3 at the time of the conveyance from the defendants to the said Fannie E. Lance? Answer: "$450."

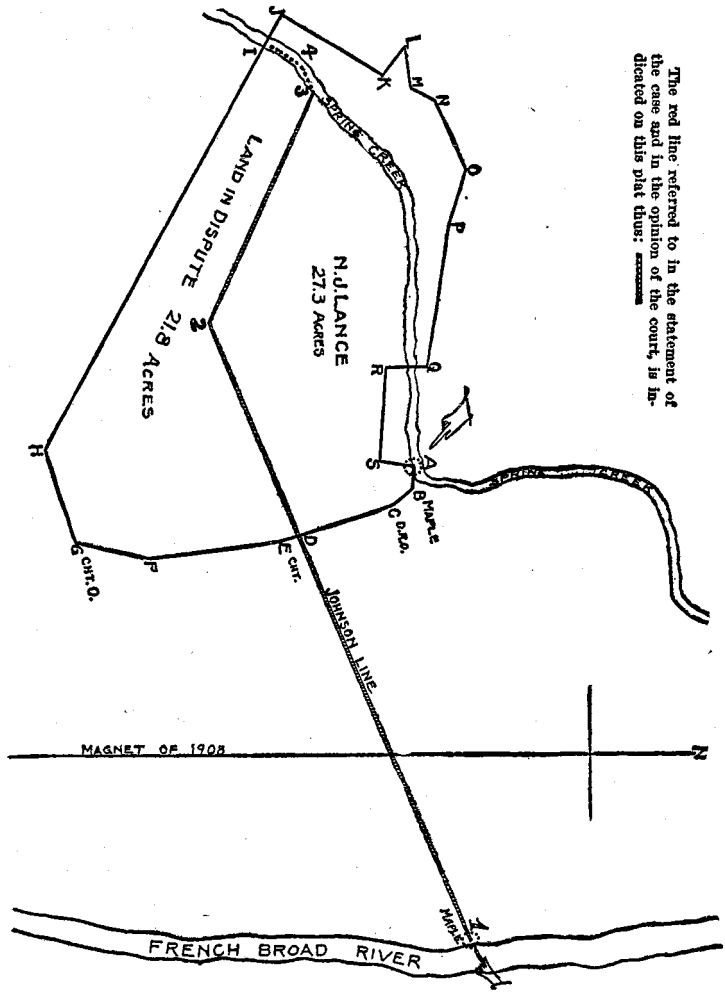
The facts of the case and the contentions of the parties as to the location of the land are fully stated in the charge of the court, which was as follows:

"The plaintiffs in this action contend that on 11 February, 1903, the defendants, J. H. and C. T. Rumbough, conveyed to the plaintiff Fannie E. Lance all the lands embraced within the black lines on the plat and containing in the aggregate about 49 acres, and that the defendants executed to the plaintiff a deed therefor with full covenants of seizin and warranty.

"Plaintiffs further contend that before the execution of said (22) deed the defendant J. H. Rumbough caused one J. H. Hunter, a surveyor, to survey the tract of land and mark its corners and lines, and that Hunter, acting under the directions of the defendant J. H. Rumbough, and in the presence of his agent, J. C. Rumbough, and also in the presence of the plaintiff N. J. Lance, began the survey at A, as shown on the plat, and ran thence to B to C to E to F to G to H to I to J to K to L to M to N to O to P to Q to R to S and back to A, and that Hunter, at the time he made the survey, marked the corners and lines of said tract so surveyed by him wherever there were trees or other natural objects capable of being marked.

"The defendants, on the other hand, contend that they only sold the plaintiff the land lying north of the line running from 1 to 2 to 3, or the Johnson line claimed by them to be the one called for in their deed, and that the defendant J. H. Rumbough instructed Hunter to begin surveying at A, and to run by way of B and C to D, and thence by way of the red line to 2 and 3, and passing 3 and crossing Spring Creek to the Spring Creek Road, and thence down and with that road to the beginning.

"The defendants further contend that if their deed to the plaintiff should be so construed as to run from A to the chestnut oak at G in the Johnson line, as the next call in the deed is S. 70° 30′ W. and with said line 24 poles to a stake, that you would run from G straight to the red


The red line referred to in the statement of the case and in the opinion of the court, is indicated on this plat thus:
LAND IN DISPUTE
21.8 ACRES
N.J. LANCE
27.3 ACRES
SPRING CREEK
SPRING CREEK
MAPLE
C.O.R.D.
E CUT.
G CUT. O.
JOHNSON LINE
MAGNET OF 1908
FRENCH BROAD RIVER
MAPLE

line between 1 and 2 and thence with that line 24 poles, which would carry it to near the figure 2, and thence with the red line from 2 to 3 and passing 3 and crossing Spring Creek to the road.

"The plaintiffs, replying to this position of the defendants, say: That at the time the survey was made and the deed executed there was a suit pending between Rumbough and Johnson to establish the Johnson line, and Rumbough contended that the Johnson line began at a maple stump about 20 poles up the river and south of 1, and ran from thence passing G to H and from H to I, and that a survey had been made in said action by Hunter, prior to the time he made the survey for Lance and Rumbough, in which he had located the line for Rumbough according to his contention, and that when he started to make the survey (23) for Lance and Rumbough, before the execution of the deed, Rumbough instructed him to run the line up the ridge from A to the Johnson line at G, as contended for by Rumbough, and thence with said line to Spring Creek.

"The plaintiffs further say that if you run the line from A to G and thence a straight line to the red line near D, and with the red line to Spring Creek, no other call in the deed after leaving G will fit the survey.

"The defendants admit that at the time of the conveyance from them to the plaintiff Fannie E. Lance they nor either of them were seized of the lands lying south and southeast of the red line running from 1 to 2 to 3, as shown on the plat, and therefore they had no right or power to convey the same to the said Fannie E. Lance.

"As to the first issue, the court charges you that whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for it may be or however short of or beyond the distance specified.

"But where two natural boundaries are called for at the same place, as, in this case, a chestnut oak in the Johnson line on the ridge, and one of them can be found and satisfactorily located and the other can not, then you should be guided by the natural boundary found and located. The line of another tract of land is a natural boundary, provided, at the time the deed calling for it is made, the line is indicated by visible marks so that it can be identified and located, or if it can in any other way be located with reasonable certainty. There is no evidence before you tending to show that, at the date of the plaintiff's deed, the Johnson line from 1 to 2 to 3 had ever been marked, or could with reasonable certainty be ascertained and located. If the plaintiff has satisfied you, by the greater weight of the evidence, that, prior to the making of the deed, Hunter was requested by J. H. Rumbough to survey the land, in order that he and his wife might make plaintiff a deed for

it, and Hunter made the survey according to the instructions of Rumbough, as indicated by the black line on the map beginning at A thence to B to C to D to E to F to G to H to I to J to K to L to M to N to O to P to Q to R to S, to the beginning, and that the deed was
(24) made in pursuance to that survey, and that the calls in the deed are located according to the contention of the plaintiff as indicated on the map, and that the lines thus ran include and surround the tract containing 21.8 acres and lying south and southeast of the red line, you should answer the first issue 'Yes,' otherwise you will answer it 'No.'"

The defendant's motion for a new trial having been overruled and judgment rendered upon the verdict, he excepted and appealed.

Gudger & McElroy for plaintiffs.
Zachary & Roberts for defendant.

WALKER, J., after stating the case: The principal question in this case relates to the location of the land which was conveyed by Rumbough to the *feme* plaintiff. The defendant contended that he did not sell to the plaintiff any land south or southeast of the red or Johnson line, and that the third call of his deed should stop at that line, or, if the call is extended to G (a chestnut oak in the Johnson line on the ridge), the next call should be from that point to the red or Johnson line, as shown on the map, and thence with that line passing 3 and crossing Spring Creek to the road. There was no evidence that the red line had been established or was known as the Johnson line at the time the deed was made to the plaintiff. The location of that line was then in dispute and a suit was pending for the purpose of establishing it. Besides, there was evidence that Rumbough had admitted that the chestnut oak at G was in the Johnson line, and there was also evidence that a survey of the land he intended to convey to the plaintiff had been made, at the request of Rumbough, by a surveyor, and the lines and corners marked, and that the deed was made in accordance with the survey. The court correctly instructed the jury as to the different phases of the case presented by the testimony.

The charge with reference to the location of the corners and lines by the survey actually made for the purpose of conveying the land to the plaintiff, and describing in the deed therefor its boundaries, is well supported by numerous decisions of this Court. The survey made
(25) under such circumstances is considered as a practical location of the land by the parties. *Cherry v. Slade,* 7 N. C., 82; *Safret v. Hartman,* 50 N. C., 185; *Baxter v. Wilson,* 95 N. C., 137; *Elliott v. Jefferson,* 133 N. C., 207; *Fincannon v. Sudderth,* 140 N. C., 246; *Lumber*

Co. v. Ervin and *Mitchell v. Welborn,* 149 N. C., 347. The general rule undoubtedly is, that the line or corner of another tract of land which is sufficiently established will control course and distance, but it is not a rule without an exception, and the principle we have just stated constitutes an exception to it. *Baxter v. Wilson, supra.* The instruction which the defendant asked the court to give to the jury, that the third call should stop at the red line, assumed that it was the Johnson line, when there was no evidence showing that it had, at the time the deed was made, been established. The evidence tended to show that Rumbough, when he executed the deed, did not so regard it. The court therefore properly charged the jury to consider the evidence as to the true location of the Johnson line at that time, consisting in part of the declaration of Rumbough himself, and especially to consider the evidence as to the practical location by the parties of the Johnson line and the boundaries of the land intended to be conveyed. The charge of the court stated clearly and fully the law arising upon the evidence. It embraced all instructions to which the defendants were entitled.

The issues were sufficient to present all matters in controversy and to determine the rights of the parties, and the court therefore properly refused to submit those tendered by the defendant. *Hatcher v. Dabbs,* 133 N. C., 239; *Ray v. Long,* 132 N. C., 891; *Patterson v. Mills,* 121 N. C., 251.

As no definite sum was admitted or shown to be due by the plaintiff to the defendant, and as the correct amount due could not be ascertained until the other questions were determined, it was not necessary for the plaintiff to make any tender of the amount due on the notes. *Vaughn v. Gooch,* 92 N. C., 610. The rights of the defendant in this respect are fully protected by the judgment of the court.

We have carefully examined the other exceptions, and find no error in the rulings of the court to which they were taken.

No error.

Cited: In re Herring, 152 N. C., 259; *Waters v. Lumber Co.,* 154 N. C., 235; *Clark v. Aldridge,* 162 N. C., 332; *S. v. Jenkins,* 164 N. C., 529; *Lumber Co. v. Lumber Co.,* 169 N. C., 89.

(26)

ASHEVILLE LAND COMPANY v. JOHN H. LANGE ET AL.

(Filed 22 December, 1908.)

1. **Ejectment—Trespass—Evidence—Summons—Acts of Ownership.**

When plaintiff sues in ejectment and has shown title to the *locus in quo* in himself, it is competent for him to show acts of forcible trespass thereon of defendant, which occurred after the issuance of the summons, of such character as to indicate a claim of the right of possession.

2. **Same—Judgments—Nonsuit.**

A judgment as of nonsuit upon the evidence will not be granted in an action involving title to land, when the plaintiff has shown a forcible trespass upon the *locus in quo* by the defendant after summons was issued, and that defendant immediately entered, assumed dominion and exercised acts of ownership.

3. **Same—Pleadings.**

When the defendant, in an action involving the title to land, denied a wrongful and unlawful withholding of the possession of the *locus in quo*, and the testimony shows that plaintiff has title, and that defendant, after the summons was issued, stopped the work of plaintiff's employees by the use of a gun, claimed the land and hauled dirt thereon to cover piers which the plaintiff was having constructed, there is evidence sufficient to take the question of title to the jury.

4. **Ejectment—Title—No Adverse Claim—Pleadings—Allegation of Possession.**

Since the statute of 1893 (Revisal, sec. 1889) it is not necessary to allege that defendant was in possession, in an action involving title to land.

ACTION tried before *Peebles, J.*, and a jury, at March Term, 1908, of BUNCOMBE.

Plaintiff corporation sets forth two causes of action, alleging: (1) That it was the owner of the *locus in quo*, a lot in the town of Asheville, described by metes and bounds; that defendants were in the wrongful and unlawful possession of the land, etc. (2) That defendants are in the wrongful possession *and claim to own a part of said lot;* that plaintiff contracted with certain builders to build stone piers and a hotel on said lot, and that it, for that purpose, entered thereupon and was proceeding to erect said building; that defendants entered upon said lot,

(27) and with force and violence drove the plaintiff's agents and contractors and its employees from said lot and prevented them from continuing in the prosecution of their work, and that they continued to obstruct and prevent said work, etc.

Defendants denied all of the allegations in the complaint, except the sixth, and this they denied, "except as stated in the answer." For

a further defense they allege that defendant Charles Kearns is the owner of the following described land (proceeding to describe a lot in the city of Asheville, known as the Glen Rock Hotel, giving courses and distances); that the plaintiff is in the possession of a part of the premises described in the further defense, and unlawfully and wrongfully withholds possession, etc. Plaintiff replied to the new matter, denying same.

After the suit was instituted the corporation conveyed the land described in the complaint to one L. Blomberg, who was made a party plaintiff: Blomberg introduced a deed from the Asheville Land Company to himself, duly recorded, and a deed from the Southern Improvement Company to Halyburton. He also introduced evidence tending to show that Town Branch had changed its channel after the date of the Halyburton deed, by reason of freshets and the filling in with stone and dirt by the owner of the hotel and the city in such way as to throw to the side of the branch on which defendants' lot is located a strip of earth of about 18 feet in width, at the point of the beginning corner and for some indefinite distance up said branch. Both parties claimed under a common source. He also introduced one Plemmons, a rockmason, who testified that, some ten or twelve years before, he was engaged in work for J. D. Bostick, near the Glen Rock Hotel, building piers, right at the back of a little house claimed by Mr. Bostick, four or five feet back of the house, about forty or fifty feet from the street. "While I was at work there defendant Lange came out and said that it was his property and we were building on his land, and I just got away from there. He was on his place, just standing there." Plaintiff Blomberg testified that he heard defendant Lange testify on the former trial. He was asked whether he did not come out with a gun, and "he kinder turned and laughed and said he had a gun, or something like that, and he as much as said that he ordered them off the grounds back of the (28) house, a part of the land in dispute; that Bostick left." The witness was asked, on redirect examination, "How did you cover them (the piers) up?" Answer: "When the depot was built he hauled dirt over there, and one day he had three or four teams hauling dirt, covering up the piers. There were three or four of my piers on the line of the house, running right back, and I told Mr. Lange that I forbid him to cover up those piers." This testimony was, upon defendants' objection, excluded, because it referred to what was done after suit was brought. Plaintiff excepted.

The answer of defendants was introduced by plaintiff.

At the close of plaintiffs' evidence his Honor, upon defendants' motion, rendered judgment of nonsuit, for that the plaintiffs had introduced no evidence that defendants were in possession when the action was instituted. Plaintiff excepted and appealed.

Frank Carter, H. C. Chedester, Davidson, Bourne & Parker for plaintiffs.

J. H. Merrimon and J. G. Merrimon for defendants.

CONNOR, J. The first assignment of error presents the question whether evidence of the defendant's conduct, with respect to the land upon which it is alleged that he committed a trespass prior to the date of the summons, subsequent thereto, may be heard to show that the trespass was committed in the assertion of ownership and was followed by possession. When the plaintiff sues in ejectment, or under The Code system of pleading and practice sues to recover possession, it is elementary that he must show title and, if denied, possession at the date of the summons. This the plaintiff concedes, but he insists that, having shown a trespass, an invasion of his possession, he may, for the purpose of showing that it was committed with the intention of asserting an adverse title, introduce evidence of acts of ownership and dominion on and over the land subsequent to the trespass and the beginning of his action. It would seem that, if the defendant drove the plaintiff away from the land by violence or threats, and that suit was brought immediately, it should be competent for him to show the animus with which the
(29) trespass was committed, by showing that he followed up the trespass by actual occupation and assertion of ownership. If in this case the plaintiff should show that the title to the land in controversy is in him, and that on the day named in the complaint defendant drove him from the occupancy or possession and immediately entered and assumed dominion, exercising acts of ownership, although subsequent to the date of the summons, why should plaintiff's action be dismissed and he be compelled to start again? If defendant does not claim to own the land and assert that his unlawful conduct was a simple trespass, he can disclaim and put an end to the action. It does not come with good grace from him to say that, although he has followed up his wrongful act by actual possession, the plaintiff must be nonsuited because he sued immediately upon the commission of the trespass. It is said: "If A enters on the land of B, without ousting him or doing some act equivalent to an ouster, he will not thereby acquire a seizin as against B, unless B elects to consider himself disseized." 3 Washburn Real Prop., 137. "The possession of the defendant may be proved by his declaration, his occupation of the premises by residing thereon, or by any other acts of ownership which the case affords." Tyler on Eject., 473; *ibid.*, 875. "It is often very difficult and sometimes practically impossible to distinguish between acts which constitute merely trespasses on the land and acts amounting to a claim of title or an exercise of ownership over it; and, though trespass and ejectment are distinct remedies

which must not be confounded, it is not an easy task to find the dividing line. The practice of encumbering actions for the trial of title with this issue of the possession of the defendant often results in the miscarriage of the action and places the claimant in an extremely awkward position. Thus, questions of fact involving the title are sometimes submitted to the jury, together with disputed facts as to the possession or occupancy of the lands by the defendant, and the jury, under the practice in some States, is allowed to render a general verdict." Sedg. & Wait Trial Title, 236. With us the two issues are submitted. If the defendant does not wish to litigate the title he can disclaim, and if the plaintiff (30) fails to show a trespass or an ouster, he will be taxed with the cost.

Independent, however, of this phase of the case, we think that in more than one aspect the plaintiff was entitled to go to the jury. It is manifest from the pleadings that the defendant denies a wrongful and unlawful withholding of possession of the *locus in quo*. The testimony, if believed, shows that plaintiff's agent was working upon it, building piers, preparatory to the erection of a hotel; that defendant Lange came and said that it was his property—they were building on his land—not to build on it; that by this conduct plaintiff was prevented from proceeding with the work. Plaintiff Blomberg says that he heard defendant's testimony, on a former trial, in regard to the shotgun. This, followed by the evidence of hauling dirt on the land and covering the piers, shows clearly that defendant is assuming ownership of the property and assuming dominion over it.

Whether the action is treated as one for the recovery of possession or to quiet title, pursuant to the act of 1893, ch. 763 (Revisal, sec. 1589), the plaintiff was entitled to go to the jury and have the controversy ended. The Code system of pleading swept away the technicalities which in the old action of ejectment so often obstructed the trial of title to land. This was followed by the statute of 1893, which removed the necessity for alleging the defendant was in possession. The plaintiff may now set out his claim of title, and if defendant disclaims any adverse claim the plaintiff pays the cost, and the title as between them is settled. This remedial statute should be liberally construed to advance the remedy and permit the courts to bring the parties to an issue.

An interesting account of the legislation in the different States removing the difficulties which under the ancient writs used in England prevented parties from trying title is to be found in Sedg. & Wait Trial, sec. 80, *et seq.*: "If plaintiff sues for a trespass, and alleges title, defendant may join issue on title and admit the trespass, or, if he wish, he may deny the trespass, and thus the real question in controversy is presented. So, in an action for the recovery of possession, if defendant does not set up an adverse title he may deny possession, and the contro- (31)

versy will be narrowed to that question. He should not be permitted to trifle with the court by litigating the title and denying possession. No one knows better than he whether he is in possession of the land in controversy." In this case, pending for six years and tried once before, *Land Co. v. Lang* (146 N. C., 311), the plaintiff is now nonsuited, leaving the real question in controversy unsettled. This we do not think is allowable under our system of procedure. Either the defendant was committing an unjustifiable wrong when by his conduct he stopped plaintiffs' employees from working on the land, or he did so in the honest assertion of an adverse claim to the property. In either aspect of the case the plaintiff is entitled to appropriate relief. If defendant does not claim to own the strip of land he should be required to say so; if he does so claim, the controversy should be tried and settled. The judgment of nonsuit must be set aside and the case tried upon its merits.

New trial.

YADKIN RIVER POWER COMPANY v. THE WHITNEY COMPANY.

(Filed 22 December, 1908.)

1. **Legislative Powers—Charters—Alterations and Amendments—Constitutional Law.**

   All charters obtained by legislative enactment are subject to the provisions of Article VIII, sec. 1, of the Constitution, and "may be altered from time to time or repealed."

2. **Corporations—Electric Companies—Water Powers—Public Policy—Charters—Re-enacting Statutes.**

   Plaintiff, an electric company, obtained a charter by chapter 236, Private Laws 1897, whereby it was given the right of eminent domain to acquire water powers against the will of the owner. The corporation was not organized within five years, as required by its charter. Chapter 74, Public Laws 1907, declares that electric companies can not use such right; and thereafter, at the same session, by private act, the Legislature granted plaintiff three years in which to organize, and provided that, as amended, chapter 236, Private Laws 1897, "is hereby reënacted": *Held*, (1) that the public policy, as declared in the general law, was not repealed in its application to the plaintiff's charter by the private law subsequently passed at the same session; (2) the private act of 1907 must be taken as reënacting the plaintiff's charter in the same light, status and condition as it stood at the time the reënacting statute was passed.

HOKE, J., took no part in the decision of this case.

(32) ACTION from MONTGOMERY, heard at chambers, before *Councill, J.*, holding the Spring Terms, 1908, of the Tenth Judicial District.

Guthrie & Guthrie for plaintiff.

Burton Craige, Adams, Jerome & Armfield, and W. A. Way for defendant.

CLARK, C. J. Special proceeding to condemn a natural water power for the purpose of erecting a plant thereon. The defendant had already become by purchase the owner of the power for the identical purpose, and had begun, two years before, the construction of an immense water power plant.

The plaintiff noted numerous exceptions, but it is unnecessary to consider them if it did not possess the right of eminent domain. It claims to have acquired that right by virtue of its charter (chapter 236, Laws 1897). But such right was taken from it by chapter 74, Laws 1907, amending Revisal, sec. 1573, which provides that water powers, whether developed or undeveloped, shall not be condemned by electric companies, and that "any provisions in any special charter heretofore granted in respect to the exercise of the right of eminent domain which are in conflict with the general law, as herein amended, are repealed."

The Constitution, Art. VIII, sec. 1, provides that "all general laws and special acts" creating or authorizing the creation of any corporation "may be altered from time to time or repealed." The plaintiff took its charter subject to the power reserved in this section to amend or repeal it. *Griffin v. Water Co.*, 122 N. C., 210; *Debnam v. Telephone Co.*, 126 N. C., 843; *Coleman v. R. R.*, 138 N. C., 354.

The plaintiff's charter (chapter 236, Laws 1897) required it to begin the construction of its plant within five years from the ratification of that act. It did not do so. Chapter 179, Private Laws, (33) 1907, struck out that provision and inserted in lieu thereof the words "within three years from and after 1 April, 1907," and provided that, "as amended," chapter 236, Laws 1897, "is hereby reënacted."

The general public policy of the State was declared by the public statute (chapter 74, Laws 1907), which deprived all electric companies of the power to condemn water powers. The private act (chapter 179, Private Laws 1907), enacted subsequently, does not change the public policy (just declared) at the same session by chapter 74, Public Laws 1907 (that electric companies can not use the right of eminent domain to acquire water powers against the will of the owner), but must be taken as reënacting the plaintiff's charter, in the same plight, status and condition as it stood at the time the reënacting statute was passed; that is, the charter of 1897 had just been amended by the general statute, which struck out the provision in any and all charters which had conferred the right of eminent domain on any such company; and Private Laws 1907, ch. 179, reënacted the plaintiff's charter, as thus regulated,

by adding an amendment, giving three years from 1 April, 1907, in which the plaintiff might begin work, in lieu of the five years allowed from the ratification of the original act of 1897.

There is nothing to indicate any intention to change the status of the plaintiff's charter as it stood at the passage of the reënacting statute. There is no reason or suggestion upon the face of the reënacting statute, or *aliunde,* or in the nature of its charter or purposes, that this corporation was intended to be exempted from the public policy declared by chapter 74, Laws 1907, that such corporations should not exercise the right of eminent domain to acquire natural water powers, *in invitum.*

In *Denver Co. v. Alling,* 99 U. S., 480, it was held that the plaintiff accepted the reënacting statute as renewing the charter in the status in which it was at the time of the renewal, with such changes only as were specifically made in the reënacting statute. Especially is this true as to the grant of the right of eminent domain, a grant which must always clearly appear. 1 Lewis Em. Dom., sec. 254; 15 Cyc., 567.

(34) The excellent brief of the defendant presents the following seven reasons why the plaintiff's prayer for condemnation should not be granted, and in support of the action of the court below in denying it:

"1. The right to condemn water powers is taken away by Public Laws 1907, ch. 74, and the land sought to be condemned is a natural water power. (Finding of fact No. 9.)

"2. The plaintiff has never paid any franchise tax, as required by Public Laws 1907, ch. 256, sec. 83, and former statutes, and its charter was thereby repealed. (Finding 10.)

"3. The plaintiff did not begin the construction of its plant within five years, as required by its charter. (Finding 3.)

"4. The long delay of the plaintiff, from 1899 to 1907, after filing its borrowed map, before taking any steps to acquire the land, was unreasonable and inconsistent with the idea that the filing of the map was in good faith. (Finding 13.)

"5. The land sought to be condemned had already been appropriated by the defendant before the filing of the petition and defendant had spent over three million dollars on the construction of its dam and canal. (Finding 14.)

"6. The construction of the dam and canal, as proposed by the plaintiff, would destroy and render worthless the defendant's dam. (Findings 15, 21 and 22.)

"7. The property sought to be condemned is necessary to the completion of the defendant's plant. (Finding 16.)"

All seven of these grounds are supported by the findings of fact; but as the first is, in our opinion, conclusive against the plaintiff's claim,

the others need not be discussed. The plaintiff has no meritorious grounds in any aspect. It has expended no money, has erected no plant, has delayed beyond the time given in its charter to begin, while the defendant purchased the property, has expended very large sums in its development and has been at work for two years.

Affirmed.

Cited: R. R. v. Oates, 164 N. C., 169; *R. R. v. Light & Power Co.,* 169 N. C., 473; *Power Co. v. Power Co.,* 171 N. C., 256.

Writ of error dismissed, 214 U. S., 503.

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(35)

TOWN OF HENDERSONVILLE v. J. H. JORDAN.

(Filed 22 December, 1908.)

1. **Cities and Towns—Bond Issue—Necessary Expense—Streets and Sidewalks—Vote of People—Constitutional Law.**

The cost of maintaining the street of a town, to the extent and in the manner required for its good government and well being, is a necessary expense; and an indebtedness incurred on that account, without first submitting it to a vote of the people, is not forbidden by Article VII, sec. 7, of the Constitution.

2. **Elections—Cities and Towns—Bond Issue—Statutory Requirements—Private Laws.**

The regulations as to holding elections in the town of Hendersonville are contained in the general law on the subject (Revisal, sec. 2958), and the charter of the town of Hendersonville (chapter 97, Private Laws 1901), where the same is not in conflict with the general law; and when, under the provisions of the general law, a bond issue was authorized by the vote of the people of that town, under the charge and supervision of a registrar and two judges, the same is valid.

3. **Cities and Towns—Bond Issue—Registrar a Freeholder—Requisites—Substantial Harm—Interpretation of Statutes.**

Although the law applicable should require that a registrar of voters in an election held for the purpose of submitting the question of a bond issue to the people of a town should be a freeholder, the objection that he was not one is only an irregularity, and in the absence of any claim or evidence that substantial harm has been done it will not invalidate or affect the result.

4. **Cities and Towns—Bond Issue—Vote of the People—Polling Places—Requisites.**

The fixing and advertisement of the polling places is of the substance in an election to be held by the voters of a town; but when the judgment

appealed from establishes the fact that they had been fixed and advertised as required by Revisal, sec. 2945, applicable in this case, it will be sustained on appeal.

5. Cities and Towns—Bond Issues—Vote of the People—Majority Vote—Statutory Requirements—Constitutional Law.

When the statute under which an election upon the question of issuing bonds by a town declares that the result shall be determined by "a majority of those voting on the proposition," and the issue is for a necessary expense and not within the constitutional restrictions as to municipal indebtedness, the statute controls the question as to their validity.

6. Same—Fraud.

The fact that some illegal votes have been cast in an election to determine the question of an issuance of bonds by a town will not affect the result, in the absence of fraud, unless it is made to appear that otherwise a majority of votes would have been cast for the contesting party.

(36) APPEAL from *Ferguson, J.*, at November Term, 1908, of HENDERSON, a jury trial having been formally waived.

Defendant appealed.

It appeared that defendant had prepared, ready for delivery, $18,000 of corporate bonds, for the purpose of raising money to pave certain streets and sidewalks of the town, the issue having been sanctioned and approved by the voters of the town at an election held to determine this question; that defendant had made an offer to buy the bonds at a specified price, and, the offer having been accepted by plaintiff, defendant resists compliance, alleging that the bond issue is invalid.

The court held that the proposed issue of bonds was legal and valid, and gave judgment for plaintiff, whereupon the defendant excepted, assigning error as follows:

"Exception No. 1. That the court should have held that the law required that there should be three judges, as provided by section 1, chapter 97, Private Laws 1901, appointed to hold the election, and that his Honor's holding that two judges were sufficient is error, to which ruling the defendant excepted.

"Exception No. 2. That the court erred in holding that it was not necessary for the registrar of voters for said election to be a freeholder, to which ruling the defendant excepted.

"Exception No. 3. That the court erred in holding that the law did not require said election to be held in the county courthouse, and that the same was lawfully and regularly held at the town hall, where the mayor holds his court, to which ruling the defendant excepted.

"Exception No. 4. That the court erred in holding that it was sufficient at said election for the majority of the qualified voters *who voted at said election* to carry the proposition and authorized improvements

specified in the proposition, and the court should have held that it (37) was necessary for a majority of the qualified voters of said town to approve said proposition. To this ruling of the court defendant excepted."

The facts established presented the questions indicated in these assignments of error by defendant.

McD. Ray and Busbee & Busbee for plaintiff.
W. A. Smith for defendant.

HOKE, J., after stating the case: In *Commissioners v. Webb,* 148 N. C., 120, the Court held: "The decisions of this State sanction the position that the costs of maintaining the streets to the extent and in the manner required for the well ordering and good government of a town is a necessary expense, and that an indebtedness incurred for such a purpose does not come under the prohibition of section 7, Article VII, of the Constitution, which forbids a municipality to contract a debt, pledge its faith or loan its credit, etc., except for the necessary expenses thereof, without a vote of the people. *Fawcett v. Mt. Airy,* 134 N. C., 125; 63 L. R. A., 870; 101 Am. St. 825."

And this being true, the question presented will be determined chiefly by the construction and effect of the statutes applicable to the case. And in reference to the manner of holding municipal elections, canvassing the returns and declaring the result, etc., the general law as to municipal elections (Revisal, sec. 2944) provides: "That all elections held in any city or town shall be held under the following rules and regulations, except in the cities of Charlotte and Fayetteville and the town of Shelby, N. C., and in certain enumerated counties," the town of Hendersonville not being included in the exception. This general law, therefore (Revisal, Title VII—Election, etc.), and the charter of the town, as contained in Private Laws 1901, ch. 97, when it is not inconsistent with the general law, contain the statutory regulations controlling the matter. *Wharton v. Greensboro,* 146 N. C., 356. Referring, then, to these provisions of the statute, it appears that this election was properly held under the charge and supervision of a registrar and two judges instead of three, and that the registrar is not required to be a freeholder. Revisal, sec. 2958. This is certainly a correct position as to the number of judges, and if it were otherwise as to the qualifica- (38) tion of this registrar the objection at most is only an irregularity; and in the absence of any claim or evidence that substantial harm has come of it the authorities are to the effect that such an exception should not be allowed to invalidate or affect the result. *DeBerry v. Nicholson,* 102 N. C., 465; *Sanders v. Lacks,* 142 Mo., 255. And as to the place

where the election was held, the general law (section 2946) clearly contemplates that the polling place should be fixed by the governing authorities of the city or town; and while these places are, as a rule, of the substance (McCrary on Elections, sec. 141) and should be established and fully advertised, the facts indicate and the judgment embodies a declaration that the place was designated and fixed by the commissioners, to wit, at the town hall, a public place in the town, and was fully advertised as required by law.

On the remaining objection urged to the validity of this contemplated bond issue, that a majority of the qualified voters of the town was required, the charter provides expressly in reference to this election that the result shall be determined by "a majority of those voting on the proposition"; and the issue being for a necessary expense of the town, and not within the constitutional restrictions as to municipal indebtedness, the statute law, as stated, controls the question (*Commissioners v. Webb, supra,* and authorities cited); and a clear majority of those voting having approved the measure, the necessary authority for the issue has been established.

The testimony shows, and the finding of the court declares, "that the suggestion of illegal votes does not amount to enough to change the result of the election, provided only a majority of those voting is required to approve the proposition submitted." And, further, "There is no suggestion of any fraud in the election or in counting and reporting the votes or in declaring the result," etc. It is well established with us that "the results of an election will not be disturbed because of illegal votes received or legal votes tendered and refused, unless that number be such that the connection would show a majority for the contesting party" (*Deloatch v. Rogers,* 86 N. C., 357), and this is the generally accepted doctrine. *People v. Cicott,* 16 Mich., 283.

(39) There is therefore no valid objection shown or suggested to the validity of the bonds offered to defendant, and the judgment below is

Affirmed.

Cited: Younts v. Comrs., 151 N. C., 586; *S. v. Spires,* 152 N. C., 6; *Trustees v. Webb,* 155 N. C., 388; *Kinston v. Trust Co.,* 169 N. C., 209; *Hill v. Skinner, ibid.,* 409.

D. T. SMITHWICK v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 22 December, 1908.)

Instructions.

In this case the assignments of error were to the judge's charge, in which no substantial error was found on appeal.

ACTION tried before *Lyon, J.*, and a jury, at April Term, 1908, of FRANKLIN, for damages for personal injury.

The court submitted the usual issues. The jury found for plaintiff, and from the judgment rendered the defendant appealed.

William H. Ruffin and Spruill & Holden for plaintiff.
Day, Bell & Allen and T. W. Bickett for defendant.

PER CURIAM: The evidence tends to prove that the plaintiff was seriously injured in an accident caused by the train of defendant running beyond the end of the track at the Louisburg station.

The negligence of the defendant was properly admitted. There was no issue as to contributory negligence submitted, and the several assignments of error relate to the instructions of the court upon the issue of damage.

Upon examination we found no substantial error committed by the judge below, and there is nothing disclosed by the record which we think necessitates a new trial.

No error.

(40)

C. C. SMITH, JR., v. NEW BERN LUMBER COMPANY.

(Filed 22 December, 1908.)

1. Deeds and Conveyances—Timber—Title, Source of—Description—Estoppel—Breach of Contract

Defendant, claiming title to timber by *mesne* conveyances from plaintiff, is estopped to deny plaintiff's title to the lands in an action to recover damages for cutting timber of other kinds and dimensions than the conveyances specify.

2. Timber—Independent Contractor—Prima Facie Case—Questions for Jury.

In this case defendant offered no evidence. Plaintiff's evidence made out a *prima facie* case, and the questions of independent contractor and a wrongful cutting of plaintiff's timber were for the jury.

ACTION tried before *W. R. Allen, J.*, and a jury, at Fall Term, 1908, of JONES, to recover damages for cutting timber upon certain lands belonging to plaintiff.

These issues were submitted to the jury:

"Was the plaintiff the owner of the land described in the complaint?" Answer: "Yes; a one-half interest."

2. "If so, did the defendant wrongfully cut timber thereon not conveyed by the deeds of C. C. Smith to C. M. Heath?" Answer: "Yes."

3. "If so, did defendant wrongfully consume lightwood therefrom?" Answer: "Yes."

4. "What damage, if any, is plaintiff entitled to recover? Answer: "Three hundred dollars."

From the judgment rendered the defendant appealed.

Warren & Warren, Simmons, Ward & Allen for plaintiff.
W. D. McIver for defendant.

PER CURIAM: It is admitted in the amended answer of the defendant that it claims title to all the timber of certain kinds and dimensions by virtue of the timber deeds from the plaintiff to Heath, and thence by *mesne* conveyances to the defendant. The timber was cut and the entry made on the lands for the purpose of cutting it in pursuance of such deeds. In consequence the defendant would be estopped from denying plaintiff's title to the land in an action brought to recover
(41) damages for a violation of the contract by cutting timber of other kinds and dimensions than such as is authorized by the contract. *Monds v. Lumber Co.*, 131 N. C., 20.

It will be seen from the defendant's amended answer that the only issue raised by the pleadings is the liability of the defendant for such wrongful cutting. The defendant's answer sets up that the cutting was done by an independent contractor, over whom it had no control. As to whether Heath was cutting for defendant, as its agent, or under an independent contract, was a question under the evidence in this case for the jury. The defendant offered no evidence as to its relations with Heath, but rested its case upon the evidence offered by plaintiff.

The evidence introduced by plaintiff made out a *prima facie* case and was amply sufficient to go to the jury, both upon that question and as to the wrongful cutting of timber, etc., not authorized by the timber contract.

We have examined the record with our accustomed care, and fail to find any error necessitating a new trial.

No error.

CALDWELL LAND AND LUMBER COMPANY v. J. R. ERWIN.

(Filed 22 December, 1908.)

1. **Grants—Deeds and Conveyances—Descriptions—Fixed Corners—Subsequent Surveys.**

An instruction is erroneous when its effect is to ignore the calls of a grant under which a party claims, and adopts a line from a fixed corner subsequently made by the surveyor by construction and not by the actual survey upon which the patent was issued.

2. **Grants—Boundaries—Calls.**

In this case the call in grant No. 893, "beginning at the S. W. corner of entry No. 3058, and running with the line of the entry," refers to the line of entry No. 3058, upon which grant No. 895 was based. (See chapter 173, Laws 1893.)

APPEAL from *Ferguson, J.*, at June Term, 1908, of CALDWELL. (42) This is a proceeding under section 1709 of the Revisal, in which the plaintiff filed a protest to an entry by the defendant of a certain tract of land in Caldwell County, containing 300 acres, more or less. The question is whether there was any vacant land within the boundaries described in the entry. The defendant introduced in evidence a grant to George N. Folk, No. 893, the calls of which were as follows: "Beginning on the hillside south of Lost Cove Creek, S. W. corner of entry No. 3058, and running north with the line of the entry, crossing Lost Cove Creek, 300 poles to a stake in J. M. Webb's line; thence west with his line 20 poles to his S. W. corner; thence north with his line 20 poles to a stake, corner of No. 3069, and thence by various courses and distances (given in the grant) to the beginning." There was evidence tending to show that the southwest corner of entry No. 3058 was at a chestnut, and that if the lines of grant No. 893 should be run north 300 poles with the line of the entry to Webb's line, and thence west with Webb's line to his southwest corner, there would be no vacant land within the boundaries of defendant's entry. J. M. Houck, who surveyed the land under the warrants, testified that he ran a line east from Webb's southwest corner 20 poles, and established a corner and located the line from that point to the chestnut, the beginning corner, by construction and not by actual survey. He also stated that the calls, courses and distances in grants numbered 889, 893 and 895 correspond with the lines as surveyed by him.

Among other instructions given, the court charged the jury as follows: "If you should find from the evidence that the surveyor, who surveyed under the warrant of the entry, actually located and established a corner by driving a stake and marking witnesses to it at 20 poles east

of Webb's corner, then the grant would run to it." The jury returned a verdict for the defendant. The court, being of the opinion that the instruction above quoted was erroneous, set aside the verdict and ordered a new trial. The defendant excepted and appealed.

(43) *Jones & Whisnant for plaintiff.*
Lawrence Wakefield and Mark Squires for defendant.

WALKER, J. The new trial was properly ordered by the court, as the effect of the instruction was to ignore the calls of the grant and adopt a line which was not run and marked at the time the grant was issued, and with a view of making it one of the boundaries of the grant. This case is not within the principle established in *Cherry v. Slade,* 7 N. C., 82; *Safret v. Hartman,* 50 N. C., 185; *Fincannon v. Sudderth,* 140 N. C., 246; *Elliott v. Jefferson,* 133 N. C., 207. It will be seen upon an examination of these cases that none of them sustains the contention of the defendant that the instruction of the court was correct and the verdict should stand. The rule that a line actually run by the surveyor, which was marked and a corner made, entitles the party claiming under the patent or deed to hold accordingly, notwithstanding a mistaken description of the land in the deed, presupposes that the patent or deed is made in pursuance of the survey and that the line which was marked and the corner which was made were adopted and acted upon in making the patent or deed, and therefore gives them controlling effect. *Elliott v. Jefferson, supra.* The court below, in *Safret v. Hartman, supra,* charged the jury "that notwithstanding the black oak was not called for in the deed, yet if it was marked as a corner to the land conveyed, at the time of the conveyance, the line should be extended to it, regardless of course and distance." This Court held the instruction to be erroneous, and adverted to the rule as we have already stated it. It does not appear in this case that the patent was made in pursuance of what the surveyor testified was done by him, but, on the contrary, the call is north from the southwest corner of entry No. 3058 with the line of that entry to Webb's line; thence west with his line 20 poles to his southwest corner; thence north with his line 20 poles to a stake, and thence with the several courses and distances to the beginning. We do not know what the evidence will be at the next trial, and therefore can not determine what the boundaries of the grant are. We are of the opinion, though, that the call in grant No. 893, namely, "running with the line of the entry," does not refer to the line of entry No. 3059, upon which grant No. 893 was issued, but to the line of entry No. 3058, upon which grant No. 895 was based. This ap-
(44) pears clearly from the wording of the two grants. Chapter 173

of the Laws of 1893 provides for the correction of the calls of the entries by the descriptions in the grants issued to George N. Folk, and declares the latter to be "the true and proper descriptions." This act was passed before the entry of the defendant had been laid. The court did not err in setting aside the verdict and ordering a new trial.

No error.

Cited: Lance v. Rumbough, ante, 25; *Lumber Co. v. Lumber Co.,* 169 N. C., 89, 95.

IN THE MATTER OF I. N. EBBS.

(Filed 22 December, 1908.)

1. Attorneys—Proceedings to Disbar.

Proceedings to disbar an attorney, brought under the provisions of Public Laws 1907, ch. 941, are of a civil nature.

2. Same "Convicted"—Other Jurisdiction—Power of Courts.

Chapter 941, Laws 1907, does not confer upon the court the power to disbar an attorney because he has been "convicted" in the courts of another State or of the United States.

3. Same.

Revisal, sec. 211, is a diabling statute, and withdraws from the court the power to disbar attorneys convicted of crimes in another jurisdiction.

BROWN, J., and CLARK, C. J., dissenting.

ACTION tried before *Peebles J.,* upon demurrer, heard at May Term, 1908, of BUNCOMBE.

Pursuant to the provisions of chapter 941, Public Laws 1907, the Committee on Grievances of the North Carolina Bar Association filed with the Solicitor of the Fifteenth Judicial District an accusation stating that, upon investigation of certain charges preferred before them against I. N. Ebbs, a licensed attorney and member of the Bar of the State, residing in said district, the said committee were of the opinion that said charges should be further investigated by the court, as provided by the statute. A copy of the charges and the records upon which they were founded accompanied the report. The solicitor thereupon caused the report and the records, together with an accusation preferred by himself embodied in the report, to be served on said attorney. (45) *Hon. R. B. Peebles, Judge presiding,* thereupon made an order reciting the proceedings had before the committee, directing the said I. N. Ebbs to appear before him, at Asheville, N. C., on a day named, and

answer said charges. On the return day the said I. N. Ebbs duly appeared, being represented by counsel. The committee was represented by the solicitor of the district and other counsel. The accusation was founded upon certified records from the Circuit Court of the United States, Eastern District of Louisiana, showing a bill of indictment returned by the grand jury, charging respondent with forgery in six counts. The specific acts charged consisted in unlawfully, falsely and feloniously forging and altering certain receipts, accounts, etc., with intent to defraud the United States. Upon a trial before said court, respondent was convicted upon all of the counts except the first and sentenced to imprisonment in the Parish Prison of the Parish of New Orleans for the term of ninety days and to pay a fine of $1,000.

Respondent demurred to the evidence, as follows:

"The respondent, I. N. Ebbs, with leave of court, objects to the sufficiency of the accusation preferred by the solicitor for the State, as amended, in the above-entitled proceeding, and says:

"1. The said accusation contained no cause for the disbarment of respondent, except an allegation of a conviction of the defendant of a crime alleged to be punishable in the penitentiary, before and by the United States District Court for the Eastern District of Louisiana.

"2. That said accusation does not charge this respondent with having been convicted of any crime since the passage of chapter 941, Laws 1907.

"3. That the only conviction alleged in said accusation is a conviction for an offense not punishable in the penitentiary by the laws of North Carolina, even if the offense had been committed within the State of North Carolina."

His Honor overruled the demurrer and rendered the following judgment:

"It is ordered, adjudged and decreed that the said I. N. Ebbs be
(46) and he is hereby disbarred as an attorney at law from the practice as an attorney and counselor in the courts of this State, and that the name of the said I. N. Ebbs be stricken from the roll of the practicing attorneys of the courts of this State, and that he henceforth be denied any and all the rights or privileges of an attorney and counselor in the courts of the State of North Carolina.

"The clerk of this court is hereby ordered to send a certified copy of this judgment to the Clerk of the Superior Court of Madison County, North Carolina, and the clerk of Madison County will enter the same in the judgment docket of his court."

Respondent excepted and appealed.

Assistant Attorney-General Hayden Clement for the State.
Adams & Adams and J. M. Gudger, Sr., for defendant.

CONNOR, J. Because of the novelty of the question raised by the demurrer of the respondent, and the importance to the public welfare of the correct interpretation of the statute under which this proceeding was instituted, we have given the record a careful and anxious consideration. The statute of 1907 (chapter 941) was enacted at the instance of the State Bar Association for the purpose of enabling it to more effectually discharge its duty to the people of the State, the courts and the bar by excluding from the profession unworthy members. This is the first instance in which the courts have been called upon to interpret and enforce its provisions.

Section 1 provides: "That an attorney at law must be disbarred and removed for the following causes: (*a*) Upon his being convicted of a crime punishable by imprisonment in the penitentiary. (*b*) When any judgment is rendered against him for money collected by him as an attorney and retained by him without any *bona fide* claim thereto or any part thereof.

"Sec. 2. That an attorney at law may be disbarred," etc., naming two causes.

The motion to disbar the respondent is based upon the first section. It will be observed that, among the several causes for which an attorney must or may be disbarred, this is the only one in which the court is required to act upon a record, and the respondent is not permitted to offer anything by way of defense or exculpation. The (47) court can not inquire into his guilt. The production of the record, showing a conviction, makes it the imperative duty of the court to disbar him. Without expressing any opinion as to the wisdom of so drastic a statute, we are not permitted to enlarge its terms by construction. The respondent says that by a recognized canon of construction the penalty must be confined to a conviction had in a court of this State. The case was thoroughly argued before us, and the industry of counsel has afforded us much aid. Counsel for respondent rely upon the rule laid down by *Mr. Justice Gray* in *Logan v. United States,* 144 U. S., 263 (p. 303). In that case the plaintiffs in error were indicted in the Circuit Court of the United States for murder and conspiracy, under the provisions of an act of Congress. The indictment was found and the case tried in the State of Texas. The Government introduced one Martin as a witness. It appeared that he had been convicted in the courts of North Carolina of a felony and sentenced to imprisonment in the county jail. The Texas statute rendered a person convicted of a felony incompetent to testify in the courts of that State. In discussing the exception to the ruling of the court admitting the witness, it was said: "At common law and on general principles of jurisprudence, when not controlled by express statute giving effect within the State which

enacts it to a conviction and sentence in another State such conviction and sentence can have no effect by way of penalty or of personal disability or disqualification beyond the limits of the State in which the judgment is rendered." The question, as applied to the disability of a person offered as a witness to testify, arose in this State, in *S. v. Candler,* 10 N. C., 393, when it was held by a divided court that a witness convicted of an infamous crime in Tennessee was incompetent to testify in this State. The *Chief Justice* concedes that such was not the law in England, but was of the opinion that by virtue of the "full faith and credit" clause of the Federal Constitution the law in this country was otherwise. The Court was not construing a statute in that case, but discussing a general principle of law. The question has been decided otherwise in many other States, and the decided weight of au-
(48) thority is against the decision in *Candler's Case. Parker, C. J.,* in *Com. v. Green,* 17 Mass., 515, writes a very able opinion, holding that "The conviction of an infamous crime in a foreign country or in any other of the United States does not render the subject of such conviction an incompetent witness in the courts of Massachusetts." He says: "To hold a person incompetent on account of such conviction is to give effect to the conviction and to enforce the punishment; and thus the penal laws of our State would reach into others," violating well-settled principles. In *Simms v. Simms,* 75 N. Y., 466, it appears that by a statute of that State it is provided that "No person sentenced upon a conviction for felony shall be competent to testify, unless pardoned," etc. *Rapallo, J.,* said: "I think it quite clear that the disqualification created by this statute is consequent only upon a conviction in this State." The conviction relied upon to exclude the witness was had in Ohio. Quoting Greenleaf on Evidence, who says that the weight of modern opinion seems to be that personal disqualification arising not from the laws of nature but from positive laws, especially such as are of a penal nature, are strictly territorial and can not be enforced in any country other than that in which they originated, he says: "I think this doctrine applicable to the question now in hand, and that there is nothing in the Constitution of the United States which prevents such application or requires that the personal disabilities, such as incompetency to testify or to vote, which may be imposed upon a person convicted of crime in one State, should follow him and be enforced in all the others. If such were the operation of the constitutional provision, the qualifications of witnesses called in our courts and of voters at our elections might be made to depend upon the laws of other States instead of our own." The learned *Justice* notices the decision in *Candler's case* and meets the argument upon which it is founded. It is insisted by the Attorney-General, and, we think, correctly, that this is

not a criminal action. It is rather in the nature of a civil proceeding, and probably should be prosecuted in the name of the Bar Association. This, we notice, is done in several of the States—as in Maine—*Penobscot Bar v. Kimball,* 64 Me., 140. Treating it as a civil proceeding, it is clear that the record of a conviction in a criminal action in another jurisdiction would not be conclusive of guilt. *Judge* (49) *Rapallo* says: "A record of conviction for a crime is not conclusive evidence, in a civil action, of the facts upon which it was based. There is a great weight of authority against its being admissible at all, except as evidence of the fact of conviction, when that fact is material." Greenleaf Ev., sec. 537; Wharton Conflict Laws, sec. 108; *Granite v. Bond,* 102 Md., 379; 5 A. & E., Anno. Cases, 915. The point was presented and decided in an interesting case in 2 West Va., 569—*Ex parte Quarrier.* The applicant for admission to the bar was duly licensed as an attorney in another State, and, complying with the statute in the newly made State of West Virginia, he was met with the objection that he was guilty of treason, having in his native State voted for the ordinance of secession and voluntarily entering the army of the Confederate States. He had received a pardon from the President. The Court held that he was entitled to be admitted, saying: "Indeed, it must not be forgotten that in this case no treason against the State of West Virginia, whose courts are invoked to consider the subject, has been either proved or confessed, and the only acts stated that could amount to the crime of treason were perpetrated against the United States, and for which the party has been pardoned by that Government. Now it would be straining the point too far to hold as contended for, that the war being waged against the United States, of which the State of West Virginia was one, was therefore waged against her in the sense contemplated by the statute against treason, and that therefore the acts in question were treason against the State and felony within the statute. For, while it is not intended to deny that the same act might constitute treason against the United States and also against the State, it is not enough to wage war against the United States generally or collectively or as component parts of the national Union, but it must be done directly against the State in particular. . . . An appeal has been made to the court to exclude attorneys, circumstanced as the applicant is, upon the ground of public policy and the danger of baleful influence in a political light. But these are considerations better addressed to the Legislature than the courts. Whatever may be the true policy of the lawmaking power to pursue is a question (50) for that power to determine. The duty and true policy of the courts to pursue is to expound the law as it is, and, if it is not what it ought to be, to leave it to the Legislature to change it."

In *Wisconsin v. Insurance Co.*, 127 U. S., 265, it is said (p. 291): "The proper place for punishment is where the crime was committed, and no society takes concern in any crime but what is hurtful to itself." Kames Eq. (3 Ed.), 326. When we consider the question upon the "reason of the thing" and sound State policy, the wisdom of the law, as we find it laid down with practical uniformity, is manifest. It is the natural interpretation of all statutes creating offenses and defining conduct, the doing of which is made indictable or subject to penalties, to refer them solely to the commission of such acts within this State. In respect to punishment of crimes and imposition of penalties, the States act within their own territorial limits and the Federal Government within its own sphere. No State can administer the Federal statutes, maintain prosecutions for their violations or impose punishments or penalties. *Parker, C. J.*, in *Green's case, supra,* wisely says: "Whether the facts which would be here deemed an infamous crime are the same which constitute the like offense in the country from which the record comes, the court will have no means of knowing with certainty. The crime of treason is known to be different in different countries. What is felony also in our country may not be felony in another, and it is competent for the Legislature of every nation to attach disabilities to the commission of offenses which by the laws of other nations may be wholly without such consequences." We know that the Federal Government punishes practically all offenses with imprisonment in the penitentiary. Violations of the revenue laws, often technical and involving no moral turpitude whatever, may be so punished. Again, acts which in our State are deemed misdemeanors, punishable by fine or a short term in the county jail or house of correction, are deemed of grave character and punished by imprisonment in the State's Prison in other States. Each State makes its penal codes, and the Federal Government does the same. If any other interpretation were put upon our statute
(51) it would logically follow that for violation of the Federal statutes or statutes of other States citizens of this State would forfeit their right to vote under our Constitution. Certainly the people of North Carolina never contemplated that any such construction would be put upon their laws. Care must be had to keep clearly in mind the fact that the court, in enforcing the statute, does not and can not inquire whether in truth the respondent has committed the crime charged. It is restricted to the inquiry whether he has been "convicted," and for this purpose the record of conviction by a court having jurisdiction to hear and determine the charge is conclusive, and the Court *must disbar* him. No provision is made of pardon or for repentance, followed by a life of probity. We are of the opinion that upon well-settled principles and sound reason the statute is confined to a conviction in this State.

It is insisted that, however this may be in regard to the act of 1907, the respondent may be disbarred by the court under the power conferred in section 211, Revisal. It is suggested that this statute is by implication repealed by the act of 1907. We incline to the opinion that the last statute is not in conflict with sections 211 and 212 of the Revisal. It is not necessary that we should decide the question, because, while the language clearly restricts the power of the courts to disbar an attorney, the exceptive language, "unless he shall have been convicted in open court or confessed himself guilty of some criminal offense, showing himself unfit to be trusted," etc., are to be interpreted in the same way as the word "convicted," in the act of 1907; hence the same obstruction is met in enforcing section 211 against the respondent. The history of this legislation may be learned and the purpose of the Legislature understood by reference to *Moore, ex parte,* 63 N. C., 397; Biggs, *ex parte,* 64 N. C., 202, and *Schenck, ex parte,* 65 N. C., 353. The last case was argued with a wealth of learning by the most eminent members of the Bar of the State. The Court held that the act of 1871 (Revisal, sec. 211) was constitutional; that it did not deprive the court of any of its "inherent powers"; that the court had no power to disbar an attorney for causes other than those prescribed by the statute. The opinion concludes: "It is a law of the land and ought to be observed." The question came before the Court again in *Haywood, ex parte,* 66 N. C., 1. (52) *Pearson, C. J.,* after a careful consideration of the effect of the statute upon the power of the court to disbar an attorney, said: "The act of 1871 (Revisal, sec. 211) takes from the court the common-law power to purge the bar of unfit members, except in specified cases, and it fails to provide any other power to be used in its place. It is a disabling and not an enabling statute, the whole purpose seeming to be to tie the hands of the court, so, when one power is taken away, the court is not at liberty to fall back upon another which it had before adjudged to be ineffectual to accomplish the end proposed." This case, as *Schenck, ex parte,* was argued by Mr. Moore, Mr. Phillips and Mr. Merrimon, counsel eminent for their learning, industry and loyalty to their profession. The Court was evidently desirous of exerting such power as had been left to it by the Legislature to compel a derelict attorney to discharge a conceded duty or be disbarred. It came to the conclusion that "the Legislature had tied its hands." We do not entertain any doubt that, in the absence of restrictive legislation, the courts have an inherent power to strike from their rolls names of attorneys who are found by reason of their conduct unfit and unworthy members. The decisions to this effect are numerous and uniform. An instructive opinion upon the question is to be found in *Penobscot Bar v. Kimball,* 64 Me., 140. *Dickerson, J.,* says: "An attorney is an officer of the court, as appears from the terms

of his oath of office, to wit: 'You will conduct yourself in the office of an attorney according to the best of your knowledge and discretion, and with all good fidelity, as well to the courts as your clients.' The order of his admission to the bar is the judgment of the court that he possesses the requisites, legal qualifications and good moral character to entitle him to practice the profession of an attorney at law. From the moment of his entrance upon the duties of his office he becomes responsible to the court for his official misconduct. The tenure of his office is during good behavior, and he can only be deprived of it for misconduct ascertained and determined by the court, after opportunity to be heard has been afforded. In the absence of specific provisions to the con-
(53) trary, the power of removal is commensurate with the power of appointment. . . If a good, moral character is indispensable to entitle one to admission to the bar, it is obvious that the necessity for its continuance becomes enhanced by the conflicts, excitements and temptations to which the practitioner is daily liable. For his official misconduct there is no power of removal but in the court. This power is therefore at once necessary to protect the court, preserve the purity of the administration of justice and maintain the integrity of the bar. . . . It is a mistaken view of this subject, as the foregoing authorities show, to conclude that an attorney at law can only be disbarred for acts done 'in his office as attorney' or 'with the courts,' in the term of his oath of office. On the contrary, an attorney may be guilty of disreputable practices and gross immoralities in his private capacity and without the pale of the court which render him unfit to associate with gentlemen, disqualify him for the faithful discharge of his professional duties, in or out of court, and render him unworthy to minister in the forum of justice. When such a case arises, from whatever acts or causes, the cardinal condition of the attorney's admission to the bar, the possession of a 'good moral character' is forfeited, and it will become the solemn duty of the court, upon a due presentment of the case, to revoke the authority it gave the offending member as a symbol of legal fitness and moral uprightness, lest it should be exercised for evil or tarnished with shame." *Whipple, C. J.*, in *Mills, ex parte,* 1 Minn., 393, says: "Should this Court, after being officially advised that one of its officers has forfeited the good name he possessed when permitted to assume the duties of his office, still hold him out to the world as worthy of confidence, they would, in my opinion, fail in the performance of a duty cast upon them by the law. It is a duty they owe to themselves, to the bar and to the public to see that a power which may be wielded for good or for evil is not entrusted to incompetent or dishonest hands. The extreme judgment of expulsion is not intended as a punishment inflicted upon the individual, but as a measure necessary to the protec-

tion of the public, who have a right to demand of us that no person shall be permitted to aid in the administration of justice whose character is tainted with corruption." *Ex parte Smith,* 28 (54) Ind., 47; *Fletcher v. Daingerfield,* 20 Cal., 427; *ex parte Brown,* 2 Miss., 303. In *S. v. Kirke,* 12 Fla., 278, *Wescott, J.,* writes an exhaustive opinion, reviewing the statutes and decisions in England and in this country. *Percy's case,* 36 N. Y., 651; *In re Wooley,* 74 Ky., 95; *People v. Goodrich,* 79 Ill., 148; *In re Smith,* 73 Kan., 743. These cases all hold that for dishonesty or other conduct in his official character, showing an absence of good moral character, the court has the inherent power to disbar an attorney. Some of them, as in the case from Maine, hold that when without reference to his official duties or relations he is guilty of such conduct the court may strike his name from the roll of its attorneys. In none of the cases do the courts undertake to say how far the Legislature may limit this inherent and essential power. We do not deem it proper to express any opinion upon this delicate question. This Court having held, in the cases cited, that the act of 1871 (now section 211, Revisal) did not deprive it of its essential inherent powers in this respect, we do not care to disturb or draw the question into discussion. Whatever may have been the reasons for passing that statute, they no longer exist, having passed away with the conditions which brought them into action. We are sure that in reënacting the statute in the Revisal of 1905 it was not the intention of the Legislature to unduly "tie the hand" of the court in preserving the high standard of conduct and character of our bar, which has been the pride of the people of the State. We have no doubt that if it appear to the Legislature that larger power in the courts is necessary to enable them to discharge their duty it will be prompt to confer it or to withdraw any undue restrictions now existing. Even for so laudable an end as purging the bar of unworthy members we should not exercise doubtful power or unnecessarily come into conflict with the Legislature. We do not entertain any doubt that, notwithstanding the restrictions placed upon the courts by the statute, ample power exists to protect them and their suitors from indignity, fraud, dishonesty or malpractice on the part of any of its officers in the discharge of their official duties. It is manifect, however, that for the commission of crimes which seriously affect their moral (55) character, but have no direct connection with their practical and immediate relation to the courts, the power to disbar attorneys is restricted by the express language of the statutes to convictions of the class of crimes named in the statutes. To give any other construction to the statute would not only do violence to well-settled principles, but might lead to results not contemplated by the Legislature. If, as the record shows, the respondent is guilty of the crime charged, his name

should be stricken from the roll of attorneys in this State, but as we have seen, no power now exists in the court to do so. We were requested by the committee on grievances to express our opinion to this extent, to the end that such further legislation may be had as would enable the State Bar Association to aid the courts in removing from the bar unworthy members. How far it is wise to define the crimes or confine cases to the mode of punishment as the basis for compulsory action is for the consideration of the Legislature. Like all legislation of general application, it is difficult to avoid danger of miscarriage in individual cases. We have been favorably impressed with the method of procedure followed in the *Kimball case,* 64 Me., 140. There the accusation was made by the bar, and, upon a notice to show cause, a reference was ordered to take testimony and report to the court; whereupon, after argument, the case was disposed of upon its merits. The disposition made by us of this appeal will not prevent a further investigation of the fitness of respondent to continue to be a member of the bar, if the restriction now imposed upon the court is removed. The action of the committee on grievances is in all respects to be commended. They have discharged their duty, and the failure to remove the respondent, who, as the record shows, has been convicted of forgery, is no fault of theirs. The case must be remanded to the Superior Court of Buncombe, with direction to dismiss the proceeding, unless the Legislature shall confer the power to investigate and pass upon the motion to disbar for conduct showing that since he received his license from this Court he has been guilty of dishonest and criminal conduct. In this he has violated his oath that he "will honestly demean himself in the practice of
(56) an attorney." In such investigation the record of his conviction will be competent evidence of his guilt. We do not hold that for the commission of a felony or other infamous crime, "showing him to be unfit to be trusted in the discharge of the duties of his profession" committed in another State, he should not be disbarred by the courts of this State. The question is not presented. It is obvious that a man who will commit forgery or perjury or be otherwise dishonest in one State is not a fit person to be a member of the bar of this State. We simply hold that the statute (chapter 941, Laws 1907) does not impose upon the court the duty or confer the power to disbar an attorney because he has been "convicted" in the courts of another State or the United States. We further hold that the language of section 211, Revisal, disables the court from disbarring for the conviction of crime in another jurisdiction, in the exercise of its "inherent power" to deal with its attorneys. We had occasion in *In re Applicants,* 143 N. C., 1, to consider the question of our power to refuse to license applicants who were shown to be of bad moral character, and the extent to which it was

subject to legislative control. The subject was carefully considered and the opinion of a majority of the Court expressed in the able and exhaustive opinion of *Mr. Justice Hoke*. The Legislature promptly amended the statute, restoring to the Court the power to pass upon the moral character of applicants. Laws 1907, ch. 70. The long and honorable history of the Bar of North Carolina, distinguished by its learning, high personal and professional standards and its patriotic service to the State, is justly regarded by the people with pride. Prior to 1868 no court, so far as our public records show, had been called upon to exercise its power to disbar an attorney. The unfortunate conflicts of the period following the Civil War called attention to the necessity for defining more clearly the relative rights and powers of the bench and bar. The courts promptly and wisely recognized the power of the Legislature and the statutes enacted by it as the "State's collected will." If new conditions bringing a necessity for restoring the "inherent powers" to the courts exist, we should in the same spirit obey the law, with the assurance that such legislation will be enacted as will enable the Bar Association, with the aid of the court, to remove from the roll the names of men who are *guilty* of forgery, whether (57) committed in this State or elsewhere. We do not see any good reason why, if the law be so changed as to permit it, the Court, in this proceeding, may not investigate the serious question presented by the action of the committee on grievances, and proceed, after full hearing, to dispose of it by making such order as will preserve the integrity and purity of the bar, so far as respondent is concerned. While we do not construe his demurrer to the evidence as an admission of his guilt, because under the statute it was not open to him to deny it, we are of the opinion that if power is conferred upon the court by the Legislature, it is due to him and the Bar of the State that a full investigation be had, and that he either be relieved of the charge resting upon him or that he be disbarred and his name stricken from the roll of attorneys. There seems to be a misconception of the plain language of the statute. In unmistakable terms it says that upon *conviction* of the crime the court *must* disbar. No question of the respondent's *guilt* is or can be presented. The judge did not and could not possibly give the respondent leave to answer denying the commission of the offense. He had no power to hear or determine any such question. If the power of the court is limited, it is because the Legislature has done so. The same power can remove the limitation. It is not a question whether men guilty of felony shall practice law in North Carolina, but whether the court shall exercise power of which the Legislature has deprived them. It was attempted, in *Moore, ex parte; Biggs, ex parte,* and *Schenck, ex parte,* with us, and the Legislature "tied the hands" of the Court. *Ex parte*

Garland, 71 U. S., 333. We must declare the law as we find it to be, without fear of criticism. The courts of this State will exhaust their power to purge the bar of unworthy members, but dare not assume power to do so.

The cause will be remanded to the Superior Court of Buncombe, with direction to set aside the order disbarring respondent, and taking such further action in the premises as may be in accordance with the law.

The General Assembly convenes on the first Wednesday in Jan-
(58) uary, 1909, and, if it see fit, a very simple amendment to section 211 of the Revisal will clothe the court with full power to proceed.

Remanded.

BROWN, J., dissenting: I am unable to agree with my brethren in the conclusion they have reached in this proceeding. It is brought at the instance of the Bar Association for the purpose of depriving the respondent of his right to practice law in the courts of this State. It is not criminal in its character, but purely civil; instituted, not for the purpose of punishment, but with the wholesome object of preserving the courts of justice from the official administration of a person unfit to practice in them. This is well settled in this country, as well as in Great Britain, where the courts have exclusive control over the admission as well as the disbarment of all practitioners before them. *Ex parte Wall,* 107 U. S., 288; *S. v. Wenton,* 11 Oregon, 456, 342; *S. v. Finn,* 32 Oregon, 519; *In re Crum,* 7 N. D., 316; *Scott v. State,* 86 Texas, 321.

Inasmuch as the proceeding is merely civil in its nature, the statute of 1907, under which it is brought, can not be *ex post facto* in its character, and no such question can arise. *Watson v. Mercer,* 8 Peters, U. S., 110; *Ogden v. Sanders,* 12 Wheat., U. S., 267.

The charges preferred against the respondent, of a most serious character, are as follows: "(2) That the said I. N. Ebbs, on 4 December, 1903, was convicted in the United States Court for the Eastern District of Louisiana upon a certain bill of indictment, a copy of which is attached hereto, and that the said Ebbs was duly sentenced by the said court to a term of imprisonment, after the jury had returned a verdict of guilty. The crime of which he was so convicted was punishable by imprisonment in the penitentiary." The offenses of which the respondent was convicted, as set out in the petition, are as follows: "Unlawfully, knowingly and feloniously uttering and publishing as true a certain receipt. (3) Unlawfully, feloniously and knowingly transmitting and presenting to the General Land Office of the Department of the Interior of the United States a certain false receipt. (4) Knowingly, unlawfully and feloniously transmitting and presenting for approval and

and payment a certain account and claim upon and against the (59) Government of the United States. (5) Unlawfully, knowingly and feloniously, and with intent to defraud the United States, transmitting and presenting to the General Land Office a certain false and fraudulent voucher. (6) Knowingly, unlawfully and feloniously, and with intent to defraud the United States, presenting a certain false claim in violation of sections 5421 and 5438 of the Revised Statutes of the United States."

The record shows that respondent was duly tried by a jury at December Term, 1903, of the Circuit Court of the United States, at New Orleans, convicted and sentenced to pay a fine and to be imprisoned, and that he was imprisoned accordingly.

The respondent, by his demurrer to the petition, admits the truth of the facts stated therein; that is, he admits that he has been convicted by a jury of the offenses charged, punishable by imprisonment in the penitentiary.

It is useless to discuss the character of the crimes of which the respondent has been convicted. It will be admitted by all that one who has committed them should not be permitted to practice in the courts of the State. I concur with my brethren that our courts have power to investigate such charges and, if they are sustained, to disbar the respondent. But I differ from them in holding that any investigation is now necessary. The learned judge who heard this matter in the court below, when he overruled the respondent's demurrer, gave him leave to file an answer, which he declined to do. The respondent should have availed himself of his right to answer and deny the truth of the allegations contained in the bill of indictment, which is made a part of the petition, and should have insisted that the Court here investigate the truth of the charges preferred against him. If the judge declined to give him a trial the respondent could have appealed. Instead of doing that, when his demurrer was overruled he stands mute and refuses to answer. What honorable attorney, fit to practice in our courts, would stand silent in the presence of such accusations? He should have courted investigation. His refusal to answer and deny the truth of the accusations in the bill, and to demand a trial upon them here, is sufficient to justify his disbarment. What else could the judge (60) do but enter the judgment that was rendered? This Court has held, as I understand the opinion, that the respondent can not be disbarred under section 1, subsection A, of the statute, because the acts committed are not punishable by imprisonment in the penitentiary by the laws of this State, and, secondly, because the respondent has not been convicted in this State of a crime punishable in its penitentiary. I think the construction placed upon the act is too narrow entirely, and

contrary to its spirit and purpose. The statute declares: "Section 1. That an attorney at law must be disbarred and removed for the following causes: (*a*) Upon being convicted of a crime punishable by imprisonment in the penitentiary."

It must be conceded that those words are broad enough to cover a conviction and sentence to the penitentiary under the laws of any State or of the United States. That being so, I know of no canon of construction which requires a more restricted construction to be given them. One of the recognized rules of construction declares that, when possible, such construction should be given a statute as will effectuate the object sought to be accomplished. The undoubted purpose of the act was to remove from the legal profession those of its members who are unworthy of the respect and confidence of the people. The end to be attained is the protection of those who deal with members of the bar, and not punishment.

The public welfare, as well as the respect due the profession of the law, requires that its practitioners enjoy the confidence of the community. "It is not enough," says the Supreme Court of Connecticut, "for an attorney that he be honest. He must be that and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices." *County Bar v. Taylor,* 60 Conn., 11.

My learned brother, *Justice Walker,* has written most impressively of the high character which should be the standard for our profession, and of the grave consequences which must follow its debasement. I can not hope to add anything to what he has so well said. *In re Applicants,* 143 N. C., at p. 33.

It must be admitted that nothing can conduce more to lower
(61) and degrade the legal profession than to permit convicted felons from other States, who have served terms in their penitentiaries, to practice law in our courts. A term in the penitentiaries of the United States or of one of our sister States tends as much to impair a man's character and to destroy his usefulness as a legal adviser as a term in our own penal institution. Therefore I see no reason to suppose that the Legislature meant to exclude only North Carolina convicts from our courts. We must bear in mind that the General Assembly was not dealing with the administration of criminal law, but was declaring simply what class of persons should be excluded from a profession which is so intimately connected with the welfare of our people. I see no reason why we should not be willing to accept, under such circumstances, the judgments of the courts of other States and of the United States. In all other property matters we must extend to them the same faith and credit we give to our own. *Embry v. Palmer,* 107 U. S., 9. We have

recognized this principle of comity in this State by holding that a witness convicted of forgery in Tennessee was incompetent in the courts of North Carolina, in a strong opinion by *Chief Justice Henderson. S. v. Candler,* 10 N. C., 393. What reason, then, is there to suppose that the General Assembly did not intend to exclude from practice in our courts those who have been condemned as felons by the judgments and laws of other courts of our common country? It is practically impossible to try them over again in this State or to investigate the truth of the charges, for the evidence and the witnesses are beyond our reach. We must accept the judgment of other jurisdictions, or else we must let those who carry the odor of the felon's cell about them stand up and plead in our courts.

Again, if those only are to be excluded who commit crimes against the State of North Carolina we can never exclude those who are felons under the laws of the United States, even though they "be with treason damned."

Under the construction given the statute, an attorney of this State might be convicted and sentenced for larceny in a distant State and return and pursue his profession unmolested, as it might be (62) impossible to bring the witnesses here upon whose evidence he was convicted.

I am convinced that the language of the statute is comprehensive enough to exclude from our courts all who have been convicted in any court of the United States, or of any State thereof, of a crime which under the laws of such jurisdiction is punishable by imprisonment in the penitentiary, a universally recognized method of punishing criminals. I feel sure such was the intent of the Bar Association in framing the act, and that such was the purpose of the General Assembly in enacting it, and I think it should be so construed.

CLARK, C. J., dissents upon the ground that the commission of a felony anywhere makes the party an unfit member of an honorable profession, and is a ground for disbarment under our statute (Revisal, sec. 211). If it be conceded that the "conviction" thereof in another jurisdiction is not such proof of the fact as our statute contemplates, yet when the judge gave the respondent leave to file an answer denying the commission of the offense he did not do so. The charge, based on a certified judgment upon conviction in the United States Circuit Court, not being denied, must be taken as admitted in open court (Revisal, sec. 211), for this is a civil proceeding. Our courts could not "convict" the respondent for a felony committed elsewhere, with a view to punishment for crime, but in a civil proceeding for disbarment it could inquire

as to the fact whether he committed the act alleged. Offered the opportunity in open court, he did not answer the charge, and, there being no issue raised, the court properly gave judgment.

Cited: *S. v. Johnson,* 171 N. C., 801, 802.

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CARL DICK ET AL. V. BEN MILLER ET AL.

(Filed 22 December, 1908.)

1. **Deeds and Conveyances—Interpretation—Wills.**

When the language of a paper-writing is that of a deed, describes the lands and contains the usual *habendum* clause, recites a valuable consideration and is therein expressly spoken of by the maker as a deed, the writing can not be interpreted as a will and is not revocable by the maker as such.

2. **Deeds and Conveyances—Interpretation—Estates in Futuro—Title—Possession.**

An estate of freehold may commence *in futuro* in this State; and when a deed expresses "the purpose and intent" to convey the lands described, and contains the words "title is vested" in the grantor "during his natural life, then passes to" M., the reservation of the "title" during the grantor's life is construed as the reservation of the possession.

ACTION tried before *Jones, J.,* and a jury, at September Term, 1908, of GUILFORD.

Plaintiffs appealed.

R. C. Strudwick for plaintiffs.

John A. Barringer and A. M. Scales and Shaw & Hines for defendants.

CLARK, C. J. There is but one point raised by this appeal. The paper-writing offered by defendant as a conveyance from Henry Dick to Ben Miller contains the following clause: "The purpose and intent of this deed is to convey the above property to the aforesaid Ben Miller, but title is vested in Henry Dick during his natural life, then title passes to Ben Miller." There is but one witness to the paper, and the plaintiff contends that the paper is a will, and therefore void.

The paper-writing contains the following language: "In consideration of $1 and other valuable services, the party of the first part has bargained and sold, and by these presents does bargain, sell and convey unto

the said party of the second part and his heirs a tract of land," etc. The first words of the instrument are: "This deed, made this 15 March, 1906, by Henry Dick to Ben Miller," etc. There is a description of the property by metes and bounds, the usual *habendum* clause and full covenants of warranty. These are not the words of a will. (64) Throughout the language is that of a deed. There are no words such as are used in a will. If a will, it would have been revocable. This instrument certainly is not.

In this State an estate of freehold may be made to commence *in futuro*. It is clear that the intent here was to convey a present interest, reserving a life estate in the grantor. The reservation of the *title* during the grantor's life was meant doubtless as a reservation of the *possession*. There are cases of "taking the will for the deed," but a court could not mistake this conveyance with warranty, and upon a valuable consideration, for a testamentary and revocable disposition of property.

No error.

J. J. COMBES v. T. T. AND J. B. ADAMS ET AL.

(Filed 22 December, 1908.)

DEFENDANTS T. T. AND J. B. ADAMS APPEALED.

1. **Deeds and Conveyances—Contracts to Convey—Specific Performance—Consideration.**

A binding contract to convey land, when there has been no fraud, mistake, undue influence or oppression, will be specifically enforced; and as a rule the mere inadequacy of price, without more, will not affect the application of the principle.

2. **Deeds and Conveyances—Contracts to Convey—Specific Performance—Principal and Agent.**

Where the specific performance of a contract, signed by the owner or principal, is of such character as to be enforcible, it is also enforcible if signed by his agent "thereto lawfully authorized."

3. **Same—Written Appointment—Sufficiency.**

A written power given to an agent authorizing him to negotiate for the sale of lands at a certain price, restricting it to a period of thirty days, the owner and principal binding himself to "execute good conveyances to such purchaser as the agent may produce, on the payment of the price," imports authority to the agent to enter into and make a binding agreement of sale in accordance with the provisions of the instrument.

4. **Deeds and Conveyances—Contracts to Convey—Registration Laws.**

Contracts to convey land come within the express provision of our registration laws. (Revisal, sec. 980.)

5. Same—Principal and Agent—Injunction—Prima Facie Right.

When the plaintiff claims under a contract to convey lands, valid upon its face and signed by the agent of the owner or principal thereto lawfully authorized, he has a *prima facie* right to the issuance of a restraining order against defendants committing trespass upon the lands, claiming under a like contract from the owner or principal, registered at a time subsequent to that of registration of plaintiff's contract.

6. Same—Fraud—Questions for Jury.

When both plaintiff and defendant are claiming the same lands under different contracts to convey, and the plaintiff has shown a *prima facie* right to the continuance of the restraining order theretofore granted by virtue of his contract being first recorded, controverted questions of conspiracy and fraud respecting the validity of plaintiff's contract are matters properly referable to a jury, and the restraining order should be continued to the hearing.

(65) ACTION from MACON, heard by *Ferguson, J.*, on 22 June, 1908, on return to preliminary restraining order.

The action was instituted by plaintiff to enforce specific performance of a contract to convey land situated in Macon County against defendants T. W. McLoud, attorney in fact of Henry Stewart, Sr., Cassie Stewart, T. T. Adams and J. B. Adams (under the firm name of T. T. Adams Company), Henry Stewart, Jr., and Lula Stewart, T. B. Shepherd and R. A. Shepherd, plaintiff claiming the right to such relief under and by virtue of the following instruments:

"EXHIBIT A."

"This agreement, entered into this 4 April, 1908, by and between Henry Stewart, Sr., and Cassie Stewart, by T. W. McLoud, their attorney in fact, and Henry Stewart, Jr., of Highlands, N. C., of the first part, and T. B. Shepherd of the second part:

"Witnesseth, That the said parties of the first part hereby authorize the said party of the second part to negotiate for the sale of certain lands in Highlands Township, known as Stewart lands, except
(66) therefrom the lands known as the Dobson lands, at the price of $5 per acre; said boundary being estimated approximately to contain 3,000 acres; that the said party of the second part is to have as his commission for the effecting of said sale the sum of ten per cent of the price for which said lands are sold, the same to be paid in equal proportions by the several parties of the first part; and the parties of the first part agree with the party of the second part that this authority shall take effect on 29 April, 1908, and continue for a period of thirty days; and they further agree to allow a reasonable time thereafter for examination of titles by the purchaser and survey of the lands, if required, and that they will execute good and sufficient conveyances in the law to such purchaser as the party of the second part shall produce

to the parties of the first part upon the tender by such purchaser of the purchase price per acre as herein stipulated for.

"Witness our hands, the day and year above written.

HENRY STEWART, SR.,
CASSIE STEWART,
By T. M. MCLOUD,
Their Attorney in Fact.

"Attest: W. T. Potts." HENRY STEWART, JR.

"EXHIBIT B."

"NORTH CAROLINA—Macon County.

"This agreement, made and entered into this 14 May, 1908, by T. B. Shepherd and wife, R. A. Shepherd, of Macon County and State of North Carolina, parties of the first part, and J. J. Combes, of Swain County and State of North Carolina, party of the second part:

"Witnesseth, That for and in consideration of the payment by the party of the second part, during the life of this agreement, of the sum of $6 per acre to the parties of the first part for all the lands described and defined in a contract made and entered into on 4 April, 1908, between T. B. Shepherd and Henry Stewart, Sr., and Cassie Stewart, by their attorney in fact, T. M. McLoud, and Henry Stewart, Jr., which contract was registered on 16 April, 1908, in book 3-A of deeds in the register's office of Macon County, N. C., at pages 272 and (67) 273, to which reference is hereby specially made for more definite description. Said parties of the first part, upon payment of the price as above set forth by the party of the second part, agree to make or cause to be made a deed of the kind and nature mentioned in said contract or agreement to the party of the second part. Said parties of the first part agree to allow said party of the second part a reasonable time to examine and investigate the titles to said lands above described, in the event that said party of the second part decides to purchase or take said lands before the expiration of this agreement.

"This agreement shall be null and void on and after 31 May, 1908.

T. B. SHEPHERD. [Seal.]
R. A. SHEPHERD. [Seal.]"

"Filed 26 May, 1908. R. M. LEDFORD, C. S. C."

"Exhibit A" was registered in Macon County, 16 April, 1908, and "Exhibit B," the contract with plaintiff, was executed on 14 May, 1908, and registered in Macon County on same date. Plaintiff alleges his readiness and ability to presently comply with the contract on his part. Defendants T. T. and J. B. Adams hold a contract for the same lands, executed by Henry and Cassie Stewart, by T. M. McLoud, their attorney

in fact, and Henry and Lula Stewart, bearing date of 29 April, 1908, and registered in Macon County 25 May, 1908. As ancillary to plaintiff's principal demand for specific performance, plaintiff sued out a restraining order in the cause, alleging that defendants T. T. and J. B. Adams, claiming the right to do so under their contract, have wrongfully and unlawfully entered upon said land and are committing divers trespasses and depredations thereon, and are threatening to cut and destroy and remove the valued timber growing in and upon said land, to plaintiff's great and irreparable damage, and that said defendants will carry out this threat and wrongful purpose unless restrained, etc.

Defendants T. T. and J. B. Adams admit that they had entered (68) upon said land with the intent to acquire and own the same under their contract with the Stewarts, and allege that there is a fraudulent combination and conspiracy between Combes and Shepherd to prevent the Stewarts from complying with their contract; and aver, further, that the contract ("Exhibit B") under which plaintiff claims an interest and seeks to acquire ownership of the lands is without proper authority and is legally insufficient to impart any interest in the land.

The restraining order was continued to the hearing, and defendants T. T. and J. B. Adams excepted and appealed. The appeal bond was filed on 28 July, 1908. Appeal perfected 9 November and duly docketed in the court 11 November, 1908.

A. W. Horn and Davidson, Bourne & Parker for plaintiff.
Robertson & Benbow and Busbee & Busbee for defendants.

HOKE, J., after stating the facts: It is accepted doctrine that a binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced. *Rudisill v. Whitener,* 146 N. C., 403; *Boles v. Caudle,* 133 N. C., 528; *Whitted v. Fuquay,* 127 N. C., 68. This last decision being to the effect that mere inadequacy of price, without more, will not as a rule interrupt or prevent the application of the principle. It is also well recognized with us that in order to make a valid contract concerning land, under the statute of frauds, it is not required that there should be a signing by the owner or principal, but that a signature by an agent "thereto lawfully authorized" is sufficient. *Phillips v. Hooker,* 62 N. C., 193. And this position may obtain under some circumstances, though the agent be acting for an undisclosed principal. *Nicholson v. Dover,* 145 N. C., 18. These contracts, too, coming within the express terms of our registration laws, if otherwise binding and valid, the one first registered will confer the superior right. Revisal, sec. 980.

It will be noted that the defendants T. T. and J. B. Adams claim the land in controversy under the Stewarts by an instrument registered on

25 May, and the contract of plaintiff, signed by T. B. Shepherd ("Exhibit B"), having been registered prior to that under which defendants claim, to wit, on 14 May, if said Shepherd was an agent "thereto legally authorized," the plaintiff, on the face of the papers, would (69) have the better claim. In this aspect of the case the rights of the parties will depend chiefly on the proper construction of the instrument under and by virtue of which T. B. Shepherd acted ("Exhibit A"), this instrument having been likewise registered prior to defendants' contract. On behalf of defendants it is earnestly argued that this instrument ("Exhibit A") only conferred upon T. B. Shepherd the usual power of an ordinary real-estate broker, and that the authority of such an agent is restricted, as a rule, to bringing the parties together or finding a purchaser ready and able to pay the price, and the authorities cited in the learned brief of defendants' counsel are apt in support of this position, notably *Kramer v. Blair,* 88 Va., 456; *Morris v. Ruddy,* 20 N. J. Eq., 236; *Johnson v. Land Co.,* 111 Ga., 491; Clark & Skyles on Agency, sec. 751. But we do not think that this instrument ("Exhibit A") can be so restricted. There is high authority to the effect that the term "negotiate" itself imports authority to enter into and make a binding agreement. *Palmer v. Ferry,* 72 Mass., 420. And while this may not be true in every instance or in a general proposition, in this case, as in the authority cited, when taken in connection with the purposes and nature of the instrument and with the other terms of expressions contained therein, we are of opinion that the power given to negotiate a sale of these lands clearly conferred and was intended to confer on T. B. Shepherd the power to make a contract that would bind the parties. A perusal of the entire instrument gives clear indication that such was the purpose. He was authorized to "negotiate for the sale of the Stewart lands at the price of $5 per acre," the authority was restricted to a period of thirty days, and the owners bound themselves to "execute good conveyances to such purchaser as the parties may produce on the payment of the price." Indeed, there was no occasion to execute a paper at all unless this effect was to be given it; and while this of itself would not be controlling, it adds force to the interpretation we have given it.

While we make no question of the correctness of the general (70) proposition insisted on by defendants, we are of opinion that this instrument confers much larger powers than those ordinarily possessed by real-estate brokers, and authorized the agent, as stated, to make a binding contract to convey the property. The plaintiff, then, holding a contract for the property, signed by an agent thereto duly authorized, and first registered, on the face of the papers, has a *prima facie* right to the relief which he seeks, and the court correctly adjudged that the restraining order be continued to the hearing. True, there are alle-

gations and evidence, on the part of the defendants tending to impeach the plaintiff's claim by reason of conspiracy and fraud, but these are questions to be referred to the jury for decision. They are denied by plaintiff, and on the facts presented it is proper to apply to them the rule laid down in *Tise v. Whitaker,* 144 N. C., 507, "that if the evidence raises serious question as to the existence of facts which make for plaintiff's right, and sufficient to establish it, a preliminary restraining order will be continued to the hearing."

There is no error, and the judgment below is

Affirmed.

DEFENDANT HENRY STEWART'S APPEAL.

Appeal and Error—Interlocutory Orders—Power of Trial Court—Motion to Set Aside Judgment—Newly Discovered Evidence.

All questions incident to and necessarily involved in an appeal from an order continuing a restraining order to the hearing are carried by the appeal to the Supreme Court, and as to such there is thereafter no power in the trial judge to entertain a motion to set aside the judgment for newly discovered evidence.

HOKE, J. After the appeal of T. T. and J. B. Adams was perfected in this case, being from a judgment continuing a restraining order to the hearing, and after same was docketed in this Court, Henry Stewart, another one of defendants, moved before his Honor *R. B. Peebles, J.,* riding the courts of the Sixteenth District, to set aside the restraining order on account of newly discovered evidence, etc. The judge denied the motion, holding that the cause as to the questions involved
(71) in the restraining order was no longer before the Superior Court and that he had no power to comply with the defendant's motion. The defendant Stewart excepted and appealed.

There is no error. While the Court has held that an appeal from an interlocutory order leaves the action for all other purposes in the court below, the decision is also to the effect that the disposition of the interlocutory order and all questions incident to and necessarily involved in the ruling thereon are carried by the appeal to the appellate court, and the judge below therefore had no power to entertain or act upon appellant's motion. *Green v. Griffin,* 95 N. C., 50.

The judgment denying defendant's application is

Affirmed.

Cited: Bonner v. Rodman, 163 N. C., 3; *Winslow v. White, ibid.,* 32; *Mintz v. Russ,* 161 N. C., 540; *Ward v. Albertson,* 165 N. C., 222; *Howe v. Hartwick,* 167 N. C., 451; *Hardware Co. v. Banking Co.,* 169 N. C., 750.

MARSHALL SMITH v. L. T. HARTSELL ET AL.

(Filed 22 December, 1908.)

1. Champerty and Maintenance—Officious Interference.

A contract or agreement will not be held within the condemnation of the principle relating to champerty or maintenance unless the interference by the party charged therewith is clearly officious and for the purpose of stirring up strife and continuing litigation.

2. Same—Interest.

An agreement of a party to give aid in the prosecution of a suit in the determination of which he has an actual interest is not invalid for maintenance or champerty.

3. Same.

A party who has a valid debt against an estate of deceased may make a valid contract with the heirs at law to "do everything proper and legitimate and to aid them in every way to recover said estate," in a suit to be instituted for that purpose, in consideration of payment of his debt upon recovery; and the contract is not officious or objectionable as being one of maintenance or champerty, and is enforcible upon the recovery of the estate, the subject of the agreement.

4. Public Policy—Witness—Contract—Agreement to Testify—Consideration.

An agreement by a party to give all true evidence when called on in any suit it may be deemed necessary to bring to recover an estate in which he has an interest, is not void as against public policy, when there is no indication that he was to receive payment therefor beyond that which the law allows to a witness and to which he would be legally entitled.

5. Pleadings—Demurrer—Allegations Taken as True.

When an action is dismissed upon demurrer to a complaint the statements made therein will be accepted as true and interpreted in the light most favorable to the plaintiff.

6. Pleadings—Demurrer—Fraud—Questions for Jury.

Upon reversing on appeal the judgment of the trial judge sustaining a demurrer to a complaint, questions of fraud and undue influence alleged in the answer are for the consideration of the jury.

ACTION tried before *Justice, J.*, and a jury, at August Term, (72) 1908, of CABARRUS.

The action was originally instituted by plaintiff against defendant L. T. Hartsell, and the complaint, among other things, alleged:

1. That George W. Robbins died intestate on 9 June, 1906, in the State of Arkansas, Howard County, having a family at the place of his residence, and also having a living wife, Caroline E. Robbins, and two children residing in Concord, N. C.

2. That at the date of the death of said George W. Robbins he owed the plaintiff the sum of $750, which Caroline E. Robbins, A. B. McClure, J. E. Robbins and H. M. McClure, heirs at law and distributees of said George W. Robbins, assumed and agreed to pay to the plaintiff, copy of which contract or memorandum of agreement is hereto attached and marked "Exhibit A," and asked to be taken as a part thereof.

3. That by virtue of said contract and information furnished by the plaintiff the said Caroline E. Robbins, A. B. McClure, J. F. Robbins and H. M. McClure effected a settlement, through the defendant as their attorney, in the latter part of August or the first days of September, 1906, by which they were to receive in cash from the estate of George W. Robbins, deceased, the sum of $2,250; that thereafter, to wit, on 28 September, 1906, the said Caroline E. Robbins, Bell McClure and H. M. McClure gave an order to the plaintiff L. T. Hartsell, the de-
(73) fendant, to pay to the plaintiff the sum of $750 out of the first moneys coming into his hands for them or either of them from the estate of George W. Robbins, deceased, copy of which order is hereto attached and marked "Exhibit B," and asked to be taken as a part hereof.

4. That the defendant, the latter part of 1906 or early in the year 1907, received the money from said estate, and now has in his possession the sum of $775, $750 of which belongs to the plaintiff, having paid J. F. Robbins his full share of all the moneys coming from said estate, he being a minor at the time he executed the contract marked "Exhibit A," hereto attached.

5. That on the evening of 28 September, 1906, the plaintiff, through his attorney, presented the order (attached hereto and marked "Exhibit B") to the defendant, which was accepted, and that he stated that it was all right and that he would pay it out of the first moneys coming into his hands from said estate.

6. That plaintiff, through his attorney, made demand on the defendant for said amount immediately after he received the same, which was about the first of February, 1907.

The agreement referred to as "Exhibit A" was as follows:

"This agreement, made this 26 July, 1906, between Caroline E. Robbins, A. B. McClure and husband, H. M. McClure, heirs at law and distributees of George W. Robbins, deceased, parties of the first part, and Marshall Smith, party of the second part:

"Witnesseth, That the said parties of the first part, in consideration of the covenants on the part of the party of the second part hereinafter contained, covenant and agree that in case they recover the estate of George W. Robbins they will pay out of said money the sum of $750,

which the said George W. Robbins was justly due the said Marshall Smith; that the said Marshall Smith, party of the second part, in consideration of the covenants of the first part, hereby agrees to do everything proper and legitimate, and to aid them in every way to recover said estate; that he will give all and true evidence, when called upon, in any suit that it may be necessary to bring in reference to said estate.

"In witness whereof, the parties have hereunto subscribed their (74) names, this the day and year above written.

CAROLINE E. (her X mark) ROBBINS,
A. B. MCCLURE,
J. F. ROBBINS,
H. M MCCLURE."

This agreement was duly acknowledged, and the order made by the signers of the contract was set out, as follows:

"MR. L. T. HARTSELL, *Attorney,*
Concord, N. C.

"DEAR SIR:—You will please pay to Marshall Smith the sum of $750 out of the first moneys coming into your hands for us or either of us from the estate of George W. Robbins, deceased, as per agreement with said Smith, entered into 26 July, 1906.

CAROLINE E. (her X mark) ROBBINS, [SEAL.]
BELL MCCLURE, [SEAL.]
H. M. MCCLURE, [SEAL.]
_____ [SEAL.]"

This order was also acknowledged before a notary and privy examination of the *feme covert* taken and certified.

Defendant L. T. Hartsell answered, denying, on information and belief, the alleged indebtedness of the intestate, George W. Robbins, and in the same way avers that the order given was without consideration, and in substance denies that he accepted the order under circumstances that indicated or amounted to a promise to pay.

At January Term, 1908, the drawers of this order were at their own instance made parties defendant, and answered, alleging, among other things, that the contract, marked "Exhibit A," was obtained by false and fraudulent representations on the part of plaintiff, etc. Plaintiff replied, averring the existence and *bona fides* of the debt due from the intestate to himself, and set out in full the entire circumstances and dealings between himself and defendants, and alleged that demand was justly due and owing from defendants.

The cause having been called for trial, as stated, at August (75)

Term, 1908, and the jury selected and empaneled, the defendant demurred *ore tenus* and moved to dismiss the action, for that the complaint fails to state facts sufficient to constitute a cause of action. Motion allowed. Judgment, and plaintiff excepted and appealed.

Adams, Armfield, Jerome & Maness and W. G. Means for plaintiff.
Montgomery & Crowell for defendants.

HOKE, J., after stating the facts: Plaintiff's action having been dismissed as on demurrer, the statements of the complaint, which make for his recovery, will be accepted as true and interpreted in the light most favorable to him; and, applying this rule of construction, we do not take the view of the facts alleged in the pleadings that seems to have impressed the trial judge. From these facts it appears that plaintiff had a valid and existing debt against one George Robbins, who died intestate in the State of Arkansas, having a family there and leaving an estate valued at six or eight thousand dollars; that plaintiff, conferring with an attorney about his debt and claim, informed his attorney that George Robbins had a lawful wife and legitimate children living in North Carolina, and was told by the attorney that these last-named persons were the rightful owners of this property, subject to payment of the intestate's debts, and was advised by him to inform these parties of the true condition of affairs and confer and arrange with them about the payment of his debt; that, acting on this advice, plaintiff, being in North Carolina, did confer with the wife and children here, and entered into an agreement with them about the payment of his claim, marked "Exhibit A"; that he took an order from these defendants, or some of them, for the amount, $750, on L. T. Hartsell, who was acting as their attorney in the matter of recovering their interest in the estate of the intestate, the order, marked "Exhibit B," and this attorney, having received and having in hand several thousand dollars of the estate so recovered, accepted this order and has now on hand the amount of same, having retained it subject to the decision of the court on plaintiff's
(76) demand made in this action. The action was originally instituted against L. T. Hartsell, the attorney, who answers, denying plaintiff's right to recover; and the defendants, the legitimate children in North Carolina, who signed the agreement and order, having been made parties defendant, also answered and resisted recovery, contending that the agreement on which the order was obtained was invalid by reason of stipulations for champerty and maintenance and because it contained an agreement to testify in the courts for a consideration, and was therefore contrary to public policy; but we are of opinion that neither position can be sustained on the facts as they now appear.

The term "maintenance" is properly defined as "an officious inter-

meddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it."

And "champerty" is a species of maintenance whereby a stranger makes a "bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense."

" 'Champerty' is a species of maintenance which at common law was an indictable offense. 'Maintenance' was an officious intermeddling in a lawsuit by a mere stranger, without profit. 'Champerty' involved an element of compensation for such unlawful interference by bargain for part of the matter in suit or some profit growing out of it." *Sommerville, J.,* in *Gilman v. Jones, infra,* and see *Torrence v. Shedd,* 112 Ill., 466.

The harsher application of the doctrine contained in these definitions, as it formerly obtained, has been very much relaxed and modified. Under the more recent decisions many exceptions have been recognized and established, and it has come to be very generally accepted that a contract or agreement will not be held within the condemnation of the principle indicated unless the interference is clearly officious and for the purpose of stirring up "strife and continuing litigation." 5 Lawson on Rights and Remedies, sec. 2400; *Gilman v. Jones,* 87 Ala., 691; *Thalhimer v. Brinkerhoff,* 3 Cowen, 623; 15 Amer. Dec., 308. And there is well-considered authority to the effect that assistance of this (77) kind will not be considered officious when one has an interest or acts in the *bona fide* belief that he has. *McCall v. Capehart,* 20 Ala., 526; *Lewis v. Brown,* 36 W. Va., 1.

In the cases referred to will be found learned and interesting statements as to the change that has taken place in the application of this doctrine of maintenance and champerty to modern and existing conditions. Thus in *Gilman v. Jones,* 87 Ala., 699, it is said:

"There is much reason, it thus seems, for the relaxation of the old doctrines pertaining to the subject, so that they may be adapted to the new order of things in the present highly progressive and commercial age. Necessity and justice have accordingly forced the establishment of recognized exceptions to the doctrine of these offenses. Among these may be enumerated the following instances: Relationship by blood and marriage will often justify parties in giving each other assistance in lawsuits; and the relation of attorney and client, or the extension of charitable aid to the poor and oppressed litigant; and especially is an interference in a lawsuit excusable when it is by one who has, or honestly believes he has, a *valuable interest* in its prosecution. It is especially with the last-mentioned exception we are concerned in the present case, which, in our judgment is controlled by it."

The principle is thus generally stated in 3 A. & E. Enc., 76: "It has been seen that the *gist* of the offense of maintenance is that the interference is *officious*. Where, therefore, a party either has, or honestly believes he has, *an interest*, either in the subject-matter of the litigation or in the question to be determined, he may assist in the prosecution or defense of the suit, either by furnishing counsel or contributing to the expenses; and may, in order to strengthen his position, purchase the interest of another party in addition to his own. The interest may be either small or great, certain or uncertain, vested or contingent; but it is essential that it be distinct from what he may acquire from the party maintained."

And again, on page 701: "We may safely say that the whole doctrine of maintenance has been modified in recent times so as to confine
(78) it to strangers who, having no valuable interest in a suit, pragmatically interfere in it for the improper purpose of stirring up litigation and strife. And champerty, which is a species of maintenance attended with a bargain for a part or the whole of the thing in dispute, does not exist in the absence of this characteristic of maintenance. If the pecuniary interest of a person, even though he own no part of the immediate subject-matter of the suit, be so connected with it collaterally in any way as to be diminished or increased in value by the result of such suit, we can perceive no principle of public policy that ought to forbid such person from taking proper care that such interest shall be properly protected in the courts."

And in *Thallhimer's case, supra, Sanford, Chancellor,* said: "Where the person promoting the suit of another has any interest whatever in the thing demanded, distinct from that which he may acquire by an agreement with the suitor, he is in effect also a suitor, according to the nature and extent of his interest. To deny to such a person the benefit which he might receive from a suit conducted mainly or partly for the benefit of another would be to close the temple of justice against all persons not parties to the suit and yet having interest in the subject of litigation which may be affected by the determination of the cause. It is accordingly a principle that any interest whatever in the subject of the suit is sufficient to exempt him who gives aid to the suitor from the charge of illegal maintenance. Whether this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to him who has such an interest to participate in the suit of another who has or claims some right to the same subject. Bac. Abr., title Maintenance, B, and the several authorities there cited. Where there is consanguinity or affinity between the suitor and he who gives aid to the suit, the voice of nature and the language of the law equally declare that such assistance is not unlawful maintenance. The relation of landlord

and tenant, that of master and servant, acts of charity to the poor, and the exercise of legal profession are all cases in which it is not unlawful to give aid in the conduct of suits before the courts of justice. Upon all such cases these laws were never intended to operate. They were intended to prevent the interference of strangers having no (79) pretense of right to the subject of the suit and standing in no relation of duty to the suitor. They were intended to prevent traffic in doubtful claims and to operate upon buyers of pretended rights who had no relation to the suitor or the subject otherwise than as purchasers of the profits of litigation."

Applying the principles so well and clearly stated in these citations, and as the facts are to be now considered, the stipulations of this agreement do not constitute either champerty or maintenance. There is no indication that he is to contribute to the costs and expenses of any suit commenced or contemplated. On the contrary, in reference to this matter, the agreement on his part is confined to conduct that is "proper and legitimate"; it is so nominated in the bond. And if it were otherwise, the interference in this matter on the part of plaintiff could in no sense be considered officious. He had a valid debt against G. W. Robbins; the contract so states, and the allegations in the complaint are definite and full to this same effect; and if this is true his claim could have been collected out of the estate; and the defendants, who are endeavoring to recover this estate, as the distributees and heirs at law of G. W. Robbins, and who succeeded in their efforts, agreed that in case of recovery they would pay off his claim. The interest in the fund and its recovery was sufficient, we think, to justify and uphold a much more exacting stipulation on the part of plaintiff than that which he assumed in this agreement.

This position in no way conflicts with the decision of this Court in *Munday v. Whissenhunt,* 90 N. C., 459, to which we were referred by defendant's counsel. That was a stipulation for one-half of the recovery in consideration of services in the conduct and management of a lawsuit by one who was not an attorney at law and who had no interest whatever in the subject-matter of the litigation or its results, except what arose to him under and by virtue of the contract he was seeking to enforce. It was therefore clearly officious and came directly under the condemnation of the principle we apply to the present case.

Nor do we think the objection tenable that the agreement is void as contrary to public policy, because it contains a stipulation to testify in a court of justice. The authorities are to the effect (80) that all contracts to *suppress* testimony that is competent and relevant in a judicial investigation are contrary to public policy. Such contracts tend to obstruct the due course of justice and are invalid. And

so contracts to procure testimony to establish a given result, or contracts to testify for a sum made to depend on the recovery or the amount of it, offering as they do enticement to perjury, and so tending to pervert the course of justice, are likewise forbidden. *Martin v. Amos,* 35 N. C., 201; *Goodrich v. Tenney,* 144 Ill., 422; *Turk v. Miller,* 14 Montana, 467; *Dawkins v. Gill,* 10 Ala., 206.

But this contract, as we interpret it, does not necessarily come under the condemnation of any of these decisions. The agreement of plaintiff in this respect was to give all true evidence "when called on in any suit it may be necessary to bring to recover the estate." It does not appear—certainly not on the face of the agreement—that he is to receive more or less than the usual or ordinary fees of a witness for so testifying. He only agrees to do what is entirely proper for him to do, and which the law would compel him to do without any agreement. Standing alone, as a rule, this agreement would not be a sufficient consideration to uphold an executory contract, but it is not an immoral or illegal stipulation and should not have the effect of avoiding a contract that is otherwise legal and binding. *Cobb v. Cowdery,* 40 Vt., 25; *Nickelson v. Wilson,* 60 N. Y., 362; *Wellington v. Kelly,* 84 N. Y., 543. According to the complaint, the facts of which are admitted, the plaintiff held, as heretofore stated, a valid and just debt against the estate of G. W. Robbins, and could have enforced its collection by law. This course would and might have involved delay, and defendants, who were the true owners of the estate, agreed to pay plaintiff's claim and just debt, for which these assets were liable, whenever this estate was recovered and came into their hands; the plaintiff, on his part, to do everything that was "legitimate and proper to aid them, and to give true evidence whenever called on." There are allegations of fraud and undue influence and other impeaching averments made by defendants, but these are questions to be referred to the jury.

(81) On the aspect of the matter presented for our consideration by this demurrer we are of opinion there was error in dismissing plaintiff's action, and the order to that effect must be set aside. The question as to the effect of the acceptance of the order by defendant Hartsell is deferred until the facts concerning it are more fully declared. We have only considered and dealt with the questions presented and argued before us.

Reversed.

L. H. SMITH ET AL. v. ROSS B. SMITH.

(Filed 22 December, 1908.)

1. **Tenants in Common—Possession by One—Tax Sales—Deeds and Conveyances—Trusts and Trustees.**

A tenant in common in sole possession assumes an implied obligation to sustain the common interest. When he permits the land to be sold for taxes, without notifying his cotenants, and conveyed by a sheriff's deed to a stranger, and takes a deed from him, he holds as trustee for the cotenancy.

2. **Same—Judgments—Reference.**

When a tenant in common has wrongfully permitted the lands of the cotenancy to be sold for taxes to a stranger, and acquires his deed from him, it is proper for the court to order, at the suit of his cotenants, that his cotenants be let into possession, and a reference to state an account as to waste and betterments, disbursements for taxes and receipts of rents and profits within three years next before the commencement of the action.

3. **Tenants in Common—Possession by One—Deeds and Conveyances—Tax Sales—Revisal, sec. 2860.**

Revisal, sec. 2860, authorizing one tenant in common to pay his share of the taxes or to redeem his share of the land after sale for taxes, applies to instances in which all the tenants stand on the same footing in regard to possession, and does not apply when one tenant is in possession for all.

4. **County Commissioners—Deeds and Conveyances—Tax Sale—Certificate—Foreclosure.**

A deed to land made by the county commissioners for land sold for taxes and bought in by them (in 1899) without foreclosure of the certificate is void.

APPEAL from *Guion, J.*, who found the facts by consent, at (82) Spring Term, 1908, of CHEROKEE.

Defendant appealed.

J. H. Harwood and E. B. Norvell for plaintiffs.
Dillard & Bell and Ben Posey for defendant.

CLARK, C. J. The plaintiffs and defendant were heirs at law of Charlotte and Henry Smith, and as such inherited the 589 acres of land. The appellant (defendant) was a tenant in common with appellees until the unity of possession was broken by the conveyance of said lands to D. W. Deweese, a stranger, in 1891, by the sheriff, after sale for nonpayment of taxes. The defendant, as one of the tenants in common, resided on the lands and listed them for taxes. His own share was sold with all the other shares, and the whole estate of the "Smith heirs" was

transferred to Deweese, the purchaser, who brought a suit against appellant to recover possession of the 589 acres that had been conveyed to him. Thereupon appellant bought the land from Deweese and took deed therefor. The plaintiffs were the two sisters of the defendant and were married.

In 1899 the second tract, of 643 acres, owned by defendant and his sisters in common, was sold for taxes and bought in by the county commissioners, and the defendant subsequently procured a deed from said commissioners to himself. There had been no foreclosure by the county on said certificate.

"Tenants in common by descent are placed in confidential relations to each other by operation of law, as to the joint property, and the same duties are imposed as if a joint trust were created by contract between them or the act of a third party. Being associated in interest as tenants in common, an implied obligation exists to sustain the common interest. The reciprocal obligation will be enforced in equity as a trust. These relations of trust and confidence bind all to put forth their best exertions and to embrace every opportunity to protect and secure their common interest and forbid the assumption of a hostile attitude by either." Freeman on Cotenancy, sec. 151, p. 213; *Tisdale v. Tisdale,* 2 Sneed (Tenn.), 599.

(83) It is a well-settled rule that a person under any legal or moral obligation to pay the taxes can not by neglecting to pay the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself or by subsequently buying from a stranger who purchased at the sale; otherwise he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. Freeman on Cotenancy, sec. 159; *Moss v. Shear,* 25 Cal., 45; *Coppinger v. Rice,* 33 Cal., 408.

In *Dubois v. Campau,* 24 Mich., 370, it is said: "If a cotenant is in possession of the cotenancy using the whole, and a stranger acquires title thereto by a tax sale, the former can never procure such title and assert it against his cotenants, because it was his duty to pay the taxes, and his purchase of the tax title is the mere correction of the wrong which he committed by suffering them to become delinquent. To allow him to assert his purchase to defeat the title of the other owners, under such circumstances, would enable him to take advantage of his own wrong, to the injury of others, and encourage fraud."

Revisal, sec. 2860, it is true, authorized one tenant in common to pay his share of the taxes or to redeem his share of the land after it has been sold for taxes. But that refers to cases where all the tenants are on the same footing, all or none being in possession. It does not authorize one tenant in common to take title for the whole tract, nor does it apply to a case like this, where one tenant was in possession. *Prima facie,* such

tenant would be trustee for his cotenants. It was his duty, certainly, to list the land for taxes, as he did. If he had shown, further, that when before sale for taxes notice of sale was served on him, as the law requires (Revisal, sec. 2889), he notified his cotenants, and they failed to attend to the matter, the position of the defendant would be better; but he has shown nothing of the kind, and in the absence of such proof he can not retain possession against his cotenants. The defendant pleaded the statute of limitations, but nothing less than twenty years is an ouster between tenants in common. *Hicks v. Bullock,* 96 N. C., 164.

A case very much in point is *Insurance Co. v. Day,* 127 N. C., 133, where it was held that a widow having a dower interest in land and residing thereon could not defeat the interest of the heirs at (84) law by buying the land at a tax sale; that the effect of her purchase was no more than to relieve the land of the tax lien. Here, when the tenant in common residing on the land allowed it to be sold for taxes and did not redeem it, and showed no notice to his cotenants, his taking the deed from the purchaser for 589 acres for $70 amounts, at most, to holding it in trust for all the tenants in common.

The deed from the county commissioners to defendant for the 643 acres without foreclosure of the certificate was a nullity. *Wilcox v. Leach,* 123 N. C., 74.

His Honor properly provided in the judgment that the plaintiffs, cotenants, be let into possession, and for a reference to state an account as to any waste and betterments, disbursements for taxes and receipts of rents and profits within three years before commencement of this action.

No error.

Cited: McNair v. Boyd, 163 N. C., 480; *Kivett v. Gardner,* 169 N. C., 80.

ANTHONY S. DAVIS AND WIFE v. CHAMPION FIBER COMPANY ET AL.

(Filed 22 December, 1908.)

1. Injunction—Contempt—Evidence—Findings Sufficient.

A finding by the judge below that, after the issuance and service of an order restraining defendant, its agents and employees from cutting and carrying away timber trees from the *locus in quo,* it and its superintendent, under advice of counsel, have arbitrarily undertaken to locate disputed boundaries to suit their own purposes, and have willfully and intentionally continued to cut and carry away timber trees upon the lands in dispute and embraced in the restraining order, is sufficient to sustain a judgment for contempt of court.

2. Injunction—Description—Sufficiently Definite—Contempt.

A preliminary order restraining defendant from cutting and carrying away timber trees beyond a disputed line claimed by plaintiff is sufficiently definite to authorize a judgment for contempt, when the description of the land set forth in the complaint, the wrong complained of and the evidence, taken in connection with the order, tended strongly to establish that defendant and its agent were fully aware of the location of the land in dispute, and fully informed of the placing of the line contended for by plaintiff.

3. Injunction—Description—Definiteness.

There is no particular form required for a restraining order, and it is sufficiently definite if it informs the party of the matters or things he is therein restrained from doing.

(85) MOTION for attachment for contempt in violation of a restraining order issued in the cause, heard before *Peebles, J.*, at Webster, N. C., on 17 October, 1908.

On the hearing the court found that a preliminary restraining order, commanding the defendant, the Champion Fiber Company, its agents and employees, and all persons acting for it, from cutting timber on certain tracts of land claimed by plaintiffs and fully set forth and described, had been duly served and had been thereafter willfully violated by said defendant and Harry Rotha, its agent and employee, superintendent of the woods department, and adjudged the defendants guilty of contempt and imposed a fine on them for such misconduct. The parties affected excepted and appealed from the judgment.

Walter E. Moore and Moore & Rollins for plaintiffs.
George H. Smathers for defendants.

HOKE, J. It appears from the evidence in the cause that plaintiffs owned a large body of land in the county of Jackson, containing several thousand acres, and defendants owned a body of land adjoining thereto; that plaintiffs claimed that the true line of division between the tracts at the point chiefly in controversy was that established or found in a survey by one John H. Smith and called and referred to as the "Smith line," while defendants claimed that the correct divisional line between the parties was further south and according to a survey made by W. H. Hargrove and termed and referred to as the "Cook and Hargrove line"; that the timber in question was between these two lines, and defendants were engaged in cutting and removing the same when they were notified by plaintiff that they were trespassing on plaintiffs' land, according to the lines claimed by them. The parties having conferred about the matter and failed to agree, the plaintiffs instituted their action (86) and filed their complaint, in which they fully set forth and

described their lands, referring to the grants under which they derived title, alleging that defendants were unlawfully and wrongfully trespassing upon their lands and cutting and removing the timber therefrom. A preliminary restraining order was thereupon issued and served on defendants, as stated, restraining defendants, their agents and employees "from cutting, felling or removing any of the timber trees and woods standing, growing and being upon the lands set forth and described in plaintiff's said complaint, and from doing further waste, destruction or trespass upon said land or any part thereof, and from removing, carrying away or shipping any logs, bark or lumber taken from said land, wherever the same may be." It was further made to appear that defendants, their agents and employees, and of these particularly Harry Rotha, paid no attention whatever to the order of the court, but continued to cut and remove the timber between the disputed lines, just as they had been doing before the order was served, and made no change in their conduct in this respect until the question of their being in contempt was raised at the hearing.

The court finds, and there was ample evidence to sustain the finding, as follows: "I find that since the restraining order made as aforesaid was duly served upon the said Champion Fiber Company it and its superintendent of the woods department, Harry Rotha, under the advice of counsel, have undertaken to arbitrarily locate the Cathcart line to suit their own purposes, and have willfully and intentionally continued to cut and carry away timber trees situate and being on the land claimed by plaintiffs and embraced in the restraining order, just as they were doing before the issuing of said order." And on this finding we are of opinion that the defendants were properly adjudged guilty of contempt.

It is contended that the preliminary restraining order is not sufficiently definite in its terms to authorize the judgment, but we can not take that view of the order when considered in connection with the evidence in the case and the findings of the judge thereon. The description of the land fully set forth in the complaint by metes and bounds. (87) The allegations in the complaint that the "defendants had wrongfully entered and trespassed upon said lands," by fair and reasonable intendment could only refer to the location as claimed by plaintiffs. The acts prohibited were clearly defined and stated, and the evidence tended strongly to establish that defendant and its agents were fully aware of the location of the land in dispute and were fully informed of the placing of this "Smith line," which plaintiffs claimed to be the true dividing line between the tracts. In 10 Ency. Pl. and Pr., 1021, it is said in reference to the form of a restraining order, that "No particular form is necessary; it is essential only that the defendants shall be given authentic notification of the mandate of the court or judge, which the

defendant must obey at his peril." And in Beach on Injunctions, sec. 251, it is said that "An injunction order must be obeyed in its spirit as well as its letter. The party enjoined must not do the thing forbidden, nor permit to be done, nor effect it, either by trick or evasion." Even when an injunction is not served, if the party to be affected has been made aware of its being issued or that it is about to be issued, and knowingly and intentionally violates it, or knowingly and intentionally does an act to render the order of no effect, there is authority for the position that such a person may be attached for contempt of the process.

In *Osborne v. Tenant,* 14 Vesey Ch., 136, *Lord Eldon* said: "If these parties, by their attendance in court, were apprised that there was an order, that is sufficient; and I can not attend to a distinction so thin as that persons standing here until the moment the Lord Chancellor is about to pronounce the order which, from all that passed, they must know will be pronounced, can by getting out of the hall at that instant avoid all the consequences." *Winslow v. Nayson,* 113 Mass., 411.

On the facts appearing, we are of opinion that the defendants were properly adjudged guilty of contempt, and the judgment of the court below is

Affirmed.

Cited: Weston v. Lumber Co., 158 N. C., 273; *Louman v. Ballard,* 168 N. C., 20.

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(88)

DEFENDANT'S APPEAL.

Injunction—Findings—Evidence—Bona Fide Controversy.

In this case there was sufficient evidence to justify the finding of the lower court that there was a *bona fide* controversy concerning the ownership of timber, and the restraining order was continued to the hearing.

APPEAL by defendants from order continuing the injunction to the hearing.

Same counsel.

HOKE, J. The court below finds, and the evidence fully justifies the finding, that there was a *bona fide* controversy between the parties as to the ownership of the land and timber in controversy; and the restraining order continued to the hearing comes within the expressed provisions of the statute (Rev., secs. 807, 808). See *Moore v. Fowle,* 139 N. C., 51.

The judgment is

Affirmed.

DAVID CLARK ET AL. v. SACO-PETTEE MACHINE WORKS ET AL.; DAVID CLARK ET AL. v. CROMPTON AND KNOWLES LOOM WORKS ET AL.

(Filed 22 December, 1908.)

Appeal and Error—Certiorari—Case as Settled.

When it appears, on examination of the transcript on appeal, that certain papers were sent up by the clerk as a part thereof which had been excluded by the order of the trial judge, and that others were omitted which the judge had ordered to be included, the record will be remanded, on motion, to the clerk, with direction to correct the transcript in accordance with the order of the judge.

CLARK, C. J., did not sit in this case.

W. J. Adams and Womack & Pace for plaintiffs.
A. A. Seawell and K. R. Hoyle for defendants.

PER CURIAM: This was a motion by the plaintiffs for a *certiorari,* directed to the clerk of the Superior Court of LEE to certify the transcript of the record in accordance with the order of *Long, J.* (89) The motion was made, upon notice, and argued before us. Upon a careful inspection of the record, we find that *Judge Long* directed that the following papers comprise the transcript, to wit, "The summons, the complaint, the proper records, above set out, including the bond, notice of appeal, waiver of notice and this statement of the case on appeal, will constitute the case on appeal to the Supreme Court."

We find upon examining the transcript that certain other papers which his Honor directed to be stricken from the file in the cause have been inadvertently included. The clerk, in sending up the transcript, should be guided solely by the order of the judge, and send no other papers than those directed by him. The record will be remanded to the clerk, with directions to certify to this Court the transcript in accordance with this order.

The plaintiffs further move for a *certiorari* directing the clerk to send up certain affidavits which were used on the hearing before the judge. It appears that these affidavits are in the record and were used in the argument of this case and of No. 289. The clerk of the Superior Court of LEE will make copies of these affidavits and attach to the transcript in both appeals. The same order is made in No. 289. This order is made without prejudice to defendants' right to make such motions on the record, when sent up, as they may be advised.

Motion allowed.

Cited: S. c., post, 375.

(90)

S. WITTKOWSKY v. THE BOARD OF COMMISSIONERS OF JACKSON COUNTY.

(Filed 22 December, 1908.)

1. Townships—Corporate Powers—Legislative Powers—Constitutional Law.

Under Revisal, sec. 1318, subdiv. 30, enacted in pursuance of the constitutional amendment of 1875, townships are not corporate bodies and have no corporate powers when not specifically conferred by statute.

2. Same—Bond Issues.

Townships may issue bonds to aid in the construction of railroads only under authority given by statute passed in accordance with the requirements of Article II, section 14, of the Constitution, respecting its several readings, the roll call, the "aye and no" vote, etc.

3. Same—Interpretation of Constitution—Implication—County Divisions.

The restrictions imposed by Article II, section 14, of the Constitution on counties, cities and towns in pledging their credit or contracting a debt are by necessary implication applicable to townships, as they are but constituent parts of the county organization.

4. Interpretation of Statutes—Townships—Bond Issue—Railroads, Aid to Finish.

Section 1996, The Code of 1883, does not confer on a township the right to issue bonds to aid in the construction of a railroad upon which work has not been commenced.

5. Bond Issues—Constitutional Law—Legislative Journals—Notice to Purchaser.

When township bonds give notice upon their face of the act under which they were issued, and when an examination of the legislative journals would have disclosed that the act was not passed in accordance with the constitutional mandate, a purchaser is put upon notice of the defect in the issue.

APPEAL from *Guion, J.*, who found the facts, by consent, at May Term, 1908, of JACKSON.

The Court, upon the pleadings and admissions, found the following facts material to the decision of this appeal:

The General Assembly of North Carolina, at its session of 1889, chartered the Carolina Mining, Manufacturing and Improvement
(91) Company (chapter 159, Private Laws 1889). Said corporation, among other things, was empowered to construct and operate "tramroads or railroads as public carriers," etc. At the session of 1891 the act of 1889 was amended and the corporation empowered to extend its operations into other counties named. Private Laws 1891, ch. 315. It was further provided in the amendatory act that, upon the petition of ten of the qualified voters of either of the counties or any of the town-

ships in such counties within which said company was empowered to build railroads, the board of commissioners should submit to the voters of such counties or townships the question whether such counties or townships should issue bonds for the purpose of aiding said company in the construction of such roads, etc. It was further provided in said amendatory act (section 5) that the said townships in each and all the counties embraced in the charter of the said Carolina Mining, Manufacturing and Improvement Company are hereby incorporated for the purposes of this act, and the commissioners of the respective counties are hereby constituted and appointed the agents of said corporation for the said purposes; and if the said townships or either of them shall vote township bonds in aid of the construction of the said road or railroads the said commissioners shall, as agents of said townships or either of them, issue bonds in accordance with the terms of the propositions adopted by a majority of the voters of the township or townships whose bonds are to be issued. Neither of said acts were passed in accordance with the provisions of Article II, section 14, of the Constitution. They were not read on three several days in each house, nor was there any entry on the journals of the number voting for and against their passage. A petition having been filed before the Board of Commissioners of Jackson County by ten voters of Webster Township, in said county, for that purpose, an election was ordered to be held and the proposition submitted to the voters of said township to issue coupon bonds to the amount of $6,000 to aid in the construction of a railroad to be built by said improvement company from some point at or near Sylva, on the Murphy division of what is now the Southern Railroad, to Webster, in Webster Township, in said county, the bonds to be issued in accordance with the provisions of the said statutes and to run (92) thirty years. At said election a majority of the qualified voters of the township voted for the issuance of said bonds. The commissioners of Jackson County, pursuant to said election and said statutes, issued and delivered to the said mining and improvement company bonds to the amount of $2,000, with coupons attached, as provided by the statute. These bonds were issued pursuant to the terms of the order of the commissioners, the company having at that time completed the grading of the road. No other work has been done on said road by the said company and no other bonds were issued. At the time of the election no railroad was in process of construction from the points named in the petition or order of election, nor was any company engaged in constructing any railroad from and to said points at said date. Said bonds were not voted to aid in the completion of any railroad then begun, nor were the citizens of said township interested in having such railroad constructed further than is the usual interest in having a railroad built

through their locality. The company sold the bonds described in the complaint to plaintiff about the year 1896 (being Nos. 11-20, inclusive), with the coupons attached, in the open market, without notice of any defect or irregularity in the issuing thereof, except such notice as was apparent upon the face of the bonds and the Journals of the House and Senate of the General Assembly in regard to the passage of the statutes, both of which are referred to in the face of the bonds, with the recital that they are issued in pursuance thereof.

A special tax was levied by the said Board of Commissioners of Jackson County on the property and polls of Webster Township to meet the interest on said bonds, regularly, after the issuing of said bonds, each year prior to the purchase of the said bonds by the plaintiff, S. Wittkowsky, and for some time thereafter, and the interest paid to plaintiff, as stated in plaintiff's complaint; and said board of commissioners levied said tax for one or more years and collected the same, but failed to pay over the same to the plaintiff and the other bondholders, and said sum is now in the hands of the Treasurer of Jackson County, N. C., or under the control of the said board of county commissioners.

(93) The Code of 1883 was passed in accordance with the provisions of Article II, section 14, of the Constitution. There are fifteen townships in Jackson County. Said railroad was to run only through Sylva and Webster, about three miles in length, and in no other portion of said county. There was due plaintiff on the matured coupons on said bonds 1 January, 1908, with interest, $725.90.

Upon the foregoing facts his Honor was of the opinion that said bonds were invalid, and rendered judgment for defendant. Plaintiff excepted and appealed.

George H. Smathers for plaintiff.

Coleman C. Cowan, Felix E. Alley and Walter E. Moore for defendant.

CONNOR, J. Plaintiff concedes that as the acts of 1889 and 1891 were not passed in accordance with the requirements of Article II, section 14, of the Constitution, the action of the commissioners in ordering the election and issuing the bonds was without authority, unless, as he insists, townships are not included in the article and section. It is too firmly settled by repeated decisions of this Court to be regarded as open to debate that the constitutional requirements in regard to the manner in which such acts are passed are mandatory and essential to their validity. The learned counsel, however, calls attention to the fact that townships are not named in the Constitution, and insists that, as counties, cities and towns are specifically named, townships are excluded,

expressio unius exclusio alterius. The question thus presented has not before been called to our attention or decided. We are therefore without authority to aid us in its solution. The language of Article II, section 14, of the Constitution, is: "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or impose a tax upon the people of the State, or allow the counties, cities or towns to do so, unless," etc. It is manifest, therefore, that townships are not named as among the political divisions of the State, within the provisions of the act and section. Are they included by necessary implication? The answer to this question presents an interesting line of investigation. Prior to 1868, strictly speaking, the only political divisions (94) of the State were counties. Towns existed by virtue of charters. Militia districts, voting precincts, etc., were established by the county courts. They were for the more convenient administration of the affairs and government of the county, having no corporate powers whatsoever. The county was governed in its internal affairs by the justices of the peace, sitting in quarterly sessions. The town and township system which prevailed in the New England and some other States were unknown to our Constitution and laws. The counties were only political divisions of the State and were not municipal corporations. *White v. Commissioners,* 90 N. C., and cases cited.

When the Convention of 1868 framed the new Constitution there was a manifest purpose to introduce the township into our system; and while none then existed, or were created by the Constitution, provision was made for dividing the counties into "convenient districts," which should "have corporate powers for the necessary purposes of local government and be called townships." Article VII, sections 3-4. Pursuant to this constitutional provision, the boards of commissioners divided the counties into townships and made report to the General Assembly. An elaborate system of township government was thereupon established, with a board of trustees having charge of the public highways and other local matters of administration. This was unsuited to our people and their habits, and was later abolished by the General Assembly, and the township was made to serve practically the same purpose in the county governmental system as the district or precinct prior to 1868. In 1875, by an amendment to the Constitution, the Legislature was empowered to abrogate the article relating to county government and formulate such plan or system as it saw fit. Pursuant to this power, the General Assembly established practically the system now prevailing. Townships are not now corporate bodies nor have they "any corporate powers whatsoever, unless authorized by an act of the General Assembly." Rev., sec. 1318, subdiv. 30; *Wallace v. Trustees,* 84 N. C.,

164. This Court has held in several cases, and it is not now an
(95) open question, that townships may, by observing the constitutional requirements, issue bonds to aid in the construction of railroads. *Wood v. Oxford,* 97 N. C., 227; *Brown v. Commissioners,* 100 N. C., 92; *Jones v. Commissioners,* 107 N. C., 248. We have also held that the Legislature may establish fence districts and school districts and confer upon them power to contract debts and issue bonds to raise money for the purpose of erecting fences, schoolhouses, etc., levying, through the county commissioners, taxes to pay the interest, provide a sinking fund and, at maturity, pay the principal of the bonds. As said by *Merrimon, C. J.,* in *Jones v. Commissioners, supra,* "The townships are constituent parts of the county organization." While townships and other taxing districts are sometimes referred to as *quasi* municipal corporations, they are but territorial sections of counties, upon which, for appropriate purposes, power is conferred to perform functions of government of local application and interest. Townships are not named in the Constitution, Art. II, sec. 14; neither are school districts or fence districts. We think that the term "county," used therein, includes all political or legislative subdivisions of the county, as townships, etc. The term "city or town" is appropriately used, because they are in a sense different from counties, municipal corporations having powers, functions, duties and liabilities conferred by charter. It is true that they are, in a certain but restricted sense, governmental agencies. All of this has been so often discussed that it is unnecessary to cite authorities. When the term "State" or "county" is used in Article II, section 14, it must by necessary implication include townships and impose upon the Legislature the same limitations in respect to one as to the other in passing laws authorizing the contraction of debts and the imposition of taxes. Any other conclusion would lead to the strange result that the county could lend its credit, pledge its faith, contract a debt and impose taxes only when a bill for that purpose had been passed after three readings on three several days, upon a roll call and entry on the journal, whereas the power could be conferred upon a township or other taxing district by the usual legislative methods. The danger of this class of legislation being hastily enacted is illustrated by this record.

(96) It appears that, in a private bill to incorporate a mining and improvement company and another to amend the charter, power is conferred upon counties and townships to contract debts and issue bonds. There is nothing in the title of the bill to indicate that it contained any such provision. No railroad is named; no limit is fixed, either to the amount of the bonds or the time which they are to run. Townships in the most general terms, are declared "bodies corporate." Certainly such loose methods of legislation, conferring such extensive powers, was

never contemplated by the framers of the Constitution. To give the construction to the protective provision of that instrument contended for would be to do violence to its manifest purpose and meaning. Article VII, section 7, uses the terms "county, city, town or other municipal corporation." This does not throw much, if any, light upon the proper interpretation of Article II, section 14.

The plaintiff further insists that the bonds may be held valid under section 1996 of The Code of 1883. We had occasion to discuss the same contention in *Graves v. Commissioners,* 135 N. C., 49. These bonds do not come within any of the provisions of section 1996. That section makes no reference to township bonds; but if the word "county" be construed as including township the plaintiff is confronted by the difficulty that the bonds are not issued in the exercise of any such power, but expressly refer to the acts of 1889 and 1891 for their authority. No railroad was begun or in process of construction when the election was held; hence they could not have been issued for the purpose of completing a railroad, and in any aspect this is an essential requisite to the validity of bonds issued pursuant to section 1996. Conceding that the county commissioners have, by virtue of that section, power to subscribe to the completion of a railroad in which the people of the county have an interest, this power could not be exercised to fix a debt on one or more townships of the county. The fact that the road ran through only one township would make no difference.

With every inclination to hold political divisions of the State whose voters have at election approved the issue of bonds liable to honest purchasers, we find ourselves unable to do so in this case. We have no right to disregard the plain mandate of the Constitution. (97) The bonds gave notice on their face that the commissioners were issuing them pursuant to acts of the General Assembly, and an examination of its journals would have shown that the acts were not passed as the Constitution commanded. This, as uniformly held, put the purchaser upon notice of the defect in them. It would seem a wise rule, for the safety of such legislation, that an act authorizing a bond issue should by its title give notice of its purpose. This would insure its reference to the proper committee and its due consideration. If passed, the clerk would have notice that it came within Article II, section 14. Private charters are usually passed hastily and without that examination required in passing bills empowering the issuing of bonds and imposition of taxes. The judgment of his Honor must be

Affirmed.

P. H. ABERNATHY v. SOUTH AND WESTERN RAILWAY COMPANY.

(Filed 22 December, 1908.)

1. **Railroads—Condemnation, Right of—Trespass.**

A railroad company having the right of eminent domain, entering upon and occupying lands for building its track, is not a trespasser.

2. **Railroads—Condemnation Proceedings—Procedure—Power of Courts.**

The courts have authority under the statute to make rules of procedure in condemnation proceedings, when not expressly provided, "so that the practice shall in such cases conform as near as may be to the ordinary practice in the court." (Revisal, sec. 2593.)

3. **Railroads—Condemnation Proceedings—Exceptions—Clerk—Appeal and Error—Trial by Jury.**

In condemnation proceedings, questions of fact and law are first determined by the clerk, to whose rulings exceptions may be noted. No appeal lies until after the final report of the commissioners to appraise the value of the land has been made. Upon appeal the entire record is taken up and all of the exceptions are passed upon by the Supreme Court.

4. **Railroads—Condemnation Proceedings—Compensation—Title.**

A plaintiff, asking compensation from a railroad company for possessing and occupying his land for railroad purposes without first having exercised its right thereto in condemnation proceedings, must show title in himself; he may not force the corporation to take and pay for a doubtful title.

5. **Same—Evidence.**

In the trial of a special proceeding by the owner for compensation for land taken by the company it is competent for it to introduce evidence tending to show title in a stranger to the suit, without connecting itself therewith.

6. **Railroads—Condemnation Proceedings—Title in Stranger—Evidence.**

It is competent, in the trial of a suit brought for compensation by one claiming title to land used by a railroad company for railroad purposes, for the company to introduce evidence tending to show a prior unregistered deed from plaintiff's grantor to a third person; the loss and manner of loss of the deed; facts showing that, at the time he acquired the quitclaim deed under which he claimed, plaintiff knew that his grantor had no title and bought at a grossly inadequate price.

7. **Railroads—Condemnation Proceedings—Compensation—Damages—Misjoinder—Procedure.**

Proceedings for compensation for the use and occupation of plaintiff's land by defendant railroad company as a right of way for railroad purposes, and a cause of action for damages arising in trespass, are a misjoinder. The petition will not be dismissed, but the cause of action for damages will be stricken out.

8. Railroads—Condemnation Proceedings—Compensation—Measure of Damages—Evidence.

In proceedings for compensation for the use and occupation of a right of way over his lands by defendant railroad company for railroad purposes, the measure of the recovery is the difference between the fair market value of the land before the right of way was taken and its impaired value thereby. The evidence should be restricted to that question.

ACTION tried before *Moore,* J., and a jury, at July Term, 1908, (98) of MITCHELL.

The plaintiff instituted this special proceeding against defendant pursuant to the provisions of section 2580, Revisal, for the purpose of finding and recovering compensation for the right of way over his land occupied and appropriated by defendant for "railroad purposes." He filed his petition before the clerk of the Superior Court, alleging that he was the owner in fee of the land, a description of which (99) is set out; that defendant has entered upon and built its track across said land, and appropriated pursuant to the power conferred by its charter 200 feet for its track, etc. He further alleged: "That said land is peculiarly valuable by reason of valuable deposits of mineral therein, especially mica, there being on said land a valuable deposit of mica, which your petitioner is informed and believes could have been worked at a great profit, but by reason of the construction of said railroad by the said defendant, South and Western Railway Company, as aforesaid, the working of said deposit of mica has been rendered impractical and unprofitable, in that the embankments and excavations aforesaid and the roadbed and track of the said railroad have been built across the said deposit of mica in such a manner as to make it necessary, in order to prevent the obstructing of trains operating on said roadbed and track, to transport the whole of the waste and output of said mica deposit across the said embankments, excavations, roadbed and track of the said defendant, and your petitioner is informed and believes that by reason of the great cost of so transporting the waste and output of the said mica deposit the working of the same would now be impracticable and unprofitable, all of which is to the great damage of your petitioner. Wherefore, your petitioner prays the court that it appoint three disinterested freeholders who reside in the county of Mitchell, where the said land is situated, to appraise and assess the compensation and damages for the right of way of said railroad over said lands and for the use and occupancy of said lands by said defendant company for the use of its said railroad, and for damages to your petitioner caused by the construction of said railroad and by the repairs made and to be made thereon." Summons was duly issued and served upon defendant company. Defendant answered denying the allegation of ownership,

admitting that defendant company, subsequent to 22 July, 1902, went into possession of the right of way described in the petition. The allegation in regard to the mica mine was denied. Defendant asked for appropriate relief, etc., demanding that the issues of fact raised by the petition and answer be transferred to the civil docket for trial,
(100) etc. The clerk made an order appointing three commissioners to assess the benefits and damages sustained by petitioner by reason of the construction of the track and the appropriation of the right of way. To this order defendant duly excepted and demanded a jury trial. The commissioners made their report, assessing against defendant $8,000 as compensation and damages. Defendant filed exceptions to the report. Plaintiff also excepted, for that the amount assessed was inadequate, etc., demanding a jury trial upon the issue as to compensation. The clerk overruled all of the exceptions and confirmed the report. Plaintiff and defendant again excepted and appealed to the Superior Court. At the November Term, 1905, defendant, by leave of the court, amended its answer, setting forth that plaintiff acquired his title from one Abijah Thomas, who, prior to the execution of the deed to him, had conveyed said land to one J. L. Rorrison, who was then dead; that said deed had been lost, etc.

The cause came on for trial at the July Term, 1908, of MITCHELL. Plaintiff introduced a grant to Job Thomas, dated 8 June, 1876; a certified copy of a deed from Job Thomas and wife to Abijah Thomas, dated 15 May, 1880. Defendant objected to the introduction of this deed. It was admitted under the provisions of chapter 101, Laws 1907. Defendant excepted. Plaintiff introduced a deed from Abijah Thomas to himself, dated 17 June, 1901. The consideration recited in this deed was $10, and the operative words are, "have given, granted, conveyed, confirmed and quitclaimed, and by these presents do give, grant, convey, confirm and quitclaim unto the said P. H. A., his heirs and assigns, all my right, claim, interest and property in and to," etc., describing the land. It does not contain any warranty. It was duly probated and recorded 14 September, 1901. Plaintiff and defendant introduced testimony in regard to the value of the land, the location of the road, the mica mine and the effect of the construction of the track upon the operation of the mine, etc. Plaintiff's witnesses placed a valuation upon the land before the track was laid and the right of way acquired of $20,000. There was much conflicting evidence in regard to the value of the mica
(101) mine, defendant's witnesses giving the opinion that it was of very small value, while plaintiff's witnesses thought it very valuable. Defendant offered to show by several witnesses that they had seen a deed executed by Abijah Thomas to J. L. Rorrison some eighteen years ago; that the surveyor ran the land by the deed to Rorrison. It introduced

J. W. Gudger and proposed to show by him that "he took the acknowledgment of the deed from Abijah Thomas to J. L. Rorrison and returned the same to the custody of J. H. Greene, attorney for Captain Rorrison, and that since the last time he saw it Mr. Greene's office and all his papers and personal effects were washed away in the flood which devastated Bakersville some time thereafter." It further proposed to show by Malone Thomas, son of Abijah, who was dead, that he was present when plaintiff came to his father to get him to convey the land; that "Abijah refused to do so, stating that he had made a previous deed to J. L. Rorrison. They also proposed to show by this witness that he had seen the deed from his father, Abijah Thomas, to J. L. Rorrison, and that it had been lost." "The court, being of the opinion that the defendant could not in this action dispute the title of the plaintiff by showing title in some other person unless it claims under him, sustained the objection to all of the testimony offered for this purpose; whereupon defendant excepted." Defendant also proposed to show by Malone Thomas that he was working the mica mine at the time the survey was made; that he worked under Rorrison; that the mica was sold to Rorrison and that he was paid a royalty on it. This testimony was excluded, and defendant excepted. Other testimony of the same character was tendered and excluded, and defendant excepted.

At the conclusion of the evidence the defendant tendered the following question of fact, and asked the court to decide it before submitting to the jury the issue in regard to damages and compensation: "Is the plaintiff, P. H. Abernathy, the owner of the land described in the petition filed in this cause?" The court refused to consider or decide the question of fact. Defendant excepted. The defendant thereupon asked the court to submit an issue of fact to the jury in the same language. This was declined. Exception by defendant. The defendant submitted several requests for special instruction, all of which were (102) denied, and defendant excepted. A number of exceptions were noted to instructions given to the jury in regard to the mode of ascertaining the amount of compensation and damage which plaintiff was entitled to recover.

The following issues were submitted to the jury:

"Is the plaintiff the owner of the land described in the petition?"

The court instructed the jury that if they found he was the owner they would answer the first issue "Yes"; otherwise, "No."

"What damage, if any, has the plaintiff sustained by reason of the impaired value of the plaintiff's land, caused by the appropriation by the defendant as a right of way over said land and constructing and operating a railroad on said right of way?"

The jury answered the first issue "Yes," and assessed the damages at $7,000.

Judgment was signed as set out in the record. Defendant duly assigned error and appealed.

Adams & Adams, W. C. Newland and S. J. Ervin for plaintiff.
J. Norment Powell for defendant.

CONNOR, J., after stating the case: Defendant, pursuant to the provisions of its charter, entered and built its track upon and through the land described in the petition. It made no effort to acquire a right of way by condemnation proceedings under its charter or the general law (chapter 61, Revisal). The plaintiff, claiming to own the land, pursuant to section 2580, brought this special proceeding, alleging title in fee in himself and demanding compensation for the right of way upon which defendant had constructed its track. He concedes that defendant is entitled, in the exercise of the right of eminent domain conferred upon it, and has the right to appropriate for "railroad purposes" a strip of the land of 200 feet width, and proposes to confer by the judgment in this proceeding title to the easement upon being paid compensation. This he is entitled to do, provided the land belongs to him. While the proceeding for condemnation, when instituted by the corporation, is a
(103) forced sale, so, when instituted by the owner, it is a forced purchase of the easement. But for the right of entry and appropriation before condemnation the defendant would by entering be open to an action for trespass. This present proceeding admits the right of defendant to "take," and seeks to make it "pay." The provisions of the statute regarding the mode of procedure and rules of practice are indefinite and obscure. The Legislature, recognizing the difficulty of doing more than outlining the practice so as to safeguard the rights of the parties, has conferred upon the court the power to make rules of procedure when they are not expressly provided by the statute; "so that, the practice shall in such cases conform as near as may be to the ordinary practice in the courts." Revisal, section 2593. We have, in cases wherein the corporation filed the petition, prescribed the procedure in conformity, as nearly as practicable, with other special proceedings. *R. R. v. Lumber Co.,* 132 N. C., 644; *Durham v. Riggsbee,* 141 N. C., 128; *R. R. v. R. R.,* 148 N. C., 61. While in other special proceedings, when an issue of fact is raised upon the pleadings it is transferred to the civil docket for trial, in condemnation proceedings the questions of law and fact are passed upon by the clerk, to whose rulings exceptions are noted, and no appeal lies until the final report of the commissioners comes in, when upon exceptions filed, the entire record is sent

to the Superior Court, where all of the exceptions are passed upon and questions may be then presented for the first time. *R. R. v. Stroud,* 132 N. C., 413; *R. R. v. Newton,* 133 N. C., 132; *Porter v. Armstrong,* 134 N. C., 447; *Durham v. Riggsbee,* 141 N. C., 128. The reason for this practice is discussed in these cases. Pursuant to these decisions, the clerk should have found whether the plaintiff was the owner of the land before ordering the appraisement. If he had found that he was not such owner he would have dismissed the proceeding, and plaintiff could have appealed. If he had found him to be the owner the defendant could have excepted, the clerk would have appointed the commissioners, and upon the coming in of the report and exception the entire record would have been open to review. Assuming that the clerk found that plaintiff was the owner, the case was properly in the Superior (104) Court for all purposes. We have held that in proceedings instituted by the corporation the only issue of fact to be submitted to the jury was the amount of compensation. *R. R. v. R. R., supra.* It is not clear whether his Honor should have decided the question of title or have formulated an issue and, under proper instructions, have submitted it to the jury. It is not very material as to the manner in which it was done. If controverted questions of fact were presented in regard to the title the judge can always call in to his aid a jury.

It is manifest, however, that before the plaintiff can proceed to claim or recover compensation he must establish not a mere *prima facie* but a good title, as he would be compelled to do in a bill for specific performance. If he does not own the land upon which the defendant has constructed its road and imposed a burden, he has nothing to be "taken," and therefore nothing for which he is entitled to compensation. His Honor, recognizing this truth, submitted an issue to the jury in regard to plaintiff's title. The defendant complains that he did not permit them to show that, notwithstanding his paper title, plaintiff did not in fact have title, because his grantor had before conveying to him granted to one Rorrison. The record states that his Honor excluded the evidence tendered by defendant upon this question, because he was of the opinion that it could not in this proceeding dispute plaintiff's title by showing that the true title was in a third person. The question is of first impression with us. The statute provides that if there are adverse and conflicting claimants to the money the court may direct it to be paid into court, and the rights of such claimants will be adjusted by reference or otherwise. This end is accomplished by bringing all persons claiming an interest in the land before the court. The company acquires the right of way and the court distributes the compensation. Unless some such provision is made, a corporation having the right of eminent domain would be indefinitely postponed in acquiring title and going on

with its work, or be subjected to a succession of suits for compensation.

The court will never require a purchaser to take and pay for a
(105) doubtful title when he is entitled to call for "a good and indefeasible" one. Certainly, if in this case, after plaintiff had shown his quitclaim deed, defendant had introduced a deed of prior date from his grantor to Rorrison, the court would not have excluded it because defendant did not connect himself with such title. The rule may be assimilated to that which prevails in an action for the recovery of land in which defendant may always meet the plaintiff's *prima facie* title by showing an outstanding title in a stranger, for the obvious reason that no one except the true owner has the right to oust the person in possession; hence the familiar maxims that the plaintiff in an action of ejectment must recover upon the strength of his own title, and not upon the weakness of defendant's. If this were an action for the possession of the land, plaintiff, upon showing title out of the State by the grant and a chain of title to himself, would recover, unless the defendant could show a prior grant to some one other than plaintiff's grantor or a prior deed to a third person, etc. We do not see any good reason why, upon the same principle, it is not open to defendant to show that the plaintiff's grantor had no title when he undertook to convey to him. The reason is much stronger here, because the plaintiff is seeking to compel defendant to buy an easement in the land and pay full value for it. The evidence, if believed, tended to show that several years before Thomas conveyed to plaintiff he conveyed the same land to one Rorrison, who went into possession, had it surveyed by the calls in the deed, worked the mica mines on it, etc. Defendant offered to show by the witness Gudger that he took the probate of the deed and gave it to Mr. Greene, Rorrison's attorney; that his office was washed away in a freshet which visited the town of Bakersville. Defendant also offered to show by Malone Thomas, son of Abijah, that when plaintiff approached his father to buy the land he told plaintiff that he had conveyed it to Rorrison; that witness saw the deed to Rorrison and that it had been lost; "that it was washed away," and "the surveyor had it running the land—that is how I came to see the deed"; that Rorrison was in possession of the land at that time. Several other witnesses were introduced to show that Rorrison was in possession, working the mine. Rorri-

son and Abijah Thomas are both dead. This testimony is compe-
(106) tent and should have been received upon the question of plaintiff's ownership. If true, it is manifest that at the time Thomas conveyed to plaintiff he was not the owner of the land. The learned counsel for plaintiff insists that the evidence was not of sufficient probative force to set up the deed and show that it was lost. We think that, if believed, it was amply sufficient to be submitted to the court and jury

upon the question whether Thomas had executed such a deed. There is Thomas' declaration to the plaintiff when he approached him to buy—a declaration against the interest of the declarant; the testimony of Gudger that he took the probate of "the deed"; of two sons of Thomas that they had seen "the deed"; of one that he was present when his father told plaintiff that he had conveyed to Rorrison, and that he saw the deed when the land was being surveyed for Rorrison; of several witnesses that Rorrison was in possession of the land—that they worked the mine for him; and the purchase by plaintiff of the "right, title and interest" of Thomas for $10 of a tract of land which plaintiff's witnesses swear was worth $20,000. Upon a bill by the heirs of Rorrison to set up the deed, this evidence, if believed, would be regarded as plenary. In regard to the loss of the deed, the evidence is necessarily much less cogent. If the execution and delivery of the deed, followed by possession of the grantee, is shown, a *prima facie* case showing that it was lost would entitle the party to relief. However this may be, his Honor's ruling precluded defendant from pursuing the line of proof. It may be that, if permitted to follow it up, more satisfactory evidence of the loss could have been adduced. Under our former system of practice, a person claiming under a deed alleged to have been lost before registration sought relief by a bill in equity, wherein the judge heard the proofs and granted or refused relief in accordance with his opinion as to the convincing character of the evidence. He required the proof to be satisfactory, especially when the fact of execution was denied. In *Plummer v. Baskerville,* 36 N. C., 252, the *Chief Justice* lays down the general rules by which courts of equity were guided in such cases, and discusses the evidence at much length. In concluding the opinion denying relief, he says: "It would be too much to declare the ex- (107) istence of such an instrument, when its execution is in no manner proved, either by witnesses to it or by a person saying he had seen it, or even by a single declaration of the supposed bargainor, and when there has been and could be no corresponding possession, besides many other circumstances to render it at least probable that no such instrument was in fact ever executed." The testimony in this appeal tends to establish every fact, the absence of which is made the basis of the refusal to grant relief in that case. In *McCain v. Hill,* 37 N. C., 176, relief was granted. Plaintiff is not "a purchaser for value," as that term used in the registration laws has been defined by us. *Fullenweider v. Roberts,* 20 N. C., 278; *Harris v. DeGraffinried,* 33 N. C., 89; *Potts v. Blackwell,* 57 N. C., 58; *Worthy v. Caddell,* 76 N. C., 82. It is not suggested that $10 was, at the date of the deed to plaintiff, more than a nominal consideration. The language of the deed excludes the suggestion that plaintiff supposed that he was buying more than a claim to the land; he

bought with full notice that his grantor disclaimed having title. A quit-claim deed by its terms puts the person taking it upon notice that he is getting a doubtful title. *Lumber Co. v. Price,* 144 N. C., 50.

It is not necessary to the decision of this case that the heirs of Rorrison be brought in. If the title is in them the plaintiff can confer no title to the easement or right of way, and must fail in his suit. To bring them in would be to engraft a controversy in which the plaintiff has no possible concern. Our conclusion upon this question entitles the defendant to a new trial. As the case goes back for that purpose, it may be well to notice several other exceptions to prevent further delay in disposing of the controversy.

Defendant moved the court to dismiss the proceeding because it insists that two causes of action are joined in the petition—one for compensation and the other for damages. We concur with the learned counsel for defendant that, in a proceeding for condemnation, being entirely statutory, a cause of action for damages, as for a trespass, can not be joined. The authorities cited in his brief and commented upon in the oral argument sustain him in this view. *Allen v. R. R.,* 102 (108) N. C., 381; *Land v. R. R.,* 107 N. C., 72. It is also true that no new cause of action can be engrafted upon the petition in the Superior Court. The proceeding must be conducted upon the petition as filed, and no amendment changing its character or involving controversies between the parties, not germane to it, can be made in the Superior Court. New parties may be brought in if necessary to a final determination of the matters involved in the proceeding as instituted, as, for instance, the distribution of the compensation and perfecting the title to the right of way. While this is true, we do not follow counsel to the conclusion that the petition should be dismissed because irrelevant matter has been included. Such matter may and should be stricken out, so that the court may proceed to administer the rights of the parties without complication with such irrelevant matter. The right of the owner of land subjected to an easement by a corporation in the exercise of the right of eminent domain is to have compensation for his property or right to its full use, enjoyment and control. "Compensation and damages are sometimes used interchangeably to represent the purchase money paid for rights acquired by the eminent domain; but it is better to let 'compensation' stand for purchase money and 'damages' for indemnity for a trespass. Whatever confusion there may be in the use of terms, the difference between 'compensation' and 'damages' is frequently expressed in the rule that they shall not be ascertained in a single proceeding or suit." Randolph on Em. Dom., sec. 222. We can see that a failure to keep the distinction in view may lead to confusion, resulting in injustice. The compensation must be full and complete and

include everything which affects the value of the property taken and in its relation to the entire property affected. In *Brown v. Power Co.*, 140 N. C., 333, we had occasion to consider the question and refer to what we there said and the authorities which we there cited. We concur with his Honor in refusing to dismiss the petition.

Upon another trial the question of compensation will be confined to the rule therein laid down. The real question in such case is, what was a fair market value of the property before the road was constructed, and how much is such value impaired by its construc- (109) tion? The difference represents the amount which should be paid to compensate the owner for what has been taken. Without undertaking to pass upon a number of exceptions lodged to his Honor's ruling in admitting testimony, we may say that, in our opinion, a rather wide range was allowed, probably by reason of the form of the petition and the issue. It is not material to inquire whether the entire tract, including the mica, is "taken" in the construction of the road. Any evidence which aids the jury in fixing a fair market value of the land, and its diminution by the burden put upon it, is relevant and should be heard; any evidence which does not measure up to this standard is calculated to confuse the minds of the jury, and should be excluded. This is as far as we can safely go in the present state of the case.

The court properly admitted the deed from Job Thomas to Abijah. The act of 1907 (chapter 83) cured any defect in the certificate. These curative acts have been uniformly sustained by the courts.

For the reasons pointed out, there must be a

New trial.

Cited: Lambeth v. Power Co., 152 N. C., 373; *R. R. v. Oates*, 164 N. C., 174; *R. R. v. Armfield*, 167 N. C., 465; *Lloyd v. Venable*, 168 N. C., 533; *R. R. v. Mfg. Co.*, 169 N. C., 164.

EDITH STINE, ADMINISTRATRIX, v. SOUTHERN RAILWAY COMPANY.

(Filed 22 December, 1908.)

APPEAL by plaintiff from *Lyon, J.*, at March Term, 1908, of NASH

Gudger & McElroy for plaintiff.
Moore & Rollins for defendant.

PER CURIAM: The questions presented in this appeal are substantially similar to those appearing in *High v. R. R.*, 112 N. C., 385, and *Beach v. R. R.*, 148 N. C., 152, and on the authority of those decisions and others of like import the judgment dismissing plaintiff's action as on judgment of nonsuit is

Affirmed.

GEORGE HYAMS v. SOUTHERN RAILWAY COMPANY.

(Filed 22 December, 1908.)

(110) ACTION tried before *Peebles, J.*, and a jury, at March Term, 1908, of BUNCOMBE.

Merrimon & Merrimon and Craig, Martin & Winston for plaintiff.
Moore & Rollins for defendant.

PER CURIAM: We have given this case most careful consideration, and are of opinion that no actionable negligence has been shown on the part of defendant, and the judgment below dismissing the action as on judgment of nonsuit is

Affirmed.

TABLE ROCK LUMBER COMPANY ET AL. v. ANDREW BRANCH ET AL.

(Filed 22 December, 1908.)

ACTION for trespass, tried before *Justice, J.*, and a jury, at August Term, 1908, of BURKE.

Plaintiffs appealed.

Avery & Ervin, J. T. Perkins and Avery & Avery for plaintiffs.
Spainhour & Hairfield, S. J. Ervin and John M. Mull for defendants.

PER CURIAM: The judgment below is affirmed for want of a case on appeal, settled and signed by counsel or the judge, according to the statute. No error appears on the face of the record.

Affirmed.

Cited: *S. c.*, 158 N. C., 252; *S. v. Bailey*, 162 N. C., 584.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SPRING TERM, 1909

E. B. BELL AND M. V. SWINDELL v. MUTUAL MACHINE COMPANY.

(Filed 17 February, 1909.)

1. **Vessels—Repairing—Negligence—Measure of Damages.**

The measure of damages for work defectively done on a vessel in caulking and otherwise repairing it is the necessary costs of having the defects repaired and interest on the value of the vessel, hire of employees, and the like, during the additional delay caused by the defective work.

2. **Vessels—Repairing—Neligence—Counterclaim.**

A counterclaim for damages on account of defective work in caulking and otherwise repairing a vessel may be set up in an action to recover for the work.

3. **Same—Judgment—Estoppel.**

When it has been adjudicated in a former action that the defendant in this action had performed his contract to repair the vessel of the present plaintiff, the plaintiff is estopped to claim damages arising from defective work alleged to have been done thereon.

4. **Vessels—Repairing—Negligence—Damages Remote.**

A recovery of damages for destruction by fire of plaintiff's vessel, caused by a leak alleged to have been the result of defendant's defective work in caulking and repairing it, by admitting the water to four barrels of lime stored in it, is too remote, in the absence of notice that the vessel was to be used for carrying lime.

5. **Vessels—Repairing—Contributory Negligence.**

It is incumbent on plaintiff to allege and prove that he used due diligence to discover that defendant's work on his vessel was defective, and

that he could not discover the work was so, or that the vessel would leak, until too late to avoid the consequences, in order to recover damages alleged to have resulted from the defective work while the vessel was at sea.

6. Same—Proximate Cause.

To start a vessel on a voyage upon the assumption that defendant had properly caulked and repaired it, without inspection or trial, is such gross negligence on the part of plaintiff as to be the proximate cause of the vessel's destruction by a leak, in an action for damages on the ground that the leak was caused by defendant's defective work.

(112) ACTION tried before *Guion, J.*, and a jury, at Fall Term, 1909, of HYDE.

Defendant appealed.

Ward & Grimes and Walter Jones for plaintiffs.
Small, MacLean & McMullan for defendant.

CLARK, C. J. The plaintiffs placed their schooner, "Melville," on the marine railway of the defendant at Washington, N. C., to be caulked and otherwise repaired. They allege in their complaint that the work was so defectively done that on the voyage the vessel leaked, and the water, finally coming into contact with some barrels of lime which were in the cargo, set fire to the vessel, which was thereby burned. This action is to recover the value of the vessel and cargo.

If the repairs were defectively made, so that the vessel leaked, the damages were the cost of having the defects repaired and interest on the value of the plant (the vessel) and hire of employees, and the like (*Sharpe v. R. R.*, 130 N. C., 613; *Tompkins v. Cotton Mills, ibid.*, 347; *Mills v. R. R.*, 119 N. C., 693), during the additional delay thus caused. This direct damage might have been set up as a defense to the action by the defendant in which it recovered of the plaintiffs its charges for making such repairs, and the defendant pleads such judgment as a bar to this action. The plaintiffs contend that this is a counterclaim, which it was optional with them to plead. It seems to us that while
(113) the damages now sued for, if valid, would be a counterclaim, the foundation for them is taken away by the adjudication in the other action that the defendant had performed its contract.

Aside from that, there is no evidence and no allegation that the defendant had notice that the vessel was to be used for carrying lime, nor, indeed, that this was its purpose. The evidence is that four barrels of lime were taken on board among the cargo. It was a remote and not a direct consequence that the water from the leak reached them and set fire to the vessel. The captain testified that he could have saved the vessel except for the fire.

The burning of the vessel from the leak was not in the contemplation

of the parties. Even if the vessel had been sunk by the leaks, it was incumbent upon the plaintiffs to allege and to prove that they used due diligence, but did not and could not discover that the work was defective so that the vessel would leak until too late to avoid that consequence. *R. R. v. Hardware Co.*, 143 N. C., 57. The complaint does not aver this, but on the contrary says that the plaintiffs relied on the defendant and had "no knowledge of the breach of duty and violation of contract" by the defendant. To start a vessel on a voyage upon that assumption, without inspection or trial—for none is alleged—was such gross negligence on the part of the plaintiffs as makes that the proximate cause of the disaster. The captain of the vessel, a witness for plaintiffs, testified that he knew the vessel was leaking before he sailed and when he took the four barrels of lime aboard.

In refusing the motion to nonsuit there was

Error.

BUFFALO CITY MILLS v. GEORGE H. TOADVINE LUMBER COMPANY.

(Filed 17 February, 1909.)

Railroads—Right of Way—Covenant—Fee.

A covenant to grant a right of way does not entitle the covenantee to demand a conveyance of the land. There is nothing in the contract in this case showing any intention to convey the land over which the right of way was located.

ACTION heard before *Guion, J.*, upon the pleadings and admis- (114) sions, at November Term, 1908, of PASQUOTANK.

The defendant corporation, on 30 December, 1902, conveyed to one Andrew Brown a parcel of land, described by metes and bounds, in Elizabeth City, N. C. Following the description of the property the deed contains the following language: "The said party of the first part also leases to the said party of the second part the right of way, as at present located, through the said Toadvine Lumber Company's land for a siding to the line of the Norfolk and Southern Railway for the period of five years from 1 January, 1903, with the right or option to the said Andrew Brown, at the expiration of the said lease of five years of said right of way, to purchase and permanently retain the same in fee, as at present located, upon the payment to the said Toadvine Lumber Company of $500 on or before 31 December, 1907, and upon the payment of the said $500, as aforesaid, the said Toadvine Lumber Company to make a good and perfect title to the said Andrew

Brown for the said right of way as now located. It is further agreed and bargained between the said parties that should the said Andrew Brown decline to purchase the said right of way, as aforesaid, then the said Toadvine company shall permit and allow the said Andrew Brown and convey to him a permanent right of way on their property along Pine Street towards the Norfolk and Southern Railway Company, west, so far as the said Toadvine Lumber Company's property extends towards or up to the said Norfolk and Southern Railway Company, reserving to itself the right of way to lay water pipes and maintain the same forever along the line of Second Street to and from Knobb's Creek from the lands now occupied by the said Toadvine Lum-
(115) ber Company lying southwest of the lands sold to Andrew Brown, as aforesaid." Brown conveyed the land and assigned the lease, together with the options, to the plaintiff, Buffalo City Mills.

At the expiration of the lease, plaintiff, interpreting the contract as a covenant to convey the *land* over which the right of way extended, tendered defendant the sum of $500 and demanded a conveyance thereof. Defendant stated that it was ready, willing and able to convey the right of way, but refused to convey the land as demanded. Whereupon this suit was instituted to compel the specific performance of the contract as interpreted by plaintiff. His Honor, upon the pleadings and exhibits, adjudged that, upon the payment of $500 by plaintiff, defendant "convey in fee simple to the plaintiff a right of way over the strip of land described in the deed of defendant to Andrew Brown." He also adjudged that plaintiff was not entitled to demand a conveyance of the land. Plaintiff excepted and appealed.

W. A. Worth and N. T. M. Melliss for plaintiff.
Aydlett & Ehringhaus for defendant.

CONNOR, J., after stating the case: The sole question raised by plaintiff's contention is whether the contract to convey an easement in fee simple over the land is to be construed as a contract to convey the land itself. Conceding that there is no rule of construction leading to this conclusion, counsel contend that an examination of the entire instrument discloses that such was the intention of the parties. He calls attention to the last clause, providing that in the event that Brown shall not purchase the right of way described in the former clause the defendant will convey a right of way on their property along Pine Street, etc., reserving to itself the right to lay water pipes and maintain the same, etc. From this he draws the conclusion that if by paying $500 for the right of way, as described in the first clause, he gets nothing more than the easement, he is put in the attitude of paying for something which by

the second clause he is entitled to demand without paying anything. This he says is an unreasonable construction to put upon the language of the entire deed. It is evident that the right secured to Brown in the second clause of the deed is not coextensive with that which (116) he acquired by paying the sum of $500, as described in the first clause. There is no language in the deed explaining the extent of the difference, nor is it necessary for us to conjecture what it may be. It is manifest that Brown did not contract to pay $500 for an easement which in the same contract is secured to him for nothing. In any aspect of the case, we find no authority for construing the contract to convey an *easement* into one to convey the *land,* and this is the result to which the plaintiff's contention arrives. We concur with his Honor, and the judgment must be

Affirmed.

THE COUNTY BOARD OF EDUCATION OF CHEROKEE COUNTY v. THE BOARD OF COMMISSIONERS OF CHEROKEE COUNTY.

(Filed 17 February, 1909.)

1. **Taxation—County Commissioners—Public Schools—Duties—Four-months Period—Constitutional Law.**

   The requirement of Article IX, section 3, of the Constitution, that the county commissioners provide by taxation for maintaining the public schools for the minimum period of four months in each year, is not restricted by Articles V and VII, limiting the power of taxation, and the commissioners are subject to indictment upon failure to provide the term of schools required by said section 3, Article IX. (Revisal, secs. 3590, 3592.)

2. **County Commissioners—Duties, Enforcement of—Mandamus.**

   When the county commissioners have so failed in the performance of their duties as to permit and require an interference of the court by civil process, the remedy is by *mandamus.*

3. **Mandamus—Public Officer—Discretionary Powers.**

   A writ of *mandamus* will not be granted to compel the performance of an act by a public officer involving the exercise of his judgment and discretion, to whom its performance is thus committed by our Constitution and statutes.

4. **Same—Taxation—County Commissioners—Public Schools—Four-months Term.**

   Our Constitution and statutes have committed to the judgment and discretion of the county commissioners the manner and method of levying taxes to maintain a four-months minimum period of the public schools, and in the exercise thereof the courts will not interfere by civil process, mandamus or otherwise, unless their action is so unreasonable as to amount to a manifest abuse of power.

5. Same—Board of Education—Estimate—Advisory and Recommendatory.

The action of the board of education of a county in making and submitting to the county commissioners an estimate of the amount required to maintain a four-months term of a public school (Revisal, sec. 4112) is recommendatory and in aid of the judgment and discretion given by our Constitution and statutes to the county commissioners in such matters.

6. Same—Action Dismissed.

The courts will not grant a *mandamus* to compel the county commissioners to accept and adopt as final the estimate of the amount required to maintain a four-months term of a public school made by the county board of education (Revisal, sec. 4112), and an action brought by the latter board for that purpose will be dismissed.

CLARK, C. J., dissenting.

(117) ACTION to obtain a peremptory writ of *mandamus,* heard on complaint and answer before *Peebles, J.,* at Fall Term, 1908, of CHEROKEE.

The complaint, in substance, alleged that the funds available from the regular and ordinary sources of taxation are insufficient to maintain the public schools of Cherokee County for a period of four months in 1909; that under the provisions of section 4112, Revisal, the plaintiffs, in their official capacity, had submitted an estimate of the amount required for the purpose, and demanded that a specific additional tax be levied by defendants, this estimate and demand being in terms as follows:

"GENTLEMEN: We beg to submit for your consideration and action thereon the following: Under and by virtue of section 3, Article IX of the Constitution of North Carolina, it is your duty to levy a sufficient tax, in addition to and beyond the limit of 66 2-3 cents on $100 worth of property and $2 on each taxable poll levied for general State and county purposes, in order to maintain one or more public schools in every school district in Cherokee County at least four months in every school year. In order that you may intelligently make this levy,
(118) we submit the following: For the school year beginning 1 July, 1907, and ending 30 June, 1908, it required $12,268.12, estimated, to run the schools for that year; this in addition to the commissions to which the sheriff and treasurer are entitled, and which would make the actual expenses of the schools about $13,150. Of this amount we had on hand $3,450.72. Received from the State, $666.98; fines, $223.45, and the levy for 1907-'08 is $8,780.70.

"We have carefully estimated and considered the condition of the affairs of the schools of the county. It will take the sum of $15,190 to run the schools for the year 1908-'09—that is, beginning 1 July, 1908,

and ending 30 June, 1909, based upon the following items of expenditure for teachers, building, commissioners and contingent funds, to wit, $15,190.

"The amount of money that you could raise at 18 cents on the $100 worth of property would be $6,346.49, and on the taxable poll about $2,418, making a total of $8,764.49.

"We estimate that we will receive from the State of North Carolina on the first $100,000 about $660. We also estimate that we will receive in fines and forfeitures about $250, making a total of $9,674.49. Therefore, in order for us to have four months of school in the county it will require an extra levy, over and above the 18 cents on the $100 worth of property and $1.50 on each taxable poll, of a sum sufficient to raise $4,515.51. We therefore respectfully request that your honorable body do make a sufficient levy, in addition to the 18 cents on the $100 worth of property and $1.50 on the poll, sufficient to raise the further sum of $5,515.51, to be used as a supplemental and special tax, in order to run each public school in Cherokee County for four months for the school year beginning 1 July, 1908, and ending 30 June, 1909. In order to raise this sum of money, we are of opinion that you are required to levy as a supplemental and special tax about 16 cents on the $100 worth of property in the county. If we had not had the $3,450.72 on hand the first of last July it would have been impossible for us to have run the schools four months during the school year 1907-'08. This year there will be no surplus fund on hand, owing to the fact that considerable building has been done and (119) the patrons of the schools are demanding a higher grade of teachers, which necessarily demands higher pay."

The complaint further averred that defendant board, being unmindful of its duty, had declined and refused and still declines and refuses to accede to plaintiff's demand.

The defendants answer and admit that the estimate has been received in terms as stated, and allege that they are not bound to accept this estimate of plaintiff as final or conclusive, nor to act upon it, if in "their judgment" the amount of tax is too large and not required for the purpose indicated. Defendants, further answering, "expressly deny that the funds available from the regular and ordinary sources of taxation in the county of Cherokee are insufficient to maintain four months of public schools in said county, as required by Article IX, section 3, of the Constitution of the State of North Carolina; but on the contrary the defendants allege that the funds which will be derived from the school tax already levied in said county will be, if properly and economically expended, amply sufficient to keep open the schools in every school district in said county for the period required by law; that

it is true, as alleged in paragraph 4 of said complaint, that the Board of County Commissioners of Cherokee County did, in the exercise of their best judgment and discretion, decline and refuse to accede to the demand of the plaintiff to levy the additional tax asked for, but the defendants allege that in so doing the said Board of County Commissioners of Cherokee County were not unmindful of any duty imposed on them, but on the contrary were acting in accordance with their duty and obligation not to levy upon and require the payment by the citizens of Cherokee County of any taxes over and above such as were necessary to defray the expenses of conducting the schools and carrying on the general business affairs of the county; and the defendants allege that they have made a careful investigation, and after such investigation they verily believe and aver the fact to be that the demand of the plaintiff is unreasonable and the additional tax levy asked for unnecessary and exorbitant, and that the tax levy already made, 60 cents on the property and $1.80 on polls, within the county of Cherokee, will produce
(120) ample revenue with which to defray all the expenses of the county, and the proportion of said taxes applicable to school purposes, to wit, 18 cents on property and $1.50 on polls, will be, if properly, economically, judiciously and lawfully expended, more than sufficient to keep open for four months, as required by law, in every school district in said county, a well-equipped school; that under such circumstances it was not only lawful, but it was the duty of said board of county commissioners, in the proper exercise of their judgment and discretion, to decline to make any additional tax levy, and especially so large a levy as that demanded by the plaintiffs, and, as defendants are advised and believe, this honorable court will not interfere with the said board of county commissioners in the exercise of their judgment and discretion."

The court, upon the facts appearing in the complaint and answer, entered judgment as follows:

"This cause coming on to be heard upon the motion of the plaintiff for a peremptory writ of mandamus, and the court being of the opinion that, upon the complaint and answer, the plaintiff is not entitled to said writ, the court finds as facts that the defendants have exercised their discretion in the premises and declined to levy this tax, as asked for by plaintiff. It is now, therefore, ordered, adjudged and decreed that said motion be and the same is hereby dismissed, and that the action be and the same is hereby dismissed, with costs. R. B. PEEBLES,

Judge Presiding."

Whereupon plaintiff excepted and appealed.

E. B. Norvell, Dillard & Bell and Bickett & White for plaintiff.
Ben Posey and Merrick & Barnard for defendants.

HOKE, J., after stating the case: The Constitution of this State (Art. IX, sec. 3) provides "that each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least four months in every year, and if the commissioners of any county shall fail to comply (121) with the aforesaid requirement of this section they shall be liable to indictment."

Construing this section, in *Collie v. Commissioners,* 145 N. C., 170, the Court held that the duty of the county commissioners to provide by taxation for maintaining the public school for the minimum period of four months was not affected by the restrictions on the power of taxation contained in Articles V and VII of the Constitution; and from this it follows that the requirements of section 3, Article IX, to the extent indicated, are peremptory, and a failure on the part of the commissioners to perform the duty thereby imposed is or must be made an indictable offense. The provisions of our statute law are ample to make this feature of the Constitution effective by indictment (Revisal, secs. 3590-3592), and there are, no doubt, other sections of the criminal code bearing on the subject, and the question presented on this appeal is whether the duty referred to can be enforced by writ of *mandamus,* the writ applied for by plaintiff in this proceeding. As relevant to this question, and on facts appearing in the record, it is recognized doctrine that the writ of *mandamus* is the appropriate remedy to enforce the performance of duty on the part of county officials, when the duty in question is both peremptory and explicit, but that such a writ will not be granted to compel the performance of an act "involving the exercise of judgment and discretion on the part of the officer to whom its performance is committed." In some of the books the principle is stated in this way, "that the writ is only allowable when the duty is mandatory and the act sought to be coerced is ministerial in its nature"; and while expressions are sometimes found that the performance of a duty to some extent discretionary will be controlled by this writ when it clearly appears that an officer has acted capriciously, an examination of these authorities will, we think, disclose that in cases involving the exercise of official discretion the order of the court in actions for *mandamus* has always been restricted to compelling an officer to act in a given case, and will never undertake to direct him as to how he shall act.

In Abbott on Municipal Corporations, sec. 1108, the principle is thus stated: "To authorize the writ, the duty must be manda- (122) tory and the act sought to be coerced ministerial in its nature. If the officer or governmental agency sought to be coerced is vested by law with discretionary powers as to the doing or not doing of the act sought to be coerced, or *in the manner of doing it,* the writ will not issue." And in High on Extr. Legal Remedies (2 Ed.), sec. 24, it is said: "But the

most important principle to be observed in the exercise of the jurisdiction by *mandamus,* and one which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy, is that which fixes the distinction between duties of a peremptory or mandatory nature and those which are discretionary in their character, involving the exercise of some degree of judgment on the part of the officer or body against whom the *mandamus* is sought. . . . And whenever such officers or bodies are vested with discretionary powers as to the performance of any duty required at their hands, or when in reaching a given result of official action they are necessarily obliged to use some degree of judgment and discretion, while *mandamus* will lie to set them in motion and to compel action upon the matters in controversy, it will in no manner interfere with the exercise of such discretion or control or dictate the judgment or decision which shall be reached." And again, in section 34: "An important distinction to be observed in the outset, and which will more fully appear hereafter, is that between duties which are peremptory and absolute, and hence merely ministerial in their nature, and those which involve the exercise of some degree of official discretion and judgment upon the part of the officers charged with their performance. As regards the latter class of duties, concerning which the officer is vested with discretionary powers, while the writ may properly command him to act or may set him in motion, it will not further control or interfere with his action, nor will it direct him to act in any specific manner."

The doctrine so stated is in accord with the uniform decisions of this Court on the subject. *Ward v. Commissioners,* 146 N. C., 534; *Glenn v. Commissioners,* 139 N. C., 412; *Barnes v. Commissioners,* 135 (123) N. C., 27; *Ewbank v. Turner,* 134 N. C., 77; *Loughran v. Hickory,* 129 N. C., 281; *Tate v. Commissioners,* 122 N. C., 812; *Burton v. Furman,* 115 N. C., 166; *Broadnax v. Groom,* 64 N. C., 244.

In the well-considered opinion of *Associate Justice MacRae* in *Burton v. Furman, supra,* it is said: "Neither will this writ (*mandamus*) be granted to compel the performance of an act involving an exercise of judgment and discretion on the part of the officer to whom its performance is committed. The law is so thoroughly settled in this State by the former adjudications of the Court that we have nothing to do but refer to them." And the learned *Justice* then quotes with approval from the opinion of *Justice Bynum,* in *Brown v. Turner,* 70 N. C., 93, to this effect: "*Mandamus* will lie when the act required to be done is imposed by law, is merely ministerial, the relator has a clear right and is without any other adequate remedy. Moses on Mandamus, 68. But it does not lie where judgment and discretion are to be exercised, nor to control the officer in the manner of conducting the general duties of his office."

An application of these authorities to the facts appearing in the record requires that the order of the judge denying plaintiff's prayer for a *mandamus* should be affirmed. The question presented, the amount of taxes to be levied to maintain the public schools of Cherokee County for the minimum period of four months, is one which clearly involves the exercise of judgment and discretion, which our Constitution and statute law have thus far referred to the board of commissioners of the several counties, and the courts can not and should not undertake to control their decision. In this view, the recent case before the Court, *Ward v. Commissioners,* seems to be directly in point. That was a case in which certain citizens and taxpayers of Beaufort County applied for a *mandamus* to compel the county commissioners to build a sufficient courthouse for the county, and on the hearing it was found as a fact that "The commissioners have not kept and maintained in good and sufficient repair the courthouse of the county, and do not offer or propose to do so." Relief by *mandamus* was denied, and *Chief Justice Clark,* delivering the opinion of the Court, said: "A *mandamus* will not lie to compel the county commissioners to repair or build a (124) courthouse. The duty of providing a sufficient and proper courthouse is to be discharged by the county commissioners, subject to indictment if there is a willful failure, and to supervision of the people of the county in the election of another board of commissioners, should the voters see fit. It is not a duty resting for enforcement with the judge of the Superior Court nor subject to supervision by the court. The plaintiff has no specific legal right for the enforcement of which he can invoke an order of the judicial branch of the Government to supervise and control the administrative branch. The building a new courthouse or repairing an old one is not a mere ministerial matter, admitting of no debate, but is one of discretion, committed to the county commissioners, in regard to which their judgment and discretion must prevail, and not the opinion of a judge. Only when a grand jury and jury have found a criminal abuse of duty can the court intervene, and then only to punish the individuals—not to compel them, as officials, to do any specific act not required by statute to be done in a specific way or to a prescribed extent. In *Brodnax v. Groom,* 64 N. C., 244, *Pearson, C. J.,* discussed this subject, and said: 'The case before us is within the *power* of the county commissioners. How can this Court undertake to control its *exercise?* Can we say such a bridge does not need repairs, or that in building a new bridge near the site of an old bridge it should be erected, as heretofore, upon posts, so as to be cheap, but warranted to last some years, or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have *stone pillars,* at a heavier outlay at the start, but such as will insure permanence and be cheaper in the long run? In short,' the Court continued, 'this Court is

not capable of controlling the *exercise* of power on the part of the General Assembly or of the county authorities, and it can not assume to do so without putting itself in antagonism as well to the General Assembly as to the county authorities and *erecting a despotism of five men,* which is opposed to the fundamental principles of our Government and the usage of all times past. For the exercise of powers conferred by the Constitution the people must rely upon the honesty of the (125) members of the General Assembly and of the persons elected to fill places of trust in the several counties. This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the Government or upon the county authorities.'"

It is argued for plaintiff that this decision does not apply, because the question there involved was clearly one of discretion, "whether the courthouse provided was sufficient," while here the duty to maintain a public school for four months is peremptory and permits no discretion. But the argument does not correctly state the question presented. It is not, shall the school be maintained for four months? but how much money is required to be raised by taxation for the purpose indicated; and this, as stated, is a matter which does involve both judgment and discretion, and which can not be controlled by the courts in an action of this character, but has been wisely referred by the law to the board of county commissioners. Having general charge and supervision of the county affairs, they best know the circumstances and needs of its people and all the conditions that enter into the problem—the valuation of the property in the county, the amount likely to be realized from a given levy, and the amount available or to be expected from other sources. Moreover, acting as they do under a continuing sense of responsibility to the people who elected them, and liable to indictment in case of willful or negligent failure to perform their duties, they are the body best fitted for the management of these local affairs and most likely to give satisfactory results. Even when the power exists, the courts are most reluctant to interfere, and will never do so by civil process, unless the local officers fail or refuse to act at all, or unless their action is so unreasonable as to amount to a manifest and oppressive abuse of discretion. *Rosenthal v. Goldsboro,* 149 N. C., 128; *R. R. v. Commissioners,* 148 N. C., 220.

It is further argued that, as the county board of education, acting under the provisions of the statute (Revisal, sec. 4112), have submitted an estimate of the amount required to maintain the public schools during the year 1909 for the minimum period of four months, this (126) is ascertained as a definite fact, and thereupon the duty of the county commissioners to levy a tax sufficient to raise the amount has become both peremptory and specific, bringing the case under the

principle declared and upheld in *Tate v. Commissioners, supra.* But the objection to this position is that under the law in question the estimate made by the board of education is not final and conclusive, but the amount is referred to the board of county commissioners for ultimate decision and, as we have endeavored to show, in the exercise of their discretion, and is not, therefore, a fixed sum or definite tax rate, as in *Tate v. Commissioners.* This, we think, is clearly the proper interpretation of the statute under which this estimate was submitted. Both our constitutional provisions and general legislation on the subject establish and approve the principle and policy of local regulation for these matters of local concern, not to be departed from, except in cases of great and overruling necessity; and a statute should never be construed as infringing upon this principle of local self-government unless explicit in terms and clearly sanctioned by the Constitution. Not only is this not true of the statute in question here, but the section itself throughout gives clear indication that, notwithstanding the estimate made by the board of education, the question of amount is for the county commissioners to determine: "If the tax levied by the State be insufficient to maintain one or more public schools in each district for four months, then the board of commissioners shall levy annually a special tax to supply the deficiency," etc. . . . "The taxes shall be levied on the property, credits and polls of the county, and in the assessment of the amount on each the commissioners shall observe the constitutional equation." And in the conclusion of the section it is directed: "The county board of education, on or before the annual meeting of the commissioners for levying county taxes, shall make an estimate of the amount of money necessary to maintain the schools for four months and submit it to the board of county commissioners."

One of the more usual definitions of the term "submit" is to "commit to the discretion or judgment of another," and the term "estimate" tends to show that the action of the board of education was intended, at most, to have only persuasive force, and, taken together, "to (127) make an estimate of the amount and submit it to the board of county commissioners," clearly shows that it was submitted for their consideration only, and that the determination of the question was with them. *School District v. Omaha,* 39 Neb. 745.

We are of opinion that the judge below has put the correct interpretation upon the statute, and that his judgment dismissing the action should be

Affirmed.

CLARK, C. J., dissenting: A *mandamus* lies only when there is a legal duty without discretion. The county commissioners are chosen to administer county affairs. Therefore, whether they shall erect or repair

bridges, courthouses, and the like, is a matter vested in their discretion, which the courts can not regulate, and must be corrected, if their conduct is not satisfactory, by the people electing a different board, except only where the neglect of duty or misconduct is such as calls for indictment and punishment.

But public education is a State, not a county, matter. The Constitution requires four months schooling, and the county commissioners are allowed no discretion. Indictment of the commissioners will give the child, whose life is passing, no compensation for its irreparable loss. Neither would the election of new commissioners a year or two later. Besides, there may be counties in which the popular majority would be unfavorable to a levy of taxation adequate for four months' schooling. A bridge or a defective courthouse can wait. The child's education can not. With him,

"Dies fluunt et vita irreparabilis."

"The days flow by, and the years that can never be recalled."

When the county commissioners refuse to levy the tax requisite to give the four months' schooling guaranteed by the Constitution, the injury and wrong done is irreparable, unless the State can step in through its courts and promptly enforce its constitutional guarantee.

(128) The statute does not contemplate that the estimate of the county board of education is conclusive as to the amount that the county commissioners shall levy, any more than that the estimate of the county commissioners is final. To hold the former might unduly burden the county. To accept the latter would destroy the constitutional guarantee of four months' schooling. But when it is alleged by the county board of education that the sum fixed by the county commissioners is inadequate, the State, through its courts, should hear the matter at chambers, as in all cases of *mandamus* for other than a money demand, and, upon examination of the records and other proofs offered, determine the question. It is a matter of arithmetic and evidence, and far less complicated than many questions the courts are called upon to decide. Only thus can the State maintain and enforce its educational system according to the Constitution.

NOTE—Immediately after filing this opinion and dissent, the Legislature (of 1909), then in session, passed an act giving the county boards of education the right to sue out a *mandamus* in such cases.

Cited: Jones v. North Wilkesboro, post, 653; *Howell v. Howell,* 151 N. C., 579; *Vineberg v. Day,* 152 N. C., 358; *Comrs. v. Bonner,* 153 N. C., 69; *Newton v. School Committee,* 158 N. C., 188; *School Comrs. v. Aldermen, ibid.,* 194; *Key v. Board of Education,* 170 N. C., 125; *Edwards v. Comrs., ibid.,* 451; *Johnston v. Board of Elections,* 172 N. C., 167; *Britt v. Board of Canvassers, ibid.,* 807; *Worley v. Comrs., ibid.,* 818.

WALKER & MYERS v. D. W. COOPER.

(Filed 17 February, 1909.)

1. Written Contracts—Parol Evidence—Contradiction.

Evidence of a contemporaneous oral agreement, that plaintiff agreed to take as much lumber a week as defendant could deliver, is inadmissible when contradicting the written contract between them, that defendant was to cut and deliver not less than 40,000 feet per week.

2. Contracts—Mortgages—Damages—Liens—Substitution.

Plaintiff, under agreement with defendant, giving a lien for advancements, and to enable him to fulfill his contract to cut and deliver certain lumber, took up a mortgage on defendant's mules, etc. Plaintiff claimed that defendant had not fulfilled his contract, and seized the mules, etc., under the mortgage and the agreement. The jury found that defendant had broken his contract, to plaintiff's damage in a certain sum: *Held*, the amount awarded by the verdict was a lien on the mules, etc.

3. Contracts, Breach of—Waiver.

Plaintiff's receiving for several weeks a less number of feet of lumber a week from defendant than he had contracted to cut and deliver under a continuous contract, if considered to be a waiver of plaintiff's rights as to the actual deliveries made, does not bar a recovery of damages incident to a future failure to deliver the stipulated quantity, or of those arising from an ultimate breach of contract involving a severance of the contract relation.

ACTION tried before *Cooke, J.*, and a jury, at November Term, (129) 1908, of BERTIE.

This action is to recover two mules and two logging wagons.

On issues submitted, the jury rendered the following verdict:

1. "Are the plaintiffs, Walker & Myers, the owners and entitled to the possession of the two mules described in the complaint and taken in claim and delivery?" Answer: "Yes."

2. "Was defendant in wrongful possession thereof when this action was brought?" Answer: "Yes."

3. "What is the value of said mule?" Answer: "One hundred dollars."

4. "Were the plaintiffs, Walker & Myers, the owners and entitled to the possession of the two log wagons described in the complaint?" Answer: "Yes."

5. "Was the defendant in the wrongful possession of said wagons when this action was brought?" Answer: "Yes."

6. "What is the value of said wagons?" Answer: "Sixty-six dollars."

7. "Did the plaintiffs, Walker & Myers, break their contract with defendant Cooper, as alleged in his answer?" Answer: "No."

8. "If so, what damage has defendant sustained?" Answer: ____

9. "What is the balance due plaintiffs, Walker & Myers, on their account against the defendant?" Answer: "One hundred and ninety-six dollars and three cents."

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

(130) *A. O. Gaylord for plaintiffs.*
Winston & Matthews for defendants.

HOKE, J. The Court has carefully considered the exceptions noted, and are of opinion that substantial justice has been awarded and that no reversible error appears in the record.

There was evidence tending to show that in January, 1907, plaintiffs and defendant entered into a contract by which defendant, in substance, agreed in writing to cut and deliver for plaintiffs, at their mill on Roanoke River, a large amount of lumber—over a million feet in quantity—not less than 40,000 feet per week, and sold and conveyed to plaintiffs the mules and wagons in question to secure performance of contract on the part of defendant; that plaintiffs were to supply all rafting gear, to make all necessary advances and to pay for said lumber the price of $4 per thousand feet; that plaintiffs, at defendant's request and by way of advancement, took up a mortgage on the mules in question, on which there was due at the time of transfer to plaintiffs the sum of $126.50, and had made all necessary advancements required and necessary to enable defendant to supply the timber to the amount stipulated; that defendant failed to supply the lumber to the amount stipulated and failed to comply with the stipulations of the contract, and plaintiffs were forced to close defendant out; that the amount due them at the time the contract relation was terminated was about $300, and the mules and wagons were seized under the mortgage and the terms of the contract referred to.

The defendant, admitting that he had not delivered the contract amount of 40,000 feet per week, contended chiefly that this failure did not justify the seizure of the mules and the termination of the contract relation:

1. Because at the time this written contract was entered into there was a parol agreement that if the defendant could not supply the 40,000 feet per week the plaintiffs would take what defendant could deliver, and evidence was offered by the defendant as to such parol agreement and excluded by the court.

2. That the failure on the part of the defendant was caused by plaintiff's own default in not making sufficient and proper advancements when required.

Defendant further contended that the contract gave to plaintiffs (131) no lien on the property seized, but the Court is of opinion that the amount recovered by the plaintiffs, by correct and fair interpretation, should be held and construed as damages for breach of contract on the part of defendant and, as such, secured by a lien on the property under the express terms of the agreement. The claim that the plaintiffs, by their own default, caused the breach of contract complained of, after full investigation, has been found against the defendant by the jury in response to the seventh issue, and the court made a correct ruling in excluding the parol evidence offered in contravention of the written agreement of the parties. *Walker v. Venters,* 148 N. C., 338. In that case the Court held as follows: "A writing can not be contradicted by a contemporaneous oral agreement, and plaintiff, having agreed in writing to deliver twenty bales of cotton annually for ten years in payment of land, could not show an oral agreement at the time that he could pay $4,000 in money to discharge the debt." And on this subject *Chief Justice Clark,* for the Court, said: "The plaintiff offered to prove an alleged parol agreement, made at the time the mortgage was executed, that in case of payment in full settlement at one time, or in event of foreclosure, the amount to be paid was to be $4,000 in money, at plaintiff's option. This evidence the court excluded, because it contradicted the written agreement. This is the only exception requiring consideration. It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well-established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides, and is not to be set aside upon the slippery memory of man."

Nor is there validity in the objection further urged by defendant that plaintiffs had waived their right to demand delivery of the 40,000 feet per week by accepting for some time delivery of 5,000 feet or less. If it should be conceded that such an acceptance would bar an award of damages for the weeks which the lesser amount had been received, there is no testimony, fact or circumstance relevant to the inquiry which tends to support the position that such acceptance was intended to change the structural nature of the contract or to be in (132) relinquishment of plaintiffs' right to recover damages incident to a future failure to deliver the stipulated quantity or the damages arising from an ultimate breach of contract involving a severance of the contract relation.

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

No error.

Cited: Freeman v. Bell, post., 148; *Woodson v. Beck,* 151 N. C., 146; *Machine Co. v. McClamrock,* 152 N. C., 407, 408; *Hilliard v. Newberry,* 153 N. C., 109; *Pierce v. Cobb,* 161 N. C., 304; *Wilson v. Scarboro,* 163 N. C., 385; *Guano Co. v. Live Stock Co.,* 168 N. C., 447.

J. O. MATTHEWS, ADMINISTRATOR, v. SALLIE PETERSON ET AL.

(Filed 17 February, 1909.)

1. **Limitations of Actions—Shortened by Statute—Reasonable Time.**

When a limitation of time for bringing an action is shortened by statute, there must be a reasonable time given, notwithstanding the statute, within which to bring the action.

2. **Same—Executors and Administrators.**

An administrator who seeks to subject land to the payment of a debt barred by the statute of limitations does not move for that purpose within a reasonable time after the statute has been passed (Revisal, sec. 367) shortening the limitation when he has waited for more than a year after the passage of the statute and for more than eight months after the prospective date fixed therein for it to become operative. (The provisions of Revisal, sec. 367, that letters of administration be granted within ten years after death of deceased commended, discussed and applied to the facts of this case by CLARK, C. J.)

ACTION tried before *W. R. Allen, J.,* and a jury, at December (Special) Term, 1907, of SAMPSON.

Plaintiff appealed.

George E. Butler and J. D. Kerr for plaintiff.
Stevens, Beasley & Weeks and F. R. Cooper for defendants.

CLARK, C. J. Petition by administrator to sell land to make assets to pay debts. By consent, the facts were found by the judge, and are as follows: The plaintiff's intestate, Haywood J. Peterson, died 12 July,
1895. The plaintiff took out letters of administration 25 Sep-
(133) tember, 1905. This proceeding was begun 23 March, 1906,
to make assets to pay five judgments taken before a justice of the peace 13 November, 1888, and docketed in the Superior Court the same day. These judgments were presented to the administrator a few weeks after his qualification, and were admitted by him to be valid claims against the estate. No personal property of the estate came into the hands of the administrator.

Upon the above findings of fact the court sustained the defendants' plea of the statute of limitations.

The facts in this case are almost identical with those in *Matthews v. Peterson, post,* 134, with one essential difference. Revisal, sec. 367, which suspends the running of the statute upon the death of a debtor till one year after the issuing of letters to his personal representative (*Winslow v. Benton,* 130 N. C., 58), contains this clause, inserted by the Revisal commissioners: "*Provided* such letters are issued within ten years after the death of such person." The Revisal was enacted 6 March, 1905, but to go into effect 1 August, 1905. The plaintiff took out his letters thereafter on 23 September, 1905, which was more than ten years after the death of the judgment debtor, the plaintiff's intestate.

It is true that when a statute shortens a limitation there must be "reasonable time," notwithstanding the statute, in which to bring the action. *Strickland v. Draughan,* 91 N. C., 103; *Nichols v. R. R.,* 120 N. C., 498; *Culbreth v. Downing,* 121 N. C., 206; *Carson v. R. R.,* 128 N. C., 98; *Terry v. Anderson,* 95 U. S., 628; Cooley Const. Lim. (8 Ed.), 450. Here the seven years in which the judgment was *causa litis* (*Daniels v. Laughlin,* 87 N. C., 433) expired 13 November, 1895, and the lien expired 13 November, 1898, but for The Code, sec. 164, suspending the running of the statute as to the former (not as to the lien). The Revisal, sec. 367, restricting the suspension of the statute to cases where the letters were issued in ten years after death of debtor, was enacted 6 March, 1905. The General Assembly thought till 1 August, 1905, was sufficient time for every one to take notice of any changes made by the statute, but in addition, though the plaintiff qualified 23 September, 1905, he did not begin this action till 23 March, 1906, (134) over a year after the passage of the statute and nearly eight months after the prospective date fixed by the Legislature for the statute to take effect. The claim is not meritorious. More than seventeen years had elapsed after judgments taken, with no effort to enforce collection, and more than ten years after they had ceased to be *causa litis. Daniels v. Laughlin,* 87 N. C., 433. As to such stale claims, evidence of payment may well have been lost. The Revisal, sec. 367, was a wise provision. The plaintiff, nevertheless, waited more than a year after its enactment and nearly eight months after the future day set for its going into effect before beginning this proceeding. Not having moved "in a reasonable time" after the passage of the act, he is justly barred.

The judgment sustaining the plea of the statute of limitation is Affirmed.

Cited: S. c., 152 N. C., 169; *Fisher v. Ballard,* 164 N. C., 329.

J. O. MATTHEWS, ADMINISTRATOR, v. HANNAH C. PETERSON.

(Filed 17 February, 1909.)

1. **Executors and Administrators—Limitations of Actions—Revisal, Sec. 367, When Operative.**

An action which was not barred in the debtor's lifetime can be maintained against his personal representative to recover a debt, when the cause of action survives him, after the statute has run, if brought within one year after the issuance of the letters of administration; and when the letters of administration have been issued before the operative effect of Revisal, sec. 367, the provision that such should have been issued within ten years from the death of the intestate is inapplicable.

2. **Executors and Administrators—Limitations of Actions, by Whom Pleaded —Heirs at Law—Lands.**

The heirs at law can successfully plead the statute of limitations (Revisal, sec. 367) against the administrator seeking to subject their lands to the payment of deceased's debts as fully as he can against a creditor.

3. **Executors and Administrators—Judgment Liens—Statute of Limitations.**

There is no statutory provision which prevents the expiration of a judgment lien in case of death and administration similar to that of Revisal, sec. 367.

4. **Same—Deeds and Conveyances—Intestate's Deed—Fraud—Procedure.**

When intestate has made a *bona fide* conveyance of land, subject to lien by judgment, his administrator can not sell it to make assets to pay the judgment after the expiration of the judgment lien. Questions of fraud in intestate's deed left undetermined in this case can be passed upon on a new trial awarded. Revisal, sec. 87 (5), applies to funds in the administrator's hands.

(135) ACTION tried before *W. R. Allen, J.*, and a jury, at December (Special) Term, 1907, of SAMPSON.

Plaintiff appealed.

George E. Butler and J. D. Kerr for plaintiff.
Stevens, Beasley & Weeks and F. R. Cooper for defendant.

CLARK, C. J. Petition by the administrator to sell land to make assets to pay debts. By consent, the judge found the facts as follows, reserving the question of fraud in the conveyance of his realty by the intestate, alleged in the petition, for future adjudication:

The plaintiff's intestate died 10 July, 1894. Letters of administration were issued to the plaintiff 27 March, 1905. This proceeding was begun 23 March, 1906, to sell land to make assets to pay four judgments taken before a justice of the peace 13 November, 1888, and docketed in the

Superior Court the same day. These judgments were presented to the administrator a few weeks after his qualification and were admitted by him to be valid against the estate. No personalty came into the hands of the administrator.

Upon the above findings of fact the court sustained the defendant's plea of the statute of limitations.

The general rule is unquestionably that when the "statute of limitations once begins to run nothing stops it." But the statute (Revisal, sec. 367) has made an exception where a party dies. It provides that if the debt is not barred at the time of the debtor's death, action can be brought against his personal representative (if the cause (136) of action survive), though the period of limitation has then elapsed, if within one year after issuing of letters of administration. *Winslow v. Benton,* 130 N. C., 58. This is not an action by a creditor, and the heir at law can plead the statute as against the administrator seeking to subject realty as fully as he could have pleaded it against the creditor. *Smith v. Brown,* 99 N. C., 377. The administrator, by virtue of the above section (367), could not avail himself of the statute as against the debt evidenced by the judgment. But there is no similar provision preventing the expiration of the lien of the judgment. That lien expired at the end of ten years, Revisal, secs. 574, 1479. The plaintiff, therefore, can have no land sold for assets which was *bona fide* conveyed by his intestate. The question of fraud in the conveyance was left undetermined, and can be determined when the case goes back. Revisal, sec. 87 (5), applies only where funds are in the hands of the personal representative.

Revisal, sec. 367, that an action can be brought, notwithstanding the expiration of the period of limitation (when the debt was not barred at death of debtor and the cause of action survives), if brought within one year after issuance of letters to the personal representative of the debtor, contains this new provision: *"Provided* such letters are issued within ten years after the death of such person." This is a wise restriction to prevent the inconvenience and often the injustice of collecting stale claims, but it was first enacted in the Revisal, and therefore did not go into effect until 1 August, 1905 (Revisal, sec. 5463). The plaintiff qualified 27 March, 1905, and this case is excepted from the operation of the proviso by the Revisal, sec. 5454.

The judgment sustaining the plea of the statute of limitations is Reversed.

Cited: *S. c.,* 152 N. C., 169.

(137)

LIZZIE IVES ET AL. v. CHARLES GRING.

(Filed 17 February, 1909.)

1. **Negligence—Evidence—Nonsuit—Marine Railway.**
   In an action for damages to plaintiff's marine railway, lawfully placed, by defendant's tugboat running into it at night, an instruction that plaintiff could not recover is properly refused when the evidence tended to show that the captain of the tugboat was fully aware of the location of the railway, could have seen it by the moonlight and lights in the harbor, and had deviated from a channel known to him and which would have afforded ample room for his boat to pass without injury.

2. **Same—Nuisance.**
   The captain of a tugboat is not authorized to run into a marine railway unnecessarily and negligently, though the railway was illegally placed and constructed and was a public nuisance.

3. **Burden of Proof—Contributory Negligence—Proximate Cause—Instructions—Questions for Jury.**
   The burden of proof is on defendant to show contributory negligence, and when there is evidence tending to show that negligence on defendant's part caused the injury the court can not fix, as a matter of law, contributory negligence or proximate cause upon plaintiff.

4. **Negligence—Causal Connection—Instructions.**
   A prayer for instruction, based upon plaintiff's negligent act, which did not cause the injury complained of, is properly refused.

5. **Negligence—Light—Marine Railway—Proximate Cause—Contributory Negligence—Instructions.**
   In an action for damages to plaintiff's marine railway, caused by defendant's tugboat running into it at night, a charge was correct, when there was evidence to support it, that if plaintiff did not have a light on its marine railway, and such failure was the proximate cause of the injury, to find the plaintiff guilty of contributory negligence.

6. **Negligence—Marine Railway—Construction—Proximate Cause—Harbor Line—Questions for Jury.**
   In an action for damages to plaintiff's marine railway, caused by defendant's tugboat running into it at night, the question of proximate cause arising from the extension of the railway beyond the harbor line was one for the jury.

ACTION tried before *Webb, J.*, and a jury, at September Term, 1908, of PASQUOTANK.

Defendant appealed.

(138) *Aydlett & Ehringhaus for plaintiff.*
J. Heywood Sawyer for defendant.

CLARK, C. J. This is an action for damages to the marine railway of plaintiffs by the tugboat of the defendant. The evidence is that the tugboat, which was bound down the river, instead of following the

usual course, ran diagonally towards the shore, and, striking the marine railway of plaintiffs, damaged it. The captain of the tugboat testified that he knew the locality well, having passed it more than two hundred times. After the injury he offered to pay damages, but the parties could not agree upon the amount. It was a bright moonlight night, and there was also a bonfire on shore and a line of electric lights, which lighted up the harbor. There were 540 feet between the end of the marine railway and the buoy on the opposite side, in which space the tugboat should have passed.

The court properly refused to charge that, upon the evidence, the plaintiffs were not entitled to recover, and to answer the first issue "No." Whether there was a harbor line or not, the marine railway was a necessity for the repair of vessels. It was not shown to be located there illegally, or that it was a public nuisance; and if it had been, the tugboat was not authorized to run into it unnecessarily and negligently, as the evidence tended to show. The marine railway had been at that place eighteen years, and the captain of the tugboat had been by it, he says, more than two hundred times.

The court also properly refused to charge that as a matter of law the plaintiff was guilty of contributory negligence. The burden was upon the defendant to set this up and "prove it on the trial." Revisal, sec. 483. There was evidence tending strongly to show that the cause of the injury was the negligence of the defendant. The court properly refused the prayer to instruct the jury that the proximate cause of the injury was the contributory negligence of the plaintiff.

If it were negligence for the plaintiff to leave the cradle under water on the railway at night, this did not cause the injury. Clearly the proximate cause was the negligence of the tugboat in not proceeding on its course in a channel 540 feet wide, but going several hundred feet out of its way and driving in shore against the marine railway.

The court properly charged that if the plaintiff did not have (139) a light on its marine railway, and such failure was the proximate cause, to find the plaintiff guilty of contributory negligence. The court also properly refused to charge that if the marine railway extended beyond the harbor line this was the proximate cause, but left the inquiry as to the proximate cause to the jury.

Upon the evidence the jury could hardly have found otherwise than that the proximate cause of the injury was the negligent handling of the tugboat and its going two hundred feet or more out of its course and outside of the regular channel.

No error.

Writ of error dismissed, 222 U. S., 365.

THOMAS W. BABB v. GAY MANUFACTURING COMPANY.

(Filed 17 February, 1909.)

1. State's Lands—Enterer—Prior Grant—Evidence—Vacant and Unappropriated.

When plaintiff, enterer, introduces a valid grant, issued prior to his, under which the defendant claims, it shows that the lands had been previously granted and were not vacant and unappropriated at the time of the issuance of his grant, and it is unnecessary for the defendant, claimant, to show a connected title therewith.

2. State's Lands—Grants—Description Sufficient.

When a grant of land gives the corners and courses and distances of the land, and the first corner can thereby be located with reference to the second, and parol evidence is competent to locate the two, it is not void upon its face for uncertainty of description.

PROCEEDING under the entry laws, heard before *Ward, J.*, at Fall Term, 1908, of PERQUIMANS.

From a judgment sustaining the protest filed by defendant the plaintiff (the enterer) appealed.

W. M. Bond and P. W. McMullan for plaintiff.
Shepherd & Shepherd and Pruden & Pruden for defendant.

(140) BROWN, J. It is unnecessary to determine the validity of the entry made by plaintiff upon the lands in controversy. It is quite indefinite and uncertain, and may possibly be void for that reason. *Fisher v. Owens,* 144 N. C., 649; *Call v. Robinett,* 147 N. C., 615. But we sustain the judgment of the Superior Court upon the ground that plaintiff enterer has failed to show that the lands entered are vacant and unappropriated. *Walker v. Carpenter,* 144 N. C., 674.

For the purpose of showing that the lands he has entered are unappropriated the plaintiff introduced a grant to James P. Winslow, dated 29 December, 1891, and a deed from W. H. Lamb and J. H. Lane to defendant, dated 3 December, 1895, both containing the following description: "Being the Thomas E. Winslow entry, beginning at Rufus White's corner and running S. 70 E. 161 chains to Stallings' corner; thence N. 20 E. 27 chains to Hollowell's corner; thence N. 59 W. 152 chains to David White's corner; thence S. 32½ W. 52 chains to the first station; containing 650 acres, more or less." The plaintiff contends that the grant and deed are void, for the reason that the land attempted to be described therein can not be located. The defendant introduced a deed from J. P. Winslow to Lamb and Lane for the same land.

It is not necessary that the defendant, the claimant, should show an assignment of the Thomas E. Winslow entry, or to show that the words "Thomas E. Winslow," recited in the grant, were intended for James P. Winslow.

When plaintiff put in evidence a valid grant from the State, issued in 1891, long prior to his entry, he showed that the lands had been previously granted and were not vacant and unappropriated.

We see no reason why the grant can not be located by parol evidence. It is certainly not void on its face. The Rufus White corner called for in the grant may be located by reference to the Stallings corner and the course and distance between the two, and it is competent to introduce parol evidence to locate those corners. *Shepherd v. Simpson,* 12 N. C., 237; *Perry v. Scott,* 109 N. C., 374.

Affirmed.

(141)

D. L. PERRY ET AL. v. JOSHUA SWANNER AND WIFE.

(Filed 17 February, 1909.)

1. Contracts—Material Men—Suit by Contractor—Trusts and Trustees—Parties—Judgment.

A contractor to build a house can not maintain an action against the owner to the use of those who furnished material for its construction without alleging and proving an express trust.

2. Contracts—Material Men—Suit by Contractor—Authority to Collect—Parties.

The authority given a contractor to collect debts due the material men does not constitute him a trustee of an express trust, within the meaning of the statute, so as to authorize him to maintain a suit in his own name in their behalf as *cestuis que trust.*

3. Contracts—Material Men—Contractor—Notice to Owner—Parties—Procedure.

When the contractor furnishes the owner with statements of the amounts due the material men, according to Revisal, secs. 2021, 2022, 2023, a direct obligation of the owner to the material men may be created, upon which the latter may sue in their own names.

ACTION tried before *Guion, J.,* and a jury, at October Term, 1908, of BEAUFORT.

Plaintiff made a contract with the defendants to build two houses for them. In the course of construction of the houses, and before completion, the parties had a misunderstanding and plaintiff stopped work. He sued the defendants before a justice of the peace for damages for

breach of contract, which was appealed, and also the defendants in the Superior Court for balance of contract price, and the two actions were consolidated, plaintiff recovering $82.10. The plaintiff then brings this suit to recover the amounts which he owed to material men for material which he claims went into the construction of the houses.

There were two alleged causes of action set out in the complaint. As to the second cause of action, the plaintiff voluntarily submitted to nonsuit. As to the first alleged cause of action, upon the close of plaintiff's testimony the court intimated that the action should be instituted by each claimant for the amount of his claim, as provided for under
(142) sections 2021, 2022, 2023 of the Revisal, and offered to allow counsel to make claimants parties plaintiff if they so desired. Counsel, being of opinion to the contrary, submitted to a nonsuit and appealed to the Supreme Court.

Small, MacLean & McMullan for plaintiff.
Ward & Grimes for defendants.

BROWN, J. It is contended that a defect in parties can be taken advantage of only by demurrer, and that the objection comes too late at the close of plaintiff's evidence.

It is not a question of parties, as we understand the matter, that is raised by the motion to nonsuit, but a question as to whether or not the plaintiff has made out a cause of action upon which he personally can recover. There is only one plaintiff to this action, and the fact that he sues to the use of a number of others who furnished material to defendants for the construction of the house does not necessarily make them parties, so as to be bound by a final judgment.

The plaintiff does not allege that he is trustee of an express trust, and had he alleged it he does not offer any proof to sustain it. Clark's Code, sec. 179.

Mere authority to collect the debts due the material men would not constitute the plaintiff a trustee of an express trust, within the meaning of the statute, so as to authorize him to maintain a suit in his own name on behalf of his *cestuis que trust. Abrams v. Cureton,* 74 N. C., 523; *Battle v. Davis,* 66 N. C., 252. The plaintiff testified that he furnished to defendants written statements of the sums due to the material men, in accordance with the statute (Revisal, secs. 2021, 2022, 2023). When that statute is complied with, a direct obligation upon the part of the owner to the material man may be created, upon which the latter may sue in his own name. The judgment of nonsuit is

Affirmed.

Cited: Martin v. Mark, 158 N. C., 443; *Foundry Co. v. Aluminum Co.,* 172 N. C., 706.

(143)

E. V. PERRY, ADMINISTRATOR, v. THE SECURITY LIFE AND ANNUITY COMPANY.

(Filed 17 February, 1909.)

1. Insurance—Policy—Conditional Delivery—Payment of Premiums.

A contract of life insurance delivered upon condition that it would be effective only if the advance premium should have been paid in the lifetime and good health of the insured is not binding when these conditions have not been complied with by him.

2. Same—Prima Facie Case—Rebuttal.

While the production of a policy of life insurance on the trial is *prima facie* evidence of its validity as a binding contract, the presumption may be rebutted by proof that it was delivered upon condition that the advance premium must be paid in the lifetime and good health of the insured, which was not done.

3. Same.

When the insured has received possession of a life insurance policy under agreement that it was to be effective, at his option, only upon payment of the advance premium in his lifetime and good health, his administrator may not recover thereon when he did not notify the company of his election to take the policy and failed to perform the condition upon which the contract was to be binding.

ACTION heard by *Ward J.*, and a jury, at Fall Term, 1908, of PERQUIMANS.

Plaintiff appealed.

Charles Whedbee and P. W. McMullan for plaintiff.
Aydlett & Ehringhaus and W. M. Bond for defendant.

WALKER, J. This action was brought to recover the amount ($1,000) of a policy of insurance alleged to have been issued by the defendant to the intestate of the plaintiff on 12 November, 1906. The defendant denied that the policy was ever delivered to the intestate, except upon a condition, the payment of the premium, which he failed to perform. It also contended that the intestate refused to accept the policy until he could ascertain whether he would be able to pay the first premium. He was unable to pay the premium himself, and requested his daughters to pay it. They asked J. L. Billups to pay the premium, and he promised to do so, but he did not notify the company of the fact (144) nor did he tender the premium until H. T. Billups, the intestate, had become quite ill and three days before his death. He then offered to pay the premium to the defendant's district agent, and not to the agent who had delivered the policy and had sole charge of the matter.

The application for the insurance, which was signed by the intestate and made a part of the contract, contains the following clause: "The company shall incur no liability under this application until it has been received, approved and the policy issued thereon by the company at the home office and the premium has actually been paid to and accepted by the company, or its duly authorized agent, during my lifetime and good health." The policy provides as follows: "The insurance hereunder is granted in consideration of the application for this policy, which is a part of this contract, and of the premium of $72.68, to be paid on delivery hereof."

The court, at the close of the evidence, intimated that the jury would be instructed to return a verdict for the defendant if they found the facts to be as stated by the witnesses. The plaintiff thereupon submitted to a nonsuit and appealed. The parties to a proposed contract of insurance may make such agreement as to the payment of the first premium as they may desire, and such agreement, whether express or implied, must be performed or waived. In the absence of any agreement, it is generally understood that prepayment of the first premium is not necessary to the validity of an oral preliminary contract, but that payment must be made upon delivery of the policy. When, however, it is expressly agreed that the contract shall not become binding until the first premium has been paid, no contract, oral or otherwise, can be considered as complete unless such prepayment has been made or waived. Vance on Insurance, p. 175, sec. 67; 2 Bacon Ben. Soc. and Life Ins. (3 Ed.), sec. 353. Such a stipulation is not against public policy, nor does the law for any other reason prohibit it. The difficulty is found, not so much in the statement of the legal principle which governs in such cases as in the application of it to the facts of each particular case. If there has been an actual delivery of the policy,

(145) nothing else appearing, the production of it at the trial presents a *prima facie* case for the plaintiff. *Kendrick v. Insurance Co.*, 124 N. C., 315; *Grier v. Insurance Co.*, 132 N. C., 542; *Rayburn v. Casualty Co.*, 138 N. C., 379; *Waters v. Annuity Co.*, 144 N. C., 663. This is so, for the reason that a presumption arises that the policy was delivered unconditionally and with the intent that it should take effect as a completed contract of insurance between the parties, there being nothing to overcome this natural presumption. It is competent, though, for the parties to agree upon a conditional delivery, and when such a delivery is shown, and the condition has not been performed, there is, of course, no contract. The testimony in this case, if viewed in the most favorable light for the plaintiff, clearly shows that the policy was actually delivered with the understanding and agreement that it should not take effect until the advance premium had been paid during the

lifetime and good health of the intestate. Indeed, it was not accepted by him for the purpose of taking effect, and he was not bound to pay the premium. If he concluded afterwards to accept it the company should have been notified that he had elected to do so, and this should have been done and the premium paid or tendered while he was in good health, for such was the agreement of the parties. The case is not like *Rayburn v. Casualty Co.* and *Waters v. Annuity Co.*, except in the particulars already stated. In each of those cases the delivery was unconditional. It would not be just or right, and certainly it would not be sanctioned by the law, if we should hold the defendant to be liable upon this policy. It is not necessary that we should recite the evidence, as it all bears one way and conclusively establishes the contention of the defendant, that the delivery of the policy was upon a condition precedent, which was not performed. The judgment of the Superior Court was therefore correct.

No error.

Cited: *Annuity Co. v. Forrest,* 152 N. C., 625; *Pender v. Ins. Co.,* 163 N. C., 102; *Murphy v. Ins. Co.,* 167 N. C., 336.

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(146)

BERRY FREEMAN v. H. T. BELL.

(Filed 17 February, 1909.)

1. **Contract, Breach of—Abandonment—Damages—Questions for Jury.**

In this case, whether the contract to convey land sued on was abandoned by the subsequent agreement of the grantee to pay rent, or whether the subsequent agreement was to pay an annual sum as interest were questions of fact to be determined by the jury.

2. **Written Contracts—Subsequent Agreement—Parol Evidence.**

An oral agreement made subsequent to the execution of a written contract is competent to prove a further extension of time of payment to that therein mentioned.

3. **Mortgagor and Mortgagee—Vendee in Possession—Sale to Third Person—Damages.**

When a vendee remains in possession of lands under a written contract of sale, and the vendor enters into an agreement to accept interest on the purchase price, the relation of mortgagor and mortgagee is established, and the latter may not sell the *locus in quo* in a summary manner to an innocent third person without incurring liability for damages, although he may have disabled himself from specifically performing his contract.

4. Measure of Damages—Verdict—Discretion of Court—Appeal and Error.

This Court can not review a refusal of the trial judge to set aside the verdict or issue of damages as excessive or against the weight of the evidence unless there is an abuse of discretion.

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

This is an action to recover damages of the defendant for the wrongful breach of a contract to convey land, which contract is as follows:

"NORTH CAROLINA—Halifax County.

"This agreement, made and entered into this day between H. T. Bell and Berry Freeman, as follows: The said H. T. Bell has sold to Berry Freeman one tract of land in Rose Heath Township, Halifax County, N. C., and known as the Walston land, and adjoining the land of Fred Staton, the Lavy Cherry place and N. B. Josey, containing one hundred and fifty acres, more or less, on the following terms,
(147) to wit: The said H. T. Bell agrees to sell said land to said Berry Freeman for $800, the first payment of $100 to be made on the first day of November, 1903, with interest on the whole amount due for said land; otherwise to be void. Then the said Bell agrees to make deed to said Freeman and take mortgage on the land for other payments, and the crops on the land made in 1903 shall be responsible for the payment of the $100 and interest due on the first day of November, 1902.

"Witness our hands and seals, this 1st day of October, 1902.

H. T. BELL. [Seal.]

BERRY (his X mark) FREEMAN. [Seal.]

Witness: J. A. PERRY."

The following issues were submitted to the jury:

1. "Did the plaintiff abandon his rights under the contract set out in the answer?" Answer: "No."

2. "Did the defendant fail to perform said contract on his part?" Answer: "Yes."

3. "Did defendant agree to continue said contract in force up to 1906, when defendant sold the same, upon payment of $50 annually?" Answer: "Yes."

4. "What damage, if any, is plaintiff entitled to recover?" Answer: "Six hundred and fifty dollars."

From the judgment rendered defendant appealed.

E. L. Travis and A. P. Kitchin for plaintiff.

Raymond Dunn, Murray Allen and John L. Bridgers for defendant.

BROWN, J. There can be no question that the written contract is a valid objection, binding the defendant to sell and convey the land upon payment of the purchase money. Whether it was an existing enforcible contract, which a court would give effect to by compelling a specific performance, or for the breach of which it would award damages in this action, depends entirely upon the point of view from which we look at it.

From the defendant's standpoint, the contract was entirely abandoned by the plaintiff long before this action, and he had become a voluntary tenant, paying rent, and was so at the time the defendant sold the land to Sam Dunn, on 19 October, 1906. According to the (148) plaintiff's version of the facts, he was on the land as a purchaser under this contract, and remained there in that capacity for three consecutive years and paid $50 per year as interest on the purchase money, and the defendant received it as interest and agreed to extend the time for payment of the principal. The jury have established fully the plaintiff's version of the facts, and have found that when defendant sold the land to Dunn the plaintiff was in actual possession under the contract in evidence, as a purchaser, and not as a tenant, and that he had paid the annual interest of $50 for that very year, as well as for the two previous years. While no issue was submitted as to the tender of the purchase money, there is evidence that about 1 November, 1906, while plaintiff was in possession, he offered to pay the $800 purchase money to defendant, who refused it, because he had sold the land to Dunn.

We think the motion to nonsuit was properly denied, and for the same reasons we are of opinion that the defendant's four prayers for instruction were properly refused, as they were drawn upon the theory that there is no evidence upon which the plaintiff can recover.

The other six exceptions are taken to the introduction of evidence tending to prove an extension of the time of payment by the defendant. It is contended that such parol evidence tends to contradict the written instrument. It is well settled that the rule that parol evidence will not be admitted to contradict or modify a written contract does not apply where the modification takes place after the execution of the contract. *Adams v. Battle,* 125 N. C., 153; *Harris v. Murphy,* 119 N. C., 34.

The court will exclude evidence of an agreement contemporaneous with the execution of the written contract tending to contradict it as to time or manner of payment. *Walker v. Venters,* 148 N. C., 338; *Walker v. Cooper, ante,* 128. But we are not aware that any court has ever held that after the written contract has been executed it is incompetent to prove by parol evidence another and subsequent agreement extending time of payment. We find nothing in *Hall v. Fisher,* 126 N. C., 205, which supports the defendant's exceptions.

But it is really immaterial in this case whether there was a (149) definite and binding agreement of extension of time of payment or not. If the plaintiff remained in possession of the land as a purchaser under the written contract, and the defendant accepted the interest on the purchase money annually, including the year 1906, then at the time the defendant sold to Dunn, on 19 October, 1906, the relation of mortgagor and mortgagee existed between the defendant and the plaintiff, and the latter could not be foreclosed of his rights in so summary a manner without the defendant incurring liability for the damage sustained.

It is well settled that, so far as the questions involved in this action are concerned, a verdict remaining in possession under a contract of sale stands upon the same footing in his relation to the vendor as a mortgagor in possession. *Jones v. Boyd,* 80 N. C., 258; *Killebrew v. Hines,* 104 N. C., 188.

It is immaterial that the contract was unregistered. It was, nevertheless, valid as between the parties to it; and although the defendant, by his conveyance to Dunn, has disabled himself from specifically performing the contract, under the findings of the jury he is liable for damages for its breach.

It may be, as contended, that the damages awarded are excessive, but we can not review the judge of the Superior Court upon a matter within his sound discretion, unless it appears that there has been a gross abuse of such discretion, and that is not the case here.

We agree with counsel for plaintiff that "the defendant lost his case on the facts and not upon the law, and that this Court is powerless to help him."

No error.

Cited: Bouldin v. Daniel, 151 N. C., 284; *Harvey v. R. R.,* 153 N. C., 575; *McKinney v. Matthews,* 166 N. C., 580; *Lutz v. Hoyle,* 167 N. C., 634; *Brown v. Mitchell,* 168 N. C., 313.

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(150)

HARDIE-TYNES MANUFACTURING COMPANY v. EASTON COTTON OIL COMPANY.

(Filed 17 February, 1909.)

Measure of Damages—Breach of Warranty—Engines—Full Indemnity.

The measure of damages on a breach of warranty in a contract for the sale of an engine that it would do certain work is such, generally speaking,

as would award full indemnity; and, without regard to the contract price, the party may recover the full difference between the value of the engine received and what it would reasonably have cost him to purchase such an engine as that described in the contract and warranty.

APPEAL by plaintiff from *Ward, J.*, at Fall Term, 1908, of PERQUIMANS.

This action was brought to recover damages for a breach of contract in the sale of an engine by the plaintiff to the defendant. It appears that the plaintiff agreed to sell and deliver to the defendant a Corliss engine of a certain description and weight, and that the engine, which was delivered under the contract, was not of that description or weight and was defective in other respects. The contract contains the following clause:

Warranty.—"It is understood and agreed that the foregoing specifications are intended to cover one of our standard heavy-duty girder-frame Corliss engines, as above specified, to be of the dimensions named, complete in all its parts, made throughout of first-class material and workmanship; to perform in a proper manner when properly handled, and to give the best results obtainable from an engine of this type under similar conditions."

The issues, with the answers thereto, were as follows:

1. "In what sum, if any, is the defendant indebted to the plaintiff?" Answer: "Two hundred and fifty-seven dollars and two cents, and interest from 31 December, 1906."

2. "Did the plaintiff company warrant the engine in question, as alleged in the answer?" Answer: "Yes."

3. "Did the said engine conform to and satisfy the terms of said warranty, as alleged?" Answer: "No."

4. "What are defendant's damages?" Answer: "Three hun- (151) dred and twenty-five dollars."

Plaintiff moved for a new trial; the motion was overruled and judgment entered upon the verdict, whereupon plaintiff appealed.

W. A. Worth for plaintiff.
P. W. McMullan for defendant.

WALKER, J., after stating the case: The principal question in this case, and, indeed, the only one necessary to be considered by us, relates to that part of the charge of the court upon the measure of damages to which the plaintiff excepted, namely, "that the measure of defendant's damages is the difference, if the jury should find there was a difference, between the value of the engine received and what it would have cost the defendant to purchase such an engine as that described in

the contract and warranty in the case." After giving this charge, the court fully instructed the jury as to the facts and circumstances they might consider in determining the value of the engine delivered and the cost of such an engine as is described in the contract, and to this part of the charge there was no exception. The question raised by the plaintiff's exception does not require much, if any, discussion, as the rule for measuring the damages in cases like this one has been settled by the decisions of this Court. In *Parker v. Fenwick,* 138 N. C., 209, following the rule as laid down in *Manufacturing Co. v. Gray,* 126 N. C., 108, the Court says: "The true measure of damages is the difference between the value of the property received and what it would have cost the defendant to purchase such machinery as that described in the contract and warranty." In deciding these cases we adopted the rule as clearly stated in *Marsh v. McPherson,* 105 U. S., 709, to this effect: "The price fixed in the contract at which the plaintiff agreed to take the machines, whether the transaction is viewed as an exchange of property at assumed valuations or as a purchase and sale for money, is not conclusive between the parties upon the question of damages recoverable for a breach. If there had been a total failure on the part of the defendant to comply with the contract, and it had refused to deliver any of the machines specified, the damages to the plain-
(152) tiff would have been the amount of money with which at the time of the breach he could have supplied himself by purchase from others, with the same number of similar articles of equal value. If the market price had in the meantime advanced, the recovery would be for more, or if it had fallen it would be for less than the contract price; the rule to measure the loss in such cases being the difference between the contract and the market price. The same rule applies where the breach is partial and not total; and to make good the warranty as to condition, the cost of repairs and, as to freedom from liens, the cost of removing them, if that be the difference in actual value, between the article as warranted and the article as delivered, is all that can be properly recovered as damages, unless in exceptional cases of special damage. Whatever that difference in the actual circumstances of the case is shown to be is the true rule and measure of damages. Where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the vendee's damage is what it would reasonably cost to supply the deficiency, without regard to the contract price." *Manufacturing Co. v. Gray,* 129 N. C., 438; *Benjamin v. Hilliard,* 23 How., 167. The aim of the law, generally speaking, is to put the injured party, as nearly as practicable, in the position he would have occupied if the contract had been kept, so as to award to him full indemnity for the breach. *Machine Co. v. Tobacco Co.,* 141 N. C., 284.

What the amount shall be must, of course, be determined by the jury, after careful regard to the nature of the case and to its special facts and circumstances. The reasonable cost of repairs may in some cases indemnify the party entitled to compensation, but the jury are not necessarily confined to this narrow limit, but, as the court stated in this case, may consider that as an element, in connection with any other facts which will enable them to ascertain the true amount.

We have carefully examined the case, and find no error in the rulings of the court to which the other exceptions were taken.

No error.

Cited: *Guano Co. v. Live-Stock Co.*, 168 N. C., 450.

(153)

ELIZA B. MOORE v. MARYLAND CASUALTY COMPANY.

(Filed 17 February, 1909.)

Insurance—Indemnity—Receipt—Future Indemnity.

When insured, in a policy securing a fixed amount of indemnity on account of sickness, files proof of claim, as provided by the terms of the policy, to a fixed date and executes a receipt for such amount, the language will be restricted to the amount due, and not extended to cover a claim for indemnity for future sickness. The Court concurs with the construction put upon the receipt by the trial judge.

ACTION heard before *Guion, J.*, at December Term, 1908, of BEAUFORT.

On 12 June, 1907, defendant issued to plaintiff its policy, insuring his life in the sum of $5,000 "and for a weekly indemnity of $25 for the term of twelve months from 12 June, 1907." For a total disability the defendant agreed to pay the said sum, and for a partial disability one-half thereof. The policy provided that if the disability continued less than thirteen weeks the amount should be payable at the termination of the disability; and if for longer duration, at the end of thirteen weeks from the date of the accident or illness. The plaintiff, on 23 October, 1907, filed with the company a claim for indemnity for total disability of eight weeks and for partial disability of seven weeks, amounting to $275. The claim was not controverted, and on 31 October, 1907, defendant sent to plaintiff its draft for the full amount. Attached to the draft was a paper containing the following language:

"*To Maryland Casualty Company, Baltimore, Md.*

"Claim No. 619 J. D. is Policy No. DX 44178.

"The above draft must be endorsed on back, and the attached voucher signed and sealed by the payee.

"*Voucher No.* 100 59.—In consideration of the payment of the above draft for $275, I hereby discharge and release the Maryland Casualty Company from all claim for indemnity under Policy No. DX 44178 on account of illness beginning on 6 July, 1907.

"It is understood that this payment shall not be construed as (154) an admission of any liability on the part of the company for the said accident or illness or results therefrom.

"Dated at Washington, N. C. Witness my hand and seal, this 5 November, 1907. E. B. MOORE. [Seal.]

"Witness: L. A. SQUIRES, ELIAS B. MOORE.
S. C. PEGRAM.

"Endorsement: ELIAS B. MOORE."

The draft was paid upon presentation. Thereafter plaintiff filed a claim for indemnity for partial disability for eleven weeks, amounting to $137.50. The partial disability was caused by a continuation of the sickness beginning 6 July. Defendant refused to pay the claim, and plaintiff prosecutes this action to recover the amount demanded. Defendant relies upon the voucher of 31 October, 1907, as a release and discharge of all further claim on account of said sickness beginning 6 July, 1907. The partial disability of plaintiff is not controverted. Upon appeal from the justice's court, the cause was heard in the Superior Court, when his Honor instructed the jury that plaintiff was entitled to recover. Defendant duly excepted. Judgment and appeal by defendant.

Ward & Grimes for plaintiff.
Small, MacLean & McMullan for defendant.

CONNOR, J., after stating the case: The sole question presented by defendant's exception is whether the voucher executed by plaintiff at the time he received the draft for $275 bars his recovery of the amount sued for in this action. The amount received by him was all that was due at that time, under the terms of the policy. The proof of claim makes no reference to any claim for future indemnity. It is, of course, conceded that, pursuant to our statute (Revisal, sec. 859), the acceptance of "a less amount than that demanded or claimed to be due in satisfaction thereof" is a valid discharge of the whole amount, if so agreed upon and accepted. But there was no other amount than the $275 paid,

"claimed or demanded," nor was any reference made to any (155) claim or demand for future indemnity for disability thereafter sustained. The plaintiff had paid defendant in full at the date

of the policy for its contract of indemnity, extending over the full period of twelve months, but four of which had expired. Neither party, so far as appears, desired to put an end to the contract or surrender any benefits accruing thereunder. It would be a strange result if, in accepting and acknowledging the receipt of the exact amount due him at the time, the plaintiff's receipt should be construed to be a surrender of all further claim under his contract with defendant for which he had paid a full consideration. It will be noted that the paper is a printed form used by the defendant, attached to the draft, the signature of which was required before payment. It is hardly probable that either party understood that it applied to or covered any other than the claim then made and due. It may be that the language of the voucher, without reference to the proof of claim and other papers attached, would be sufficiently broad to include all claims accruing by reason of the sickness of 6 July, 1907, but, when read in connection therewith, we think it manifestly referred to the claim then due and for which the draft was drawn. Defendant relies upon the decision of this Court in *Wright v. R. R.*, 125 N. C., 1. In that case the damage for which the plaintiff sued had been sustained prior to the date of the release and was expressly referred to and included therein. The distinction is obvious. It is true that the sickness of 6 July, 1907, was sickness from which the claim for weekly indemnity arose, but the plaintiff's right to demand indemnity was not for being sick, but for disability caused by sickness, measured by the week. For such disability as had not accrued plaintiff neither had nor claimed to have any demand. If it be suggested that the language used was an agreement to release such claim as might accrue in the future, the objection to its validity is found in the fact that it is without consideration. He received no more than he was entitled to, and defendant paid no more than it was under legal liability to pay. "It is a general principal that the release shall be construed from the standpoint which the parties occupied at the time of its execution, and confined to the intention of the parties at the time of such execution. . . . . The words employed in a release should not be extended beyond (156) the consideration; otherwise, the courts make a release for the parties which they never intended or contemplated." 24 A. & E. Enc., 290. The case, stated in the simplest form, comes to this: On 31 October, 1907, defendant owed plaintiff $275, and plaintiff held its contract to pay a fixed indemnity for any disability thereafter accruing. Defendant paid the amount which it owed by draft, attaching the voucher. Plaintiff received the draft and signed the voucher. To extend its language, by construction, to indemnity for disability thereafter accruing would, we think, do violence to the intention of the parties—certainly of the plaintiff, who, if so construed, surrendered a claim

for indemnity for which he had paid in full for no consideration. As a release is a new contract, it must be so construed as to effectuate the intention of both parties. Considered from any point of view, we concur with his Honor's ruling. The judgment must be

Affirmed.

R. L. SMITH v. TOWN OF BELHAVEN.

(Filed 17 February, 1909.)

Bond Issues—Vote of the People—Several Classes of Debt—One Ballot Box—Constitutional Law.

An issue of municipal bonds, when approved by the majority of the qualified voters, under the authority of a statute passed according to the constitutional requirements, is not invalid because there were several distinct debts provided and voted for in one ballot box. Article VII, sec. 7, of the Constitution does not require that the vote upon each distinct proposition must be in a separate ballot box.

ACTION from BEAUFORT, heard upon demurrer to complaint by *Peebles, J.*, by consent, at chambers, in Elizabeth City, 14 January, 1909.

The plaintiff brings this action to enjoin the issuing of cer-
(157) tain bonds by the municipality of Belhaven. Upon a hearing before *Peebles, J.*, the injunction to the final hearing was denied. The plaintiff appealed.

The facts are stated in the opinion of the Court.

J. A. Leigh for plaintiff.
Small, MacLean & McMullan for defendant.

BROWN, J. The record discloses these material facts, as admitted by the parties. That by virtue of an act of the General Assembly, ratified on 1 March, 1907, and entitled "An Act to authorize the Board of Aldermen of Belhaven, Beaufort County, to issue bonds," the defendants called and held an election, in the manner prescribed by the said act, at which time a majority of the votes cast by the registered voters, constituting a majority of the qualified voters of the said town, were in favor of the bond issue authorized by the said act; that it was set forth in said act that the defendants were authorized and empowered to issue bonds, not exceeding in amount $20,000, for the purpose of paying the outstanding indebtedness of the said town; to purchase a site or otherwise secure and maintain, build and equip a town hall; to construct, build and maintain a public dock; to construct, build and maintain, make and repair the

streets and sidewalks of said town; to purchase and maintain all necessary equipment for a well-organized fire department, and to make such other improvements as the board of aldermen may deem expedient and necessary.

The validity of the bond issue is contested upon the ground that "five distinct kinds of debt are included in the proposed bond issue and were not each voted upon in separate ballot boxes for each of the purposes of the bond issue, as required by section 7, Article VII of the Constitution of this State. There is nothing in the section above cited which requires a separate ballot box for each proposition.

The defendant town has received legislative authority to contract the debt and issue the bonds, upon condition that the approval of a majority of the qualified voters be first obtained. The act does not prescribe that a vote shall be taken in a separate box on each proposition, and the condition has been met in manner and form as required by the act. Nor does it matter that the proposition was voted for on one (158) paper ballot instead of several distinct ballots. The proposition to issue the bonds was submitted as one proposition, and as it was carried by a majority of the qualified voters, the bonds to be issued in pursuance thereof are valid. The purchaser is not bound to see to the application of the proceeds of sale.

The question presented has been fully determined and discussed in *Lumberton v. Nuveen,* 144 N. C., 303, where the authorities are collected. We are of opinion that the proposed bond issue is valid.

Affirmed.

Cited: Winston v. Bank, 158 N. C., 520.

LOUISE B. SMITH v. SUSAN E. MOORE, PETITIONER.

(Filed 24 February, 1909.)

1. Supreme Court—Motions—Newly Discovered Evidence—Petition to Rehear.

A motion for a new trial, in the Supreme Court, upon the ground of newly discovered evidence, is a matter for the full Court, and will not be entertained after the case has been certified down, nor will an ungranted petition to rehear, made at the same time to the Justices of the Court, under the rule, put the case in the Supreme Court.

2. Same.

An order of the Supreme Court to again docket a case in which an opinion has been rendered is based on error of law in the previous decision, and an application to that effect, if not granted, will not permit a motion therein for a new trial for newly discovered evidence, which can be made in the lower court.

PETITION to rehear, and motion for new trial for newly discovered evidence in this case, reported in 149 N. C., 185.

CLARK, C. J. After the opinion in this case had been certified down, the defendants filed a petition here to rehear, and a motion for new trial for newly discovered evidence.

(159) A petition to rehear rests upon alleged error in the opinion, and requires, before it is docketed for consideration by the Court, the approval of one or more Justices, to whom it is submitted by the petition. Rule 53. This approval the two Justices to whom the petition was referred have felt impelled to decline.

A motion for a new trial for newly discovered evidence is a matter for the full Court, like all other motions. The practice in such cases, since the statute of 1887, now Revisal, sec. 604, as laid down in *Black v. Black,* 111 N. C., 305, is:

1. When the case is pending here, this Court can entertain a motion on the ground of newly discovered evidence, and, of course, it could do so even after the opinion is filed, if before it is certified down, *i. e.,* as long as the matter is *in fieri.*

2. When final judgment is rendered in this Court, as is still done, though not so often as formerly (*R. R. Connection Case,* 137 N. C., 21), the motion on the ground of newly discovered evidence must be made here and a petition to rehear filed. This is necessarily so in such cases, as the case is not sent back to the Superior Court at all. The petitioner misunderstood the reference to "final judgment rendered in this Court," for the next paragraph provides:

3. When the opinion has been certified down, such motion must be made in the Superior Court. To same effect *Banking Co. v. Morehead,* 126 N. C., 283. *Turner v. Davis,* 132 N. C., 189, was rested "on the peculiar facts of that case," as is there stated.

The remedy of the petitioner is by motion, on the ground of newly discovered evidence, made in the Superior Court. *Banking Co. v. Morehead, supra.* Of course, when a petition to rehear is docketed the case is again in this Court, for argument, and a motion for new trial for newly discovered evidence can then be made here. But a mere application to rehear, not ordered docketed by the Justices to whom it is presented, does not put the case in this Court. An order to docket is based on error of law in the previous decision, and a certificate to that effect will not be made merely to permit a motion, which can be made in the court below.

Motion denied.

Cited: Lancaster v. Bland, 168 N. C., 378.

(160)

JOANNA V. SPENCE v. THE LAKE DRUMMOND CANAL COMPANY.

(Filed 24 February, 1909.)

Evidence—Damages—Exceptions—Harmless Error.

Defendant's exception that under a certain issue permanent damages were awarded plaintiff, when from the character of the injury, or otherwise, the plaintiff was entitled to recover damages, can not be to defendant's prejudice, and it is not reversible error on his appeal.

ACTION tried before *Ward, J.*, and a jury, at Fall Term, 1908, of CAMDEN.

The jury rendered the following verdict:

1. "Is the plaintiff the owner in fee simple of the lands described in the complaint?" Answer: "Yes."

2. "Did defendant dig out and widen its canal and wrongfully throw dirt, sand and mud on plaintiff's land and thereby permanently injure the lands of plaintiff, as alleged?" Answer: "Yes."

3. "What permanent damage, if any, has plaintiff sustained thereby?" Answer: "Three hundred and fifty dollars."

Motion for new trial; overruled. Defendant excepted.

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

Aydlett & Ehringhaus for defendant.
No counsel contra.

PER CURIAM: The Court is unable to perceive any error in the proceedings below to the defendant's prejudice. As we understand the evidence, it tended to show that defendant, in cutting a ditch on its own right of way, threw and carried the mud, etc., on the side of the ditch and out and over the plaintiff's lands, rendering several acres entirely worthless and causing other damage to plaintiff's property.

The court, in charging the jury, restricted the plaintiff's recovery to the wrong, as indicated, telling them that plaintiff could only recover for wrongfully causing mud, sand and water to flow over on plaintiff's land and injure it. The defendant did not seriously contend (161) before us that this was not a legitimate subject for recovery, but seemed to object for that plaintiff was allowed to recover as for permanent damages. It may be that the amount recovered in this present case should not be considered and termed permanent damages, but the court only allowed recovery to the extent of the wrong actually inflicted, and the insertion of the word "permanent" would seem to make for defend-

ant's benefit, as the effect, if any is allowed, would be to justify a repetition of the act, without further complaint, to the extent that the land has been heretofore covered and destroyed.

There is no error to defendant's prejudice, certainly in the use of the term in the issue, and the judgment below is therefore affirmed.

No error.

Cited: *Farris v. R. R.*, 151 N. C., 492.

C. T. SAMPLE ET AL. v. JOHN L. ROPER LUMBER COMPANY.

(Filed 24 February, 1909.)

1. Deeds and Conveyances—Title—Common Source.

When one claiming to own land, or having deed therefor in fee, grants or conveys to another a restricted estate or limited interest in the same, and it is apparent that the grantee acquired and holds his interest in recognition of the grantor's title, in any action between them concerning the property, the parties ordinarily come under the general rule that when it appears that both parties claim title from the same source neither shall be heard to deny or question the validity of such title.

2. Same—Outstanding Title—Proof—Superior Title.

This general rule is not in strictness one of estoppel, but is a rule of justice and convenience adopted by the courts to relieve the parties of the necessity of going back of the common source and deducing title from the State, when it is apparent that both are acting in recognition of the common source as the true title, and the same is subject to the exception that it is always open to the holder of the weaker claim to show a better outstanding title, provided he connects himself with it.

3. Same—Evidence.

When it appeared that defendant had purchased the standing timber on a tract of land of given dimensions, and taken a deed therefor in recognition of the grantor's claim of title, and on the trial between them, this being the plaintiff's only evidence of title, defendant offered evidence tending to show that there was an outstanding title superior to that of plaintiff's, and that defendant had acquired it, such evidence should have been received, and its rejection constitutes reversible error.

4. Limitation of Actions—Trespass—Cause of Action Accrued—"Continuing Trespass."

"Continuing trespass," within the statute of limitations, requiring action therefor to be brought within a specified period from the original trespass, refers to trespass by structures of a permanent nature, and not to separate and distinct acts of wrongfully cutting timber.

ACTION tried before *Ward, J.*, and a jury, at July (Special) (162) Term, 1908, of TYRRELL.

The complaint alleged, and there was evidence tending to show, that plaintiffs, on 12 September, 1899, had sold to defendant the timber of given dimension, to wit, measuring 14 inches at the stump, standing on a large body of land in Tyrrell County at a contract price of $1,900, with a right to cut and remove the same within a specified time—three years, with privilege of two years more by paying interest—and with the right, further, to cut timber below the dimension given for the purpose of constructing tramways, etc., necessary and required for the cutting and removing of said timber; that defendant had entered on said land and had cut and removed the timber specified and had paid the contract price therefor.

The complaint further alleged, and there was evidence tending to show, that defendant was occupying said land under and by virtue of the contract, and had cut a large quantity of timber standing on same below said dimension and not covered and contained in the contract, causing much spoil and injury, to plaintiffs' damage.

The contract on its face tended to show that plaintiffs, at the time of the sale, had deeds for the land and covenanted that they were the owners of the timber sold, and that they would warrant and defend the title to same, etc.

Defendant moved to dismiss the action, on the ground that (163) plaintiffs had shown no evidence of title to the land that would justify a recovery for damages done thereto by cutting timber not embraced within the contract stipulation. Motion overruled, and defendant excepted. Defendant contended, further, that the testimony tended to show a continuing trespass; and inasmuch as a part of the wrongful cutting alleged was shown to have been more than three years before the action was commenced, the entire wrong was brought within the protection of the statute of limitations. This position was overruled, and defendant excepted.

In the course of the trial defendant offered in evidence grants covering all or a portion of the land in question, issued to John Gray Blount, bearing date 1796; and, further: "2d. Deeds made in 1904, registered same year in said count, from the only heirs at law of John Gray Blount, who died about 1836, said deeds conveying the said lands to certain parties, and *mesne* conveyances from the said grantees, made in 1904, to defendant company, said conveyances being properly registered in Tyrrell County during the year 1904."

It was admitted by the plaintiffs that the said grant and deeds covered part of the lands mentioned in the contract, and that the parties who signed the said deeds to the grantees of the defendant company were, at

the time of executing same, the only living heirs at law of John Gray Blount, who died many years before; that the said deeds were registered in said county after the said cutting of timber had commenced and before it was ended.

The court ruled that said title in the defendant was immaterial, and that, the defendant having entered these lands under the contract, the defendant could not deny the plaintiffs' title to the timber cut by the introduction of these deeds. Defendant excepted.

There was a verdict for $2,000 damages for wrongful cutting of timber on the land within three years next before action brought, and excluding any recovery for injury prior to that time by reason of the statute of limitations. Judgment on the verdict for plaintiffs. Defendant appealed, and assigned for error:

(164) 1. The failure to dismiss the action as on judgment of nonsuit.

2. The ruling that the evidence offered was irrelevant and incompetent.

3. The refusal to hold that all recovery was barred because a part had been more than three years, and the evidence showed that the cutting was continuous.

Aydlett & Ehringhaus for plaintiffs.
W. M. Bond for defendant.

HOKE, J., after stating the case: In *McCoy v. Lumber Co.*, 149 N. C., 1, this Court held, in effect, that where one having a deed for real property, or, being in possession, claiming to own the same in fee, conveys or grants to another a lesser estate in the property or a restricted interest therein, and there is evidence tending to show that the grantee took in recognition of the grantor's right as the true owner, the parties to such a transaction, in any litigation between them involving the title, come within the principle very generally recognized, that when it appears that both parties to a suit claim under the same title, neither, as a general rule, shall be heard to deny or question the validity of the common source of their respective claims. In the present case there is on the face of the instrument evidence which tends to show that the plaintiffs, claiming to be the owners of the property, sold to the defendant a restricted interest therein, to wit, the standing timber of given dimension, and that defendant bought the timber in recognition at the time of plaintiffs' claim as owner of the land, and there was no error, therefore, in denying motion for nonsuit, made by defendant on the ground that there was no evidence tending to sustain plaintiffs' claim of title. In the same case (*McCoy v. Lumber Co., supra*) the Court referred to several well-considered decisions upholding the position that this principle, which pre-

vented parties litigant from questioning the validity of the title under which they both claimed, was not in strictness an estoppel, but "a rule of justice and convenience, adopted by the courts to relieve the plaintiff in ejectment from the necessity of going back of the common source and deducing title from the State," and that it was subject to the exception that a defendant was allowed to show there was a title (165) outstanding superior to this common source, and that he had acquired it. *Christenbury v. King,* 85 N. C., 230. In this case *Ashe, J.,* for the Court, said: "It is well settled as an inflexible rule that where both parties claim under the same person neither of them can deny his right, and then as between them the elder is the better title and must prevail. . . . To this rule there is an exception when the defendant can show a better title outstanding and has acquired it."

Applying the principle indicated in this exception, we are of opinion that there was error in holding that the evidence offered, tending to show that defendant had acquired the title of John Gray Blount, was irrelevant and immaterial. Such a position would be to give the general rule relied upon by plaintiffs to establish their title the force and effect of a strict estoppel; whereas it yields to the exception stated, that defendant is allowed to show a better title outstanding, and that he has acquired it, and if to a part of it he should be allowed to reduce the recovery by such part. It may be that, notwithstanding this proposed testimony, the plaintiffs' title may prove the true one, but we think the evidence offered tended at least to show that defendant had brought itself within the recognized exception as to part of the land, and it was error to exclude it or to hold that it had no significance. It may be well to note that this is not an action to recover possession of the land. It may be that in such case the defendant, having entered under plaintiffs' permit and license, would be required to surrender possession so acquired before asserting its claim; but this is an action for damages for wrongfully cutting timber, and, if defendant has in fact the true title, to allow recovery by plaintiffs would be to hold defendant responsible for cutting its own timber, a result that should not be sanctioned or allowed.

There is no merit in defendant's exception as to the statute of limitations. True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such action shall be commenced within three years from the original trespass and not thereafter; but this term, "continuing trespass," was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and (166) made by companies in the exercise of some *quasi*-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never

intended to apply when every successive act amounted to a distinct and separate renewal of the wrong. In this case every wrong invasion of plaintiffs' property amounted to a distinct, separate trespass, day by day, and for any and all such trespasses coming within the three years the defendant is responsible.

For the error heretofore indicated there should be a new trial of the issues.

New trial.

Cited: Bryan v. Hodges, 151 N. C., 414; *Foy v. Lumber Co.,* 152 N. C., 599; *Bowen v. Perkins,* 154 N. C., 452, 453; *Van Gilder v. Bullen,* 159 N. C., 297; *LeRoy v. Steamboat Co.,* 165 N. C., 120; *Teeter v. Telegraph Co.,* 172 N. C., 785.

R. G. CHAPMAN & CO. v. CHARLES McLAWHORN.

(Filed 24 February, 1909.)

1. **Principal and Agent—Guaranty of Payment—Party in Interest—Trusts and Trustees.**

An agent to sell goods on a *del credere* commission—that is, who guarantees payment on all sales and turns over to the principal, when called for, all notes, accounts, etc.—is not a real party in interest, and can not maintain, in his own right or by construction, as trustee of an express trust, an action to recover for the goods sold.

2. **Same—Evidence—Nonsuit.**

When it is shown that a plaintiff is not a real party in interest, his action to recover, brought in his own right, will be dismissed on a motion as of nonsuit upon the evidence.

ACTION heard before *O. H. Allen, J.,* and a jury, at August Term, 1908, of PITT.

F. G. James and Jarvis & Blow for plaintiffs.
J. L. Fleming and Skinner & Whedbee for defendant.

CLARK, C. J. This was an action to recover for guano sold the defendant. The answer averred that the guano was bought of plaintiffs as agents of the Royster Guano Company. Chapman testified (167) that his firm sold the guano, as agents for the Royster Guano Company, on a *del credere* commission—that is, the agents guaranteed payment on all sales and were to turn over all notes and accounts,

when called for, though he says they were not always called for. The plaintiffs put in evidence their contract with the guano company, which provides, "all the above fertilizers to be consigned to you, as herein provided, as our agents, remain our property until sold by you, and, after sale by you, the cash, notes, accounts or other proceeds of sale are our property." Chapman further testified that his firm had a subsequent agreement with the Royster Guano Company that if the plaintiffs brought this action the guano company was to be responsible for the costs, and if the plaintiffs did not collect this bill they would not pay the guano company.

In any aspect of the case, whether the plaintiffs were released from their guarantee of sales or not, they were simply agents for the Royster Guano Company, which owned the guano and the debt incurred by the defendant for its purchase. "Every action must be prosecuted in the name of the real party in interest." As it is clear that the proceeds of any judgment in this action, if recovered by the plaintiffs, would be the property of the Royster Guano Company, the court properly allowed the motion for nonsuit, on the ground that "the evidence disclosed that the plaintiffs were not the owners of the account sued on." *Abrams v. Cureton,* 74 N. C., 523; *Alexander v. Wriston,* 81 N. C., 194; *Jackson v. Love,* 82 N. C., 407; *Wilcoxon v. Logan,* 91 N. C., 452; *Wynne v. Heck,* 92 N. C., 416; *Egerton v. Carr,* 94 N. C., 653; *Boyd v. Insurance Co.,* 111 N. C., 376; *Boykin v. Bank,* 118 N. C., 568; *Morefield v. Harris,* 126 N. C., 628. And there are many other cases to like effect. Besides, the statute is explicit. The plaintiffs here had no interest in this claim. They were neither legal nor equitable owners of it, nor were they trustees of an express trust.

Affirmed.

Cited: McRackan v. R. R., post, 332; *Vaughan v. Moseley,* 157 N. C., 157; *Martin v. Mask,* 158 N. C., 443; *Vaughan v. Davenport,* 159 N. C., 371.

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NORTH STATE PIANO COMPANY v. SPRUILL & BRO.

(Filed 24 February, 1909.)

1. Mortgagor and Mortgagee—Chattel Mortgage—Notice—Registration—Priorities—Liens.

A recital in a registered chattel mortgage of a piano that there was no encumbrance except a certain amount now due "a piano company": *Held,* (1) is not sufficient notice to the mortgagee in the recorded mortgage;

(2) if it were otherwise full and sufficient, it could not supply the absence of registration; (3) the words employed were to protect the mortgagor from any charge of improperly conveying mortgaged property and from liability incurred to the mortgagee on that account.

2. Same.

A holder of a registered mortgage has a prior lien to that of a holder whose mortgage was first made, but not recorded, notwithstanding a recital in the recorded mortgage that there was no encumbrance except "$115 now due a piano company," which subsequently proved to be due the holder of the unregistered mortgage. (The question of notice and liens by mortgage discussed by CLARK, C. J.)

ACTION from BEAUFORT, heard at chambers, on case agreed, by *Guion, J.*, at Fall Term, 1908.

Defendants appealed.

Small, McLean & McMullan for plaintiff.
A. O. Gaylord for defendant.

CLARK, C. J. On 28 November, 1905, the defendant McConnico borrowed of Spruill & Bro., the interpleaders herein, $75 and, to secure the same, executed a chattel mortgage on a piano, which mortgage was recorded in Washington County, where the mortgagor resided, on 6 December, 1905. This mortgage conveyed "one McPhail piano, now in our possession, which is free and clear of all encumbrance, except $115 now due the piano company." On 10 March, 1905, said McConnico, having purchased said piano, had executed a conditional-sale agreement to the North State Piano Company for $115, balance due on the purchase money, which mortgage has never been registered, as required by Revisal, sec. 983, in Washington County, where McConnico resided and has had the piano in possession.

(169) This is a claim and delivery for the piano, begun by the North State Piano Company, in which Spruill & Bro., interpleaded. It is agreed that said mortgagees and interpleaders had no actual notice or knowledge of the conditional sale to the plaintiff, nor of any lien on the piano except the recital in the mortgage to them that there was no encumbrance "except $115 now due piano company." The recital does not name the piano company nor state how or for what the $115 was due. It was insufficient, even as a notice. But nothing is better settled than that "No notice, however full and formal, will supply the place of registration." *Tremaine v. Williams,* 144 N. C., 116; *Wood v. Tinsley,* 138 N. C., 510; *Collins v. Davis,* 132 N. C., 106; *McAlister v. Purcell,* 124 N. C., 263; *Blalock v. Strain,* 122 N. C., 285; *Patterson v. Mills,* 121 N. C., 267; *Hooker v. Nichols,* 116 N. C., 161; *Barber v.*

Wadsworth, 115 N. C., 29; *Quinnerly v. Quinnerly,* 114 N. C., 145; *Maddox v. Arp, ibid.,* 585; *Hinton v. Leigh,* 102 N. C., 31; *Bank v. Manufacturing Co.,* 96 N. C., 298; *Todd v. Outlaw,* 79 N. C., 235; *Blevins v. Barker,* 75 N. C., 436; *Robinson v. Willoughby,* 70 N. C., 358; *Miller v. Miller,* 62 N. C., 85; *Leggett v. Bullock,* 44 N. C., 283; *Womble v. Battle,* 38 N. C., 182; *Fleming v. Burgin,* 37 N. C., 584; and many other cases. They are too numerous to cite.

The words (in the mortgage to Spruill & Bro.), "clear of all encumbrance except $115 due the piano company," were merely meant to avoid any charge against the mortgagor of conveying mortgaged property or incurring liability to the grantees for removal by them of the encumbrance. The acceptance of the mortgage was not an assumption by the mortgagees of any trust to apply the property to payment of the $115 due the unnamed piano company, nor was it a waiver of the want of registration as to any mortgage or lien theretofore given by the mortgagor.

To maintain the contention that the unregistered lien of $115 has priority over the duly registered mortgage to Spruill & Bro. the plaintiff relies upon three cases: (1) *Hinton v. Leigh,* 102 N. C., 28. That case approved the above well-settled doctrine, but held that it did not apply because the deed in trust recited the prior unregistered mortgage, and the reference in the *tenendum* was held broad enough to include the mortgage among the debts to be paid by the trustee under and by virtue of the trust deed. Whether we should give that construction to the words of the *tenendum,* if before us now, admits of doubt (170) but that case is not a precedent that merely mentioning a prior lien in a conveyance dispenses with the requirement of registration. (2) The second case cited by plaintiff is *Brasfield v. Powell,* 117 N. C., 140. There, as the Court said, "there is a lien on the crop to be paid out of the crop, and the defendants accepted this conveyance with this provision in it; and when they did so, they accepted it as trustees and are bound to carry out the trust." Here the mortgage to Spruill & Bro. does not recite any prior conveyance nor indicate that the mortgagees shall hold the property in trust to pay off said prior lien and apply only the surplus to their own debt. (3) The third and last case cited by plaintiff is *Bank v. Vass,* 130 N. C., 590, where it was held that the words in the *warranty,* reciting a prior conveyance, were more than a bare notice and created and established a trust in favor of the prior encumbrancer, the Court being careful to add, "This benefit is in no way derived by title acquired through the deed of trust (the prior unregistered conveyance), but it comes by virtue of the charge and trust set out in the mortgage (the registered conveyance)."

The distinction is this: Where the deed conveys only the remainder,

after reserving a charge, or conveys the property in trust to apply the proceeds first to such other charge, then it is not necessary that such prior lien should be recorded, nor, indeed, that it should be in writing, nor even that it should be made before the conveyance reciting it. But when, as here, the conveyance of the property merely refers to or mentions that there is a prior conveyance or lien, this is no more than a notice, and if such prior lien or conveyance is not at that time of record it has no effect against the later conveyance if that is first recorded.

The words "clear of all encumbrance except $115 due the piano company" can not be construed a trust in the mortgagees to apply the property to said debt in preference to their own. The mortgagees took the property with notice of an encumbrance, which has no priority because unregistered.

Upon the facts agreed, judgment should have been rendered in favor of the holders of the registered mortgage, Spruill & Bro.

Reversed.

Cited: Wooten v. Taylor, 159 N. C., 612; *Trust Co. v. Sterchie,* 169 N. C., 24.

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B. W. EDWARDS ET AL. v. THE SNOW HILL SUPPLY COMPANY ET AL.

(Filed 24 February, 1909.)

1. Corporations—Mortgagor and Mortgagee—Mortgage to Officers—Pre-existing Debt.

A mortgage on all its property, made by a corporation to its president and two directors under authority of a resolution of the board of directors, without any vote of the stockholders, to secure them in their prior endorsements of the company's notes negotiated at a bank for the benefit of the corporation, is void; otherwise, had the mortgage been authorized at the time of the endorsements and receipt of the money to aid the corporation's business.

2. Corporations—Mortgagor and Mortgagee—Seal—Officers—Evidence—Rebuttal.

The presumption that a mortgage, with its seal affixed, was authorized by a corporation (Revisal, sec. 1130) is rebutted when it was executed to the company's officers to secure a pre-existing debt.

3. Corporations—Mortgagor and Mortgagee—Mortgage to Officers—Void as to Creditors.

When a mortgage has been made on all its property by a corporation to its officers to secure a pre-existing debt, the company continuing in possession, it is evidence sufficient to sustain a judgment that it was void as to other creditors.

ACTION heard by *O. H. Allen, J.*, upon report of referee, at December Term, 1908, of GREENE.

Appeal by Faircloth & Dail.

L. V. Morrill and C. B. Aycock for plaintiff.

W. C. Munroe, G. V. Cowper and J. Paul Frizzelle for defendant.

CLARK, C. J. On 10 January, 1908, at a meeting of the stockholders of the Snow Hill Supply Company, it was arranged that the company would borrow $8,000 from the bank, and the stockholders agreed among themselves that if F. W. Faircloth, T. M. Dail and A. C. Dail, the president and two of the directors would individually endorse said note as sureties, the stockholders would place their stock in the company with said endorsers as collateral. On 11 January a note of the company for $4,000, and on 18 March a similar note for (172) $2,000, with said endorsers, was discounted by the bank and the proceeds used in the business of the company. A portion of the stock, as agreed, was deposited with said endorsers. On 23 May, 1908, the board of directors, without any vote of the stockholders or any entry on the minute book of the company, executed and put on record a mortgage to said Faircloth, Dail and Dail on the real property described, together with all its stock of goods and accounts and notes, to secure them against loss, as endorsers, upon said notes of $6,000, which mortgage on it face purported to have been executed 15 February, 1908, and embraced all the property of the company subject to certain prior mortgages on the realty.

At the meeting on 10 January, 1908, the company's report showed that its assets were $2,000 to $5,000 less than its liabilities and capital stock. It does not appear whether the corporation was solvent when the mortgage was delivered, on 23 May, 1908, or not. It went into the hands of a receiver 7 October, 1908, being then insolvent, and this is a controversy over the application of the assets to the indebtedness of the company.

The court properly held, sustaining the ruling of the referee, that the mortgage to Faircloth and others was not a valid lien, and that the $6,000 thereby intended to be secured should participate in the assets for its *pro rata* as an unsecured indebtedness only.

The mortgage was invalid, because: (1) The officers of the company had no right to take advantage of their knowledge of its financial condition to secure a preference for themselves on all its property as to a pre-existing debt. *Hill v. Lumber Co.*, 113 N. C., 173; *Electric Light Co. v. Electric Light Co.*, 116 N. C., 112; *Graham v. Carr*, 130 N. C., 274; *Holshouser v. Copper Co.*, 138 N. C., 251. It would have been otherwise if at the time the money was authorized to be borrowed the

company had authorized the mortgage to be executed to secure its officers, who agreed to sign the note as endorsers. In such case the money received would have balanced the debt secured and would have paid off that amount of prior debts to others or would otherwise have aided the business of the company. Such arrangements are often neces-
(173) sary, and when *bona fide* are valid. *Banking Co. v. Lumber Co.*, 91 Ga., 624, cited and approved; *Hill v. Lumber Co.*, 113 N. C., 179.

(2) The mortgage was executed without any authority from the stockholders. While the execution of the deed in the manner prescribed (Revisal, sec. 1130), when the corporation seal is affixed, is presumed to be authorized (*Duke v. Markham*, 105 N. C., 136), this presumption is rebutted when executed to the company's officers.

(3) In addition, so far as this mortgage for a pre-existing debt was upon a stock of goods continually being depleted and renewed, possession being retained by the mortgagor, the mortgage being on all its property and in favor of its officers, the referee was justified in holding that it was void as to the other creditors. *Cheatham v. Hawkins*, 76 N. C., 335; *Cowan v. Phillips*, 119 N. C., 26.

Affirmed.

Cited: Crockett v. Bray, 151 N. C., 619; *Powell v. Lumber Co.*, 153 N. C., 56; *Grocery Co. v. Taylor*, 162 N. C., 311; *Hopkins v. Lumber Co., ibid.*, 534; *Wall v. Rothrock*, 171 N. C., 390-391.

B. W. EDWARDS ET AL. v. SNOW HILL SUPPLY COMPANY.

(Filed 24 February, 1909.)

1. Corporations—Deeds and Conveyances—Mortgage—Corporate Act—Mala Grammatica.

A mortgage made by a corporation, regular in its body in all respects, except that it recites the corporation "of the first part, their heirs and assigns," is not void, as the name of the corporation is erroneously treated as a collective noun and "*mala grammatica non vitiat.*"

2. Corporations—Deeds and Conveyances—Construction—Validity.

When the attestation clause, the body and the conveying words in a deed purport to make it that of an existing corporation, and it is signed "F. W. F., President (Seal); B. W. E., Sec. and Treas. (Seal)," has the corporate seal affixed, and has been probated by the clerk of the court, upon examination of an attesting witness, and ordered registered, its validity as a corporate act will be upheld. (*Clark v. Hodge*, 116 N. C., 763, cited and distinguished.)

3. Corporations—Deeds and Conveyances—Seal, Failure to Register.

The validity of a mortgage made by a corporation, duly signed by its proper officers and otherwise regular, is not impaired by the failure of the register of deeds to record the corporate seal affixed to the instrument.

4. Corporations—Deeds and Conveyances—Seal—Authority Prima Facie.

The common seal of a corporation affixed to its conveyance is *prima facie* evidence that it was affixed and the conveyance executed by the proper authority.

ACTION from GREENE, heard by *O. H. Allen, J.*, at chambers in (174) Kinston, upon report of the receiver and referee, 22 December, 1908.

Appeal by Snow Hill Banking and Trust Company, mortgagee of parties plaintiff.

L. V. Morrill for creditors, plaintiff and appellants.

W. C. Monroe, G. V. Cooper and J. Paul Frizzelle for bank, plaintiff and appellee.

CLARK, C. J. The only question raised is as to the valid execution of a mortgage for $2,000 to the defendant from the Snow Hill Supply Company. It is not denied that the money was borrowed for the use of the said supply company, was used in carrying on its business, and is justly due. The corporation was solvent when it executed the mortgage, and no stockholder has ever questioned its validity. The objection comes from other creditors, who insist that this is an unsecured debt, because of an irregularity in the execution of the mortgage.

The instrument purported to be a mortgage on real estate, and was duly registered. The attesting clause is as follows: "In testimony whereof, the said party of the first part has hereunto set their hands and seals, the day and date first above written. F. W. Faircloth, President (Seal); B. W. Edwards, Sec. and Treas. (Seal)." The corporation seal was affixed. There was a witness to the execution of said paper, and upon his examination the clerk probated it and ordered its registration.

The mortgage names the "Snow Hill Supply Company" as party of the first part, and it is shown that said company was duly incorporated. The mortgage is regular in all respects, in its body, ex- (175) cept that it is twice said "the said Snow Hill Supply Company, of the first part, *their* heirs and assigns." But this is merely treating the name of the corporation as a collective noun, which is admissible, and if otherwise, *"mala grammatica non vitiat."*

This case is very different from *Clark v. Hodge,* 116 N. C., 763, relied on by appellees, for in that case the text showed that the mortgage

was, in truth, that of an individual and not of a corporation. It recited that whereas the corporation was indebted to the mortgagee, "for which he holds *my* note to secure the payment of the same, *I* do hereby convey," etc., specifying that, on foreclosure, the ten per cent allowed for attorney's fee should be "charged to *me*," winding up with "Witness *my* hand and seal," signing as president, but with his private seal. Two others signed as secretary and treasurer, and the corporation seal was affixed. The Court held that, so far as the signing was concerned, this might be held the deed of the corporation, "but from the attestation clause, the body of the deed and the *conveying words* it is clear that this is the conveyance of D. N. Hitchcock, and not that of the corporation acting through him." The opposite is the case here, where the words are "the said party of the first part, in consideration of $2,000 in hand paid," etc., "by these presents bargains, sells and conveys"; and again it is said "the Snow Hill Supply Company, the party of the first part, do covenant," etc., and this reference to the Snow Hill Supply Company, as party of the first part, is again repeated in the body of the deed.

In this case the corporate seal was duly attached to the mortgage, but was omitted when first registered, though this was corrected by the register after this action was begun. As the deed recited, both in the conveying and warranty clauses, "the Snow Hill Supply Company" as "the party of the first part," and the attestation clause recites "the party of the first part hereunto set their hands and seals," and the paper was in fact duly executed by the officers of the corporation, who signed as president and secretary and treasurer, respectively, and affixed the corporate seal, the validity of the mortgage is not impaired by
(176) the failure of the register to record the corporate seal. *Heath v. Cotton Mills,* 115 N. C., 246; *Strain v. Fitzgerald,* 130 N. C., 600.

The common seal being affixed is *prima facie* evidence that it was so affixed (and that the mortgage was executed) by proper authority. *Duke v. Markham,* 105 N. C., 136; *Clark v. Hodge,* 116 N. C., 765; 1 Devlin Deeds, sec. 341. There is no evidence offered in this case to contradict this presumption. In holding that the mortgage was invalid, and that the debt therein recited was simply an unsecured debt of the corporation, there was error, and the judgment of the court is in that respect

Reversed.

Cited: Brown v. Hutchinson, 155 N. C., 211.

ROBERT GREEN ET AL. v. JOHN C. RODMAN.

(Filed 24 February, 1909.)

1. **Mortgagor and Mortgagee—Mortgagee in Possession—Tenant—Accountability—Rents.**

By entry upon the mortgaged premises the mortgagee makes himself tenant of the land and becomes responsible to the mortgagor for the "highest fair rent" and for all such acts of omission for which an ordinary tenant would be liable.

2. **Same—Lessor and Lessee—Assignee of Mortgage Note—Notice.**

One who has not been in possession of mortgaged premises and has advanced money to a lessee in possession, with an option of purchase, with which the lessee acquired the note secured by the prior outstanding mortgage by accepting the mortgage note as collateral for the loan at a time when nothing was due under the lease, does not become a mortgagee in possession and is not chargeable with notice of any claim against the lessee made by the mortgagor for rents and profits, and he is entitled to have the mortgage foreclosed and the proceeds applied thereunder to the satisfaction of his debt, without an accounting.

3. **Judgment—Rights Reserved—Estoppel.**

When a judgment expressly reserves the rights of one of the parties litigant, without prejudice, it does not estop him from further asserting such rights.

BROWN, J., did not sit.

ACTION tried before *Guion, J.*, and a jury, at December Term, (177) 1908, of BEAUFORT.

This action was brought for the redemption of a mortgage, and was tried in the court below upon the following facts:

1. The mortgage was executed by Robert Green and S. T. Hooker to Lawrence Hooker on a lot in Washington, N. C., 13 April, 1905, to secure the sum of $1,500 due by note, payable 1 January, 1906, with 6 per cent interest.

2. On 26 August, 1905, Robert Green and S. T. Hooker executed to Miles & Corey a lease of said property for the term of five years, the lessees agreeing to pay as rent $50 per month, the first payment to be made on 15 October, 1905. The rent was paid to 1 March, 1906, but none has been paid since that time. Miles & Corey took possession of the lot under the lease, and remained in possession until the accumulated rents from 1 March, 1906, amounted to $1,600, with interest thereon from 1 August, 1907.

3. The lease to Miles & Corey contained a provision that they might purchase the property described therein at any time on or before 26 August, 1906, at $5,000, by an actual tender of the money. On 20 Janu-

ary, 1906, Miles & Corey commenced in the Superior Court an action against Robert Green, S. T. Hooker and Lawrence Hooker for the specific performance of the contract to sell contained in the lease. In said suit a judgment, purporting to be by consent, was entered at February Term, 1906, and at the same term it was set aside by the court and another judgment rendered, and it appeared in the last judgment that Miles & Corey had purchased the note secured by the mortgage from Lawrence Hooker, and the court thereupon adjudged that they be subrogated to his rights under the mortgage. The court enjoined the sale of the property under the mortgage, which had been advertised. The judgment recites, as the case states, that "Miles & Corey are in possession of the land described in the complaint under the lease or contract from Green & Hooker," and "it was ordered that the plaintiffs pay over the rents, as provided in said lease or contract, to the clerk of the court, to be held by him pending the adjudication of the rights of the parties, respectively." Miles & Corey borrowed from John C. Rodman
(178) the sum of $500 on 5 March, 1906, to enable them to purchase the note, secured by the mortgage, from Lawrence Hooker, and it was so applied. They thereupon transferred to John C. Rodman the said note, secured by the mortgage, as collateral to secure the indebtedness to him. At April Term, 1906, in the case of Miles & Corey against Green & Hooker, the plaintiffs moved, on the pleadings, for a decree for the specific performance of the contract of sale contained in the lease, on the pleadings, and their motion was denied and the injunction against the sale of the property under the Hooker mortgage was dissolved. The court further adjudged as follows: "The said plaintiffs being subrogated as aforesaid to the (rights of the) said Lawrence Hooker in the premises, it is hereby adjudged that they be at liberty to collect said debt and foreclose the mortgage securing the same." At May Term, 1907, upon the trial of the said action, the court having intimated that the plaintiffs were not entitled to specific performance of the contract set forth in the lease, the plaintiffs submitted to a nonsuit, and judgment was entered accordingly. No money was paid into court by Miles & Corey under the former judgment.

4. Miles & Corey and John C. Rodman advertised the property described in the mortgage for sale, in the name of Lawrence Hooker, as mortgagee, whereupon the present suit to restrain the sale and for an accounting was brought by the plaintiffs against the defendants, John C. Rodman, Miles & Corey and Lawrence Hooker. In all of the transactions connected with the transfer of the mortgage by Lawrence Hooker to Miles & Corey, and by the latter to John C. Rodman, as well as with the attempted sale under the mortgage, the said Miles & Corey and John C. Rodman were represented by the same attorney, and during all of said time Miles & Corey continued in possession of the property

and failed to pay any rent into court or to Green & Hooker, and the accrued rent amounts to $1,600 as aforesaid. At December Term, 1908, in an action between Robert Green, S. T. Hooker and Miles & Corey, the court adjudged that the defendants were indebted to the plaintiffs in the said sum of $1,600, the amount due as rent by them for the property described in the complaint, with interest from 1 August (179) 1907. The court further adjudged that the said amount "shall be applied *pro rata* in satisfaction of the mortgage to Lawrence Hooker and the debt therein secured to him, without prejudice to the further order of the court in respect to the rights of John C. Rodman, as assignee of said debt, and the right of plaintiffs in respect of satisfaction thereof by application of rents or otherwise." At the same term, with the consent of the parties, the question as to the rights of the plaintiff and of John C. Rodman, upon the facts as above stated, having been reserved for the consideration of the court, the court adjudged that John C. Rodman is entitled to recover the debt to him by Miles & Corey, and that the same is secured by the mortgage from Green & Hooker to Lawrence Hooker, which was assigned to Miles & Corey; and it was further adjudged that the commissioner then appointed sell the property, upon the terms and under the directions set out in the decree, and report to the court.

The plaintiffs excepted to the said judgment and appealed to this Court.

Small, MacLean & McMullan for plaintiffs.
W. C. Rodman for defendant.

WALKER, J., after stating the case: It has been settled by the authorities that when a mortgagee takes possession of the land conveyed to him by the mortgage he must account to the mortgagor for the "highest fair rent, and he becomes responsible for all such acts or omissions as would under the usual leases constitute claims on an ordinary tenant," because by his entry and possession he makes himself "tenant of the land," and it is but just and reasonable that he should be held liable for its rents and profits to the mortgagor. *Morrison v. McLeod,* 37 N. C., 108; *Hinson v. Smith,* 118 N. C., 503; *Gammon v. Johnson,* 127 N. C., 53; *Jackson v. Hall,* 84 N. C., 489. The mortgagee is trustee to secure the payment of his debt, and when the debt is paid he holds for the mortgagor. Whatever, therefore, he receives by virtue of his trust must go in satisfaction of his claim. But this conceded principle does not apply to the facts of this case, so as to charge the defendant, Rodman, with the rents and profits of the land mortgaged by Green & Hooker to Lawrence Hooker. The latter assigned the debt secured by the mortgage to Miles & Corey, and they assigned the (180)

same to Rodman to secure a debt of $500 due to him. Miles & Corey, before they assigned the mortgage to Rodman, had leased the land for five years from Green & Hooker, with an option to buy it, and the case shows that when they purchased the mortgage debt from Lawrence Hooker they were in possession of the land under the leases, and continued to hold as lessees until they assigned the debt and mortgage to Rodman. The court, by its judgment rendered at February Term, 1906, recognized them as tenants in possession under the contract of lease; and, indeed, in the second section of the case settled for this Court, which sets out the facts admitted by the parties, it is stated that Miles & Corey entered under the lease and continued in possession until the rents, which have accrued since 1 March, 1906, amounted to $1,600. At the time Miles & Corey assigned the mortgage debt to Rodman they had paid the rents then due. Rodman never took possession of the land. It is evident, from the facts thus stated, and which appear more fully in the record, that Miles & Corey purchased the note secured by the mortgage from Lawrence Hooker for the purpose of protecting their interests under the lease against this prior encumbrance, and it appears clearly that they never, while they held the note, asserted any right to the possession of the land by virtue of any interest they acquired under the mortgage, but only as lessees. They occupied the land after the purchase of the mortgage note, just as they had done before. We repeat that when Rodman received the mortgage note as collateral for the debt due by Miles & Corey he acquired all their interest under the mortgage by the assignment to him, and at that time the rents due by the lessees, Miles & Corey, had been paid. Rodman is not concluded by any judgment of the court or estopped thereby from setting up his claim to foreclose the mortgage, as all his rights were expressly excepted from the operation of the said orders and judgments and reserved to him without prejudice; nor is he charged with notice of any proceedings or of any facts which entitle the plaintiff to have the rents and profits of the land credited on the mortgage debt as against him,

(181) for at the time he received the debt secured by the mortgage as collateral the rents had been paid by Miles & Corey, and he, by virtue of the assignment of the debt so secured, had succeeded to all the rights of Miles & Corey thereunder.

It follows from this statement that the principle of law upon which the plaintiffs rely has no application to this case, and that Rodman is entitled to foreclose the mortgage by sale for the purpose of paying the amount due to him. Consequently there was no error in the ruling and judgment of the court upon the case and facts admitted therein.

Affirmed.

Cited: Owens v. Mfg. Co., 168 N. C., 400.

B. F. TYSON ET AL. v. B. B. JONES ET AL.

(Filed 24 February, 1909.)

Contracts to Convey Land—Written Instrument—Fraud—Parol Evidence.

False and fraudulent representations sufficient to void a written contract may be shown by parol as a defense in an action for damages alleged to have been sustained by its breach, as such does not tend to vary or contradict the writing, but to render the entire instrument void.

ACTION tried before *O. H. Allen, J.,* and a jury, at November Term, 1908, of PITT.

There was a verdict and judgment for defendants, and plaintiff appealed.

The following issues were submitted:

1. "Did the plaintiffs and the defendants enter into the agreement set out in the paper-writing alleged in the complaint?" Answer: "Yes, by consent."

2. "Did the defendants B. B. Jones and D. S. Moore fail and refuse to carry out said contract on their part?" Answer: "Yes, by consent."

3. "If so, was the execution of the contract sued on obtained by deceit, misrepresentation and fraud?" Answer: "Yes."

4. "If so, what amount are plaintiffs entitled to recover of the defendants in this action?" Answer: --------

5. "Are plaintiffs indebted to defendants? If so, what (182) amount?" Answer: "Nothing."

Jarvis & Blow for plaintiffs.
No counsel for defendants.

BROWN, J. The plaintiffs and defendants entered into a written contract, wherein the defendants contracted to purchase and the plaintiffs to sell a tract of land therein described, upon the terms therein expressed. The sum of $750 is agreed upon in the contract on stipulated damages in case of a breach of the contract, to recover which plaintiffs bring action.

The defendants aver that they were induced to enter into the contract by the deceit, misrepresentation and fraud of plaintiffs, in falsely representing, before the contract was executed, that the plaintiffs had the legal right to drain this land through that of Miss Emily Daniels, whereas plaintiffs knew they had no such right.

The motion to nonsuit, as well as the prayer for instruction, was properly denied, as there is sufficient evidence to go to the jury to support the allegations of the plaintiff embodied in the third issue.

The other exceptions of the plaintiff necessary to consider relate to the admissibility of the evidence tending to prove the allegation of fraud and deceit. The plaintiff contends that the introduction of such evidence contradicts the terms of the written contract.

The defendants do not seek to contradict or change the written words. They admit that the paper-writing contains the contract agreed upon, but they aver they were induced to enter into it by the fraud and deceit of plaintiffs, or one of them; that the representation was a material one; that it was false, and that they relied upon its truth. This evidence does not come within the principle laid down in *Walker v. Venters,* 148 N. C., 388, and authorities there cited, and is not offered for the purpose of changing the contract, but of avoiding it upon the ground of fraud.

The judgment is

Affirmed.

Cited: Unitype Co. v. Ashcraft, 155 N. C., 69; *Machine Co. v. McKay,* 161 N. C., 587.

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(183)

C. B. COLES & SONS CO. v. STANDARD LUMBER COMPANY.

(Filed 24 February, 1909.)

PLAINTIFF'S APPEAL.

1. Contracts, Executory—Interests Passed.

The trial judge properly held that the plaintiff was not entitled to recover possession of the lumber described in the complaint. The contract to sell was executory and no title to the lumber passed.

2. Contracts, Breach of—Occupation of Storage Yard—Measure of Damages—Speculative Damages.

For the wrongful failure to remove lumber from the yard of another, in violation of a contract, the damages recoverable, in the absence of a special agreement, should be confined to the value of the use and occupation of the yard—that is, a fair rental value. Profits on lumber which could have been sawed and placed on the yard, had the plaintiff removed his lumber, are too speculative and remote.

3. Same—Evidence.

It is necessary to a recovery of a fair rental value of a lumber yard, on which lumber had been left by a party to a contract in violation of his agreement to move it, that evidence of such value be introduced upon the trial; testimony of the use to which the yard could have been put would be relevant.

4. Contract, Breach of—Money Borrowed—Measure of Damages—Interest.

For the breach of a contract to advance money to one engaged in operating a sawmill the measure of damages is the extra expense incurred in securing the money, and such special damages as proximately resulted from the breach as were within the contemplation of the parties when the contract was made.

ACTION tried before *O. H. Allen, J.*, and a jury, at November Term, 1908, of CRAVEN.

Plaintiff, on 17 December, 1906, entered into a contract with defendant, the material parts whereof are:

"This agreement, made this 17 December, 1906, by and between C. I. DeBruhl and Milton Prescott, trading as the Standard Lumber Company (not incorporated), New Bern, N. C., parties of the first part, and C. B. Coles & Sons Co., a corporation duly created and existing under the laws of the State of New Jersey, Camden, N. J., party of the second part, witnesses: That the said party of the first part, in (184) consideration of the promises hereinafter made by the party of the second part, promises and agrees to and with said party of the second part that they will bargain, sell and deliver to said party of the second part the output of North Carolina pine lumber, not to exceed 100,000 feet per month, board measure, manufactured by said parties of the first part at their mill situated in New Bern, N. C., from the date of this agreement until 1 April, 1907; the same to be properly manufactured, kiln-dried and delivered to the barge rail at the wharf of the party of the first part at New Bern, N. C., at the following prices, subject to two per cent discount, and as further provided: . . . And the said party of the first part agrees that he will deliver to the said party of the second part 100,000 feet of the said lumber within thirty days from the date of this contract, and that he will, each thirty days during the existence of this contract, deliver to the aforesaid party of the second part 100,000 feet of the said lumber in accordance with the terms hereof; and the said party of the first part agrees to provide shelter for all the lumber herein contracted for, and store the said grades of lumber thereunder, so as to deliver all of the said lumber in good condition; and the said party of the first part agrees to sort out, pile separately and have the same loaded separately in the barge as follows: . . . And the party of the second part, in consideration of the premises, promises and agrees to and with the party of the first part that it will buy from the party of the first part all the lumber hereinbefore mentioned, and receive, measure and pay for the same in accordance with the prices, terms and conditions herein set out; and the said party of the second part agrees to advance to the said party of the first part the sum of $10 for each 1,000 feet, board measure, of the lumber of the grade of 3's and better, and the sum of $6 for each 1,000 feet,

board measure, of the lumber of the box grades, and shall be manufactured and stored and ready for delivery and shipment. It is mutually agreed by the parties hereto that the advances hereinbefore mentioned shall be made every two weeks, and all payments of advances shall be based on the estimate or measurement of the lumber by the party
(185) of the second part or its agent. It is further agreed that no advances are to be made each two weeks on any larger amount of lumber than 50,000 feet, and the balance of the purchase money shall be paid to the party of the first part by the party of the second part when the lumber shall have been delivered to the wharf of the party of the second part at Camden, N. J., and inspected by the said party of the second part."

Plaintiff, on 7 May, 1907, brought this action, alleging that, pursuant to the terms of this contract, it was the owner and entitled to the possession of certain lumber described in the complaint. At the institution of the action plaintiff obtained a requisition from the clerk for the immediate possession of the lumber, and defendant replevied. Defendant denied that plaintiff was the owner of the lumber, and, by way of counterclaim, alleged that plaintiff failed to perform its part of the contract, whereby it sustained damages, all of which is set out in full in the answer. Plaintiff replied to the counterclaim, denying each allegation thereof.

The following issues were submitted to the jury, to which they responded, as set out in the record:

1. "Is the plaintiff the owner and entitled to the possession of the property described in the complaint?" Answer: "No."

2. "Does the defendant wrongfully detain the possession of the same from the plaintiff?" Answer: _____.

3. "What was the value of the property at the time of the seizure?" Answer: "Two thousand dollars."

4. "Is the plaintiff indebted to the defendant upon counterclaim by reason of a breach of contract?" Answer: "Yes."

5. "If so, what is the defendant entitled to recover thereon?" Answer: "One thousand eight hundred and fifteen dollars and sixty-five cents."

6. "What amount, if any, has plaintiff advanced to defendant on account of unshipped lumber?" Answer: "Seven hundred and thirty-five dollars."

Judgment was rendered for defendant for the sum of $1,080.65, being the amount of damages assessed for breach of contract, less the amount advanced by plaintiff. Both parties, having noted exceptions, appealed.

(186) *Simmons, Ward & Allen for plaintiff.*

Moore & Dunn and W. D. McIver for defendant.

CONNOR, J., after stating the case: The controversy, in regard to plaintiff's right to recover the lumber on the yard, is dependent upon the construction of the contract and the conduct of plaintiff respecting its performance of the stipulation thereof. The evidence upon this last question was conflicting. The contract is executory, and until all of the stipulations contained in it were performed, or, at least, performance with readiness and ability tendered and refused, no title vested in plaintiff. These aspects of the case were fully explained to the jury by his Honor, followed by the instruction that if the defendant had cut, graded and set apart this lumber, and plaintiff had paid for it or stood ready to pay for it, and nothing was to be done but to take charge of it, and defendant refused to permit them to do so, they should answer the first issue in the affirmative. To this instruction plaintiff excepted.

We find no error in the instructions. They are in accordance with the principles and authorities announced in *Hughes v. Knott,* 138 N. C., 105. It is true that the contract, being in writing, was to be construed by the court, but the plaintiff's right to demand the possession of the lumber was dependent upon the establishment of its compliance with the terms of the contract, and this was properly submitted to the jury. The first issue having been answered adversely to plaintiff, the second and third were immaterial. This brings us to an examination of plaintiff's exceptions to his Honor's instructions upon the character and measure of damages which defendant was entitled to recover.

Defendant claimed that it was entitled to deliver and plaintiff compelled to receive 100,000 feet a month from the date of the agreement to 1 April, 1907, and that it had a profit of $3 per thousand feet in the lumber. It appears that 61,098 feet were delivered, and plaintiff advanced on account thereof $700, and paid for insurance $35; that by reason of plaintiff's failure to accept and remove the quantity of lumber for which it had contracted, its yards were blocked, whereby it sustained damage; that by reason of plaintiff's failure to make advancements, as it had contracted to do, it was unable to operate its mill, and sustained a loss of profits on lumber, which it would have sold (187) if plaintiff had complied with its contract in respect to the advancement. Defendant further claimed that by reason of the failure of plaintiff to comply with its contract it was unable to meet its obligations, resulting in a destruction of its business and the sacrifice of its property, and for this it claimed a large amount of damages. His Honor excluded evidence tending to establish the last element of damage, and instructed the jury that they could not award any damage on that account. In regard to the other elements of damage he instructed the jury: "The defendant would be entitled to recover from the plaintiff such damages for any breach of the contract on the part of plaintiff as

may have fairly and reasonably arisen, according to the usual course of things, and for such damages as were caused by the breach of the contract, as are incident to the acts or omissions thereof, and which may have reasonably been assumed to have been in contemplation of the parties at the time of the making of the contract. The defendant would be entitled to recover such amount as it has lost by reason of blocking his yard, if you find from the evidence it was blocked; by reason of his not being able to secure the advances contemplated by the contract, if you find he did not receive the advances, and such profits as he would have made from operating the mill, if he was forced to shut down by the failure of the plaintiff to make the advances as called for in the contract. If you find that defendant had lumber on his yard, and that by reason of the plaintiff not taking it off, when he could have reasonably done so, defendant suffered loss by reason of that, you will give him whatever you find to be a reasonable allowance." To these instructions plaintiff excepted.

It will be convenient to dispose of the several elements of damage in the same order as given by his Honor. He told the jury that defendant was entitled to damages by reason of his yard being "blocked." It appears from the testimony that plaintiff was under a contract obligation to take 100,000 feet of lumber per month. This lumber was to be piled on defendant's yard until delivered to plaintiff or loaded on barge or vessel. If plaintiff failed to provide means for removing it accord-
(188) ing to its contract, it would seem, in the absence of any special agreement to the contrary, that for failure to do so it would be liable for the use and occupation of so much of the yard as was occupied by the lumber after its default. For any special or consequential damage no liability would attach itself by special agreement. We find no evidence showing the rental value of the yard. The suggestion that if the yard had been relieved of the lumber which plaintiff was to take, the defendant could or would have sawed other lumber, piled it on the yard and sold it at a profit, is too speculative and remote. Too many contingencies are involved to make it a safe measure or element of damage. If one is under contract obligation to remove lumber from a yard at a given time, and fails to do so, in the absence of any special circumstance entering into the contract when made, he is liable for the use and occupation—that is, a fair rental value of the yard. In ascertaining its rental value, evidence of the manner in which it was used or capable of being used would be competent. We think that the instruction was erroneous, for two reasons: There was no evidence of the rental value of the yard to guide the jury. The jury may, in the light of the testimony admitted by the court, have well understood that they were to take into consideration the profits which defendant may have made by

piling lumber on the yard and selling it. This was entirely speculative. His Honor instructed the jury that defendant was entitled to recover damages by reason of his not being able to secure advances. The difficulty which is encountered in sustaining this instruction is that the only evidence of any loss to defendant in this respect was that it was unable to go on with its operations, and was compelled to close out its business, sacrificing its property. This element of damage is too remote and entirely speculative. Treated in the most favorable light for defendant, the plaintiff's obligation was to loan it money, the time and amount to be measured by the delivery and value of the lumber. The measure of damage for a failure in this respect would be any extra expense to which defendant was put to obtain the money. The failure to perform an agreement to loan a man money, unless some special and consequential damages were shown to be in contemplation of the (189) parties when the contract was made, would not subject him to speculative damage. In *Green v. Goddard,* 50 Mass., 212, defendants failed to meet certain bills drawn on them which they were under obligation to pay. Plaintiffs alleged that by reason of defendants' default they sustained loss in the business operations, etc. *Hubbard, J.,* discussing this claim, says: "In regard to the claim for losses alleged by the plaintiffs to have been suffered by them in consequence of the withholding of advances by Baring Bros. & Co. on the goods consigned, . . . we think the claim can not be sustained. The plaintiffs are entitled to recover for the loss directly and necessarily incurred by them in providing for the payment of these bills; but they can not claim compensation for the loss of those incidental benefits which they might have derived from the use of their money. Speculative damages (sometimes so called) are not favored in law, and the actual damage arising out of breach of contract for the nonpayment of money is usually measured by the interest of money. . . . In the use of the money, instead of realizing great profits, they might have encountered difficulties and sustained injuries unforeseen at the time, and have suffered like thousands of others. Theirs is not a loss, in the just sense of the term, but the deprivation of an opportunity for making money, which might have proved beneficial or might have been ruinous, and it is of that uncertain character which is not to be weighed in the even balances of the law nor to be ascertained by well-established rules of computation among merchants. . . . To sustain such a claim would be to sanction principles not supported by any decision with which we are acquainted, and instead of making persons sustain the direct loss arising from their neglect of engagement it would be to expose them to hazards never contemplated, and to affect them by uncertain speculations in the profits in which they could have no participation, while at the same time they would be insurers of such

profits to their creditors." It may be that a failure to perform an agreement to loan or advance money for a specific purpose, known to the defendant and in view of the parties to the contract, the profit to be made being fixed, would subject the defendant to damage for such loss.
(190) Defendant's claim does not come within such a class. To hold the plaintiff responsible for speculative damages in this case would be a dangerous innovation upon the rule of reasonable certainty and contemplation.

His Honor further told the jury that "If defendant had lumber on his yard, and by reason of plaintiff not taking it off when he could have reasonably done so, and defendant suffered loss by reason of that, you will give him whatever you find to be a reasonable allowance." If defendant, as we have said, is entitled to recover for the use and occupation of his yard by reason of plaintiff's failure to remove according to his contract, he can not recover double damages by charging plaintiff with possible losses sustained by reason of its failure to take the lumber away. The only amount which it would seem he could sustain by plaintiff's failure to remove the lumber was the value of the use of the yard. Again, if liable at all, some measure of damages should have been given the jury for their guidance. It should not have been left to them to give whatever "they found to be a reasonable allowance." For a breach of a business contract, in the absence of any element entitling the plaintiff to vindictive or exemplary damages, he is entitled to compensation for the loss sustained by the breach. The measure or rule by which such compensation is fixed by the jury is certain and to be given them by the court as their guide. The law seeks to confine the damages to such as reasonably flow from the breach and were in the contemplation of the parties. The recovery of profits, while in some cases allowed, is confined to "such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." Hale on Damages, 73, citing *Griffin v. Colver,* 16 N. Y., 489. Eliminating all other elements of damage, we have this case: Plaintiff contracted to take from defendant, at a stipulated price, subject to inspection, etc., 100,000 feet of lumber a month. The lumber was to be cut, graded and piled on defendant's yard. The jury find that plaintiff failed to comply with his contract. If defendant had the lumber on its yard, ready for delivery, and plaintiff failed to take it, he is
(191) liable for the difference between the contract price and what it cost defendant to cut and place the lumber on the yard—that is, the profit which defendant would have made on the lumber, subject to a reduction of such profit, if any, as defendant made by selling the

lumber to some other person. This is the measure of defendant's loss and plaintiff's liability. If by reason of plaintiff's failure to take the lumber according to contract the yard was "blocked," plaintiff is liable for the value of the use and occupation of the yard. In ascertaining such value, testimony of the use to which defendant could have put it, etc., is relevant. The other elements of damage are too remote and uncertain. The testimony sent up is not very full, and we are unable to do more than prescribe the general principles upon which the damage should be assessed. It appears that some three months or more intervened between the date of the contract and the period fixed for its termination. The defendant says that the profit on the lumber was from $3 to $3.35 per thousand feet. Some 61,000 feet were delivered and $735 advanced on the undelivered lumber. It would seem an easy matter to calculate the damages. In no aspect of the testimony does it appear that by any measure of damages could the jury have correctly arrived at the sum of $1,815. All in excess of the profits on the lumber which plaintiff failed to take is speculative; that is, we find nothing in the evidence to guide the jury to the conclusion that defendant lost that sum by reason of damages reasonably within the contemplation of the parties, etc. For the reasons given, there must be a new trial on the fifth issue.

New trial.

DEFENDANT'S APPEAL.

Contract, Breach of—Measure of Damages—Contemplation of Parties.

The general rule in regard to damages for breach of a contract confining them to such as proximately resulted from such breach, and were within the contemplation of the parties, was applied by the Court.

CONNOR, J. Defendant tendered the following issue: "What (192) damage, if any, has defendant sustained by reason of the loss of its business and sacrifice of its property by reason of the breach of the contract?" This was refused, and defendant excepted. Many other exceptions were noted to the rejection of evidence bearing upon this contention. For the reasons given in plaintiff's appeal, we concur with his Honor. It may be well that defendant was crippled in his business and ultimately compelled to close it out because plaintiff did not take the lumber as he contracted to do, but it would be impossible to carry on the business affairs of life if, in the absence of any stipulation for indemnity against such remote results, a breach of contract entailed such liabilities. How is it possible for a court or jury to know, or by any competent testimony to ascertain, whether a continuation of the business would have brought profit to defendant, or the amount of such profit? The changes and

chances of business and industrial life are too uncertain to form the basis of verdicts. To many sanguine minds fortunes are foreseen in all enterprises. Unfortunately, while the general result of commercial and industrial enterprises add to the wealth of the State, experience and observation teach us that a large proportion, if not a majority, of individuals go down in the struggle. Whether the defendant would have made money by continuing his business is uncertain; how much he would have made is beyond any human power to conjecture. To hold plaintiff an insurer of success, and the extent of it in dollars and cents, would be to impose liabilities never contemplated and render business more hazardous than it now is.

Without further pursuing an interesting but elusive subject, we have no hesitation in affirming his Honor's ruling.

Affirmed.

Cited: Elks v. Ins. Co., 159 N. C., 628.

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(193)

SADIE B. HAMILTON v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 24 February, 1909.)

1. **Damages—Timber—Tax Lists—Evidence.**

The tax list, showing the assessed value of land for taxation, is not competent evidence in an action for damages for burning the timber. The revenue laws in this State make it the duty of the assessors to place a valuation on land, the owner not being required or permitted to do so.

2. **Damages—Value—Opinion of Witnesses—Instructions.**

Where there is conflicting evidence as to the amount of damages caused to land by defendant's negligence, in an action involving that question, there is no error in an instruction that the jury should not be controlled in their verdict by the opinion of the witnesses, but that they should apply their own knowledge and common sense in the light of their experience, consider the evidence fully and determine the amount of the damages.

ACTION tried before *Cooke, J.,* and a jury, at Fall Term, 1908, of HALIFAX.

Plaintiff sues to recover damages for burning wood on her land by the negligence of defendant's employees. The cause of action was not denied. The exceptions upon which defendant relies relate to the amount of damages sustained by plaintiff. There was a verdict for $450. Judgment; appeal.

George C. Green for plaintiff.
Murray Allen and R. C. Dunn for defendant.

CONNOR, J. For the purpose of showing the extent of her damage, plaintiff introduced Guilford Gee, who testified that he was her agent; that the land was damaged $8 per acre by the fire. He further testified that he, as agent for plaintiff, listed the land for taxation. Defendant proposed to ask witness at what valuation the land was listed for the year 1907, the fire having burned the wood during the month of December of that year. Plaintiff objected. The objection was sustained, and defendant excepted. The same question was asked witness as to 1908 and excluded. Defendant offered to show by other witnesses the value at which the land was assessed for taxation and to intro- (194) duce the tax lists, all of which was excluded. Defendant excepted.

Under our revenue law the owner of land does not, in listing it for taxation, fix any value upon it. This is done by the assessors, "either from actual view or from the best information that they can practically obtain, according to its true valuation in money." Revisal, sec. 5203. We can not see, therefore, how the fact that the witness "listed" the land for taxation has any tendency to show its value or his opinion in that respect. The valuation is, as said by the Court in *Ridley v. R. R.*, 124 N. C., 37, *res inter alios acta. R. R. v. Land Co.*, 137 N. C., 330. We are content to rest our decision upon what is said in these cases. The objection is not that tax lists are not public records, but in the valuation of the land for taxation the owner is not consulted—he takes no part. The valuation is but the opinion, upon oath, it is true, of these assessors, for the purpose of taxation. It is well understood that it is the custom of the assessors to fix a uniform rather than an actual valuation. In any aspect of the question, we concur with his Honor's ruling, both upon authority and the reason of the thing.

Exception is taken to his Honor's saying to the jury: "The opinion of witnesses is not controlling on you. You are to apply your own knowledge and common sense, so far as affected by your experience." The estimates placed by the witnesses varied from $30 to $800. How was the jury to arrive at a verdict in this condition of the evidence—that is, weigh and value the opinions of the witnesses—except by using their common sense and experience? It is because of the capacity of men of experience, intelligence and common sense to weigh testimony and properly value it that they are called upon the jury. It is this which gives to this "ancient mode of trial" its value in the decision of issues of fact. His Honor, however, proceeded to say to them: "You are to consider all of the evidence fully, and determine *from it* how much damage plaintiff has sustained by reason of these fires; that is the question for you." The

charge is in strict accord with principle and the practice in our courts. The exception is without merit. We find no error, and the judgment must be

Affirmed.

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(195)

T. T. GOODING v. JOHN P. MOORE AND JOHN P. MOORE, JR., DOING BUSINESS AS THE SOUTHWARD LUMBER COMPANY.

(Filed 4 March, 1909.)

1. Contracts, Oral—Subsequent Writing—Convenience—No Condition Precedent—Binding Effect.

When the parties to an oral contract contemplate a subsequent reducing it to writing, as a matter of convenience and prudence and not as a condition precedent, it is binding upon them, though their intent to formally express the agreement in writing was never effectuated.

2. Evidence—Issues, Withdrawal of—Effect—Nonsuit—Damages.

Upon the withdrawal of an issue from the jury by the trial judge upon the question of whether the defendant was answerable in damages for refusing to permit the plaintiff to cut certain timber, on the ground that such were not recoverable under the contract sued on, the effect is that of an order of nonsuit upon the evidence, and it is erroneous when such damages may be recoverable and there is any competent evidence making for plaintiff's claim.

3. Principal and Agent—Contracts, Oral—Part Performance—Subsequent Writing—Signature Refused—Material Variation—Parol Evidence.

When there is evidence tending to show a parol agreement between plaintiff and defendant's agent for the former to cut all defendant's timber upon a certain tract of land, and thereafter, at the agent's request, the plaintiff saw the owner, who agreed to send to plaintiff a written contract for his signature, containing the agreement entered into by parol, it it competent for plaintiff to show that he refused to sign the contract when presented, for the reason that, in the material particular as to the quantity of timber to be cut, and other respects, it differed with the parol agreement made between them.

4. Principal and Agent—General Agent—Secret Limitation—Apparent Authority.

One dealing with an agent within the apparent scope of his authority to bind his principal is not bound by any secret limitation on the agent's authority not made known to him; and a contract for the cutting of timber, made by a general agent with authority to buy timber interests with plants for the purpose of cutting it, and who had general management of his principal's business at the location in question at the time, is made within the apparent scope of the agent's authority.

(196) ACTION tried before *O. H. Allen, J.*, and a jury, at November Term, 1908, of CRAVEN.

The plaintiff declared on three causes of action:

For first cause of action plaintiff alleged that defendants had entered into a valid and binding contract for plaintiff to cut, log and deliver at defendants' mill the standing timber growing on a certain tract of land, known as the Nixon tract, amounting to about two million feet, and at a contract price of $3.50 per thousand feet, with certain incidental stipulations with regard to advancements, time of payment, etc.; that plaintiff had entered upon the performance of the contract, had delivered 1,040 feet, for which plaintiff had been paid; had cut and delivered about 350,000 feet, on which there was a balance due from defendants of about $600, and that defendants had then wrongfully broken the contract, refusing to allow plaintiff to continue and complete the same, to plaintiff's damage about $4,000.

Second cause of action was for injuries caused by reason of defendants' negligence in failing to supply proper and adequate equipment, according to the stipulations of the contract.

Third cause of action was on a *quantum meruit* for the use of defendants' stock, etc., in work not included or covered by the contract.

Defendants entered a general denial to the plaintiff's second and third causes of action, and on issues submitted there was a verdict for defendants; and as to the first cause of action, denied that it had ever entered into any contract to cut the entire body of timber on the Nixon tract, as claimed by plaintiff, but averred that the timber cut and delivered by plaintiff was under a special contract, restricted to the service rendered, and for which plaintiff had been paid in full.

On the first cause of action the court held, in effect, that there was no evidence tending to show a valid contract between plaintiff and defendants for cutting the entire timber on the Nixon tract, as claimed by plaintiff, and withdrew the issue addressed to that question from the jury, and plaintiff excepted. The court then submitted an issue as to the balance due for the service rendered in cutting and delivering the timber received by defendants, to wit, the 350,000 feet, and the jury found such a balance due and unpaid to be $169.30. Plaintiff (197) moved for a new trial, for error in the ruling of the court as to the first issue. Motion denied, and plaintiff excepted. Judgment on the verdict for $169.30, and plaintiff excepted and appealed.

D. L. Ward for plaintiff.
Simmons, Ward & Allen for defendants.

HOKE, J., after stating the case: We find no error to plaintiff's prejudice in the disposition of the second and third causes of action, and the judgment is in that respect affirmed; but we do not concur in the ruling

of the court as to the first cause of action, and think the issues and all of them framed to present that phase of plaintiff's demand should be submitted to another jury.

While the evidence shows that it was contemplated by both plaintiff and defendant that the contract between them as to the timber on the Nixon tract should be reduced to writing, there was testimony on the part of the plaintiff tending to show that such a requirement was not a condition precedent to the contractual relation, but was only a formality to be carried out from convenience and prudence and after the contract had been fully made between them; and if this view should prevail the parties would be bound, though their intent to formally express their agreement in writing was never carried out. *Teal v. Templeton,* 149 N. C., 32. Thus the plaintiff, testifying in his own behalf, stated, among other things, that a Mr. Pitts, professing to represent the defendants in the transaction, made a definite contract with plaintiff to cut the timber, and he went to work under its terms; that after he had been at work for nearly a month this Mr. Pitts asked him to go down to Wilmington and confer with the elder Mr. Moore, one of the owners of the plant, and that plaintiff went to Wilmington, and there, after conference, "the contract was written out in pencil and witness agreed to it. I did not read it, but it was read to me. He (defendant) was to have it drawn up and sent to me to sign." This witness further testified that when the
(198) copies were made and sent to him they differed in various and essential particulars from the contract agreed upon, and he declined to sign it, etc., and defendant stopped witness from cutting.

Again, there was testimony on the part of plaintiff tending to show that this Mr. Pitts was a general agent for defendant, not only in purchasing the plant and the timber in question, but in managing their business at this place, and that he made the contract with plaintiff, as claimed by him, within the scope of this agent's apparent authority, and if this view should be accepted the contract made by Pitts would bind the defendants, notwithstanding it exceeded the authority actually given him by defendants, and though he may have violated their instructions in making any contract by parol, unless it should appear that the limitation suggested on the agent's apparent authority was made known to plaintiff before a definite contract was made with him. Tiffany on Agency, 189; Clark on Contracts, 513. In this citation from Clark it is said: "The acts of a general agent, known as such, govern his principal in all matters coming within the proper and legitimate scope of the business to be transacted, although he violates by these acts his private instructions, for his authority can not be limited by any private instruction unless known to the person dealing with him."

And in Tiffany, *supra,* the same doctrine is thus stated: "The liability

of the principal for the acts of his agent within the scope of his 'apparent' authority, as the term is here used, must rest, therefore, not upon a technical estoppel, but upon a broader doctrine of agency, that a principal is liable for acts of his agent which are within the ordinary and usual scope of the business he is employed to transact, notwithstanding undisclosed limitations upon that apparent authority—a doctrine which, as we shall see, applies even when the very existence of the agency is undisclosed. It is true that in many cases all the elements of a technical estoppel may exist, but it is by no means necessary that they do exist, to charge the principal, within this doctrine."

The principal issue in the first cause of action having been withdrawn from the jury, making the ruling of the court, in effect, an order of nonsuit, we have only adverted to evidence which makes in support of plaintiff's claim, and it may be not improper to note that there is much testimony on the part of defendants contradicting that of (199) plaintiff and tending to show that plaintiff was fully aware of the limitations and restrictions on the authority of the witness Pitts, and that in fact no contract to cut and log this entire timber on the Nixon tract was ever made with plaintiff, either by Pitts or defendants, and that plaintiff fully understood this; but we think these questions at issue should be submitted to a jury for decision, and to that end a new trial is ordered on all the issues relevant to the first cause of action or any part of it.

New trial.

Cited: Williams v. R. R., 155 N. C., 271; *Stephens v. Lumber Co.*, 160 N. C., 110; *Newberry v. R. R., ibid.*, 159; *Powell v. Lumber Co.*, 168 N. C., 635; *Ferguson v. Amusement Co.*, 171 N. C., 666; *Chesson v. Cedar Works*, 172 N. C., 34.

MOLLIE M. WILLIS v. J. G. WHITE & CO.

(Filed 4 March, 1909.)

1. **Railroads—Construction—Improper Drainage—Independent Contractor—Negligence.**

When one who has contracted to construct a roadbed and track for a railroad company according to plans furnished by the civil engineer of the company enters upon the lands of the owner for that purpose, both he and the railroad company are responsible in damages for his negligent failure to use reasonable efforts to protect the land and crops growing thereon from injury caused by the construction.

2. **Railroads—Construction—Improper Drainage—Negligence—Independent Contractor—Completion of Work—Liability.**

An independent contractor who has constructed a roadbed and track for a railroad company on its right of way in accordance with the plans and specifications of the civil engineer of the company, is not liable to the owner of the land for damages from improper drainage caused by an error of the engineer in fixing the size of the drainpipe, which accrued after the completion of the work and delivery to the railroad company.

3. **Same—Permanent Damages.**

Permanent damages to land can not be recovered of an independent contractor who has constructed a roadbed and road for a railroad company on its easement over the lands of another according to the plans and specifications of the company's civil engineer, his authority ceasing thereon when the work is turned over to and accepted by the company.

4. **Married Women—Damages to Land—Joinder of Husband—Parties.**

A married woman may maintain an action without joining her husband to recover damages to her land caused by the improper construction of a roadbed and road on a railroad company's right of way thereon.

(200) ACTION tried before *O. H. Allen, J.,* and a jury, at October Term, 1908, of CRAVEN.

The testimony discloses the following case: Plaintiff, a *feme covert,* being the owner of a tract of land described in the complaint, conveyed to the Norfolk and Southern Railway Company a right of way over said land upon which to construct a roadbed and track for its use as a common carrier. The engineers of the railroad company made a plan containing specifications for the construction of the roadbed, drainpipes, etc. The defendant contracted with the railroad company to construct the roadbed, track, etc., in accordance with the plans and specifications. The right of way ran through plaintiff's field, which was drained by a ditch crossed by the roadbed and track. The engineers prescribed the size of the drainpipe to be placed under the roadbed. The defendant built according to the plans and specifications. The engineer says: "I tried to make every provision for the draining of the land and, in my judgment, put in sufficient pipes to drain it." The work was done by defendant between 15 June, 1906, and 1 January, 1907.

Plaintiff alleges: (1) That defendant's employees removed the fence at the point of entrance to the land and failed to construct cattle guards and provide means for keeping the cattle off the land upon which a crop was growing; that by reason of defendant's negligence in this respect cattle went upon the land and injured the crop. (2) That defendant, by its negligence in the construction of the road, stopped up the ditches on the land of plaintiff, and by reason thereof "it is now flooded when it rains, on account of the drains being stopped up and cut off," etc. that the land is "sogged and soured" and its fertility destroyed; that the injury is permanent.

Defendant denied the material allegations of the complaint, and set up as a bar to plaintiff's action a release by plaintiff's tenant for all claim of damages to the crop.

His Honor submitted the following issues:

1. "Was the plaintiff's crop damaged by defendant's negli- (201) gence?

2. "What damage is plaintiff entitled to recover for crops?

3. "Was plaintiff's land permanently damaged by defendant's negligence?

4. "What sum is plaintiff entitled to recover for permanent injury to her land?"

There was evidence tending to show negligence of defendant in failing to protect the growing crop on the land while constructing the road, and its injury by reason of cattle going upon it. The jury found the issue in the affirmative and assessed the damages at $125. Upon the third issue there was evidence that the land was injured by reason of the defective drainage. One witness says: "The water wants to cross the railroad, and it can't; there is no way for it to go under the track." The evidence noted was all introduced by plaintiff. Defendant moved for judgment of nonsuit. Motion denied. Defendant excepted.

His Honor charged the jury upon the third issue: "By having sold the defendant a right of way through her land, that carried with it the right to erect the railroad over her land, but in doing so the parties constructing it are required to use every reasonable means of protecting the land through which the railroad is constructed, and if the parties constructing it negligently fail to use such means as were reasonable and proper for protecting the land it would be held liable in damages. You will consider the evidence. Was the land flooded, and if so, could that have been prevented by the use of ordinary care on the part of the defendant in constructing the road? Could they have made arrangements to have taken off that water by the exercise of reasonable care?" To this instruction defendant excepted. His Honor further told the jury that if they found the issue in the affirmative the measure of damages would be the difference in the value of the land with the road constructed as it now is and the value of the land had the road been skillfully constructed. Defendant excepted. Verdict and judgment for $325 permanent damages. Defendant appealed.

R. A. Nunn for plaintiff. (202)
Moore & Dunn for defendant.

CONNOR, J. We concur with his Honor's view in regard to the measure of duty which the railroad company owed to the plaintiff in con-

structing its roadbed and track over her land. We further concur with him in the opinion that when defendant contractor entered upon the land for the purpose of constructing the roadbed and track, pursuant to the plans and specifications made by the engineers, it came under a legal liability to use all reasonable efforts to protect plaintiff's land and the crops growing thereupon from damage, and for negligent failure to meet this standard of duty both the railroad and defendant are liable. There was ample evidence to sustain the plaintiff's allegation and the verdict of the jury in this respect. The defendant's motion for judgment of nonsuit, therefore, was properly denied.

The questions presented upon defendant's exceptions pointed to the third issue are much more serious. We do not find any evidence of negligence on the part of defendant in performing the work, constructing the roadbed, in accordance with the plans and specifications furnished to it by the company's engineer. The only evidence upon this phase of the case comes from plaintiff's witness, Colvin, who says that he was the engineer. "White & Co. had nothing to do with the plan and diagram; they had to build the railroad as I directed. I was in charge of that section and I represented the railroad company; they built this according to the lines I laid out. I put the size and position of the pipes on the map, and they put it in according to that. White & Co. had no authority over me. If there is any defect in the ditches I should say it was due to the plans of the railroad. They carried out the general plans as I made them." It is apparent, therefore, upon plaintiff's evidence—and there is none to the contrary—that whatever permanent damage plaintiff's land sustained is due to the mistake of the engineer in fixing the size of the drainpipe. It is alleged in the complaint that defendant began work in June, 1906, and concluded 1 January, 1907. It is manifest that for all damage sustained by injury to the crop of 1906 plaintiff has recovered in this action on the first and second issues. It is in evidence

(203) that plaintiff sued the railroad company in another action for "damage and injury to crops growing on the land," and her tenant recovered pay from defendant for his interest in the crops of 1906. It is clear that full compensation has been recovered for all damage sustained prior to the institution of this action 29 May, 1907. Is defendant, an independent contractor, liable for permanent damage to the land by reason of the mistake of the engineer of the railroad company in fixing the size of the drain? It was the absolute duty of the company to provide a sufficient drain through its roadbed and thereby avoid ponding water upon plaintiff's land. There is no question of negligence involved. The principle controlling the liability of the railroad is laid down by *Shepherd, C. J.*, in *Staton v. R. R.*, 111 N. C., 278. Applied to this case, the railroad was entitled to construct its roadbed

across plaintiff's land, but in doing so was not entitled to close up a ditch draining the land. It was under an absolute duty to provide means sufficient to permit the water to flow under or through the roadbed, as it did when the right of way was granted. For a failure to make such provision it was liable to an action when substantial damage was sustained —that is, the cause of action accrued from that time, and not from the time the roadbed was constructed. *Staton v. R. R.*, 147 N. C., 428; *Ridley v. R. R.*, 118 N. C., 996. The cause of action, therefore, is not for a trespass committed in building the road, but for injury caused by maintaining a nuisance whereby plaintiff's land is "sogged and soured." For this the plaintiff may, as against the railroad company, recover in one action permanent damages, for the reason that the structure is permanent. The road, upon paying the judgment, acquires an easement to maintain its roadbed and track for the reasons set forth in *Ridley v. R. R., supra,* and many others, including *Beasley v. R. R.*, 147 N. C., 362; Rev., sec. 394. If defendant be liable at all for constructing the roadbed according to the plans and specifications furnished by the railroad company's engineers, it certainly cannot be so for any other damage than accrued prior to the completion of the work and delivery to the owner. There is much doubt, whether, in the absence of any negligence in construction, a builder or contractor is liable to third parties for damages caused by mistake in the architect or engineer. In *Pearson v. Zable,* 78 Ky., 168, a municipal corporation prescribed (204) the plan for making street improvement, and employed defendants to perform the work, which resulted, by reason of the defective plan, in injury to an owner of adjoining lots. The court held that the town was liable, but, in respect to the contractor, said: "It is not alleged that the appellants did not grade the street in all respects as required by the ordinance and contracts, and we must therefore assume that they did. What they did having been done under authority of law, they are not responsible for injury resulting to the appellee in consequence of the failure to provide an outlet for the water accumulating in the street, or for the consequences resulting from it. It was not their duty, but the duty of the city, to provide plans for the work and to guard against unecessary injury to the property." The distinction between liability for negligent construction and for injuries resulting from errors of the engineers is stated by 16 A. & E. Enc., 208. The railroad company is not liable for injuries caused to persons or property by the wrongful act of the contractor "for failure to provide drains in constructing the railroad, whereby injuries result before the road is turned over to the railroad company. . . . An independent contractor is not liable, as a general rule, for injuries to a third person accruing after his completion of the work and its acceptance by the employer." There are exceptions to

the general rule, but the present case does not come within them. *Curtin v. Somersett,* 140 Penn. St., 70; 23 Am. St., 220. It is manifest that upon the evidence in this case the only damage sustained by the plaintiff is caused by the failure of the engineers to provide for a drain of sufficient size. There is, so far as we can perceive, no evidence that the land was "sogged and soured" at the time the road was completed and turned over to the company. No cause of action, therefore, accrued against the defendant, because there was no trespass on her property and no substantial injury sustained at that time. For damages resulting thereafter the company was liable for maintaining a nuisance resulting in injury. Under the common-law system of procedure the plaintiff's action would be trespass on the case and not *quære clausum*
(205) *frigit.*

Again, if defendant was liable at all, the damages could be assessed only to the time of the trial. The reasons upon which permanent damages are allowed to be assessed against a railroad company, or any other corporation having the right of eminent domain, do not apply to the defendant. It can acquire no easement or right to flood plaintiff's land or to continue the obstruction to the flow of the water, nor has it any right or power to go upon the company's roadbed and enlarge the drain. Its connection with the property came to an end when the work was completed. Its wrongful act, if wrongful at all, was in constructing the roadbed with an insufficient drain. It has no power to maintain or abate the nuisance. For injuries sustained by continuing the conditions injurious to plaintiff the railroad company alone is liable. If a contractor who constructed a building on the land of another according to plans and specifications is to be held liable to all who may come into the house, or all adjoining landowners, for injuries accruing after the completion of the building and its acceptance by the owner, as said by *Paxson, C. J.,* in *Curtin v. Somersett, supra,* "it would be difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions." We incline very strongly to the opinion that if a motion had been made by defendant for judgment of nonsuit on plaintiff's second cause of action it should have been allowed. The testimony sent up is not very full, and we direct a new trial upon the third and fourth issues.

We concur with his Honor's ruling in regard to the right of the *feme* plaintiff to maintain the action without joining her husband. Revisal, sec. 408. We also concur with his ruling in regard to the effect of the other actions brought by the tenant and the plaintiff.

The appellant will pay costs of this Court, exclusive of printing.

Partial new trial.

(206)

M. E. COZAD AND H. O. COZAD v. MCADEN ET AL.

(Filed 4 March, 1909.)

Deeds and Conveyances—Probate—"Due Form"—Adjudged to be Correct.

When a deed has been acknowledged before an officer authorized to take it, and it appears that the probate was in fact in due form and was presented for probate to the resident clerk, who examined it and adjudged it to be correct, it is a valid probate, though the clerk did not in so many words certify that it was in due form, and its exclusion from evidence on the ground of defective probate, when otherwise competent, is erroneous.

ACTION brought to remove a cloud upon plaintiff's title, heard before *Guion, J.*, and a jury, at March Term, 1908, of GRAHAM.

Plaintiffs, in developing their own title, offered in evidence two deeds covering the land in question, one from W. H. Herbert and wife to Benjamin P. Hineman, dated 1 February, 1867, and recorded in Graham County, 3 September, 1906; the second deed from Benjamin P. Hineman and wife to R. H. Stephenson, dated March, 1868, and registered in Graham County 17 April, 1893. Objection was made to the introduction of these deeds, for that same had been registered without proper or sufficient probate. The objection was sustained, and in deference to this ruling the plaintiffs, having duly excepted, submitted to a nonsuit and appealed. The case having been heard on appeal, this Court sustained the ruling of the trial court, the opinion being reported in 148 N. C., 10. A petition to rehear the cause having been formally allowed, the case is again before us on that order.

Zebulon Weaver, F. S. Johnson and T. A. Morphew for plaintiffs.

Dillard & Bell, Merrick & Barnard and Tillett & Guthrie for defendants.

PER CURIAM: The probate to which objection was taken and on which each of the deeds had been registered, was as follows:

"Acknowledgment by the grantors having been duly made in proper form before Samuel S. Carpenter, a commissioner of affidavits for the State of North Carolina, in Ohio, and annexed and certi- (207) fied, was presented to the Clerk of the Superior Court of Graham County, N. C., and said officer made and entered on each of said deeds the following order:

"NORTH CAROLINA—Graham County.

"The foregoing certificate of Samuel Carpenter, a commissioner of deeds for North Carolina, in Ohio, is adjudged to be correct. Let the deed and this certificate be registered. "S. A. CARPENTER,

"17 April, 1893. *Clerk of Superior Court.*"

And the law affecting the validity of a probate is contained in The Code of 1883, ch. 271.

Construing the sections of the statute which control the question, and those of kindred significance, our Court has heretofore held in several cases that the judgment of the Clerk of the Superior Court of Graham County, made and entered in reference to these papers, is a proper and sufficient compliance with the requirements of the statute and constitute a valid probate, authorizing registration. Thus, in section 1246, subsec. 2, being the section applicable, "When the grantor," etc., "resides in the State, but not in the county, where the land is situate," the subsection provides for an acknowledgment before a judge of the Superior Court or Supreme Court, or before a clerk of the Superior Court, Supreme Court, notary, etc., "where the grantor or subscribing witness resides." And, further, "and the clerk of the Superior Court of the county where the land lies, upon the exhibition to him of such deed," etc., "together with the certificate of acknowledgment, shall adjudge said deed," etc., "to be duly acknowledged and proved, in the same manner as if taken and made before him," etc.

In *Devereux v. McMahon,* 102 N. C., 284-288, the clerk of the court where the land lay, on the certificate, adjudged as follows: "The foregoing certificate of John T. Morgan, Clerk of the Superior Court of Nash County, is adjudged to be correct. Let the instrument and the certificate be registered." And the Court held this to be a compliance with the above-stated requirement of the subsection. *Merrimon, J.,* delivering the opinion, said: "His order certainly refers to and is
(208) based upon the certificate annexed to the deed, and it 'is adjudged to be correct'—that is, that the proof is taken correctly; and thereupon it is further ordered by him 'that the instrument (the deed) and the certificate (the instrument, the deed attached to it and, therefore, of it) be registered.' The adjudication of proof of the deed is informal, but the substance of it, and the order to register the deed based upon it, sufficiently appear. The whole purpose—the deed, the certificate of proof thereof, the adjudication of proof thereof and the order of registration, and their bearing each upon the other, in order and relation—appears, however informally, and this is sufficient. When an order or judgment is intelligible, and the essential substance thereof appears, it will be upheld, without regard to mere form."

It will be noted that the requirement for adjudication, as expressed in this subsection, is in identical terms with that of section 1250, the section which bears directly on this matter; and while the principle involved in the case is not entirely the same, as an interpretation of the language used, the decision is an apt authority in support of the view we now take of this probate.

In *Buggy Co. v. Pegram,* 102 N. C., 540, the proof was taken before a commissioner of affidavits for North Carolina, in Richmond, Va. The probate was upheld. In this case the exact language of the clerk's adjudication does not appear in the printed volume of the reports, but an examination of the record discloses that the language is identical with that used in the order we are considering, and the same was approved and sustained as valid.

Again, in *Deans v. Pate,* 114 N. C., 194, where the acknowledgment was before a nonresident notary public, the order of the clerk was to the effect that "I ------, clerk, do hereby certify that the foregoing instrument has been duly proven, as appears from the foregoing seal and certificate. Let the same, with this certificate, be registered." The probate was approved as sufficient, and the present Chief Justice, delivering the opinion, expressed, we think, the true principle correctly, as follows: "The adjudication by the Clerk of the Superior Court of Wayne that 'The foregoing instrument has been duly proven, as appears (209) from the foregoing seal and certificate,' does not follow the very words of the statute (The Code, sec. 1246, subsec. 3), in that it does not adjudge that said probate is 'in due form.' But it is intelligible and means substantially the same thing, and 'will be upheld, without regard to mere form,' as was said in *Devereux v. McMahon,* 102 N. C., 284. The acknowledgment was before an officer authorized to take it, and probate was in fact in due form. The omission, therefore, of the clerk to adjudge in just so many words that the probate was 'in due form,' when in substance he did so adjudge, was not sufficient ground to exclude the deed."

This provision as to an adjudication by the resident clerk in deeds, when the grantors reside out of the county where the land lies, or out of the State, has been the law in the same or substantially similar terms since 1868 and until 1899, when the very form used by the clerk in the present instance was declared to be the proper and approved form by statutory enactment. Revisal, sec. 1001. The authoritative interpretation of the statute applicable, as indicated in the decisions referred to, has been the received and accepted construction since 1889, and has no doubt been acted on in the probate of numerous deeds and instruments, constituting essential links in many titles in the State; and whatever the opinion of the Court might be if it were an open question, we are, on reflection, now assured that, according to established and well-recognized principles of law and public policy, the authoritative decisions of this Court formerly announced should be adhered to; and we are therefore of opinion that the decision heretofore made in the cause should be reconsidered, and the ruling of the lower court in excluding these deeds by reason of an insufficient probate should be reversed and a new trial awarded.

There is nothing in this position that in any way conflicts with the cases which have come before the Court relative to this question. It has been uniformly held, since the enactment of the statute controlling this matter in 1868, when the acknowledgment of a deed or other instrument requiring registration has been taken before some official outside (210) of the State, that, in order to a valid probate, the deed, with a proper certificate, should be presented to the resident clerk for approval, and there should be an express adjudication to that effect by the local officer. There are also decisions to the effect that in cases of the kind indicated a simple order of registration by the resident clerk is insufficient. There must, as stated, be an express adjudication by him as to the acknowledgment, but none of them conflicts with the position we now uphold, that when an acknowledgment of a deed has been made before an officer authorized to take it, and was in fact in due form, and the deed, with a proper certificate, has been presented for probate to the resident clerk, who examines the same and adjudges it to be correct, such certificate and order are a sufficient compliance with the statutory provision and constitute a valid probate. Nor is there any conflict with the decision of this Court in *Johnston v. Lumber Co.*, 147 N. C., 249. In that case the deed in question was probated in 1859, and the statute applicable, as stated in the opinion, was the Revised Code, ch. 37, sec. 5, which did not require that the local officials should approve the acknowledgment and certificate by express adjudication, and the deed was therefore properly admitted to registration without it. The probate of deeds, since the enactment of the law applicable to the present case, was not presented, and the form and effect of the adjudication required under the present statute was not considered or determined.

The judgment of nonsuit will be set aside and a new trial had.

Reversed.

Cited: *Kleybolte v. Timber* Co., 151 N. C., 637.

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(211)

CHARLES AND EDITH POLLOCK v. THE HOUSEHOLD OF RUTH AND KATE HARDY.

(Filed 4 March, 1909.)

1. **Insurance—Mutual or Insurance Orders—Beneficiary Changed.**

When not restricted by some provision of law, general or special, or by some rule of the company affecting the contract, a member of a mutual benefit society or fraternal order with an insurance feature as an inci-

dent of membership may designate the beneficiary and change him at will. The reference to fraternal orders in the Revisal, sec. 4794, does not amount to such restriction.

2. Insurance—Beneficiary—Insurable Interest—Insured—Payment of Premiums.

When the insured takes out a policy of insurance on his own life for another's benefit, pays or arranges for the payment of the premiums himself and on his own account and not as a mere "cloak or cover for a wagering transaction," it is not void by reason of the principle which obtains, that there must be an insurable interest.

3. Insurance—Premiums Paid by Beneficiary—Beneficiary Changed—No Agreement—Proceeds of Policy.

When the insured has lawfully exercised his right to change the beneficiary under his policy of insurance, the original beneficiary is not entitled to its proceeds at maturity by reason of having paid the premiums thereon for a period of time, unless the payments were made under an agreement or contract to that effect or under circumstances where a change of the beneficiary would constitute fraud.

ACTION heard by *O. H. Allen, J.*, on appeal from a justice's court and on facts agreed, at Fall Term, 1908, of CRAVEN.

From the facts formally agreed upon, as stated, it appeared that Barbara Wooten had died, at the time of her death being a member in good standing in defendant company and holding a policy of insurance or certificate of said company, and in which the plaintiffs, the brother and sister of deceased, had been originally designated as beneficiaries. It further appeared:

2. That about a week prior to her death the insured caused the name of Katie Hardy to be substituted in the same policy as beneficiary in the place of Charles and Edith Pollock, which was done by the district worthy recorder, Addie L. Whittiker, of the endowment department of the defendant company, at the request of the insured (212)

3. That Katie Hardy is no relation to the insured.

4. That a part of the premiums were paid by Charles and Edith Pollock and a part by the deceased, and some part paid by the local lodge out of money allowed to the deceased for sick benefits and due to her, and that the policy was in force and the premium paid up to the death of the insured, who died on 29 December, 1907.

5. That there is nothing contained in the charter or by-laws of the said insurance company giving the insured the right to change the beneficiaries, nor is there any power of revocation in the said policy above named, and that the said change and substitutions were made without the knowledge or consent of the said Charles and Edith Pollock, and that there was no contract between the said Barbara Wooten and Charles

Pollock and Edith Pollock, either written or verbal, that the beneficiaries should or should not be changed.

6. That the said insurance company is a mutual benefit company.

7. That the said insurance company stands ready and willing to pay the amount of the policy to whomsoever is adjudged to be the rightful claimant, and that the said company claims no interest in the controversy.

Upon the facts the court adjudged that the fund belonged to the defendant Kate Hardy, the beneficiary last designated, and that plaintiffs take nothing by their suit. Thereupon plaintiffs excepted and appealed.

W. W. Clark and R. W. Williams for plaintiffs.
No counsel contra.

HOKE, J., after stating the case: It is very generally recognized that in these mutual benefit societies and fraternal orders, carrying an insurance feature as an incident of membership, a member holding a policy of insurance may designate anyone whom he may select as beneficiary, unless this right of selection is confined or restricted by some provision of law or some rule of the company affecting the contract. Bacon (213) on Benefit Societies and Life Insurance (3d Ed.), vol. 1, sec. 246.

In the present case neither the policy nor the rules of the order seem to contain any stipulation affecting the matter, and we find no statutory provision of the kind suggested, for it will not be contended that the mere reference to fraternal societies contained in the Revisal, sec. 4794, amounts to such a restriction. Cooley's Briefs on the Law of Insurance, vol. 1, page 797.

This position in no way conflicts with the principle which obtains with us, that to justify the taking out of a life insurance policy there must exist an insurable interest. Such a principle is recognized in cases where one takes out a policy on the life of another, but does not apply when the insured takes out a policy on his own life and pays or arranges for the payment of the premium himself and on his own account (*Albert v. Insurance Co.*, 122 N. C., 92; *Union Fraternal League v. Walton*, 109 Ga., 1) and unless such an agreement is a mere "cloak or cover for a wagering transaction." 29 Cyc., 116. It is further established, certainly by the weight of authority, that, in the absence of some restriction of the kind indicated, some inhibitory provision of the general law or the charter, or some rule of the company affecting the matter, a member holding a policy or benefit certificate may change the beneficiary at his election. If certain formalities are required, they must, as a rule, be observed, but unless restrained, as indicated, the member may change the beneficiary at will, and the last holder properly designated

will be entitled to the fund. Niblack on Benefit Societies, pp. 331-409; Bacon on Benefit Societies and Life Insurance, 291a, 308.

In this last reference (section 291a) the author says: "Beneficiaries have no property in benefit, but a mere expectancy. Under the contract entered into between a beneficiary society and the member, or wherever the right to change the beneficiary is reserved in the contract, the designated beneficiary has no property in the benefit to be paid, but a mere expectancy. The Supreme Court of California has thus stated the rule: 'The beneficiary named in the certificate has no interest or property therein that her heirs could succeed to. Her interest was a mere expectancy of an incomplete gift. It was revocable at the will of (214) the insured and could not ripen into a right until his death. Her right under the certificate was not unlike that of an heir apparent, and that is not to be deemed an interest of any kind.' The same doctrine was fully set forth by the Court of Errors and Appeals of New Jersey, where the court said: 'By the terms of such contracts (those of benefit societies) the beneficiary may be changed by the mere will of the member and without the beneficiary's consent. In such case the right of the beneficiary is not property, but a mere expectancy, dependent on the will of the member to whom the certificate is issued. For this reason the beneficiary's interest in the certificate and contract evidenced thereby differs totally from the interest of a beneficiary named in an ordinary life insurance policy containing no provision for the designation of a new beneficiary. The cases, so far as I can discover, are agreed upon this doctrine.' This principle is now so well settled that no further authorities need be cited."

There may be, and not infrequently are, facts and circumstances existing which would raise an equity in the original beneficiary and which would justify and require a court to interfere for his protection; but the authorities are very generally to the effect that the mere payment of the premiums and dues for a time, without more, and in the absence of a binding contract that the beneficiaries then designated should receive the proceeds of the policy or the benefits arising therefrom, would not support such a claim. Thus, in 29 Cyc., 128-129, the author says: "An equity in favor of the original beneficiary precluding the substitution of another in his place may rest on a contract between him and the member, based on a sufficient consideration, by which he is to receive the benefits. Thus, if a member designates a beneficiary or, having designated a beneficiary, delivers the certificate to him, on an agreement that he shall receive the benefits in consideration of past advances made by him, or present or future advances, or in consideration of his promise to pay dues and assessments, which promise is fulfilled, the member can not thereafter substitute a different person as beneficiary. However, the fact

that the person originally designated incurs expenses with reference to the transaction on the faith of the designation, as by paying dues (215) and assessments to keep the certificate alive, does not prevent the substitution of a new beneficiary in his place, in the absence of a contract that he is to receive the benefits, nor does the fact that the member delivers the certificate to the beneficiary as a gift preclude him from subsequently substituting a new beneficiary."

An application of the principles stated fully justifies the court in entering the judgment of nonsuit. There is no provision of law, general or special, and no rule of the company or stipulation of the policy which forbids the change that was made in the present case; and there are no facts or circumstances which show that the payments by the original beneficiaries were made under any contract or agreement with the insured that would give plaintiffs any right to the relief which they seek. There is, therefore, no error appearing, and the judgment below is

Affirmed.

Cited: Hardy v. Ins. Co., 152 N. C., 289.

D. D. WAGNER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 March, 1909.)

The facts on this appeal being practically the same as they were on a former appeal in the same case, and the trial judge having followed the decision formerly rendered, the judgment is affirmed.

ACTION tried before *W. R. Allen, J.*, and a jury, at November Term, 1908, of EDGECOMBE, to recover damages alleged to have been caused by defendant's negligence.

Defendant appealed.

Gilliam & Clark for plaintiff.
John L. Bridgers for defendant.

PER CURIAM: This case was before this Court on appeal at a former term, *Wagner v. R. R.*, 147 N. C., 315. On that appeal the Court refused to sustain the defendant's motion for judgment as of nonsuit, but sent the case back for a new trial on the ground of error in the (216) charge of the judge. The facts before the Court on this appeal

are practically identical with those on the former appeal, when the case was fully reviewed in the opinion of the Court by *Mr. Justice Connor*. The judge below, on the second trial, appears to have followed the former decision very carefully, and we find no exception which presents anything new or necessary to discuss.

No error.

H. C. BRIDGERS v. L. L. STATON ET AL.

(Filed 4 March, 1909.)

1. Corporations—Stockholders—Pooling Stock—Agreement Void.

An agreement for the purpose of pooling stock in a corporation to control or apportion the directors is void, and no rights can be acquired thereunder by the parties.

2. Corporations—Stockholders—Pooling Stock—Agreement to Vote—Proxy—Limitations of Power.

A written agreement assigning stock in a corporation with authority to vote, reserving to the assignors, who retain possession, the right to all dividends, amounts only to a proxy (Revisal, sec. 1185) and, after the expiration of three years, it can not be voted. Revisal, sec. 1184.

3. Corporations—Stockholders—Voting Cumulative—Officers—Adjournment.

The right to cumulative voting given by Revisal, sec. 2831 (3), is with the proviso that the minority stockholders openly announce that they will exercise such rights, when it appears that one person owns or controls more than one-fourth of the capital stock, and it can not be exercised when only one proposition is voted upon or on a motion to adjourn. (The principles and effect of cumulative voting discussed by CLARK, C. J.)

4. Corporations—Stockholders—Illegal Voting—Adjournment—Majority vote—No Quorum.

When a motion to adjourn a stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce the number of those present below a majority of all the stock issued and outstanding (Revisal, sec. 1182), an election of officers can not be lawfully held thereafter at that meeting, though the adjournment were carried by an illegal vote.

5. Corporations—Stockholders—Illegal Voting—Adjournment—Status of Meeting—Result—Power of Court.

The court can only declare the true result of a vote by the stockholders as to some measure or the election of officers illegally announced after a vote thereon, because of the illegal admission or rejection of certain votes; but as to an adjourned meeting to be held, stockholders not represented at the first meeting and new stockholders are entitled to vote, and hence the legal status as to the adjourned meeting can not be established until that meeting and the vote taken, and an injunction can not issue against certain stockholders voting at such meeting.

6. Corporations—Stockholders' Meeting—Adjournment—Ordered by Court.

A *mandamus* sought under the provisions of Revisal, secs. 1188 and 1189, can not issue to compel the reconvening of the stockholders for the election of directors because of an illegal adjournment to a certain date by lawful voting of stock, when that date has passed. The provisions of section 1188 should be followed, requiring that upon the failure of the directors for thirty days to call a stockholders' meeting for the purpose, after a written request from the owners of one-tenth of the outstanding shares of stock, the judge may, on application of a stockholder and on notice to the directors, order an election, etc.

7. Same—Quorum, How Ascertained—Notice to Stockholders.

A meeting of the stockholders of a corporation ordered upon application by the judge in accordance with the provisions of Revisal, sec. 1188, must be composed of a majority of shares held twenty days before such meeting, as it appears from the stock book or, in case of discrepancy, the transfer book of the corporation. The notice of such call, by custom and by analogy to Revisal, sec. 1190, should be mailed to all stockholders whose address is known.

8. Parties, Defective—Procedure—Demurrer.

Objection for defect of parties must be made by demurrer or answer; otherwise it is waived.

9. Stockholders—Transfer Books.

When there is a discrepancy between the stock book and the transfer book, the latter controls. Revisal, 1181.

(217) ACTION from EDGECOMBE, heard upon pleadings and affidavits before *W. R. Allen, J.*, 30 November, 1908.

Plaintiff appealed.

(218) *F. S. Spruill for plaintiff.*

G. M. T. Fountain, Aycock & Winston and F. A. Daniels for defendants.

CLARK, C. J. This is an action brought under Revisal, secs. 1188 and 1189, and seeks a *mandamus* to compel a reconvening of a meeting of the stockholders of a private corporation and an injunction against certain stockholders voting at such meeting.

The plaintiff complained, among other things, that he and the defendants had "pooled their stock," which was a majority of the stock, under an agreement, to last ten years, that the directors were to be divided between them, and that the defendants had violated their agreement. Such agreement was against public policy and void, and his Honor properly held that the plaintiff could base no rights thereon. *Harvey v. Improvement Co.*, 118 N. C., 693.

His Honor found as facts that at the regular annual meeting, held 14 October, 1908, which was the regular time for the election of directors,

it appeared that the total capital stock of the company, outstanding, was 1,644 shares, of which 537 shares were held by plaintiff for himself or as agent or proxy, and that the defendants, in person or as proxy, represented 525 shares, and, further, were allowed to vote 276 shares under instruments more than three years old, which assigned the stock for a period of years, with authority to vote the same, reserving to the assignors the right to draw all dividends thereon during such period, the assignors also retaining possession of the stock. His Honor rightly held such assignment to be no more than a proxy (Revisal, sec. 1185), and, being more than three years old, the holders were not entitled to vote thereon. Revisal, sec. 1184. He consequently held that only 1,062 shares were legally represented, of which the 537 represented by the plaintiff was a majority. The defendants, however, voting said 276 shares, cast 801 votes and controlled the meeting.

In computing the 525 votes legally represented by the defendant, his Honor allowed them to vote 130 shares which were transferred on the book of stock certificates 24 September, 1908, and, as we understand it, new certificates of stock were issued that day. The entry thereof on the stock ledger was not made till 26 September, though dated (219) 24 September. Revisal, sec. 1181, provides that "the stock books of the corporation shall be referred to to ascertain who are the stockholders, and in case of a discrepancy between the books the transfer book shall control."

The plaintiff demanded his right to vote cumulative under authority of chapter 457, Laws 1907; Pell's Revisal, 1183, upon the question of adjournment. This was refused, and the meeting adjourned till 18 November, but there has been no meeting held since 14 October. His Honor finds that the plaintiff did not cast his vote for directors or offer to do so. It was impossible for him to vote cumulative upon a single proposition. It is only when several persons are voted for at the same time that the voter can "cumulate" his votes.

It is true that of the legal votes present the plaintiff's 537 was a majority, and the adjournment was illegally carried, but this has no practical bearing on the controversy, for, as the defendants withdrew, the plaintiff's 537 shares was not a "majority of all the stock issued and outstanding" (1644), which is required by Revisal, sec. 1182, and he could not have held an election after the "breaking of the quorum," and in fact did not attempt to do so. It makes no difference whether the adjournment was illegally voted or not, since the tangible fact of the withdrawal of the defendants in law put an end to the meeting.

His Honor held that the plaintiff was not entitled to vote cumulative, "because chapter 457, Laws 1907, was not passed for the benefit of a stockholder owning or controlling one-fourth or more of the stock, but

to protect the small stockholder against him." Such reason is not given in the statute. The statute, now included in section 1183, Pell's Revisal, is not very clearly or succinctly expressed. It provides that if "at the time of the election of the directors, managers or trustees" of a corporation it appears from the transfer book or otherwise that more than one-fourth of the capital stock is owned or controlled by one person [which, of course, includes corporations (Revisal, sec. 2831, subsec. 6)], the stockholders shall have the right of cumulative voting "in the election of the directors, managers or trustees of such corporation," with (220) a proviso that the minority stockholders shall openly announce in such meeting held for such election that they will exercise such right of cumulative voting. The right, if thus publicly claimed by any minority stockholder (and the plaintiff held less than a majority of all the stock), is given whenever it appears (as it did here) that any one person owns or controls more than one-fourth of the capital stock, whatever the amount of his stock. Whenever it is given, it is allowed "to each stockholder." Such right is not given generally, but only in the election of officers. It could not apply to other matters, as the motion to adjourn, for instance, where there is only one proposition and nothing to "cumulate" upon. If directors had been voted for, the plaintiff was entitled to vote cumulative. It may be noted that whether the voting is cumulative or not, whenever more than one is voted for at the same time, double such number, minus one, might receive a majority. For instance, in this case, if there were 1,600 shares and each voted for five directors, 8,000 names would be on the ballots and nine men (twice five, minus one) could receive 801 votes or more, *i. e.*, a majority of 1,600. The subject of cumulative voting is discussed (but not in this aspect) in 10 Cyc., 337.

The plaintiff most earnestly contends that in the new meeting the votes should be cast as they were then legally represented. If a vote as to some measure, or in an election of officers, had been illegally announced because of the illegal admission or rejection of certain votes, the court could declare the true result. *In re Argus Printing Co.*, 26 Am. St., 689; 12 L. R. A., 781. But even in an adjourned meeting stockholders not represented at the first meeting are entitled to vote, and on plaintiff's own showing this is not even an adjourned meeting; for, aside from the fact that the adjournment to 18 November was illegal because voted by a minority (as he contends), that date has passed.

No directors having been elected, the statutory remedy (which excludes any other) provides (Revisal, sec. 1188) that on failure to elect directors at the designated time, if the directors shall fail or refuse for thirty days to call a meeting for that purpose, after receipt of a written request for such election from the owners of one-tenth of the out-

standing shares of stock, the judge may, on application of any (221) stockholder and on notice to the directors, order an election or make such other order as justice may require. In such meeting any stockholder whose certificate has been issued to him more than twenty days before such meeting will be entitled to vote, whether he was or was not represented in the meeting of 14 October, 1908, or even if he was not a stockholder at that meeting. The new meeting must be composed of a majority of shares and held by those who are stockholders of record twenty days before such meeting.

The proceeding was properly dismissed because the statute was not complied with. There was no application to the directors to call a meeting, alleged or shown, nor refusal after thirty days' notice. The plaintiff, by complying with the statute, can, if so advised, bring a new action against the directors and compel the meeting to be called for the election of directors. By analogy to Revisal, sec. 1190, and by general custom, if the meeting is ordered, notice should be mailed to all stockholders whose address is known.

In this action the corporation itself might well have been made a party, but if the failure to do so is a defect it was not so serious as to justify a dismissal of the action on that ground, if otherwise regular. The objection for defect of parties must have been made by demurrer (Revisal, sec. 474, subsec. 4), and should have been cured by making the corporation a party, as this would not substantially change the nature of the action. *Commissioners v. Candler,* 123 N. C., 682. The objection was waived by failure to demur. *Howe v. Harper,* 127 N. C., 356. For the reason above given, however, the judgment dismissing the action is

Affirmed.

Cited: Sheppard v. Power Co., post, 780; *Bridgers v. Bank,* 152 N. C., 298.

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(222)

COLUMBUS GAYLORD ET AL. v. SAM GAYLORD AND WIFE.

(Filed 10 March, 1909.)

1. Deeds and Conveyances—Uses and Trusts—Delivery—Intent—Parol Evidence—Parties.

When a deed reciting a valuable consideration paid, contained a habendum, "to have and to hold" the land conveyed, "free and clear of all privileges," etc., "to the grantee and his heirs in fee simple," and has full covenants of seizin and warranty, and in other respects gives clear indication that an absolute estate was intended to pass, evidence tending to show

a failure of consideration is incompetent, in an action to establish a resulting trust between the original parties in favor of the grantor, for such can never obtain when there is a contrary intent clearly expressed in the deed.

2. Same—English Statute of Frauds.

The seventh section of the English Statute of Frauds, which forbids the creation of parol trusts or confidences of land, etc., unless manifested and proved by some writing, not having been enacted here, and there being no statute with us of equivalent import, such trusts have a recognized place in our jurisprudence, but they can not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title to lands and giving clear indication on the face of the instrument that such a title was intended to pass.

3. Deeds and Conveyances—Uses and Trusts—Written Instrument—Parol Evidence—Incompetency.

The doctrine of engrafting by parol a trust upon lands conveyed by deed is subordinated to a well-recognized principle of law, that such a trust can not be established between the parties in favor of a grantor in a deed, when the effect will be to contradict or change by contemporaneous stipulations and agreements, resting in parol, the written contract, clearly and fully expressed.

4. Deeds and Conveyances—Escrow—Delivery—Intent.

In order to the valid delivery of a deed absolute or by way of escrow, it is essential that the instrument should pass from the possession and control of the grantor to that of the grantee or some one for him, with the intent at the time that the same should become effective as a conveyance immediately in the one case and as the happening of a given event in the other.

5. Same—Evidence—Depository—Physical Delivery.

The intent referred to and required for a valid delivery is not conclusively established by the manual or physical passing of the deed from the grantor to the grantee or some one for him; and if it is shown by the proof that, notwithstanding this physical delivery, it was the understanding and intent of the parties at the time that the grantee should hold the deed merely as a depository and subject to the control and call of the grantor, in that event there would be no valid delivery and the title to the property would not pass.

6. Deeds and Conveyances—Delivery—Intent—Contracts Ex Malificio.

The maxim, *Ex malificio non oritur contractus*, does not obtain when no right is asserted by reason of such a contract and when the right otherwise exists; and hence it is competent for a party having title to show that a deed had not in law been delivered, under which the adverse party in possession seeks to establish a right growing out of a fraudulent transaction.

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

(223) ACTION tried before *Guion, J.*, and a jury, at December Term, 1907, of BEAUFORT.

The plaintiffs, devisees, children and heirs of Ebenezer Gaylord, deceased, seek to recover possession of land which formerly belonged to their father, Ebenezer, from their uncle, Sam Gaylord, who is now in possession, claiming to own the land under an alleged deed to himself from his brother Ebenezer, bearing date 13 November, 1884.

The evidence tended to show that some time in the year 1884 Ebenezer Gaylord, having some trouble with his first wife, Deborah, and his father-in-law, in order to place his property so that his wife could establish no claim upon it in case of litigation, had a deed prepared and made it over to his brother, with the understanding and agreement that Sam was to give the deed back to Ebenezer when the latter should call for it. No consideration was paid by Sam, the defendant, or any one for him, and, so far as it appears, Ebenezer continued in control and possession of the property till his death, in November, 1898; that Ebenezer afterwards married a second wife, named Mary, and had by her a number of children, plaintiffs in the suit, and, while it is not so stated in the record, it was admitted on the argument that Sam had obtained the possession of the property after the death of his brother, on marrying (224) Mary, his brother's widow.

Speaking to the facts attending the transaction, Dr. Bullock, who seems to have prepared the deed, testified as follows: "Sam Gaylord asked me to come to my office; that Ebenezer wished to make him a deed, as he was in trouble, and for fear that his wife would get a part of his property in a suit she wanted to bring. I told him Ebenezer was doing a dangerous thing. The reason I said this was because it was a conditional deed. He said, 'I am making this deed over to my brother Sam to keep Deby, my wife, from getting hold of a portion of my property.' These were his very words. Said he was willing to trust his brother to return the deed when it was all over. I then probated it. Sam promised to return it. After Ebenezer died, Sam came to me and told me Ebenezer had made him a deed, and asked me about registering it. I told him he had agreed to return it. I had nothing to do with it. The purpose of the deed was to cut his wife out of the land. No money was paid then, though it may have been paid before or after that."

Columbus Gaylord testified as follows: "Ebenezer Gaylord was my father. He died in 1899. The other plaintiffs are my brothers and sisters, and children of his second marriage; they are minors." (Counsel reads description of land in deed, will and complaint.) "Witness says he knows it; it is all same land. My father's first wife was Deborah. His second wife, my mother, is named Mary. Defendant is in possession of this land. I heard a conversation between my father, the grantor in the deed, and the defendant, a year or two before he died, about the deed. Defendant told my father that the paper he held he burned up."

W. L. Judkins testified as follows: "I knew Ebenezer Gaylord and Sam Gaylord; was present at the time he signed the deed to Sam Gaylord. Both witnesses to the deed are dead. The argument between Ebenezer and Sam was that Sam was to hold the deed until Ebenezer had made some arrangements, then Sam was to return the deed to his brother. Ebenezer was having some trouble with his wife—I don't know what—with her father and about farming. I don't know what the trouble was. (225) Afterwards they met in my presence and Ebenezer approached him about the deed, and Sam told him he had made way with it; he did not have it. No money was paid. He made this deed to his brother until he could arrange his troubles at that time; seemed to be a deed to help him arrange things. No interest in suit. I never saw the deliverance of it; wasn't there when he handed it to him. Trouble was over his wife and wife's father. She was talking about bringing a suit against him for her separate maintenance. He had some trouble about his farming up there, and seemed to want to leave this deed in the hands of his brother until he could settle these troubles. It was all the land he had that I knew of."

R. W. Harris testified as follows: "I have heard a conversation between Ebenezer and Sam Gaylord, three years before Ebenezer died. Ebenezer asked him about the deed. Sam said he didn't have it; he had burned it. Ebenezer said, 'It's a damn lie; you got it to give my folks trouble about when I am dead.' I heard him talking about it before, and they all seemed to know that Sam had it. This time they had a quarrel about it."

W. W. S. Waters testified: "I heard Ebenezer say to Sam, 'I have given you that deed as a brother, and you as a brother ought to give it back, as you promised.' Sam said, 'I have destroyed it.' Ebenezer said, 'You agreed to return it to me; I now want it back.'"

At the close of the testimony of plaintiffs, on motion of defendants, there was judgment as of nonsuit, and plaintiffs excepted and appealed.

Ward & Grimes and Bragaw & Harding for plaintiffs.
A. O. Gaylord and Small, MacLean & McMullan for defendants.

HOKE, J., after stating the case: The alleged deed recites a valuable consideration paid by defendant Sam Gaylord, the grantee in the deed; contains a *habendum*, "to have and to hold the said tracts of land, free and clear of all privileges and appurtenances thereunto belonging, to the said Sam M. Gaylord and his hairs in fee simple, forever," and also (226) the covenants, "that the grantor is seized of the premises in fee simple and hath the right to convey the same; that they are free from all encumbrances, and that the grantor will warrant and defend

the title to the same against the lawful claim of all persons," etc.; and the authorities are to the effect that in a deed of this character, giving on the face clear indication that an absolute estate was intended to pass, either by the recital of a valuable consideration paid or by an express covenant to warrant and defend the title, no trust would be implied or result in favor of the grantor by reason of the circumstance that no consideration was in fact paid. *Dickenson v. Dickenson,* 6 N. C., 279; *Squire v. Harder,* 1 Paige Chan., 494; *Hogan v. Jaques,* 19 N. J. Eq., 123; *Lovett v. Taylor,* 54 N. J. Eq., 311; *Jackson v. Cleveland,* 15 Mich., 94. And while the opinion in *Dickenson v. Dickenson, supra,* has been so far modified in *Barbee v. Barbee,* 108 N. C., 581, as to permit proof that in fact no consideration was paid or that the same was different from the recital, this modification was on a question not presented here, and in no way affects the principle that in a written deed purporting to pass to the grantee an absolute title the recital therein of a valuable consideration paid will prevent an implied or resulting trust in favor of the grantor arising from the lack of consideration. Thus *Shepherd, J.,* for the Court, delivering the opinion in *Barbee v. Barbee,* 108 N. C., at p. 584, after saying that while the trend of our State decisions heretofore had favored the position that the recital in a deed of a valuable consideration paid should be held to be an estoppel for all purposes, yet "The overwhelming weight of American authority is in favor of treating the recital as only *prima facie* evidence of payment as in the case of a receipt, the only effect of the consideration clause being to estop the grantor from alleging that the deed was executed without consideration in order to prevent a resulting trust."

This doctrine of a trust or use resulting to a grantor when there was no consideration paid was a rule of the common law incident chiefly to conveyances of feoffment, and never obtained when there was a contrary declaration made by the grantor at the time of the conveyance, either oral or written, and in the rare instances where the doctrine (227) is applicable to written instruments it is never allowed to prevail when there is a contrary intent clearly expressed in a written deed. Thus, in *Jackson v. Cleveland, supra, Campbell, J.,* said: "Accordingly, either the mention of a consideration, although nominal, or the declaration of uses will prevent a resulting trust and confirm the title in the feoffee. A court of chancery has never ventured against the expressed will of the donor appearing on the face of the deed to take the use from the donee and give it back to the donor. In other words, uses annexed to a perfect gift, however gratuitous, were enforced."

And *Walton, the Chancellor,* in *Squires v. Harder, supra,* said: "No resulting trust can be raised or effectuated to the express terms of a conveyance and in favor of a grantor. In this case the complainants

have given an absolute conveyance, with warranty; they are therefore estopped from alleging that a part of the consideration was received in their own money."

Nor do we think it permissible upon the evidence that the plaintiffs should engraft a parol trust on a deed of the kind presented here by express declaration or agreement. The seventh section of the English Statute of Frauds, forbidding "the creation of parol trusts or confidences of lands, tenements or hereditaments, unless manifested and proved by some writing," not being in force with us, and no statute of equivalent import having been enacted, these parol trusts have a recognized place in our jurisprudence and have been sanctioned and upheld in numerous and well-considered decisions. *Avery v. Stewart,* 136 N. C., 436; *Sykes v. Boone,* 132 N. C., 199; *Shelton v. Shelton,* 58 N. C., 292; *Strong v. Glasgow,* 6 N. C., 289. Upon the creation of these estates, however, our authorities seem to have declared or established the limitation that except in cases of fraud, mistake or undue influence, a parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass. *Dickenson v. Dickenson, supra; Bonham v. Craig,* 80 N. C., 224; *Jackson v. Cleveland, supra,* reported also in 90 (228) Amer. Dec., 226, with a full and learned note on this phase of the doctrine; *Dean v. Dean,* 6 Conn., 285; *Cain v. Cox,* 23 West Va., 594, 605; *Dyer v. Dyer,* White and Tudor Leading Cases in Equity (part 1), pp. 314, 344, 354, 355, 356, etc.

In this last reference will be found a comprehensive and very satisfactory treatment of this question in the notes by the American editor, in which the writer refers to the North Carolina decisions as establishing the proposition stated, and, among other things pertinent to the inquiry, says: "The second head (that presented here, when the deed purports to be for a full and valuable consideration but is in fact gratuitous) is also capable of subdivision. The trust may be set up between the original parties or in favor of a third person. In the former instance the objection is twofold, under the provisions of the Statute of Frauds, and that the evidence contradicts a writing under a seal. See *Porter v. Mayfield,* 9 Harris, 264. The trust can not be alleged consistently with the deed, because it is impossible to believe that the grantee gave a full and valuable consideration for the privilege of holding the land for the use of the grantor. A deed may be regarded in two aspects; In one it is the means by which the title is conveyed; in the other, a memorandum of the terms and conditions of the transfer. If a man deliberately executes a sealed instrument, reciting that he has transferred

the right of ownership for value received, he should not be permitted to put the grantee to the proof of that which has been established with the utmost solemnity known to the law. This is the more true because such a disguise is generally adopted for some sinister purpose, to defraud creditors or deprive a wife of dower. See *Murphy v. Hubert,* 4 Harris, 50. If there be any instance to the contrary, it is better that the grantee should suffer for his folly in putting the transaction in a form contrary to the truth than that the stability of titles should be endangered by rendering it impossible to frame a conveyance that shall be secure from attack. *Leman v. Whetlet,* 4 Russell, 323; *Porter v. Mayfield,* 9 Harris, 264, *post; Hogan v. Jaques,* 4 C. E. Green, 123. If it be proved that the deed was misdrawn through accident or fraud, or that it was procured through undue influence (*Legen-* (229) *felter v. Richey,* 8 P. F. Smith, 485), a trust may arise *dehors* the instrument; but this depends on other principles."

The law was so held in *Bogett v. Hildreth,* 103 Mass., 484, where *Wells, J.,* used the following language in delivering judgment: "As to the share of Lucinda, conveyed by her to Sophronia, without consideration, and upon an agreement to reconvey or hold it for the benefit of Lucinda, no valid trust arises from that transaction. *Walker v. Locke,* 5 Cushing, 90. A voluntary deed is valid between the parties as a gift, and does not raise any trust in favor of the grantor. It is otherwise with a feoffment, and perhaps in other conveyances, wherever there is no declaration of the uses or the consideration is open to inquiry in determining the effect of the deed between the parties and their privies. Cruise Dig. (Greenleaf Ed.), title 11, ch. 4, p. 16, and title 32, ch. 2, p. 38. In this Commonwealth the consideration is not open to such inquiry. Supposing the deed in question to have been in the common form, the recital of a consideration and the declaration of the use to the grantee and her heirs in the *habendum* are both conclusive between the parties and exclude any resulting trust to the grantor. *Squire v. Harder,* 1 Paige, 494; Hill on Trustees, 112; 2 Story's Eq., p. 1197; *Philbroke v. Delano,* 29 Maine, 410; *Farrington v. Barr,* 36 N. H., 86; *Graves v. Graves,* 9 Foster, 129." See *Haigh v. Reye,* 4 L. R., Ch. Appeals, 473.

It was held in like manner in *Wilkinson v. Wilkinson,* 17 N. C., 378, that the recital of a valuable consideration is conclusive on the parties and those claiming under them, unless it is shown to have been introduced by mistake or fraud. *Gaston, J.,* said: "The plaintiffs here allege that the defendant caused this consideration of value to be untruly inserted in the deed, either without the knowledge of the grantor or by availing himself of the misconception of the grantor, that it was a necessary form to give the instrument validity. The parol evidence is admissible to support this charge; for if it be made out, then the instru-

ment must be considered as if it had truly been what the contracting parties intended it to be. But it is admissible for this purpose only."

The main current of decision is in this direction and establishes
(230) that a trust can not be fastened on an absolute deed by evidence that the grantee paid no consideration or that he agreed to take and hold the premises from the grantor. *Hutchinson v. Tindall,* 2 Green., ch. 357; *Robson v. Harwell,* 6 Ga., 589; *Squire v. Harder,* 1 Paige, 494; *Rathbun v. Rathbun,* 6 Barb., 98; *Philbroke v. Delano,* 29 Me., 410; *Graves v. Graves,* 9 Foster, 129; *Leman v. Whetley,* 4 Russell, 423. In *Squire v. Harder* the complainants sought to establish a resulting trust in land which they had conveyed with warranty, and were held to be estopped from showing that the grantee had only a life interest in the purchase money and that upon her death it would have belonged to them.

Thus it will be seen that, while in North Carolina, the seventh section of the English Statute of Frauds not having been enacted here, parol trusts will be upheld in given instances in favor of third persons, as in *Shelton v. Shelton, supra,* or even creditors of the grantor, as in *Shields v. Whitaker,* 82 N. C., 516, such trusts will not be permitted or established here by reason of contemporaneous parol contracts and agreements between the parties when the same are in direct conflict with the expressed stipulations of the written deed and the entire purport of the instrument. In such case and to that extent the doctrine of parol trusts is subordinated to another well-recognized principle of law, that when parties have formally and explicitly expressed their entire contract, in writing, the same shall not be contradicted or changed by contemporaneous stipulations and agreements resting in parol. The position is well brought out and supported in the two decisions cited here: *Dickenson v. Dickenson, supra,* and *Strong v. Glasgow, supra.* In *Dickenson v. Dickenson* it was held: "Where an absolute deed is made, parol evidence is not admissible to prove that the deed was made under any special trust (for the grantor), and that a valuable consideration was not paid." And, a few pages further on, in *Strong v. Glasgow,* a parol trust was engrafted or enforced where A. bought the property of B. at a sheriff's sale and took a conveyance of same under agreement with B. to hold the property for him. "For," said the Court,
(231) "the complainants, not being parties to the deed, were at liberty to establish the original contract."

The same position is very well expressed by *Green, J.,* in *Cain v. Cox, supra*: "In this state of facts, what was the operation of this deed of 1854, whereby Rezin Cain conveyed this tract of land to his sisters upon a parol trust for his own use? In *Troll v. Carter,* 15 W. Va., 578, this Court decided: 'If land be conveyed by a deed of bargain and sale for a

merely nominal consideration, the courts of equity will not receive *parol* evidence to prove that the grantee agreed to hold the land for the grantor's use, as the deed in such a case must have been made for the express purpose of divesting the grantor of his title and vesting the same in the grantee. Such *parol* evidence, if admitted, would defeat the very purpose for which the deed was made, and must be regarded as contradicting the deed, and the general rule of evidence requires in such case the rejection of parol evidence.' "

In Adams' Equity, 28, it is said: "The declaration of trust by the parties is not, independently of the statute of frauds, required to be made or evidenced in any particular way. And, therefore, previously to that statute, a trust, whether of real or personal property, might be declared either by deed, by writing not under seal or by word of mouth, subject, however, to the ordinary rule of law, that if an instrument in writing existed it could not be explained or contradicted by parol evidence."

There are decisions to the contrary in other jurisdictions, and no doubt like expressions in some of our own cases. Thus, in *Hall v. Livingston,* 3 Del. Chan., 348, the chancellor, in a learned and elaborate opinion, contended that a parol trust could be set up against the grantee in a deed absolute on its face and without any allegation in the bill that the alleged trust was omitted by fraud or mistake. In this case it will be noted that in the first instance the trust declared was in favor of certain creditors of the grantor by lien and otherwise, and the decision might be reconciled on the principle that when there has been a severance of the legal and equitable estate by a valid agreement and a trust declared for a specific purpose the remainder of the interest not required for the purpose indicated usually results (232) to the grantor. *Bond v. Moore,* 90 N. C., 239.

There are also decisions to the effect that when there is a contract or agreement to hold in trust for the grantor or other parties to the deed, and in direct contravention of the written provisions the refusal to carry out the oral agreement would of itself constitute such a fraud that a trust could be engrafted in the deed *ex malificio.* Some of the cases so hold in England, though the statute of frauds, forbidding oral trusts, prevails in that country. This position, however, is clearly untenable in those cases where the agreement itself can not be established by competent testimony. The better-considered authorities are to the effect that there can be no actionable fraud arising from breach of an agreement, without more, when the law forbids that the agreement should be set up or established. *Wills v. Robertson,* 121 Iowa, 381; note to *Jackson v. Cleveland, supra,* 90 Amer. Dec., 266.

And we are of opinion that the doctrine as it obtains with us, and

as heretofore stated, making, as it does, for the stability of titles which rest so largely on written instruments, and well supported by authority, should prevail, and, applied to the facts presented here, would forbid that a trust should be declared or established in plaintiffs' favor in case the deed from Ebenezer to Sam Gaylord had been fully executed. While we hold the opinion as indicated, and have expressed the views of the Court thereon at some length, because of the importance of the question, and of the suggestions that the claim of plaintiffs could in any event be sustained under the doctrine of parol trusts, we do not approve the ruling of the trial judge in dismissing the case as on judgment of nonsuit; for on the allegations and evidence we are further of opinion that an issue is presented as to whether the deed from Ebenezer to Sam Gaylord was in fact ever delivered. It is a familiar principle that the question of the delivery of a deed or other written instrument is very largely dependent on the intent of the parties at the time and is not at all conclusively established by the manual or physical passing of the deed from the grantor to the grantee. As said by this Court in *Waters v. Annuity Co.*, 144 N. C., 670, "The fact that a policy in a

(233) given case has been turned over to the insured is not conclusive in the question of delivery. This matter of delivery is very largely one of intent, and the physical act of turning over a policy is open to explanation by parol evidence." And the authorities are uniformly to the effect that, in order to be a valid delivery, the deed must pass from the possession and control of the grantor to that of the grantee, or to some one for the grantee's use and benefit, with the intent at the time that the title should pass or the instrument become effective as a conveyance. And this requirement that the intent to pass the title shall exist at the time, as applied to the facts presented here, is in no way affected by the doctrine very generally recognized, that a deed can not be delivered to a grantee by way of escrow, for, before a written instrument can become an escrow, the same incident must exist, "that the same should pass from the control and possession of the grantor with the intent at the time that it should become effective on the happening of a given event." Thus, in *James v. Vanderhayden,* 1 Paige, 385, it was held, that "When a bond, mortgage or deed was delivered to a third person, to be kept by him during the pleasure of the parties, and subject to their further order, the papers in question were not escrows, and that the third person was a mere depository." This doctrine of escrows, therefore, as stated, in no way affects the question, and in the case before us, if the instrument having been prepared and signed was then handed over by Ebenezer to Sam Gaylord, not with the intent that the title should pass, but with the intent that Sam Gaylord should hold the same as a depository or subject to the control and call of Ebenezer,

there was no delivery, and the title to the property descended to the plaintiffs, the children and heirs at law of Ebenezer, subject to the dower of his widow.

The views we have expressed will be found to accord with well-considered decisions in this and other jurisdictions; notably, *Fortune v. Hunt,* 149 N. C., 358; *Tarlton v. Griggs,* 131 N. C., 216; *Roe v. Lovick,* 43 N. C., 88; *Wilson v. Wilson,* 158 Ill., 567; *Porter v. Woodhouse,* 59 Conn., 568. In *Tarlton v. Griggs, supra, Cook, J.,* delivering the opinion of the Court, said: "There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so with the intent that it shall be taken by the grantee (234) or by some one for him. Both the intent and act are necessary to a valid delivery. Whether such existed is a question of fact to be found by the jury. *Floyd v. Taylor,* 34 N. C., 47. But if the grantor did not intend to pass the deed beyond his possession and control, so that he would have no right to recall it, and did not do so, then there would be no delivery in law, the facts of which must likewise be found by the jury." And, further, in the same opinion, quoting with approval from the opinion of *Roe v. Lovick, supra:* "But when the grantor parts with the possession of the deed, showing an intention that it should not then become a deed, but delivered merely as a depository and subject to the future control and disposition of the maker, then the delivery would be incomplete and no title would pass."

In *Porter v. Woodhouse, supra, Andrews, C. J.,* said: "The delivery of a deed implies a parting with the possession and a surrender of authority over it by the grantor at the time, either absolutely or conditionally; absolutely, if the effect of the deed is to be immediate and the title to pass or the estate of the grantee to commence at once; but conditionally, if the operation of the deed is to be postponed or made dependent on the happening of some subsequent event. A conditional delivery is and can only be made by placing the deed in the hands of a third person, to be kept by him until the happening of the event upon the happening of which the deed is to be delivered over by the third person to the grantee. But it is an essential characteristic and an indispensable feature of its delivery, whether absolute or conditional, that there must be a parting with the possession of the deed and with all power and control over it by the grantor for the benefit of the grantee *at the time of delivery. Prestman v. Baker,* 30 Wis., 644. The delivery of a deed is as essential to the passing of the title to the land described in it as is the signing of it or the acknowledgment. It is the final act, without which all other formalities are ineffectual. To constitute a delivery the grantor must part with the legal possession of the deed and of all right to

(235) retain it. The present and future dominion over the deed must pass from the grantor."

Nor is the objection available that there is evidence tending to show that it was the purpose and motive of Ebenezer in this transaction to put his property in such a position that his then wife could not successfully establish a claim upon the property in case of expected litigation between them. It is an undoubted principle that a court will not lend itself to establish a right growing out of a fraudulent transaction, a wholesome principle that has found expression in the maxim, *ex malificio non oritur contractus;* but this principle only applies when it becomes necessary to invoke the aid of the court to establish or assert the right arising by reason of such a transaction, and does not obtain when the right otherwise exists. See *York v. Merritt,* 80 N. C., 285. If there were no delivery of the deed in question, the title never passed from Ebenezer, and the plaintiffs, his children, whether as devisees or heirs at law, can assert their claim by reason of the title that was originally his. It may be well to note that while the testimony touching the transaction could not have been admitted to establish a right or claim, as stated, when otherwise relevant it may still be received on the question of delivery.

From what has been said, it follows that the order of nonsuit will be set aside, and the cause will be submitted to the jury on some determinative issue involving the question as to whether the deed under which defendant claims was turned over to him with intent that the title should pass, or was the same to be held by defendant as a depository and subject to the control and call of Ebenezer, the grantor.

Reversed.

CONNOR, J., concurring: I concur in the decision of this case and the reasons upon which it is based. I think no other question is presented for decision, and that what is said in regard to the validity of the alleged parol trust is *obiter*. The question was not passed upon by the judge nor argued in this Court. Whether such a trust, upon the evidence taken as true, can be declared by parol and enforced by the court is not free from doubt. I therefore think that we should not decide it and foreclose the parties, unless fairly presented and an oppor-

(236) tunity afforded them for argument. In *Shelton v. Shelton,* 58 N. C., 292, *Chief Justice Pearson* thus states the law, as held by this Court:

1. "At common law it was not necessary that a trust should be declared in any particular way; the declaration could be made by deed or by mere word of mouth. In either case, if the trust could be proved, the chancellor would enforce its execution.

2. "In England, by section 7 of the Statute of Frauds (29 Car. II), all declarations of trust are required to be 'manifested and proved' by some writing, signed by the party, etc.

3. "In this State there is no statute which requires the declaration of a trust to be in writing, and the matter stands as at common law.

4. "That the statute of 1819 [Revisal, sec. 976] does not include the declaration of a trust; it is not 'a contract to sell or convey land.' [Cases cited in Pell's Revisal, 976.]

5. "That the rule which excludes parol evidence for the purpose of 'explaining, altering or adding to a written instrument' has no application," because, as said by *Pearson, C. J.*, "the declaration of a trust neither contradicts, explains nor adds to the deed." Replying to the suggestion to the contrary, he says: "If this position be true, the English statute, in respect to the declaration of trusts, was uncalled for, and the doctrine of verbal declaration of trusts would not have obtained at common law. The truth is, neither the declaration nor the implication of a trust has ever been considered as affected by that rule of evidence. The deed has its full force and effect in passing the absolute title at law, and is not altered, added to or explained by the trust, which is an incident attached to it in equity as affecting the conscience of the party who holds the legal title."

The language used by the learned *Chief Justice* has been cited in a large number of cases with approval. *Riggs v. Swann,* 59 N. C., 118, in which he says: "The objection that the declaration of trust was not in writing, and was therefore void, is not tenable. There is in this State no statute which requires the declaration of a trust, *made at the time the legal title passes* to one who agrees to hold in trust, accompanying the transmission of the legal title, shall be in writing." In *Ferguson v. Haas,* 64 N. C., 773, *Mr. Justice Rodman* makes a careful (237) examination of the subject (*Pearson, C. J.*, being a member of the Court). The decision in *Shelton's case* was attacked as "an innovation." The attack was based upon the suggestion, which appears to have been advanced, that it was held in the opinion that a trust could be declared by a "mere oral declaration," without any surrounding or sustaining circumstances. *Judge Rodman* says: "No such point was decided. . . . It is hard to conceive of a case which could be founded on words only, without some corroborating acts and circumstances." He concludes that the Court "sees no occasion to alter any of the expressions in the case." In *Fry v. Ramseur,* 66 N. C., 466, *Pearson, C. J.*, reaffirms the doctrine in *Shelton's case.* In *Shields v. Whitaker,* 82 N. C., 516, *Smith, C. J.*, quotes with unqualified approval the opinion. *Holmes v. Holmes,* 86 N. C., 205; *Smiley v. Pearce,* 98 N. C., 185; *Holden v. Strickland,* 116 N. C., 185; *Cobb v. Edwards,* 117 N. C., 244; *Bank v.*

Fries, 121 N. C., 241. In *Sykes v. Boone,* 132 N. C., 199, and *Avery v. Stewart,* 136 N. C., 426, *Mr. Justice Walker* reviews the authorities and cites *Shelton's case* with approval. In *Pittman v. Pittman,* 107 N. C., 159, *Shepherd, J.,* discusses the question, and holds that a written agreement, not under seal, made *subsequent* to the transmission of the title, without any consideration to support it, to hold in trust and convey to the grantor, would not be enforced in equity. He says: "To declare a trust in this case would contravene several other principles which have been firmly established by this Court, one of which is that no parol trust can be proved by subsequent declarations alone." Citing *Smiley v. Pearce, supra.* The learned *Justice,* referring to the contention that a trust could be established in the manner attempted in that case, says: "If this be so, it would be difficult to escape what would seem to be the logical conclusion, that a voluntary trust may be declared by a simple oral declaration, *unaccompanied by the transfer of the legal title.*" Assuming that the testimony in this record is true, and eliminating any question of the parties having any unlawful purpose in conveying the land, we have this case: Ebenezer Gaylord, being the owner of
(238) the land, and having or apprehending some trouble with his wife, conveys it to his brother, without any valuable or other consideration than that the grantee would hold it in trust and convey to him. Ebenezer remains in possession until his death. It is evident that the deed was not to be registered, because several witnesses say that when Ebenezer asked his brother for it he assured him that it was burned or destroyed. Ebenezer's wife dies; he marries a second time, and dies; his brother marries his widow and thereby gets into possession of the land and refuses to convey to his deceased brother's children. If the declaration of trust is not required to be in writing, and to prove it does not contradict, add to or alter the deed, with the surrounding and corroborating circumstances, *every one of which* sustain the contention of the plaintiffs, I am unable to see, in the light of the decisions of this Court, how we can refuse to grant relief. It seems that the language of *Judge Pearson,* in *Clonninger v. Summit,* 55 N. C., 513, is peculiarly applicable to defendant's attitude. "This mean subterfuge, showing that the original purpose of the defendant was not to befriend his neighbor (brother), but to trick him out of his home, will not avail the defendant."

I am unable to see how the warranty in the deed, which is a personal covenant of quiet enjoyment, for the breach of which no damage could be recovered, as no purchase money was paid, can estop the plaintiffs. The declaration of trust is not inconsistent with or contradictory of any recital or assertion in the deed, which has full operation at law. Decisions of other courts, wherein the seventh section of the statute of

frauds has been enacted, are not helpful to us. It will be noted that many of those cited in the opinion are discussions of implied or resulting trusts, because no consideration was paid. It is conceded that, by an express provision (eighth section) of the statute, implied and resulting trusts are excepted. The effort to bring cases where no consideration is paid by the grantee within the saving provisions of that section has given rise to much discussion. The plaintiffs' case is not affected by it. They rely upon an *express* trust, affected by the seventh section. As said by *Judge Pearson,* if an express trust comes within the parol-evidence rule, there was no occasion for the adoption of the seventh section of the statute. It is not easy to perceive how the intro- (239) duction of parol evidence to show that at the time of the delivery of a deed a declaration of trust for the grantor was made and accepted by both parties contradicts the deed, whereas, if made under the same circumstances in favor of a third person, it does not do so. In both cases the land is conveyed to the grantor. The additional words, "to his only use and behoof," adds nothing to the usual form of the *habendum.* Certainly they do not prevent the engrafting of a parol trust for a third person. I find that in *Murphy v. Hubert,* 7 Pa. St., 420, *Gibson, C. J.,* held that as the seventh section of the statute of frauds had not been enacted in that State, the Court was not authorized to reject parol evidence of the declaration of a trust made at the time the title passed. He asks, "Why was the seventh section, with others, omitted? Certainly, to prevent its provisions from becoming the law of the land. And how can we make them the law of the land in the face of such a demonstration of legislative intent?"

Without further discussing the subject, I am of the opinion that a question of so much importance, and concededly not free from difficulty, should not be decided until it is fairly presented as the decisive question in the case. I have no disposition to extend the doctrine of parol trusts, as held by our predecessors. I think that the opinion restricts it in narrower limits than has heretofore been done, and prefer to leave the question as I find it until, after full argument and mature reflection, it becomes our duty to decide it. I have not overlooked the decision in *Bonham v. Craig,* 80 N. C., 224, and several other cases, which appear to conflict with *Shelton's case.* It would seem that the Court regarded the parol agreement in those cases as attempts to attach a condition rather than declare a trust. The distinction is clearly pointed out in *Shelton v. Shelton.* I do not care to discuss the question of the purpose for which the deed was made, as affecting the validity of the trust, or, rather, the right of the plaintiffs to come into a court of conscience.

WALKER, J., concurred in this opinion.

Cited: Newkirk v. Stevens, 152 N. C., 502; *Dunlap v. Willett,* 153 N. C., 321; *Ricks v. Wilson,* 154 N. C., 286; *Weaver v. Weaver,* 159 N. C., 21; *Jones v. Jones,* 164 N. C., 322; *Cavenaugh v. Jarman, ibid.,* 375; *Foy v. Stephens,* 168 N. C., 441; *Trust Co. v. Sterchie,* 169 N. C., 22; *Campbell v. Sigmon,* 170 N. C., 351; *Walters v. Walters,* 171 N. C., 313; *S. c.,* 172 N. C., 329, 330; *Allen v. Gooding,* 173 N. C., 96.

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TABLE ROCK LUMBER COMPANY ET AL. V. ANDREW BRANCH ET AL.

(Filed 10 March, 1909.)

Evidence—Deeds and Conveyances—Deeds from Deceased Persons—Ante Litem Motam.

When, to establish a disputed corner of land, a deed from a deceased person is offered in evidence as a declaration tending to establish it, it is incompetent if the deceased was not a disinterested person at the time he made the deed, or if it was not made *ante litem motam.* (The requisites of such evidence discussed by WALKER, J.)

ACTION tried before *Ferguson, J.,* and a jury, at August Term, 1908, of BURKE.

Avery & Ervin and Avery & Avery for plaintiffs.
J. F. Spainhour, J. M. Mull and E. J. Ervin for defendants.

WALKER, J. This action was brought to recover damages for a trespass upon land. The plaintiff claimed under two grants from the State to A. C. Avery and *mesne* conveyances, by which it alleged that it had acquired title. The defendant alleged that it had a superior title to the land described in said grants and deeds. Evidence was introduced by the parties to establish their respective contentions. Issues were submitted to the jury, which, with the answers thereto, were as follows:

1. "Are the plaintiffs the owners of the lands described in the complaint, or any part thereof, and if so, what part?" Answer: "Yes, except 330-acre grant, the 100-acre grant and the 200-acre deed and the 50-acre deed, as laid down on plat 'A.'"

2. "Has the defendant trespassed upon any of the lands owned by the plaintiffs?" Answer: "No."

3. "If so, what damages have the plaintiffs, the Table Rock Lumber Company, sustained?" Answer: "Nothing."

In order to locate one of the corners of the land the defendants

introduced a deed from Pink Branch to J. F. Harris, and insisted that it was competent as a declaration of Branch, who is dead, that the corner is where they claim it to be. The plaintiffs objected to this evidence (which was admitted by the court), upon the ground that at the time he executed the deed Pink Branch was not disinterested and that the true corner is at a different place. It appeared (241) that if the corner is located according to the defendant's claim, the boundaries of Pink Branch's land would be enlarged and would include his house, whereas, if the corner is established according to the plaintiff's claim, the boundaries of the land will be contracted and the house excluded. It also appears that Pink Branch had destroyed a poplar, which was his corner, as claimed by the plaintiff, and had marked a poplar, claimed by the defendants as the corner, and which was at a different place, as his corner, and, further, that this so extended his line as to embrace more land.

This evidence was incompetent and therefore improperly admitted. The case shows that at the time the deed was executed by Branch and at the time he showed the corner to the witness he was interested to locate the corner as he did, as the boundaries were thereby enlarged and he was the owner of the land.

We stated the rule in *Yow v. Hamilton,* 136 N. C., 357, as follows: (1) The declaration must have come from a disinterested person. (2) It must have been made *ante litem motam.* (3) The declarant must be deceased, citing numerous cases, and among them *Sasser v. Herring,* 14 N. C., 341 (300); *Hedrick v. Gobble,* 63 N. C., 48; *Caldwell v. Neely,* 81 N. C., 114; *Mason v. McCormick,* 85 N. C., 226; *Smith v. Headrick,* 93 N. C., 210. See, also, *Smith v. Walker,* 4 N. C., 127; *Hill v. Dalton,* 140 N. C., 16. If the rule of law thus established by the authorities is applied to the facts of this case, the declarations of Pink Branch were incompetent and should have been excluded by the court, and the same is true as to the declaration to the witness Wilson.

It is unnecessary to discuss the other exceptions, as we think there should be another trial of the case upon all the issues, because of the error of the court in admitting incompetent testimony.

New trial.

Cited: Lumber Co. v. Triplett, 151 N. C., 411; *Lumber Co. v. Branch,* 158 N. C., 252; *Lumber Co. v. Lumber Co.,* 169 N. C., 96.

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AMOS HARRELL ET AL. v. CORA HAGAN ET AL.

(Filed 10 March, 1909.)

1. Trusts and Trustees—Resulting Trusts—Conversation With Deceased Person—Evidence.

In an action to engraft a resulting trust on lands alleged to have been bought by O. at a public sale in behalf of H., both deceased, testimony of witnesses who are parties and interested in the result of the action as to a conversation between O. and H. tending to establish the trust is incompetent. (Revisal, sec. 1631.)

2. Procedure—Final Judgment—Interpleader.

After the courts have passed upon the merits of a controversy, and an appeal had and determined by the Supreme Court, an interpleader by new parties should not be allowed, as an independent action should have been brought; but while this is an irregularity, the court below may proceed, under this decision, as the case is now constituted.

ACTION tried before *W. R. Allen, J.*, and a jury, at February Term, 1909, of EDGECOMBE.

R. G. Allsbrook and G. M. T. Fountain for plaintiffs.
F. S. Spruill and W. O. Howard for defendants.

WALKER, J. This action was brought for the recovery of land and was before this Court on appeal at Spring Term, 1908 (147 N. C., 111). We then decided in favor of the defendants and directed judgment to be entered accordingly in the Superior Court. After the opinion and judgment of this Court had been certified to the court below, Martha Cale, W. W. Owens and others interpleaded, and alleged that they were the owners of the land as heirs of C. H. Owens. The defendants answered the interplea, and averred that C. H. Owens bought the land at a sale made by H. A. Gilliam, trustee of Eagles & Crisp, bankrupts, upon a parol agreement that he would hold it in trust for Opperlina Harrell, under whom they claimed the land. Issues were submitted to the jury, which, with the answers thereto, were as follows:

1. "Was there a parol agreement between C. H. Owens and Opperlina Harrell that Owens would buy in the tract of land for her and hold it in trust until the rents from the land and proceeds from
(243) the sale of timber repaid him the purchase money, and then that the land should be hers?" Answer: "Yes."

2. "Has Owens received from the rents and sales of timber a sum sufficient in amount to repay him?" Answer: "Yes."

In order to establish the parol trust, two of the defendants, who are

interested in the result of this action, were permitted to testify, over the objection of the interpleaders, that they heard a conversation between C. H. Owens and Opperlina Harrell, in which Owens agreed to buy the land at the sale of the trustee and hold the same in trust for her. The admitted evidence tended to show that C. H. Owens had agreed with Opperlina Harrell to buy the land at the sale in trust for her, and that as soon as he had received rents and profits sufficient to reimburse himself she should have it. Mrs. Harrell stayed on the land twelve months and then moved to Macclesfield, where she occupied a home provided for her by C. H. Owens. The year before Owens died he told her that "he was through with the land and she could take it." It also appears from the pleadings, and was not controverted on the argument before us, that at the time of the sale, and prior to the adjudication of bankruptcy, Opperlina Harrell had executed a mortgage to B. F. Eagles, who afterwards sold the land under the power obtained in the mortgage to S. M. Crisp, a member of the firm of Eagles & Crisp, to whom the debt was really due; that on 1 January, 1891, Opperlina Harrell executed to Eagles & Crisp a second mortgage, which was unsatisfied and in force when S. M. Crisp bought at the sale made under the first mortgage by B. F. Eagles. There was testimony other than that of Cora and Farror Harrell as to the agreement of C. H. Owens with Opperlina Harrell.

The defendants contended that the purchase of B. F. Crisp at the sale under the first mortgage did not change his fiduciary relation towards Opperlina Harrell and vest the title to the land absolutely in him, but that in equity the effect of the purchase was to remove an outstanding encumbrance, the amount paid for the land being tacked to that secured by the second mortgage, under the rule that a second mortgagee can not buy the land at a sale under the first mortgage and hold the same, discharged of the trust created by the two mortgages, but he is entitled only to add the amount paid by him to the debt due under the second mortgage. *Taylor v. Heggie,* 83 N. C., 244. It was (244) also contended that as Opperlina Harrell, under the said rule, had an equitable estate in the land at the time of the purchase by C. H. Owens at the sale made by H. A. Gilliam, trustee, the agreement of Owens created a valid parol trust in her favor, under former decisions of this Court. *Vannoy v. Martin,* 41 N. C., 169; *Vestal v. Sloan,* 76 N. C., 127; *Sykes v. Boone,* 132 N. C., 199; *Avery v. Stewart,* 136 N. C., 426. We prefer not to consider these interesting questions at this time, as there was error in the admission of testimony, which requires another trial of the case, at which the evidence may be materially changed and an entirely new state of facts presented.

The testimony of Cora and Farror Harrell as to the conversation be-

tween C. H. Owens and Opperlina Harrell was incompetent, under prior rulings of this Court. *Wilson v. Featherstone,* 122 N. C., 747; *Witty v. Barham,* 147 N. C., 479. The witnesses were both interested in the result of this action and parties thereto, and C. H. Owens and Opperlina Harrell were dead. Whether the construction by the court of Revisal, sec. 1631 (Code, sec. 590), is the correct one, it is useless for us now to discuss. The true meaning of the statute and the intent of the Legislature have been settled by this Court in well-considered opinions, which we are not disposed to disturb.

There was error in admitting the testimony of the two witnesses, as above indicated, for which the interpleaders are entitled to a new trial. The other exceptions need not be considered at this time.

We do not approve the course adopted in the court below of allowing the interplea to be filed by new parties after this Court had fully passed upon the merits of the pending action and directed judgment to be entered in favor of the defendants. The interpleaders should have been required to bring an independent action. The plaintiffs are not interested in their controversy with the defendants, and, besides, the pending suit had been settled by final judgment. While this is an irregularity, the court may proceed in the case as now constituted.

New trial.

Cited: *Grissom v. Grissom,* 170 N. C., 98.

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IN RE WILL OF MARTHA HEDGEPETH.

(Filed 10 March, 1909.)

1. **Wills, Lost or Destroyed—Probate, Common Form—Jurisdiction.**

The clerk of the Superior Court has jurisdiction to take probate of a lost will, or of one which was not destroyed by the testator, or was destroyed by him when not having the *animo revocandi,* and an action in the nature of a bill in equity to set up the will is unnecessary.

2. **Same—Contents—Evidence—One Witness.**

It is necessary to the probate of a will before the clerk in common form to show its execution was in the manner prescribed by statute (Revisal, sec. 3113), but its contents may be proven by the clear and satisfactory testimony of one witness.

3. **Wills, Lost or Destroyed—Probate—Evidence, Sufficient.**

It is sufficient for the probate of a will in common form before the clerk when it is shown by affidavits that it was properly executed and attested, the death of the testator, the contents, and that a person other than the testator, with whom it was last seen, had destroyed it.

4. Wills—Probate—Common Form—Caveat—Right of Party in Interest—Laches.

A person interested is entitled to file a *caveat* to a will probated in common form and require the propounder to prove the will in solemn form, if the right has not been lost by acquiescence or unreasonable delay. (Revisal, sec. 3135.) As to whether laches can be imputed without notice of probate in common form, *Quære.*

5. Same—Reasonable Delay.

A reasonable time which will bar the next of kin or heir at law to file a *caveat* to a will probated in common form has not been settled by the Court; but that of seven years, fixed by the Acts of 1907, ch. 862, passed subsequently to the probate in this case, is applicable.

6. Wills, Lost or Destroyed—Probate—Solemn Form—Proof Required—Propounder—Burden of Proof.

Upon the filing of a *caveat* to a will probated in common form the propounder must prove the will *per testes* in solemn form, and the burden is upon him to show (1) the formal execution as prescribed by statute; (2) the contents, if the original was not produced; (3) the loss of the original will or that it had not been destroyed by the testator or with his consent or procurement.

7. Same—Presumption of Revocation—Evidence.

When the propounder, to establish a will in common form, does not produce the original, or when it is not to be found, there is a presumption of fact that it was destroyed by the testator *animo revocandi*, which will have to be overcome by competent evidence; and affidavits admitted before the clerk when the will was admitted to probate in common form is incompetent.

ACTION tried before *Ward, J.*, and a jury, at December Spe- (246) cial Term, of NASH. Appeal by Ruffin Lyon.

The record discloses this case: On 11 May, 1900, John T. Hedgepeth offered for probate before the Clerk of the Superior Court of Nash County a paper writing purporting to be the last will and testament of Martha Hedgepeth, in words and figures as follows, to wit:

"NORTH CAROLINA—Nash County.

I, Martha Hedgepeth, of Nash County and Nashville Township and State of North Carolina, being of sound mind and disposing memory, do make and declare this to be my last will and testament: I give to John T. Hedgepeth, formerly known as John Massengill, son of Martha Massengill, widow of T. Massengill, all my land situate in Nashville Township, Nash County, and bounded as follows: S. L. Arrington, Isaac Wombleton and others, known as a part of the John Evans land, containing forty acres, more or less.

MARTHA (her X mark) HEDGEPETH. [Seal.]"

"Witness: R. F. DRAKE,
J. C. HARPER."

The propounder filed the affidavit of J. C. Harper, setting forth that he was a subscribing witness to the will of Martha Hedgepeth; that R. F. Drake, the other subscribing witness, is dead; that said Martha Hedgepeth, in the presence of deponent and R. F. Drake, the other subscribing witness, subscribed her name at the end of said paper writing, of which the one now presented is, in substance, a true copy, which original bears the date of same time, about 1889 or 1890. The deponent further saith that the said Martha Hedgepeth, the testatrix aforesaid, did, at the time of subscribing her name, as aforesaid, (247) declare the said paper writing so subscribed by her, a copy of which is exhibited, to be her last will and testament, and that at her request defendant subscribed his name thereto as a subscribing witness; that she was of sound mind and memory, of full age, etc. The propounder also filed the affidavit of Mrs. Tolie Cooper, setting forth that she was at the home of Martha Hedgepeth, who was sick, when John C. Harper and R. F. Drake came to write her will; that R. F. Drake wrote the will, and, at the request of Mrs. Hedgepeth, R. F. Drake, after signing and witnessing, handed the will to her husband, L. W. Hedgepeth. Mr. Drake asked Mr. Hedgepeth if he should bring the will with him to Nashville. Mr. Hedgepeth answered no, he would be in Nashville in a few days and bring the will with him. After all had left, Martha Hedgepeth told deponent that she had made her will and given all she had to John Hedgepeth. She was of sound mind and disposing memory. Deponent filed the affidavit of Jordan Brewer, stating that "A short time before L. W. Hedgepeth was married the second time, he told deponent 'there was a will, but John Hedgepeth will never get that land, for I have put that will to ashes.'"

Upon the foregoing affidavits the clerk adjudged that the paper writing and every part thereof is the last will and testament of Martha Hedgepeth, and admitted it to probate in common form.

On 19 March, 1906, Mary E. Etheridge and others, heirs at law of Martha Hedgepeth, filed a *caveat* to said will in the office of the Clerk of the Superior Court of Nash County, whereupon citations were issued to Ruffin Lyon, who purchased the land from John Hedgepeth, and others, heirs at law, to come in and see the proceedings. An issue of *devisavit vel non* was thereupon made up and transmitted to the Superior Court of Nash County for trial. At the December Term, 1907, the issue was tried before the court and a jury, when the following evidence was introduced by the propounders:

J. C. Harper testified: "I know Martha Ann Hedgepeth. I was at her house. Captain Drake was writing a paper. Captain Hedgepeth sent for me to witness it. Captain Drake went out and wrote a will—what purported to be a will—and I read it to her. Captain Drake and I

witnessed it. It was in 1889. It willed forty acres. She said (248) she wanted to give to John Hedgepeth. I read it to her, and she signed it. I heard it was destroyed, and I do not know anything about it, except it left forty acres to John Hedgepeth."

Mrs. Tolie Cooper testified: "I know Mrs. Hedgepeth. I was there at the time in question. I was there when it was written. She said it was her will. She had given everything she had to John Hedgepeth. It was several years ago. She is dead. I do not know what became of it nor the contents of it."

Mrs. Beauregard Griffin testified: "I was the widow of L. W. Hedgepeth. I never saw the will at all. I heard her say she had made the will to keep her out—that she did not want her people to have it."

The affidavit of Jordan Brewer was offered and excluded. Exception by the propounder, who assigned said ruling as error.

The propounder proposed to show by Mrs. Griffin that she had heard some outside party say that she had destroyed the will and that John Massengill had never had the land.

The propounder offered in evidence the record of a paper writing purporting to be the last will and testament of Martha Ann Hedgepeth, on file in the office of the clerk of the Superior Court. It was admitted that said paper writing had been made up and written after the death of Martha Ann Hedgepeth on *ex parte* affidavits before the clerk of the Superior Court, and without any petition having been filed in said proceeding before the clerk to set up the contents of the lost or destroyed will, and that no notice had been issued to the parties interested of the proceedings before the clerk, in which said will was set up, but that said lost or destroyed will had been proven in common form. The paper writing was, on objection, excluded by the court. The propounder and his grantee duly excepted.

There was no evidence before the court that Martha Ann Hedgepeth, at the time of making the alleged will, had signed said will in the presence of the two witnesses, requested them to sign it, or that they had signed it in the presence of each other. There was no evidence that the will was lost or destroyed—no evidence about it, one way or the other.

At the close of the propounder's evidence his Honor, being of the opinion that the entire proceeding before the clerk was ir- (249) regular, and that there was no evidence before the court to show a lost will or destroyed will, and no petition having been filed by the propounder asking to be allowed to set up and prove the contents of the lost will, directed the jury to answer the issues as set out, and dismissed the proceeding, and signed the judgment found in the record. The propounder and his grantee excepted. From the judgment the propounder and Lyon appealed.

T. T. Thorne for caveators.
Jacob Battle and Joseph B. Cheshire, Jr., for propounder.

CONNOR, J., after stating the case: It is well settled by the decisions of this Court that the clerk has jurisdiction to take probate of a lost will, or one destroyed by some person other than the testator, or by the testator not having the *animo revocandi.* It is not necessary in either case to bring an action in the nature of a bill in equity to set up the will. *McCormick v. Jernigan,* 110 N. C., 406; *Evans' will,* 123 N. C., 113. His Honor was therefore in error in holding that the entire proceeding before the clerk was irregular and void. We think that there was evidence before the clerk entitling the propounder to have the will admitted to probate in common form. It seems to be well settled that while it must be shown that the will was executed as prescribed by the statute (Revisal, sec. 3113), if lost or destroyed, its contents may be proven by the testimony of one witness, provided the evidence be clear and satisfactory. "The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached." This was held after a most learned and exhaustive discussion by the Court of Appeals in *Sugden v. St. Leonard,* 1 L. R., Probate Div., 154. It has been uniformly so held by the courts in this country. *In re Johnson's will,* 40 Conn., 587; *Mercer v. Mackin,* 77 Ky., 434. "If the subscribing witnesses to the lost will are living and within the jurisdiction of the court, they must be produced and examined, as in other cases, to prove execution. If they are dead, or their presence can not for any valid reason be procured,
(250) the execution of the will may be proved by substitutionary evidence." 1 Underhill Wills, sec. 274. The court, in such cases, proceeds with caution, and requires satisfactory proof in regard to the contents of the will, its due execution and its destruction or loss otherwise than by the testator or with his consent. It would seem that the proof before the clerk measured up to the standard required. Mr. Harper's affidavit showed the execution of the will, its attestation by Mr. Drake and himself, the death of Mr. Drake and the contents of the will. Mrs. Cooper's affidavit was corroborative in every respect. The affidavit of Brewer showed the declaration of L. W. Hedgepeth, the person with whom the will was last seen, that he had destroyed it. The only question in regard to this evidence was whether such declaration was competent. It is true there was no affidavit that a search had been made or that Hedgepeth was dead. However this may be, there was sufficient evidence to justify the clerk in admitting the paper writing to probate in common form.

It is, however, equally clear that any person interested in doing

so was entitled "as of common right" to file a *caveat* and require the propounder to prove the will in solemn form, provided such right had not been lost by acquiescence or unreasonable delay. Revisal, sec. 3135. What is a reasonable time beyond which the next of kin or heir at law will be barred because of acquiescence has not been settled by this Court. The question is discussed by *Pearson, J.*, in *Etheridge v. Corprew*, 48 N. C., 14. It would seem that he was of the opinion that no laches would be imputed unless they had notice of the probate. He says: "Certainly delay can not be considered as amounting to laches until the petitioners are fixed with notice; and as they are entitled, as of common right, to have the script propounded in solemn form, it was for the respondents to allege and prove all the facts necessary to establish a forfeiture of that right." *Smith, C. J.*, in *Randolph v. Hughes*, 89 N. C., 428, discusses the authorities. We find that the Legislature (Laws 1907, ch. 862) has fixed the time within which the *caveat* must be filed at seven years. We find nothing to indicate that, in the absence of any controlling circumstances, a shorter time would, prior to the statute, bar the caveators, and we adopt the statutory period in this case. Therefore, when the *caveat* was filed and the bond given, (251) as required by the statute, the propounder was called upon to prove the will *per testes* in solemn form. Upon the trial of the issue the propounder carried the burden to show: (1) The formal execution of the will, as prescribed by the statute. This he could do by calling the subscribing witnesses or by accounting for their absence, resorting to the best competent evidence obtainable. (2) To show the contents of the will, if the original was not produced. This, as we have said, could be done by a single witness, if no other was obtainable. (3) To show that the original will was lost or had been destroyed otherwise than by the testatrix or with her consent or procurement. *Mayo v. Jones*, 78 N. C., 402; Redfield Wills, 349; I Underhill Wills, sec. 274. The will not being found, there is a presumption of fact that it was destroyed by the testator *animo revocandi*. Some courts have held that this is a presumption of law, but the better view is as stated. *Redfield, J.*, in *Minkler v. Minkler*, 14 Conn., 125, says: "It is not, then, a legal or artificial presumption of law, like the *presumptiones juris et de jure* of the civil law, that the will is burned, etc.; it is, at all events, revoked. So, too, it being destroyed, or lost in any other mode, no doubt we would hold, as the English ecclesiastical courts have done, that the mere absence of the will did *prima facie* amount to a revocation. But we would hold this merely as a natural presumption, as matter of fact, and imposing the duty upon him who asserted the contrary to support his assertion by proof." *Jackson v. Brown*, 6 Wend., 173. It seems that if the will is shown to have been last seen in the custody of a third person no pre-

sumption of revocation would arise. *Shultz v. Shultz,* 35 N. Y., 653; 2 Greenleaf Ev., 681. We do not think the *ex parte* affidavits, taken before the clerk when the will was admitted to probate in common form, competent evidence upon the trial of the issue. The caveators were not parties—had no opportunity to cross-examine the witnesses or contradict them. The issue was to be tried upon evidence then and there introduced before the jury. Jordan Brewer's affidavit was incompetent. *Scott v. Maddox,* 113 Ga., 795.

This brings us to consider the question whether the evidence (252) introduced by the propounder entitled him to go to the jury.

Assuming that the execution and contents of the will were proven, there was a failure of proof to account for its nonproduction. Mrs. Cooper does not testify, as stated in her affidavit, that the will was handed to L. W. Hedgepeth. On the contrary, she says, after testifying to its execution: "I do not know what became of it nor the contents of it." There is no evidence tending to show that Mrs. Hedgepeth parted with the will after signing it. The presumption was not rebutted; in fact, there was no evidence tending to do so. His Honor correctly excluded the evidence of Mrs. Griffin. It is a hardship upon Lyon, who, relying upon the proof of the will in common form, purchased the land. It would seem that, for the protection of titles and purchasers, it would be well to require all wills in which real property is devised to be proven in solemn form. It would seldom occur to a layman or a lawyer that the title to land devised in a will was open to the uncertainty of a jury verdict for seven years after the probate of the will. If it had appeared that the caveators had notice or knowledge that the will had been admitted to probate and Hedgepeth had taken possession of the land, asserting ownership, we should have thought three years a reasonable time within which to have filed a *caveat.* In the light of our decisions and the testimony, we concur with his Honor's ruling. The judgment must be

Affirmed.

Cited: Watson v. Hinson, 162 N. C., 79; *Dulin v. Bailey,* 172 N. C., 609.

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

(Filed 10 March, 1909.)

Deeds and Conveyances—Interpretation—Words Employed—Construed as a Whole—Intent—Time to Cut and Remove—Injunction.

A deed conveying timber of a certain dimension on a described tract of land for a fixed price, granting four years in which to cut, haul and remove the same, and granting an extension of two years, at the grantee's option, upon payment of interest on the purchase price, should be construed as a whole and the intention of the parties gathered from the language used; and when, by placing the words in their proper relation to each other and the subject-matter of the contract, it appears that the right to cut, as well as to remove, was included in the extension of time, and the grantors were duly notified beforehand of the purpose to exercise the option, the time of commencing to cut is not limited to the first period. The injunction should have been continued to the hearing.

CLARK, C. J., and WALKER, J., dissenting.

ACTION heard upon proceedings for a restraining order by *Jones, J.*, at May Term, 1907, of HARNETT.

Plaintiff appealed.

This case was heard and decided at the September Term, 1907 (146 N. C., 158). A petition to rehear was filed and ordered to be docketed. The facts upon which the decision was based are set out in the report of the case and need not be repeated, except in so far as they may be necessary to dispose of the petition to rehear.

Rose & Rose and Shepherd & Shepherd for plaintiffs.
E. F. Young, J. C. Clifford and Stewart & Muse for defendants.

CONNOR, J. When this case was before us at a former term it was argued only on one side, plaintiffs' counsel filing a brief. Our attention is now called to language in the deed from Barnes to Etheridge, under which plaintiffs claim title to the timber, which was not then adverted to or discussed. The decision went upon the view that the clause giving the grantee the right to call for an extension of two years after the expiration of the original term granted was confined to the (254) removal of the timber. After a careful reconsideration of the language of the entire deed, we are of the opinion that we failed to give full effect to all of its provisions and adopted a construction unduly restrictive of the plaintiffs' right. Following the premises, a description of the land, etc., the entire deed is in the following language:

"For and in consideration of the sum of $1,400 in cash, the receipt

of which is hereby acknowledged, I have this day agreed to bargain and sell, and by these presents do bargain and sell, to James E. Etheridge, of Norfolk, Va., his heirs and assigns, with the privilege of moving, as hereinafter stated, at any time within four years from date, subject to the conditions hereinafter contained, all of the pine sawmill timber of the following dimensions—that is, 12 inches in diameter at the stump at the time of removing—on the tract or parcel of land situated in the county of Harnett, in the State of North Carolina, and bounded as follows, to wit: Consisting of about 375 acres, more or less, and known as the Smith tract, bounded on the north by A. R. Wilson and William Fowler estate lands; on the east by John Williams and Fowler estate; south by Byrd Bros., who bought the southern part of said tract, by their line to Parker Covington land, and by his line to the beginning. The said James E. Etheridge, his heirs and assigns shall have four years *to cut, haul and remove* said timber from said land; and if longer time is desired *to remove* said timber the right is hereby granted, upon the payment of eight per cent per annum upon the purchase price for the time it takes after the expiration of the four years herein granted, together with the right and privileges for and during the said period from this date; that his agents, heirs or assigns to enter upon said land or any other land owned by him, and to pass and repass on the same at will, on foot or with teams and conveyances; to build lumber camps, stables and other fixtures; *to cut and remove the said* timber, and to construct and operate any roads, tramroads or railroads over and upon said lands as the said James E. Etheridge, his heirs or assigns may deem necessary for *cutting and removing* said timber, and to use such trees, underwood and brush on said land as may be needed in the construction and
(255) operation of said roads, tramways and railroads, and to use and operate any railroads, tramways or roads that the grantee herein or his heirs or assigns may construct or cause to be constructed, so long as they desire, *not exceeding two years;* the right to remove any and all fixtures, roads, railroads and tramways or anything put up by said James E. Etheridge, his heirs or assigns on said lands."

Eliminating unnecessary verbiage, the clause in respect to the extension of time reads as follows: "Said E. . . . shall have four years *to cut, haul and remove* said timber from said land; and if longer time be required to *remove* said timber the right is hereby granted, upon the payment of eight per cent per annum upon the purchase price for the time it takes after the expiration of the four years herein granted; . . . *to cut and remove* the said timber and to construct and operate such roads . . . as the said E. . . . may deem necessary for *cutting and removing* said timber, so long as they may desire, not exceeding two years." It thus appears that the extension of two years includes

the right to "cut and remove," these words being connected with and placed in their legitimate relation to the words "herein granted." In this way we think a natural interpretation is given the instrument and all parts of it given effect, which is the primary purpose of all construction. To eliminate the words "to cut" and "cutting," leaving only the words "remove" and "removing," is not allowable. It is elementary that it is the duty of the court to ascertain and effectuate the intention of the parties to written instruments, but it is also elementary that they must gather intention from the language used. No question is raised in regard to the reasonableness of the time granted to cut and remove. The original period of four years extended, "not exceeding two," makes in all six years, and this has never been suggested as unreasonable. There is no uncertainty respecting the time when the grantee must begin to cut; hence none of the questions in that respect which have been before this and other courts are involved here. The simple question is whether by the language of the deed the extension from and after the expiration of the four years includes the right to *cut* as well as *remove* the timber sold to the grantee. For the reasons given, we think it does. (256) Plaintiff, the assignee of Etheridge, before the expiration of the original period, gave notice that it desired an extension of "four years." Of course, it was not entitled to so long a time, but its error in this respect did not work a forfeiture of its right to two years. Defendant denied that it was entitled to any extension, and began to cut the timber. In this they were interfering with plaintiff's right. Fully recognizing the wisdom of adhering to our decisions, we as fully recognize our duty, when, by inadvertence or a failure to correctly interpret the language of an instrument or to give due weight to controlling reason and authority, we have fallen into error, to correct it at the earliest opportunity. The petition must be granted and the order heretofore made reversed. The injunction should have been continued to the hearing. This will be certified to the Superior Court of Harnett, to the end that further proceedings may be had in accordance with this decision.

Petition allowed.

CLARK, C. J., dissenting: There is no reason shown, in my judgment, to disturb the unanimous decision of this Court, as set out in the well-considered opinion of the Court in 146 N. C., 158.

The contract provides for "four years to *cut,* haul and remove the timber from said lands." It further provides that "if longer time is desired to *remove* the timber" two years additional are allowed for that purpose, upon payment of 8 per cent interest, etc. We look in vain in the contract of the parties for any right to "cut" a single stick of timber after the lapse of four years. The evident intent of the parties, as ex-

pressed by themselves in their contract, was (1) four years in which to "cut and remove"; (2) two years thereafter to "remove" any timber which had been cut during the four years, but which had not been removed at the expiration of that period. The incidental powers are conferred for the execution of the above rights, *i. e.,* to enable the vendee to "cut and remove" during the four years, and to "remove" during the two additional years timber which was cut but not removed at the end of the stipulated time. These incidental powers are not to be
(257) construed to extend the stipulated rights, which do not embrace any right to "cut" after the expiration of the four years. The operation of the railroad during the two years is to "remove" timber already cut. It does not authorize the cutting of more timber.

WALKER, J., dissenting: I concur in the dissenting opinion of the *Chief Justice.* In order to understand the question presented in this case, it will be necessary to set out the language of the latter portion of the contract which we are construing and italicize some of its words. That part of the contract is as follows: "The said James E. Etheridge, his heirs and assigns, shall have four years to cut, haul and remove said timber from said land, and if longer time is desired to remove said timber the right is hereby *granted,* upon the payment of eight per cent per annum upon the purchase price for the time it takes after the expiration of the four years herein granted, together with the right and privileges for and during the said period from this date, and his agents, heirs or assigns to enter upon said land or any other land owned by him, and to pass and repass on the same at will, on foot or with teams and conveyances, to build lumber camps, stables and other fixtures, *to cut and remove* the said timber, and to construct and operate any roads, tramroads or railroads over and upon said lands as the said James E. Etheridge, his heirs or assigns may deem necessary for cutting and removing said timber, and to use such trees, underwood and brush on said land as may be needed in the construction and operation of said roads, tramways and railroads, and to use and operate any railroad, tramways or roads that the grantee herein or his heirs or assigns may construct or cause to be constructed, so long as they may desire, not exceeding two years; the right to remove any and all fixtures, roads, railroads and tramways or anything put up by said James E. Etheridge, his heirs or assigns on said lands." It is explicitly stated in the contract, as will be seen by a perusal of it, that the right to *cut* and remove the timber is limited to four years from the date of the contract. This provision appears twice in the instrument. The extension of two years is restricted to
(258) removing the timber which has been cut. The elliptical form of contract, as given in the opinion of the Court, which the Court

considers as containing its substance or material parts, is, in my judgment, apt to mislead, and the selection of the portions of the contract, as thus made, is, I believe, what has led the Court into error. The part omitted by the Court between the word "granted," which I have italicized, and the words "to cut and remove," which I have also italicized, in the copy of the contract above set forth, can not be excluded without doing violence to the real intention of the parties. They must be included in any consideration of the contract for the purpose of ascertaining what the parties meant. I can not agree with my brethren of the majority that words so essential to the completeness of the whole may be excluded as an immaterial part thereof, when we come to construe the contract, and that words or phrases widely separated by the parties themselves, in expressing their meaning, should thus be brought into juxtaposition. I know of no rule of interpretation justifying such a course. On the contrary, the elementary rule of construction is that effect should be given to every part of the contract. The parties separated by the omitted words the parts thus brought together or closely associated by the Court in its opinion, and for the very purpose of clearly showing their intention. The privilege of ingress and egress and the right given of building lumber camps, stables and other fixtures, "to cut and remove the said timber," evidently means that Etheridge should have such right and privilege *for the purpose* of cutting and removing, as previously provided in the contract. This is made clear by the clause which immediately follows: "and to construct and operate any roads, tramroads or railroads over and upon said lands as the said James E. Etheridge may deem necessary *for* cutting and removing said timber," with the right to use and operate the said roads for the purpose of cutting during the four years and removing within the additional time, not to exceed two years. The parties, in language that should not be misunderstood, agreed that Etheridge should have four years to *cut* and two years to *remove* the timber already cut, if so much additional time were desired, and when, in a subsequent part of their contract, they used the words "to cut and remove," so much relied on in the opinion of the Court, (259) they referred by the clearest implication to the division of time as already fixed—that is, four years for cutting and as much as two additional years for removing—and the said words "to cut and remove" were not, as I have stated, intended to confer the right to cut for two additional years, but have reference to the purpose for which the privilege of ingress and egress and the right to construct roads, etc., were given. But this is not all that can be said in support of the view entertained by the *Chief Justice* and myself. In the opinion of the Court all reference to the first clause of the contract is entirely omitted and emphasis placed on the concluding portion. Even as thus considered, we

think the construction of the Court is erroneous. I have discussed the case, though, so far, upon a consideration only of the latter portion of the contract, to which the opinion of the Court is confirmed, without giving effect to all that is said by the parties therein. It is not permissible to refer only to a part or to detached parts of the contract. The first clause of the contract must also be considered, for we must look at the instrument as a whole, and see and understand every part, in order to arrive at the true meaning of the parties. In the beginning, J. D. Barnes, the owner of the timber, sells it to James E. Etheridge for four years, "with the privilege of removing, as hereinafter stated," for the consideration of $1,400. What is the privilege of removing to which reference is made? We find, upon reading the contract, that there is provision *thereinafter* made for cutting and removing during four years from date; "and if longer time is desired to remove said timber the right is granted, upon the payment of eight per cent per annum on the purchase price for the time it takes after the expiration of the four years herein granted." If the parties did not intend that there should be two periods of time—one for four years in which to cut and remove and, if desired, one for as long a time as two additional years to remove only—why did they twice state in their contract that there should be a time for cutting and an additional time allowed for removing? The Court attaches no sufficient importance to this clearly worded provision of the contract, showing unmistakably the intention of the parties. Besides, and this
(260) would seem to make the meaning of the parties, as we contend it is, exceedingly plain, the consideration for the extension of the time is not anything to be paid for the trees which might be cut during that time, as would be natural, but merely eight per cent interest on the original consideration for cutting and removing during the four years, which interest was manifestly charged, not for trees to be cut, but as a reasonable rent or compensation for the use of the land while the trees already cut were being removed. We have held that a contract like this one conveys to the grantee only the timber which is cut during the time specified for cutting, and the title to the timber which is not cut during that time remains in or reverts to the grantor. *Bunch v. Lumber Co.*, 134 N. C., 116; *Hawkins v. Lumber Co.*, 139 N. C., 160. Can it be supposed that Barnes intended or Etheridge understood that the latter should cut trees during the two additional years without paying anything for them? Etheridge might have cut diligently for the first four years and not have exhausted all the trees of the specified dimensions, and yet, under the construction of the court, he could cut for two more years without paying for the trees, but by simply paying interest on the amount of consideration named in the contract for cutting four years. It seems to me that the Court

has substituted for the plainly expressed intention of the parties one which is not warranted by the terms of the contract, and has disregarded language which, to my mind, can have but one meaning. If it were intended that Etheridge should have two additional years to *cut* and remove, why was this intention not expressed in the clause extending the time, which is worded as follows, "if longer time is desired to remove said timber the right is hereby granted"? Here is language capable of but one construction; and if it is to be given a meaning the very reverse of that it plainly conveys, the intent of the parties that it should have the opposite meaning should appear unmistakably, so as to force upon us the conviction that, while they have used language apt and sufficient to express the meaning that the additional time was allowed only for the removal of the cut timber, they in fact did not mean what they have said, and so clearly said. There is no language in the contract which leads to such a strange result. In construing a contract we seek for the intention of the parties, but (261) this must be found in the words which they have used to express it. We can know what they meant only by what they have said, and, when their meaning is once plainly stated, we may do great injustice if by resorting to language of doubtful signification in some other part of the instrument, and especially language relating to a different subject, we reverse the clearly expressed intention of the parties. Even if there is any seeming conflict in the terms of the contract—and there is not—we should try to reconcile them, if possible; and if this can not be done, and one of them must be rejected, that which is certain should be preferred to what is vague and uncertain. My conclusion is that the parties have stated in no uncertain terms that the additional time, not exceeding two years, was allowed for removing the timber which had been cut within the four years.

The effect of the decision in this case will be to permit a large number of resident and nonresident lumber companies, who have similar contracts to the one now under construction, to destroy what is left of our forests without any just or adequate compensation to the owners, a right which I do not think the parties could have had in contemplation when the contracts were made.

Cited: Bateman v. Lumber Co., 154 N. C., 251; *Gilbert v. Shingle Co.,* 167 N. C., 289, 290.

H. T. MOORE, JOHN B. MOORE, W. L. MOORE, AND MARY POWELL AND HUSBAND v. THE ROWLAND LUMBER COMPANY ET AL.

(Filed 10 March, 1909.)

1. Appeal and Error—Interlocutory Order—Fragmentary Appeal.

An appeal will not lie from an interlocutory order rendered in an action for the recovery of certain interests in timber, determinative only, under agreement of counsel, of the question of title, leaving the objections and exceptions relative to the question of damages open for future determination. The judgment should be determinative of all the matters at issue, so that the case may be considered and decided upon one appeal.

2. Judgments—Parties—Proceedings Void.

When in special proceeding, under which certain timber interests were sold by a commissioner, it does appear upon the face of the record that certain persons of age were not made parties, or that they have not appeared as such in person or by attorney, or have waived their rights, they are not bound by a judgment rendered therein, and as to them the entire proceeding is void upon its face.

3. Appeal and Error—Discretion—Verdict Set Aside.

The Supreme Court will not interfere with the exercise of discretion by the trial judge in refusing to set aside the findings of the jury as being against the weight of the evidence, except where there is a gross abuse of discretion apparent upon the record.

(262) ACTION tried before *Lyon, J.*, and a jury, at November Term, 1908, of SAMPSON.

Action to recover an interest in certain timber on a tract of land of 1,473 acres, conveyed to defendant by Cyrus M. Faircloth, commissioner, by deed, dated 11 November, 1899, executed by virtue of a certain *ex parte* special proceeding, commenced 26 June, 1899, in the Superior Court of Sampson County, the final decree of sale being made by the clerk on 23 October, 1899.

Upon the trial these issues were submitted, without objection:

1. "Did the plaintiffs or any of them, have knowledge of the sale by C. M. Faircloth, commissioner, to the defendant, and if so, which ones?" Answer: "No."

2. "Did the plaintiffs or any of them receive any part of the purchase money paid by the defendant for said timber with a knowledge of their interest and rights under the deed of trust, and if so, which ones?" Answer: "No."

3. "Have the plaintiffs or any of them ratified the sale of the timber, with a knowledge of their rights under the deed of trust?" Answer: "No."

Interlocutory judgment:

"It being agreed between counsel for plaintiffs and defendants that the question of damages should be left open for future determination, and that only such issues as affected title to the property in dispute should be submitted to the jury, and upon the incoming of the verdict, as copied in the record, it is adjudged that each of the plaintiffs, John B. Moore, H. F. Moore and W. L. Moore, is the owner of a one-fortieth undivided interest in the lands and property described in the complaint, and that the plaintiff Mary Powell is the owner of a (263) one-thirty-fifth interest in said property. Wherefore, it is ordered that a jury be impaneled and that they be required to pass upon the question of damages at a subsequent term of this court. The defendant does not waive or forfeit any of its objections or exceptions, or of its right of appeal. C. C. LYON, J."

Motion to set aside verdict as contrary to the greater weight of said evidence, and for a new trial. Motion denied. Defendants appealed.

F. R. Cooper for plaintiffs.

H. A. Grady and Rountree & Carr for defendants.

BROWN, J. An appeal will not lie to this Court from an interlocutory judgment of this character. The damages should have been assessed and a final judgment rendered, to the end that all assignments of error on each issue, including the issue of damage, based on exceptions taken during the trial, may be considered and determined upon one appeal.

As the parties desire to have the matter determined, we have examined the assignments of error and find nothing in the record which warrants a new trial upon the three issues already determined.

A careful examination of the special proceeding under which the timber was sold to defendant by the commissioner, Faircloth, discloses nowhere that the plaintiffs above named were made parties thereto or even referred to as such in the *ex parte* petition or in any order or decree of sale. The names of John B. Moore, Henry F. Moore and Walter L. Moore are mentioned in section 5 of the petition, but not as parties to the proceeding.

It being admitted that they were of age at the time said proceeding was commenced, it is settled that they are not bound by the decree unless they were parties to it or in some way had ratified and confirmed the sale.

Inasmuch as these plaintiffs are nowhere referred to as parties in the proceeding, judgment or decree in the special proceeding, the case can not be brought within the principle of *Harrison v. Hargrove,* 120 N. C., 97.

(264) The court acquired no jurisdiction over these plaintiffs as parties, nor was there any appearance by counsel for them, as in *England v. Garner,* 90 N. C., 198. As to them, the entire proceeding is void upon its face. *Harrison v. Hargrove, supra.*

The matters presented by the three issues are purely of fact, upon which there was conflicting evidence, and we find no error in his Honor's charge upon them. As to the exception to his Honor's refusal to set aside the findings of the jury as being against the weight of the evidence, we have frequently said that this Court will not interfere, except where there is a gross abuse of discretion apparent in the record.

No error.

Cited: *Richardson v. Express Co.,* 151 N. C., 61; *Hobbs v. Cashwell,* 152 N. C., 187.

WINSLOW BROS. & CO. v. L. L. STATON.

(Filed 10 March, 1909.)

1. Principal and Agent—Undisclosed Principal—Contracts—Evidence.

In defense to an action brought by the principal to recover an amount credited to an agent's individual debt out of the proceeds of sale of his principal's goods, evidence is competent tending to show, with burden of proof on defendant alleging it, that at the time of the transaction the defendant understood that the one acting as agent was selling his own goods and in his own right, and that he had a place of business, with his own sign out, and that the fact of agency was unknown to him. (*Hoffman v. Kramer,* 123 N. C., 570, and that line of cases upon the principles of law applicable to brokerage, cited, discussed and distinguished by BROWN, J.)

2. Same.

When a principal sues upon the contract for the price of goods sold by his agent to a third party the principal's rights are subject to the equities of the third party, when he had no knowledge at the time that he was dealing with an agent or one in a fiduciary capacity, or of such facts and circumstances as would put him on inquiry.

3. Issues Tendered—Evidence Excluded—Appeal and Error.

It is not necessary on appeal for a party to have tendered an issue when all evidence relevant to it has been excluded by the trial judge.

(265) ACTION tried before *W. R. Allen, J.,* and a jury, at November Term, 1909, of EDGECOMBE.

Certain issues were submitted to the jury, and upon the responses thereto the court rendered judgment against the defendant, who excepted and appealed.

The facts are fully stated in the opinion of the Court by *Justice Brown.*

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

BROWN, J. The findings of fact and the evidence admitted on the trial establish these facts: One J. L. Spraggins sold to the defendant three mules—two for a factory with which defendant is connected, and one for himself—at the price of $737.50. Spraggins received in full payment from defendant $500 in cash and a release in full for a debt he owed defendant amounting to $250.

The plaintiffs contend that the mules were their property; that Spraggins sold as their agent, under a written contract in evidence, and sue to recover the balance of $237.50, with interest from 7 February, 1906, the purchase price agreed upon for the brown mare mule, which amount they aver "the defendant promised and agreed to pay."

The defendant offered to prove that at the time he bought the mules he understood Spraggins to be in business for himself; that Spraggins owed him at that time more than sufficient to pay for the mule; that Spraggins agreed to let him have the mule in payment of the doctor's bill; that at the time of the sale there was a sign over the place of business where he purchased the mules, "J. L. Spraggins' Feed and Sales Stables"; that defendant did not know Spraggins was representing the plaintiffs.

The court excluded the evidence, and defendant excepted. We are of opinion that his Honor erred in excluding the evidence, as to escape a recovery against him the burden is on defendant to prove the facts alleged in his amended answer.

There is a well-defined distinction between this case and *Hoffman v. Kramer,* 123 N. C., 570, which was in line with and followed the decision of the Supreme Court of the United States in *Warner v. Martin,* 52 U. S., 209. In both cases the goods were consigned to "factors," a term of well-known commercial significance, and applied to a class of mercantile agents whose sole business is to sell merchandise consigned to them on a commission called "factorage." They hold themselves out to the business world as such, and those who deal with them are fixed with knowledge of their calling and know that they act as the agents of others, and whatever is out of the "usual course of trade" must put their customers upon notice.

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It is an "independent calling" and universally recognized as such.

Black's Law Dictionary. When one who pursues such calling sells goods for a customer and takes his own antecedent debt in payment, it is treated as no sale, for "it is a departure from the usage of trade, as well known by the creditor as it is by the factor, and therefore it is immaterial that the creditor believed the factor owned the goods himself." *Warner v. Martin,* 52 U. S., 209.

It was first held in England, before *Lord Mansfield's* time, that those who dealt with recognized factors were not put upon notice by the character of their calling, for we find in a note to *Radbone v. Williams,* 7 Dumf. and E. Term Reports, 360, that great judge quoted as saying: "Where a factor, dealing for a principal, but concealing the principal, delivers goods in his own name, the person contracting with him has the right to consider him, to all intents and purposes, as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been well settled." To the same effect is *George v. Clagett,* 3 Smith Leading Cases, 189. Afterwards a distinction seems to have been made by some of the English judges between those who are known to deal exclusively as factors and those who, in addition, do business on their own account.

In *Baring v. Corrie,* 2 B. & A., 137, it is said: "But a mere general knowledge that the person selling the goods is a factor, if he also carries on business *on his own account,* will not be sufficient to charge (267) the vendee with notice. He must know or have good reason to believe that the vendor is acting as the agent of some other person in that particular transaction."

By later English decisions, as well as in some of the highest courts of this country, it seems to be the prevailing opinion that he who deals with one who acts exclusively as a general factor and holds himself out as such is put upon notice as to the agency by the character of the calling. *Guereiro v. Peile,* 5 Eng. C. L., 399; *Warner v. Martin, supra.* In *Trant v. Milliken,* 57 Me., 63, it is held that the vendee purchasing from a foreign factor must have knowledge of his "representative character." There is no evidence that Spraggins was a general factor, whose exclusive business and calling was to sell horses and mules on commission. On the contrary, the defendant offered to prove that Spraggins had his own sign posted over the door of his place of business and that he held himself out to the world as a dealer "on his own hook."

Under such conditions the plaintiffs are held to a certain responsibility for the acts of their agent, and the rule of law applies that the principal is liable where the agent acts within the scope of his apparent

authority, provided a liability would attach to the principal if he were in the place of the agent. *Nicholson v. Dover,* 145 N. C., 20, and cases cited.

The principle was formulated in 1833 by *Lord Denman, C. J.,* in *Sims v. Bond,* 27 Eng. C. L., 99, in these words, which have been adopted by text writers and courts generally, viz.: "It is a well-established rule of law that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same position at the time of the disclosure of the real principal as if the agent had been the contracting party." To the same effect are Ewells Evans on Agency, 379; Story on Agency, 420; Wharton on Agency, 403; *Navigation Co. v. Bank,* 47 U. S., 344; *Ford v. Williams,* 62 U. S., 387; *Woodruff v. McGee,* 30 Ga., 158; *Barham v. Bell,* 112 N. C., 133.

Applying this rule, it has been held that where a person sells (268) goods to a purchaser without disclosing his agency, and the purchaser has no knowledge that the former is not the owner of the goods, the purchaser may, in an action by the principal for the purchase money, set off a demand due him from such agent. *Gardner v. Allen,* 6 Ala., 187, reported in 41 Am. Dec., 46, with copious notes and authorities sustaining the decision. *Caines v. Brisban,* 13 Johns., 9; *Hogan v. Shorb,* 24 Wend., 458.

In Story on Agency it is said (sec. 419): "So, if the agent has sold goods in his own name, no other person being known as principal, and the agent agrees at the time of the sale that the vendee may set off against the price a debt due to him by the agent, that set-off will be as good against a suit brought by the principal as it would be if the suit were brought by the agent for the price." This statement of the law is sustained by a great array of authority cited in the case of *Trant v. Milliken, supra.* See, also, *Kelly v. Mason,* 7 Mass., 319. Paley on Agency, 325, says: "If an agent be permitted to deal as if he were principal the party dealing with him and ignorant of his representative character is entitled to the same rights against him as if he were in fact the principal. So that, under these circumstances, he may set off against the demand of the principal a debt due from the agent himself." To the same effect are Chitty on Contracts, p. 225; 1 Parsons Cont., 632; *Gardner v. Allen, supra.* See, also, *Gerard v. McCormick* (N. Y.), 14 L. R. A., 234 and notes; *Bank v. Gilbert,* 24 Ill. App., 334; *Holmes v. Langston,* 110 Ga., 861; *Tawnebaum v. Maisellus,* 22 N. Y. Sup., 928; *Trutt v. Brown* (Ky.), 15 Am. Dec., 32; *Morris v. Sellers,* 46 Tex., 391; *Marsh v. Irons,* 3 Mo. App., 486.

There is another familiar principle of law which will bar a recovery by the plaintiffs if the facts are found to be as alleged by defendant.

The plaintiffs have not repudiated their agent's contract and sued for the value of the mule, but have sued upon the contract for the contract price, setting out specifically the contract of sale, the price agreed to be paid, and demanding judgment therefor. It is said by Mr. Reinhard, in his work on Agency, sec. 377: "If the principal exercises the privilege of appropriating the benefits of the contract to himself, and sues the
(269) third party, the latter has the right, as against the principal, to interpose every defense which would have existed in his favor had the agent been the principal and sued upon the contract; the principal's rights, in other words, are subject to the equities of the third party."

To the same effect are the decisions of the courts. *Taintor v. Prendergash,* 3 Hill (N. Y.), 72, and many cases cited by the author in the notes.

If it should turn out that the defendant had notice of the representative character of Spraggins, or that he was put on inquiry at time of the transaction that he was acting in a fiduciary capacity, this principle would not apply, and the action on the contract for the price agreed could be maintained.

It is true that the defendant did not tender an issue embodying his question as to notice; but inasmuch as the court had excluded all the evidence he offered in support of his amended answer, he was not called upon to tender an issue. He was not required to do a vain thing.

For the error pointed out, there must be a

New trial.

R. C. SLOAN ET AL. v. ETTA HART ET AL.

(Filed 17 March, 1909.)

1. Lessor and Lessee—Covenant Implied—Entry—Rights and Remedies.

By entering into a contract of lease, to commence at a fixed future time, the lessor impliedly covenants with the lessee that the latter shall then have the premises open to his entry.

2. Same—Trespasser.

An implied covenant of entry in a lease of lands does not extend beyond the future time fixed for the lease to begin, and has no application to the trespass thereafter of a stranger or one who takes possession of and holds the leased premises after the time fixed for the lessee to take possession.

3. Lessor and Lessee—Covenant Implied—Entry—Breach of Covenant—Rights and Remedies—Damages.

Upon the breach of an implied covenant that the lessee of lands shall at a fixed time have the premises open to his entry, arising from the holding over of a tenant in possession, the lessee is under no obligation to maintain an action for possession against such tenant, but may recover damages of the lessor.

4. Same—Entire Damages.

The entire damages arising from a breach of an implied covenant that the leased lands should be open to the entry of the lessee at the fixed future time should be recovered in one and the same action.

5. Lessor and Lessee—Contracts, Breach of—Cause of Action, When Arising.

Upon the failure of a lessor to put the lessee in possession, in breach of his contract of lease, the injury immediately ensues, and the cause of action arises without the necessity of tender by the lessee of the rent.

6. Same—Measure of Damages.

The measure of damages for a breach of an implied covenant in a lease, that the leased land should be open to the entry of the lessee at a future time specified, is the difference between the rent agreed upon and the market value of the term, plus any special damages alleged and proved as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.

7. Lessor and Lessee—Breach of Covenant—Pleadings—Proof.

In order to recover special damages arising out of a breach of contract, they must be both pleaded and proved.

ACTION tried before *Lyon, J.*, and a jury, at October Term, (270) 1908, of NEW HANOVER, to recover damages for breach of a lease contract entered into between plaintiffs and the defendant.

The court submitted these issues:

1. "Were the plaintiffs injured by the breach by defendants of their contract, as alleged in the complaint?

2. "What damages, if any, are plaintiffs entitled to recover?

3. "Did the defendants have the right to rent the stores to the plaintiffs according to the lease offered in evidence?"

The jury answered the first issue "Yes," the second issue "$373.31," and the third issue "No."

From the judgment rendered the defendants appealed.

The facts are stated in the opinion of the Court.

Robert Ruark for plaintiffs. (271)
E. K. Bryan for defendants.

BROWN, J. The admitted facts are that on 18 May, 1906, the defendants, through their agent, leased in writing to plaintiffs two stores, 19

and 21 South Front Street, in the city of Wilmington, the term to begin 1 October, 1906, and expire 30 September, 1909, at a rental of $66.66⅔ per month, payable in advance. The premises had been theretofore leased to Josh Simon, whose term expired 30 September, 1906, but in his lease are these words: "It is further agreed that the owner or agents will have the right to place rent cards, 'For Rent,' on front of the house thirty days before the expiration of this lease, provided I do not agree to hold this property for another year." Simon refused to vacate on 1 October, and defendants endeavored to eject him by proceedings before a justice of the peace. Being unsuccessful, they appealed to the Superior Court, where the cause is now pending. The plaintiffs rented other stores, and bring this action to recover damages. The court charged the jury that it was the duty of the defendants to put the plaintiffs in possession on the date fixed for the beginning of the term, to which defendants excepted.

1. It is unnecessary to consider *seriatim* the many assignments of error, as we are of opinion that upon the admitted facts the plaintiffs are entitled to recover actual damages, and that a new trial is necessary upon that issue for error in the charge.

The appeal presents a question which has never been decided before in this State and upon which the courts of other States have differed materially in their judgments, and which is tersely expressed in the very able brief of the learned counsel for plaintiffs, as follows: "Did the lessors impliedly covenant with the lessees that the leased premises would be open to entry by the lessees at the date fixed for the beginning of the term?"

All authorities are agreed that if Josh Simon, the prior tenant, held over rightfully under the terms of his lease, the defendants would be liable, for to hold otherwise would be giving to the defendants the benefits of their own wrong.

(272) If defendants' failure to put plaintiffs in possession were caused by a wrongful holding over of the former tenant, then the authorities are in direct conflict.

If there were a finding that the plaintiffs had notice at the date of their lease of the terms of Simon's lease, we might be inclined to the opinion that nothing short of an express covenant to put the plaintiffs in possession at the date agreed would render defendants liable for damages for Simon's failure to vacate.

In the absence of evidence of such notice, and assuming for the purposes of this case only that the holding over of the former tenant is wrongful, we are persuaded by reason and authority to hold that when plaintiffs' lease was executed, on 18 May, the lessors impliedly covenanted to put the plaintiffs in possession on 1 October, and that there has been

an admitted breach of that covenant, for which the lessors are liable in actual damages, notwithstanding that they acted in good faith. The leading case which holds that there is no implied covenant on the part of the lessor is the New York case of *Gardner v. Keteltas,* 3 Hill, 330; 38 Amer. Dec., 637. This case, which by some text writers is stated to have declared the "American Rule," has been followed by later decisions of the New York courts. An examination of the case, however, shows that there existed in New York at the time a statute such as does not exist in North Carolina, and the conclusion of the Court appears to have been to some extent based upon that statute. However that may be, the New York case has been followed by respectable courts, without adverting to any peculiar statutory enactments in their respective States.

Investigation and reflection leads us to the conclusion that the decisions by the courts of Great Britain, made as early as 1829, are as well supported by authority and more strongly sustained by reason and abstract justice than is the judgment of the New York Court.

The first of these decisions is summed up with quaint terseness by *Baron Vaughan:* "The court were all clearly of opinion that he who lets agrees to give possession, and not merely to give a chance of a lawsuit."

Beginning with the case of *Coe v. Clay,* 15 Eng. Com. Law, (273) 492, what is known as the "English Rule" was announced—that is, that in the absence of express provision in the lease, the lessor impliedly covenants with the lessee that the premises shall be open to entry by the lessee at the time fixed for the beginning of the term. This case has been followed by *Jenks v. Edwards,* 11 Exch., 775; *Hertzberg v. Reisenbach,* 64 Tex., 262; *L'Huissier v. Zallee,* 24 Mo., 13; *Reiger v. Weltes,* 110 Mo. App., 173; *Hughes v. Hood,* 50 Mo., 350; *King v. Reynolds,* 67 Ala., 229; 42 Am. Rep., 107; *Vincent v. Defield,* 98 Mich., 84; *Cohen v. Norton,* 57 Conn., 480; 5 L. R. A., 572; *Herpolsheimer v. Christopher* (Neb.), 9 L. R. A. (N. S.), 1127, and *Huntington v. Parsons,* W. Va., 9 L. R. A. (N. S.), 1130.

The theory of the New York Court is that if the lessee is prevented from taking possession by a tenant wrongfully holding over it is not the duty of the landlord to oust the wrongdoer, because the right to possession at the end of the outstanding term is in the lessee and not in the lessor, and that, therefore, when the landlord has given the tenant the right to possession he has done all the law should require him to do as against third persons not claiming under prior and superior rights derived from him. *Gardner v. Keteltas, supra.*

This decision has been followed in the States of New Hampshire, Maryland, Vermont, Illinois and Pennsylvania.

The theory of the English courts, and those of this country following

their decisions, is that when a lease is made, the beginning of which is fixed at some future date, it is within the contemplation of the parties and a part of their understanding, without which the lease would not have been made, that when the time comes for the lessee to take possession, according to the lease, the lessor shall have the premises open to the entry of the lessee, and that the latter is not liable for rent until he is afforded an opportunity to enter, and is under no obligation to maintain an action against a tenant holding over to recover possession.

This is the ruling of the courts of Missouri, Alabama, Indiana, Michigan, California, Arkansas, Nebraska and Texas. The English
(274) rule appears to us to be better founded in reason and more consonant with good conscience, sound principle and fair dealing.

It is unnecessary to discuss the reasons *pro* and *con,* since they are fully given in the opinions of the several courts cited. The implied covenant referred to, however, does not extend beyond the time when the lease is to commence. If, after the time when the lessee is entitled to have the possession, according to the terms of the lease, a stranger trespass on or take possession of and hold the leased premises, that is a wrong done to the lessee, for which the lessor can not be held responsible. *King v. Reynolds,* 67 Ala., 233.

2. We come now to consider the question, what damages are the plaintiffs entitled to recover? The entire damages, whatever they may be, for the breach of the implied covenant are to be recovered in this action, for a recovery in this will bar any future action. In that respect it differs from those cases wherein the servant sues the master for his wages when he has been wrongfully discharged in violation of his contract of employment. Then the servant may wait until the contract period has expired and sue for the whole amount, or he can bring repeated actions on each wage as it falls due under the contract. *Jarrett v. Self,* 90 N. C., 478; *Smith v. Lumber Co.,* 140 N. C., 377.

The failure to put the lessee in possession was one single act of omission which constituted a breach of the contract of lease and excuses him from tendering the rent. Therefore the damage is susceptible of immediate assessment, as the lapse of time is not necessary to develop it. It is a principle in the law of contracts, as well as torts, that where the right of a party is once violated the injury immediately ensues and the cause of action arises. The recovery will then embrace such legal damages as may be recovered for the breach. In its application to a tort the rule is very clearly stated in *Mast v. Sapp,* 140 N. C., 533.

In assessing damages in cases of this character the principle of *Hadley v. Baxendale,* 9 Exch., 341, is upheld by the Supreme Court of Connecticut, as well as by the other courts that have passed on the question.

This excludes the assessment of speculative or consequential dam-

ages, and confines the recovery to such actual damages as may be (275) reasonably supposed to have been within the contemplation of the parties at the time the contract was made. The measure of damages appears settled by practically all the authorities to be the difference between the rent agreed upon and the market value of the term, plus any special damages alleged and proved. *Cohen v. Norton,* 57 Conn.; *Herpolsheimer v. Christopher, supra.* In these cases practically all the precedents are collected.

For purpose of illustration only, we note that there is some evidence that the stores leased were worth in the market $100 per month. If that fact be established, the plaintiffs would be entitled to recover the present value of the difference between the rent they contracted to pay and the rent at $100 per month for the full term of the lease.

By rental value is meant, not the probable profits that might accrue to the plaintiffs, but the value, as ascertained by proof, of what the premises would rent for, or by evidence of other facts from which the fair rental value may be determined.

The learned counsel for defendants properly conceded this rule to be correct, but excepts to the charge of the court as to special damage because there is no special damage proven.

In this particular the judge below erred. Such special damages as may have been reasonably within the contemplation of the parties are allowed in this class of cases, but they must be both pleaded and proven before the court can submit them to the consideration of the jury.

They are required to be pleaded, so as to give notice of the character of plaintiff's claim, and they must be proven as pleaded. *Herpolsheimer v. Christopher, supra.* There is no allegation in the complaint of any special damage, and no evidence to support the claim. His Honor therefore erred in submitting the question of such damages to the jury.

For this error we award a new trial upon the second issue.

Let each party pay his own costs of the appeal, including cost of printing, and the remainder of costs of appeal is to be equally divided.

Partial new trial.

Cited: S. c., 153 N. C., 183; *Huggins v. Waters,* 154 N. C., 446; *Investment Co. v. Tel. Co.,* 156 N. C., 265; *Martin v. Clegg,* 163 N. C., 530; *Huggins v. Waters,* 167 N. C., 198.

(276)

E. W. EDWARDS v. CITY OF RALEIGH.

(Filed 17 March, 1909.)

1. Cities and Towns—Basement Stairways—Judicial Notice.

Stairways to underground basements of buildings, leading down through openings in the sidewalks, are commonly used in the business portions of cities and of this the courts may take judicial notice.

2. Cities and Towns—Sidewalks—Basement Stairways—Proper Construction—Negligence.

It is not actionable negligence, *per se*, for a city to permit an opening for a basement stairway to a business building to remain on the inner part of its sidewalk, next to the building, which is 50 feet long and 3 feet 7 inches wide, when from either end steps the full width of the opening lead down a distance of 8 feet 7 inches, the lengthway is protected by a sufficient railing, and there is sufficient width of the sidewalk left for pedestrians.

3. Cities and Towns—Sidewalks—Basement Stairways—Notice Presumed.

Persons using the streets of a city should take notice of basement stairways to business buildings constructed with reasonable care along its sidewalks for the purpose of commerce.

4. Cities and Towns—Sidewalks—Basement Stairways—Municipal Powers—Lapse of Time—Presumptions.

The authorities of a city, in the exercise of the power to regulate and control the streets, may grant the right to construct proper stairways along its sidewalks to the basements of business buildings, and the assent of the city to their construction and use will be presumed after a long lapse of time, in this case forty years.

5. Cities and Towns—Sidewalks—Basement Stairways—Negligence—Evidence—Nonsuit.

In an action for damages against a city for personal injuries received, when it appears that the plaintiff, being partially blind and feeling his way along with a stick, at night, fell into a well-lighted opening in the sidewalk, in which there was a properly constructed basement stairway, of which he knew, but to which he had erroneously estimated the distance, no actionable negligence is established, and a judgment as of nonsuit upon the evidence should be sustained.

(277) ACTION tried before *Neal, J.*, and a jury, at October Term, 1908, of WAKE.

This was an action brought by E. W. Edwards against the city of Raleigh for injuries sustained from falling into an excavation, cellar or basement way on East Martin Street, in the city of Raleigh. At the conclusion of the plaintiff's evidence the defendant moved to nonsuit the plaintiff, upon the ground that, according to his own testimony, he

was guilty of such contributory negligence as bars a recovery. Motion allowed. Plaintiff excepted and appealed. The facts are fully stated in the opinion of the Court.

Douglass & Lyon for plaintiff.
William B. Jones and William B. Snow for defendant.

BROWN, J. The evidence, taken in the most favorable light for the plaintiff, establishes these facts: On 23 November, 1907, about 7 P. M., the plaintiff, while walking along the sidewalk of East Martin Street, in the city of Raleigh, stepped into the entrance to a basement way leading from the inner side of said street next to the Citizens National Bank, by stairsteps down into the basement of that building.

The sidewalk is 10 feet 10 inches wide, from the building to the curb. The stairway opening is a part of the construction of the building, next to the wall and parallel with it. The length is some fifty feet, 3 feet 8 inches in width, and 8 feet 7 inches deep. The entire length of it is protected by a substantial iron railing. The west end and east end are open, with inclined steps the width of the aperture leading to the basement. At the entrance to the east end, where plaintiff stepped in and fell down the steps, there is a small board platform, slightly elevated and the width of the steps. From the iron railing to the outer edge of the sidewalk is 6 feet 6 inches.

The photograph in evidence shows that the street is lighted by an arc electric light, hanging a short distance from this stairway and throwing its light upon it. There is no allegation or proof that the street was not lighted. The plaintiff testifies that his vision is very defective—in fact, that he is partially blind—that he can not see above a certain distance, and when he passes a person he can see the lower part of the body only, and that very obscurely. Plaintiff was walking alone and using his umbrella for a guide. He knew of this basement stairway and had passed it frequently, and that there was an (278) opening at the end where he stepped in, and that there was nothing across this opening. He states that he stepped in because he was not aware that he was so close to it.

We are of opinion that the motion to nonsuit was properly allowed, but not upon the ground upon which the learned counsel for defendant based it.

Where, in the solitude of the night, one suffers grievous injury from the culpable negligence of another, under the circumstances in evidence in this case, the carelessness which would excuse the other and bar a recovery certainly ought to be of a gross character and made apparent by direct or circumstantial proof. This reasonable principle is the

controlling one in the judgment of *Lord Ellenborough,* in *Weld v. Gas Light Co.,* 2 Eng. Com. Law, 78, and is approved by the Supreme Court of Pennsylvania, in *Beatty v. Gilmore,* 55 Am. Dec., 515.

While it is doubtful if there is any evidence of contributory negligence on his part, the plaintiff has failed to show an omission of duty upon the part of the city authorities which constitutes culpable negligence, and therefore the motion was properly allowed.

The evidence establishes the fact that this basement stairway has been in existence, and used in manner and form as it now is, for about forty years; and while the evidence does not disclose how many similar structures there are in Raleigh, every-day observation teaches that it is a kind of entrance to underground basements that is in common use in Raleigh and all other cities that we have any knowledge of.

In invoking our every-day experience, we but follow the example of the Court of Appeals of New York, in *Jergensen v. Squires,* 144 N. Y., 285, where it is said by *Chief Justice Andrews:* "It is a matter of observation that openings for cellar ways extending into the sidewalks in cities or villages in front of business buildings are very common. They afford access to the basements of such buildings and render them much more valuable for business purposes." In that case it is held that the Legislature may grant the power to municipalities to authorize such structures, and that such authority, along with municipal assent
(279) to their construction and use, will be presumed after long lapse of time, which in that case was twenty years. The *Chief Justice* says: "It would be an unnatural inference that, in the city of New York, where so many of such openings are found, they exist by sufferance merely, and were tolerated but not permitted by the public authorities. In the absence of affirmative proof of permission, it should be implied, if there is nothing to disprove it, either in the character of the structure or in the actual circumstances disclosed. It is unreasonable to suppose that a usage so general and unchallenged did not have its origin in municipal assent." The learned judge then proceeds to demonstrate that the authority to permit such structures is derived from the general municipal authority to control and regulate the public streets, saying: "There can, we think, be no doubt of the existence of this power."

The right of municipal authorities, under their general power to regulate and control the streets, to authorize such entrances from them is recognized by the Supreme Court of Illinois, in *Gridley v. Bloomington,* 68 Ill., 47, and it is held that municipal assent will be presumed from long use. See, also, *Nelson v. Godfrey,* 12 Ill., 20; *Fisher v. Thirkell,* 21 Mich., 1; Dillon Mun. Corp., sec. 554.

It follows that if the corporate authorities of Raleigh, under their general control of the streets, have power to authorize the construction

and use of this stairway in manner and form as it has existed and been in use for forty years, the defendant can not be liable to the plaintiff for his injuries because of its existence. The general use of such structures, protected as this is and opening on a stairway, and their public necessity and usefulness, rebuts any inference of negligence in permitting their existence.

In *Smith v. Leavenworth,* 15 Kan., 86, in speaking of how such a structure must be guarded, the Court says: "If the cellar way is so guarded as to be perfectly safe, under ordinary circumstances, for persons traveling upon such street, the city would not be so guilty of negligence in such a case as to be liable for some unforeseen injury, resulting from fortuitous circumstances which could not, in the ordinary course of events, be expected or anticipated as likely to occur."

It is only a reasonable requirement of the law that persons (280) using the streets should take notice of such structures as are necessary for purposes of commerce or for the convenient occupation of dwelling houses, such as exterior basement stairs. *Russell v. Monroe,* 116 N. C., 727, quoting from *Bueschung v. St. Louis,* 6 Mo. App., 85.

This last-cited case is exactly "on all fours" with this, and in the opinion it is said: "Had this cellar way been a sheer precipitous descent, it would undoubtedly have been culpable negligence to have it without a railing at the east end, and exposed for a distance of two feet along the line of the sidewalk; but it does not appear to have been any want of ordinary care in the owner of this building not to extend the railing on the south side past the head of the steps, and not to have a gate at the east side. The railing extended along the street to the point at which it might prudently be supposed that all probable danger of accident to one at all capable of taking care of himself would cease. The sidewalks of a city can not be made absolutely safe, and are not intended for the use of blind people."

Again the Court says: "In an incautious moment the most prudent man might take a backward step, or a step sideways, and fall down any staircase; but it does not follow from this that a cellar entrance may not be built in a frequented street or that it must be guarded by a gate, and that the absence of such a guard is a want of ordinary care, which will subject the property owner to an action at the hands of any one who falls down the steps."

We could quote from numerous other authorities which sustain our view, but it would unnecessarily lengthen this opinion.

We feel warranted in saying that the overwhelming weight of authority exculpates the corporate authorities of defendant city from any imputation of negligence arising upon the admitted facts of this case.

Affirmed.

HICKSON LUMBER COMPANY ET AL. v. GAY LUMBER COMPANY ET AL.

(Filed 17 March, 1909.)

Corporations—Insolvency—Mortgage Liens—Assets, Distribution of—Costs.

It is error to tax the costs against first-mortgage creditors who have established the priority of their lien over the rights of general creditors, in statutory proceedings to wind up the affairs of an insolvent corporation and to distribute its assets. (Revisal, secs. 1207-1226.)

(281) ACTION tried before *Neal, J.*, on exception to report of receiver, at June Term, 1908, of LENOIR.

Appeal by Annie W. Pou, James H. Pou and the Commercial and Farmers Bank.

Rountree & Carr for plaintiff Hickson Lumber Company.
Womack & Pace and Aycock & Winston for defendants.

BROWN, J. In his final decree in this cause his Honor, *Judge Neal,* in the exercise of his discretion, assessed these appellants with a considerable part of the costs of this proceeding. In doing so, we think he was in error, for he was not vested with any such discretionary power.

This is not an action brought under the general equity powers of the court, assuming that there may be such an action, but it is a statutory proceeding, brought to wind up the affairs of an insolvent corporation and distribute its assets to those who are entitled according to priority, and the payment of costs is governed by the statutes.

The appellants are first-mortgage creditors, the priority of whose debts is established over the general creditors and over plaintiff appellee's mortgage. (See opinion in this case, this term.)

Section 1207 of the Revisal prescribes, specifically: "After the payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid propor-
(282) tionately to the amount of their respective debts," etc. Again, section 1226 prescribes: "Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services and the costs and expenses of administration of his trust, and the costs of the proceedings in said court to be first paid out of said assets." The effect of such legislation is to take from the funds of the insolvent corporation a sufficient sum to pay all the costs, allowances and legitimate expenses, and then to distribute what is left according to priority.

So much of the judgment of the Superior Court as taxes any part of the costs against the appellants is reversed, and the cause is remanded, with direction to tax the costs in accordance with this opinion.

Let the appellee, the Hickson Lumber Company, pay the costs of this appeal.

Reversed.

Cited: S. c., 152 N. C., 271; *Yates v. Yates,* 170 N. C., 536.

HICKSON LUMBER COMPANY ET AL. v. GAY LUMBER COMPANY.

(Filed 17 March, 1909.)

1. Mortgagor and Mortgagee—After-acquired Property—Terms Sufficient—Property Embraced.

Subsequently acquired property will be construed as subject to the lien given by mortgage, when the mortgage so states in express terms, or it clearly appears from the language used that such was the manifest intention of the parties; and the expression, "all the property, real, personal, or mixed, wheresoever the same is situated, now owned (by the grantor) or shall be owned during the continuance of the liability hereinafter mentioned," is sufficient, when identified, to bring after-acquired property within the terms of the instrument.

2. Mortgagor and Mortgagee—After-acquired Property—Equity—Validity of Mortgage.

A mortgage of after-acquired property, whether real or personal, will be enforced by a court of equity, without reference to whether the mortgage is by a railroad corporation.

3. Mortgagor and Mortgagee—Equal Equities—Common Law.

The after-acquired property clause of a mortgage will not be enforced against subsequent purchasers for value and without notice.

4. Mortgagor and Mortgagee—After-acquired Property—Registration—Notice—Equities.

One who loans money to the mortgagor for the subsequent purchase of property falling within the terms and description of a prior registered mortgage of after-acquired property takes with notice of the mortgagee's equities therein, and no equity is raised to defeat the rights under the prior registered mortgage.

5. Same—Purchase—Money Loaned—Equities.

When one purchases land with money advanced by another, without giving at the time a sufficient conveyance to create a lien thereon, and the lands so purchased come within the terms and description of his prior registered mortgage on after-acquired property, the lien of the mortgage attaches and is prior to that of a registered mortgage on the land subsequently given by the mortgagor to the one advancing the money.

(283) ACTION heard by *Neal, J.,* at June Term, 1908, of LENOIR.

This is a proceeding to wind up the affairs of the defendant, the Gay Lumber Company, to which the creditors of said corporation are parties. The cause was referred to a referee, who made his report, to which exceptions were filed by certain creditors whose interests are affected by his rulings. A final decree was entered by *Neal, J.,* at June Term, 1908, of LENOIR, passing on the exceptions and adjudicating the rights of the parties. This appeal is by the Hickson Lumber Company, which claims a lien upon certain lands and property of the Gay Lumber Company, which, it insists, has precedence over the mortgage made to James H. Pou, securing debts to his wife, Annie W., and to the Commercial and Farmers Bank.

The facts are stated in the opinion of the Court.

Rountree & Carr for appellants.

Aycock & Winston and Womack & Pace for Annie W. Pou.

BROWN, J. The controversy presented by this appeal is clearly stated in the brief of the learned counsel for appellants, in these words:

(284) "The only question which we desire to present on this appeal is whether the mortgage to James H. Pou covers the property specifically described in the mortgage to the Hickson Lumber Company by virtue of the following language contained in the Pou mortgage: 'Also all the property, real, personal, or mixed, wheresoever the same is situated, now owned by the Gay Lumber Company or shall be owned during the continuance of the liability hereinafter mentioned.' We insist that it does not." The Pou mortgage was executed 24 February, 1903, and duly recorded 6 March, 1903. The Hickson mortgage was executed 24 September, 1903, recorded 16 October, 1903, and embraces five tracts of land, therein described, and one locomotive, all of which property was acquired by the Gay Lumber Company after the Pou mortgage was recorded. The several tracts of land were conveyed by deeds to the Gay Lumber Company, by the grantors therein named, some little time before the execution of the Hickson mortgage and after the recording of the Pou mortgage. Upon the hearing the Hickson Lumber Company offered to prove that the tracts of timber described in the mortgage, and which were acquired subsequently to the execution of the mortgage executed to James H. Pou, were purchased with funds advanced for the purpose by the said Hickson Lumber Company. This evidence was excluded, and the appellant excepted.

For the purpose of this appeal, we will consider the fact offered to be proven as established.

The questions to be considered are:

First, the sufficiency of the terms of the Pou mortgage to embrace after-acquired property.

Second, the validity of a mortgage which undertakes to bind after-acquired property.

Third, whether or not the fact that the Hickson Lumber Company furnished money to the Gay Lumber Company, which money was used by the latter company in the purchase of these lands, gives the lumber company a priority over the lien of the Pou mortgage.

1. Although the after-acquired property clause in the Pou mortgage might have been expressed with greater fullness of language, nevertheless there is manifested an undoubted intention upon the part of the mortgagor to bring within the lien of the instrument all property, both real and personal, which the mortgagor shall acquire at (285) any time after the execution of the mortgage and during the continuance of the liability created by it. From its very nature, such a clause can not usually describe with accuracy the property the mortgagor will thereafter acquire, for that is unknown. But upon the principle of *"Id certum est quod certum reddi potest,"* the after-acquired property may be easily identified and brought within the terms of the instrument.

The substance of the authorities is to the effect that when the mortgage is intended to cover subsequently acquired property, either express terms should be used to that end or else it must clearly appear from the language of the deed that such was the manifest intention of the parties. *Holroyd v. Marshall,* 10 H. L. Cases, 191; *R. R. v. Hamilton,* 134 U. S., 296; *Hammock v. Trust Co.,* 105 U. S., 77; *Maxwell v. Dental Association,* 77 Fed., 938; *Parker v. R. R.,* 33 Fed., 693.

In *R. R. v. Hamilton, supra,* the mortgage included real and personal property "now or at any time hereafter owned or acquired" by the mortgagor. Similar terms are used in other mortgages, which have been sustained by the courts as sufficient to cover after-acquired property, as, for instance, "or which may be acquired during the existence of this security"; "then owned or subsequently acquired"; "which is now owned or shall hereafter be acquired"; "now held or hereafter to be acquired." *Hammock v. Trust Co., supra; Parker v. R. R., supra; R. R. v. Woeltper,* 64 Pa. St., 366.

In *Maxwell v. Dental Co., supra,* it is said: "It may not be necessary to describe specifically the future property which it is intended the mortgage shall cover, but it is essential that the mortgage shall show that it is intended to apply to after-acquired property of the mortgagor."

The unbroken current of authority is all in one direction, in requiring either express words or, in their absence, an unmistakable intention to embrace after-acquired property.

Our researches have discovered but one case where words similar to those in the Pou mortgage were held not to cover an after-acquired grant of lands, but we think the decision, which is extremely voluminous, as it covers many points, is evidently based upon the fact that the lands were granted on certain terms or trusts, the object of which (286) would be defeated if the property granted could be subjected to the mortgage lien. *Meyer v. Johnson,* 53 Ala., 323, and same case, 64 Ala., 606. The consensus of authority leads us to conclude that the terms employed in the Pou mortgage are sufficient to embrace the after-acquired lands and personal property of the mortgagor.

2. The words used being sufficient, we will next consider the validity of such a mortgage.

It is well understood that at common law nothing can be mortgaged that is not in existence and does not at the time belong to the mortgagor, for a person can not convey that which he does not own; but it is now well settled that equity will give effect to a contract to convey future-acquired property, whether real or personal. Equity considers that done which the mortgagor has agreed to do, and treats the mortgage as already attaching to the newly acquired property as it comes into the mortgagor's hands. "It is settled that such a clause is valid," says *Mr. Justice Brewer,* in *Trust Co. v. Kneeland,* 138 U. S., 419. "A clause in a mortgage which subjects subsequently acquired property to the lien of the mortgage is a valid clause," says *Mr. Justice Peckham,* in *Bear Lake Co. v. Garland,* 164 U. S., 15. *Galveston v. Cowdy,* 11 Wallace, 459; 1 Jones on Mortgages, sec. 153; Pingrey on Mortgages, sec. 453; *Brown v. Dail,* 117 N. C., 41; *Perry v. White,* 111 N. C., 197; *Cooper v. Rouse,* 130 N. C., 202.

The learned counsel for the appellant contend that "The mortgage to Pou is not upon a railroad, and the peculiar rules applicable to railroad mortgages can not apply. The fact that a logging road is treated as a railroad for some purposes does not convert a sawmill into a railroad. The use of the words can not change the essential nature of things." Although it appears that the mortgagor, while doing principally a lumber business, owned and operated a railroad twenty miles long, a part of the mortgaged property, we are not treating it, in the consideration of this case, as strictly a railroad corporation, within the common acceptation of that term.

This principle of equity jurisprudence, as enforced by the (287) courts, is not confined in its application to railroad corporations, as is manifest from an examination of the text writers and the cases cited from our own and other courts.

One of the oldest as well as a leading case on the subject is *Mitchell v. Winslow,* 2 Story, 630; Fed. Cases, No. 9673: There a partnership,

engaged in the manufacture of cutlery, executed a mortgage of all the machinery in and belonging to the cutlery manufactory in Westbrook, with all the tools of every kind thereunto belonging, together with all the tools and machinery for the use of the said manufactory which they might at any time purchase for four years from the date of the mortgage, and also all the stock which they might manufacture or purchase during said four years. In his opinion the eminent *Judge Story* said: "It seems to me a clear result of all the authorities that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor, or not, or, if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto."

In *Holroyd v. Marshall,* 10 H. L. Cases, 191, it was held that "If a mortgagor mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of the property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagees immediately on the property being acquired."

Neither of those decisions relates to railway corporations. *Maxwell v. Dental Co.,* 77 Fed., 938, is a well-considered case, touching the after-acquired property clause in a mortgage in no way connected with a railroad corporation.

3. Having determined that the Pou mortgage is a valid lien upon the after-acquired property of the mortgagor, we will next consider if there is any principle of equity which forbids its enforcement against the appellants. The courts will not enforce the after-acquired property clause in a mortgage against any one who can set up an equity of equal dignity in his own behalf, for where equities are equal the law will prevail. Therefore the clause will not be enforced against (288) subsequent purchasers for value and without notice. *Holroyd v. Marshall, supra.*

The appellant can not avail itself of that protection, as the Pou mortgage was recorded in apt time. In North Carolina a mortgage upon after-acquired property, being enforcible *inter partes,* becomes, upon registration, valid and enforcible against subsequent purchasers, because the registration is an effectual notice as against the world. Hence, the Hickson Lumber Company advanced their money, with which to buy new timber lands, with a knowledge of the Pou mortgage and with notice of Pou's equities. The fact that the appellant loaned money to

the mortgagor to buy the lands which the mortgagor purchased from others will not raise an equity to defeat the Pou mortgage, of which appellant had notice. *Coe v. R. R.,* 10 Ohio St., 372; *Galveston v. Cowdy,* 78 U. S., 459; *Bank v. Dowd,* 52 L. R. A., 481; *Locomotive Works v. Truesdale,* 9 L. R. A., 140.

It is undoubtedly true that if the appellant had a lien on these lands at the date they were acquired by the Gay Lumber Company, which it could enforce against that corporation, it could enforce it against Pou, for the after-acquired property clause only attaches to such interest as the mortgagor acquires; and it would be immaterial whether Pou had notice of such lien or not. Jones on Mortgages, sec. 158. But the appellant had no lien when the Gay company acquired the lands by deed. It never had any lien until its mortgage was subsequently executed, and that is secondary to the Pou mortgage.

The money advanced to purchase the lands can not well be classified as "purchase money," for the purchase money was paid to the vendors at the time they executed their deeds to the Gay Lumber Company. It was simply money borrowed with which to pay for the lands, and until the execution of the mortgage by the Gay company to appellant it was only a simple contract debt, with nothing to secure it.

But assuming that the money advanced constituted "the purchase money," in the strict sense of those words, that would give appellants no lien on the lands. Ever since the leading case of *Womble v. Battle,* 38 N. C., 182, decided in 1844, it has been settled in this State that (289) a vendor of real estate who has conveyed it by deed has no lien upon the land for the purchase money, and that the English doctrine of a purchase-money lien does not obtain here. We therefore conclude that, assuming the facts to be as claimed, they establish no equity in appellant which is paramount to the Pou mortgage.

Let the costs of this appeal be paid by the Hickson Lumber Company.

Affirmed.

Cited: Cox v. Lighting Co., 151 N. C., 67; *Dry Kiln Co. v. Ellington,* 172 N. C., 484.

AMMA RIVENBARK v. J. M. TEACHEY ET AL.

(Filed 17 March, 1909.)

1. Deeds and Conveyances—Compromise—Conditions Precedent—Parol Evidence.

When, in an action to enforce specific performance of a contract to convey lands, the defense is that subsequently the parties agreed that the

original contract was to be abandoned, conditioned upon the conveyance of a different tract, the party relying upon the compromise must show the fulfillment of the conditions therein in order to avail himself of the defense, and an offer to convey a less number of acres than agreed upon is insufficient.

2. Deeds and Conveyances—Surveys—Plats Attached—Written Instruments —Parol Evidence.

When a written contract to convey certain lands is uncertain as to the number of acres, but has a plat attached as a part thereof, and referred to therein, giving the boundaries according to a survey made for the purpose, and there is no allegation or proof of fraud or mistake, parol evidence is incompetent to show that a less number of acres than that to be ascertained by the boundaries was intended, as such would have the effect of varying or contradicting the terms of the written instrument.

3. Same—Conditions Precedent—Compromise.

When, in defense to an action for specific performance of a contract to convey lands, it is shown that the parties had agreed that upon the conveyance of a certain other tract of uncertain acreage the original contract sued on would be abandoned, and subsequently had a plat of the boundaries made and attached it to the written contract in evidence as a part thereof, the rights of the parties are to be determined by the acreage included within the boundaries ascertained by the survey, and parol evidence is incompetent to show that a less number of acres was intended.

ACTION tried before *Lyon, J.,* and a jury, at November Term, (290) 1908, of DUPLIN.

This action was brought to compel the specific performance of a contract, or option, for the conveyance of a one-half undivided interest in a tract of land containing 240 acres, and for damages for cutting timber on the land. The defendant J. M. Teachey agreed to convey the land to the plaintiff upon the tender of $1,500, the purchase price, within thirty days after 19 June, 1906, the date of the option. There was evidence tending to show that the plaintiff made the tender within the thirty days, but the defendant Teachey refused to deliver the deed, which had been executed and deposited in the Bank of Duplin. The defendant J. M. Teachey conveyed the land to the defendant J. J. Harper. Afterwards the parties agreed to compromise and settle their differences upon the terms that the defendants J. J. Harper and W. J. Teachey should convey to the plaintiff a straw thicket containing "about ten acres, more or less," which was a part of the land described in the option, and when this was done the option and the deed which had been deposited in the bank should be canceled. The defendants J. J. Harper and W. J. Teachey agreed, in writing, with the plaintiff that they would "convey at once (to the plaintiff) the 15 acres of land described in a plat made by W. J. Boney," which was annexed to the written agreement and made a part thereof. The survey of the land had been made

by W. J. Boney, at the request and under the general direction of the defendants. The metes and bounds were described in the plat annexed to the agreement. The defendants executed a deed to the plaintiff and deposited it in the bank for him, but it did not convey all the land described in the plat, the defendants contending that they had agreed to convey only 15 acres, and they offered to show that they had agreed to convey only 15 acres, and not by the metes and bounds set out in the plat. This testimony was excluded by the court, and the defendants excepted. The plaintiff contended that the defendants had not complied with their agreement to convey the land described in the
(291) plat, and that therefore he was entitled to the specific performance of the original contract, or option, while the defendants contended that they had only agreed to convey 15 acres and had complied with this agreement, and that, by their tender of the deed, thereby the option was no longer of any force or effect. Evidence was introduced to sustain these contentions, but it is not necessary to state it in detail.

Issues were submitted to the jury, which, with the answers thereto are as follows:

1. "Was the option, or agreement, of date 19 June, 1906, entered into between the parties, as alleged in the complaint?" Answer: "Yes."

2. "Did the plaintiff procure the option of 19 June, 1906, from J. M. Teachey by false representations?" Answer: "No."

3. "Did the plaintiff tender the $1,500, named in said option, within the time therein named, and demand deed for the land?" Answer: "Yes."

4. "Have the defendants refused and declined to accept the $1,500 and execute and deliver a deed for said land?" Answer: "Yes."

5. "Did the plaintiffs abandon and release the option of 19 June, 1906, made by J. M. Teachey and wife to Amma Rivenbark?" Answer: "No."

6. "Have the defendants W. J. Teachey and J. J. Harper tendered a deed according to the contract of 20 December, 1906?" Answer: "No."

7. "What damage is plaintiff entitled to recover of defendants?" Answer: "Three hundred and fifty dollars."

8. "Was the plaintiff ready, willing and able, and is he still ready, willing and able to perform his part of said contract and pay the purchase money for said land?" Answer: "Yes."

Judgment was entered upon the verdict, and the defendants appealed.

J. O. Carr, George R. Ward and Kerr & Garvin for plaintiff.
Stevens, Beasley & Weeks for defendants.

WALKER, J., after stating the case: The decision of this case, in a large measure, turns upon the fifth issue, for it must be conceded that if the plaintiff had not abandoned or released the (292) original contract he is entitled to recover. No issue was submitted to the effect that the contract of 20 December, 1906, was substituted for that of 19 June, 1906, nor was there any sufficient averment of that kind in the answer, nor does the former contract show on its face that it was made in substitution for the latter. The parties, after chaffering for some time, finally agreed to compromise and settle their differences, the defendants agreeing to convey certain lands, described by metes and bounds in a plat annexed to the written agreement, and said lands to contain 15 acres, and the plaintiff, on his part, agreeing to surrender and release all interest under the original contract, and to cancel the same, and the deed executed and deposited with the bank in pursuance thereof, when the deed for the land described in the agreement of 20 December, 1906, should be executed. The defendants actually undertook to perform the latter contract by executing a deed for the land, but failed to include in their deed all the land which, according to a proper legal construction, was agreed to be conveyed. The letter of the plaintiff (in the form of a contract), dated 7 August, 1906, and addressed to "A. L. McGowan, cashier," expressly states that the original contract which had been deposited with the bank should not be canceled "until the first deed above-mentioned is executed." The oral evidence also tends to show that the parties did not intend that the original option should be considered as annulled until the deed had been executed under the contract of 20 December, 1906. The parol testimony offered by the defendants was not admissible to show that they intended to convey only 15 acres by metes and bounds differing from those described in the plat, which was annexed to and made a part of the contract of 20 December, 1906. It would clearly contradict, or at least vary, the terms of that contract, and, in the absence of proper allegations and proof of fraud or mistake, would be in contravention of the rule of law excluding such testimony. *Bank v. Moore,* 138 N. C., 529; *Evans v. Freeman,* 142 N. C., 61; *Mudge v. Varner,* 146 N. C., 147. As said in *Collins v. Land Co.,* 128 N. C., 567, "It is the offer of sale by the plat, and the sale in accordance therewith, that is the material thing which determines the rights of the parties." A simple calculation, according to the definite boundaries by courses and distances, as shown on the (293) plat, would have determined the number of acres the tract of land contained. *Smathers v. Gilmer,* 126 N. C., 759.

It is evident that the parties were uncertain as to the number of acres embraced by the description of the tract of land intended to be conveyed to the plaintiff in lieu of that described in the option, and for that rea-

son caused the survey to be made in order to fix the boundaries of the land, without regard to the acreage. We can not adopt the theory of the defendants, that they intended to sell and convey 15 acres of land which had not been located, for such a contract would have been void for uncertainty.

We have carefully examined the other exceptions, and find no error in the rulings of the court to which they were taken. The defendants have lost the cases, because they failed to comply with the terms of the compromise, but on the contrary violated the rights of the plaintiff, under the option, by cutting the timber on the land and thereby diminishing its value to the plaintiff.

No error.

Cited: Kernodle v. Williams, 153 N. C., 485.

ALVIN ROYAL v. F. C. THORNTON ET AL.

(Filed 17 March, 1909.)

1. Injunctions, Before Whom Returnable—Jurisdiction.

Section 814, Revisal, confers upon a judge holding a special term jurisdiction to grant a restraining order, returnable before himself, only in cases "which he may have jurisdiction to hear and determine under the commission issued to him": *Held,* that he has no jurisdiction to make a restraining order returnable before himself in a case wherein the summons is returnable to a regular term, beginning after the termination of the special term which he is commissioned to hold. He has no jurisdiction to "hear and determine" such case.

2. Same—Procedure.

A restraining order, improperly made by a judge holding a special term of court, returnable before himself, and by him continued to the hearing, will be reversed, without prejudice to the plaintiff's rights to apply to a judge having jurisdiction, upon the affidavits filed, or new ones, if so advised.

(294) ACTION for injunction, heard by *J. S. Adams, J.,* at December Special Term, 1908, of SAMPSON.

The summons in this action was issued on 3 December, 1908, returnable to the February Term, 1909, of Sampson. On 14 December, 1908, plaintiff filed an affidavit, upon which he made a motion for a restraining order. *J. S. Adams, J.,* holding a special term of Sampson for the trial of civil causes, issued a restraining order to defendants to

show cause before him on 21 December, 1908, at Clinton, in said county. Upon the return day the defendants resisted the continuance of the order, assigning, among other grounds, "That the order is irregular, because made returnable before his Honor, *J. S. Adams,* a judge holding a special term in Sampson County, in a case in which said judge has no jurisdiction to hear and determine, under the commission issued to him. No pleadings being filed, nor the summons, being yet returnable, there is no cause for trial, under his Honor's commission." His Honor continued the order, with permission to defendants to file bond, etc. Defendants excepted and appealed.

Fowler & Crumpler for plaintiff.
A. McL. Graham and H. A. Grady for defendants.

CONNOR, J. The statute (Rev. 814) provides that the judges of the Superior Court shall have jurisdiction to grant injunctions and issue restraining orders in all civil actions which are authorized by law, provided that a judge holding a special term in any county may grant an injunction or issue a restraining order, returnable before himself, in any case which he may have jurisdiction to hear and determine, under the commission issued to him, and the same shall be returnable as directed by the judge in the order. The only question presented, therefore, is whether *Judge Adams* had, by virtue of his commission to hold the special term of Sampson County, beginning 14 December, 1908, for the trial of civil cases, jurisdiction "to hear and determine" this case. Under the Code of Civil Procedure, defendant was not called upon to answer the complaint until the last day of the February Term, 1909. How, then, could *Judge Adams* "hear and determine" the (295) case? The Legislature having thus limited his jurisdiction to make restraining orders returnable before himself in Sampson County, we have no power to extend the jurisdiction. He had the right to make the original order, but it should have been returnable before the resident judge of the district or the judge holding the courts of the district, either by assignment or exchange. Rev. 815; *Hamilton v. Icard,* 112 N. C., 589. There was error in making the order returnable before himself. The order continuing the injunction will be reversed, without prejudice to the plaintiff to apply to the judge having jurisdiction for a restraining order, upon the affidavit filed, or a new one, as he may be advised. Of course, by consent, any judge may grant and continue restraining orders. There is

Error.

CITY OF KINSTON v. T. C. WOOTEN.

(Filed 17 March, 1909.)

1. **Cities and Towns—Paving Streets—Assessments—Notice—Due Process—Constitutional Law.**

Chapter 338, Private Laws 1905, providing for an assessment by the town of Kinston upon the lands of abutting owners for the purpose of paving public streets and sidewalks, and for an action in condemnation to enforce collection, gives the owner the right to deny the whole or any part of the amount claimed and plead any defense in the course and practice of the courts that may be available to him in the action prescribed; and hence the absence of notice before the assessment was made and determined upon does not affect the validity of the assessment upon the question of due process.

2. **Cities and Towns—Paving Streets—Assessments—Burden and Benefits—Power of Courts—Constitutional Law.**

As a general rule, the assessment of adjoining property by a city for the paving of its streets and sidewalks by the front-foot rule will be upheld; but in instances where it is made to appear that in applying this rule to the property of an individual owner there is a marked disproportion between the burden imposed and any possible benefit, so that it is manifest that the principle of equality had been entirely ignored and gross injustice done, the court may interfere and afford proper relief.

3. **Same—Evidence.**

In an action to declare an assessment made for the purpose of paving a sidewalk and street upon the front-foot rule a lien on the lots of adjoining owners, and to enforce the lien by the sale of the property, the trial court should hear the evidence offered by the defendant, when pertinent to the inquiry.

4. **Cities and Towns—Assessments—Paving Streets—Burdens and Benefits.**

Under the facts and circumstances of this case, an assessment of $447 on a lot valued at $1,500 held not to present such a case of imposition as would authorize the court to interfere and arrest its collection.

(296) ACTION tried before *Neal, J.*, and a jury, at March Term, 1908, of LENOIR.

The action was brought by the plaintiff against the defendant for the purpose of having a lien declared against the lands of the defendant, situated on Queen Street, in Kinston, N. C., and referred to in the complaint, and for the purpose of having the same condemned to be sold to pay the assessment made against said land by the board of aldermen of the city of Kinston, for the proportionate part of the cost of paving the roadway and sidewalk of Queen Street, in said city, as authorized by chapter 338, Private Laws 1905, and by the ordinances,

"A," "B," "C," and "D," enacted by said board of aldermen pursuant to said act, which ordinances are attached to and made a part of the complaint.

It was agreed that under and by authority of said private act the said board of aldermen resolved to pave and did pave that portion of Queen Street lying and being between the Atlantic and North Carolina Railroad, where it crosses said Queen Street, and Bright Street, the length of said street thus paved being 2,329.2 lineal feet; that the defendant owns a lot of land on said portion of said Queen Street with a frontage abutting thereon of 110 lineal feet; that the entire cost of paving the roadway of said portion of Queen Street, hereafter referred to as the taxing district, was $30 (254.31), and that the cost per lineal foot was $12.98, and one-sixth of the cost per lineal foot was $2.16⅓, and that one-sixth of the entire cost of paving that (297) portion of said Queen Street on which said lot of land abuts was $237.97. It was further agreed that the taxing district contained 8,121.41 square yards of sidewalk paving, and that the said pavement cost $11,015.50, and each square yard of pavement cost $1.429, and two-thirds of the cost of each square yard of pavement is 95¼ cents; that there are 220.37 square yards of sidewalk pavement on which said lot of land abuts, and two-thirds of the cost of paving that part of the said sidewalk on which said lot abuts is $209.90. It was further agreed that the said board of aldermen did not give the defendant notice of the making of said assessment until after it was made, and the defendant had no opportunity of being heard until the assessment was made, and then notice, both of the assessment and the time when the same would become due, was caused to be served upon the defendant, who refused to pay the same. The defendant moved to nonsuit the plaintiff, for the reason that the assessment was made without giving the defendant an opportunity to be heard, which was the taking of property without due process of law. Motion denied. Defendant excepts. Exception 1.

The defendant testified as follows: That the said lot was situated on the corner of Queen and Bright streets, one block south of the courthouse, and was at the terminus of the taxing district; that on the opposite western corner Dr. John A. Pollock resided, and that Miss Tiffany West owned a residence on the southwestern corner and resided therein; that the southern corner was occupied by negroes, and that the buildings were unsightly; that the lot was narrow, as a part of the original lot had been cut off and a residence fronting on Bright Street had been erected thereon; that the lot assessed is situated in the part of the city where the property is of less value than any other on that part of the street improved. It was valued at $1,000. The assessment

is one-fourth of what the property cost. The property above the courthouse is valued ten times more, according to frontage, than the lot in question. It is unimproved and does not bear any revenue at all. It is 110 feet long on Queen Street and 35 feet deep, and is the terminus of the improvement.

(298) The following issues were submitted by the court to the jury:

1. "Is the defendant's lot so situated and located that any assessment charged against it should not be measured by the frontage rule?

2. "What amount, if any, is the plaintiff entitled to have charged and assessed as a lien against the property of the defendant described in the complaint?" Answer: "Four hundred and forty-seven dollars and forty-six cents."

The court held that no evidence had been submitted that was sufficient to change the frontage rule in this case, and charged the jury that if they believed all the evidence they should answer the second issue "Four hundred and forty-seven dollars and forty-six cents," and this issue was so answered. The court rendered the judgment on the verdict, declaring the amount assessed a lien on the lot in question, and directing a sale pursuant to the statute, and defendant excepted and appealed.

Y. T. Ormond for plaintiff.
Defendant not represented.

HOKE, J., after stating the facts: The statute under which the assessment was made and this action instituted provides that the assessment shall be recovered by action, and that in any action to recover the same the owner of the property shall have the right to deny the whole or any part of the amount claimed to be due by the city, and to plead any irregularity in reference to the assessment or any fact relied upon to question the legality of the assessment; and the issues raised shall be tried and the cause disposed of according to law and the course and practice of the court. And in *Kinston v. Loftin,* 149 N. C., 255, the Court held that this provision complied with every proper requirement as to notice, and offered a defendant opportunity to assert and maintain every defense to which he might be justly entitled. The defendant's objection for lack of notice, therefore, can not be sustained. Again, in *Loftin's case, supra,* reference was made to *Raleigh v. Peace,* 110 N. C., 32, and *Hilliard v. Asheville,* 118 N. C., 845, as establishing the validity of these special assessments as a general proposition, and what is known as the front-foot rule as an approved method of apportioning the same among the owners of the property affected.

(299) In these cases, however, while the right to make assessments of

this character is recognized and is referred in a general way to the sovereign power of taxation, they are also declared to be so far peculiar that they can only be upheld on the theory of special benefits conferred, and which bear some reasonable relation to the burdens imposed; the front-foot rule being accepted as a legislative declaration that this shall be considered, and is a fair and reasonable method of making the assessment and establishing an approximate equality in the distribution of the burdens. From this it would seem to follow that the right of imposing such burdens, unlike the power of general taxation, is not unlimited and without restraint, but may be in certain cases subjected to judicial scrutiny and control. Accordingly, in *Raleigh v. Peace, supra, Shepherd, J.,* delivering the opinion, quotes with approval from *Shuford v. Commissioners,* 85 N. C., 8, and further says: *"Ruffin J.,* in *Shuford v. Commissioners, supra,* says that such assessments 'are committed to the unrestrained discretion of the lawmaking power of the State, only, as I take it, that the burden imposed on each citizen's property must be in proportion to the advantages it may derive therefrom.' The latter part of the sentence very clearly implies the power of the courts to interfere to some extent, and in this we very heartily concur; but it is not essential in this case that we should define and mark the limits of this power, and it is sufficient to say that, according to all of the authorities, the Legislature or its duly authorized instrumentalities are, primarily at least, the judges in respect to the particulars mentioned, and that their decision will not be disturbed unless it clearly appears that there is an absence of power or that the particular method prescribed for the assessment of the peculiar benefits to the abutting property is so plainly inequitable as to offend some constitutional principle."

This intimation of the right of the court to interfere, under certain circumstances, for the protection of the property owner has been sanctioned and approved by the United States Supreme Court in the case of *Norwood v. Baker,* 172 U. S., 269, in which it was held: "(1) The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore that the owners do not in fact pay anything in excess of what they receive by reason of such improvement. (2) The exaction from the owner of pri- (300) vate property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation; but unless such excess of cost over special benefits be of a material character it ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment."

And while this case has been explained and modified by subsequent decisions of the same Court, notably in *French v. Paving Co.*, 181 U. S., 324, and other cases in this and later volumes, the principle remains and may be taken as established that, although the systems provided in the different States will be upheld and usually recognized as conclusive, in so far as they establish general rules for imposing these assessments, yet, in applying these rules or any given method to the property of an individual owner, if it should be made to appear that there is such marked disproportion between the burden imposed and any possible benefit as to make it clearly manifest that the principle of equality had been entirely ignored and gross injustice done, in such case the court may interfere and afford proper relief. On a question dependent so largely on the varying facts and circumstances of the different cases the courts have not undertaken to define with more precision the limit by which their right to interfere shall be ascertained and determined, and could not well do so; but the doctrine thus stated in general terms will find support in many decided cases and text writers of approved merit. *Norwood v. Baker, supra; French v. Paving Co., supra; Pipe and Tile Co. v. Cullahan,* 125 Iowa, 358; A. & E. Anno. Cases, 7; *Preston v. Judd,* 84 Ky., 150; *Atlanta v. Hamlein,* 96 Ga., 381; *Everett v. Bayonne,* 63 N. J. L., 202; *S. v. Passaic,* 37 N. J. L., 65; *Weed v. Boston,* 172 Mass., 28; *Washington Avenue,* 69 Pa. St., 352; *White v. Tacoma,* 109 Fed., 32; Judson on Taxation, sec. 355 *et seq.*, secs. 359-388; Smith Modern Law, Municipal Corporations, sec. 1267; Hamilton on Special Assessments.

In *Preston v. Judd, supra,* the Court held: "In assessing property to pay for street improvements, the municipality having decided
(301) that the assessed area or tax district as an entirety will be benefited by the contemplated improvements, a lot owner may be compelled to pay his proportion of the cost of the improvement unless the absence of benefit and of public need of the improvement make it manifest that the burden amounts to spoliation and not legitimate taxation, in which event the burden can not be imposed."

In *Atlanta v. Hamlein, supra,* it was held: "Ordinarily, the question of benefit, whether general or special, is concluded by a distinct legislative declaration specifically authorizing the improvement; but where by its charter a municipal corporation is authorized generally to pave the public streets and charge against the abutting landowners proportionate shares of the cost of such improvement, estimated upon the front-foot rule, if in the assessment for a given improvement there be such a gross disproportion between the sum assessed against a particular lot owner and the value of his abutting lot as that if the municipal corporation be permitted to proceed with its collection such action would

amount to a virtual confiscation of the landowner's property, the assessment can not be upheld as a valid exercise of the power conferred, and a court of equity will enjoin the collection of the sum so assessed."

And in Judson on Taxation, sec. 359, it is said: "The legislative discretion, therefore, in apportioning the cost of public improvements, while broad and comprehensive, is not unlimited, but is subject to judicial review and scrutiny in determining whether property charged with such cost is taxed in accord with the fundamental canons of taxation and thus under 'due process of law.'"

And, again, in section 388, this author, after careful review of the recent decisions of the Supreme Court on the question, said: "It is clearly established by these decisions of the Supreme Court that the legislative power, broad and comprehensive as it is in taxation, is not unlimited and is not beyond the reach of judicial review and scrutiny. The rule thus laid down in the case of special assessments is substantially the same which has been declared in regard to the requirement of a public purpose in general taxation or in the enforcement of limitations upon the legislative power of classification. These are primarily legislative questions, and the courts, especially the Federal courts, (302) will only in extreme cases review the exercise of that discretion. Thus it is primarily for the Legislature to determine whether a tax is levied for a public purpose. But, as was seen in the preceding chapter, cases are not wanting in which such legislative declaration or finding had been overruled by the courts. It is primarily a legislative function to determine what is a reasonable classification for taxation, but this determination is subject to judicial review."

It will thus be seen that, while the right of the court to interfere for the protection of the individual owner of property is recognized, its exercise can only be justified and upheld in rare and extreme cases, when it is manifest that otherwise palpable injustice will be done and the owner's rights clearly violated. This limitation arises of necessity in this scheme of taxation, for in its practical application it would well-nigh arrest all imposition of these burdens if each individual owner of property were allowed to interfere and stay the action of the officials on any other principle. And on the facts presented we are of opinion that no error has been committed to defendant's prejudice in the disposition of the case. Under the doctrine established by the authorities cited, and by the express provisions of the statute, the court did right to hear the evidence offered by defendant (see, further, *Indianapolis v. Holt,* 155 Ind., 222, 235); and we think he correctly ruled, also, that, taking all the testimony as true, it did not establish or tend to establish defendant's right to relief from the assessment imposed upon his property. While the lot in question is described as being only 35 feet in

depth, and is estimated to be worth not more than $1,500, the evidence further shows that it is situated on the principal street of a thriving, prosperous town, within one block of the courthouse and well within the benefits of the improvement, and it also tends to show that this depth of 35 feet has been caused by cutting off a portion of the lot for a private residence, and that the full depth of the lot affected by the improvement is much greater than the thirty-five feet.

We are of opinion, as stated, that the testimony entirely fails to bring the defendant's case within the principle he seeks to invoke, and that the judgment against him must be affirmed.

No error.

Cited: Jones v. Wilkesboro, post, 653; *Land Co. v. Smith,* 151 N. C., 72; *Tarboro v. Staton,* 156 N. C., 506, 513; *Drainage Comrs. v. Mitchell,* 170 N. C., 326.

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(303)

RICHMOND PEARSON AND WIFE v. C. C. MILLARD.

(Filed 17 March, 1909.)

1. **Consideration—Option—Lease.**
   A lease is a sufficient consideration to support specific performance of an option of purchase therein granted.

2. **Same—Unilateral Contract—Acceptance.**
   An option of purchase contained in a lease is a unilateral contract, binding the lessors only when it is unconditionally accepted according to its terms.

3. **Same—Notice Sufficient—Compliance.**
   When a lessee of lands with an option of purchase notifies the agent of the lessor of his acceptance of the option of purchase, in accordance with its terms, the notice is sufficient.

4. **Same—Evidence—Principal and Agent—Harmless Error.**
   When it is shown that a lessee, holding a lease with an option of purchase, has notified the agent of the lessor, the latter residing abroad with her husband, of his acceptance of the option according to its terms, who communicated the fact to the husband, and she made no reply, it is harmless error to admit in evidence, under her objection, a letter from the husband stating that the terms of the option had not been complied with upon a different ground than that contended for in the action, whether the husband was or was not the agent of the wife.

5. **Deeds and Conveyances — Contracts — Specific Performance — Option — Notice of Acceptance—Deferred Payments—Tender of Deed—Mutual Obligations.**
   When a lessee of lands, with an option of purchase, upon making a cash payment and securing with mortgage certain notes given for balance of

purchase price, accepts unconditionally the option according to its terms, and tenders the cash payment, it is the duty of the lessor to prepare and tender the deed, and upon his failure to do so the lessee is not required to tender the notes secured by the mortgage in order to enforce specific performance of the contract.

6. Contracts—Specific Performance, When Enforced.

While specific performance of a contract is not a matter of absolute right, yet it will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice and work no hardship upon the parties to the contract.

7. Deeds and Conveyances—Contracts—Option—Acceptance—Specific Performance.

An assignment by one partner to another of an option of purchase of the lands described in their lease is valid and enforcible by the assignee thereof upon an unconditional acceptance of and compliance with the terms of the option.

8. Deeds and Conveyances—Options—Assignee of Option—Personal Transactions—Deferred Payments—Waiver—Equity.

Specific performance of an accepted option to convey lands in accordance with its terms can not be avoided on the ground that it was made to a partnership, the option assigned to one of them, and that the transaction providing for deferred payments was personal to both partners, when the assignee of the option waived any right to deferred payments, and is ready, able and willing to pay cash in full; and a decree providing for the payment in full and the execution of the conveyance will not be disturbed on appeal.

ACTION tried before *Peebles, J.*, and a jury, at May Term, 1908, (304) of BUNCOMBE.

Plaintiff, Mrs. Pearson, being the owner of the property in controversy, known as the Farmers Warehouse, in Asheville, N. C., together with her husband, Richmond Pearson, on 19 December, 1901, leased it to defendant Millard and H. W. Lasater, his copartner, for the term of five years, at a rental of $60 a month, the term to begin 3 July, 1902. The lease contained a number of provisions, none of which are necessary to be set out, except the following: "It is understood and agreed between the parties hereto that the parties of the first part, for and in consideration of the covenants and agreements herein contained, to be performed by the parties of the second part, hereby agree and covenant to and with said parties of the second part that they shall have an option of purchasing the property hereby conveyed on or before the third day of July, 1907, at the price of $9,000, payable $1,000 cash on consummation of trade and the balance in four annual installments of $2,000 each, the deferred payments to draw six per cent semiannual interest from the date of such consummation, as aforesaid, and to be represented by four promissory notes, of denominations aforesaid, duly

secured by deed of trust, to provide that the parties of the second part shall pay all taxes and assessments for and on account of said
(305) property within the time and as prescribed by law, to keep the property in good condition and repair and to keep the same insured. . . . But it is expressly agreed and understood that this option to purchase, as hereinbefore stated, does not mean that the parties of the second part herein shall have the sole and exclusive right of purchase, but that they shall have the refusal or preference of right of purchasing on terms herein stated, and their failure to accept the same on those terms, when offered to them, shall give the parties of the first part a perfect and complete right to make sale of same to any other party on such terms as they may see fit," etc.

This lease was executed by all of the parties, Mrs. Pearson complying with the statutory provisions required for the execution of a deed.

On 2 October, 1903, Lasater, having sold and assigned all of his interest in the livery business, in which the firm were engaged, to defendant Millard, executed to him an assignment of his interest in the lease and option. This assignment was introduced over plaintiffs' objection and subject to their exception. Mr. and Mrs. Pearson resided abroad, the former being United States Minister to Persia. Mr. Whitson was Mrs. Pearson's agent for the collection of rent. On 28 May, 1906, plaintiffs instituted this action for the recovery of possession of the property, alleging that by the failure of defendant to perform certain covenants in the lease he had forfeited his term. Defendant set up the lease and alleged that he had performed all of the covenants and exercised his option to purchase the property by notifying plaintiffs' agent, tendering the cash payment, and that he was ready and willing to perform all of the other conditions of the option. Plaintiffs replied, and, upon issues submitted, the jury found the following facts: That defendant, during the month of December, 1905, notified Mr. Whitson of his purpose to purchase the property under the terms of the contract; that Mr. Whitson was the authorized agent of the plaintiffs, with power to accept or reject the offer; that defendant tendered the amount of $1,000 and was able to pay same; that the rent was not in arrears at that time; that defendant had not failed to comply with the condition of the lease in regard to repairs; that he was not in the wrongful pos-
(306) session of the property; that plaintiff was not entitled to recover any amount for rent or damages; that Lasater assigned his interest in the option to defendant prior to 1 January, 1906; that defendant owed the plaintiffs on account of purchase money for the property $9,000, with interest from 3 January, 1906, the date of the tender. Upon this verdict his Honor rendered judgment that, upon the payment to plaintiff, Mrs. Pearson, by defendant, or by payment into the

clerk's office of $9,000, with interest from 3 January, 1906, plaintiffs execute and deliver to defendant a good and sufficient deed for the property; and if they failed to do so the judgment should operate as a conveyance in accordance with the provisions of the statute. The plaintiffs, having noted exceptions to his Honor's rulings, excepted to the judgment and appealed.

J. C. Martin and W. R. Whitson for plaintiffs.
Merrick & Barnard for defendant.

CONNOR, J., after stating the case: Plaintiffs except and assign as error his Honor's refusal to submit the issue, "Did defendant offer to comply with all of the conditions of the written contract mentioned in the pleadings, as alleged in the answer?" His Honor submitted separate issues directed to the several conditions in the lease, and this, we think, was proper. Every controverted question of the fact was settled by the verdict upon the issues submitted. The exception can not be sustained.

Plaintiffs assign as error the admission of the assignment by Lasater to defendant. It was certainly relevant and competent. Its admission did not affect its effect upon the rights of the parties, but was necessary to enable the court to pass upon that question. We are unable to perceive how it could prejudice the plaintiffs.

The next assignment of error is in the admission of Mr. Pearson's letter of 23 February, 1906, to Mr. Whitson. This letter was written from Teheran, Persia, in response to the letter notifying plaintiffs that defendant had accepted the option and was ready to make the purchase "under its terms." Mrs. Pearson insists that Mr. Pearson was not her agent, and that she was not bound by his letter. Conceding this to be true, we do not see how the letter affected her rights. Mr. Pearson simply placed his construction upon the option, (307) which, if correct, deprived defendant of any right under it. He insists that the option entitled the lessees to purchase, provided no one else would give more, and said that he had been offered a larger price. There is no suggestion that the acceptance was not in accordance with its terms, but that, under the terms, defendant had no right to call for a deed. Certainly there is nothing in the letter prejudicial to Mrs. Pearson. There was some evidence that Mr. Pearson was her agent. In any point of view, there is no prejudicial error in his Honor's ruling. The jury having found that none of the conditions in the lease—payment of rent and for repairs—had been broken, and having further found that Mr. Whitson was the authorized agent of the plaintiff, with power to accept or reject the offer made by defendant, and that he was notified of the acceptance by defendant, and the cash payment of

$1,000 was tendered within the time fixed in the lease, we are brought to a consideration of the pivotal questions argued by counsel.

The option was simply an offer by plaintiffs to permit the lessees to purchase upon the terms stated, "on or before 3 July, 1907." Until accepted by the lessees, it was a unilateral contract, binding only the lessors. We had occasion to consider the subject in *Trogden v. Williams,* 144 N. C., 192, and examined the authorities bearing upon the relative rights and duties of the parties to a contract of this character. The option was in this case based upon a sufficient consideration, "When an option is given the lessee to purchase the leased premises, the lease is a sufficient consideration to support the option, and the lessor can not withdraw it before the time in which to accept it has expired." *Tilton v. Coal Co.,* 28 (Utah), 173. "The doctrine of the earlier English and American cases, in which it is held that the want of mutuality of obligations and remedy would render the contract incapable of specific enforcement, has, by the more modern cases, been so modified that optional agreements to convey, without any corresponding obligation or covenant to purchase, will now be specifically enforced in equity, if made upon sufficient and valuable consideration; and so, when the agreement to convey is a part of a lease, or other contract between the
(308) parties, for which the agreement to convey forms the true consideration, the want of mutuality will not avoid the contract." *Hayes v. O'Brien,* 149 Ill., 403; 23 L. R. A., 555. "Such a contract is a continuing obligation on the part of the lessor, running with the lease, which the lessee may accept at his option, within the time limited." *Ibid.* Until accepted, it is an offer of the lessor; but as said by *Mr. Justice Field* (*Willard v. Tayloe,* 8 Wall., 557), by notice of the acceptance " a contract of sale is completed." The contract becomes bilateral, binding both parties. *Trogden v. Williams, supra.* It is, of course, elementary, and sustained by a uniform current of authorities that, as in any other proposition to sell, the acceptance must be in accordance with the terms of the option, that is, unconditional. *Weaver v. Burr,* 31 W. Va., 736; 3 L. R. A., 94; *Smelting Co. v. Belden Co.,* 127 U. S., 379; *Kelsey v. Crowther,* 162 U. S., 404; *Trogden v. Williams, supra.*

Was the acceptance by defendant unconditional and in accordance with the terms of the contract? Mr. Whitson said that defendant's exact words were: "That he wanted to avail himself of the right to purchase under his contract with Mr. Pearson, and that he was ready to pay me the $1,000 on the purchase price." Defendant says that he notified Whitson that "he was going to pay under the option, and wanted Whitson to write for the deed." The jury finds that the defendant notified Whitson that "it was his purpose to purchase the

property under the terms of the contract," and Mr. Whitson says that he wrote plaintiff, or, rather Mr. Pearson, of the acceptance; he further says he supposes that Mrs. Pearson was in Persia, with her husband, who was resident Minister at Teheran. There is no suggestion in the testimony that any condition was attached to the acceptance. Excluding Mr. Pearson's letter as not binding on Mrs. Pearson, she makes no response whatever to the notice. If we consider the letter as the response of her agent, no suggestion is made that the acceptance is not in accordance with the terms of the option; but an entirely different reason is assigned for refusing to make the deed, that he has been offered a larger price and is under no obligation, by the terms of the option, to convey. Rejecting this construction, what duty devolved upon the plaintiffs upon receipt of the notice of acceptance of the option? Clearly, to accept the $1,000 cash and prepare a deed to (309) Millard & Lasater, and tender it; whereupon it was their duty to prepare and tender notes and a trust deed for the balance of the purchase money. At the time of the notice of acceptance by defendant nothing was said about any assignment by Lasater. As is said by *Mr. Justice Field,* in *Willard v. Tayloe,* 8 Wall., 557 (75 U. S.), "Until the purchase money was accepted, there was no occasion to prepare any instrument for execution. So long as that was refused, the preparation of a trust deed was a work of supererogation. Besides, the execution of the trust deed by the complainant was to be simultaneous with the execution of the conveyance by the defendant. The two were to be concurrent acts; and if the complainant were to prepare one of them, the defendant was to prepare the other, and it is not pretended that the defendant acted in the matter at all." In that case the bill was filed by the purchaser. Here the purchaser, defendant, is asserting his right by way of equitable counterclaim. The plaintiffs, either by silence or Mr. Pearson's letter, refused to comply with their duty under the contract, and, of course, defendant could take no further step in the transaction. If plaintiffs had prepared and tendered a deed to Millard & Lasater and demanded their notes and trust deed pursuant to the terms of the contract, it may well be that Lasater would have joined Millard in their execution, or Millard may have paid the entire purchase price in cash. It would be neither just nor equitable to permit plaintiffs to repudiate their obligations, absolutely, at the inception of the transaction, and thereby prevent the defendant from complying further with his offer to accept the terms of the contract and thereby destroy his rights. There is nothing in the evidence to justify plaintiffs' refusal to accept the cash and tender the deed, "under the terms of the contract," as made by them. But the learned counsel insists that the acceptance by defendant was for himself alone, and not for Millard & Lasater, and that, thus

construed, plaintiffs were under no obligation to convey to him and accept his notes and trust deed; that they contracted with both partners and were entitled to demand strict performance of the contract. It is undoubtedly true, as contended by plaintiffs, that when a person enters into a contract with another, involving personal services or per-
(310) sonal confidence, the contract can not be assigned, so as to bring one of the parties into contract relations with a stranger. "Contracts involving the relation of personal confidence, and such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided, are not transferable." 4 Cyc., 22. It seems to be well settled that "when a lease contains an agreement that the lessee may purchase the land during the continuance of the lease, the assignment of the lease conveys to and vests in the assignee the same right." *Menger v. Ward,* 87 Tex., 622, 853. It would seem, therefore, that by Lasater's assignment the defendant was entitled to the benefit of his interest in the option—that is, by complying with its terms, to call for the conveyance.

The only element of personal confidence involved in the option was that both Millard and Lasater were to execute their notes for the balance of the purchase money. As we have seen, the acceptance by defendant was "under the terms of the option." There was no suggestion that Lasater was not to sign the notes. In *Menger v. Ward,* 87 Tex., 62, relied upon by plaintiffs, the option, superadded to the lease, gave the right to the lessee to purchase the property by paying a part of the purchase price cash and giving his notes for balance. The lessee mortgaged his term. One of the questions involved in the litigation was whether the mortgage of the leasehold property carried the option. The court held that, as credit was given for a part of the purchase price, the option did not pass by the mortgage. This decision was based upon the principle that the lessor could not be compelled to accept a stranger as his debtor, and was unquestionably correct. In the case before us no new party is attempted to be brought into the contract, but one of them "drops out" by assigning his interest to his copartner. The assignment of his interest, of course, made no change in the right of the plaintiffs to have the contract accepted and executed according to its terms, but they made no such claim or demand. There is no evidence showing or tending to show that Lasater would not, as in good faith he should have done to make his assignment effectual, have joined in the notes and trust deed. The acceptance having been made in good faith, according to the terms of the contract, we can see no reason why defendant was not entitled to have had an op-
(311) portunity to either give the notes to Lasater or, as his Honor has directed, pay the full amount of the purchase money down.

A court of equity looks to the substance of the thing; and while it will not vary the terms of the contract or deprive the plaintiffs of any of their legal rights, after the option by acceptance has been merged into a contract, it will guard the rights of both parties and make them do equity. The only element of personal confidence involved in the contract was that the lessors were to have four years' credit. If this is waived and the amount is paid in cash, how can the plaintiffs complain? If they desired the notes, they should have put themselves in an attitude to call for them by tendering the deed; this they refused to do. "A party does not forfeit his right to the interposition of a court of equity to enforce specific performance of a contract if he, reasonably and in good faith, offers to comply and continues ready to comply with its stipulations on his part, although he may err in estimating the extent of his obligation." *Willard v. Tayloe, supra.* While, as consistently held by this and all other courts administering equitable rights and remedies, specific performance is not a matter of absolute right, yet it will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice and work no hardship upon the party who has entered into the contract.

Upon a review of the entire evidence and the verdict of the jury, we think that defendant has acted in entire good faith and is entitled to the relief granted by his Honor. Plaintiffs are not required to enter into any contract with a stranger or to release any security to which they were entitled under the contract. They agreed to sell the property for $9,000 if accepted on or before 2 July, 1907. Only $1,000 was to be paid cash, and credit of four years was given for the balance. The option was accepted more than a year before the time fixed, and they, without assigning any valid reason, rejected it. They receive, under the provisions of the judgment, the whole amount of the purchase money, with interest from the day of the tender.

Upon a careful examination of the entire record, with the aid of excellent briefs and oral argument, we find no reversible error.

No error.

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(312)

W. H. GRIFFIN v. SOUTHERN RAILWAY COMPANY.

(Filed 24 March, 1909.)

1. Railroads—Cities and Towns—Use of Streets—Assent of Town.

A railroad company has the right to use the streets of a town for legitimate railroad purposes, with the assent of a town, having statutory powers, given by resolution of its board of aldermen. (Revisal, sec. 2567, subsec. 5.)

2. **Railroads—Corporation Commission—Union Depots—Inherent Powers—Cities and Towns—Use of Streets.**

The statute authorizing the Corporation Commission to order union stations to be built and maintained carries with it the power to do what is reasonably necessary to execute such order, including the use of the streets of a town for legitimate railroad purposes, the laying of tracks, etc., necessary to that end.

3. **Railroads—Cities and Towns—Use of Streets—Ministerial Duties—Power of Courts—Injunction.**

The action of the board of aldermen in authorizing a railroad company to use a certain street for legitimate railroad purposes, the laying and use of tracks, etc., when the statutory power is given, is not reviewable by the courts at the instance of an owner of land on the street, claiming that some other street should have been so used.

4. **Railroads—Cities and Towns—Use of Street—Tracks—Additional Servitude—Remedy—Damages—Injunction.**

The remedy of an owner of land on a street which has been used for railroad purposes, the maintenance of track, etc., against a railroad company using additional tracks necessary to maintain a union depot, is by an action for damages for a super-imposed burden upon the street, and not by injunction.

5. **Railroads—Cities and Towns—Use of Streets—Tracks—Assent of City—Corporation Commission—Public Good—Injunction.**

The progress of work, apparently for the public good, such as the laying of a track on a city street by railroad companies to maintain a union station authorized by the city and ordered by the Corporation Commission, will not be interfered with by injunction.

6. **Same—Power of Court—Supreme Court.**

It appearing in this case that certain railroads had been improperly restrained by a private owner of lands from building tracks along a city street, with the approval of the city, and done in order to build and maintain a union depot ordered by the Corporation Commission about two years previously, judgment dissolving the restraining order was entered in the Supreme Court. (Revisal, sec. 1542.)

(313) INJUNCTION proceedings, from WAYNE, heard at chambers, at Goldsboro, by *Lyon, J.*, 25 January, 1909.

Defendant appealed.

F. A. Daniels, Aycock & Winston and W. T. Dortch for plaintiff.
W. B. Rodman, J. H. Pou and I. F. Dortch for defendant.

CLARK, C. J. On 5 July, 1905, the Board of Aldermen of Goldsboro, N. C., petitioned the Corporation Commission to order the three railroads entering that city to establish a union passenger station. After sundry proceedings, which are set out in 142 N. C., 394-396, the three

railroads concerned agreed upon a location for said union passenger station on the western edge of the town. The Corporation Commission, after full investigation, approved the location so chosen, and directed the erection of the building at that spot, as they were empowered to do. Revisal, sec. 1097 (3). Certain persons, being dissatisfied, sued out a restraining order, which the judge below dissolved, and this Court affirmed his action. *Dewey v. R. R.*, 142 N. C., 392. The railroads have jointly erected said building, and all three have laid their tracks to the new union station. The plaintiff, who owns land abutting on Beech Street, between James and George Streets, a distance of 420 feet, has sued out this restraining order against the Southern Railway Company to prohibit it from using that part of Beech Street (between James and George), and has thus brought the whole matter to a standstill, though the station is completed and the tracks of all three railroads have been graded and laid for the purpose of using said joint passenger station, in compliance with the order of the Corporation Commission.

The Revisal, sec. 2567 (5), expressly grants to railroad companies the right to use the streets of a town or city, with "the assent of the corporation of such city." The assent of the city to the use of Beech Street by the defendant railroad companies for this purpose has been duly given by resolution of its board of aldermen. Besides, as *Hoke, J.*, well says, in *Dewey v. R. R., supra,* 401, when the statute authorized the Corporation Commission to order the union station, that carried with it the right to do whatever is reasonably necessary to execute such order, which the defendant was executing. *Industrial Sid-* (314) *ing case,* 140 N. C., 239; *Corporation Commission v. R. R.*, 139 N. C., 126. This is also held in *Osborne v. R. R.*, 147 U. S., 248; *Staton v. R. R.*, 147 N. C., 428.

The city clearly possessed the statutory right to assent to the use of the street by the railroad company. This is often a most essential power, necessary to be used for the benefit of the people of the city. The plaintiff, however, seeks to show that the defendant might have gone along some other street. If so, some lot owner there could retort that the railroad ought to go along Beech Street. The designation of the street to be used is a matter to be determined by the governing body of the city, with an eye to the general welfare. Besides, there has been a railroad track on Beech Street, from James to George (this very *locus in quo*), since 1873, and the trains of defendant and of the Atlantic and North Carolina Railroad have been using this track daily for all that time—thirty-six years. It is true it was in use as a "Y," and also more lately for access to an industrial plant, but the plaintiff acquired the property knowing that the railroad tracks were there and in daily

use to any extent the railroad companies saw fit. The plaintiff does not own any interest in the soil of the street. If there is any additional servitude, the plaintiff's remedy is by an action for damages, not for an injunction.

In *Staton v. R. R.*, 147 N. C., 428, *Connor, J.*, says: "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 and 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. . . . That the public would in many ways be seriously injured is manifest. Courts never (315) 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. Emery,* 108 N. C., 130."

It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done, except in extreme cases, and this is not such an one. It is contrary to the policy of the law to use the extraordinary powers of the court to arrest the development of industrial enterprises or the progress of works prosecuted apparently for the public good, as well as for private gain. The court will not put the public to needless inconvenience. The court should have dissolved the restraining order. *Walton v. Mills,* 86 N. C., 280; *Dunkart v. Rhinehardt,* 87 N. C., 224; *Lumber Co. v. Wallace,* 92 N. C., 23; *Lewis v. Lumber Co.,* 99 N. C., 11; *Navigation Co. v. Emery,* 108 N. C., 130; *Commissioners v. Lumber Co.,* 114 N. C., 505; *R. R. v. Lumber Co.,* 116 N. C., 924; *Land Co. v. Webb,* 117 N. C., 478; *Merrick v. R. R.,* 118 N. C., 1082; *Wynn v. Beardsley,* 126 N. C., 116.

The chief street in Goldsboro, running through its center and for the whole length of the town, has been used for over seventy years by one railroad, for sixty years by two, and for half a century by all three of these same railroads. It is singular that it should now be contended that 420 feet of this remote street, almost on the very edge of the town, can not thus be used, with the assent of the town, whose charter confers on it the right to change and even abolish any street.

As the order to establish this union station was made by the Corporation Commission, at the request of the town authorities and for the convenience and comfort of the traveling public, nearly two years ago, and the railroads were on the point of beginning the use of the station and tracks, upon which they have expended considerable sums, in obeying the order of the Corporation Commission, judgment dissolving the restraining order will be entered in this Court, as was done in *R. R. Connection case,* 137 N. C., 21, and cases there cited. Revisal, sec. 1542.

Reversed.

Cited: Sutphin v. Sparger, post, 519; *Butler v. Tobacco Co.,* 152 N. C., 419; *S. v. R. R.,* 153 N. C., 562; *Waste Co. v. R. R.,* 167 N. C., 341, 343; *Jones v. Lassiter,* 169 N. C., 751; *Scott v. Comrs.,* 170 N. C., 330; *Hales v. R. R.,* 172 N. C., 109.

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(316)

NANNIE J. BAILEY AND HUSBAND v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 24 March, 1909.)

1. Telegraphs—Delivery of Message—Negligence—Evidence.

Evidence that the husband of *feme* plaintiff told the messenger who, about four hours afterwards, delivered the message, that he was expecting a message, and to bring it out to his wife, is competent upon the question of negligent delay in delivery, when the addressee lived but a short distance from defendant's office and delivery was delayed several hours.

2. Telegraphs—Death Message—Evidence—Mental Anguish.

When there is evidence tending to show negligence on the part of defendant telegraph company in delivering a message announcing the death of a sister, evidence of mental anguish suffered by plaintiff is competent.

3. Telegraphs—Delivery of Message—Negligence—Damages—Avoidance—Evidence.

When negligent delay is shown in the delivery of a message, and the uncontradicted evidence in defense is that by driving a distance through the country trains could have been caught which would have enabled plaintiff to have reached destination before the funeral, the court can not say, as a matter of law, that it was plaintiff's duty to thus avoid the injury, but the question is one for the jury, under all the facts and circumstances of the case.

ACTION tried before *Lyon, J.,* and a jury, at December Term, 1908, of DUPLIN.

Defendant appealed.

Stevens, Beasley & Weeks and H. A. Grady for plaintiff.
J. D. Bellamy & Son for defendant.

CLARK, C. J. This is an action for negligence in delayed delivery of a message sent to plaintiff, at Warsaw, N. C., informing her that Mrs. Elmore (who was her sister) had died that morning and would be buried next afternoon. The telegram was sent from LaGrange, N. C., on Sunday, and reached Warsaw that afternoon at 5:33, but was not delivered until 9:30, being too late for plaintiff to take the train going north, which passed at 8:51, and which the plaintiff says she would have taken and could have gotten to the residence of the deceased,
(317) eight miles south of LaGrange, in time for the funeral. The next train going in that direction passed next day at 11 A. M., too late to get to the funeral by going to LaGrange.

The husband of plaintiff met the telegraph messenger, who was also a railroad station hand, going to the depot, where the husband himself had just been, about 6 P. M., and told him he was expecting such a message, and to bring it right out, as his wife, in such event, would go on the 8:51 train. This was excepted to, but was competent as tending to show that with inquiry the agent could have learned where plaintiff resided. The same messenger brought the telegram to plaintiff's residence, which was 300 yards from the depot, about 9:30 o'clock. Warsaw is a town of 750 inhabitants. It can not be seriously contended that the defendant was not guilty of negligence; nor was there error in admitting evidence that plaintiff suffered mental anguish because of failure to receive the message in time to take the 8:51 train. That is the gist of the action. The object in using the telegraph was to give the sendee opportunity to attend the funeral.

There was evidence that plaintiff, by getting up at 5 o'clock next morning, could have driven across the country, twenty-seven to thirty miles, and thus have reached the funeral in time, notwithstanding failure to catch the train—the 8:51 train—the evening before, or have gone on at 11 A. M. to Goldsboro and driven from there, some fourteen miles. The plaintiff introduced evidence of her husband's physical disability to ride so far, and she might have been unwilling to travel across country without him. We could not hold as a matter of law that it was incumbent on plaintiff to make such exertions as that to cure the defendant's neglect. At the most, failure to do so, if practicable, would be a matter in mitigation of damages, and there was no prayer asked in that view. The court ruled that it was plaintiff's duty to use all reasonable diligence to avoid the consequence of defendant's delay in delivery of the message and submitted to the jury, upon the evidence, as an issue of fact: "Could the plaintiffs, by the exercise of reasonable dili-

gence, have attended the funeral, notwithstanding the failure of the defendant to deliver the telegram in time to take the north- (318) bound train on 28 July, 1907?" to which the jury responded "No." We do not find that the other exceptions require discussion.

No error.

Cited: *Weeks v. Tel. Co.*, 169 N. C., 705; *Gainey v. Tel. Co.*, 170 N. C. 9.

C. S. WILLIS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 24 March, 1909.)

1. Telegraph—Pleadings—Allegation of Ownership.

An allegation in the complaint that a telegram was delivered to defendant telegraph company at B. for transmission to R., which defendant undertook and agreed to transmit accordingly, is a distinct averment that defendant owned and operated the line from B. to N., an intermediate station, through which it was forwarded to its destination.

2. Telegraph—Pleadings—Evidence—Averments—No Denial—Amendments—Questions for jury.

A complaint and answer is some evidence that a telegraph company owned a telegraph line over which a message was forwarded by it, when the former contains a distinct allegation of ownership, which the latter does not deny; and the fact that subsequently an amendment to the answer was allowed and made does not render the evidence incompetent, but affects only its weight or sufficiency to prove the fact.

3. Telegraphs—Negligence—Delivery—Evidence—Questions for Jury.

A telegram was incorrectly addressed to 23 East Marshall Street, in Richmond, Va. It was received in Richmond at 3:30 P. M., the 27th, and the messenger attempted to deliver it at 23 East Marshall Street and at 23 West Marshall Street, and unsuccessfully inquired where the addressee could be found. He did not inquire at the postoffice. He delivered nine other messages on that trip, and reported at defendant's office at 6 o'clock P. M. Unavailing inquiries were made of several persons there, and the city directory was consulted. A service message, asking for a better address, was sent to the initial point, which was delayed until the next morning, owing to the observance of office hours. The message was delivered at 10 A. M., the 28th, at the address as corrected: *Held*, evidence of negligence in the delivery sufficient to go to the jury.

4. Instructions—General—Sufficiency.

Instructions of law which are correct in their general application to the evidence are sufficient, in the absence of requests for specific instructions.

CONNOR, J., dissents. BROWN, J., concurs in dissenting opinion.

(319) ACTION tried before *O. H. Allen, J.,* and a jury, at Fall Term, 1908, of CARTERET.

This action was brought to recover damages for failing to deliver a telegram. It appears that on 27 July, 1907, at 3 o'clock P. M., Elvin Willis, a brother of the plaintiff, delivered to the defendant, at Beaufort, N. C., for transmission to the plaintiff, C. S. Willis, who lived in Richmond, Va., the following message: "C. S. Willis, 923 East Marshall Street, Richmond, Va. Papa died at 10:30 A. M. Elvin." The message was not delivered until 10 o'clock A. M. on 28 July, 1907. It was received by the defendant's operator at Richmond at 3:30 P. M. on the day it was sent. The message was sent from Beaufort by way of Newport, and relayed at the latter place. When received by the defendant's operator at Newport, the address had been changed from "923 Marshall Street" to "23 Marshall Street," and the evidence tended to show that this change was made after the message had been received by the operator at Beaufort—in other words, on the line between Beaufort and Newport. The defendant contended that it was not liable by reason of this fact, as it did not own or operate that line, but that it was owned and operated as an independent line by Thomas Duncan, and there was evidence in the case to sustain this contention. It appears, though, that in the complaint, filed at Fall Term, 1907, the plaintiff alleged that the defendant owned and operated the said line as a part of its line between Beaufort, N. C., and Richmond, Va., and that it undertook to transmit the message from Beaufort to Richmond. These allegations were made in sections 1, 2 and 3 of the complaint, and they were not denied in the answer, filed at Fall Term, 1907, though the other allegations of the complaint were. At Fall Term, 1908, by leave of the court, the defendant filed an amended answer, in which the allegations as to the ownership and control of the telegraph line from Beaufort to Newport were denied, and evidence was introduced at the trial which tended to show that

(320) said line was not owned or controlled by defendant, but by Thomas Duncan. The plaintiff put in evidence the complaint and the first answer for the purpose of showing that the defendant did own and control the line from Beaufort to Newport. The defendant requested the court to charge the jury "That, if they believed the evidence, the line from Beaufort to Newport was not owned and operated by the defendant, and it would not be liable for any error which occurred on that line." This instruction the court declined to give, but charged that "It is a question for the jury to find, from the greater weight of the evidence, whether the line from Beaufort to Newport was owned and operated by the defendant, and if the jury found that the line from Beaufort to Newport was not owned or operated by the defendant it would not be liable for any error that may have occurred on that line,

the burden of proof as to who owned the line from Beaufort to Newport being on the plaintiff." Defendant excepted.

The defendant requested the court to charge the jury that the defendant would not be responsible for any error that may have occurred in the transmission of the telegram before the same reached its line; and if the jury should find from the evidence that the telegram was delayed by reason of an error in the transmission and change of address before it reached the line of the defendant, then the jury would answer the first issue "No." The court, in response to the prayer, instructed the jury as follows: "The defendant would not be responsible for any error that may have occurred in the transmission of the telegram before the same reached its line. If the jury should find from the evidence that the telegram was delayed by reason of an error in transmission and the change of the address before it reached the line of the defendant, and such delay was the cause of the failure of the plaintiff to receive the message in time to have attended the funeral, then they will answer the first issue 'No.'"

The evidence tended to show that when the message was received at Richmond, the operator handed it to a messenger for delivery to the sendee, and that he used a bicycle in delivering messages. The messenger, who had nine other messages to deliver, went to the place described in the message, No. 23 East Marshall Street, and also to 23 West Marshall Street, and inquired for C. S. Willis, but found that he (321) did not live at either place. He also inquired at each house as to where Willis could be found, but received no information. The messenger returned to the office at 6 o'clock P. M., the same day, as soon as he had delivered the other messages, and handed the message for Willis to the operator, to whom he reported the facts. The operator examined the city directory, and not finding Willis' name, inquired of other persons by that name about him. Failing to get any information, he wired back for a better address, but his service message was not received at Newport in time to wire to Beaufort and receive an answer before the time for closing the office, which was 9 o'clock P. M. A message was received at Newport from Beaufort giving the correct address that night, but after office hours, and it was not forwarded until the next day. The message from Newport to Richmond had to be sent *via* New Bern and relayed at that place, as the main or direct line to Richmond could not be used, "it being in trouble," as the operator testified. If it had been in order, the corrected message could have been sent to Richmond that night. It could not be sent by New Bern, as the office there had been closed for the night. There was evidence that no inquiry was made at the postoffice at Richmond for C. S. Willis, who lived at 923 Marshall Street, nor was there any further search for him. The night clerk at

Richmond mailed a postal card to Willis. The plaintiff could have left Richmond and attended the funeral of his father if the message had been delivered to him at any time before 8 P. M. on the day it was sent, and would have left by the first train.

The court charged the jury as to what would constitute negligence in failing to deliver the message after it was received by defendant, substantially, as follows: If the defendant did not operate the Beaufort and Newport line and the jury should find that an error in the message occurred on that line, and at the time the message was received by defendant company it had an incorrect address and the one at which defendant undertook to deliver the telegram, then the jury will consider whether or not the defendant company was guilty of negligence after the telegram reached its line at Newport; and if in the exercise of ordi-
(322) nary care and diligence the defendant could have gotten the correct address and delivered the telegram to plaintiff, so that he could have left Richmond on 27 July and reached home in time for the funeral, and defendant failed to do so, it was guilty of negligence, and the jury will answer the first issue "Yes." Defendant excepted to this instruction.

There was evidence as to plaintiff's mental anguish and damages.

The court having refused to charge, as requested, that there was no evidence of any negligent delay in transmitting and delivering the telegram, and that the jury should answer the first issue "No," the defendant excepted.

At the close of the testimony the defendant moved to nonsuit the plaintiff. The motion was refused, and the defendant excepted.

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

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

WALKER, J., after stating the case: The plaintiff alleged in his complaint that the telegram was delivered to the defendant at Beaufort, N. C., for transmission to him at Richmond, Va. This was a clear and distinct allegation that the defendant was at the time the owner of the telegraph line between Beaufort and Newport, for this was a part of the line from Beaufort to Richmond, and the pleadings and facts show that this fact was well known to the defendant. It is also alleged that the defendant was engaged in the business of transmitting messages from Beaufort to Richmond, and received the message in question at Beaufort and undertook to transmit and deliver it to the plaintiff at Richmond. The message, it appears, was actually sent by way of Newport and over the

Beaufort and Newport line. Those allegations, which were made in sections 1, 2 and 3 of the complaint, were not denied in the first answer of the defendant, which was filed 25 January, 1908, and no reference was made to them, although the allegations of the other sections of the complaint were specially denied. If there had been no amended answer the allegations of the first three sections of the complaint would be deemed to be admitted, and the defendant would consequently (323) be liable for any error in transmitting the message from Beaufort to Newport on its way to Richmond which occurred on that line. The language of the statute is that "Every material allegation of the complaint not controverted by the answer shall, for the purposes of the action, be taken as true." Revisal, sec. 503. When the plaintiff alleged, substantially, though very plainly, that the defendant was the owner of the line from Beaufort to Newport, and also alleged, in so many words, that it received the message at Beaufort and agreed to transmit and deliver it to the plaintiff, the defendant was called upon to deny the allegation, if not true, and by not doing so it tacitly admitted the truth of it. One of the fundamental maxims of the law is that silence implies consent. (*Qui tacet, consentire videtur.*) For instance, where there is a duty to speak, and the party upon whom this duty rests does not, an assent may be inferred from his silence. *Russell v. Thornton,* 4 H. & N., 798, per *Bramwell, J.;* Broom Legal Maxims (8 Ed.), 786. In this case there was a verified complaint, containing the material allegation that the plaintiff owned the Beaufort and Newport line and had undertaken to transmit the message, not from Newport to Richmond, as now contended and as averred in the defendant's amended answer, but from Beaufort to Richmond. It was the defendant's duty to deny this allegation, if it were not true, as it vitally affected the question of its liability in one aspect of the case. Having chosen to be silent when it had the opportunity to traverse the allegation, we must hold that the complaint and first answer constituted some evidence from which the jury might reasonably infer the ownership by the defendant of the line from Beaufort to Newport. In *Perry v. Manufacturing Co.,* 40 Conn., 317, the Court say: "Admissions by a party or by an authorized agent, either in court or out, may be given in evidence; but the circumstances surrounding the admission, the purposes for which it was made, and the conditions attached to it, may be fully shown. It may not infrequently happen that a party will not be bound by an admission and will not be estopped from denying its truth. And in view of the showing on both sides, allowing each party to prove the whole truth, it will be for the triers to determine how the proof stands on the facts in controversy, on which the admission is claimed to bear. These principles were acted on substantially in the court below. They seem to us (324)

just and reasonable and in harmony with the law of evidence." See, also, *Pope v. Allis,* 115 U. S., 363, where many cases are cited in support of the competency of a pleading in an action as evidence against the party filing it, even where he had no personal knowledge of the facts alleged, but made his averment on information and belief. The case of *Avery v. Stewart,* 136 N. C., 426, would seem to be directly in point. The fact that the defendant afterwards filed an amended answer and denied that it was the owner of the Beaufort and Newport line does not affect the competency of the evidence, but merely detracts from its weight or its sufficiency to prove the fact now in issue. See, also, 8 Enc. Pl. & Pr., 27, and notes. *McMillan v. Gambill,* 115 N. C., 352; 11 A. & E. Enc. (2 Ed.), 488. It would seem unreasonable that while the silence of a party when called upon in a conversation to speak is receivable in evidence against him, an answer which is deliberately prepared and verified by the oath of the defendant in response to a demand for the exact truth should be incapable of probative force. Candor and frankness required the defendant to answer every material allegation well pleaded, and any failure to deny or evasion by him or suppression of the truth should be considered as some evidence against him of the truth of the allegation. Such conduct is admissible as evidence, although it may be explained and is not conclusive.

We think there was some evidence of negligence in failing to deliver the message after it was received at Richmond. The court charged the jury substantially that if the defendant's servants failed to exercise ordinary care in attempting to deliver the message, and if by the exercise of such care the message could have been delivered in time for the plaintiff to have reached his home and attended the funeral of his father, there was negligence. This instruction is sustained by the case of *Hendricks v. Telegraph Co.,* 126 N. C., 304. See, also, *Lyne v. Telegraph Co.,* 123 N. C., 129. The charge of the court was very general, it is true, but it is sufficient, in the absence of any special prayer for a more specific instruction.

(325) The motion to nonsuit was properly refused, as there was some evidence of negligence for the consideration of the jury under the instruction of the court.

It is not necessary to discuss the other assignments of error. We have carefully examined them and do not find any error in the rulings to which the defendant excepted.

No error.

CONNOR, J., dissenting: Plaintiff shows, without contradiction, that the telegram was written by his brother, addressed to him, at "923 East Marshall Street, Richmond, Va.," and delivered to the operator at Beau-

fort. He then introduced Miss Lucy Edwards, who testified that "she was working for defendant company and the Beaufort and Newport Telegraph Company at Newport; that she transmitted a message similar to the one offered in evidence; that she received the message on the Beaufort and Newport line, and when it was received it was addressed to 23 East Marshall Street. Mr. Duncan is the owner of the Beaufort and Newport line, and I call it the Duncan line, and I received compensation from him for my services." The Western Union tariff book shows that the Beaufort and Newport line is an entirely different line. At the time the original telegram was received from Beaufort by her it was addressed to plaintiff, at 23 East Marshall Street, Richmond, Va. Defendant has no office at Beaufort, as she understood it. There was no Western Union operator at Beaufort. The plaintiff introduced the telegram addressed to and received by him in Richmond, "23 East Marshall Street." The message was sent from Newport immediately, and it is conceded that the delay in delivering the message in Richmond was caused by the mistake in the address. There was no other evidence on the part of plaintiff in regard to the place at which the mistake occurred. The evidence of Miss Edwards was corroborated by defendant's witnesses. There is, upon this testimony, no possible room for doubt that the Beaufort and Newport line was entirely independent of defendant company, and that the mistake occurred on that line. There is not a scintilla of evidence to the contrary. Why, then, was defendant not entitled to the instruction asked? Plaintiff had made out a perfect case against the Beaufort and Newport line, exonerating defendant from any liability for the mistake. When the complaint was filed plaintiff (326) alleged that defendant was conducting the business of receiving and transmitting messages between Beaufort and Richmond, and that on 27 July plaintiff's brother filed with defendant at Beaufort the telegram, etc.; that it negligently failed to deliver the message in time for plaintiff to attend his father's funeral, etc. Defendant, at the return term, answered, denying the allegations in regard to negligence, etc., and omitted to make answer to the other allegations. At the next term defendants obtained from the court leave, upon terms, paying cost, etc., to file an amended answer. Pursuant to said permission, defendant filed an answer denying that it had any office at Beaufort or that it received any message at that place for transmission. The amended answer, in this respect, was in exact accord with plaintiff's proof. The original answer was introduced as evidence to show that, in truth, notwithstanding plaintiff's evidence, defendant did receive the message at Beaufort, and the jury were permitted to find the fact. The plaintiff recovers a verdict and damages in direct contradiction of his own proof, because the counsel for defendant omitted in the original answer to deny the

allegation. It was permitted to file the amended answer, and did so, alleging *just what plaintiff proved.* I do not deny that admissions in an answer, although afterwards cured by amendment, may be introduced in evidence when the truth of the matter alleged in the answer is in controversy. Here the truth of the matter alleged in the answer was not only not in controversy, but was established beyond controversy by plaintiff's witness. His Honor instructed the jury that if they found that the mistake in the address occurred at the Beaufort office they should answer the issue for defendant. The plaintiff showed by his own witness that it did occur at that office. As frequently occurs, counsel inadvertently failed to answer an allegation and, as matter of course, is permitted to put in a denial. This is very far from being a "solemn admission," as if defendant had admitted the allegation. The purpose of a judicial trial is to ascertain the truth and administer the law as applicable to the facts. Rules of pleading and practice are made to promote this end. The plaintiff may show the fact to be different from the testimony of
(327) his witness, but he can not impeach his witness and ask the jury to discredit her. In this case he did neither, but he fixed liability upon one company and recovers damages from another. It is not suggested that there was any connection between the two lines fixing liability upon defendant company for the mistake of the Beaufort and Newport line. Plaintiff shows that the telegram was delivered to the Beaufort and Newport operator, addressed to "923 East Marshall Street"; that it was received by defendant's operator, addressed to "23 East Marshall Street," transmitted and delivered to the plaintiff in Richmond, addressed to "23 East Marshall Street"; and yet, for injury conceded to result from the mistake made at Beaufort, the defendant is made to pay damages, and this because counsel inadvertently failed to answer an allegation of the complaint which, by permission, it did answer and deny. I think that his Honor should have told the jury that, upon the uncontradicted evidence, the mistake occurred on the Beaufort and Newport line, for which defendant was not responsible. There is no denial that defendant delivered the message promptly when the correct address was given it. The only suggestion of negligence is that there was delay in sending the office message calling for a better address. This was, in the light of plaintiff's evidence, the only question for the jury.

BROWN, J., concurs in the dissenting opinion.

W. R. CAULEY v. J. R. SUTTON ET AL.

(Filed 24 March, 1909.)

1. **Mortgagor and Mortgagee—Trusts and Trustees—Tax Deeds.**

A mortgagee holds the legal title to the mortgaged lands in trust for the mortgagor and himself, and by subsequently acquiring a tax deed to the mortgaged premises he can not deprive the mortgagor of his equity of redemption.

2. **Same—Additional Mortgage Lien.**

Money subsequently paid by a mortgagee to acquire a tax title on the mortgaged lands becomes a lien on the land. (Revisal, sec. 2858.)

3. **Mortgagor and Mortgagee—Trusts and Trustees—Legal Title—Possession—Limitation of Actions.**

The statute of limitations does not run against a mortgagor in possession of lands by reason of the legal title being in the mortgagee, not in possession. (Revisal, sec. 385, subsec. 4.)

4. **Mortgagor and Mortgagee—Mortgage Deed—One Action—Procedure.**

In an action brought for the cancellation of a mortgage and for general relief it is the better procedure to ascertain, when appropriate, the amount due upon the mortgage debt, so that redemption or foreclosure can be had and all controversy between the parties settled in the same action. The judgment in this action will be considered interlocutory, or final, according as the parties may determine to proceed.

ACTION tried before *Lyon, J.*, and a jury, at November Term, (328) 1908, of LENOIR.

Defendants appealed.

G. V. Cowper and Y. T. Ormond for plaintiff.
Loftin, Varser & Dawson and Murray Allen for defendants.

WALKER, J. This action was brought for the purpose of having canceled a tax deed executed by the sheriff to Ben Sutton, and also a mortgage on land executed by the plaintiff to Ben Sutton, which he alleged had been satisfied. The defendants are the heirs of Ben Sutton, who is dead. The plaintiff alleged, and there was evidence tending to prove, that the mortgagee bought the land at a tax sale and received a deed from the sheriff therefor. The defendants averred that the tax sale was in all respects valid, and passed the absolute title to their ancestor, and that he had been in adverse possession of the land after the execution of the mortgage for a sufficient length of time to bar the plaintiff's cause of action under the statute of limitations. The court restricted the issues to the effect of the tax deed as a cloud upon the title,

and refused to pass upon the question as to the payment of the debt secured by the mortgage, the administrator of Ben Sutton not being a party to the action. The jury found in response to issues submitted to them, that Ben Sutton acquired no title to the land by the tax sale and the deed of the sheriff to him, and therefore that the plaintiff is (329) the owner of the land in controversy; in other words, that the tax deed did not deprive the plaintiff of his equity of redemption by conveying an absolute or unconditional estate to the ancestor of defendants. They further found that the plaintiff's cause of action was not barred by the statute of limitations. The court rendered judgment upon the verdict, and left all matters of account between the parties, with reference to the mortgage debt, to be determined in an independent action, without prejudice by reason of the proceedings and judgment in this suit. The defendant excepted and appealed.

The only question involved in this case is whether the mortgagee, by his purchase at the tax sale, acquired title to the land and thereby extinguished the plaintiff's equity of redemption. This question must be answered in the negative. In some States, where a mortgage is regarded only as a security for the debt and the legal title is not considered as in the mortgagee, it has been held that a mortgagee who is not in actual possession of the land may acquire the title by purchase at a tax sale as against the mortgagor. But this is not the rule with us. The legal estate passes to the mortgagee, and he holds it, not only in trust for himself, but also for the mortgagor. *McLeod v. Bullard,* 86 N. C., 210-216; *Capehart v. Dettrick,* 91 N. C., 344. We have held that if he pays off an encumbrance or buys in an outstanding title superior to his own he can not hold it for his own benefit, but the act inures to the benefit of him for whom he holds as trustee; and, further, "if he buys at a sale made under a prior mortgage he does not acquire the title for his own personal benefit, but merely removes an encumbrance, and the charges of it as a prior lien, upon the property itself; and this is so, because he can not take advantage of his position to the injury of those whose interests are committed to his protection." *Taylor v. Heggie,* 83 N. C., 244. The taxes assessed were a lien upon the land, and when the mortgagee bought at the sheriff's sale he purchased only an encumbrance, the cost of which he is entitled to have added to the debt secured by the mortgage, and it is therefore an additional lien upon the land. The mortgagee could have paid the taxes and acquired a lien upon the land to the extent of the amount so paid by him. The Code, sec. 3706 (Revisal, sec. 2858). He did not acquire the equitable estate of (330) the mortgagor, which still exists, notwithstanding his purchase at the tax sale, and he can not use his deed for the purpose of asserting any right in conflict with the mortgagor's equity of redemption.

We find no error in the rulings of the court to which the numerous exceptions were taken. There was no evidence that the mortgagee had occupied the land for a sufficient length of time to bar the equity of redemption under the statute of limitations. A constructive possession by him, arising from the fact of his being the owner of the legal title, without actual possession for the required length of time, did not effect that result. *Simons v. Ballard,* 102 N. C., 105; *Parker v. Banks,* 79 N. C., 480; The Code, sec. 152 (4); Revisal, sec. 391 (4). The statute requiring actions to recover lands sold for taxes to be brought within three years after the execution of the sheriff's deed has no application to this action, as it was not brought for the recovery of the land. *Beck v. Meroney,* 135 N. C., 532. It was brought under the act of 1893, sec. 6 (Revisal, sec. 1589).

The plaintiff alleged that the debt had been paid, and asked for a cancellation of the mortgage and for general relief. It would have been a more correct procedure if the court had ascertained what amount, if any, is due upon the mortgage debt, proper parties being made for that purpose, so that the plaintiff could redeem or the mortgage be foreclosed by sale under the order of the court and all matters in controversy between the parties settled in one action. As it is, only a part of the case has been tried.

We do not commend the course pursued; and if the plaintiff or the defendants so desire, the Court may proceed further in the cause for the purpose herein indicated; otherwise the present judgment will stand as a final and not merely an interlocutory judgment in this action, without prejudice to the right of either party to proceed by an independent action to have determined the other matters of difference between them.

No error.

Cited: McNair v. Boyd, 163 N. C., 480.

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(331)

DONALD McRACKAN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 24 March, 1909.)

Penalty Statutes—"Party Aggrieved"—Interest in Goods—Agent or Attorney.

The penalty prescribed by Revisal, sec. 2631, is for the person who is interested in having the goods shipped, and whose legal right in respect thereto is denied; and a person may not maintain an action for the penalty, as the party aggrieved, who has no right or interest in the goods tendered by him for shipment, except as agent or attorney for an attaching creditor and surety on his attachment bond, after the debt has been paid and the goods released.

ACTION tried before *Lyon, J.*, and a jury, at July Term, 1908, of COLUMBUS. Plaintiff appealed.

Lyon & Greer and Douglass & Lyon for plaintiff.
Davis & Davis for defendant.

WALKER, J. This action was brought, under Revisal, sec. 2631, to recover the penalty for refusing to receive a box of goods tendered by the plaintiff in person to the defendant, at Clarendon, N. C., for shipment to Whiteville, N. C. The box of goods belonged to Samuel I. Epstein, who had delivered them to the defendant, at Clarendon, for shipment to Clio, S. C., and received a bill of lading therefor. While the box was in the defendant's possession, at Clarendon, it was attached in an action brought by Broom & Mayer against Samuel I. Epstein. The plaintiff testified: "I had no interest in these goods, except as surety on the attachment bond and as attorney for Broom & Mayer, at whose instance the goods had been attached." The claim of Broom & Mayer was paid the day after the plaintiff tendered the box of goods to the defendant for shipment to Whiteville. The court, at the close of the evidence, and on motion of the defendant, entered judgment of nonsuit, under the statute, and plaintiff appealed.

(332) The question presented is whether the plaintiff is the "party aggrieved," within the meaning of those words, as used in the statute. He was not acting in his own behalf, but as agent or attorney for his clients, Broom & Mayer, in the suit against the real owner of the goods, when he made the tender of the box to the defendant at Clarendon. It appears that he had no interest in the goods. He was therefore not in any sense the party aggrieved. If he were acting for the deputy sheriff, who levied the warrant of attachment on the goods, the same result would follow. If there were any default committed by the defendant, it was liable either to the deputy sheriff or to Broom & Mayer, but certainly not to the plaintiff. He was not, in a legal sense, injured by the refusal of the defendant to receive the box of goods. The party aggrieved is one who is injured, in respect to some right, by the act alleged to be wrongful. *Cunningham v. Porchet,* 23 Tex. Civ. App., 82; Black's Law Dict., p. 53. The plaintiff was not acting for himself and had no right or interest in the goods, but he was merely representing his principal, and with the same effect as if the latter had been personally present and acting in his own behalf. If an agent can recover the penalty under such circumstances, the defendant might be subjected to a double liability, for the principal was surely aggrieved or injured, and he also could recover, unless we should allow the plaintiff to recover for the use of the principal; and this can not be done, for we have held,

in *Chapman v. McLawhorn, ante,* 166, that "every action must be prosecuted in the name of the real party in interest," and the agent of the "real party" can not therefore maintain an action based upon a transaction conducted by him for his principal. We have said that the "party aggrieved" is the person who is interested in having the goods shipped, and whose legal right in respect thereto is denied. *Cardwell v. R. R.,* 146 N. C., 218. See, also, *Stone v. R. R.,* 144 N. C., 220; *Rollins v. R. R.,* 146 N. C., 153; *Davis v. R. R.,* 147 N. C., 68, where will be found a general discussion of the question as to who is the "party aggrieved," within the meaning of statutes of like import with the one now under consideration. As the plaintiff had no interest in the transaction in his own right, but solely as the representative of another, he was not, in contemplation of law, aggrieved by the alleged wrongful act of the defendant, and is not therefore entitled to sue for the penalty. (333) If he can recover then every shipping clerk of a merchant who is employed to superintend the forwarding of goods to his customer is entitled to sue for the penalty in case of a refusal by the carrier to receive the goods. We do not think the statute will bear any such construction.

Affirmed.

Cited: Lumber Co. v. R. R., 152 N. C., 77.

B. S. MIDGETTE, ADMINISTRATOR, v. THE BRANNING MANUFACTURING COMPANY.

(Filed 24 March, 1909.)

1. **Witnesses—Irrelevant Answer—Motion to Strike Out Answer—Objections and Exceptions.**

When a question calls for the statement of a fact, but the witness expresses an opinion, the party objecting should move the court to strike out the answer. For refusal to do so, an exception may be lodged.

2. **Contracts—Independent Contractor—Burden of Proof.**

When it is shown that an injury is sustained in the operation of machinery belonging to defendant, the burden is upon him to show that it was being operated by an independent contractor.

3. **Negligence—Master and Servant—Rule of the Prudent Man—Burden of Proof.**

In an action to recover damages for personal injury the burden of proof is on the plaintiff to show that the defendant failed to exercise the rea-

sonable care that a prudent man would have used, under the circumstances, in the discharge of a duty owed to plaintiff, and that such failure was the proximate cause of the injury complained of.

4. Master and Servant—Safe Place to Work—Duty of Employer.

An employer owes the duty to his employees working in mills or plants where the machinery is more or less complicated to provide them with a reasonably safe place to work and to supply them with machinery reasonably safe and suitable, and to keep it in such condition, as far as it can be done in the exercise of reasonable care and diligence.

5. Master and Servant—Employer and Employee—Fellow-servants—Evidence—Instructions.

When there is evidence tending to show that an injury was sustained by plaintiff in the course of his employment, while acting under the direction of another employee having authority to direct the place and manner of his work, an instruction that they were fellow-servants is properly refused.

6. Master and Servant—Employer and Employee—Duty of Employer—Contributory Negligence—Rule of the Prudent Man—Instructions.

While working among dangerous machinery in defendant's mill or plant, it is the duty of the employee to use the same degree of care required of a man of ordinary prudence under the circumstances. Upon the question of contributory negligence it is proper for the judge to charge the jury, in effect, that defendant's liability for a personal injury caused the employee in the course of his employment would depend upon whether the employee acted as a reasonably prudent man would have done to foresee the consequences of his act and avoid the injury.

(334) ACTION tried before *Ward, J.*, and a jury, at July Special Term, 1908, of TYRRELL.

The plaintiff, administrator, alleges that plaintiff's intestate, Leary, as he is informed and believes, was employed and working in the mill of the defendant company, under its direction, as assistant engineer, on and before 18 December, 1900; that on 18 December, 1900, the said W. S. Leary was killed in the mill of the defendant company by reason of the negligence of said company, in that its machinery and belts were not safe and were in a rotten and insecure condition and unfit for the operation of the said mill; that the said mill of the defendant company was not in a safe condition and its machinery was in bad condition, unsafe and dangerous; that the same was old and secondhand, having been carried from another old mill and placed in the mill at Columbia; that the building was badly and negligently arranged, with not sufficient room for operating said machinery and repairing same, which facts were known to the defendant company; that the plaintiff's intestate, Leary, while in the employ of the defendant company and under its direction, was ordered to repair one of the belts running the machinery of the

said mill, which had broken, and he was required to do this work while the mill was running, which was dangerous and unsafe; that while so engaged in discharging the duties imposed upon him by his employer, to wit, "mending one of the belts," one of them broke and intestate was killed. (335)

Defendant denied that it was in any respect negligent or was guilty of any breach of duty to intestate in the premises. It alleged that plaintiff's intestate was guilty of contributory negligence. It also alleged that his intestate well knew the condition of the machinery when he entered upon the employment there, a month before his death, and assumed the risk incident thereto.

The following issues were, without objection, submitted to the jury:

1. "Was the death of plaintiff's intestate caused by the negligence of the defendant, as alleged?"

2. "Did said intestate, by his own negligence, contribute to his death?"

3. "What damage, if any, is plaintiff entitled to recover of defendant?"

There was evidence tending to show that the mill was running at night —8 or 9 o'clock—to make up lost time, when intestate was killed; that it was in bad condition; that it could not make time without running on "and stopping often"; that it was an old, second-hand mill; that the "hog," a machine which grinds up slabs, was run by two belts, having a cylinder, with twelve knots, making 1,600 revolutions a minute, and that it was in bad condition, out of balance, had poor foundation, and was, on that account, shaking. There was evidence on the part of defendant tending to contradict this evidence.

The direct testimony in regard to the manner in which intestate came to his death comes from C. H. Leary, who testified that "On the day intestate was killed we had worked part of the time, and started up again at 7 o'clock at night to make up lost time. He was killed between 8 and 9 o'clock that night. I was upstairs, talking with the sawyer, and he said to me that one of the 'hog' belts was broken, there being a belt on each side of the cylinder. I went down to repair the broken belt. I found it torn in two and took it off, putting a piece of edging between the belt and pulley. I then went down to work on the belt, but soon found that the edging which I had put in had shaken out. Had the 'hog' been in place, it would not have shaken and the piece would not have come out. It came out because it was shaken so bad. Deceased was helping me to fix the belt. I (336) directed him, and had the right to direct him. He was under my direction. I sent him up to the 'hog' to put the piece back. The 'hog' was eight feet higher than where we were standing. He walked

up on the conveyor box, which conveyed sawdust to the platform. This was the only way he could get up to it without going over the conveyor box and through the belts. I did not see him after he got up. It was not more than a minute. When he got up the belt got foul around the pulley; it was slipping; it struck him on the hand. When it first got foul the sawdust was so thick I could not see him until the engine was slowed down. I saw him then, hung up in the belt that caused his death. If the engine had been shut down when he went up to repair the belt, there was no danger. There would have been no danger if the 'hog' had been balanced. The pulley was badly worn—about played out; the belt was unsound and had been burned. It was two feet between where I was working and the conveyor belt."

Witness was here asked by plaintiff what was the space condition of the room where he had to work. Defendant objected to this question and to the answer to the same. Objection overruled. Witness answered: "Did not have room; if there had been more room, could have gone around." To the admission of this question and answer defendant excepted. He said, on cross-examination: "When the machinery ought to stop, it was the duty of both myself and my brother to stop it. My brother had been at the mill some little time. W. T. Campen employed us both and paid us both. The 'hog' was approached by a ladder; to get to the ladder my brother had to come out underneath the belt or go through it; after he got out he could have gone up the ladder; after he got up to the pulley he would have been safer going up by the ladder which was provided by the company. If the engine had been stopped, there would have been no danger. The cause of danger was that my brother went up there when the engine was in motion. When I was there it was my duty to stop the engine. When we were at work on the pulley the safer plan was to go up by the way he went."

(337) Plaintiff was permitted, over defendant's exception, to show by one Walker that the "hog" would shake a great deal; that the mill broke down often, and that "we could seldom make a day" —the breaking of the conveyor chain was the cause of the delay; that there was no safe way to go up into this machinery while the mill was running. Witness had worked at the mill, but had not seen the "hog" for three months before the accident.

Leary was recalled, and testified that "to go around the shaft there was only twelve inches space, and that he would have to go all around the mill."

Defendant introduced W. T. Campen, who had charge of the mill. He testified, upon the question of negligence and contributory negligence, that "I instructed the hands never to repair the mill unless it was shut down. I gave this instruction to the deceased and his brother,

Howard Leary. . . . There was greater danger going up the way the deceased went than if he had gone up the steps which were provided by the company. Deceased had been working with the company six weeks when he was killed. The brother of the deceased said it was his own fault that he was killed." There was contradictory evidence upon this point. Witness also testified that "The mill and machinery were in as good condition as mills generally are, and were kept in good condition. No 'hog' could be run for twenty hours in balance, owing to the great strain upon it, but this 'hog' and machinery were in a condition usual with mills." Defendant introduced other testimony to the same effect. It was admitted that the mill belonged to defendant.

For the purpose of showing that plaintiff's intestate was not employed by it, defendant introduced W. T. Campen, who testified that in December, 1899, he was employed by the Branning Manufacturing Company to take this mill and run it. By the contract he was to keep up all repairs and do all the work. He was to receive the timber from the log cars of the Branning Manufacturing Company, cut the logs into lumber and deliver it to the Branning Manufacturing Company, thus manufactured, for shipment on its cars, for which the Branning company was to pay him $1.75 per thousand feet. "We were to give each other thirty days' notice before either could give up the contract I took charge on 15 January. Later, and before the accident, I became dissatisfied with the contract and gave notice that I would quit, (338) whereupon Mr. Branning, president of the company, had an interview with me and told me he would pay me what I could make, and he indemnified me that I should make $150 per month. Under the contract I was to have entire charge of the mill; I was to hire the hands and to discharge them, and no one else had anything to do with them. I remained in charge two years and one month. If I made more than $150 per month, which he guaranteed, at $1.75 per thousand, I was to have it. . . . I kept no office and kept no books. I made out the pay rolls and sent them to Edenton, and the money was charged to me. The Branning company employed an inspector to keep the amount of lumber I cut. This was agreed upon when I made the bargain, and this was the only person about the mill that the Branning company hired or paid. It was also agreed, when the contract was made, that the Branning company should keep the books and should furnish the cash for the purpose of paying the hands upon the pay rolls furnished by me. This was done because I had no facilities for bookkeeping and because there were no banks in Columbia from which I could get money. There was some trading done by my laborers at the store of the Branning Manufacturing Company. This credit was given them at my request. Statements were sent to me and I was responsible to the amount of the

wages due the hands. The amounts so advanced were charged to me on the books. The company agreed to pay me five per cent of the net profits for the trade of my men at their store. This agreement was not made until after the guarantee by the Branning company, referred to above. I hired intestate, paid him and directed him, and no one but me had the right to discharge him. I would not have kept a man as assistant engineer who was disagreeable to the chief, and would have dismissed him upon complaint of the chief, but he could not be removed without my consent. My name did not appear upon the pay roll at all —only the hands employed by me. Bills for material furnished the mill and for repairs upon the mill were charged against me, and I would send them to the Branning company, which would put them to my account. That company had nothing to do with the work, except to give me any special sizes they would want to cut. Generally the tim-
(339) ber was cut in sixteen and twelve-foot lengths, but if defendant wanted a special bill I would cut them for it."

This testimony was corroborated by Horton Corwin, Jr., president of defendant company. Plaintiff's witness, Walker, upon this branch of the case, testified that while he was employed at the mill (in 1900) he saw Mr. Branning come to the mill often. "He would talk with Campen; were walking around the plant together once or twice a month." There was other evidence to the same effect. Defendant owned a plant in Edenton, N. C. The mill in which plaintiff's intestate was employed was located at Columbia, N. C. The lumber cut there belonged to defendant; it was shipped to Edenton.

Defendant, at the appropriate stages of the trial, moved for judgment of nonsuit, which was refused, and defendant excepted. Defendant made a number of requests for special instructions, which are noticed in the opinion. The instructions given, to which exceptions are taken, are noted and discussed in the opinion. There was a verdict for the plaintiff upon both issues, and damages assessed at $2,000. Motion for new trial; motion denied. Exception. Judgment upon the verdict. Defendant assigned errors and appealed.

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

Pruden & Pruden and Shepherd & Shepherd and W. M. Bond for defendant.

CONNOR, J., after stating the case: No issue being tendered in regard to the alleged assumption of risk by plaintiff's intestate, that defense is eliminated from the case. We presume that the learned counsel treated that phase of the case as involved in the issue directed to the alleged contributory negligence of plaintiff's intestate. We have set out the

testimony at some length, because the requests for special instructions and the exceptions to the instructions given present every possible question which could arise upon the record. We will first dispose of the exceptions to his Honor's admission of testimony. The first is directed to the answer given by the witness as to the "space condition," etc. It will be observed that the answer is not responsive to the question. He was not asked for an opinion or conclusion, but for a fact. If his Honor had been so requested, he would doubtless have stricken (340) out the answer and directed the witness to give one responsive to the question. This the witness did later on by saying that "there was only twelve-inch space to go around the shaft." While the first answer may have been, and probably was, subject to the criticism made by defendant, it was, in the light of the subsequent answer, giving the fact upon which the jury were enabled to draw their own conclusion, not prejudicial to defendant—certainly not sufficiently so to call for a new trial. It is frequently difficult to draw the line between testimony which is a statement of fact and that which is a conclusion of the witness. The testimony upon which the next two exceptions are based is, at the most, irrelevant and harmless. The exception to the testimony of Waters, in regard to the condition of the mill three months before the death of plaintiff's intestate, is not referred to in the brief and is to be treated as abandoned. The motion for judgment of nonsuit was properly denied.

The contention of the defendant in regard to the question of Campen's being an independent contractor, which, as said by his Honor to the jury, lay at the threshold of the case, is presented by the prayer for an instruction that, "Upon all of the evidence in this case, the jury shall find that Campen was an independent contractor; that defendant owed no duty to the intestate, and they shall answer the first issue 'No.'" This his Honor declined, but said to the jury "that this would be the first inquiry, and if they found that Campen was an independent contractor, that ends the case." He further instructed the jury: "It is contended by the defendant that it had contracted its mill to Campen. It is accepted law that where a contract is for something that may be lawfully done and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with, 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 done is interested only in the ultimate result of the work and not in several steps as to progress, the latter is not liable to a third person for the negligence of the contractor, but liability of the superior master depends upon his right to control the conduct of the person with whom he contracts in the prosecution of the work.

(341) If you find from the evidence that Campen leased the mill of the Branning Manufacturing Company under contract, that he was to employ the labor and bear all the expense of running the mill, was to receive the logs of the company from the trucks, manufacture the same into timber and deliver it aboard cars for shipment, at $1.75 per thousand feet, with guarantee that he should make as much as $150 per month, and that it did not retain the right to control the conduct of Campen and was interested only in the ultimate result of the work, then the defendant is not liable, and you will answer the first issue 'No.' But if you find from the evidence that there was a general control of the operation of the mill reserved by the defendant company in respect to the general operation of the mill, then go further and consider the question of negligence raised."

To these instructions defendant excepted. We think that the charge is in accordance with the decisions of this Court. The language used by his Honor in defining an independent contractor is identical with that of *Walker, J.*, in *Craft v. Lumber Co.*, 132 N. C., 151, quoted with approval in *Young v. Lumber Co.*, 147 N. C., 26. If his Honor correctly declined the instruction, which practically took the question from the jury, there can be no valid criticism of the charge given. Plaintiff suggests that the burden of showing that Campen was an independent contractor was on the defendant. The burden was upon the plaintiff to show that his intestate was in the employment of defendant. It would seem that when he showed that the mill was the property of the defendant corporation, that at the time of his employment it was being operated in sawing the logs of the defendant, and that the sawed lumber was shipped to defendant at Edenton, near by, where it was operating a plant, plaintiff was entitled to go to the jury on the issue. "Where the plaintiff has suffered an injury from the negligent management of a vehicle, such as a boat, car or carriage, it is sufficient *prima facie* evidence that the negligence was imputable to the defendant to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his
(342) control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor or other person, for whose negligence the owner would not be answerable." 1 Sher. and Red. Neg., 71. Any other rule, especially where persons are dealing with corporations, which can act only through agents and servants, would render it almost impossible for a plaintiff to recover for injuries sustained by defective machinery or negligent use of machinery. The plaintiff's intestate may be taken to have known that the mill was the

property of defendant—that it was being used for the purpose of sawing defendant's logs. One witness said that "defendant owned much timber on this side of the sound and a railroad." Campen said: "There was some trading done by my laborers at the store of the Branning Manufacturing Company." All of this was well calculated to cause intestate to suppose that Campen was operating the mill for defendant company, and, in the absence of any testimony to the contrary, would be sufficient to carry the case to the jury and sustain a verdict. Without entering into the debatable domain of the burden of proof it is sufficient to say that, at least in this case, the plaintiff had put upon defendant the duty of "going forward" or "persuading" the jury that Campen was not operating the mill for the owner, but as an independent contractor. The instruction asked by defendant involves the proposition that, taking all of the evidence as true, it has shown as a matter of law that Campen was an independent contractor. An examination of the authorities and decided cases discloses much confusion and uncertainty in respect to what constitutes an independent contractor. The question underwent an exhaustive discussion in *Wiswall v. Brinson,* 32 N. C., 554, in which *Pearson, J.,* and *Ruffin, C. J.,* differed in opinion. These opinions are "mines of learning" and "arsenals of argument." *Pearson, J.,* begins the discussion by saying that "the question is one of serious difficulty," and that the cases "are numerous," that "many of them turn upon nice distinctions." He states the fundamental principles, that "One should so use his own as not to injure another," and "That which you do by another, you do by yourself." And from these two maxims he says: "The general rule results where one procures work to be done, if a third person is injured by the negligence or want of skill of the person employed, the person for whose benefit and at whose instance (343) the work is done must make compensation. . . . The rule is founded upon justice, and exceptions to it should be allowed with caution, and only to the extent called for by public convenience." He then proceeds to discuss the recognized exceptions, as established by decided cases. We would not undertake to add anything to the discussion in the opinion, concurred in by *Nash, J.,* and the dissenting opinion of *Ruffin, C. J.* It is conceded that where the person employed to do work carries on an independent employment and does the work in his own way, by his own means, and free from the right of control by the person for whom the work is done, he is an independent contractor. This exception is based upon public convenience and sound policy. It is said: "The true test, as it seems to us, by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the

result of his work, and not as to the means by which it is accomplished." Such was the leading case of *Milligan v. Wedge,* 12 Adol. & E., 737, cited by *Sharpenstein, J.,* in *Bennett v. Truebody,* 66 Cal., 509. There the injury was caused by the negligence of a plumber, who "exercised an independent and distinct employment." It was held that the owner of the premises was not liable. In *Hexamer v. Webb,* 101 N. Y., 377, the party employed was engaged in the "roofing and cornice business." *Coal Co. v. McEnery,* 27 Conn., 274. It would seem that where the person employed to do the work in his own way, and free from the control of the employer, is engaged in an independent calling, it is but just that persons who contract with him, either as employees or otherwise, should look to him for compensation. We do not mean to say that the exception is confined to work done by one engaged in an independent calling. It is certainly much more difficult to fix the limits of the exception when this element is absent. In *Waters v. Fuel Co.,* 52 Minn., 474, the employee of defendant was engaged in delivering coal at a stipulated price per load: *Held,* that he was the servant of the company. The Court said: "It is not easy to frame a definition of the
(344) term 'independent contractor,' that will satisfactorily meet the conditions of different cases as they arise, as each case must depend so largely upon its own facts." *Speed v. R. R.,* 71 Mo., 303, was an action for personal injuries sustained by plaintiff while engaged in unloading a car belonging to defendant. It appeared that the defendant had entered into an agreement with one Merry, by which he was to take entire charge and control of the business of loading and unloading freight to and from its cars at St. Louis station. By the terms of the agreement Merry was to have authority and control over the grounds, yards and building at the station, including engines and cars, to enable him to properly discharge his duties under the agreement. Merry was to be paid fifteen cents per ton for each ton shipped to or from the yard. All the business was to be transacted by Merry in a manner satisfactory to the superintendent of defendant and subject to his control. Plaintiff was employed by Merry and was injured while in such employment. Defendant set up the defense that Merry was an independent contractor. *Henry, J.,* said: "There is an irreconcilable conflict in the adjudications upon this subject. The general principle is recognized everywhere that one is only liable for damages occasioned by the act of another when he stands in the relation of master to that other. It is an easy matter to state the general principle, but it is often extremely difficult to determine, from the facts in a given case, whether the relation of master and servant exists." It was held in that case that the relation existed and defendant company was liable. The value of the decision is weakened by the fact that the court attached importance to the character of

the business in which defendant was engaged—a common carrier. Probably all that can be done, after an examination of the decided cases, is to adopt the conclusion of *Judge Bailey,* that "There is much confusion in the authorities, and much depends on the exact conditions of the employment and particular circumstances attending each case. The mere fact that one works by the piece or job, and not by the day or week, is not a conclusive test of the character of the employee, whether a servant or an independent contractor." Personal Injuries, 470.

The plaintiff having shown conditions entitling him to go to the jury, it became the duty of defendant to show or at least to introduce evidence to repel the plaintiff's proof. The truth of the testimony, together with the reasonable inferences to be drawn there- (345) from, was for the jury. There was much in the testimony to justify them in rejecting the defendant's contention. As we have pointed out, the mill belonged to defendant; the logs being cut were its property; the hands were paid by orders on the defendant; some of them traded at defendant's store; the defendant kept an inspector at the mill to take an account of the lumber; the defendant guaranteed that Campen should make at least $150 per month; the contract was for no definite time. There is no suggestion that Campen carried on any independent employment. Mr. Branning came to the mill often. It is true that defendant's testimony was to the effect that the company had nothing to do with the work, except to give special sizes it wanted cut, and tended to explain many of the circumstances and conditions relied upon by plaintiff. It is significant that Campen uses the expression that he was employed by the Branning Manufacturing Company to take the mill and run it. In *Young v. Lumber Co., supra,* the contract under which the logs were cut in the woods was in writing. We held that his Honor erroneously submitted the question as to its legal signification to the jury, but held that he should have submitted the question whether the contractor was cutting the logs in good faith under the contract. Merely calling a man an independent contractor can not make him so. We should hesitate to hold that a person or corporation could, under the form and semblance of an independent contract, operate a second-hand mill, in bad repair, dangerous to employees, for the purpose of having its logs cut into lumber, and escape liability for injuries sustained by the employees, who, in good faith and upon reasonable grounds, supposed that they were employed by and were working for the owner of the mill. Such an exception to the general rule stated by *Pearson, J.,* in *Wiswall v. Brinson, supra,* would not be founded upon public convenience or sound policy. In *Davis v. Summerfield,* 133 N. C., 325, we held that where the character of the work to be done was

essentially dangerous, the duty to use due care could not be delegated to an independent contractor by the owner of the property. We also discussed the question in *Young's case, supra.* This is a recognized exception to the rule. How far this exception to the nonliability of the owner of the property is applicable to a case like this we do not
(346) undertake to say. It is well worthy of consideration whether the owner of machinery, unsafe for use and dangerous to employees, can, by contracting with an insolvent person to operate it to do the owner's work, and by simply surrendering control of the manner of doing the work, avoid liability for injuries sustained by employees. It may be that liability would be based upon a different legal foundation—falling within the domain of tort, rather than breach of contract. *R. R. v. Madden,* 77 Kan., 80.

Upon the question of negligence the court instructed the jury: "In order to establish actionable negligence it is necessary for the plaintiff to show to the jury, by the greater weight of evidence, that there has been a failure by the defendant in the exercise of reasonable care to discharge some duty which it owed the plaintiff, under the circumstances, in which they were placed, reasonable care being that care which a prudent man would exercise under similar circumstances, when surrounded by like conditions; and not only this, but he must also show that such failure of duty was the proximate cause of the result, proximate cause being that which produces the result in a continuous sequence and one without which the accident would not have happened, and one which a man of ordinary prudence could foresee that such result would likely happen. It is the law in North Carolina that an employer of labor to assist in the operation of mills—plants—where the machinery is more or less complicated is required to provide his employees, in the exercise of reasonable care, a reasonably safe place to work, and to supply them with machinery reasonably safe and suitable, and he is also required to keep such machinery in such condition, as far as can be done in the exercise of reasonable care and diligence."

We perceive no error in this instruction. It is in accordance with the decisions of this Court and the well-settled principles of the law prescribing the duty of employers to their employees. The record states that his Honor charged the jury in respect to fellow-servants, to which there was no exception, other than his refusal to instruct the jury, as requested, that intestate and his brother, Howard Leary, were fellow-servants. This, in the light of the testimony of Howard, "I directed him and had a right to direct him; he was under my direction;
(347) I sent him up to the 'hog' to put the piece back," he could not have given. Defendant asked a number of instructions upon the second issue, some of which embodied correct propositions of law.

Some of them could not have been given as asked, because they practically took the question from the jury. His Honor instructed the jury upon this issue: "While the law imposes a duty upon the master, it also imposes a correlative duty upon the servant. It requires him to exercise ordinary care for his own safety, to use his intelligence and his senses, and it holds him responsible if he is injured by his failure to exercise such care. It requires him to observe the machinery at which he is working and the appliances used to discover those dangers which a man of ordinary prudence would discover; and if he fails to perform his duty and is injured thereby, he can not recover damages, for while the plaintiff assumes the risk incident to the working in the mill, he did not assume the risk resulting from defective machinery or from defective place or appliances to do his work; and if the plaintiff knew of the danger of the machinery when he went up to fix the 'hog,' and if in consequence thereof the danger to himself was so obvious that any man of ordinary prudence would not have gone up the way plaintiff went, then the plaintiff would be guilty of contributory negligence, and you should answer the second issue 'Yes.' If, however, the plaintiff was not guilty of contributory negligence, you will answer this issue 'No.' If there was a safe way to go to the 'hog' provided by the company, which intestate knew or ought to have known, and he chose another way, which was unsafe, and this was the proximate cause of the hurt, the jury shall answer the second issue 'Yes.' That if the jury shall find that it was clear in the mind of one of ordinary intelligence that it was dangerous to go into the machinery as deceased did, and that the danger was obvious and imminent, and, notwithstanding, undertook to do so, and his doing so was the proximate cause of his hurt, the jury will answer the second issue 'Yes.'"

These instructions are correct in themselves and, we think, present every phase of the controversy. The exception to the refusal to dismiss the case because not brought in one year was not pressed (348) in this Court. It is settled by *Meekins v. R. R.*, 131 N. C., 1.

We have examined the entire record, in the light of the exceptions made to his Honor's rulings and the briefs of counsel. The case was carefully tried and fairly submitted to the jury. The evidence, while in some respects conflicting, sustains the plaintiff's contention that the machinery was in bad condition, unsafe, and certainly dangerous when being operated at night. There is

No error.

Cited: Thomas v. Lumber Co., 153 N. C., 355; *Harwell v. Lumber Co.*, 154 N. C., 263; *Denny v. Burlington*, 155 N. C., 37; *Sutton v. Lyons*, 156 N. C., 5; *Embler v. Lumber Co.*, 167 N. C., 460.

RICHARD REVIS v. CITY OF RALEIGH.

(Filed 24 March, 1909.)

1. **Cities and Towns—Neligence—Dangerous Sidewalks—Notice, Actual—Duty to Repair—Reasonable Time.**

In an action against a city for injuries received by defendant falling into a hole on the sidewalk, insecurely covered, there was evidence tending to show that the city had been notified of the unsafe and dangerous condition of the covering: *Held*, if the jury find that the city had notice of the dangerous condition, it was its duty to make the conditions safe, within a reasonable time after notice, and its failure to do so is actionable negligence.

2. **Cities and Towns—Negligence—Dangerous Sidewalks—Notice Implied—Duty to Repair—Reasonable Time.**

A city is responsible in damages for an injury directly and proximately resulting from defects and pitfalls left in the sidewalks of its streets, when by inspecting them with reasonable frequency they should have had notice thereof in time to have made them safe.

3. **Same—Questions for Jury—Burden of Proof—Instructions.**

The question of notice of dangerous places in the sidewalks implied from a failure of the city to inspect its streets with reasonable frequency, is one for the jury, on the evidence; and a charge, in an action to recover damages for personal injury, that the burden was on the plaintiff to satisfy the jury by the greater weight of the evidence that the city, through its proper officers, knew or should have known of their existence within a reasonable time to make them safe and avoid the injury, is correct.

(349) ACTION tried before *Neal, J.*, and a jury, at October Term, 1908, of WAKE.

The plaintiff sues to recover damages alleged to have resulted from injuries sustained by the negligence of defendant. He alleges that on or about 6 September, 1907, and for a long time theretofore, the city of Raleigh negligently permitted a deep and dangerous hole or well to remain in and upon the sidewalk on the north side of Davie Street, between Fayetteville and Wilmington streets, in said city, over and upon which many persons passed and repassed, and negligently permitted said hole or well to be insecurely covered with boards which had become decayed and insufficient to bear up a person of ordinary weight, and negligently allowed the said hole or well to be and remain so covered as to mislead persons passing along and over the said sidewalk as to the existence of the said hole or well beneath the said covering; that said city of Raleigh knew of the existence of said hole or well and said dangerous covering, or ought to have known of the same; that on or about 8 September, 1907, the plaintiff, Richard Revis, without any fault on

his part and not knowing of the existence of the said hole or well, in passing along and over said sidewalk, and being led to believe that the aforesaid covering which concealed said hole or well was boards lying on solid ground, stepped upon the said boards or covering and was suddenly and with great force precipitated into the hole or well beneath, and was painfully, seriously and permanently injured; that by reason of the injuries he received, as alleged, he suffered great bodily harm, mental anguish, etc.

Defendant denied the material allegations of the complaint, and alleged that plaintiff's injuries were caused by his own negligence.

The court, at the conclusion of the evidence, declined to submit the issue in regard to contributory negligence.

There was evidence tending to show that, several months prior to the injury, a hole had been dug for the purpose of placing a telephone pole on the edge of the sidewalk, about the curbing; that it was covered over with a plank (top of a goods box), which had become rotten and insecure; that the grass had grown around the hole; that on 6 September, 1907, plaintiff drove up to the sidewalk and got out of his wagon for the purpose of going into a house. He thus describes the way in which he was injured: "I drove a little past the door, on ac- (350) count of the rocks and brick lying there in front of the door, and I got out on the curbing from the wagon hub and put my foot on the paving rock and stepped out, . . . and as I did so I made not many steps, and the next thing I knew I was in the hole; did not see any sign of the hole; did not have any idea of a hole being there; never knew there was a hole there. It looked to me as a solid piece of plank on the ground; it looked to me no more than a piece of plank lying on the ground, or something of the kind, and I did not see any difference. I stepped there just as quick as I would anywhere else, because I had no idea there was any hole there."

George L. Lane, a witness for the plaintiff, testified that "The hole had been there four or five months; the grass had grown around it; a piece of old goods box had been placed over it (very soft plank), and it had been there long enough for the grass to grow around it. . . . I called the attention of Mr. Pope, a policeman at the time—I do not know whom he was in company with, whether it was Mr. Beasley or some other man—and he said to me, 'I will attend to that; I will see the committee on the streets,' or something like that. At the time Mr. Lee, of Lee & Broughton, came by and Mr. Pope pointed out the condition to him at the time." This witness said that he saw the board a short while after plaintiff was injured. There was other testimony tending to corroborate this witness. There was evidence in regard to the character and extent of the injuries sustained by plaintiff.

Defendant introduced J. A. Pope, who denied the testimony of Lane in regard to notifying him of the hole and the condition of the plank over it.

The court refused to submit an issue in regard to contributory negligence. Defendant excepted.

His Honor, among other instructions in regard to the duty of defendant to keep its streets in safe condition and proper repair, said: "Proper repair implies, also, all obstructions or dangerous pits or holes or other perilous places on the streets or sidewalks of the city should be protected by proper barriers or covering. That is a duty imposed upon every city and town in North Carolina by statute, and it is the (351) law of the land. Now, the court also charges you that if the jury shall find from the evidence that the defendant permitted an opening in the sidewalk, insufficiently covered and protected, on one of its principal streets, upon which there is much travel, no matter for how long a time the same has remained in said unsafe condition, or for such length of time as the city authorities should have known of its existence, or if for any length of time, with the actual knowledge of the authorities of said city, and the plaintiff stepped or fell into said opening and was injured thereby, the jury should answer the first issue 'Yes.' The city does not warrant that the condition of its sidewalks shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and to establish such responsibility it is not sufficient to show that a defect or dangerous obstruction existed and an injury has been caused thereby. The burden is upon the plaintiff to satisfy the minds of the jury by the greater weight of the evidence that the proper officers of the city knew or by ordinary diligence might have discovered the defect or dangerous obstruction, and also that the character of the same was such that injuries to persons using the sidewalk, in the exercise of ordinary care and watchfulness, might reasonably be anticipated. If the jury shall find from the evidence that the city did not create or cause the opening in the sidewalk nor authorize the same to be done, then the city would be liable, if at all, only for negligently permitting the same to exist in a dangerous condition on the public streets. It is not negligence, *per se,* for the city to allow a covered hole upon its sidewalk. It is for the jury to determine whether or not the character of the place was such that injuries to travelers thereon might reasonably be anticipated, and whether or not the city was negligent in allowing and permitting the same to exist; and in arriving at a conclusion upon this question the jury should take into consideration the nature and character of the place, its size, location and the character and sufficiency of the covering. The burden is on the plaintiff to show either that the covered hole was originally dangerous—that is, when it was first covered—and that

injuries to the public might be reasonably anticipated by the city authorities, or that it had thereafter become so, long enough before the accident for the authorities to have known it, so as to impose upon them the obligation to put it in a proper condition. If the jury (352) shall find from the evidence that some proper official of the city had actual notice of the existence of the hole, and if the jury shall further find from the evidence that at the time of such notice there was a reasonably secure and strong covering over the hole, then the city could only be liable, if at all, for a failure to exercise ordinary care to keep the same in a safe condition." To these instructions defendant excepted. He further told the jury that "If they permitted that hole to stay there so long as one week without an inspection and a man went along there —this plaintiff went along there—and fell in, the court charges you that that would be negligence for which the city of Raleigh would be liable, because the court charges you that it is the duty of the city of Raleigh, the defendant in this action, to have their officers and agents to inspect the public thoroughfares of the city over which people pass and repass, and where they have a right to assume that they may do so with safety, and if they permit dangerous excavations to stand for so long a time as a week, the court charges you that would negligence." Defendant excepted. Verdict for plaintiff. Motion for new trial; denied. Defendant duly assigned errors and appealed.

Douglass & Lyon for plaintiff.
W. B. Snow and W. B. Jones for defendant.

CONNOR, J., after stating the case: We concur with his Honor that there was no evidence of contributory negligence. The answer alleged that plaintiff contributed to his injury by his negligence and carried the burden of sustaining the allegation. It having failed to show either by introducing testimony or eliciting anything from plaintiff's evidence to make good its averment, the issue was properly withdrawn. It is elementary that the court should not submit an issue where there is no evidence to sustain a finding for the party who carries the burden of proving it. The ruling of his Honor gives to the defendant the benefit, upon review, of having all of the testimony, with all inferences, most favorable to it, taken as true, or as if plaintiff had demurred to the evidence in this respect. Considered in this way, we find no evi- (353) dence of the truth of defendant's averment.

While much was said in the instruction to the jury and in the argument in this Court in regard to the alleged negligence of defendant in permitting the hole for the telephone pole to be dug on or near the sidewalk, the decision turns upon the question whether there was actionable

negligence in failing to provide and maintain a safe and secure covering for it. The general instruction of his Honor in regard to the duty of the defendant to keep the streets and sidewalks in a safe condition for persons traveling on them is in strict accordance with and very largely in the language of the opinion of *Mr. Justice Hoke,* in *Fitzgerald v. Concord,* 140 N. C., 110, which is fully sustained both by reason and authority. The plaintiff contends that in either of two aspects of the evidence he is entitled to recover: (1) That defendant's officers had actual notice of the hole in the street, and of the unsafe and insecure condition of the covering over it, long before the plaintiff sustained the injury; that the opportunity to repair was ample and the duty imperative. (2) That if it has failed to convince the jury that defendant had actual notice of the conditions—they had existed for so long a time prior to the time of his injury that it was its duty to have known them by inspection and examination of the streets—that by construction of law it was fixed with notice, imposing the duty of repair.

In considering the first view, if, as testified by the witness Lane and the witnesses corroborating him, the defendant's officers were notified—had their attention called to the unsafe and dangerous condition of the covering over the hole—and it was their manifest duty to promptly remove it, either by filling up the hole or placing a sound and safe covering over it, one at least sufficiently strong to have borne the weight of a man—in this view of the case the liability of the defendant is clear. "Upon notice of defects and dangers in the streets, the city must remove them within a reasonable time, and failure to do so is negligence." *Jones v. Greensboro,* 124 N. C., 310; 15 A. & E. Enc., 477.

(354) We are unable to perceive any valid excuse for the failure to repair the covering or fill up the hole, if defendant had notice, as testified by Lane. If, however, the city had no actual notice of the dangerous condition existing, the plaintiff must show that by the exercise of that degree of care and the performance of the duty of inspection of the street it would have known it. The city is not permitted to neglect the duty of reasonably frequent inspection of its streets, and when, by reason of defects and pitfalls or defective coverings of culverts, holes, etc., some one is injured, avoid liability by pleading ignorance of the conditions producing the injury. In this view of the case the question is to be submitted to the jury and in the light of all the evidence they shall say whether a reasonable time has elapsed between the origin of the dangerous condition and the injury to have enabled the city authorities to have discovered and removed or remedied it. No arbitrary rule of law in this respect can be laid down by the court. "There is and can be no fixed time from which notice may be inferred. A reasonable time in one instance may not be in another." Smith Mun. Corp., sec. 1302.

"On the question of notice, implied from the continued existence of the defect, no definite or fixed rule can be laid down as to the time required, and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect," etc. *Fitzgerald v. Concord, supra;* 15 A. & E. Enc., 483; 1 Sher. & Red. on Neg., 643. His Honor drew this distinction in saying to the jury, "If the defendant permitted an opening in the sidewalk, insufficiently covered and protected on one of its principal streets, upon which there is much travel, no matter how long the same has been in an unsafe condition, or for such length of time as the city should have known of its existence, or if for any length of time, with the actual knowledge of the authorities," etc. While this language is not so clear as might be desired, it is evident from that which immediately followed that the jury could not have been misled. He said: "The burden is upon the plaintiff to satisfy the minds of the jury by the greater weight of the evidence that the proper officers of the city knew or by ordinary diligence might have discovered the defect or dangerous obstruction, and also that the character of the same (355) was such that injuries to persons using the sidewalk, in the exercise of ordinary care and watchfulness, might have been anticipated." This language is absolutely free from objection. He again said that the burden was upon the plaintiff to show the dangerous conditions, and that they had existed long enough before the accident for the authorities to have known it, so as to impose upon them the obligation to put it in a proper condition. To this point in the instruction no exception can be sustained. His Honor, in conclusion, and by way of illustration, said: "If they permitted that hole to stay there as long as one week without an inspection, and a man went along there—and this plaintiff went along there—and fell in, the court charges you that would be negligence, for which the city of Raleigh would be liable." We do not concur with this language. The court can not, certainly in a case like this, say as a matter of law that the failure to inspect this street for a week was negligence. The period of time within which inspection of a street must be made is dependent upon the facts in each case, and should be left to the jury; it must be reasonably frequent, but what is so depends upon a number of conditions, varying in different cases. There was no evidence that only a week had elapsed since the hole was dug or the plank had become insecure; all of the evidence indicated a much longer time. Certainly the fact that a hole had been dug in the sidewalk, or near to it, four or five months before the accident, and that it was covered by a piece of goods box—"soft plank"—long enough for "the grass to grow

around it," excludes the suggestion that only a week had elapsed between its placing and the injury to plaintiff.

In view of the entire charge, we can not think that the jury could have been misled by the language to which exception is taken. It is the well-settled rule of all appellate courts to read and construe the entire charge of the court and deal with it as a whole. It is not permissible to make disconnected excerpts and seek to find reversible error. To do so would frequently result in new trials where it was manifest that no prejudicial error was committed or the jury misled. The plaintiff's
(356) counsel insisted that upon the whole evidence he was entitled to recover. It is not clear but that an instruction, properly framed, based upon this review, would have been correct.

We have considered the other exceptions made by defendant, and find no error in his Honor's ruling in respect to them. Upon an examination of the entire record we find

No error.

Cited: Johnson v. Raleigh, 156 N. C., 271; *Bailey v. Winston,* 157 N. C., 259; *Hines v. Rocky Mount,* 162 N. C., 416; *Alexander v. Statesville,* 165 N. C., 533; *McNeill v. R. R.,* 167 N. C., 397; *Foster v. Tryon,* 169 N. C., 183; *Sehorn v. Charlotte,* 171 N. C., 541; *Monk v.* Goldstein, 172 N. C., 519.

W. B. WINDLEY v. J. T. SWAIN AND WIFE.

(Filed 24 March, 1909.)

1. Deeds and Conveyances—Coverture—Judgments—Liens.

When title to a tract of land was in the husband, and one had a judgment for $200 against the husband for the purchase money, duly docketed, and, the wife having instituted an action against the husband and the holder of the judgment to establish for herself and children an interest in the land, by reason of the fact that she had aided in the purchase of the same, a decree by consent was entered declaring the judgment to be in full force and effect to the amount of $100, and adjudging that the husband convey to the wife a certain interest in the property, this conveyance was subject to the judgment lien for the purchase money to the extent of $100, and on sale of the land to enforce collection of the judgment the purchaser acquired the title.

2. Deeds and Conveyances—Judgment—Jurisdiction—Coverture.

A judgment of a court having jurisdiction of the cause and the parties against a married woman on her contract, made during coverture, will be set aside, on direct application, when it appears by the pleadings that she

was under coverture at the time the contract was made, though the defense of coverture was not formally pleaded, but it is binding upon her while it stands as the formal and final deliverance of the court.

3. Deeds and Conveyances—Lands—Title—Purchase Price—Coverture—Judgment in personam.

Under the facts and circumstances of this case, the consent judgment recognizing the validity of a former judgment rendered against the husband for balance due upon purchase price for land to which the title was in him, and adjudging an interest in the land in the wife on account of payment made by her with her own funds, and decreeing a balance due thereon a lien upon the land, whether the second judgment was *in personam* against her. *Quœre.*

4. Judgments, Entire—Rights Under—Estoppel—Coverture.

A *feme covert*, claiming an interest in lands under a decree of court, can not assert her claim thereto under one clause of an entire judgment and repudiate a lien upon it declared and established by another clause thereof.

5. Pleadings—Action for Possession of Lands—Married Women—Equities.

When the complaint in an action to recover lands contains the ordinary allegations, and the answer a general denial, the pleadings are not sufficient to sustain an equity set up in favor of a *feme* defendant, arising by reason of coverture, in transactions concerning lands.

ACTION to recover a tract of land, tried before *Guion, J.*, and a (357) jury, at October Term, 1908, of BEAUFORT.

The proceedings in the court below, and the exceptions for error by defendant, appearing in the case on appeal, are as follows: The defendant J. T. Swain filed no answer. It was admitted by defendant Martha A. Swain that the defendant J. T. Swain had the legal title and possession at the time of the judgment taken against him by A. D. MacLean, subject as between her and said J. T. Swain to such estate as she might be entitled, as set out in her complaint, filed 1 November, 1904, in her suit against him, R. T. Hodges, sheriff, and A. D. MacLean. The plaintiff introduced the record, consisting of summons, judgment, transcript of judgment, and execution, in the case of A. D. MacLean v. J. T. Swain, and the entire record, except the affidavits and exhibits in the subsequent case of Martha A. Swain v. J. T. Swain, R. T. Hodges and A. D. MacLean.

The plaintiff also introduced a deed from the sheriff, by virtue of the execution sale, as above set out, to plaintiff, regular in form and execution, and admittedly conveying to plaintiff in fee simple.

It is admitted that defendant is now in possession, and by plaintiff that defendant, at the time of rendition of the above judgments, and now, was and is a married woman and not a free trader. Plaintiff rested.

(358) Defendant moved for judgment as of nonsuit, and requested the court to charge the jury that plaintiff was not entitled to recover and to answer the issue "No." The court refused the motion and the said prayer. Defendant excepted. First exception.

The court then charged the jury, if they believe the evidence, to answer the issue submitted, to wit, "Is plaintiff the owner and entitled to the possession of the land described in the complaint?" "Yes." Defendant excepted. Second exception.

The jury answered the issue "Yes," and there was judgment thereon, to which defendant excepted and appealed to the Supreme Court. Third exception.

Appellant groups her exceptions and assigns error thereon as follows:

Exception 1: The refusal of the court to nonsuit the plaintiff, on all the evidence, for that the judgment in Martha A. Swain v. J. T. Swain, R. T. Hodges and A. D. MacLean did not warrant the sale of the land under execution issuing therefrom, as plaintiff in said cause was under coverture and said judgment was void as to her.

Exceptions 2 and 3: For same cause and upon same ground.

Small, MacLean & McMullan for plaintiff.
Ward & Grimes for defendants.

HOKE, J., after stating the case: On the trial it was made to appear that, on 30 August, 1904, a judgment was obtained in a justice's court against the male defendant for $200 and interest, the summons and judgment reciting that it was for the purchase money of the land in controversy, and same was duly docketed in the Superior Court of Beaufort County the day following, 31 August. A *ven. ex.* issued, in the form provided by the statute (Revisal, sec. 627), and the property was advertised by the sheriff, when the *feme* defendant instituted her action in the Superior Court of Beaufort County against her husband, J. T. Swain, the plaintiff in the judgment, and the sheriff, and filed a complaint, alleging, in substance, that she and her husband had bought this property for a home, and that, of the balance due for purchase money, $150, the male defendant had paid nothing, but that she (359) herself had paid the debt down to $50, which last sum her husband had paid off with his own money, and there was nothing due for the purchase money of the land, and they did not owe the plaintiff in the judgment anything, except for professional services, and the entire proceedings was a scheme on the part of her husband and the plaintiff in the judgment to deprive herself and children of their home, and asked that the sale be restrained and her own and children's rights in the property declared and established. These allegations were fully

denied by the parties charged, and at December Term, 1905, the cause coming on for hearing, the same was compromised and adjusted, and pursuant thereto judgment was entered as follows:

"This cause coming on to be heard at December Term, 1905, before his Honor, *Thomas J. Shaw, Judge* presiding, the parties being present in person, with their attorneys: It is now, by consent of both parties, given in open court, considered and adjudged that the matters in controversy, as recited in the pleadings, be settled and adjudicated as follows: That the defendant J. T. Swain execute a deed to his children, George S. Swain, Mary M. Swain, Jesse T. Swain and David Sylvester Swain, conveying to them and their heirs, in fee simple, the lot or parcel of land described in the deed from C. S. Doughty and wife to J. T. Swain, recorded in the register's office of Beaufort County, in book 93, pp. 352-353, which is hereby referred to, saving and reserving unto the said Martha A. Swain and J. T. Swain, jointly, an estate for the remainder of their natural lives in the said land and for the life of the survivor of them. Upon failure of defendant to execute such deed, this judgment shall operate as a conveyance in lieu thereof.

"It is further ordered that the judgment against the property referred to in the pleadings be reduced to $100, together with such interest and costs as have accrued thereon, and that the same is declared in full force and effect.

"It is further ordered that each party pay his or her proper costs of this suit, to be taxed by the clerk, and that the temporary restraining order heretofore granted be dissolved.

"THOS. J. SHAW,
"Judge Presiding."

Default having been made in the payment of this judgment (360) of $100, a *ven. ex.* was issued, in proper form, the property sold, and the plaintiff in the present suit became the purchaser and took a deed for the property, which is the title under which he makes the present claim. On these facts the Court is of opinion that the plaintiff was entitled to recover the property, and the ruling of his Honor below to that effect should be sustained.

It was objected chiefly on part of *feme* defendant that, inasmuch as it appears on the face of the record that *feme* defendant was and is a married woman, no valid judgment could be obtained against her, and that the same should not be allowed to stand. There are decisions in this State to the effect that when it appears on the face of the pleadings that a defendant was a married woman at the time a contract was entered into, and judgment *in personam* has been entered against her, the same will be set aside on direct application, though the defense of

coverture was not formally pleaded. *Green v. Ballard,* 116 N. C., 144, cited with approval in *Moore v. Wolfe,* 122 N. C., 711. It was not required in these cases to decide whether such a judgment was void or only voidable, and in that event effective until set aside, where innocent third parties were concerned. And there are well-considered decisions with us to the effect that while a judgment against a married woman stands as the formal and final deliverance of a court having jurisdiction of the causes and the parties, the same is binding upon her. *Grantham v. Kennedy,* 91 N. C., 148; *Vick v. Pope,* 81 N. C., 22; *Greene v. Branton,* 16 N. C., 504.

There is doubt, however, if the principle referred to in these authorities is involved here at all; for, in order to uphold his title, the present plaintiff is not required to resort to any judgment *in personam* against the *feme* defendant, and he has made no effort to do so. The title to the property was in the husband of *feme* defendant, and the creditor had a valid judgment against the husband, duly docketed and showing on its face that it was for the purchase money. Nothing has ever occurred to destroy or weaken the binding force of this judgment to the amount of $100 and interest, the amount outstanding when the sheriff's sale took place; on the contrary, in the suit instituted by the *feme* defendant to establish the interest of herself and children in this property
(361) the consent decree recognizes the validity of this judgment and declares, in express terms, in reference to it: "It is further ordered that this judgment be reduced to $100, together with such interest and costs as have accrued thereon, and that the same is declared in full force and effect." The judgment further directs that the husband shall execute a deed to the children of these parties, in fee simple, subject to a life estate reserved to the husband and the wife and the survivor of them. Under and by virtue of this judgment against the husband, which has always been a binding lien upon the land, the lot was sold and the present plaintiff became the purchaser, and, in our opinion, as stated, the sheriff's deed, made under and by virtue of this sale, conveyed to him a good title.

No evidence has ever been offered which shows or tends to show that any separate estate of the *feme* defendant has ever been invested in this property, and even the allegations to this effect in her original suit against the creditor and her husband in regard to this matter are very vague and unsatisfactory. On the contrary, as will be noted in the case on appeal, the *feme* defendant, under a general denial in the answer, rests her claim on the rights arising to her under and by virtue of the very decree we are now asked to ignore and set aside. This decree, as we have seen, recognizes the validity of the judgment under which the present plaintiff purchased, and no principle of law or equity would

require or permit that the *feme* defendant should assert her claim to the property under one clause of an entire judgment and repudiate a lien upon it declared and established by another.

Even if there were facts presented giving indication of an equity in her favor, the same could not be entertained on the present pleadings, which, as stated, contains the ordinary allegations in an action to recover land, and a general denial on the part of defendant. *Webb v. Borden,* 145 N. C., 188; *Buchanan v. Harrington,* 141 N. C., 39.

No error.

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CHARLES FORD v. A. STROUD.

(Filed 24 March, 1909.)

1. **Contracts to Convey Land—Parol Contracts, Breach of—Equity—Assumpsit Implied—Improvements—Moneys Had and Received.**

   While a parol contract to convey land is void, the law will grant relief against the vendor, failing to make title, in favor of the vendee, who has entered into possession, paid a part of the purchase price and put permanent improvements upon the land, and will permit a recovery of the money paid on account of the purchase price and the cost of the improvements to the extent of the enhanced value, less reasonable rents and profits while in possession.

2. **Contracts to Convey Land—Parol Contract—Purchase Money—Improvements—Possession—Assumpsit.**

   A vendee who, while in possession of lands under a parol contract to convey, has paid a part of the purchase price and put permanent improvements thereon is entitled to his equitable remedy, upon an implied *assumpsit*, for money had and received, after surrendering possession, when his vendor can not make title.

APPEAL from *Lyon J.*, at April Term, 1908, of COLUMBUS.

Plaintiff sues for the recovery of money paid defendant on account of the purchase money of a tract of land under a parol contract to purchase, and for compensation for improvements put upon the land while in possession under the contract. He sets out his contract in his complaint, alleges the payment of the money and that he put the improvements on the land, and the refusal of defendant to make a deed. Defendant does not specifically deny these allegations, but sets up new matter, by way of avoidance, etc. Plaintiff testified that defendant proposed to sell him the land and he agreed to buy it for $750. He paid defendant $200 on account of the purchase money and went into possession. The contract was not reduced to writing. Defendant paid an

additional $200, stayed on the land two years, making valuable improvements, buildings, etc., and "had to leave." Defendant returned $80 of the amount paid. When plaintiff demanded of defendant a deed for the land he told him to call on Mr. D. L. Gore, who would make the deed; that he went to Mr. Gore to get a deed and he refused to give him one.

"I told defendant that I wanted him to give my money back,
(363) and he refused to do so. Mr. Gore said he would not make me a deed unless I would take all of the land. I offered to pay Mr. Gore the balance of the money on the piece of the land, as defendant told me to do. . . . Defendant said he had a bond for title. I could not get a deed from Gore nor from defendant for the land, although I was ready to pay the money and offered to do so." Defendant objected to this testimony and duly excepted to its admission. Plaintiff testified, without objection, that he put improvements on the land, giving estimate of value. Defendant offered no evidence, but moved for judgment of nonsuit, which was denied, and he excepted. Defendant tendered issues, which his Honor refused to submit. Exception.

The following issues were submitted to the jury:

1. "Did defendant contract with plaintiff to sell plaintiff the tract of land described in the complaint?

2. "Is the defendant indebted to plaintiff on account of money paid to him on purchase price of said land, and if so, what amount?

3. "Is the defendant indebted to plaintiff on account of improvements of said land, and if so, what amount?"

Defendant excepted.

The only portion of his Honor's charge to which exception was taken, and which is set out, is as follows: "If they found from the evidence and by the greater weight thereof, the burden being on the plaintiff, that the plaintiff complied with his part of the contract, or offered to comply with said contract, and that he tendered D. L. Gore the amount for said land under the contract, and that Gore refused to receive same and make title to the plaintiff unless plaintiff would take it and pay for more land that he had contracted for, the court charges you that it was not necessary for the plaintiff to tender the actual cash to the said Gore."

There was a verdict for plaintiff on all of the issues. Judgment, and appeal.

Plaintiff not represented in this Court.
(364) *H. McClammy for defendant.*

CONNOR, J. The defendant's motion for judgment of nonsuit presents the merits of the appeal. The motion admits the plaintiff's testi-

mony to be true. If upon these facts he is entitled to maintain the action, the rulings in regard to the admission of evidence and the instructions are correct. While the answer does not specifically admit the allegation in the complaint in regard to the contract, it does not contain a general or specific denial, as required by the Code of Procedure. We think that, upon both reason and authority, the plaintiff is entitled to maintain his action and recover the amount paid on account of the purchase money and compensation for his improvements to the extent of the enhanced value of the land, less profits made by him while in possession. It is true that the contract of purchase, being in parol, is void. It appears that defendant was not able to make title until, by complying with the terms of a bond which he held from D. L. Gore, he acquired one himself, and this he has failed to do, resulting in plaintiff's losing the land. In *Ellis v. Ellis,* 16 N. C., 402, it was held that a party who had paid the purchase money for land, under a parol contract, which was repudiated by the vendor, was not entitled to maintain a bill in equity, either for specific performance, because of the statute of frauds, or for the amount paid on the purchase price. The reason given by *Ruffin, C. J.,* is: "Because, so far as concerns the land, the contract is merely void, and the money can be recovered at law in an action for money had and received." There is in such cases a total failure of consideration; and as it would be inequitable to permit the vendor to repudiate his contract and retain the money paid upon it, the law gives to the vendee an equitable action, based upon an implied *assumpsit,* for money had and received. The right to be reimbursed for the payment of the purchase money on a parol contract for the purchase of land, repudiated by the vendor, and have compensation for betterments made while in possession under the contract, has in many cases been enforced by courts of equity by enjoining the eviction of the vendee until the money paid on the purchase price has been repaid and compensation for improvements made. In *Albea v. Griffin,* 22 N. C., 9, the bill was for specific performance of the contract. The defendants relied upon the statute of frauds, the contract being in parol. *Gaston, J.,* said: "We admit this objection to be well founded, and we hold, (365) as a consequence from it, that, the contract being void, not only its specific performance can not be enforced, but that no action will lie, in law or equity, for damages because of nonperformance. But we are, nevertheless, of the opinion that plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity. The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and, by the act of God or the caprice of the defendants, this expectation has been frustrated. The

consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired, to his injury." *Baker v. Carson,* 21 N. C., 381. In *Dunn v. Moore,* 38 N. C., 364, relief was denied because the contract set up in the bill was denied. *Nash, J.,* said that if defendant had admitted the contract the court would not have permitted him to put plaintiff out "without returning the money he had received and compensating him for his improvements." While in the case at bar the contract is not denied, if it had been we should not hesitate to follow the decision in *Luton v. Badham,* 127 N. C., 96, in which *Mr. Justice Furches* reviews this and all of the other cases, and shows conclusively that the right to relief can not be defeated by a mere denial of the contract. See the very able and, the writer thinks, conclusive opinion of *Smith, C. J.,* in *McCracken v. McCracken,* 88 N. C., 272. Certainly this can not be done where the action is for the recovery of the purchase money, as upon an implied *assumpsit* for money had and received or for money paid for a consideration which has failed. In *Daniel v. Crumpler,* 75 N. C., 184, *Rodman, J.,* says that the right to recover the purchase money and compensation for improvements against one who has repudiated his parol contract to convey land "stands on general principles of equity." As said by *Judge Furches,* in *Luton v. Badham, supra,* all of the cases are based upon this theory. It is doubtful whether, prior to the abolition of the distinction between actions at law and suits in equity, an action could have been maintained at law for compensation for improvements put upon land by the vendee.

The court of equity had granted relief by enjoining the eviction
(366) of the vendee by the vendor, who had repudiated his contract, until he had made compensation for improvements. Whatever difficulty was encountered because of technical rules of pleading disappear when forms of action are abolished and a plaintiff recovers upon the facts stated in his complaint and proven upon the trial. The careful review of the authorities and satisfactory discussion in the opinion in *Luton v. Badham, supra,* and the dissent of *Smith, C. J.,* in *McCracken's case, supra,* relieves us of the duty of doing more than to refer to them. It is interesting to observe the trend of thought upon the subject, as illustrated in the decided cases, showing how the law "works itself pure" and enforces the maxim that "There is no wrong without a remedy." If, as said by *Judge Gaston,* it is inequitable for a man to make a parol contract to sell land, receive the purchase money and encourage the vendee to make improvements on it, and, by repudiating the contract, retain the money and take the land, with its enhanced value, certainly the court must find some way, either preventive or remedial, to make him "do equity." We think that it has done so. We can not perceive any good reason for saying that, so long as the vendee

retains possession under the contract, he will be protected in his right, but if, seeing that he can get no title, he surrenders possession, he is without remedy. His Honor correctly denied the motion for judgment of nonsuit and admitted the evidence of the contract. It seems that defendant had purchased a body of land from Gore, of which he sold plaintiff only a portion, and that he owed Gore on account of the purchase money more than plaintiff owed defendant. Plaintiff was under no obligation to pay Gore any more than he owed defendant; hence the contention about the validity of the tender to Gore by plaintiff is without merit. Plaintiff was under no obligation to Gore—had made no contract with him. Defendant was in default in not perfecting his title and conveying to plaintiff according to his contract. We find no error in the portion of the charge set out in the record. The remainder is presumed to be correct. The issues submitted present the matter in controversy. Upon an inspection of the entire record, we find

No error.

Cited: Ballard v. Boyette, 171 N. C., 26; *Smithdeal v. McAdoo,* 172 N. C., 702.

(367)

J. T. HARRIS ET AL V. C. H. MARTIN, ADMINISTRATOR, ET AL.

(Filed 1 April, 1909.)

1. **Pleadings—Evidence—Wills—Testator—Identification.**

The propounders of a will are not required to prove the identity of the one who signed the will as the testatrix, when the allegations are that the signature of the testatrix was obtained by duress, undue influence, etc., and that she did not have sufficient mental capacity, and there is no allegation that she did not sign the will.

2. **Wills—Evidence—Testator—Identification.**

Testimony of an attorney and witness to a will that they were sent for and introduced to a person, whom they had not met before, and who answered to the name of the testatrix, and that the will was drafted and executed by such person as the testatrix named in the will, is *prima facie* evidence that the person signed was the executrix named, and sufficient to take the case to the jury.

ACTION tried before *Neal, J.,* and a jury, at October Term, 1908, of WAKE, involving the validity of a will.

Caveators appealed.

Aycock & Winston, R. N. Simms and J. N. Holding for plaintiffs.
Armistead Jones & Son and Pou & Brooks for defendants.

CLARK, C. J. This is a *caveat* of the will of Sarah C. Harris. The complaint alleges that said paper writing "was not and is not the last will and testament of the said Sarah C. Harris, deceased, for the reason that the signature of the said Sarah C. Harris thereto was obtained by undue and improper influence and duress upon the said Sarah C. Harris," and as a further ground alleges that "at the time of the execution thereof and continuously thereafter until her death, the said Sarah C. Harris did not have the capacity to make and execute a will, for the reason that she was not of a sound and disposing mind and memory at and during said time."

W. H. Ruffin, Esq., attorney at law, of Louisburg, testified that he received a message from Mrs. Jennie Martin, who resided in the same town, that her sister, Miss Harris, wished him to come to her (368) (Mrs. Martin's) house to draw Miss Harris' will; that he went and was introduced by Mrs. Martin to Miss Harris as her sister; that Mrs. Martin then stated to witness that this was her sister, who wanted her will drawn, and Mrs. Martin stated what the terms of the will were; that the witness took notes, then turned to Miss Harris, read the notes to her and asked her was that the way she wished the will drawn, and that she replied "Yes"; that the witness went off and drew the will, and returned, bringing, as requested, Dr. O. L. Ellis as a witness; that Miss Harris and Mrs. Martin came into the room and witness read the will to Miss Harris and asked her if that was the way she wished her will drawn, and she said "Yes," and requested him and Dr. Ellis to witness it; that she then signed the will in their presence, and they signed it in her presence. On cross-examination witness said he met Miss Harris only on those two occasions and knew her only by the introduction above stated, and that she seemed physically and mentally capable of making a will.

Dr. Ellis, a practicing physician, testified that he accompanied Mr. Ruffin on this last occasion and was introduced to Miss Harris, whom he had never met before and knew only by this introduction; that Mr. Ruffin read the will over to her, and she said that was her will; that she signed it in the presence of Mr. Ruffin and himself, and they signed it as witnesses in her presence; that he was asked to sign by Mr. Ruffin in her presence.

The caveators introduced no testimony. The jury found that the paper writing was the last will and testament of Sarah C. Harris.

The caveators contend that the court should have instructed the jury, as requested, that there was not sufficient evidence to answer the issue "Yes," and that they should answer it "No." There was no evidence whatever tending to show, as the caveators contend, that another person had fraudulently and falsely impersonated Miss Harris. There was no

allegation of that nature in the complaint. On the contrary, it was averred that "the signature of Sarah C. Harris thereto was procured by undue influence and duress," and that "at the time of execution" of said will "the said Sarah C. Harris did not have the capacity to make and execute a will." Upon the averments in the complaint, there was nothing that required the respondents to put in evidence an (369) identity that was not questioned, and which, indeed, was admitted by the pleadings. Indeed, when the propounders rested, after putting in evidence the formal execution of the will, it must have been a distinct surprise to raise the question of identity of the testator without any allegation in the complaint.

The testatrix announced herself as Miss Sarah C. Harris, not only by accepting the introduction, but by signing herself by that name. Where a cartman took goods to the house of L., not knowing the owner, asked a person he found there for Mr. L., and the person said "I am Mr. L.," it was held by *Lord Lyndhurst* that this was *prima facie* evidence of the identity of Mr. L. *Wilton v. Edwards,* 6 Car. & P., 677; Harris Identification, secs. 75, 99, 115. When one is asked who he is, his reply that he is S. is some evidence of that fact. *Reynolds v. Staines,* 2 C. & K., 745. Where, at an auction, a person was addressed by several as "R." and his name was so written upon the board, *Wilde, C. J.,* held that this was *prima facie* evidence that such was his name. *Collier v. Nokes,* 2 C. & K., 1012.

The facts in evidence were sufficient to submit the case to the jury upon the identity of the testator, and, there being no evidence to the contrary, it satisfied the jury. It would have been easy for the caveators, the nearest relatives of the deceased, to have shown from the description of her person, from her handwriting, by their knowledge of her whereabouts at that time, and other circumstances, whatever reason, if any there were, to throw doubt upon the identity of the testator. The transaction took place in the usual manner, the witnesses were two gentlemen of standing in their respective professions, and there is nothing whatever in the attendant circumstances to cast a doubt upon the *bona fides* of the transaction.

Strangers must frequently execute wills when no better known to the witnesses than the testator was in this case. Had the question of the identity of testator been raised by the pleadings, doubtless the proof would have been complete, but as it was there was a *prima facie* case and no evidence to the contrary. The other exceptions require no discussion.

No error.

(370)

F. D. HICKS v. MARSHALL KING ET AL.

(Filed 1 April, 1909.)

1. **Lessor and Lessee—Contracts to Convey—Sale of Land—Installments—Landlord's Lien—Foreclosure.**

When, under an agreement of lease of lands, containing also a contract to convey the same upon payment of a stipulated rental for a specified period, in full, the lessor treats the lease as continuing after default, he is entitled as lessor to the landlord's lien for rent; but when he puts an end to it by seeking to resume possession, the lessee can assert his equity under the contract to convey, and cause the land to be sold, to be applied to the balance due for the purchase money.

2. **Same—Prompt Payment of Installments—Default—Equity—Time of the Essence.**

Contracts for sale on installments are similar to mortgages, and the equity is not destroyed by stipulations for prompt payment of the rent or installments of the purchase price; for, upon default, the debtor is entitled to have the balance ascertained, a sale ordered, and to receive the surplus, if any.

3. **Contracts to Convey—Sale of Land—Installments—Foreclosure—"Balance Due."**

When the full period for installments has passed at the time of judgment ordering the sale of the property under a contract for sale on installments, it is necessary only to deduct the payments made, and direct a sale to pay the balance due; but as to installments not then due, the present value thereof only is a charge against the purchaser.

APPEAL from *Lyon J.*, at November Term, 1908, of DUPLIN.

On 1 January, 1907, the plaintiff leased his farm, in writing, to the defendant (a colored man) for the term of ten years, at a yearly rental of five bales of good middling cotton, of 500 pounds each, with a further provision that if said rent were promptly paid, together with the taxes on the land, then the defendant could become purchaser of the land upon payment of fifty bales more, with provision for forfeiture if any installment of rent is not promptly paid by lessee, and right of re-entrance thereon. During the first five years the defendant one year paid his rent, one year he overpaid 1,500 pounds of cotton, and the other years he fell behind; but the plaintiff did not assert the right to re-enter till the end of the fifth year, at which time the defendant was (371) in arrears, for the five years $63.51. On 30 December, 1901, the plaintiff began this action for recovery of the land and balance due on rent. A receiver was appointed, who rented the land to the defendant, pending litigation. The cause was referred to A. McL. Graham, upon whose report the judge

rendered judgment for the balance of rent due to date and for the value of the additional fifty bales of cotton, and ordered that upon nonpayment of above sum the property be sold for payment thereof and costs, including allowances to receiver and referee. The plaintiff appealed.

E. K. Bryan and H. E. Faison for plaintiff.

Stevens, Beasley & Weeks, Rountree & Carr, Walter Clark, Jr., Aycock & Winston and Bunn & Spruill for defendants.

CLARK, C. J. The appeal presents practically but one point. The plaintiff contends that the court should have held that punctual payment of rent was of the essence of the contract, and that upon default the plaintiff was entitled to re-enter and take possession. But this would ignore the other features of the contract.

This case is almost identical with *Crinkley v. Egerton,* 113 N. C., 444, which held that as long as the lessor treated the lease as continuing he was entitled as lessor to the landlord's lien for rent; but that whenever he put an end to it by seeking to resume possession the defendant could assert his equity under the contract to convey, and could cause the land to be sold. Similar contracts have been construed to be contracts to convey. *Puffer v. Lucas,* 112 N. C., 377; *Clark v. Hill,* 117 N. C., 11; *Barrington v. Skinner, ibid.,* 47; *Jones v. Jones, ibid.,* 254; *Manufacturing Co. v. Gray,* 121 N. C., 168; *Wilcox v. Cherry,* 123 N. C., 79; *Thomas v. Cooksey,* 130 N. C., 148; *Hamilton v. Highlands,* 144 N. C., 283.

When, as here, the full period for installments has passed at the date of the judgment, it is necessary only to deduct the payments made and direct a sale of the property to pay the balance due. When there are installments which have not fallen due, the present value only of such should be charged against the purchaser. Contracts for sale on installments are similar to mortgages. In neither is the equity destroyed by the stipulation for prompt payment, but the debtor (372) is entitled to have the balance ascertained and a sale ordered, and to receive surplus, if any.

Affirmed.

Cited: Burwell v. Warehouse Co., 172 N. C., 80.

DAVID CLARK, THE EUGENIA MANUFACTURING COMPANY ET AL. v. SACO-PETTEE MACHINE COMPANY ET AL.

(Filed 1 April, 1909.)

1. **Pleadings—Power of Court—Discretion—Review—Appeal and Error.**

When there is no evidence that the discretionary powers of the trial judge have been abused in his refusal to reopen a pending cause and permit answers to be filed, his decision is not reviewable.

2. **Jurisdiction—Consent of Parties—Judgment—Validity.**

A decree of confirmation of receiver's report of sale of insolvent corporation's property may, by consent, be made out of term and in another county than the one in which the cause is pending.

3. **Jurisdiction—Parties—Judgment—Defects—Confirmation.**

The legal effect of confirming a decree in term, when the court has jurisdiction over the parties and subject-matter, which was made out of term and in a different county from the one in which the cause is pending, is the same as if the decree had been again written and entered at the term.

4. **Same.**

When, at a term of court having jurisdiction of the parties and subject-matter, a decree written and spread upon the minutes at a former term, and defective, is referred to and confirmed, it is given validity thereby.

APPEAL from MOORE, from an order confirming report of sale of receiver, entered by *Long, J.*, 9 September, 1908.

This is a proceeding, brought under section 1199 of the Revisal, for the dissolution and settlement of the Eugenia Manufacturing Company, a corporation heretofore doing business in that portion of Moore County, N. C., now within the county of Lee. The creditors of the corporation are named as defendants in the proceeding. The action was (373) originally instituted in the Superior Court of Moore County and afterwards removed to the county of Lee. A. W. Graham was duly appointed receiver of the said corporation. On 8 April, 1908, an order of sale and decree of foreclosure of a deed of trust securing the bonded indebtedness of the corporation was made by *Jones, J.*, at chambers, in Richmond County. This decree was filed in the Superior Court of Moore County on 8 April, 1908. The property was not sold, as appears by the report of the receiver to the April Term, 1908, of said court, and another decree was entered, which refers to the first-named decree, as follows: "And said decree is hereby in all other matters affirmed." The only modification made was in appointing another day of sale. It appearing that April Term was a criminal term and, the property not

having been sold, another decree was entered at May Term, 1908, of the Superior Court of Moore County, as follows:

"This cause coming on to be heard at May Term, 1908, of Moore, before *Jones, J.*, and it appearing to the court that all creditors and stockholders of the Eugenia Manufacturing Company have been made parties to this action, and that no answer nor demurrer has been filed to the complaint therein, and that an order of sale has heretofore been made of the real and personal property of the said Eugenia Manufacturing Company, which was affirmed at the April Term, 1908, of this court; and it appearing to the court that said April Term, 1908, of this court was for the trial of criminal cases only, with the right to take judgment in civil actions when a jury trial was not required:

"Now, therefore, upon motion of Walter Clark, Jr., and W. A. Devin, attorneys for the plaintiff and the receiver, it is ordered that the order of sale heretofore made in this case be and the same is in all things confirmed, and it is further ordered that this cause be removed to the county of Lee; and it is further ordered that, in the event said receiver shall be of the opinion that it is to the interest of the creditors of the said Eugenia Manufacturing Company that the said sale be postponed to the first Monday in August, he is hereby authorized to postpone said sale.

"E. B. JONES,
"Judge Presiding."

On 3 August, 1908, the receiver sold said property of the Eugenia Manufacturing Company at public auction, and on 3 (374) August, 1908, in the office of the Superior Court of Lee County, filed his report of sale. Answers were attempted to be filed on 17 August, 1908, by certain creditors, which were ordered to be stricken from the record as having been filed without leave after time for pleading had expired. This feature of the case was considered by the Supreme Court in an opinion (*ante,* 88).

At August Term, 1908, of the Superior Court of Lee County, the motion to confirm the sale was made, and resisted by certain creditors, by their attorneys, whereupon his Honor, *Judge Long,* presiding, made an order, by consent, as follows:

"This cause coming on to be heard before his Honor, *B. F. Long, Judge* presiding, upon motion and consent of the parties, it is ordered that all motions in the cause be continued, to be heard by the court at Monroe, N. C., in the Eighth Judicial District, on Thursday, 3 September, 1908."

It appears from the findings of *Judge Long,* recited in his subsequent decree, that on account of high water prevailing in the district, by consent of the parties the cause was again continued, to be heard on

Wednesday, 9 September, 1908, in the Superior Court of Richmond County, in pursuance of the above-recited order, made at August Term of the Superior Court of Lee County. The cause was heard at Rockingham, Richmond County, on the date agreed, by consent, all parties being present, at which time *Judge Long* made an elaborate decree, reciting all prior orders and decrees in the cause and confirming the sale of the property, and directing title to be made, and distributing the proceeds of sale and applying the same in accordance with the original decree of sale made by *Judge Jones.* To this decree the defendants (creditors) excepted and appealed.

Womack & Pace and Aycock & Winston for plaintiffs.
A. A. F. Seawell and K. R. Hoyle for defendants.

BROWN, J. We think the exception to the ruling of his Honor at August Term, 1908, refusing to open the case and permit answers to be filed traversing certain allegations of the complaint, and praying
(375) for affirmative relief, can not be sustained. It was within the sound discretion of the judge below to open the case at that late day and set aside the sale and allow the answers to be filed, but his discretion was exercised against the defendants and is not reviewable by us, certainly not when there is no evidence that such discretionary power has been abused.

The parties, having slept on their legal rights, forfeited them; and as they failed to convince the judge below that he should exercise his discretion in their behalf, this Court can not help them.

The matter, we think, was practically disposed of by us at the last term (*ante,* 88), when we held that the answers, having been filed in the papers in the case without authority of the court, and long after time for pleading had expired, were properly ordered to be stricken from the official records.

It is contended by the defendants, in excepting to the decree of confirmation, that his Honor had no jurisdiction to render such decree after the term had expired and outside of the county of Lee. We would have no hesitation in holding with the defendants but for the finding by the judge that all parties consented that the matter should be heard and determined while the judge was in the district, in Union County, and, the parties being unable to reach Union Court, by consent the matter was heard at Richmond Court and the decree of confirmation was then rendered. It is well settled that by consent of parties a judge of the Superior Court may hear such motions and enter judgments out of term and in another county than the one wherein the cause is pending. *Bank v. Peregoy,* 147 N. C., 296; *Bynum v. Powe,* 97 N. C., 374; *Godwin v. Monds,* 101 N. C., 354.

It is further contended that the court should have ordered another sale, as the original decree was rendered by *Jones, J.,* in Richmond County, at chambers, and that such decree was void, *ab initio.* It is possible that the decree of 8 April, rendered outside of the county of Moore, where the cause was then pending, was of such a sweeping character as to constitute something more than a mere direction to a receiver to sell property, and that under *Bank v. Peregoy, supra,* the judge had no jurisdiction to render it at chambers in Richmond County, except upon a consent hearing. But this decree was ratified and adopted by the court in term time, in April, and again in May (376) in Moore County, before the cause was removed to Lee County. At the May Term the defendants had been brought in and had been made parties and were before the court, and took no exception to the decree then rendered.

This decree undertakes to ratify and affirm the decree of 8 April, 1908, and also the decree of April Term, not only as to the order of sale contained in the decree, but declares that said decrees "are in all things confirmed." Having full and complete jurisdiction at May Term over all the parties, as well as the subject-matter of the action, *Judge Jones* adopted and again promulgated the decree he had formally made in Richmond County. This the judge had the right to do, and the legal effect is the same as if he had rewritten and again signed and entered the Richmond decree *in iisdem terminis.*

No answers were filed at that time, no issues raised, and there was no reason why the decree should not have then been rendered. In this view of the case it is immaterial to consider whether the Richmond decree, of 8 April, was absolutely void or only voidable. It was in writing and spread on the minutes of the court, and the decree of May Term gave it vitality by reference to it, as much so as if it had been copied in the May decree. *"Id certum est quod certum reddi potest."*

This conclusion, at which we have arrived after a full investigation of the record, we think disposes of every assignment of error.

The judgment of the Superior Court rendered by his Honor, *Judge Long,* is

Affirmed.

Cited: *S. c., post,* 789.

(377)

W. O. JONES ET AL. v. THE PROVIDENT SAVINGS LIFE ASSOCIATION OF NEW YORK.

(Filed 1 April, 1909.)

Insurance—Premiums—Agreement of Parties—Final Judgment.

An agreement entered into between the parties to the suit, looking to an accounting between them in view of further adjustment required, should the plaintiff recover of defendant life insurance company certain premiums paid by him to it, can not have the force and effect of changing the character of the action, after final judgment for defendant, and open up questions which involve an inquiry into the scheme and plan of defendant's organization and an investigation as to the regulation and management of the internal affairs of the company.

MOTION for judgment, before *Lyon, J.*, at January Term, 1909, of WAKE.

The case was originally tried before *Long, J.*, and a jury, at October Term, 1907, of WAKE.

The plaintiffs, filing their complaint, alleged, in substance, that they were holders and beneficiaries of an insurance policy in defendant company, and that by the terms of the policy the premiums payable thereon should never exceed the amount printed on the policy for the attained age of sixty-five years; that the holder, W. O. Jones, having attained and passed the said age, the defendant company had wrongfully assessed against him and had compelled payment of premiums largely in excess of the amount demandable under the contract and policy, to his damage. The plaintiffs further allege that W. O. Jones was induced to enter into said contract by the false and fraudulent assurances on the part of defendant's general agent that the premiums on the policy would never exceed the amount printed thereon for an attained age of sixty-five years, the specific relief demanded being set forth, as follows:

1. "That the said premiums be declared excessive, and that an account be taken of all sums paid on premiums since said plaintiff, W. O. Jones, attained the age of sixty-five, in excess of the rate prescribed for that age on the back of the policy, and that the defendant be
(378) adjudged to pay the same to the plaintiffs, and that it be declared that all future premiums shall conform to the representations and agreements as aforesaid.

2. "That if this reasonable prayer be not granted, the entire amount of the premiums, with interest thereon, be paid the plaintiffs by the defendant and said policy be rescinded."

Denial was made of these allegations, and, on issues submitted, the jury rendered the following verdict:

1. "At the times alleged in the complaint was J. Sterling Jones the general agent of the defendant company?" Answer: "No."

2. "Did the said J. Sterling Jones, as the general agent of the defendant company, induce the plaintiff W. O. Jones, by false and fraudulent representations, to apply for insurance in the terms of the application and to take out a policy of insurance from the defendant company, as alleged in the complaint, upon an understanding and agreement, made at and before the delivery of the policy, that the premium upon the said policy should never exceed the rate prescribed in a table on the back of the said policy for the age of sixty-five?" Answer: "No."

3. "Was the plaintiff W. O. Jones, by reason of said alleged false and fraudulent representations and agreements, induced to accept the said policy and pay the premiums thereon, and was he thereby misled and prevented from examining and questioning the terms of the policy, as so represented and agreed, at and before the delivery of the policy and until he had attained the age of sixty-seven years and until the said premiums began to exceed the rate prescribed for the age of sixty-five?" Answer: "No."

4. "Was the said J. Sterling Jones authorized and empowered by the defendant company, as its agent, under his contract with the defendant, to issue policies of insurance or to change or alter the contents thereof?" Answer: "No."

5. "If the said J. Sterling Jones, under his contract with the defendant, was not authorized and empowered to issue policies of insurance or to change or alter the contents thereof at and before the delivery of the policy by the defendant to the plaintiff W. O. Jones, did the plaintiff Jones, at or before the acceptance of the policy, have notice from the defendant or its agent that the powers of the said J. Sterling Jones were so limited that he was not authorized (379) to issue policies of insurance or to change or to alter the contents thereof?" Answer: "No."

6. "Did the said W. O. Jones, after the delivery and acceptance of the policy by him, continue to pay the alleged excessive premiums thereafter, under protest of himself or his agent, and by reason of assurances and promises of the defendant company, through J. Sterling Jones or other agents of the defendant, as alleged by the plaintiff, that the said excessive payments, as alleged, would be properly adjusted so as to conform to the alleged representations and agreements as set forth in the complaint, and did the plaintiff fail to sue the defendant by reason of such assurances and promises and at the request of defendant's agent or agents?" Answer: "Yes."

7. "Did the plaintiff W. O. Jones, after having an opportunity to learn the character, terms and conditions of the policy, without disavow-

ing its terms and giving notice of protest to the defendant or its agents, by his acts, conduct, dealings and negotiations with the defendant, either himself or through and by his agent, ratify or acquiesce in the terms of the said policy?" Answer: "Yes."

8. "How many premiums did plaintiffs pay under protest?" Answer: "Two."

9. "Did plaintiff W. O. Jones ascertain that the policy of insurance was not in accordance with the alleged representations of J. Sterling Jones more than three years before the institution of this action?" Answer: "Yes."

10. "Did the plaintiff W. O. Jones ascertain that the policy of insurance was not in accordance with the alleged representations of J. Sterling Jones more than ten years before the institution of this action?" Answer: "No."

11. "Did plaintiffs, before the commencement of this action, demand of defendant a reasonable and equitable adjustment of the matters in difference or, upon refusal, a return of the premiums, and was such demand refused?" Answer: "No."

12. "Did the plaintiffs' cause of action arise more than three years before the beginning of the suit?" Answer: "No."

13. "Did the plaintiffs' cause of action arise more than ten years before the beginning of the action?" Answer: "No."

14. "Has defendant constantly carried on business and main-
(380) tained an agency in this State, in compliance with the laws of this State, since the date of the policy issued to plaintiff, 1 August, 1887?" Answer: "Yes."

15. "Did defendant file with the Secretary of State copies of its charter and by-laws, as required by chapter 62, Public Laws 1899, and thereupon become domesticated in this State?" Answer: "Yes."

16. "What amount, together with interest, has been paid on said policy in excess of the rate prescribed for the age of sixty-five in the lower or second table on the back of said policy?" Answer: "One thousand seven hundred and fifty-four dollars and nine cents" (by consent).

17. "What has been the cost to the defendant of carrying the liability imposed upon it by this policy issued to the plaintiff, since the same was issued, 1 August, 1887, to the present time?" Answer: (This issue not to be answered by the jury.)

And the court below, being of opinion that, according to the admitted stipulations of the policy, the premiums could never exceed the maximum rate for the attained age of sixty-five years, and that all premiums paid in excess of that amount were illegal, gave judgment in favor of plaintiff for the sum of $1,754.09, the amount of such excessive premiums, as established by the verdict. On appeal this judgment was re-

versed, and for reasons assigned in the opinion, written by the *Chief Justice,* as reported in 147 N. C., 540, it was ordered that, on the verdict and the admitted stipulations of the policy, judgment should be entered for defendant. This opinion having been certified down, and the defendant having moved for judgment in accordance therewith, the plaintiffs resisted the motion and filed a petition in the cause, alleging that, under and by virtue of an agreement in the cause, entered into between the parties, of date 20 April, 1907, and whereby the defendant had obtained a continuance of the same, the plaintiffs were entitled to have the rule or rules established and declared in this action by which future assessments and dividend credits should be made. It was further urged that this relief was within the scope and purpose of the original action. The petition was disallowed, in so far as the same contemplated further litigation in this cause between the parties, and final (381) judgment given for defendant on the verdict as rendered.

It was further provided in said judgment that no forfeiture of the policy should be declared by reason of the nonpayment of any premiums on and after 20 April, 1907, and the right of the plaintiffs to challenge the validity and correctness of all premiums or assessments or dividends since said date was secured and preserved. From the refusal of the court to allow further litigation between the parties in the cause now constituted the plaintiffs excepted and appealed.

Shepherd & Shepherd and J. W. Hinsdale for plaintiffs.
J. H. Pou for defendant.

HOKE, J., after stating the case: The construction and interpretation of this contract of insurance, and the effect of the stipulations therein, and also of the verdict rendered by the jury, were all involved and presented on the former appeal in the cause, 147 N. C., 540, and after full and careful consideration the Court, being of opinion with defendant, directed that judgment be entered in its favor. This opinion having been certified down, it became the duty of the judge below to comply with the order made, and there is no error to plaintiffs' prejudice in the judgment as entered. *Dobson v. Simonton,* 100 N. C., 56; *Calvert v. Peebles,* 82 N. C., 334. And we are of opinion that there is nothing in the scope of the original complaint, nor in the agreement made in the cause, to require or justify the Court in opening up the controversy, as desired by the plaintiff.

The action was instituted and tried on the theory that the amount of the premiums to be assessed against the holder were fixed and expressed at the attained age of sixty-five years, and could in no event ever exceed that sum. It was further contended that, if this were not true, the plaintiff had been induced to enter into the contract under false

and fraudulent assurances that this was its purport, and judgment was demanded in the one case for all premiums wrongfully collected in excess of the stipulated amount, or, if this were not the correct interpretation of the contract on its face, and fraud was established by the verdict, that the contract relation be severed and all premiums
(382) collected should be returned. Defendant controverted both positions taken by plaintiffs, and claimed, further, that if recovery were had by plaintiff the cost and value of the insurance which the company had carried on the life of W. O. Jones should be allowed and deducted from any recovery plaintiff should make. Issues were framed determinative of the substantial issues arising on the pleadings as understood by both parties, as no objection to the issues from either appear in the record, and the jury have rendered a verdict against the plaintiffs on their allegations of fraud, and the court has held against their legal position as to the force and meaning of the stipulations of the contract, and the agreement relied upon by plaintiffs was never intended to have the effect contended for by the plaintiffs. This agreement was entered into between the parties in April, 1907, on condition that defendant should be granted a continuance. Its principal intent and purport was to relieve the plaintiffs of the payment of further premiums pending the litigation, and to prevent the forfeiture of the policy by reason of nonpayment. This effect has been allowed it in the judgment as entered by the court, and the intimations in the agreement, looking to a further accounting between the parties, were evidently made in view of further adjustment to be required in case the plaintiffs should succeed. This was the view of the agreement entertained by the judge below, the same who presided at the trial of the cause, as indicated by the judgment concerning it, entered and signed by him at October Term, 1907, as follows:

"CONSENT ORDER.

"NORTH CAROLINA—Wake County.

Superior Court, October Term, 1907.

"Jones *et al. v.* Provident Life Assurance Society of New York.

"In this case it is agreed that, if judgment be given finally for plaintiffs, defendant shall be entitled to credits on said judgment for all unpaid premiums, with interest from date when such premiums should have been paid.

"This order is made in furtherance of an agreement of counsel that premiums falling due after 1 February, 1907, should not be paid until the final termination of the suit, and then at the rates which the
(383) court should hold the legal rate of premiums.

"B. F. LONG,

"November 6, 1907. *Judge Presiding.*"

And, in our opinion, it can not be maintained that a collateral agreement of this character should have the force and effect to change the scope of the action and open up questions which involve an inquiry into the scheme and plan of defendant's organization and an investigation as to the regulation and management of the internal affairs of the company. Such a result is not within the scope of the action as originally constituted, was never contemplated by the parties, and is not a just or correct interpretation of the agreement relied upon. There is

No error.

G. C. GRAVES v. W. K. JACKSON.

(Filed 1 April, 1909.)

1. Instructions Requested—Charge.

When the trial judge substantially gives, by a change of language, proper instructions requested, without weakening their force, there is no error.

2. Mortgagor and Mortgagee—Cancellation—Possession—Mortgage to Third Person.

When the mortgagor of a mule for the purchase price fails to pay the mortgage debt, he and the mortgagee can make a valid agreement to cancel the mortgage upon the condition that the mule be surrendered; and after such has been done and the absolute and unconditional title restored to the mortgagee, who hires the mule to the former mortgagor, a mortgage of the mule then made by the latter to a third person will not be valid, and upon conflicting evidence an issue of fact is raised for the jury.

3. Judgment—Parties—Strangers.

The owner of a mule is not bound by a judgment rendered in an action between a third person and one attempting to mortgage the mule to him, when he was not a party thereto.

ACTION tried before *Long, J.*, and a jury, at September Term, (384) 1908, of MOORE.

Plaintiff appealed.

U. L. Spence for plaintiff.
R. L. Burns for defendant.

WALKER, J. This action was brought to recover two mules which the plaintiff alleged the defendant unlawfully withholds from him, or for

the value thereof. The mules were taken into possession by the sheriff, under a requisition issued in an ancillary proceeding of claim and delivery, and the defendant gave bond for the return of the property and the same was delivered to him by the sheriff. The judgment below was in favor of the defendant, and the plaintiff appealed.

It appears that the controversy in the trial below was confined principally to the "dark horse-mule." The defendant had agreed with one W. B. Tyson, in 1903, that if Tyson should pay him $125 on or before 1 November, 1903, the mule should then be his property. Tyson failed to pay the money, being unable to do so, and the agreement was canceled by the parties, and afterwards he "hired" the mule to Tyson. The evidence tended to show that the title to the mule was to continue in Jackson until the $125 was paid. In 1904, after the agreement between Jackson and Tyson had been canceled, Tyson mortgaged the mule to the plaintiff, and the plaintiff relied upon the mortgage to establish his title to the mule. It also appeared that in an action between the plaintiff and Tyson to recover this mule and other property the court adjudged that Tyson was indebted to the plaintiff on the mortgage debt in the sum of $238.21, and that the property seized in the action under the requisition in the claim and delivery proceeding was worth $35. The mule was not seized, and the court merely adjudged that the plaintiff recover of Tyson the said sum of $238.21 and interest, and further that plaintiff is the owner of the mule and other property described in the complaint as between him and Tyson. The defendant was not a party to that suit.

The respective parties submitted prayers for instructions, which, we think, were substantially given by the court. The judge is not required to give an instruction in the very words used by counsel (385) in the request for it, even if the instruction be a proper one. If he gives it substantially, and does not, by any change of language, weaken its force, it is a sufficient compliance with the law. *Rencher v. Wynne,* 86 N. C., 268. The court, by its instructions, left the facts to be found by the jury, and correctly explained to them the law arising upon the evidence. We do not see why Jackson and Tyson could not cancel their agreement if Tyson found that he was unable to pay the price of the mule, and thereby restore the absolute or unconditional title to Jackson. All the evidence tended to show that at the time Tyson executed the mortgages to the plaintiff the title to the mule was in Jackson. The jury evidently found this to be the fact.

As to the suit between the plaintiff and Tyson, the defendant was not bound or concluded by any adjudication therein, not having been made a party to the action.

There was no error in the instructions as to the amount due on the plaintiff's mortgages. This was an issue of fact, which was properly

left to the jury. Indeed, the plaintiff by his fifth prayer, appears to have so regarded it.

We find no reversible error in any of the rulings of the court to which the plaintiff excepted. The case was fairly submitted to the jury by the court. It practically involved an issue of fact, which the jury, upon the evidence, found against the plaintiff.

No error.

Cited: *Carter v. R. R.*, 165 N. C., 253; *Shaw v. Public Service Corporation*, 168 N. C., 615.

CALDWELL HARDY, TRUSTEE, ET AL. v. MAURY WARD.

(Filed 1 April, 1909.)

1. **Timber Contracts—Options—Deeds and Conveyances—Vendor and Vendee—Tender of Deed.**

An option to purchase standing timber upon condition that when the vendee should signify his acceptance within the time specified the vendor should "at once make, execute and acknowledge" a deed for the timber and deliver it, "upon compliance with the terms of sale," makes it the duty of the vendor to tender the deed upon being notified by the vendee of his acceptance, unless such tender has been waived. (*Allston v. Connell*, 140 N. C., 485; *Trogden v. Williams*, 144 N. C., 192, cited and approved.)

2. **Timber Contracts—Deeds and Conveyances—Vendor and Vendee—Options—Acceptance—Tender of Payment.**

When the language of a contract giving an option to purchase standing timber within a specified time does not clearly express the intention of the parties, regard will be had to the conditions and circumstances surrounding the particular transaction, such as the increasing value of the timber, possession, the nominal consideration named, etc., upon the question as to whether time was "of the essence of the contract" for the completion of the purchase.

3. **Same.**

When a thirty-day-option purchase of standing timber is given for a nominal consideration, specifying that upon a cash payment and notes for the balance of the purchase price the deed will be delivered, it is necessary to tender payment upon the specified terms, and a mere acceptance within the period fixed is insufficient.

4. **Timber Contracts—Options—Deeds and Conveyances—Vendor and Vendee—Tender of Deed—Waiver.**

When it appears that the vendee, under an option to purchase standing timber, subsequently undertook, with the consent of the vendor, to have his attorney prepare the deed, it was a waiver of the obligation of the vendor, expressed in the option, to tender the deed.

5. Same—Principal and Agent—Attorney and Client.

The contract obligation of the vendor to make, execute and deliver a deed to standing timber, under an option given by him, is waived, as a matter of law, when by uncontradicted correspondence in evidence it appears that the parties subsequently agreed that the vendee's attorney should prepare the deed, and the vendor had furnished all information desired by him for that purpose.

6. Contracts, Entire—Interpretation—Questions of Law—Jury—Harmless Error.

The interpretation of an entire written agreement is a question of law; and while it is error to submit it to the jury, it is cured by the jury answering it correctly.

7. Contracts—Damages—Strict Compliance—Burden of Proof.

Damages for breach of an executory contract, in which there is no equitable element, can only be recovered by plaintiff's proving compliance with his obligation thereunder.

(387) ACTION tried before *Lyon, J.*, and a jury, at August Term, 1908, of DUPLIN.

On 22 December, 1905, defendant executed and delivered to plaintiff, trustee for the Carolina Timber Company, a paper writing, whereby, in consideration of one dollar, he sold the company "the right or option of purchasing from said party of the first part, at any time within thirty days from the date of this agreement, in fee simple and with general warranty, at the price hereinafter named, all the pine timber ten inches in diameter. . . . If the said company, its assigns or successors, shall avail themselves of this option and purchase said timber hereunder, then, when they shall have so signified their intention of doing, the said party of the first part shall at once make, execute and acknowledge a good and sufficient deed, with warranty, to the said company, its assigns or successors, upon compliance by them with the terms of sale, as above prescribed," etc. The price to be paid for the timber was $7,500, of which $2,500 was to be paid "cash upon delivery of deed," the balance in five annual installments of $1,000 each, carrying interest from date. The contract contained provisions in regard to the time within which the timber was to be cut, not material to the decision of this appeal. The contract was signed by defendant, duly proven and registered.

On 9 January, 1906, the plaintiff's representative addressed to defendant the following letter: "This is to notify you that my company will exercise your option, and I will be glad if you will assist Mr. Beasley in making up the deed. I talked to him over 'phone to-day and told him to push your matter through at once. I am writing to Mr. Beasley, telling him to call on you to help him on your deed." Mr. Beasley was plaintiff's attorney.

On 8 January, 1906, Mr. Beasley wrote defendant: "I have been employed by the Carolina Timber Company to trace your title, and will thank you for any information as to books and pages where your deeds are recorded. You can look over your papers, and it will save me lots of time." Defendant sent Mr. Beasley, "as per request," a list of deeds, dates, pages and books of registration, etc., covering the lands included in the option. At the conclusion of the list he writes, in regard to two tracts, that he "can couple them without survey," saying: "Write me if you wish this done, to facilitate writing deed. The (388) only complications in title are on the Ira Robinson tract and J. C. Mills tract. This is not to conflict with closing option. I am to give security to indemnify the company in case of any legal restraint. Draw satisfactory papers for me to sign for that purpose." This letter is without date. On 12 January, 1906, Mr. Beasley wrote defendant, asking information in regard to title to several tracts, and defendant answered the letter, 15 January, saying: "I expect to straighten up the titles as opportunity affords, but wished to do so at suitable times. Draw such paper as is satisfactory to your company, and do not make it unreasonable. We wish them to have what they buy. . . . Hope you will be able to get papers ready soon." Mr. Beasley wrote defendant 18 January and again on 20 January. In the last letter he said: "The Carolina Timber Company requests me to write you that they will take your timber, according to option, as soon as you can furnish them a fee-simple title to the same." On 26 January, 1906, Mr. Beasley wrote defendant: "The Carolina Timber Company is ready to pay you according to agreement, and we are still standing by what we promised to do, and we know you will do likewise. The money and notes are ready for you."

Defendant sold the timber to another purchaser, 23 January, 1906, for $10,000. The plaintiff tendered the money 30 January and notes bearing date 26 January. Plaintiff sues for specific performance and, if that can not be had, for damages. Plaintiff excepted to the admission of the letters from Beasley to defendant.

His Honor submitted the following issues to the jury:

1. "Did the defendant enter into an agreement with the plaintiff, of date 22 December, 1905, as alleged in complaint?

2. "Did the plaintiffs signify their intention of availing themselves of the purchase under their option and accept the terms thereof during the thirty days mentioned therein?

2½. "Did plaintiff make an offer to accept the option of December, 1905, as modified by the letter of Meyers, dated 9 January, 1906, and introduced in evidence, and if so, did the defendant accept the modification made by said letter?

3. "Were the plaintiffs willing and able to perform their part of (389) the said contract, after accepting the terms of same, prior to 23 January, 1906?

4. "Has the defendant wrongfully broken the said contract and refused to execute deed thereunder, as alleged in the complaint?

5. "What damages, if any, are plaintiffs entitled to recover of the defendant?

6. "Did the plaintiff tender purchase price before the expiration of thirty days?

7. "Did the defendant tender deed before the expiration of thirty days?"

By consent, the sixth and seventh issues were answered "No." Plaintiffs requested his Honor to instruct the jury that if they believed the evidence they would answer the second issue "Yes." This was refused, and plaintiff excepted. The same request was made as to the third and fourth issues, which was refused, and plaintiff excepted. Plaintiff excepted to the submission of the issue numbered 2½. The court, by consent, answered the first issue "Yes," and instructed the jury that the burden of proof was on the plaintiff to establish the affirmation of the second issue, and that if they had satisfied them that they accepted the terms of the contract within thirty days, to answer the issue "Yes." The jury answered the issue "No." On the issue numbered 2½ his Honor instructed the jury that if they were satisfied that plaintiff agreed that Beasley was to write the deed and plaintiff (defendant) consented to it, they would answer the issue "Yes"; otherwise they would answer it "No." "If you find from the greater weight of the evidence that such acceptance as was made by the plaintiff was contained in the letter of Meyers, dated 9 January, 1906, and that defendant accepted the modifications contained in said letter and acted upon by them, you should answer the issue 'Yes.'" Plaintiff excepted. His Honor instructed the jury that if they answered the third issue "No" they should answer the fourth issue "No" and the fifth issue "Nothing." To this instruction plaintiff excepted. The jury answered the third and fourth issues "No" and the fifth issue "Nothing."

His Honor rendered judgment for the defendant upon the (390) verdicts, to which plaintiff excepted and appealed.

J. O. Carr for plaintiffs.
Simmons, Ward & Allen for defendant.

CONNOR, J., after stating the case: Eliminating immaterial matter, the verdict of the jury, read in the light of the pleadings and the evidence, discloses this case: Defendant, on 22 December, 1905, gave to

plaintiff the right or option of purchasing, at any time within thirty days "from the date of the agreement" the timber described in the contract, with the provision that if the plaintiff should avail itself of the option "and purchase the timber" thereunder, and should so signify its intention, the defendant should "at once make, execute and acknowledge" a deed for the timber and deliver the same to the defendant "upon compliance by it with the terms of sale"—that is, paying $2,500 cash and executing its notes for $5,000, payable in five annual installments. On 9 January, 1906, plaintiff signified its acceptance of the option by writing the letter, of that date, set out in the record. Subsequent to the receipt of that letter the correspondence between Mr. Beasley (plaintiff's attorney) and the defendant took place, concluding with the letter of 20 January, 1906, and the sale of the timber by defendant, 23 January, 1906, to a third party. It is conceded that no deed was at any time tendered by defendant, and no money was tendered by plaintiff until 30 January, 1906. Plaintiff's exceptions to the refusal of his Honor to give the instructions asked, and to the instructions given, present the questions, the solution of which are decisive of the appeal. Was the plaintiff required by the terms of the option to tender the money and notes within thirty days? Did the letter of 9 January modify the terms of the option and put upon plaintiff the duty of preparing the deeds for defendant to execute, and thereby relieve him of the obligation imposed by the contract to "at once make, execute and acknowledge" the deeds when plaintiff should signify its acceptance of the option? The learned counsel for plaintiff insists that, by a proper construction of the paper-writing, the "right or option" given plaintiff was to signify its purpose *to buy* within thirty days—that is, to enter into a contract of purchase for the land, as distinguished from a completed pur- (391) chase within the time named; that when, at any time, within the thirty days, plaintiff signified its acceptance of the option, the relation of vendor and vendee was created, no time being fixed within which the money was to be paid and the deed executed; that in this condition of the transaction both parties were allowed a reasonable time to complete the trade. It is true that an option is a mere proposition on the part of the owner of the land to sell, and, until accepted by the person to whom it is made, is unilateral. We had occasion to consider the several definitions of the term, and the legal rights and liabilities growing out of it, in *Allston v. Connell,* 140 N. C., 485, and *Trogden v. Williams,* 144 N. C., 192. We found a very satisfactory discussion of the duties imposed upon the person to whom the option is given in the opinion of *Woods, J.,* in *Weaver v. Burr,* 31 W. Va., 736. In that case the option was in the following words: "I am willing to sell my land . . . for the price of $6.25 per acre, cash; and the parties for whom Mr. H. are

negotiating for said land shall have the privilege of buying said property at said price and on said terms, for sixty days from 7 June, 1883." After a very exhaustive discussion, with a wealth of authority, in regard to the general principles of law applicable to options, he says, in regard to the one under consideration: "The period of sixty days from 7 June, 1883, mentioned in the option, within which plaintiff had the privilege of buying said land at the price of $6.25 per acre, cash, expired on 6 August, 1883. During the whole of that period, and during the whole of the said 6th of August, the plaintiffs had the privilege of converting the offer of John Burr into a valid and binding contract by an unconditional acceptance of and compliance with the terms thereof. They could not do so by any other acceptance, nor could they comply with said terms in any other manner than by actual payment or tender of the whole price of the land before the sixty days expired. . . . It was their privilege to accept unconditionally, and comply with the same by paying or tendering the cash within the sixty days, and thus secure to themselves the right to compel John Burr to perform his contract."

In *Watson v. Coast,* 35 W. Va., 463, the option contained no (392) reference to payment, in cash or otherwise. It was a simple proposition to sell within a fixed period, concluding: "If not accepted, as provided, this agreement is null and void." The acceptance was by telegram: "Will take property. Meet me at Toronto, first train." The Court, distinguishing the case from *Weaver v. Burr, supra,* held that tender of the cash was not a condition precedent to the conversion of the option into a contract. *Brannon, J.,* referring to *Weaver's case,* said that the majority of the Court "construed the cash payment in the option in that case as an act required by it to be done within the limit, the option having prescribed cash payment as part of the terms, further providing that the parties should have the privilege of buying the property at said price and on said terms, for sixty days, thus including, as three judges thought, cash payment within the sixty days. But here cash is not mentioned. The only thing required to be done within the limit assigned by the option is acceptance." The learned *Justice* quotes, with approval, the language of Professor Pomeroy: "Where the contract is really an offer on one side, with a provision that this offer must be assented to and accepted, where a mere acceptance is contemplated, or payment must be made, where payment was the act of acceptance contemplated, at or before a specified date, then, of course, the act of assent or payment must be done within the prescribed time, and time is from the very form of the contract essential. If, therefore, a vendor agrees to convey, if payment be made, at or before a given date, or if an option is given which is to be accepted by payment within a given time, then the time of payment is certainly essential; in fact, payment is a condi-

tion precedent to the vesting of any right in the vendee." Contracts, sec. 387. With these general principles and two well-considered opinions to aid us, we inquire: what, in the light of the facts in this case, duty was imposed upon the plaintiff to entitle it to demand specific performance of the option or to bring it into contractual relations with the defendant? If the language used does not clearly express the intention of the parties, we must have regard to the character of property with which they were dealing, the conditions by which they were surrounded and other circumstances throwing light upon the transaction. It must be noted that the subject-matter of the transaction was standing timber, and not the land itself. We may also note, as appears from the numerous (393) appeals in this Court, and the recent history of the increasing demand, with rapidly increasing value of standing timber, that it would be unreasonable to suppose that the defendant intended to "tie up" his valuable timber without any consideration paid by plaintiff for an almost indefinite time, and, by the simple notice of acceptance, to come under a contractual obligation in which time was not "of the essence." It is in evidence that plaintiff had several "buyers" of timber in the section, and that the contracts were drawn by it, usually a printed form, which persons agreeing to sell timber were called upon to sign. The plaintiff assumed no obligation and paid nothing for the option, the recited consideration being one dollar. If the language used in the option is of doubtful meaning, it should be construed most strongly against the plaintiff. The option given is "the right of *purchasing*" within thirty days. In *Weaver's case* the option gave "the privilege of buying." We can perceive no substantial distinction between cases in this respect. If other language does not modify that which we have quoted, we should hold that the plaintiff acquired by the option the right to purchase the timber by tendering the cash and notes within thirty days. This would, we think, effectuate the intention of the parties, closing the transaction within the time fixed. The further provision, however, clearly shows that the money was to be paid and the notes tendered "upon delivery of the deed," and the defendant was to "make, execute and acknowledge" the deed "at once"—when the plaintiff signified that it would avail itself of "the option and purchase said timber." This language imposed upon the defendant the duty of making—that is, preparing, executing and tendering—the deed before the plaintiff was required to tender the money. It is clear that, as the contract was drawn and executed, the defendant was under obligation to prepare and tender the deed after notice that plaintiff desired to "exercise the option." Did the letter of 9 January, 1906, modify or change the obligation of the parties in this respect? The answer to this question is dependent upon the construction placed upon the letter of 9 January and the subsequent correspon-

dence between plaintiff's attorney (Mr. Beasley) and defendant. In the letter of 9 January plaintiff says: "I will be glad if you will
(394) assist Mr. Beasley in making up the deed. . . . I told him to push your matter through at once. I am writing to Mr. Beasley, telling him to call on you to help him on your deed." This language is a clear expression of a purpose on the part of plaintiff that its attorney will write the deed. Mr. Beasley put this construction upon the terms of his employment by plaintiff. On 8 January, a day prior to the letter of plaintiff to defendant, he writes defendant, "I have been employed by the Carolina Timber Company to trace your title," asking him to send information in regard to his deeds, etc. Defendant complies with the request, sending memorandum of dates, books, pages, etc., of registered deeds. He calls attention to complications in the title of two tracts, but says: "This is not to conflict with closing option. I am to give security to indemnify the company in case of any legal restraint. Draw satisfactory papers for me to sign for that purpose." On 15 January defendant writes in regard to details, concluding: "Hope you will be able to get papers ready soon. If you wish anything further, kindly advise me." The letter dated 20 January appears to have been "postmarked" at Kenansville, "24 January, 6 A. M., 1906," and at Rose Hill, its destination, "24 January, 9 A. M., 1906." Plaintiff says that he received it 24 January. He says: "I told him on the 20th that I wanted to close the matter. . . . Plaintiff had not notified me before then that it would approve and accept title contract."

Mr. Arringdale, a witness for plaintiff, says that he was with defendant one week before the expiration of the option, and he acknowledged that he had sold the timber to plaintiff; that he told defendant that Beasley would help him, and that "we were ready to close up the transaction"—to get his papers ready; said he would do so right away.

Mr. Meyers, who wrote the letter of 9 January, testified that he got the money and notes "three or four days after the option was out. . . . Beasley was our attorney. There was strong competition in this community for purchase of timber. This was not usual form, but was one of Camp Manufacturing Company's options."

(395) Plaintiff insists that Mr. Beasley was defendant's attorney to draw the deed, and that, therefore, the letters are not competent evidence against it. We do not concur in this view. Plaintiff's witness, Meyers, who wrote the letter of 9 January, expressly says, "Mr. Beasley was our attorney." The entire evidence is consistent with this statement.

Plaintiff insists that his Honor should not have submitted issue numbered 2½ to the jury, but should have construed the letters and held as a conclusion of law that they did not modify the contract. We incline to plaintiff's view in this respect; but if the jury have decided the

question—construed the letters correctly—there is no prejudicial error in the course pursued by his Honor. It is elementary that if a question of law be submitted to the jury and they decide it correctly, the error is cured by the verdict. If the letter of 9 January so modified the original contract or option as to relieve the defendant of the duty of preparing the deed and impose upon the plaintiff that duty, it is conceded that no deed was prepared or tendered. The parties evidently understood that, notwithstanding the terms of the original option contract, Mr. Beasley was to prepare the deeds and the contract of indemnity. We do not find any evidence tending to show a failure on the part of defendant to furnish to him the information necessary to do this. His letter, giving information, while not dated, was evidently written upon receipt of and in reply to the letter from Mr. Beasley of 8 January. Mr. Beasley acknowledged receipt of this letter on 12 January, saying that he had "traced up most of your titles." He makes inquiry about title to several tracts. Defendant answers on 15 January, giving details and concluding, "I believe this covers your questions." He explains that all of the titles are clear, except two tracts, and he had before written Mr. Beasley that the complications in regard to them were not to delay closing the transaction; that he was to give indemnity to plaintiff. We think that the letters show that plaintiff's attorney was to prepare the deeds, and that on 22 January, 1906, defendant was not in default in closing the transaction. The jury found that the acceptance of the option by plaintiff was subject to the modification in this respect. We concur in this conclusion. That time was of the essence of the contract was recognized by both parties, and, we think, correctly (396) so. If the parties agree upon a day of performance, in the absence of waiver or those providential interventions recognized as sufficient to relieve them from strict performance, the courts are not permitted to do so. The equitable doctrine that, in executory contracts for the sale of land, time is not of the essence, is subject to well-defined exceptions. Among the circumstances which will take a contract out of the operation of the doctrine are "the nature of the property or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right." Bispham Eq., 391. Among the contracts mentioned by Mr. Bispham which, by reason "of the subject-matter," are exceptions to the doctrine are contracts for sale of "trades or manufactories and mines." He further says: "As to 'surrounding circumstances,' which may render time of the essence of the contract, they must, of course, depend upon the facts of each particular case, such as whether the value of the property has greatly diminished whether the vendee has bought to sell again, and so forth. Indeed, in this country, the fact that land bears a much more commercial character than it does

in England, is subject to more fluctuations and has more of a speculative value, has led to not a few expressions of judicial opinion that time ought as a general rule to be considered as of the essence of a contract. But perhaps the safest statement of the law is that the general rule is the same in the United States as in England, but that exceptions growing out of the circumstances of the individual transaction are more numerous and looked upon with more favor." Bispham, 394. It will be found, we think, upon examination of our reports, that the equitable doctrine has usually been applied to cases when upon the execution of a bond for title by the vendor and a bond for the purchase money by the vendee the latter has been let into possession of the land, and both parties, by their conduct, have acquiesced in the *status quo,* notwithstanding the lapse of time. This was the case in *Falls v. Carpenter,* 21 N. C., 237, followed in *Scarlett v. Hunter,* 56 N. C., 84, *Pearson, J.,* saying: "When there is a contract for the sale of land, the vendee is considered, in equity, as the owner, and the vendor retains the title as security for the purchase money. He may rest satisfied with this security as long as he chooses, and when he wants the money he has the
(397) same right to compel payment by a bill for a specific performance as the vendee has to call for title." In such cases "It is taken for granted that the parties are content to allow matters to remain *in statu quo* until a movement is made by one side or the other." The reason upon which these and similar cases are decided fails when the subject-matter of the contract is standing timber, mines or property of which the vendee is not let into possession and the value of which is fluctuating. While we do not question the wisdom or justice of the doctrine which has received the sanction and approval of the chancellors for centuries, we do not think that it should be extended so as to include contracts which, on account of the subject-matter, surrounding circumstances, etc., would, in its application, defeat the intention of the parties and subject property to unreasonable burdens not in contemplation of the owners when entering into the contract or giving an option. While the courts will not unduly restrict the freedom of contract or constitute themselves guardians for the owners of such property by refusing to enforce the execution of contracts, fairly made, free from obscurity, the terms of which are understood by the parties, we can not fail to see from the records of this Court that by printed contracts, skillfully drawn, sometimes of difficult construction, valuable property rights are disposed of and burdens of uncertain extent and more uncertain duration are imposed upon lands. When the enforcement of these contracts is sought by appeal to the equitable powers of the Court, a due regard to the rights of parties and the conservation of one of the most valuable natural resources of the State imposes upon us the duty of requiring that the contract shall be

free from abiguity, understood by the parties and based upon a valuable consideration.

In this case it is manifest that specific performance can not be had, because the defendant has parted with his title before the suit was instituted. Recognizing this difficulty, plaintiff asks for damages. In this aspect of the case, there being no equitable element, it must allege and prove strict performance of the contract on its part, according to its terms as modified. This it can not do. We have given the record and the carefully prepared argument of counsel a careful consideration, and are of the opinion that there is no reversible error. (398)

No error.

Cited: Timber Co. v. Wilson, 151 N. C., 156; *Clark v. Lumber Co.,* 158 N. C., 145; *Winders v. Kenan,* 161 N. C., 633; *Binford v. Steele, ibid.,* 663, 664; *Ward v. Albertson,* 165 N. C., 221; *Dalrymple v. Cole,* 170 N. C., 108.

CHARLES MELVIN, BY HIS NEXT FRIEND, R. L. MELVIN, v. THE PIEDMONT MUTUAL LIFE INSURANCE COMPANY.

(Filed 7 April, 1909.)

1. **Insurance—Back Dues—Partial Payment—Terms of Reinstatement—Waiver.**

   Evidence that an insurance company received a partial payment for insurance of back dues on a lapsed policy is no evidence in itself of waiver, when, under the terms of the policy, the payment of "all back dues" was necessary to reinstate the policy.

2. **Same—Waiver.**

   When, under the terms of a contract of insurance, a lapsed policy would only be reinstated sixty days from the payment of all back dues, and then on condition that the insured should be in good health when the dues were paid and for five weeks thereafter, the fact that the company received a part payment of back dues raised no question of waiver for the jury, when it was shown that the insured died two days after making the partial payment.

ACTION by the beneficiary to recover on a policy of insurance, tried, on appeal from a justice's court, before *Biggs, J.,* and a jury, at October Term, 1908, of CUMBERLAND.

At the close of plaintiff's evidence there was a motion for nonsuit, under the "Hinsdale Act." Motion overruled, and defendant excepted.

The case was submitted to the jury on issues, as follows:

1. "Did the insured fraudulently misrepresent his age in the application for the policy in controversy?" Answer: "No."

2. "Is the defendant indebted to the plaintiff, and if so, in what amount?" Answer: "Yes; forty-five dollars, the amount of the policy."

Thomas H. Sutton for plaintiff.

(399) *Sinclair & Dye for defendant.*

HOKE, J. The policy declared on contains a stipulation, made a part of the contract of insurance, in terms as follows:

"5. Whenever the insured shall fail to pay the weekly premium on this policy for five weeks, and shall be due five weeks' premium, all claims on the company are by such arrears forfeited; but the insured may be reinstated by paying up all back dues, and shall be entitled to full benefits sixty days from date of paying such dues, provided the insured shall be in good health when such dues are paid and for five weeks thereafter."

There was evidence showing that on 18 January, 1908, the deceased was indebted for six weeks' unpaid weekly dues and premiums, and on that day he paid four weeks of such arrears, which was received by the agent and by him turned over to the superintendent, who entered the same on the company's books to the credit of the insured, and on 20 January, 1908, the insured died.

The court below was of opinion that the plaintiff was entitled to have the issue of defendant's liability submitted on the question of waiver, by reason of the payment of the four weeks' back dues and the receipt of same by the company, but we do not think this is a correct view of the case on the facts presented. By the terms of the contract, "On a failure to pay the weekly premiums for five weeks, all claims on the company are by such arrears forfeited," and, at the time the payment on these six weeks of back dues was made, the rights of the insured, under his policy, had ceased. *Freckman v. Royal Arcanum,* 96 Wis., 133; *Supreme Lodge v. Keener,* 6 Tex. Civ. App., 267; *Carlson v. Supreme Council,* 115 Cal., 466. While provision for reinstatement is contained in the policy, the stipulation is that such reinstatement shall occur on the payment of "all back dues"; and the authorities are very generally to the effect that, under such a stipulation, a partial payment of back dues will not work a reinstatement. *Insurance Co. v. Willet,* 24 Mich., 268; *Hudson v. Insurance Co.,* 28 N. J. Eq., 167; *Supreme Lodge v. Œters,* 95 Va., 610. Certainly no such result could be allowed unless there were evidence of some understanding or authorized agreement to that effect. Apart from this, by the express provisions of the contract, a reinstatement is only to occur after sixty days from

paying the back dues and on condition that the insured shall be (400) in good health when such dues are paid and for *five weeks thereafter*. He died in two days after the partial payment was made.

We are of opinion that the defendant's motion for nonsuit should have been allowed, and it is so ordered.

Reversed.

Cited: Wilkie v. National Council, 151 N. C., 528; *Page v. Junior Order,* 153 N. C., 409; *Clifton v. Ins. Co.,* 168 N. C., 501.

CHARLES REDMAN, BY HIS NEXT FRIEND, v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 7 April, 1909.)

1. **Railroads—Master and Servant—Warnings—Negligence—Proximate Cause.**

A railroad company is responsible in damages for the failure of its engineer to give forewarning of a sudden, unexpected and unusual movement of its train, consisting of an engine and flat cars equipped for ditching, when the proximate cause of an injury to an employee thereon while engaged in the course of his duties.

2. **Railroads—Master and Servant—Signals—Warnings—Negligence.**

When an employee on a ditching train is injured while sitting on a flat car, where he should have been, in the discharge of his duties, and it is shown that, while actually engaged, his position should be standing, but, at the time, from the nature of his employment, it was not then required, the mere fact of his sitting at the time of the injury, when he was in position to promptly discharge his duty when called upon, as required, does not relieve the defendant of the duty to signal or give warning of an unusual and unexpected jolting of the train, caused by the sudden moving of the engine.

3. **Same—Contributory Negligence.**

When an employee on a ditching train, at a place where he should have been, in the discharge of his duties, is suddenly and unexpectedly thrown, by the negligent act of the engineer of the employer, upon a piece of machinery known by him to be dangerous, the fact that he threw his hand forward and got it caught in the machinery, to his injury, is not contributory negligence, when the act was done to save further injury.

4. **Railroads—Master and Servant—Place to Work—Duty to Employee—Contributory Negligence.**

It is the duty of the employee to select such place to work as will be the least dangerous, when the circumstances admit of a choice; and when

the evidence is sufficient, it is correct for the trial judge to charge the jury that if plaintiff selected a dangerous place to perform his duties, when there were other places or positions that were available and safe, and that a man of ordinary prudence would have selected a different place than that occupied by plaintiff at the time of the injury, and the plaintiff's failure to do so was the proximate cause, the plaintiff would be guilty of contributory negligence and his recovery barred.

(401) ACTION tried before *Jones, J.*, and a jury, at November Term, 1908, of PERSON.

Plaintiff sues for personal injuries, alleged to have been sustained by defendant's negligence. The plaintiff testified that at the time he sustained the injury he was employed by defendant on one of its trains, engaged in cleaning out ditches with a ditching machine, to which a dipper was attached. He said it was his duty to hook the chain on the dipping machine. The machine sat on a flat car. It is run by a hoisting engine, which sets on the car next to the locomotive, which runs behind the cars on which the dipper and the hoisting machine is set. The dipper sets on the foremost car from the locomotive and the hoisting engine on the one next to the locomotive. A cable runs from the hoisting engine to the dipping machine. The overseer gives the signal, and the dipper is let down into the ditch. It is worked by cables. The dipper takes up the dirt and places it on the flat car in front. His duty was to hook up the machine, and the hoister runs the machine back towards the locomotive, so as to make room for the next pile of dirt. He was two or three cars from the hoisting engine at the time he was hurt. When dipping dirt he hooked up the machine every two or three minutes. He was required to be at the hooking chain. When the signal was given he unhooked the chain. The locomotive stopped while the machine was being hooked. The train would move while the dipper was being filled. He could not tell when the engine moved, except by the whistle or the bell ringing. The cable on the hoisting machine and dipper
(402) would begin to move after the dipper had filled and was ready to unload on the car. He was sitting on the side of the flat car, waiting for the signal to be given to hook up the chain and snatch-block. The dipper was coming up from the ditch with dirt. No signal was given to fix the chain. The locomotive moved forward and threw him over, and he caught at something, and caught the chain, which drew his hand into the snatch-block and injured him. No signal was given him that the train was going to move. It was a sudden movement of the car; he was not looking for it; it was a harder movement than any he had experienced since he went to work. The custom had been to work the hoisting machine only when the cars were not moving. If he had not thrown his hand on the chain his head would have gone on it. At

the time he was injured he was sitting down. He did his work while standing up; he could not perform his duty sitting down. Was sitting where he could get up and perform his duty on signal. He was sitting on the side of the car. No one told him to sit there. His feet were hanging down. When the dipper got on the car it was his duty to hook it up, but it was not necessary at this time to hook it up. He was waiting for them to give him the signal; had his back to the chain, which caught his hand. The cable was running; he knew it was running. He knew if he put his hand in it he would be hurt.

The evidence on the part of defendant tended to show that plaintiff should not have been sitting down at the time of the injury; that his duty required him to stand up, and that the men in charge of the locomotive did not know that he was sitting. The defendant's witnesses also denied that the engine moved when plaintiff was injured.

Plaintiff, being recalled, said that he was sitting so that he could get up, turn and attend to his business; that if he had been sitting three feet further away, which he could have done, he would not have been hurt; sat at the place of his own accord.

At the conclusion of the evidence defendant moved for judgment of nonsuit, which was denied. Defendant excepted. The usual issues, directed to defendant's negligence and plaintiff's contributory negligence, were submitted to the jury. Defendant submitted a number of prayers for special instructions, several of which directed the (403) jury to return a verdict for defendant; others presented questions of law applicable to certain phases of the evidence. His Honor declined to give them as drawn, and defendant excepted. The instructions given, to which exceptions were taken, are set out in the opinion. There was a verdict for the plaintiff upon both issues and his damages assessed on the third issue. Motion for new trial denied. Defendant excepted. Judgment upon the verdict. Appeal.

L. M. Carlton for plaintiff.
Guthrie & Guthrie for defendant.

CONNOR, J., after stating the case: The negligence alleged and found by the jury was in moving the train suddenly and without giving the usual signals. The plaintiff says that when the dipper was filled, ready to be unloaded—that is, drawn over the car and deposit the mud upon it—the train did not move; that it was in motion when the dipper was filling with mud from the ditch on the roadside; that he was sitting on the side of the car, waiting for the signal to hook the chain, which would have required him to stand up. The sudden motion of the train, without signal or warning, caused him to throw his hand back, and it was thereby

thrust or thrown into the snatch-block and injured. His Honor instructed the jury, in this aspect of the testimony, that if they found that plaintiff's post of duty was on the car where the snatch-block or hoisting chain was suspended; that by the rules of the company, or by custom, a signal should be given before the train moved, and that plaintiff was on the car, where his duty required him to be, waiting for the dipper to come over and on the car, to be hooked by him, and that the engineer, without notice or signal, negligently caused the train to move or jerk at a time when it was not necessary to do so, and because of the sudden movement of the train plaintiff was jarred and about to fall and lose his balance, and threw out his hand to catch, and his hand came in contact with the chain or snatch-block and was injured, and the sudden negligent moving of the train was the proximate cause of the injury, they should answer the first issue "Yes." To this instruction (404) defendant excepted. In the light of the conflicting evidence, the question of the alleged sudden moving of the train, as testified to by plaintiff, was properly submitted to the jury. If, as alleged by him, the movement was unusual and not when the position of the dipper was such as to make it necessary and proper, certainly some warning or signal should have been given, so that employees on the cars, liable to be injured, should be warned and given an opportunity to avoid injury. It is a matter of common knowledge and every-day experience that a sudden movement of a train of cars is calculated to throw persons standing on them down and subject them to serious injury. The duty to give warning of unusual and unexpected movement to employees, whose duty it is to be on the cars, is manifest. This has been too frequently and uniformly held by this Court to require the citation of authority.

Defendant insists that plaintiff can not avail himself of this principle, because he was not at his post of duty, but had voluntarily placed himself in a position of obvious danger. It is true, as contended by defendant, that the duty imposed upon the engineer to give the signal is for the protection of the employees who are on duty and at the place assigned to them. He is not required to look out for those who, leaving the post or place assigned to them, have voluntarily or, in violation of their duty, assumed a more dangerous position. In *Howard v. R. R.*, 132 N. C., 709, the plaintiff employee, riding in a shanty car, in violation of the rules of the company and without any necessity, sat on the steps of the car, and was injured by striking his foot against a pile of wood on the side of the track. We held that he could not recover. His proper place was in the car, where seats had been provided and the rules of the company required him to be. It is elementary that it is negligence for a passenger to ride on the platform of a moving train when seats have been provided and there is room for him to be seated

inside the car. *Wagner v. R. R.*, 147 N. C., 315. In the case before us the plaintiff was required to stand up only when he was hooking the chain. We see nothing to justify the conclusion that while the dipper was gathering the mud and placing it upon the car he was under any obligations to stand up. If he was at his post, to hook the chain when signalled, he performed his full duty. It was necessary (405) for him to remain on the car, so that when he was called upon he could promptly hook the chain. This was done every two or three minutes. There is no suggestion that by sitting on the side of the car, in the manner described, he was out of the line of his duty. It is the duty of a conductor on a passenger train to pass through the cars, to take up the tickets and look after his train; but it would not be contended that if, while "on his run," he sat down and was injured by the negligent management of the engine by the engineer, he could not recover because he was not "standing up" or passing through the cars. He is none the less on duty when sitting down than when passing through his cars. So with the plaintiff; his place was on the car, near to the chain and snatch-block. If he negligently sat so near the edge of the car that by the usual movement of the train he fell off, his negligence would be the proximate cause of the injury, and he could not recover for an injury sustained thereby. This view of the case was put before the jury by his Honor, who told them that if he were sitting down, as he testified, and by the motion of the ditching machine he was jarred, and threw his hand onto the snatch-block and was thereby injured, he could not recover. This was obviously correct, because the motion of the ditching machine, when properly operated, was one of the risks which plaintiff assumed when he took the employment. But the sudden, unusual and unnecessary movement of the train, without signal, was negligent, and the employee never assumes the risk of an injury sustained by defendant's negligence. It may well be that the engineer did not know that the plaintiff was sitting down near the snatch-block, or that by suddenly, and without warning, moving the train he would cause him to sustain the injury. This is not the test of liability for negligent conduct. He did know that employees were on the flat cars, operating the ditching machine; that while the dipper was being drawn onto the car for the purpose of placing the dirt or mud, the engine should not move, certainly not do so without giving warning. He further knew that it was hazardous to men at work on the cars to suddenly, and without warning, move the train; to do so was negligence, and his employer, the defendant, is liable for such injury as was the proximate result (406) of such negligence. Human life and limb is of too much value, in the estimation of the law, to permit it to be sacrificed or destroyed by negligent handling of such powerful agencies without warning and

signals to those to whom the common employer owes the duty of giving warning. The defendant's witnesses deny that the train was moved, but the issue has been settled against them by the verdict. We find no error in his Honor's charge upon the first issue.

The defendant contends that, as a matter of law, upon his own evidence, plaintiff was guilty of contributory negligence. The learned counsel stresses upon our attention plaintiff's statement that the engine started the car and he threw his hand back and struck the chain; that he knew the cable was running; that he knew if he put his hand in it he would be hurt. Of course, if plaintiff had put his hand in the snatch-block or on the cable, knowing the danger, his negligent act would have been the proximate cause of his injury, and he could not recover. This is manifest. He says that, as the train moved suddenly, he lost his balance and threw his hand back and struck the chain; that if he had not done this he would have fallen and his head would have struck it.

His Honor submitted the testimony upon the second issue, under the following instructions. After explaining to them the duty of the employee to select a safe place in which to perform his work, when two are open to him, he said: "If you should find the facts in this case to be that the plaintiff selected a dangerous place in which to wait until the dipper should be placed on the car and by him unhooked, in accordance with his duty, when there were other places or positions on the cars that were safe, and you further find that a man of ordinary prudence would not have selected a position such as that occupied by the plaintiff at the time of the injury, then and under these circumstances, if you find such was the condition and facts, the plaintiff would be guilty of contributory negligence, and you should answer the second issue 'Yes.'" This was correct.

We notice an exception to the following language used by his
(407) Honor: "The plaintiff alleges that he was injured by the defendant moving its train of cars without giving him notice or signal by ringing the bell or blowing the whistle, which it was its duty to do." In their brief the learned counsel assume that in using this language his Honor instructed the jury that it was the duty of defendant to give plaintiff signal by ringing the bell or blowing the whistle. We do not so interpret his Honor. He was stating the plaintiff's contentions. When he came to instruct the jury he explained to them that the duty to give a signal was dependent upon the rules of the company or the custom. We have carefully examined the record and the briefs of counsel, and find no error. There were no exceptions to the instruction upon the measure of damages.

No error.

Cited: Coore v. R. R., 152 N. C., 704.

ELIZABETH CITY v. D. B. BANKS ET AL.

(Filed 7 April, 1909.)

1. **Cities and Towns—Franchises—Powers—General Statutes—Public Utilities.**

The right or power of a municipal corporation "to grant, upon reasonable terms, franchises to public utilities" did not exist by general statute prior to the enactment of section 2916, subsection 6, of the Revisal, effective 1 August, 1905.

2. **Same—Use of Streets—Legislature.**

The power to grant a franchise to a business corporation over the streets of a municipality rests in the Legislature, and can not be granted by a municipal corporation when authority is not conferred by a general statute or special act.

3. **Same—Construction of Statutes.**

A municipal corporation can exercise only such powers as are expressly granted or necessarily and fairly implied in or incident to the exercise of the powers which are granted to courts, resolving any fair, reasonable doubt concerning the existence of the power against the corporation.

4. **Cities and Towns—Use of Streets—Gas Plants—Public Utilities.**

Whether a franchise granted to a business corporation to lay gas pipes in or over the streets of a municipality for the purpose of supplying gas to the citizens is one for a public utility, *quære.*

5. **Same—Compensation.**

The title to either the fee in the soil or an easement is vested in a municipality, for the use of the people, as and for a specific highway, which, without legislative authority, can not be diverted from that use. As to whether the Legislature can grant a right to use the streets of a municipality to a business corporation without compensating the adjoining owners, discussed by CONNOR, J.

6. **Cities and Towns—Use of Streets—Gas Plants—Franchise Void—Legislative Powers.**

A franchise to a business corporation by a municipality to lay gas pipes over or under its streets for the purpose of selling gas to its citizens for light, fuel and power, not exceeding a certain rate or price, is void without an express grant of power from the Legislature; and the result is not changed by giving the municipality the right to purchase, after a certain period of time, at a price to be ascertained by arbitration, or by the authority given the business corporation to contract with the municipality for furnishing gas.

7. **Cities and Towns—Use of Streets—Gas Plants—Franchise.**

The right granted to a municipal corporation to place gas pipes and mains in the public streets of a city for the distribution of gas for public and private use is a franchise and not a license.

8. Cities and Towns—Franchise Void—Bond for Performance—Contracts Unenforcible.

A bond given to a municipal corporation for the performance of certain work to be done under an *ultra vires* and void franchise granted by it is without consideration and unenforcible.

9. Cities and Towns—Franchises Void—Ratification—Pleadings—Proof.

When a franchise given by a municipal corporation is void for want of legislative authority to grant it, and the municipality sues the one to whom the franchise was granted on his bond, given for the performance of work to be done thereunder, it is necessary for the municipality to plead and prove acts of ratification under a general statute, when such is relied on, and show that substantial work had been done since the operative effect of the general statute.

ACTION tried before *Guion, J.*, and a jury, at November Term, 1908, of PASQUOTANK.

The pleadings upon which judgment was rendered disclose this case: On the application of defendant D. B. Banks, the plaintiff, a municipal corporation, duly chartered by the General Assembly of North (409) Carolina, through its mayor and aldermen, on 19 June, 1905, undertook to grant to said Banks, by an ordinance duly passed, on 3 July, 1905, a franchise, extending thirty years, to construct in said town a gas plant for the purpose of furnishing gas, for light, fuel and power to the citizens of Elizabeth City. Said franchise carried the right to use the streets of said city as the said Banks deems necessary and requisite for the purpose of laying pipes and other devices incidental and necessary to the establishment, location and operation of said plant. Permission is given said Banks to use alleys, lanes, highways, streets, bridges and streams within the limits of said city; also to place poles and string wires along the streets, etc. Permission is given said Banks to contract with the citizens of said town for furnishing gas for light, fuel and power, and to contract with the town of Elizabeth City for said purpose. Maximum rates which said Banks was to charge the citizens for gas were fixed in said ordinance. The city reserved the right to buy the plant at the end of ten years, at a price to be fixed by arbitration. In consideration of the grant of the franchise, Banks contracted with the city that he would begin the erection of said gas plant within nine months from the passage of the ordinance, and complete the same within twenty-one months from said date, subject to certain contingencies named. For the purpose of securing the performance of the covenants entered into by him, and in consideration of the grant of said franchise, the defendant Banks, as principal, and the defendant Fidelity Deposit and Trust Company executed to plaintiff a bond in the sum of $5,000, conditioned that if the said Banks should fail to comply with

the stipulations in said contract they would pay to said city $5,000 as liquidated damages, it being recited therein that, "in the opinion of the undersigned, the said amount of $5,000 is not an unjust, absurd or oppressive amount, but a fair and just compensation to be paid upon the failure," etc. Plaintiff alleges that defendant Banks began the construction of the plant within nine months, but failed to complete the same within twenty-one months. Defendant admitted the execution of the bond, but denied that the plaintiff had any corporate power to grant the franchise, and that its attempt to do so was utterly void; that by reason thereof there was no consideration to support the cove- (410) nants made by Banks, the performance of which was secured by the bond, and that same were void; that by reason of the absence of power to grant the franchise the ordinance passed by the board of aldermen was *ultra vires* and void. Defendants also aver that defendant Banks began to construct said plant within nine months, but was prevented from completing it by the financial panic which overtook the country, rendering it impossible for him to procure the materials necessary for completing the work; that he asked for an extension of time, which was refused, etc.

His Honor, being of the opinion that the condition of the bond had been forfeited, and that the matter set up in the answer did not constitute a defense thereto, rendered judgment upon the pleadings for $5,000 and costs. Defendants excepted and appealed.

J. Heywood Sawyer, Shepherd & Shepherd, Pruden & Pruden, and George J. Spence for plaintiff.

Aydlett & Ehringhaus and Edward Duffy for defendants.

CONNOR, J., after stating the facts: The question which lies at the threshold of this case is whether, in the absence of any legislative authority, express or implied, the plaintiff, through its governing body, had any power to grant to the defendant Banks the franchise to use its streets in the manner set forth in the ordinance. It is conceded that, prior to the enactment of section 2916, subsection 6, of the Revisal, which became effective 1 August, 1905, no such power was conferred upon municipal corporations by the general statutes prescribing the powers of cities and towns. By that statute they are authorized "to grant, upon reasonable terms, franchises to public utilities." Looking, therefore, to the charter of the plaintiff (Private Laws 1905, ch. 15), we find no express power conferred upon the board of aldermen to grant franchises in or over the streets of the city. Section 19 confers the power to make such ordinances as they may deem necessary for the government of the city, not inconsistent with the laws of the land, and by all needful ordi-

nances to secure order, health, quiet and safety within the city
(411) limits and for one mile beyond. Such special powers as are conferred are confined to passing ordinances relating to markets, fires, observance of the Sabbath, nuisances, powder, speed of riding and driving vehicles, keeping the sidewalks clear of obstructions, etc., regulating building material, regulating charges for hacks and omnibuses, and appointing inspectors of fish and meats. Provision is made for electing a street commissioner, with power to keep in repair the streets, bridges, etc. The board of aldermen are given power to lay out and open streets, to extend or discontinue them, and to condemn land for these purposes. We find no grant of power to make provision for furnishing lights, power or fuel, or for establishing plants for that purpose. No question is presented upon this record in regard to the power, by implication, for providing for lighting the streets. This would doubtless be found, by necessary implication, in the power to regulate the streets, provide for the safety of the people, etc. This, under the more recent decisions of this Court, would be not only an implied power, but a duty, the discharge of which would involve a necessary expense. *Faucett v. Mt. Airy,* 134 N. C., 125; *Davis v. Fremont,* 135 N. C., 538, and other cases reversing *Thrift v. Elizabeth City,* 122 N. C., 31. It will be noted that the contract made with defendant Banks makes no other provision for furnishing light for the streets than a permission to make a contract with the city for that purpose. He is under no obligation to do so. This question is therefore eliminated from the discussion. The purpose of granting the franchise is to permit defendant Banks to supply light, fuel and power to the citizens of the town. He does not come under any obligation to furnish all of the citizens. It is true that maximum rates are prescribed, and the city reserves the power to buy the plant after ten years, at a price to be fixed by arbitration. Whether the plant to be established by the defendant Banks is a public utility may be open to controversy, but our decision does not rest upon that question, and it is not necessary to discuss it. We assume, for the purpose of the decision, that it is a public utility. It is an elementary principle of law that a municipal as well as any other corporation can exercise only such powers as are expressly granted or necessarily
(412) and fairly implied in or incident to the exercise of powers which are granted. Any fair, reasonable doubt concerning the existence of the power is resolved against the corporation. 1 Dillon Mun. Corp. (4 Ed.), 89. *Mr. Justice Bynum,* in *Smith v. New Bern,* 70 N. C., 14, states the doctrine approved by *Judge Dillon* and uniformly followed by this Court—in fact, so far as our examination goes, of all American courts. He says: "All corporations derive their powers from legislative grants, and can do no act for which authority is not expressly given or

may not be reasonably inferred. But if we say that they can do nothing for which a warrant could not be found in the language of their charter, we deny them in many cases the power of self-preservation, as well as many of the means necessary to effect the essential object of their creation; hence they may exercise all the powers within the fair intent and purpose of their creation which are reasonably necessary to give effect to powers expressly granted." Reese Ultra Vires, sec. 170; *R. R. v. R. R.*, 114 N. C., 725. Applying this general principle to the case at bar, what power has a municipality, through its governing board, to use or permit the use of its streets for other than the purpose of a highway? It does not appear, nor do we deem it at all material to inquire, whether the city owns the fee in the soil over which the streets are laid out, or only an easement. Whatever difference of opinion exists in respect to the rights of abutting owners in regard to the use of the streets for other than the purposes of highways does not affect the merits of this case. In either event the law is well settled that the title either of the fee in the soil or an easement is vested in the municipality, in trust for the use of the people as and for a public highway, and that it can not, without legislative authority, divert them from this use. How far the power of the Legislature to permit other burdens to be imposed upon them may be exercised without providing for compensation to the municipality is not involved in this discussion, and we only refer to it to exclude any suggestion that in defining the power of the Legislature to impose burdens upon the streets of a municipal corporation we are referring to that question. We held, in *Brown v. Electric Co.*, 138 N. C., 533, and *Staton v. R. R.*, 147 N. C., 428, that the Legislature could not do so without providing for compensation to the abutting owner. (413) That the Legislature has very extensive powers over the public streets as a part of the public highways of the State is well settled, and that such power as the municipal authorities have are derived from legislative grant is equally well settled. *Judge Dillon* says: "Public streets, squares and commons, unless there be some special restriction when the same are dedicated or acquired, are for the *public* use, and the use is none the less for the *public at large*, as distinguished from the municipality, because they are situated within the limits of the latter, and because the Legislature may have given the supervision, control and regulation of them to the local authorities. The Legislature of the State represents the public at large, and has, in the absence of special constitutional restraint, and subject to the property rights and easements of the abutting owners, full and paramount authority over all public ways and public places." 2 Mun. Corp. (4 Ed.), 656. That the commissioners of a town can not without legislative authority sell a street or park has been uniformly held by this Court. *Moose v. Carson*,

104 N. C., 431; *White v. R. R.*, 113 N. C., 610; *Southport v. Stanly*, 125 N. C., 465; *Turner v. Commissioners*, 127 N. C., 153. In *White v. R. R., supra, Shepherd, C. J.*, discusses the question in the light of the authorities. The opinion is amply sustained, both by reason and authority. When we look beyond our own jurisdiction for cases "in point," we find that the principle has been applied to attempted grants of franchises to put gas pipes in the streets. In *Gaslight Co. v. Gas Co.*, 25 Conn., 19, it appears that the common council of the city, whose general powers are much the same as the board of aldermen of plaintiff, undertook by a resolution to confer upon the plaintiff an exclusive franchise for fifteen years to lay and maintain its pipes over or under the streets of the city. *Hinman, J.*, says: "The right of way over the streets being public to all who may have occasion to use them, and the only power of the city over them being given by its charter in order to regulate such use, it seems clear that the city can make no grant which shall convey to the grantee any interest in them which can in any proper sense be deemed property." The opinion is quoted with ap-
(414) proval by *Judge Dillon*. 2 Mun. Corp., 693. The franchise in that case was exclusive, but, as will be seen, the decision is put upon the ground stated. The plaintiff also claimed the franchise under an act of the Legislature, and in respect to this the Court held that the grant of an exclusive franchise was void because of constitutional inhibition. In *Gaslight Co. v. Light Co.*, 115 U. S., 659, it is held that the right to place gas pipes and mains in the public streets of a city for the distribution of gas for public and private use is a franchise, the privilege of exercising which can only be granted by the State or by the municipal government of the city acting under legislative authority. In *S. v. Gas Co.*, 18 Ohio St., 262, the Court, holding the same opinion, said: "This franchise may be granted directly by the State, or by a municipal corporation if it is clothed with power to make the grant. Such power in the municipality must either be expressly granted or arise out of the terms of the statute by necessary implication, so direct and necessary as to be clearly conferred." *Purnell v. McLane*, 98 Md., 589. In *Gas Co. v. Dwight*, 29 N. J., 242, *Van Fleet, Vice Chancellor*, says: "The defendants claim the right to use the public streets of Jersey City for the purpose of placing pipes therein, through which they may furnish gas to their customers. This is a right which the sovereign power alone can confer. The rule must be considered settled that no person can acquire a right to make a specific or exceptional use of a public highway not common to all the citizens of the State except by a grant from the sovereign power." In *Boston v. Richardson*, 13 Allen, 146, it is said that the right of putting gas pipes in public highways has never been exercised except by virtue of an express statute. *Mobile v.*

R. R., 124 Ala., 132; *R. R. v. R. R.*, 39 Fla., 306; *Gaslight Co. v. Middletown*, 59 N. J., 228. The authorities are quite uniform upon the subject. The wisdom of putting the limitation upon the power of governing boards of towns and cities is apparent. If they be permitted, without express power, known to the people who select them, to grant to persons and corporations franchises over the public streets, the arteries of business, social and community life, it would be to subject them to burdens unwisely or otherwise conferred, limiting and restricting their use by the people for whose benefit they have been laid out (415) and by whose taxes they are maintained. In the absence of any express grant of power in the charter, it would be difficult, if we adhere to the canons of construction of corporate charters, to find it by implication. It will hardly be contended that the laying of gas pipes for the purpose of furnishing light, fuel and power to the citizens by a private business enterprise is essential to or implied in the power to regulate and control the use of the streets. As we have seen, the courts have not found the power except as an express grant from the sovereign. If the attempt to confer the franchise upon defendant Banks is ineffectual because the plaintiff had no power to do so, the result is that the ordinance was *ultra vires* and therefore void. The doctrine is strongly stated in *R. R. v. R. R.*, 8 C. E. Gr., 441: "Whether franchises are delegated by special charters or under general laws, they are emanations from the people in their sovereign capacity. What is not conferred is withheld and remains in their original source. The attempt to exercise them by individuals or companies until so conferred can be nothing but an unwarrantable usurpation of power. This doctrine is rooted and grounded in the common law, and equally so in public policy and public expediency." If it be suggested that, while the ordinance was ineffectual to confer a franchise for thirty years, it was valid as a license and protected defendant Banks from prosecution for maintaining a nuisance, the obvious answer is that a franchise is property, intangible, it is true, but none the less property—a vested right, protected by the Constitution—while a license is a mere personal privilege, and, except in rare instances and under peculiar conditions, revocable. The plaintiff did not undertake to give or defendant to acquire a license, but a franchise, upon the faith of which he was to invest a large sum of money and establish a business of permanent character. In the absence of power in the board of aldermen to grant a franchise in the streets, we can see no reason why the Legislature, at the next or any future session, could not, in the exercise of its right to control and prescribe the use to which streets might be subjected, have prohibited the defendant Banks from continuing to use the streets or maintain his pipes, lines, poles and "other devices" thereon. Whether a succeeding board (416)

of aldermen would have been estopped to do so, after the pipes were laid and the other means for maintaining and operating the plant established, it is not necessary to decide. That corporations may under some conditions be estopped from avoiding *ultra vires* acts is settled; but the question does not arise upon this record, because it does not appear that any substantial work was done under the authority of the ordinance, and the plaintiff declared the franchise forfeited under the terms of the grant. It is again suggested that the ordinance was ratified by the plaintiff subsequent to the act of 1905 (Revisal, sec. 2916).

Without discussing the question whether a contract void, because *ultra vires,* can be ratified, we find in the pleadings nothing to indicate a purpose to ratify, or any act which is capable of being construed into a ratification. It is alleged in the complaint that defendant Banks failed to commence the erection of the plant within nine months and to complete it within twenty-one months. The defendant Banks alleges that he laid a part of the pipes within nine months from the date of the ordinance. It does not appear that he laid any pipe after 1 August, 1905, or that any other act was done by him in connection with the work. He has never used the franchise. The plaintiff does not allege any ratification or any act which could be so construed. If, as we have seen, the ordinance was void because the plaintiff was without authority to grant the franchise, it is evident that the defendant Banks acquired nothing of any value by reason of its passage. If he had, in the performance of his covenant, begun the work within the prescribed period, he would have been liable to be enjoined or prosecuted for obstructing the streets. It is manifest that as he acquired nothing his covenants are without any consideration to support them. There is a total failure of consideration, and no action can be maintained for damages by either party. It is manifest that plaintiff can not maintain an action for damages because of the failure of defendant to do an unlawful act—that is, obstruct the streets, which is indictable at common law. The plaintiff conferred no right upon the defendant Banks, and therefore can claim nothing from him on account of its unauthorized attempt to do so. We forbear discussing the other questions raised by defendants in their brief. The judgment must be reversed, with direction to the Superior Court to set it aside and take such further action as is in accordance with law.

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Reversed.

Cited: Water Co. v. Trustees, 151 N. C., 175, 176.

CAMP MANUFACTURING COMPANY v. DURHAM FERTILIZER COMPANY.

(Filed 7 April, 1909.)

Judgments, Assignment of—Summons—Service—Invalid Judgment—Notice—Limitation of Actions.

When an assignee of a judgment has knowledge that service of summons had not been made on the judgment debtor, and that the judgment was invalid as to him, the statute of limitations begins to run in favor of the assignor of the judgment; and when suit is brought by the assignee, upon the implied warranty of the assignor, more than three years after he had such knowledge, the action will be barred.

APPEAL from *Long, J.,* at January Term, 1909, of DURHAM.

Action to recover the sum of $860, being the principal, together with interest thereon from 1 January, 1893, of a judgment recovered by the defendant at March Term, 1893, of the Superior Court of Durham County, against J. F. Newsome, Robert Holloman and W. E. Jenkins. This judgment, on 21 March, 1901, was assigned to plaintiff by defendant "for value received and without recourse on it," the real consideration paid for the assignment being $75. The defendant pleaded that it was not liable under the terms of the assignment and the several statutes of limitations. From a judgment upon a "case agreed" dismissing the action the plaintiff appealed.

Winborne & Lawrence, Manning & Foushee for plaintiff.
F. L. Fuller for defendant.

BROWN, J., after stating the facts: In the statement of facts it appears that the judgment assigned was entirely regular upon its face. It afterwards transpired that, while purporting to have been served on the defendant Jenkins, in fact, the summons had never been (418) served on him.

The defendant admits the general rule to be that there is an implied warranty on the part of the assignor of a judgment that such judgment is a valid, subsisting obligation against the debtor for the amount specified therein, and has not been paid, in whole or in part. But it is contended that the use of the words "without recourse on it," in the transfer of the judgment involved in this action, relieved the assignor of that implied warranty. It is further insisted that the plaintiff's cause of action is barred by lapse of time.

The first proposition of the defendant is sustained by a very strong opinion of the Georgia Supreme Court, in *Thompson v. Bank,* 102 Ga., 696; 29 S. E. Rep., 610, but it is unnecessary to pass on it here, as we

are clearly of opinion that the action is barred, whether it be considered as an action for money had and received, for deceit or for breach of an implied warranty.

The action could not well be maintained on either of the two first-mentioned grounds, as there is not a total failure of consideration or any fact tending to indicate deceit or fraud. The judgment is valid against the other two defendants, and may eventually be made out of them, and it is admitted that this defendant believed it to be valid as to the other defendant therein, and that it purported on its face to be so.

It is admitted that the plaintiff had knowledge, on 25 April, 1904, that the summons had never been served on Jenkins, and that as to him the judgment was invalid. In any view, the plaintiff's cause of action accrued then. It could have then commenced action at once for a breach of the implied covenant of warranty, and upon establishing that the judgment was invalid it could have recovered damage, unless prevented by the words of the assignment. As more than three years had elapsed before the commencement of this action, on 14 October, 1907, it would appear that, giving the plaintiff the benefit of the three-years statute, his cause is barred. Clark's Code (3d Ed.), sec. 115, subsec. 9, and cases cited.

It is contended by defendant that the cause of action accrued (419) at the date of the assignment, 21 March, 1901, and authority is cited in support of that proposition, but it is unnecessary to consider it, as we are clear that, giving the plaintiff the benefit of the shortest period which, under our statutes, can apply to this transaction, the cause of action, if any ever accrued, is barred.

Affirmed.

S. HOCKFIELD v. SOUTHERN RAILWAY COMPANY.

(Filed 7 April, 1909.)

1. Pleadings—Admissions—Evidence.

When paragraphs of the answer, put in evidence by plaintiff, are complete in themselves, it is not error to exclude other paragraphs thereof, offered in evidence by defendant, containing distinct averments in its own interest.

2. Carriers of Freight—Consignee—Notice of Arrival—Principal and Agent.

Notice given by a carrier of the arrival of goods to a transfer company in the habit of hauling consignor's goods from the depot is not of itself sufficient notice to the consignee. The transfer company is the agent of the consignee only to the extent of the goods actually hauled by it.

3. **Pleadings—Amendments—Conditions—Discretion of Court—Appeal and Error.**

The trial judge may allow a plaintiff to amend his complaint and the defendant to amend its answer, restricting the latter from pleading the statute of limitations. His action is discretionary and not reviewable.

4. **Carriers of Freight—Consignment Missent—Rebilled—Intrastate Shipment—Penalty—Interstate Commerce.**

An interstate shipment of goods which was missent, bill of lading lost, and rebilled from one point in the State to another therein, is an intrastate shipment, and upon the carrier's violating the provisions of the Revisal, sec. 2633, the penalty therein accrues.

5. **Carriers of Freight—Delay in Delivery—Interstate Commerce—Burden.**

The penalty for failure of a common carrier to deliver freight, as prescribed by the Revisal, sec. 2633, shipped from beyond the State, after it has been unloaded from its cars and while in its depot, is constitutional and not a burden upon interstate commerce.

6. **Carriers of Freight—Delivery—Wrongful Detention—Storage Charges.**

A carrier can not enforce collection of storage charges arising from its wrongful refusal to deliver goods to consignee.

ACTION tried before *Jones, J.*, and a jury, at October Term, (420) 1908, of DURHAM.

This action began before a justice of the peace. The plaintiff did not file any written complaint. The summons required the defendant "to answer the complaint of plaintiff for the nonpayment of $200 and interest from 21 August, 1907, until paid—$97, value of box of pants shipped him by Manhattan Pants Company, and $103, penalty for delay in such case provided in section 2632, Revisal of 1905."

The defendant filed a written answer in the justice's court, denying that it was indebted to plaintiff, and set up a counterclaim for $25 for storage of the box of pants. The justice gave judgment for $93, value of the goods, and $50. The case was carried by appeal to the Superior Court. The plaintiff was allowed to amend and allege that "the defendant received at Durham, N. C., the box of pants addressed to plaintiff at Durham; that the defendant, upon the arrival of said box of goods so addressed to plaintiff, as consignee, failed to notify plaintiff of its arrival and the charges thereon, as required by section 2633 of the Revisal, and for such failure demands the sum of $50 as penalty imposed by said section 2633 of the Revisal."

The jury responded to the issues as follows:

1. "What is the value of the case of pants shipped to plaintiff?" Answer: "Ninety-three dollars."

2. "Did defendant unlawfully refuse to deliver the case of pants to plaintiff?" Answer: "Yes."

3. "Did defendant, upon the arrival of the case of pants, notify plaintiff, the consignee, of the arrival and the charge for transportation upon the same?" Answer: "No."

4. "What damage, if any, by way of penalty, is plaintiff entitled to recover of defendant?" Answer: "Fifty dollars."

5. "What amount, if anything, by way of counterclaim, for storage, is defendant entitled to recover of the plaintiff?" Answer: "Nothing."

Judgment accordingly. Appeal by defendant.

(421) *Manning & Foushee for plaintiff.*
Guthrie & Guthrie for defendant.

CLARK, C. J. The plaintiff introduced two of the four paragraphs of the answer filed before the justice of the peace. The defendant offered the other two paragraphs. In *Lewis v. R. R.*, 132 N. C., 382, it is said: "Where a paragraph of an answer admits a specific fact, and in another part of the same paragraph denies the allegations of the corresponding paragraph of the complaint, the plaintiff is entitled to introduce the admission without introducing the part denying the allegations of the complaint." Here the paragraphs of the answer put in evidence by the plaintiff were complete in themselves, and it was not error to exclude the distinct averments in its own interest made by the defendant. It could put on evidence in support of them at the trial. *Stewart v. R. R.*, 136 N. C., 385.

A transfer company was in the habit of hauling goods for plaintiff and others, but that only made it the agent of plaintiff as to goods actually hauled. There was no evidence that the transfer company was told to haul these goods, and it was not error to exclude a question asked of an agent of such transfer company to show notice given to him of plaintiff's goods being in the depot, when there was no evidence that such notice, if given, was communicated to the plaintiff. The plaintiff testified that he applied for the goods in person repeatedly.

The court allowed the plaintiff to amend its complaint and the defendant to amend its answer, but not to plead the statute of limitations. The amendment did not set up a cause of action wholly different, but merely amended the complaint to claim the penalty of $50 under the Revisal, sec. 2633. Such amendment was in the discretion of the court, as was also the refusal of an amendment pleading the statute of limitations. *Parker v. Harden*, 122 N. C., 111; *Godwin v. Fertilizer Co.*, 123 N. C., 162.

The fourth exception is abandoned. The fifth exception presents the contention that this is an interstate shipment, and that the Revisal, sec. 2633, does not apply. It is true that the shipment originated at Balti-

more, Md., but it seems to have gotten "missent," and left its route, which was *via* Dunn, N. C., thence over the Durham and South- (422) ern Railroad to Durham, N. C. The defendant's answer avers that by reason of said error or mistake the Atlantic Coast Line Railroad Company "rebilled" the goods from Selma to Durham over defendant's line, and that it received and transported the goods by virtue of said Selma to Durham bill of lading, and that the original waybill, or bill of lading, from Baltimore to Durham never came into its possession. Clearly this is an intrastate matter. But if it had been an interstate transaction the penalty imposed by the Revisal, sec. 2633, has nothing to do with interstate transportation, but deals only with the neglect of duty of the defendant after the transportation was fully completed and the goods lay in its warehouse—not in the cars at Durham. The plaintiff demanded his goods again and again, but the defendant would not make out its freight charges nor deliver the goods. The penalty laid by the Revisal, sec. 2633, has been held not a burden on interstate commerce (*Harrill v. R. R.*, 144 N. C., 532); and, indeed, the failure to deliver freight is not interstate commerce. *Morris v. Express Co.*, 146 N. C., 171.

Exception 6 is for refusal to permit defendant to amend its answer so as to plead the statute of limitations. This was a matter of discretion and not reviewable.

The defendant still has the goods, and the plaintiff has been sued by consignor and been forced to pay their value, with court costs added. There is no possible ground for defendant's counterclaim for warehouse charges on goods it wrongfully withheld and refused to deliver.

No error.

Cited: Modlin v. Ins. Co., 151 N. C., 39; *Jeans v. R. R.*, 164 N. C., 228; *Thurston v. R. R.*, 165 N. C., 599.

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(423)

IN RE APPOINTMENT OF GUARDIAN FOR MELISSA DENNY.

(Filed 7 April, 1909.)

Guardian and Ward—Incompetency—Appointment of Guardian.

A finding of the jury that a person, the subject of an inquisition of lunacy, is incompetent from want of understanding to manage his own affairs is such as to require the clerk to appoint a guardian for him, under the Revisal, sec. 1890, whatever the cause may be.

IN RE DENNY.

APPEAL from *Jones, J.*, at November Term, 1908, of PERSON.

This was an inquisition of lunacy. The jury returned the following verdict:

1. "Is Melissa Denny incompetent, from want of understanding, to manage her own affairs?" Answer: "Yes."

2. "Is Melissa Denny totally deprived of her reason?" Answer: "No."

Upon this return the clerk of the Superior Court refused to appoint a guardian and dismissed the petition. Petitioner appealed to the Superior Court. At November Term, 1908, his Honor, *Judge E. B. Jones,* overruled the clerk and directed the appointment of a guardian. Exception and appeal.

Aycock & Winston, Bryant & Brogden and L. M. Carlton for plaintiff.

W. T. Bradsher and N. Lunsford for defendants.

CLARK, C. J. This proceeding is brought under the Revisal, sec. 1890, which was the Code, sec. 1670. This section clearly makes four classes of persons for whom a guardian may be appointed, namely, (1) idiots, (2) lunatics, (3) inebriates, and (4) those who are incompetent, from want of understanding, to manage their own affairs, by reason of the excessive use of intoxicating drinks or other cause. The verdict of the jury settles the fact that Melissa Denny belongs to the fourth class, and is a sufficient finding. *In re Anderson,* 132 N. C., 243; *Sims v. Sims,* 121 N. C., 298. *Armstrong v. Short,* 8 N. C., 11, was decided under chapter 228, Laws 1784, when such inquisition was limited to the first three (424) classes, (1) idiots, (2) lunatics, (3) inebriates. The fourth class was added by the Code, sec. 1670.

The same point now presented came up in *In re Anderson,* 132 N. C., 243, where it was held that a finding that Anderson was "not an idiot or lunatic, but that he was of unsound mind and incompetent, from want of understanding, to manage his own affairs," was "sufficient to meet the language and the spirit of the statute." The finding herein is in the exact language of the statute. The cause of such want of understanding would often be impossible to assign, and the jury is not required to find it. It is the fact of a want of understanding sufficient to manage her own affairs which requires the court to appoint a guardian, whatever the cause. The appointment of a guardian is not restricted to cases where the want of sufficient understanding is due to the excessive use of intoxicating drinks, but extends to cases where it is due to "other cause."

It is said in *In re Anderson, supra,* that the provision creating the fourth class may be subject to abuse, but that the sole function of the court is to construe and apply the law. The same case upholds the jurisdiction upon the same procedure.

Revisal, sec. 1890, is somewhat stronger than the Code, sec. 1670 (under which *In re Anderson, supra,* was decided), in that it adds the words "incompetent person," so that the concluding paragraph of the Revisal, sec. 1890, reads, "and he (the clerk) shall proceed to appoint a guardian, of any person so found to be an idiot, inebriate, lunatic or incompetent person."

No error.

(425)

J. E. SMITH v. G. E. ALPHIN.

(Filed 7 April, 1909.)

1. **Briefs—Exceptions Abandoned.**

Exceptions not stated in the brief are deemed abandoned. Rule 34.

2. **Evidence—Contracts—False Warranty—Price Paid—Recovery by Purchaser.**

Evidence that certain warranted preservative powders for fruit, sold by defendant to plaintiff, contained sulphur, contrary to the statute, the nature of which was not divulged to plaintiff until after he had paid for them, is incompetent upon the question of deceit or misrepresentation, in an action by the purchaser to recover the price he had paid.

3. **Same—Subsequent Purchase With Knowledge.**

One who had bought certain preservative powders for fruit, containing sulphur, the use of which is prohibited by the State, can not avail himself of the allegation of deceit or misrepresentation upon the warranty, in a suit he has brought to recover the price he has paid therefor, when he has since made a purchase of the same kind of powders with knowledge of their contents.

4. **Issues—Objections Cured by Verdict.**

An instruction, if erroneous, that certain matters arising under a certain issue submitted were the crucial ones, becomes immaterial when the jury has answered that issue in favor of the party objecting.

5. **Contracts—Warranty—False Representations—Test—Instructions.**

In an action upon a warranty for deceit or misrepresentation it is correct for the judge to charge the jury that one of the decisive tests whether the language used was a mere expression of opinion or a warranty is whether it purported to state a fact upon which it may fairly be presumed the seller expected the buyer to rely, and upon which the buyer would, ordinarily, and did rely.

6. **Contracts—Consideration—Preservative Powders—Use Prohibited by Statute—Value.**

In an action to recover the purchase price paid for certain preservative powders for fruits the fact that such powders contained sulphur, contrary

to a statute, does not in itself prove a failure of consideration, as it does not necessarily follow that they would be deleterious or worthless, especially when sulphur in such powders is approved for the purposes intended by the United States Department of Agriculture. Revisal, sec. 3972.

(426) APPEAL from *Neal, J.*, at August Term, 1908, of WAYNE.

The plaintiff alleged two causes of action, *i. e.*, false warrant in the sale of certain letters patent for an improved fumigating apparatus, which, in connection with certain sanitary powders, "would preserve all fruits and vegetables at a nominal cost," and also for deceit and false representation in the sale thereof, the said powders being alleged by plaintiff to be hurtful, their use contrary to law, and valueless. The answer was a full denial. Verdict for defendant, and appeal by plaintiff.

Aycock & Winston, M. T. Dickinson and F. A. Daniels for plaintiff.
J. D. Langston and W. C. Munroe for defendant.

CLARK, C. J. Exceptions 1, 4, 5, 6, 9, 10 and 12 are abandoned, not being set out in appellant's brief. Rule 34.

Exception 2 was for refusal to submit issues as to the second cause of action—for deceit and misrepresentation. But there was no evidence to justify the submission of those issues. The plaintiff relies upon his evidence, that the defendant did not divulge the nature of the powders —charcoal and sulphur—until after he had paid, and that the State law forbade the use of sulphur. Laws 1905, ch. 306, sec. 3. If this law applied to this case, this might have been a defense if the defendant had brought suit for the purchase money (*Vinegar Co. v. Hawn,* 149 N. C., 355), but it does not establish deceit or misrepresentation. Besides, as, subsequently, with full knowledge, the plaintiff made a second trade with the defendant, he can not now rely upon this allegation. *Smith v. Newberry,* 140 N. C., 385.

Exception 3 was that the judge told the jury that the second issue, "Did the defendant warrant that the said powders, when used in connection with said apparatus, would preserve fruits and vegetables, at nominal cost, so that they would at all times be as fresh, palatable and wholesome, as when picked from the trees or gathered from the garden?" was the crucial one. The jury answered this issue "No"; therefore the plaintiff's contention that the third issue, "Was the warranty false?" was the crucial one becomes immaterial.

(427) The court charged: "One of the decisive tests whether the language used is a mere expression of opinion or a warranty is whether it purported to state a fact upon which it may be fairly presumed the seller expected the buyer to rely, and upon which the buyer would ordinarily rely." The plaintiff's seventh exception was to this

paragraph of the charge, and the eighth was to the following instruction: "In addition to this, in order to constitute a warranty, the plaintiff must have relied on it, and must have reasonably relied upon it." We can not sustain these exceptions. *Baum v. Stevens,* 24 N. C., 411; *Beasley v. Surles,* 140 N. C., 605.

Exception 11: The food chemist, Mr. Allen, testified substantially that it was against the statutes of North Carolina for one to sell a preparation containing sulphur to be used in the preservation of fruit. Counsel for the plaintiff commented upon this evidence, but the court charged the jury that the act in question had nothing to do with the case. The plaintiff contends that it had much to do with the case, for if the preparation was outlawed by the State it was worthless; that the person using it would be guilty of a misdemeanor, and the contract between plaintiff and defendant would be not only *contra bonos mores,* but a violation of a plain statute, and therefore there would be no consideration whatever to support the contract, and the contract would be inoperative and void; that this contract was solvable only in North Carolina, and it was useless and worthless in said State, and no valid cause of action can grow out of a breach thereof, citing the Pure-food Law (chapter 306, Laws 1905, sec. 3). *Leathers v. Tobacco Co.,* 144 N. C., 343. It is true that the defendant could not recover the purchase price if the use of sulphur for that purpose were forbidden, but it does not necessarily follow that the article would be deleterious or worthless, and that the plaintiff could therefore recover back the money paid.

The Legislature had the constitutional right to enact the statute, but its judgment as to the laws of chemistry may be incorrect and the article not deleterious. If so, while the seller could not recover the purchase price, the buyer can not recover it back. The Pure-food Law (chapter 86, Laws 1899, and chapter 306, Laws 1905; Revisal, sec. 3970a, subsec. 6) manifestly has reference to the adulteration of (428) foods kept for sale (Revisal, sec. 3969), and, therefore, if for no other reason, does not apply to this controversy, and the judge, instead of the witness, was right. Section 8, chapter 89, Laws 1899, now Revisal, sec. 3972, is as follows: "But when standards have been or may be fixed by the Secretary of Agriculture of the United States, they shall be accepted by the Board of Agriculture and published as the standards for North Carolina." It is asserted in defendant's brief that at the time this contract was made, preserving by sulphur fumes was approved by the Agricultural Department of the United States, and that a circular has been issued by it approving of such preservatives. If so, then for this additional reason the Pure-food Law had nothing to do with this case.

No error.

JACOB COOK v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 7 April, 1909.)

Power of Court—Pleadings—Amendments—Discretionary Power—Findings—Record.

When it appears that a cause was entered as continued by consent for the term by the judge at a former term, in the absence of counsel in the case, by mistake of the judge, the court thereafter, at the same term, had the power and discretion to allow defendant to amend his answer and set up a further defense arising under the contract sued on. The discretionary power of the court to allow amendments to pleadings in term, when matters are *in fieri*, discussed by WALKER, J.

APPEAL by defendant from order of *Jones, J.*, entered at September Term, 1908, of ALAMANCE.

Morehead & Sapp for plaintiff.
King & Kimball for defendant.

WALKER, J. This action was brought to recover damages for the negligent failure of the defendant to deliver a telegram. The plaintiff filed his complaint 2 August, 1906, and the defendant filed its answer, which contained a general denial of the allegations of the com-
(429) plaint, on 15 September, 1906. At a special term of the Superior Court, held in July, 1907, it appeared from the minutes, the cause was continued by consent on 16 July, 1907, but the court finds as a fact that counsel were not present at the time and that the defendant's counsel did not know of the entry until September Term, 1908. On 23 July, 1907, during the second week of the special term, the court made an order allowing the defendant to amend its answer by averring that the plaintiff had not presented his claim within sixty days after the message was filed with the company, which, by the terms of the contract between it and the plaintiff, exonerates the defendant from liability for the alleged act of negligence. The amendment to the answer was filed on 6 August, 1907. The plaintiff first learned at September Term, 1907, that the order for the amendment had been made, and that the amended answer had been filed, but did not move at that term to strike out the order or the amendment of the answer, but did move, at March Term, 1908, to strike out the amendment. The motion was continued from time to time, and heard at September Term, 1908, when the judge then presiding ordered that the amendment be stricken out. Defendant excepted and appealed. In *Gwinn v. Parker,* 119 N. C., 19, it appeared that the plaintiff had filed his complaint, and judg-

ment by default, for want of an answer, was entered. During the same term the court set aside the judgment and allowed the defendant to answer. This Court, holding that there was no error, declared it to be the settled rule that any order or decree is, during the term, *in fieri,* and the court, during the same term, can vacate or modify it, and that the court has the discretion to enlarge the time for filing pleadings. To the same effect is *Halyburton v. Carson,* 80 N. C., 16, in which *Ashe, J.,* says: "It is familiar learning that all the proceedings of a court of record are *in fieri*—under the absolute control of the judge, subject to be amended, modified or annulled at any time before the expiration of the term in which they are had or done." *Faircloth v. Isler,* 76 N. C., 49; *Dick v. Dickson,* 63 N. C., 488; *Sneed v. Lee,* 14 N. C., 364. In *Penny v. Smith,* 61 N. C., 35, *Pearson, C. J.,* for the Court, said: "The motion to dismiss the appeal, upon the ground that the county court had no power to amend the petition after dismissing it (430) and granting an appeal to the Superior Court, was put on the ground that the court was *functus officio* in respect to the case, and had no further control over it. In this the counsel for the defendant is mistaken. The proceedings of the court are *in fieri* until the expiration of the term, and until then the record remains under the control of the court. It may strike out the judgment and enter a different one; it may amend the pleadings and do any other act necessary to effect the purposes of justice—and this as well after as before what purports to be a final judgment has been entered. In other words, the court has the whole term during which to consider of its action, and any entry made on a former day does not affect its power on a subsequent day. It is every day's practice in the Superior Courts to allow the writ to be amended by entering a larger sum, or, in ejectment, to extend the time of the demise; and these amendments are usually applied for and allowed after judgment has been entered and an appeal taken." But we need not and do not rest our decision upon the ground stated in the cases cited, for it appears in this case sufficiently by the findings of fact that the order continuing the case by consent was entered by mistake. That is the substantial meaning and effect of the findings. It follows, of course, that the court had the power and the discretion to allow an amendment of the answer and permit the defendants to set out as defensive matter the terms of the contract between the parties.

It is unnecessary to consider the other reasons assigned by the defendant's counsel for reversing the order of the court.

Reversed.

(431)

N. R. SYKES v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 7 April, 1909.)

Telegraphs—Negligence—Message—Reasonable Stipulations—Demand in Sixty Days.

A stipulation written on the back of a telegraph message, requiring, in effect, that a claim for damages should be presented within sixty days or recovery thereon would be barred, will be upheld as a reasonable regulation when it appears that the party claiming damages knew of the company's default more than sixty days before the action was brought, and made no claim therefor in that time.

ACTION tried before *Long, J.*, and a jury, at January Term, 1909, of DURHAM.

Plaintiff appealed.

Benj. Lovenstein and Manning & Foushee for plaintiff.
F. L. Fuller and Tillett & Guthrie for defendant.

WALKER, J. This action was brought to recover damages for mental anguish, alleged to have been caused by the negligent failure of the defendant to deliver a death message. Plaintiff's wife was critically ill, and his brother, J. W. Sykes, in his own name, but as agent for the plaintiff, N. R. Sykes, delivered a telegram to the defendant, at Durham, N. C., to be sent to Caze Cates, at Haw River, N. C., for the purpose of informing the plaintiff's two sisters of his wife's condition, though their names were not mentioned in the message, nor was the defendant's operator notified that it was sent for that purpose. The message, which was sent on 6 December, 1907, was not delivered, but on 7 December, 1907, the plaintiff learned of its nondelivery. This action was commenced 13 March, 1908. The contract with the company required that the plaintiff should present his claim within sixty days after the filing of the message for transmission or be barred of a recovery. It was admitted that no claim had been presented, although the plaintiff knew of the defendant's default more than sixty days before this action was commenced. At the close of the evidence the court, on motion of the defendant, nonsuited the plaintiff, under the statute, and he appealed. The validity of the stipulation as to presenting the plaintiff's claim within
(432) sixty days after knowledge of the nondelivery of the message has been received by him is too well settled now to be questioned. "The object of the requirement is to give the company cognizance of facts creating the liability, in order that it may use these for investigating the cause of the loss or injury. It is impossible for these companies

to keep up with all mistakes of their employees and the injuries arising therefrom; and, while they may be clearly liable for claims presented—and for which they would readily, without suit, indemnify the injured party—yet, if they have no facts on which to base an investigation, in order to determine whether they are liable, they would very probably be heavily taxed with an expensive litigation. So, if the plaintiff has good grounds to recover damages, he should impart these facts to the company, in order to avoid litigation." Jones on Telegraph and Telephone Companies, p. 380, sec. 395. The object, therefore, in requiring notice of the claim is to enable the company to ascertain whether it is liable for the damage. This stipulation exempting the company from liability, where the claim for damages is not presented in sixty days, is not a condition restricting its liability for negligence, nor is it in the nature of a provision limiting the time within which an action may be commenced and therefore having the force and effect of the statute of limitations. We have so held in *Sherrill v. Telegraph Co.,* 109 N. C., 527. In that case the Court, by the present *Chief Justice,* after deciding in favor of the validity of the stipulation, says: "If, therefore, the action was begun within sixty days after knowledge by the plaintiff of the failure to deliver the message, it would be such compliance with the stipulation as could be required in a case where a message was not delivered at all. If not brought within such time, the plaintiff is barred by his own negligence in not presenting his claim within the specified time." It is admitted in the case, and was also admitted here at the bar, that the action was brought more than sixty days after the plaintiff had acquired knowledge of the nondelivery of the message, and under the authority of that decision this action can not be maintained. The court properly ordered a nonsuit to be entered. It is so expressly decided in *Lewis v. Telegraph Co.,* 117 N. C., 436. The defendant (433) was guilty of inexcusable negligence in this case, but the plaintiff's failure to comply with a plain and valid stipulation requiring notice of his claim to be given has forfeited his right to recover against the defendant, even for its gross violation of duty.

No error.

Cited: *Barnes v. Tel. Co.,* 156 N. C., 154; *Lytle v. Tel. Co.,* 165 N. C., 505.

MOLLIE C. PARKER v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 7 April, 1909.)

1. **Railroads—Lessor and Lessee—Pleadings—Allegations of Lease—Demurrer.**

When it is substantially alleged in the complaint, in a suit for damages against a railroad company, that plaintiff's intestate was killed while in the course of his employment by defendant's lessee company operating the railroad of the defendant as its lessee, the complaint is not demurrable on the ground that it did not sufficiently appear that the lease was in force at the time of the injury.

2. **Railroads—Lessor and Lessee—Negligent Killing—Lessor—Damages.**

Defendant lessor railroad company is liable for the negligent killing of plaintiff's intestate by its lessee railroad company. (*Logan v. R. R.*, 116 N. C., 940, and *Brown v. R. R.*, 131 N. C., 455, cited and approved.)

3. **Pleadings—Demurrer, Frivolous—Appeal and Error—Procedure.**

The Supreme Court, holding a demurrer to a complaint frivolous, will not direct judgment by default and inquiry to be entered in the trial court, when no motion for such judgment had been made in the lower court and no exception to the judge's order allowing an answer had been taken and appealed from. (Revisal, secs. 656, 472.)

4. **Pleadings—Demurrer, Frivolous—Discretionary Powers—Answer.**

It is in the discretion of the trial judge to permit defendant to answer after overruling a demurrer to the complaint, though the demurrer were frivolous.

(434) CAUSE heard on demurrer to complaint, before *Jones, J.*, at August Term, 1908, of DURHAM.

Defendant appealed.

V. S. Bryant, Aycock & Winston and A. L. Brooks for plaintiff.
Guthrie & Guthrie for defendant.

WALKER, J. This action was brought to recover damages for the death of the plaintiff's intestate, which is alleged to have been caused by the negligence of the defendant's lessee, the Southern Railway Company. It is alleged in the complaint that, prior to 6 August, 1907, the defendant leased its road, fixtures and franchise to the Southern Railway Company for a term of years, and that on said day "the defendant's lessee, by and with the knowledge, consent and approval of the defendant, was operating freight and passenger trains along said line of railway," the intestate being one of its locomotive engineers, and that while so employed and engaged in the performance of his duty he was killed by the collision of the engine, which was then in his charge as engineer, and a train of the defendant's lessee, and that the collision was caused

by the negligence of the said lessee. The defendant demurred on the ground that it did not sufficiently appear in the complaint that the lease was in force at the time the plaintiff's intestate was killed, nor that the intestate was acting under instructions given by the said lessee. We have stated only the substance of the complaint and demurrer. The court overruled the demurrer and permitted the defendant to answer, and to this ruling the defendant excepted and appealed. We do not entertain any doubt as to the correctness of the ruling of the court. It appears, at least substantially, in the complaint that at the time the intestate was killed the Southern Railway Company was operating the railway of the defendant as its lessee, and that the intestate was in the employ of the lessee and in the discharge of his duty as one of its engineers. That the defendant, as lessor, is liable for the negligent killing of the intestate by its lessee has been settled by numerous decisions of this Court. *Logan v. R. R.*, 116 N. C., 940; *Brown v. R. R.*, 131 N. C., 455.

The plaintiff contended in this Court that the demurrer was frivolous and judgment by default and inquiry should have (435) been entered in the court below, and that we should direct such a judgment to be entered. But he did not move for judgment, as required by the Revisal, sec. 656, which provides that "If a demurrer, answer or reply be frivolous, the party prejudiced thereby may apply to the court or to the judge thereof for judgment thereon, and judgment may be given accordingly." See, also, Revisal, sec. 472. Nor did the plaintiff except to the judge's order and appeal. The judge had the discretion to permit the defendant to answer after he had overruled the demurrer, even if it were frivolous. *Dunn v. Barnes,* 73 N. C., 273; Clark's Code (3 Ed.), sec. 272, p. 295, and notes. The case of *Morgan v. Harris,* 141 N. C., at p. 360, is directly in point. The *Chief Justice,* speaking for the Court, says: "When a demurrer is overruled the defendant is entitled to answer over as a matter of right, 'if it appear that the demurrer was interposed in good faith.' Revisal, sec. 506. But when the demurrer or answer is frivolous the plaintiff is entitled to judgment, unless the court, in the exercise of a sound discretion, permits the defendant to answer over. This was not done here, because the judge did not hold the demurrer frivolous, and leave to answer was therefore not necessary. The refusal to hold a demurrer or answer frivolous and to render judgment thereon is not appealable (*Walters v. Starnes,* 118 N. C., 842; *Abbott v. Hancock,* 123 N. C., 89), where the reasons are given. The plaintiff's appeal must therefore be dismissed; but when the case goes back, with this judgment holding the demurrer to be frivolous, the plaintiff will be entitled to judgment by default, unless the court below is of the opinion that, in the exercise of a sound discretion, the facts justify permission to answer over. Revisal, sec. 1279."

Walters v. Starnes, 118 N. C., 842, cited by the plaintiff, does not sustain his position. The Court, in that case, merely held that the demurrer was frivolous, contrary to the ruling of the judge, but did not direct judgment to be given in the Superior Court for the plaintiff. It was left with the judge to exercise his discretion.

No error.

Cited: Kearnes v. Gray, 173 N. C., 557.

(436)

CHARLOTTE L. HILL ET AL. v. KIRBY BEAN ET AL.

(Filed 14 April, 1909.)

1. **Evidence—Lands—Adverse Possession—Declarations.**
   In an action to recover lands, where the defense is a claim of title by adverse possession, the court permitted a witness to testify to declarations made by defendant, while in possession, concerning a letter written to plaintiff, to the effect that his possession was in subordination to the title, and by permission of the plaintiff, excluding evidence of the contents of the letter: *Held,* no error.

2. **Same—Competent for Some Purposes—Declarations Restricted—Procedure—Instructions.**
   Under Rule 27 (140 N. C., 662), when evidence competent for some purposes, but not for all, is admitted generally, unless appellant asks at the time of the admission that its purpose be restricted, or requests special instructions to that effect, the failure of the judge to so restrict it is not assignable for error.

3. **Principal and Agent—Declarations—Evidence of Agency.**
   A witness may testify that, as agent for another, he had charge of lands, paid the taxes thereon and collected the rents therefor as such is direct testimony tending to establish the agency.

4. **Adverse Possession—Adverse Acts—Procedure—Instructions.**
   When the trial judge has correctly charged the law on the question of adverse possession, arising in an action to recover land, it is not to defendant's prejudice for him to further charge, there being evidence tending to support it, that cutting timber on the *locus in quo* by a third person, in behalf of plaintiff, without the knowledge or acquiescence of defendant, would not affect defendant's claim or impair his right. It would be otherwise if such third person were recognized by defendant as acting for and in behalf of plaintiff.

ACTION tried before *Long, J.,* and a jury, at December Term, 1908, of RANDOLPH. Defendants appealed.

Hammer & Kelly and J. A. Spence for plaintiffs.
J. G. Brittain and Elijah Moffitt for defendants.

WALKER, J. This action was brought to recover two contiguous tracts of land, containing about one hundred and sixty-eight acres. Title was admitted to be out of the State, and the plaintiffs own the land, unless the defendants have acquired title thereto by adverse possession. The plaintiffs alleged that the defendants' possession was (437) not adverse, but they held the same by permission of the plaintiffs. In order to show that the defendants were merely tenants of the plaintiffs, the latter introduced as a witness Scott Smoke, who testified as to a conversation between him and Emily Bean, one of the defendants, while she was living on the land, concerning a letter to the plaintiffs. The court excluded the testimony, so far as it related to the contents of the letter, but admitted it as tending to prove a declaration by Emily Bean in acknowledgment of the plaintiffs' title and in disparagement of her own. For this purpose it was clearly competent, and the testimony was properly restricted to that purpose. *Yates v. Yates,* 76 N. C., 142; *Shaffer v. Gaynor,* 117 N. C., 24; *Ratliff v. Ratliff,* 131 N. C., 428.

The testimony of A. D. Hamilton, which was objected to by the defendants, was substantially to the same effect as that of Scott Smoke except that it related to a declaration of Richard Bean in disparagement of his title, and tended to show that Bean was in possession, not claiming in his own right, but in subordination to the plaintiffs' title. This kind of evidence has always been held to be competent, as will appear by reference to *Shaffer v. Gaynor, supra,* and the cases therein cited.

The testimony of the witness Scott Smoke was competent against Emily Bean, and if the defendants intended to raise the question that it was not so against the other defendants they should have requested the judge to restrict it, but no such ground of objection is stated in the case. See Rule 27 (140 N. C., 662). The same may be said of the testimony of the witness A. D. Hamilton.

It was competent for Mr. Bradshaw to testify that he was the agent of Francis A. C. Hill and others, and as such had charge of the land, paid the taxes and collected the rents. This is not a case of proving an agency by the declaration of the alleged agent, but by the testimony of the agent, under oath.

We do not see any error in the refusal of the court to give the instruction requested by the defendants. The judge correctly charged the jury as to what would constitute such adverse possession of the land by the defendants as to defeat the plaintiffs' recovery. He told (438) the jury that if Thayer's acts in cutting the timber were committed without the knowledge or acquiescence of the defendants they would not affect their claim or impair their rights, but it would be otherwise if he were recognized by the defendants as acting for and in behalf

of the plaintiffs. This instruction was as favorable to the defendants as they had any reason to expect.

The jury found, in response to the issues, that the plaintiffs are the owners of the land in controversy, and awarded damages. Upon this verdict judgment was entered for the plaintiffs, and defendants appealed. We find no error, after a most careful examination, in the rulings or judgment of the court.

No error.

Cited: Tise v. Thomasville, 151 N. C., 283; *S. v. McGlammery,* 173 N. C., 750.

D. T. LOWDER, ADMINISTRATOR, v. T. A. HATHCOCK, ADMINISTRATOR.

(Filed 14 April, 1909.)

1. **Guardian and Ward—Express Trust—Termination of Trust—Death of Ward—Administration—Accounting.**

The express trust existing between guardian and ward terminates at the death of the latter, and then the ward's distributees may have letters of administration taken out and call for an accounting.

2. **Guardian and Ward—Death of Ward—Administration—Limitation of Actions.**

An action brought by the administrator of a deceased lunatic against the guardian, whose last annual account, made in the ward's lifetime, showed unaccounted-for guardian funds in his hands, is barred when brought more than ten years after the death of the ward.

3. **Guardian and Ward—Death of Ward—Limitation of Action—Time Extended—Interpretation of Statutes—Requisites—Proof.**

The one year given in which to bring an action after the death of the one entitled thereto, provided the statute had not run at the time of the death and the cause of action survives (Revisal, sec. 367), embraces any remaining and unexpired time within the statutory limitation at the time of his death; and when this section is relied on, in an action by the administrator of a deceased lunatic against the guardian, to prevent the running of the statute of limitations, it is necessary that the action should have been commenced within one year from the issuance of the letters of administration.

(439) ACTION tried before *Webb, J.,* and a jury, at Fall Term, 1908, of STANLY.

Plaintiff appealed.

T. F. Kluttz and J. R. Price for plaintiff.

R. L. Smith, R. E. Austin and Montgomery & Crowell for defendant.

CLARK, C. J. T. A. Lowder qualified as guardian of Nancy Adderton, a lunatic, in 1854, and filed his last annual account in November, 1858. She died in 1887 or 1888, and D. T. Lowder qualified as her administrator 9 November, 1901. T. A. Lowder, the guardian, died in 1899, and T. A. Hathcock qualified as his administrator 13 September, 1899.

The annual account filed in 1858 showed a balance then in the hands of the guardian of $1,087.10, and this action is to recover said sum, with compound interest from that date. The guardian survived his ward eleven or twelve years; and if action had been brought during his lifetime doubtless he would have shown some disbursements on account of his ward in the thirty years between 1858 and 1887 or 1888, when she died, if not of all the fund.

Of course, no statute runs against an express trust, but the express trust was terminated by her death (*Parker v. Harden,* 121 N. C., 58; *Faggart v. Bost,* 122 N. C., 522; *Dunn v. Dunn,* 137 N. C., 534; 15 A. & E. Enc., 45), as was also the disability of her lunacy. It was then incumbent upon the ward's distributees to have letters of administration taken out and to call for an accounting.

There is a distinction as to the suspension of the statute when the debtor dies and when the creditor. When the latter dies, as in this case, The Code, sec. 164 (then in force, now Revisal, sec. 367), provided: "If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced after the expiration of that time and within one year from his death." When (440) it is the debtor who dies, the action must be begun "within one year after issuing letters testamentary or of administration."

It is true this is an enabling and not a disabling statute, and does not cut down the time given by the general statute, but extends it (if not expired) to at least one year after death of a creditor and at least one year after issuing letters to the representative of a debtor. *Person v. Montgomery,* 120 N. C., 111. But whether the three-year or six-year or ten-year statute bars (all of which are pleaded), is immaterial, as more than thirteen years elapsed after the ward's death before this action began. When there is at the death remaining unexpired any part of the time limited, but it will expire in less than "one year after the death" of the creditor, or in less than "one year after issuing letters" on the debtor's estate, such "one year" includes, and is not added to, the unexpired statutory time.

In this case the guardian had been exposed to an action for over eleven years after the death of the ward, and the time limited for an action against him had expired at his death. Even if it had not quite expired, this action was not begun until more than "a year" (in fact,

more than two years) "after issuing letters" to his administrator. *Coppersmith v. Wilson,* 107 N. C., 31; *Winslow v. Benton,* 130 N. C., 58.

In every aspect the plea of the statute was a complete bar, and it was properly sustained.

Affirmed.

(441)

MARINA L. BROWN v. W. W. MYERS AND WIFE.

(Filed 14 April, 1909.)

1. **Deeds and Conveyances—Description—Direction, Evident Mistake of—Other Errors—Presumption.**

When it is evident from an otherwise correct description in a deed that "east down a road" should have read "west," no presumption is raised that there are other errors or omissions in the description of the land conveyed.

2. **Deeds and Conveyances—Mistake of Draughtsman—Evidence—Subsequent Deeds—Descriptions Not Vague.**

A part of the description to a conveyance of land read, "down the road to the run of Mill Branch." Plaintiff contends that by mistake of the draughtsman the line should have run straight from a first bend in the road to a certain point on the branch below the point where the road came: *Held,* (1) a second deed made by the grantor subsequent to the deed recorded, without acceptance by the grantee, is no evidence of plaintiff's contention; (2) by reason of description of the line indicated, the description of the *locus in quo* is not void for vagueness or uncertainty.

3. **Notice, Service of—Superior Court—Constable.**

The service of a notice in an action in the Superior Court by a town constable is insufficient.

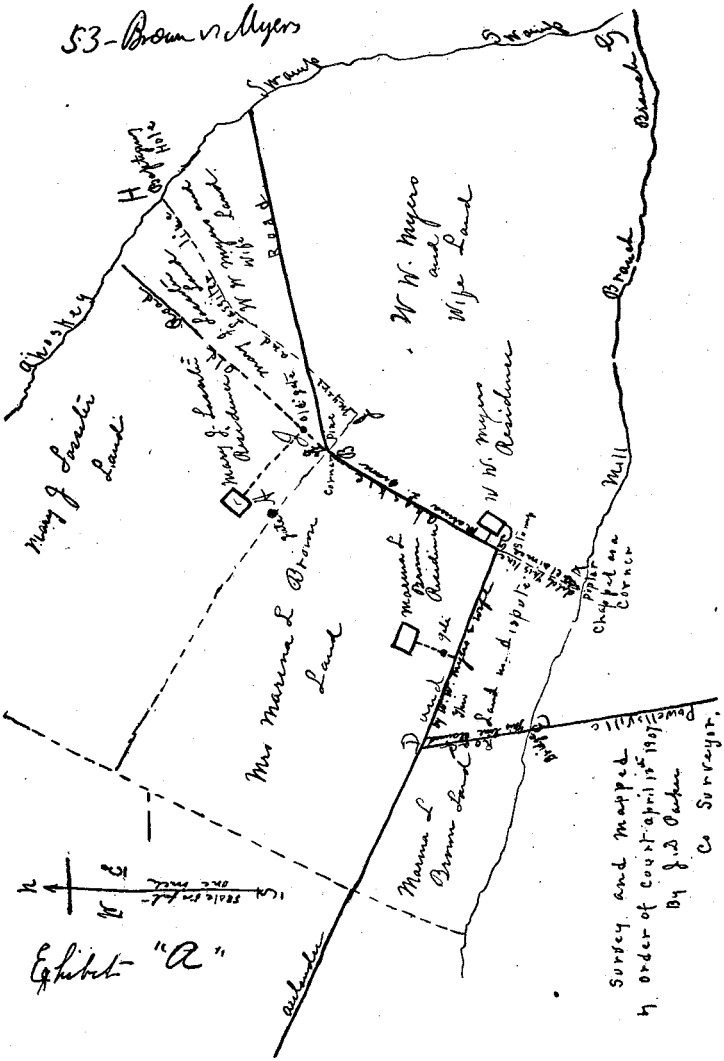
ACTION for trespass, damages and injunction, tried by *W. R. Allen, J.,* and a jury, at Fall Term, 1908, of HERTFORD.

Plaintiff appealed.

R. C. Bridgers and L. L. Smith for plaintiff.
Winborne & Lawrence for defendants.

CLARK, C. J. The plaintiff conveyed to the *feme* defendant a tract of "75 acres, more or less," describing the boundaries as follows: "Beginning at Mrs. M. J. Lassiter's road gate, thence running in an east direction *down the road to the run of Mill Branch;* thence down the run of the branch to the run of Ahoskie Swamp; thence up the run of said

swamp to the baptizing hole; thence running a line of marked trees between Mrs. M. J. Lassiter's land and Walter Lassiter to the beginning." The only controversy is as to the line "down the road to the run of Mill



Branch." Going "down the road," one would come to Mill Branch, without let or hindrance. There are two bends or sharp turns in the road, and the plaintiff contends that, while the straight road from (442) B to C should be followed, at C, the first bend, instead of further

following the road, the line should be extended almost straight ahead through the woods to F, which is a point on Mill Branch, but below the point which would be reached going "down the road to the
(443) run of Mill Branch," as is prescribed in the deed.

This variation of leaving the road and "taking to the woods," if allowable, would save the plaintiff, the grantor in the deed, the ten acres now in controversy. To justify such departure from the plain words of the deed, the plaintiff avers in the complaint that, "by mutual mistake or by mistake of the draughtsman," the words "along the road to the run of Mill Branch" were written when it ought and was intended to be written "along the road to the bend of the road; thence nearly the same course, a line of marked trees, to a poplar near the canal or the run of Mill Branch." This was denied, as was also the further allegation that prior to the execution of the deed the grantor went over the land with the husband of *feme* defendant and located the line as being from the bend of the road, at C to F, on Mill Branch, below where the line, if following the road, would strike Mill Branch. These contentions were submitted to the jury, who found for the defendant on the following issues:

1. "Is the land in dispute embraced within the boundaries of the deed to the defendant Rosa L. Myers?" Answer: "Yes."

2. "If so, did the plaintiff and W. W. Myers, prior to the execution of the deed, go over the land to be conveyed for the purpose of locating the land to be embraced in the deed, and did they locate said line and *make* the same run from B to C and then to F on the plat?" Answer: "No."

3. "If so, was it the intention of the parties to said deed, at the time of the execution thereof, to convey the land to the line, B to C, and then to F, on the plat, and no further?" Answer: "No."

The points at issue were fairly submitted and determined. The words "in an east direction" along the road, should have been "west," as the plaintiff avers and as is evident (*Wiseman v. Green,* 127 N. C., 288), but that fact has no bearing on the controversy. It raises no presumption that there were other errors and omissions whereby the plaintiff conveyed ten acres more than he intended. The jury found on the evidence that there was no omission, and that the road was the boundary on that side, as stated in the deed.

The court properly refused to charge the jury that the line
(444) in dispute was where the defendant contended. This was his first exception.

The second exception relied on in the plaintiff's brief is the rejection in evidence of another deed, written after the defendant's deed was recorded, making the line run from the bend of the road at C to F,

which deed was written by witness, in the absence of the *feme* defendant, without her request, and witness is unable to remember at whose request.

The third exception is to the holding by the court that the service of a notice in the Superior Court by a constable was insufficient. *Cullen v. Absher,* 119 N. C., 441.

The only other exception relied on in plaintiff's brief is the refusal of the following prayer: "That as a matter of law the description in the defendants' deed is too vague to cover the land in controversy, and you will therefore answer the first issue 'No.' "

These exceptions require no discussion at our hands.

No error.

H. J. SINK v. MAHALEY SINK.

(Filed 14 April, 1909.)

1. **Wills—Devises—Estates for Life—"During Widowhood."**

A devise by one of lands to his wife "during her widowhood" is an estate for life, subject to be divested if she should remarry, and subjects her to an action for damages for waste and an injunction against its further commission.

2. **Same—Residuary Legatee.**

A direction in a will that certain real and personal property be sold to pay the testator's debts and certain legacies which were provided for, and if any surplus remained it should go to the widow, does not constitute her the general residuary legatee, so as to vest the remainder of the estate in her in fee, when she takes by devise whatever may remain during the term of her widowhood.

ACTION tried before *Jones J.,* and a jury, at February Term, 1909, of DAVIDSON. Plaintiff appealed.

Walser & Walser for plaintiff. (445)
E. E. Raper for defendant.

WALKER, J. This action was brought to recover damages for waste, alleged to have been committed by the defendant on the land described in the complaint, and for an injunction against the further commission of waste. The court virtually intimated that the plaintiff could not recover, as under the will of William A. Sink his widow acquired a fee-simple estate and not merely an estate for life. The plaintiff excepted to the ruling, submitted to a nonsuit and appealed.

The decision of the case must turn upon the construction of the

eleventh item of the will, which is as follows: "I give and bequeath to my beloved wife, Mahaley, the remainder of my land, after selling off, as directed in the tenth item, whatever there may be remaining, to have and to hold to her own proper use and behoof, to embrace my mansion house and other outhouses and improvements of the land I now live on, during the term of her widowhood, and after her marriage to be equally divided between my brother and sisters or their legal representatives, share and share alike." W. A. Sink died without having had any children, leaving as his heirs at law a brother and sisters. In his will he directed that certain land and other property be sold to pay his debts and the legacies given in the will, and that if, after paying the same, any surplus remained, it should go to his widow, Mahaley Sink.

We are of opinion that the estate in the land devised to the widow could not endure beyond her life. Blackstone says that if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice, in these and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet, while they subsist they are reckoned estates for life, because, the time for which they will endure being uncertain, they may by possibility last for life if the contingencies upon which they are to determine do not sooner happen. 2 Blk., 121. In *Fuller v. Wilber,* 170 Mass., 506, the devise was as follows: "I give and bequeath to my beloved wife all my
(446) real and personal estate, of whatever name, for her sole use and benefit so long as she remains my widow, except the legacies to my children." With reference to this devise, the Court, by *Morton, J.,* said: "The first question in these cases is, what interest did the widow of Elijah Wilber take under her husband's will? There is some ground, perhaps, for saying that, with the exception of the legacies to the children, she took the entire estate absolutely and in fee, subject to be divested of it if she married again; but we think that the better construction, and the one which is according to the weight of authority, here and elsewhere, is that she took a life estate determinable on the happening of that event. *Knight v. Mahoney,* 152 Mass., 523; *Loring,* 100 Mass., 340; *Dole v. Johnson,* 3 Allen, 364; *Mansfield v. Mansfield,* 75 Me., 509, 512; *Nash v. Simpson,* 78 Me., 142, 147; *Evans' appeal,* 51 Conn., 435; *Cooper v. Pogue,* 92 Pa. St., 254, 257; 4 Kent Com., 26, 27; 2 Bl. Com., 121; 1 Washb. Real Prop. (5 Ed.), 63. The words, 'so long as she remains my widow,' imply a continuance of the estate during widowhood, and no longer; and, at most, it could not extend beyond her life." In *Kratz v. Kratz,* 189 Ill., 276, the devise was to the wife, during her widowhood, of the real and personal estate, "absolutely and unconditionally," and

the court held that her interest was limited to the period of her widowhood—that is, during her life or until she remarried. See, also, *Batterton v. Yoakum,* 17 Ill., 288.

This Court decided *In re Brooks' will,* 125 N. C., 136, that where a testator devised all his property to his wife, during her widowhood, with the condition that "should she remarry, then the law is my will," gave the widow no more than a life estate, as her death terminated her widowhood and therefore her interest in the property.

We have carefully examined the whole will, and can find nothing therein to change the settled meaning of the words used by the testator in devising certain land to his widow. There is no general residuary clause in the will. The direction to pay the surplus of any money arising from the sale of some of his real and personal property did not constitute her his general residuary devisee, so as to vest the remainder after her life estate in her. There are some expressions indicating a contrary purpose—that is, an intention that it should go to his heirs.

The cases cited by the defendants' counsel (*Foust v. Ireland,* 46 N. C., 184, and *McKrow v. Painter,* 89 N. C., 437) are not (447) in point, as they were decided upon a construction of language quite different from that contained in the will now under consideration. In this will the devise to the widow is "during her widowhood," and hence is no more and no less than a devise for life. It is not, in contemplation of law, less than a devise for life, because it may at her pleasure endure for life. It is plainly an express limitation of the estate to her for life, subject to be divested in favor of the persons designated in the will as the ulterior devisees, if she should remarry. *Rausch v. Rausch,* 31 N. Y. Suppl., 786; *Dupois v. Van Valen,* 61 N. J. Eq., 331; *Patton v. Church,* 168 Pa. St., 321; 30 A. & E. Enc. (2 Ed.), 748.

There was error in the ruling of the court. The nonsuit will therefore be set aside.

Error.

ANNE A. DAVIS v. B. F. FRAZIER.

(Filed 14 April, 1909.)

1. Deeds and Conveyances—Construction—Entire Instrument—Intent.

In construing a deed the intent of the parties as embodied in the entire instrument should prevail, and each and every part must be given effect, if it can be done by fair and reasonable intendment, before a subsequent clause thereof may be construed as repugnant to or irreconcilable with a preceding one.

2. Same—Timber—Time for Cutting—Second Cutting.

A deed to standing timber contained a clause giving the grantee the right to enter upon the lands and cut and remove the timber within five years from a specified date, followed by a clause providing that the grantee shall not have the right to cut over the land for timber a second time: *Held*, the second clause was not repugnant to or irreconcilable with the estate granted in the first, and conveyed a base or qualified fee in the specified dimensions of timber, determinable as to all timber not cut and removed from the land within the five years, and subject to the further provision that the land should not be cut over a second time for timber.

3. Same.

Under a clause in a deed conveying standing timber of a certain dimension, providing that the grantee shall not have the right to cut over the land for timber a second time if the land had been entirely cut over once, within the terms and meaning of the contract, any further cutting would amount to an actionable wrong, and it would not be affected by the fact that here and there trees could be found which were within the dimensions specified; but this would not apply to trees of such dimension, cut within the time limited, upon distinct and definite portions of the land which had not been cut over at all.

(448) ACTION heard before *Jones, J.*, and a jury, at November Term, 1908, of GRANVILLE.

There have been temporary restraining orders issued and served in the cause, and pending the action certain cross-ties have been seized and are now held under process of claim and delivery, issued in the same at plaintiff's instance. These cross-ties are claimed by one John Bullock, who has been allowed to interplead for the purpose, and who alleges that he bought and paid for the ties and owned same at the time of action instituted. On the hearing, and as determinative of the controversy, issues were framed for submission to the jury as follows:

1. "Did the defendant unlawfully enter upon the land of plaintiff and cut and remove therefrom a lot of cross-ties and hickory timber, as alleged in the complaint?

2. "What damages, if any, has the plaintiff sustained?

3. "Is the plaintiff the owner of and entitled to the possession of the cross-ties described in the affidavit filed in the claim-and-delivery proceedings in this action?"

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

A. A. Hicks and B. S. Royster for plaintiff.
V. S. Bryant, Aycock & Winston and T. Lanier for defendant.
Graham & Devin for interpleader.

HOKE, J., after stating the case: The evidence showed that on 31 May, 1905, the plaintiff, by written deed, had conveyed to Heidlebaugh and

LeFever all the standing timber on three certain tracts of land in Granville County, fully described, "which now measures, or shall (449) measure during the term of years hereafter set out, as much as ten inches in diameter at the butt," etc. "To have and to hold said timber unto the said Heidlebaugh and LeFever and their heirs and assigns, in fee simple, subject to the following conditions and agreements: (1) That the parties of the second part may enter on said land, etc., and cut and remove said timber in such manner and at such place and places as they may deem necessary, and may construct and operate all such mills and other devices in cutting and preparing such timber for market, roads, tramroads, railroads, stables, shanties and other buildings, over and upon such land as may be deemed necessary for cutting and removing said timber, and may have full power and authority to remove from said land at any time all machinery, buildings, etc., placed upon the land for said purpose. (2) And the said parties of the second part, and their heirs and assigns, have the right to enter upon and begin to cut and remove the said timber at any time they may desire; and all the timber not so cut and removed within five years from 25 May, 1905, shall revert to and become the property of the party of the first part and her heirs and assigns. (3) And it is expressly agreed and understood that the said parties of the second part shall not have the right to cut over the lands hereinafter described, a second time for timber, and that the said Mrs. Anne A. Davis shall have the right to take up the wood and cut any trees for her own use after the same have been cut over by the parties of the second part, and the parties of the second part agree not to injure the wire fences now upon said land."

There was evidence tending to show that the grantees entered the land under this deed, placed their mills, built shanties and constructed the necessary roads for the purpose, and, having cut over all the land included in the contract, removed their mills, machinery, etc., except the shanties, which they sold; and that after this was done the defendant, claiming the right to do so, had entered on the land and cut the timber and ties and committed the spoil and injury for which the plaintiff now seeks redress.

On this question Dr. I. H. Davis, among other things, testified as follows: "Am son of Mrs. A. A. Davis, plaintiff. Heidle- (450) baugh and LeFever cut over all the land described in the deed or contract, and then took up their mills, machinery, etc., and moved everything off the land, except some shanties, which they sold. They moved away from the land in August or September, 1907, and went to Virginia, I think. They cut over all the land described in the deed or contract. Mr. Frazier, the defendant, had hands cutting timber on the lands in October, 1907, and, acting under instructions from my mother,

I ordered them to stop, and I also notified Frazier personally to stop, but he paid no attention to such notice, and this suit was brought in March, 1908, and a restraining order was served on the defendant."

It does not clearly appear from the testimony that the defendant entered as assignee under this deed; but, assuming this to be true, we are of opinion that the plaintiff is entitled to have her cause submitted to a jury, and there was error in dismissing the same as on judgment of nonsuit. According to our decisions, the deed in question conveyed to the grantees, Heidlebaugh and LeFever, a fee simple in the timber of the specified dimensions, determinable as to all timber not cut and removed from the land within five years, and subject to the further provision "that the land should not be cut over for timber a second time." If the evidence of I. H. Davis, above set out, and other of like tenor, should be accepted by the jury, and it should be established that the land described in the deed had been once entirely cut over, or that a distinct and definite portion of the land had been once cut over, then the right of the grantees, or persons claiming under them, to cut and remove timber, as to all or the stated portion of said land, by the express provision of the contract, would cease and determine, and any further cutting would amount to an actionable wrong. And if this land had been entirely cut over once, within the meaning of the term as contained in the contract, the result indicated would not be affected by the fact that here and there through the different tracts trees could be found which were within the specified dimensions. If, however, there should be distinct and definite portions of the land which had not been (451) cut over at all, as to such portions we are of opinion that the rights granted under the contract will continue until they are cut over once, or the right to cut expires by the limitation as to time.

It is contended for the defendant that the stipulation contained in section 4, to the effect that the land should not be cut over a second time, is in direct conflict with the former parts of the instrument and entirely repugnant to the estate which is thereby expressly conveyed, and should therefore be rejected; but we do not think this a correct interpretation of the contract in question. It is an undoubted principle that a "subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside." This was expressly held in *Jones v. Casualty Co.*, 140 N. C., 262, and there are many decisions with us to like effect; but, as indicated in the case referred to and the authorities cited in its support, this principle is in subordination to another position, that the intent of the parties as embodied in the entire instrument is the end to be attained, and that each and every part of the contract must be given effect, if this can be done by any fair or reasonable interpretation; and it is only after

subjecting the instrument to this controlling principle of construction that a subsequent clause may be rejected as repugnant and irreconcilable. *Jones v. Casualty Co., supra;* Lawson on Contracts, secs. 388, 389; Bishop on Contracts, secs. 386, 387.

In *Jones v. Casualty Co.* the doctrine is thus stated: "Another principle applicable to the case before us, and equally well established, is that while clauses in a contract apparently repugnant must be reconciled if it can be done by any reasonable construction, yet a proviso which is utterly repugnant to the body of the contract and irreconcilable with it will be rejected; likewise a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside."

And in Lawson on Contracts, *supra,* it is said: "The third main rule is that that construction will be given which will best effectuate the intention of the parties, to be collected from the whole of the agreement; and, to ascertain the intention, regard must be had to the nature of the instrument, the condition of the parties executing it, and the objects which they had in view. . . . Courts will examine (452) the whole of the contract, and so construe each part with the others that all of them may, if possible, have some effect, for it is to be presumed that each part was inserted for a purpose and has its office to perform. So, where two clauses are inconsistent they should be construed so as to give effect to the intention of the parties as gathered from the whole instrument. So every word will, if possible, be made to operate, if by law it may, according to the intention of the parties."

And in Bishop on Contracts the author says (section 386): "After interpretation has exhausted itself in harmonizing the several clauses and words, if there is a residue which can not be reconciled the repugnancy must be got rid of by rejecting what will free the writing from it." And in section 387: "If the main body of the writing is followed by a proviso wholly repugnant thereto, it must necessarily be rejected, because otherwise the entire contract will be rendered null; but where it can be construed to qualify the main provisions, so that all may stand together, it will be retained."

A proper application of the doctrine correctly stated in these authorities will show that there is no irreconcilable conflict in the provisions of this contract, but that each and every part of it can be given effect. The instrument conveys to the grantees a base or qualified fee in the timber, determinable as to all timber not cut and removed within the time specified, *i. e.,* five years, and then provides that the cutting may commence at any time within the five years the grantees may desire, and that the land embraced in the contract shall not be cut over a second time. This last stipulation does not at all nullify the grant, but only estab-

lishes a method or condition by which the right or interest granted may be made available; and there is no reason, as stated, why this provision, made a substantial part of the contract by express agreement of the parties, should not be given effect. The insertion of this provision was no doubt caused by the suggestion indicated in *Hardison v. Lumber Co.*, 136 N. C., 175, where it is said, in substance, that if the parties
(453) desired protection against a "second cutting" they should have so contracted.

It is further urged for defendant that the fourth clause of the contract, being a condition subsequent, working a forfeiture of the estate, should be strictly construed. If it be conceded that the clause in question is a condition subsequent, the position contended for by defendant is well recognized, but it is only a rule of interpretation and does not obtain when the meaning of the contract is so plain that no construction is permissible. This is clearly illustrated and upheld in the case to which we were referred by counsel, *Epperson v. Epperson*, 108 Va., 608. In that case the Court held as follows: "While courts regard with disfavor conditions and defeasances which are calculated to prevent or defeat the absolute vesting of titles, they will not hesitate to give effect to the intention of the parties when the condition or defeasance is clear and explicit."

We have purposely refrained from definite expression as to the right to certain cross-ties and their seizure by process of claim and delivery sworn out in this action. The cause having been dismissed as on judgment of nonsuit at the close of plaintiff's testimony, the evidence which makes for the right and claim of the interpleader to these ties has not been disclosed, and we have considered it well to withhold our opinion until the facts concerning them shall be more fully ascertained and presented. For the reasons heretofore stated, this order of nonsuit will be set aside and the cause restored to the docket.

Reversed.

Cited: Brown v. R. R., 154 N. C., 303; *Smith v. Lumber Co.*, 155 N. C., 392; *Wiley v. Lumber Co.*, 156 N. C., 213; *Hendricks v. Furniture Co., ibid.*, 572; *Refining Co. v. Construction Co.*, 157 N. C., 280; *Thomas v. Bunch*, 158 N. C., 179; *Baggett v. Jackson*, 160 N. C., 30; *Midgett v. Meekins, ibid.*, 44; *Jefferson v. Lumber Co.*, 165 N. C., 49; *Lefler v. Lane*, 167 N. C., 269; *Gilbert v. Shingle Co., ibid.*, 289; *Finger v. Goode*, 169 N. C., 73; *Bowden v. Lynch*, 173 N. C., 206.

(454)

BYNUM SPAUGH ET AL. v. A. J. HARTMAN ET AL.

(Filed 14 April, 1909.)

1. Inheritance—Slaves—Legitimatizing Children—Heirs at Law.

The efficacy of the act of 1879 (Revisal, sec. 1556), legitimatizing the children of colored parents, under certain conditions, living together as husband and wife, and thus giving them the rights of inheritance, depends upon two essential facts—a cohabitation subsisting at the birth of the child and the paternity of the person from whom the property claimed is derived.

2. Same—Cohabitation.

In order to come within the provision of the act of 1879 (Revisal, sec. 1556), legitimatizing the children of colored parents living together as man and wife, etc., and thus giving them the rights of inheritance, an exclusive cohabitation must be shown, as signified by the expression, "living together as man and wife," and not casual sexual intercourse.

3. Marriage—Slaves—Legitimatizing Children—Evidence—Acts and Declarations.

The *quasi* marriage relation necessary to legitimatize the children of colored parents, under the provisions of the act of 1879 (Revisal, sec. 1556), may be shown in evidence by reputation, cohabitation, declarations and conduct, under the same general rule of evidence applicable to establish the fact of marriage.

ACTION to recover land, tried before *Long, J.*, and a jury, at November Term, 1908, of DAVIDSON.

The case was made to turn upon the finding of the jury upon this issue, submitted by consent: "Are the plaintiffs the heirs of Wesley Delap and entitled to the possession of the lands described in the complaint?" Answer: "No."

The plaintiffs moved for a new trial, assigning errors. Motion denied. Plaintiffs excepted and appealed from the judgment rendered.

Walser & Walser and McCrary & McCrary for plaintiffs.
Emery E. Raper for defendants.

BROWN, J. The land in controversy was devised by Alex Delap to James Wesley Delap (colored), who had been his slave. Upon the death of the testator the said devisee entered into possession and remained there until he died, intestate, in 1906. The de- (455) fendants then entered upon the lands and have remained there since, claiming as heirs of Alex Delap. The plaintiffs claim the lands as the children of Calvin Delap, who, it is alleged, was the son of Wesley

Delap and his "slave wife," Martha Spaugh. Calvin was born of said Martha about 1853, and it is contended that Wesley Delap was his father, acknowledged the paternity, and, at the time the child was born, was living with its mother in the relation of husband and wife, and that in consequence thereof such issue became legitimate and capable of inheriting from either parent, under the act of 1879, now Rule 13, Descents. Revisal, sec. 1556.

There was much evidence introduced by plaintiffs tending to establish the affirmative of the issue.

These questions were put by plaintiffs' counsel to witness Manuel Spaugh and excluded by the court, to which ruling the plaintiffs excepted:

"State what the general reputation as to who Martha Spaugh's husband was, and who Wesley Delap's wife was, relative to slave relations.

"Did or did not Martha and Wesley live together as man and wife, as was custom amongst slaves at and before the time of the begetting and birth of Calvin Spaugh?"

The act of February, 1879, adds to the canons of descent by legitimatizing the children of colored parents born at any time before the first day of January, 1868, of persons living together as husband and wife, and confers upon such children all the rights of heirs at law or next of kin with respect to the estate of such parents or either of them. Its efficacy depends upon two essential facts to be established—a cohabitation subsisting at the birth of the child and the paternity of the person from whom the property claimed is derived.

The cohabitation meant by the statute is not casual sexual intercourse, but an exclusive cohabitation, such as is usually signified by the words "living together as man and wife." *Branch v. Walker,* 102 N. C., 35. While the marriage of slaves was not recognized as a legal bond, it is well known that in numberless instances the marriage relation (456) was assumed by them, and to all intents and purposes, except in law, they became man and wife, and the appellation of "husband and wife" was used in reference to the parties to such unions by their owners and their associates.

By the common law it is held to be a general rule of universal application in civil cases, except in actions for criminal conversation, that, reputation, cohabitation, the declarations and conduct of the parties are competent evidence to prove that the marriage relation subsisted between them. *Archer v. Haithcock,* 51 N. C., 421; *Jones v. Riddick,* 79 N. C., 291; *Weaver v. Cryer,* 12 N. C., 337.

We are of opinion that the same rule of evidence should apply in proving that the *quasi* marriage relation referred to in the statute existed between slaves. It is not the legality of such a relation that is an is-

sue in this case, but only the fact that such a relation was assumed by the putative grandparents of the plaintiffs.

The syllabus in *Nelson v. Hunter,* upon a rehearing (144 N. C., 763), would appear to sanction the ruling of his Honor; but an examination of the case will disclose nothing inconsistent with our present ruling. *Nelson v. Hunter,* 140 N. C., 599. The facts of that case were that a marriage ceremony was performed, during the war, between Solomon Nelson and Jackie Cook, and the evidence tended strongly to prove that the relation thus assumed continued to exist until after the act of 10 March, 1866, had legalized it, and that the plaintiff Nelson claimed the property of his mother, Jackie, as her only legitimate child, the product of that union. For the purpose of showing that the relation of Solomon with Jackie was not exclusive and not that of husband and wife, it was sought to be proven by general reputation that Solomon, some time in 1867, abandoned Jackie and lived with a female of color, named Viley, in Beaufort County, with whom he had lived prior to the war. The court held that the general reputation that Viley was Solomon's wife before the war, and her declarations claiming him as her husband, were valueless and incompetent, saying in reference thereto: "If Solomon resumed his cohabitation with Viley after the passage of the act of 10 March, 1866, it could have no effect upon the legitimacy of his and Jackie's children. If his relations with Jackie con- (457) tinued long enough to have become legalized by the act, his conduct after that could not render the offspring of that union illegitimate." 140 N. C., 601. There was no purpose in that case to prove a slave marriage between Solomon and Viley, nor was there any issue of their cohabitation. Neither is *Erwin v. Bailey,* 123 N. C., 632, authority for the defendant's contention. It was there held that general reputation that the plaintiff was not the child of Cæsar Swinton was properly excluded, with which ruling we fully agree. It was an attempt to prove illegitimacy by general reputation.

We think his Honor erred in excluding the evidence.

New trial.

Cited: Walker v. Walker, 151 N. C., 166.

ANNIE H. CAMPBELL v. ELIZA W. CRONLY ET AL.

(Filed 14 April, 1909.)

1. **Deeds and Conveyances—Purchaser—Doubtful Title—Suits—Courts—Equity Jurisdiction—Specific Performance.**

A purchaser of land is not required to take a doubtful title; and when parties have entered into a contract to sell land, and the purchaser has refused to comply because of doubts entertained in regard to title, the court will treat an action by the vendor against the vendee as a bill for specific performance.

2. **Deeds and Conveyances—Doubtful Title—Actions—Cloud on Title—Courts—Statutory Jurisdiction.**

The Revisal, sec. 1589 (Laws 1893, ch. 6), enlarges the power of the courts to entertain suits to quiet titles, where the conditions were formerly such that a possessory action could not be brought; and this statute is liberally construed, so that the court can acquire jurisdiction to clear up obscure contingent limitations which are imposed upon titles.

3. **Same—Controversy Without Action.**

The courts will hear and determine a controversy submitted without action in suits brought by and against the parties in interest, wherein the vendee has refused to accept the title on the ground of its being doubtful, either in its equitable jurisdiction as treating the controversy as a bill for specific performance or under the provisions of the Revisal, sec. 1589, for the purpose of removing clouds upon obscure titles.

4. **Deeds and Conveyances—Estates—Uses and Trusts—Limitations Upon Fee—Equity.**

An estate to one, with a declaration of the use to grantor's wife and two named daughters, in fee, "and to the survivors of them," will, nothing else appearing, vest the use of the fee in the two daughters after the death of the wife; for, though no estate could be limited upon a fee simple, at common law, a limitation of this kind may take effect by way of a shifting use.

5. **Deeds and Conveyances—Uses and Trusts—Estates—Construction—Intent—Language Used—Legal Phrases—Determinable Fee.**

An estate to one, with a declaration of the use to grantor's wife and two named children, in fee, "and to the survivors of them," the conveyance further providing that if the said daughters "shall die leaving issue, then to the use of such surviving issue, who shall take the same *per stirpes*, and not *per capita*," does not vest the fee in the daughters upon the death of the wife; the grantor's intent appearing, both from the usual and legal significance of the language employed, to create in the daughters a determinable fee, and, upon the death of either, the use would shift and vest in the "surviving issue."

6. **Deeds and Conveyances—Estates—Descriptive Words—Legal Phrases—Construction.**

When the language employed in a conveyance of land as to the estate passed thereby has a clearly defined legal signification, there is no room

for construction to ascertain the intent; and when the intent of the grantor appears from the use of customary language to be that given by law to the legal phrases also used in connection with the subject matter, the latter will be construed as showing that the grantor desired to remove any doubt as to the interest conveyed.

7. Same—Living Issue—Succession of Survivorship—Purchasers—Estates.

An estate in trust to the use of grantor's two daughters, providing in the deed that if said daughters "shall die leaving living issue, then to the use of such surviving issue, who shall take the same *per stirpes*, and not *per capita*," creates a succession of survivorships in the living children and grandchildren of the daughters, who may take as purchasers upon the happening of the event, and the daughters named can not convey to a purchaser a good and indefeasible title.

8. Deeds and Conveyances—Succession of Survivorship—Children and Grandchildren—Purchaser.

When a deed in trust creates a succession of survivorships, in the use of lands, to the children and grandchildren of B. and C., a deed from a child of C. to the *locus in quo* in the lifetime of B. and C. vests in him his interest only; so that, if the child should die, leaving issue, before the death of his parent, such issue would take as a purchaser under the limitations declared.

BROWN, J., concurring in part; CLARK, C. J., dissenting.
WALKER, J., did not sit.

ACTION tried before *W. R. Allen, J.*, upon an agreed state of (459) facts, at January Term, 1909, of NEW HANOVER.

Both sides appealed.

This is a controversy submitted without action for the purpose of quieting title to real estate pursuant to section 1589 of the Revisal.

The agreed facts are: On 20 May, 1869, H. C. Brock conveyed to William B. Flanner the land in controversy, being a lot in the city of Wilmington, upon certain trusts, fully set forth in the deed, which was duly admitted to probate and registration. On 2 March, 1895, certain persons, entitled to beneficial interest in said property, instituted an action in the Superior Court of New Hanover County against certain other persons, likewise interested, and the heirs at law of the trustee, who had died, for the purpose of having certain corrections made in said deed, all of which will fully appear by reference to the record in said cause, made a part of the case agreed. Pursuant to the prayer of the plaintiffs, judgment was rendered by said court correcting said deed by inserting words "of inheritance" therein, which had been inadvertently omitted by the draughtsman. The deed, as corrected by said judgment, vested the title to said real estate in the said W. B. Flanner, in fee, upon the following trusts: To hold for the use of Emily B. London, her heirs and assigns, wife of Mauger London, and Annie H.

London, her heirs and assigns, and Eliza W. London, her heirs and assigns, children of the said Mauger London, and the survivors of them. Provided, however, that if the said Annie H. London or Eliza W. London shall die leaving issue, then to the use of such surviving issue, who shall take the same *per stirpes,* and not *per capita.* And provided further, that if the said Annie H. or Eliza W. should die without (460) issue, leaving the said Emily B. surviving, then to the use of the said Emily B. and such survivors; and if the said Annie H. and Eliza W. should die, leaving the said Emily B. surviving, then to the use of the said Emily B. during her life; and if she should die leaving issue, then to the use of such issue and their heirs; and if the said Emily B. should die, leaving the said Annie H. or Eliza W. surviving, then to the use of such survivors. And in case of the death of the said Emily B., Annie H. and Eliza W. without issue, then to the surviving children of the said M. London and their issue, if any such said children be living, to take *per stirpes,* and not *per capita.* Mauger London, who is mentioned in the said deed, died intestate on 10 May, 1894. He left him surviving his wife, Emily B. London, and, by a former marriage, his child, Annie H. London. Emily B. London, who was the second wife of Mauger London, and who is mentioned as one of the beneficiaries under the aforesaid deed, died on 6 June, 1897, leaving her surviving Eliza W. Cronly, her only child and sole heir at law. On 16 March, 1903, all of the heirs of Mauger London executed their deed to Annie H. Campbell and Eliza W. Cronly, conveying any and all such right, title and interest which they had in said real estate. Said deed was duly proven and recorded. Annie H. London married Archibald R. Campbell. The only child by this union was James Douglas Campbell, now living. Eliza W. London married Joseph M. Cronly, and is now a widow. By her marriage she has had three children, to wit, Jean Murphy, Robert Dixon and Margaret Cronly, all of whom are minors, but in this proceeding are represented by George H. Howell, their duly appointed guardian *ad litem.* The said Annie H. Campbell and Eliza W. Cronly, claiming that as tenants in common they are the owners in fee of the said property, agreed to sell the same for the sum of twelve thousand dollars to the defendant, John London, but he is advised that the said parties are not seized in fee of the said property, and have only a life estate therein, and that upon the determination of the life estate the property descends to their issue, and he declines to purchase the property until it is determined whether the said parties have a life estate or fee simple in said property; but if it is (461) adjudged that they have a right to convey, he stands ready, and is able, to comply with his contract of purchase. Eliza W. Cronly contends that she has an undivided two-thirds (2-3) interest in the

property; that the deed of trust from Brock to Flanner vested a fee simple in Emily B. London, her mother, Annie H. Campbell, and herself, each having an undivided one-third (1-3) interest therein; that, by the death of Emily B. London, her mother, she, the said Eliza W. Cronly, inherited, as her sole heir the undivided interest vested in the said Emily B. London, and that by reason thereof and her own one-third interest in her own right she is vested with an undivided two-thirds interest in the fee in said property. Annie H. Campbell contends that by the deed of trust from Brock to Flanner the property vested in Emily B. London, Eliza W. London and herself, and, upon the death of the said Emily B. London, by survivorship, the fee vested in Annie H. Campbell and Eliza W. London, in equal parts, and therefore she contends that she has an undivided one-half (½) interest therein. The minor defendants, Jean Murphy Cronly, Robert Dixon Cronly and Margaret Cronly, by their guardian *ad litem,* George H. Howell, make no contention in regard to the title to said premises, but will abide the judgment of the court upon the facts here agreed as to any rights, future or contingent, they might have under the deed of Brock to Flanner, trustee.

His Honor was of the opinion, upon the foregoing case agreed, that the plaintiff, Mrs. Annie H. Campbell, and the defendant Mrs. Eliza W. Cronly were the owners in the proportion of one-half each of the real estate in controversy; that upon the death of each their interest will pass to their "heirs at law, such heirs to take *per stirpes";* that they could not convey the land in fee simple to the purchaser. Judgment was rendered accordingly. Plaintiff, Mrs. Campbell, and defendant Mrs. Cronly assigned error and appealed.

Empie & Empie for plaintiff.
Meares & Ruark for defendant.

CONNOR, J., after stating the case: When this cause was before us on appeal, at the last term, the purchaser of the land was not a party. We remanded the case, to the end that further parties (462) be made, which has been done. The first question which confronts us is whether, in the present condition of the record, we can take jurisdiction and decide the several questions presented in regard to the title to the *locus in quo.* This Court has frequently entertained and decided controversies wherein parties have entered into a contract to sell land and the purchaser has refused to comply because of doubts entertained in regard to the title. We have treated such suits as bills by the vendor against the vendee for specific performance. It is well settled, by uniform decisions of this and other courts of equitable

jurisdiction, that the purchaser will not be required to take a doubtful title. It therefore became necessary to inquire into the vendor's title, which was sometimes done by a reference to the clerk and master, or a referee selected for that purpose. Bispham Eq., sec. 378; *Gentry v. Hamilton,* 38 N. C., 376. While the vendee will not be required to pay the contract price and take a doubtful or imperfect title, he may, if he so elect, and it be not inequitable, have a decree for such part of the land or such interest as the vendor can convey, with a deduction from the contract price. Mr. Bispham thus states the equitable doctrine: "It may sometimes happen that defects exist which render the property less valuable than the contract price, but which, nevertheless, may not be of so vital a character as to induce the purchaser entirely to throw up his bargain. In such a case the equity of specific performance with compensation comes into play for the benefit of the vendee." Equity, 390. It is said, in the note to *Seton v. Slade,* 7 Ves., 265 L. C. Eq., Vol. III, part 11, 15: "It may be laid down as a general rule, subject, however, to some exception, that a purchaser may, if he chooses, compel a vendor who has contracted to convey a larger interest in an estate than he has, to convey to him such interest as he is entitled to with compensation." *Lord Eldon,* in *Mortlock v. Buller,* 10 Ves., 315, says: "For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract, and if the vendee choose to take such as he can have, he has a right to that, and to an abatement, and the Court will not hear the objection by the vendor that the purchaser can not have the whole."

(463) *Jacobs v. Lock,* 37 N. C., 286. In such cases it becomes necessary for the court to inquire into the state of the title of the vendor, to the end that it may mould its decree as to do complete equity to all of the parties. So, in this appeal, if the vendor so desires, he may, unless it would be inequitable, acquire, under his contract of purchase, at a reasonable deduction from the contract price, such interest, if any, as either of the vendors have a right to convey. There is, however, another ground upon which a majority of the Court are of the opinion that we have and are compelled to take jurisdiction and decide the controversy in regard to the disputed title. It is well settled that, prior to the statute of 1893, chapter 6, Revisal, sec. 1589, the jurisdiction of courts of equity to entertain bills to remove cloud from title or to quiet title was restricted within well-defined limits. *Busbee v. Macy,* 85 N. C., 329; *Busbee v. Lewis, ibid.,* 332. In the opinions in these cases by *Ruffin, J.,* this Court adhered to the decisions in this and other States, many of which he cited and commented upon. *Pearson v. Boyden,* 86 N. C., 585, and cases cited. The Legislature, at the session of 1893, enacted a statute for the purpose of enlarging the power of the

courts to entertain suits to quiet titles where the conditions were such that a possessory action could not be brought. Of course, if the plaintiff had a complete remedy by means of a civil action, there was no necessity for resorting to the statutory remedy. *Pearson v. Boyden, supra.* The material part of the statute is in the following words: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."

Prof. Pomeroy, 4 Eq. Jur., sec. 1396, after discussing the jurisdiction of courts of equity prior to the passage of this and similar statutes in other States, says: "The action has been greatly extended by statute, and in many States is the ordinary mode of trying disputed titles." He gives, in a note, a list of the States in which the statutes have been enacted. He further says: "In almost every instance the statutes, either by express terms, or through broad and general language, allow the action to be maintained by persons having equitable titles; in other words, a plaintiff need not have a legal title. . . . The statute is an enabling act, and the action may be brought against (464) one or more claimants without regard to the interest or title—legal or equitable—which he, or the plaintiff, may have." The California statute is in the same words as ours. *Chief Justice Field,* in *Curtis v. Sutter,* 15 Cal., 259, says: "It is unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he has been disturbed in his possession by the institution of a suit against him and until judgment has been passed in such suit in his favor. It is sufficient if, whilst in the possession of the property, a party out of possession claims an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed and judicially determined and the question of title be thus forever quieted. It does not follow from the fact that the suit is brought in equity that the determination of questions purely of a legal character in relation to the title will necessarily be withdrawn from the ordinary cognizance of a court of law. The court sitting in equity may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings and submitted to the jury. . . . There is no difficulty in so conducting a suit, under the statute, as to fully protect the legal rights of the parties and, at the same time, to secure the beneficial results afforded by a court of equity in bills of peace—which is, repose from further litigation. Indeed, the remedy under the statute is eminently simple, direct and efficacious for this purpose." The Nebraska statute, being practically in the same language, was discussed by the same eminent jurist while a Justice of the Supreme Court

of the United States, in *Holland v. Challen,* 110 U. S., 15, when he said: "Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate in it for the purpose of determining such estate and quieting the title. It is certainly for the interest of the State that this jurisdiction of the Court should be maintained and that causes of apprehended litigation respecting real property necessarily affecting its use and enjoy-
(465) ment should be removed; for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of every-day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. . . . It is manifestly to the interest of the community that conflicting claims to property thus situated should be settled so that it may be subject to use and improvement. To meet cases of this character, statutes like the one in Nebraska have been passed by several States, and they accomplish a most useful purpose." It was held that the Federal courts would enforce the statutes when they had jurisdiction by reason of diverse citizenship. In *Parish v. Ferris,* 67 U. S., 606, the Ohio statute was enforced. See, also, *Fry v. Summers,* 4 Idaho, 424, where the statute was in the same language as ours. In *Walton v. Perkins,* 33 Minn., 357, *Mitchell, J.,* says: "This statute is intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether derived from a common source or from different and independent sources." In *Adler v. Sullivan,* 115 Ala., *Harrolson, J.,* says: "The statute is an extension of the remedy in equity theretofore existing for the removal of clouds on title." Discussing the equitable remedy, prior to the statute, he says: "This statute goes in advance of that remedy and in addition allows any person in peaceable possession of lands claiming to own the same, whose title thereto or any part thereof is denied or disputed, or where any other person claims, or is claimed or is reputed to own the same or any interest therein or to hold any lien or encumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or encumbrance, to bring and maintain a suit in equity to settle the title to said lands and clear up all doubts and disputes concerning the same." In *Holmes v. Chester,* 26 N. J. Eq., 79, the *Chancellor,* discussing a similar statute, says: "It is highly remedial and beneficial. It should therefore be construed liberally. It is a statute of repose. It deprives the defendant of no right. His claim may be tried at law if he desires it." So *Beasly, C. J.,* in *Jersey City v. Lembeck,* 31 N. J. Eq., 255, says: "The inequity that was designed to be remedied grew out of the situation of a person in
(466) the possession of land as owner, in which land another person claimed an interest which he would not enforce; and the hard-

ship was that the person so in possession could not force his adversary to sue and thus put the claim to the test." *Albro v. Dayton,* 50 N. J. Eq., 574. This Court, in *Daniels v. Fowler,* 120 N. C., 14, held that it was not necessary that plaintiff should be in possession of the property to maintain his action. In *Rumbo v. Mfg. Co.,* 129 N. C., 9, it was held that when the alleged cloud upon the title was found to be invalid the Court should not dismiss the action, but should adjudge such invalidity and remove the cloud. The present *Chief Justice* said: "It was because the Legislature thought the equitable doctrines (as laid down in *Busbee's case*) inconvenient or unjust that the act (1893) was passed." *Beck v. Meroney,* 135 N. C., 532; *McLamb v. McPhail,* 126 N. C., 218. The statute provides that if the defendant disclaims title the cost is adjudged against the plaintiff. The wisdom of enlarging the power of the court to deal with the subject is manifest. It is highly important to private right and public interest that titles shall be rendered secure and certain. As said by *Judge Field,* it is a matter of common observation that in almost every town or city, lots either without any improvement, or such as have been erected in the past falling into decay—the growth and development of the town impeded by some obscure, uncertain cloud upon or question in regard to, the title. In many cases, without the aid of the statute it is impossible to bring the claimants before the court and have them assert and "try out" their claim. It sometimes happens that obscure contingent limitations imposed upon titles operate to impoverish an entire generation when, upon a careful judicial examination, the title may be cleared up, rights adjudged and property unfettered, bringing it either into market or enabling the owners to improve and receive an income from it. It is this evil which the Legislature has sought to remedy by providing a simple, inexpensive and efficient procedure which the courts, by reason of precedents from which they were unwilling to break away, were unable to afford. The unanimity with which the judges have recognized the wisdom of the legislation, giving it a liberal construction, has made it effective.

This brings us to a consideration of the assignments of error (467) made by both plaintiff and defendants to his Honor's judgment.

The conveyance by Mr. London to Flanner, trustee, vests the legal title in him in fee, with a declaration of the use to Mrs. London, his wife, and Annie H. and Eliza W., his daughters, in fee, "and to the survivors of them." Whatever difficulty we would have found in giving effect to these last words in a common-law conveyance, operating by livery of seizin, is obviated in a deed operating under the statute of uses in which the intention of the grantor may be effectuated. "It is a maxim of the common law that no estate can be limited upon a fee simple; or, in other words, an estate in fee simple can not be made to

cease as to one and take effect, by way of limitation, upon a contingent event, in another person. It is clearly settled that limitations of that kind may take effect by way of use." Coke Lit., 271 (note), cited by *Mr. Justice Ashe,* in *Smith v. Brisson,* 90 N. C., 284, where the authorities are collected. In *Rowland v. Rowland,* 93 N. C., 215, the conveyance was to two children of the grantor in fee as tenants in common, "and upon the death of either one, then to the survivor and his or her heirs forever." *Ashe, J.,* said: "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." After an interesting discussion of the subject, the learned *Justice* says: "Our opinion is, a defeasible fee in common was given to Ophelia and John and, upon the death of Ophelia, the absolute fee vested in John as survivor, because such was the manifest intention of the donor, and because that construction is not in violation of any principle of law or rule of construction." Mordecai's Lectures, 871. This authority is conclusive to the effect that, by way of a shifting use, the beneficial interest in the entire property, upon the death of Mrs. London, vested in Annie H. and Eliza W. London in fee. Did it vest in them absolutely, or did the right of survivorship attach, carrying the equitable title, or use, to the last survivor? It will be observed that the grantor uses the words "and to the survivors of them." If controlling effect is given the word "survivors," the language of the deed is (468) complied with upon the death of Mrs. London, and the daughters take the entire estate absolutely. In *Hilliard v. Kearney,* 45 N. C., 221, *Pearson, J.,* discusses the question of successive survivorships at much length. There the property was given to five daughters, with a proviso that if either of them died without issue, "her part to be equally divided between her other sisters." It was held that upon the death of the first sister without issue the shares of the survivors became absolute. He invokes the rule that when the language of the maker of the instrument leaves his intention in doubt, that construction will be adopted which will make the estate "absolute and indefeasible." It is said, in *Cox v. Hogg,* 17 N. C., 121, that in ascertaining whether a succession of survivorships is created, the Court will examine other parts of the will. In *Fortescue v. Satterthwaite,* 23 N. C., 566, the limitation was made to depend upon the death of either of the first takers without children, when the property passed to "the children then living." These words were held to create a succession of survivorships. We have examined the cases in our reports, and, as said by *Judge Battle,* in *Biddle v. Hoyt,* 54 N. C., 159, it is difficult to extract any satisfactory principle from them. In *Galloway v. Carter,* 100 N. C., 111, the limitation was dependent upon "any or either" of the children dying without issue, etc.

These words, together with others of like import, were held to create a succession of survivorships. In view of the use of the word "survivors," and the fact that the grantor attaches a limitation to the issue of his daughters, if either of them should die leaving issue, we conclude that, upon the death of Mrs. London, the entire use or interest vested in the daughters in fee.

This would dispose of the appeal, but for the words which follow: "Provided, however, that if the said Annie H. or Eliza W. London shall die leaving issue, then to the use of such surviving issue, who shall take the same *per stirpes,* and not *per capita.*" These words would create in the daughters a determinable fee and, upon the death of either, the use would shift and vest in the "surviving issue," unless the superadded words, "they take *per stirpes,* and not *per capita,*" denotes that the grantor used the word "issue" as synonymous with "heirs" and, by directing the title in the same channel as it would be (469) carried by the canons of descent, make the children and grandchildren of his daughters take by descent and not by purchase. We think that it was the intention of Mr. London to settle the property, in the event which has happened—the death of his wife—upon his daughters, with a limitation to their children and the children of such of them as should predecease their parents, and that he used the words that they should take *"per stirpes,* and not *per capita"* to remove any doubt in respect to the interests which they would take. Having given it to the daughters in fee, he certainly could not have intended to attach a limitation for their issue, which was ineffectual and left the estate in the same plight as it was by the language first used. He intended that the word "issue" should include grandchildren of his daughters whose parents had predeceased them, with the provision that such grandchildren should take by representation—that is, the shares or interest which their deceased parent would have taken if surviving. When language is used having a clearly defined legal signification, there is no room for construction to ascertain the intent; it must be given its legal meaning and effect. This is illustrated by what is said in *Leathers v. Gray,* 101 N. C., 162, in which *Merrimon, J.,* says: "The real intention must have effect, but the real intention recognized and enforced by the law is that expressed in the will, and this is to be ascertained by a legal interpretation of the language employed to express it," or, as the learned *Justice* says, in the same case, "He must express his intention in words appropriate and sufficient to express his real meaning, and if he employs technical legal words, the technical meaning must prevail, unless the same shall be qualified, or modified, by superadded words in the will." When, however, the words of limitation are of doubtful meaning, or their usual meaning, as used, is rendered doubtful by

superadded words and we are compelled to resort to construction, they must, if possible, be given such construction as will effectuate the intention of the maker of the deed or will. The word "issue" has been construed to include grandchildren when it was manifest that it was so intended, just as the word "heirs" has been restricted to children when words are superadded showing such intention. *Mills v. Thorn,*
(470) 95 N. C., 362. If by this deed the limitation had been to the children of Annie H. and Eliza W. and the children of such as should die before their ancestor, such children to take the share of their parent by representation, it is clear that the rule in *Shelley's case* would not have operated to vest in the daughters the fee. If by construction we give the words used by Mr. London the same meaning, the same result would follow. The other limitations are eliminated by the death of Mrs. London, leaving Annie H. and Eliza W. living and the deed from the children of Mr. London to Mrs. Campbell and Mrs. Cronly.

We conclude, therefore, that his Honor correctly held that the plaintiff Mrs. Campbell and the defendant Mrs. Cronly can not convey to the purchaser a good and indefeasible title to the *locus in quo.* The conveyance by James Douglas Campbell to his mother vests in her his interest, but if he should die leaving issue before his mother, such issue would take as a purchaser under the limitation in the deed.

The judgment must be

Affirmed.

BROWN, J. I concur in the opinion written by *Mr. Justice Connor* in this case so far as it passes upon the title to the property contracted to be sold by Annie H. Campbell and Eliza W. Cronly and holding that they can not make to the purchaser London a good and indefeasible title in fee.

At a former term we remanded the cause, to the end that the purchaser be made a party, which has been done. Having then treated the matter as a *bona fide* controversy submitted without action, under our Code, to compel specific performance of a contract to purchase land, and our order having been complied with, I see no reason now why the controversy should not be determined.

We have heretofore treated such controversies submitted without action upon agreed facts, where *bona fide,* as bills in equity by the vendor against the vendee for specific performance.

I do not agree, however, that the act of 1893, referred to in the opinion, will permit any kind of a dispute about the title to land to be
(471) brought before the courts under the guise of a "controversy submitted without action," simply to obtain the opinion of the court upon an abstract proposition or a moot point in a matter where no present relief can be had or no final judicial process issued.

As there is nothing in the record which impeaches the *bona fide* character of this controversy between vendors and vendee, I concur that the judgment of the Superior Court should be affirmed.

CLARK, C. J., dissenting: In the case on appeal it is stated: "This action is brought by the plaintiff against the defendants to determine the rights and liabilities of the several parties hereto in a certain lot of land, located in the city of Wilmington, New Hanover County, of this State. It is agreed by the parties hereto that the facts upon which the controversy depends may be submitted to the court as in an action without controversy, and judgment may be entered thereon, subject to the right of either party to appeal therefrom to the Supreme Court."

The proceeding proves, on examination, to be two interrogatories submitted to the Court to ascertain its opinion as to what are the respective interests of two persons in a certain lot, without any real litigation, and there is nothing that the judgment of the Court can act upon. Accordingly, the judgment of the court below is merely an opinion, or legal advice, as to the respective rights or interests of the parties in the property. Had the property been sold by order of court for partition, the question now asked us might have been presented upon appeal from the judgment distributing the proceeds, and it might come up in other ways, in a real litigation. But as now presented it is simply a "moot" point, and the Court is asked to give its opinion, as a matter of advice or legal information. The Court is asked to pass its opinion upon an abstract proposition, in a matter in which it can not adjudge, or direct that the parties themselves, or the officers of the law, shall take any action. This is not a matter of which the courts will take jurisdiction. *McKethan v. Ray,* 71 N. C., 165; *Board of Education v. Kenan,* 112 N. C., 569. It is the function of counsel, not of the (472) courts, to advise parties as to their rights, and answer interrogatories as to the law, as herein propounded.

A case exactly "on all fours" is *Heptinstall v. Newsome,* 146 N. C., 503, in which *Brown, J.,* speaking for a unanimous court, says: "The advisory jurisdiction of courts of equity is primarily confined to trusts and trustees, which includes executors, as far as their rights, powers and duties under the will are concerned," and then, after citing authorities, sums up: "This is not an action brought by the plaintiff against some person claiming an estate or interest in the tract devised to him, but is evidently a proceeding brought in the interest of the several devisees of parcels of land to settle and determine all their respective rights arising under the will *in presenti* and *in futuro* in which the executors, as such, have no interest. The appeal and the action are dismissed."

It would add immensely to the volume of business in the courts if any two or more parties could at will propound interrogatories to the courts as to matters about which they are in doubt. "Submission of a controversy without action" was intended only to dispense with summons and pleadings, where there is a real controversy in which the court can render judgment as in any other action. It was not intended to devolve upon the courts the duty of answering legal questions without any judgment to put the opinion into effect. The two interrogatories submitted to the Court are solely as to what are the respective interests of Mrs. Campbell and Mrs. Cronly in the land, whether each owns one-third or one-half interest therein, and present only a moot point; especially is this so, since the Court holds that they can not convey it.

Courts decide legal propositions, not as advisory counsel, but only when necessary in determining the relief to be adjudged.

Cited: Crockett v. Bray, 151 N. C., 617; *Smith v. Lumber Co.,* 155 N. C., 393; *Speas v. Woodhouse,* 162 N. C., 69; *Christman v. Hilliard,* 167 N. C., 8; *McCallum v. McCallum, ibid.,* 311; *Satterwaite v. Wilkinson,* 173 N. C., 40; *Smith v. Smith, ibid.,* 125.

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FARRIER JONES, BY NEXT FRIEND, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 14 April, 1909.)

1. **Railroads—Master and Servant—Torts—Liability of Master—Scope of Employment.**

   For the torts of the servant the liability of a railroad company is limited to those committed within the scope of the employment in furtherance of its business.

2. **Same—Judgment Upon the Verdict.**

   In an action for damages from an injury to plaintiff, caused by being shot by the servant or employee of defendant railroad company, the jury found, upon issues submitted without objection, that defendant's servant shot and injured the plaintiff in a reckless and wanton manner; that he was not acting within the scope of his employment at the time, and that plaintiff was entitled to recover in a certain sum: *Held,* defendant was entitled to have his motion for judgment upon the verdict allowed.

ACTION, tried before *Long, J.,* and a jury, at October Term, 1908, of SCOTLAND, for damages, alleged to have been sustained by plaintiff by reason of an assault committed upon him by defendant's agent while acting in the scope of his employment.

The plaintiff testified that he attempted to climb upon defendant's box car, attached to a moving freight train, catching hold of the iron bars for the purpose of stealing a ride; that a flagman on top of the car told plaintiff to come up to him, when he (plaintiff) started to run; that he had gone about eight feet from the car, when the flagman shot him—shot him twice—inflicting the injury from which he suffered, etc. Plaintiff was, at the time of the shooting, sixteen years of age. This was the entire evidence in regard to the transaction. There was evidence regarding the extent of the injury. Defendant moved the court for judgment of nonsuit; motion denied. Exception. His Honor submitted the following issues to the jury:

1. "Was the plaintiff injured by the reckless and wanton acts of the defendant's agent, as alleged in the complaint?

2. "If the plaintiff was injured by the reckless and wanton acts of the defendant's agent, as alleged in the complaint, was such agent, at the time, acting in the line of his duty, scope of his (474) employment and furtherance of the business of defendant company?

3. "What damage, if any, is plaintiff entitled to recover?"

The jury answered the first issue "Yes," the second "No," and the third "Two hundred dollars."

Defendant moved for judgment upon the verdict; motion denied. Defendant excepted. Judgment for plaintiff. Defendant excepted, assigned errors and appealed.

Jonathan Peele and J. A. Lockhart for plaintiff.
John D. Shaw and Murray Allen for defendant.

CONNOR, J., after stating the case: Passing the question raised by defendant's exception to his Honor's refusal to grant the motion for judgment of nonsuit, and assuming, for the purpose of disposing of this appeal, that the question whether the flagman, when he shot plaintiff, was acting in the scope of his employment or the line of his duty, was properly submitted to the jury, the defendant is entitled either to a judgment upon the verdict or to a new trial. While the members of the Court are not agreed in regard to the correctness of his Honor's ruling upon the motion for judgment of nonsuit, a majority of them are of the opinion that defendant was entitled to have its motion for judgment upon the verdict allowed. Whatever differences of opinion may have existed in the past, the decided weight of judicial opinion concurs that for torts committed by the servant while on duty and acting within the scope of his employment or line of his duty, proximately injurious to another, the master is liable. The fact that the tort was committed

recklessly, wantonly or willfully, if within the scope of the employment, does not exonerate the master. The view which has, after most careful consideration, been adopted by both English and American courts is thus stated by Sir Frederick Pollock, probably the most accurate writer on the subject now living: "A master may be liable for the willful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes." For an interesting and exhaustive discussion of this subject see 2 Bevan on Neg., Book IV, p. 554. This limitation is both scientific and practical. Cer-
(475) tainly no one will seriously contend that a master is an insurer of his servant's conduct in respect to torts committed by him while in his employment, without regard to the pivotal question whether such conduct had any relation to or was in the scope of the employment. To maintain that he is, it must follow that almost unlimited control should be given the master over the servant, to the end that he may protect himself against such unlimited liability. The law must be both reasonable and practical—that is, it must commend itself to the sense of justice of the average man and be capable of practical application to the manifold relations of our modern, industrial, social and domestic life. It is manifest that judicial thought upon the subject, since the decision of *McManus v. Crickett,* 1 East., 106, has been affected by the introduction of the industrial corporation into the field of litigation, and the measure and standard of liability of the master for the torts of the servant has been enlarged and extended to meet the changed conditions of employment of servants by these impersonal agencies. Liability has been fixed upon corporations for torts of its servants which, if applied to natural persons engaged in mercantile, mechanical and agricultural employments, and especially to those employing domestic servants, would shock the reason, produce startling consequences and be restricted by legislation. Mr. Bevan, speaking of the development of the doctrine of liability of the employer for the torts of his employee, says: "From this limited beginning its scope has become so almost universal in modern law that Jessell, M. R., thus comments on it: 'It is clear that, on principle, a man is liable for a man's tortious act if he expressly directs him to do it, or if he employs that other person as his agent, and the act complained of is within the scope of the agent's authority.' I agree that the court ought to be very careful how it extends the doctrine, *respondeat superior.* It has been carried in our law very far, indeed—I think, quite far enough." *Smith v. Keal,* 9 Q. B. D., 351. However this may be, and whether the law is at present upon a permanent and satisfactory basis, it is manifest that for the torts of the servant the master's liability is limited to those committed within the scope of the employment—in furtherance of his busi-

ness; for, as said in *McManus v. Crickett, supra,* "No master is (476) chargeable with the acts of his servant but when he acts in the execution of the authority given him." The same thought is clearly expressed by *Mr. Justice Walker,* in *Daniels v. R. R.,* 136 N. C., 517: "When a servant quits sight of the object for which he is employed and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for his acts." The subject has been so recently discussed by all of the members of this Court, and all of our own and many other authorities cited, in *Stewart v. Lumber Co.,* 146 N. C., 47, that no good results would come from a repetition of what was there written. While the writer of this opinion, upon the verdict of the jury in that case, dissented from some of the views expressed in the prevailing opinion, he does not understand that the decision in that case brings into question the principle that liability of the master for the torts of the servant is limited to those done in the scope of the employment. The principle upon which the opinion of *Mr. Justice Brown* rested, concurred in by the *Chief Justice* and *Mr. Justice Hoke,* was that when the master placed in the control of his servant a dangerous instrumentality for the purpose of carrying on his business, the law imposed upon him the duty of prevision and precaution. This view was very strongly stated in the concurring opinion of *Mr. Justice Hoke.* While the writer differed from the justices in the application of the principle to the instrumentality used in that case, he concedes that the principle is sustained both by reason and authority, and regards the question as settled, in the future cases coming before the Court, by that decision. Applying the principle to the record in this appeal, we find that his Honor, without objection by plaintiff, submitted two issues —the first, directed to the allegation that plaintiff was injured by the reckless and wanton conduct of defendant's agent, and, second, whether at the time the assault was committed the agent was acting in the line of his duty, etc. It is true that the first issue concluded with the words "as alleged in the complaint." When we refer to the complaint we find that plaintiff sets out the transaction in detail and in several aspects. We think that, read in the light of his Honor's instruc- (477) tion and the submission of the second issue, the finding by the jury upon the first issue referred to the manner in which the assault was committed—that is, recklessly and wantonly. In stating the contentions of the parties his Honor calls attention to the testimony of the plaintiff and the contention of defendant, that plaintiff was shot "at some other time and place, and was not shot by any agent of the defendant company." He concludes this part of the charge by saying that the burden is upon plaintiff to satisfy the jury that "what he says about it

is true." His Honor then defines a wanton, reckless act, saying: "You will notice that this issue presents to you the question as to whether this was a wanton act, and I undertake to tell you what, in the eye of the law, a wanton act is. If, under the instructions I have given you, gentlemen, your answer should be 'No,' it will not be necessary for you to answer the second and third issues." We quote the charge to show that the only question presented to the jury upon the first issue was whether the flagman shot plaintiff in a reckless and wanton manner. His Honor recognized the fact that plaintiff must not only establish the allegation that defendant's servant assaulted him, but must go further and show that the wanton, reckless assault was committed by the employee while acting in the scope of his employment and line of duty. The second issue was therefore consistent with the finding upon the first and necessary to establish a complete cause of action. While the plaintiff's evidence was uncontradicted, it was the province of the jury to draw the inference whether the employee was acting in the scope of the employment. "The inquiry as to the scope of the servant's employment being for the jury (unless the act is manifestly out of the course of the servant's employment, where a nonsuit is proper), the reported cases turn, in nearly every instance, either on the validity of the finding or on the question whether there is evidence for the jury." Bevan Neg., 584. The question involved in the second issue might have been tried and determined on the first if his Honor had seen proper to do so. This was done in *Pierce v. R. R.*, 124 N. C., 83, where the court charged the jury that if they found that the injury was inflicted by the servant, in
(478) the course of his employment, to find the issue for the plaintiff. The plaintiff did not except to the submission of the second issue to the jury or the instruction of the court. The question is therefore not presented whether, as a matter of law, his Honor should have held that the servant was acting in the full scope of his employment. We have been unfortunate if we have not been able to make ourselves understood in this case. We do not hold, nor is there any word in the opinion to justify the suggestion to the contrary, that corporations or natural persons are privileged to shoot people. No such question is raised by any exception in the record, nor was it suggested upon the argument. We simply hold that when, without objection or exception, an issue is found by the jury that the defendant's servant was not acting within the scope of the employment when he committed the assault, the employer is not liable. This is elementary, and the courts, "without variableness or shadow of turning," have uniformly so held.

In *Palmer v. R. R.*, 131 N. C., 250, the opinion concludes with the words, "The employee must have been acting at the time within the scope of his employment on the defendant's car." The jury—not the

court—found that in this case he was not so acting. We are unable to perceive how we can, in the face of this finding, without a single exception by the plaintiff, do otherwise. No motion was made to set the verdict aside. This disposition of the appeal renders it unnecessary to consider the charge in regard to the character and measure of damages which could be awarded. The judgment must be reversed, with direction to enter judgment that defendant go without day, etc.

Reversed.

BROWN, J., concurring: I concur in the opinion written for the Court by *Mr. Justice Connor,* which to my mind is conclusive that the defendant company is not liable for the unwarranted and unauthorized act of its brakeman in shooting at the plaintiff. There is not a scintilla of evidence in the record that the brakeman shot at the plaintiff in an endeavor either to keep plaintiff off the train or to put him off after he was on. Upon all the evidence the act of the brakeman was neither authorized by the defendant nor done in the discharge of the brakeman's duty to it. It was plainly a reckless, "devil-may-care" act, for the consequences of which the person who did it (479) should be punished, and not his innocent employer, who could not prevent it and did not ratify it.

In the *Stewart case,* in my opinion, the company is held liable upon a well-defined ground, supported by most respectable authority, to the effect that a steam locomotive is such a dangerous instrumentality that the company is liable for the manner in which the engineer selected by the company uses it when running it in the company's business. That principle is not involved in the case.

I do not understand, nor do I think any one else seriously believes, that railway or other corporations claim for their employees the privileges of the ancient nobility of France to shoot down innocent persons at will or to commit other lawless acts. I have so much respect for the great mass of railway employees that I do not think they merit any such severe censure. My experience has convinced me that they are very generally a most faithful, law-abiding as well as highly respected class of our industrial population. But now and then, as in all other callings, however great or however humble, some reckless individual will be found. When his lawless act is done in the discharge of his duty to his master, or when it is authorized or ratified by him, then the master is justly held to be liable for the damage inflicted, however innocent the master may be; but when such act was not done in furtherance of the master's business, and was neither authorized nor ratified by him, but was the wanton, reckless, personal act of the servant, which the master could neither foresee nor prevent, and does not ratify, then

it is neither law nor justice to hold the master responsible, and this applies to corporate as well as individual employers of labor.

Such has been the law of this and our mother country from time immemorial.

CLARK, C. J., dissenting: The plaintiff was attempting to climb up on the defendant's box car to steal a ride. A flagman on top, discovering him, told him to "Come on up." Whether the menacing tone, or the fact that he was discovered, or, as is probable, the flourish of a pistol, intimidated the plaintiff, he started to run, and when about
(480) eight feet from the car the flagman shot the plaintiff, striking him twice. This was one continuous act. The flagman was in discharge of his duty in discovering the plaintiff, and could not put off that character and without change of position assume another while the plaintiff was running eight feet, which a calculation shows was less than half a second. He could not be an employee of the railroad when he frightened the man and cease to be an employee and fire two accurate shots within the half second, or 1-120 part of a minute, while the badly frightened man was running eight feet. As the flagman fired and struck the fleeing man twice before he could run eight feet, the pistol must have been drawn and presented before the plaintiff turned to fly. The remark of the flagman, "Come up here," must have been accompanied by the presented pistol, which caused the precipitate retreat of the plaintiff. The act of the flagman was continuous, and the shooting was so quick—two shots that were hits, before the scared man could move more than eight feet—that it can not be divided. But, independent of that, the flagman was at his post, in the exercise of his employment, and for his conduct the defendant is responsible. *Hayes v. R. R.*, 141 N. C., 195.

This Court has held again and again that a railroad is liable for the conduct of its agents, whether negligent or willful and wanton, when the act is done in the course of their employment. In *Jackson v. Tel. Co.*, 139 N. C., 347, it was held that the corporation must answer for the servant's wrongful act, "if committed in the scope and course of the servant's employment," and that he is in such scope and course of employment if he "is at the time about his master's business." If this were not so, the corporation would never be liable, for it does not hire its employees to do negligent acts or commit wanton and willful wrongs.

The company was held liable when its station agent got into a difficulty with an ex-passenger, over the delivery of a trunk, and killed him, though he was certainly not employed to kill passengers. *Daniel v. R. R.*, 117 N. C., 592. Nor was the conductor employed to kiss a female passenger, but he was on duty, and the company was held liable,

in *Strother v. R. R.*, 123 N. C., 197. Nor was the fireman (481) employed to throw a chunk of coal to frighten a boy who was stealing a ride on the tender, but the company paid for the resultant injury. *Pierce v. R. R.*, 124 N. C., 84. Nor were the employees authorized to throw stones at a tramp stealing a ride; in fact, the duties of some did not involve that of making the tramp get off, but the company was held liable. *Cook v. R. R.*, 128 N. C., 333. The fact that here the employee used a pistol instead of stones, and that a half-second after the man had gotten off and was eight feet away, is an aggravation and not a defense.

In *Stewart v. Lumber Co.*, 146 N. C., 47, the company was held liable for the wanton conduct of employees as to one neither a passenger nor a trespasser, by blowing the whistle and hollering to frighten plaintiff's horse, which was injured in the resultant runaway. The question in that case, which divided the majority of the Court, whether the plaintiff could recover punitive damages or actual damages, does not now arise, but four of the Court agreed that the action could be maintained, as had been done on a similar state of facts in *Brendle v. R. R.*, 125 N. C., 474; *Hussey v. R. R.*, 98 N. C., 34. The company was held liable for torts of its agents, even when *ultra vires*. *Gruber v. R. R.*, 92 N. C., 1; *White v. R. R.*, 115 N. C., 636; *Waters v. Lumber Co., ibid.*, 652. In the unanimous opinion of the Court, in *Foot v. R. R.*, 142 N. C., 52, the railroad was held liable for the willful and wanton misconduct of its employee, citing *Brendle v. R. R., supra.*

There are many other cases to the same effect in this and the other States. It is difficult to see how the company is liable if the employee throws stones or coal at a trespasser, or frightens him, by cursing, into jumping off (*Hayes v. R. R.*, 141 N. C., 195), but is not liable if lead is used; nor how it is responsible to one off the right of way for injuries resulting from frightening his horse by shouts and blowing the whistle, and not liable for shooting one on the right of way and not eight feet from the car.

The liability of a farmer, merchant or other citizen, in the performance of his inherent right to do business, for the conduct of his agents is necessarily not as broad as that of these great corporations, which are given artificial existence and great special privileges, (482) on the ground, not only that they shall be used for the public benefit, but on the implied agreement that they shall not be used to the public detriment. Using vast physical and pecuniary power, they must be liable for its misuse; and, employing great numbers of men, they alone can control them, and are responsible for their discipline. They are liable for negligence of a fellow-servant and for public regulation of their charges and conduct. If an employee on a rapidly moving train

throws rocks or fires into a crowd, he could rarely be identified or found able to respond in damages. If he killed a citizen's horse or cow by shooting from the top of the train, the company would be responsible. Why not when he shoots a man?

Jaggard on Torts, sec. 86, thus correctly sums up the result of the authorities: "The master is liable for the conduct of his servant, within the course of his employment, not only where responsibility would attach under the test or scope of his employment, but also where the conduct is not intended to be for the master's benefit, but for the servant's malicious, capricious or other private purpose, and whenever a duty rests on the master to avoid doing harm to the third persons and the servant violates that duty in the course of his employment."

Under the reign of privilege in France one of the privileged class was seen to shoot a workman from the top of a building for the pleasure of seeing him tumble to the ground. He was not held to account, but the incident aided to topple over the French monarchy to its death. Corporations can not claim such privileges for its officers or employees. If employees on a moving train can fire at cattle or at people along the track at will, without any responsibility on the part of the company, because the act is willful and wanton, then the company is using its vast privileges, not upon terms of liability for good behavior to the public, but upon the narrow ground that, like a private business, it is only responsible for the conduct that it authorizes. It was wrong for the plaintiff to attempt to steal a ride, but the penalty for such offense is not execution by shooting.

Upon the finding on the first and third issues the court properly rendered judgment. The finding on the second issue, very clearly,
(483) was meant not to negative the finding on the first issue that the shooting was "reckless and wanton, and as alleged in the complaint," but merely to negative that it was "in furtherance of the business" of the defendant. The second issue was immaterial and irrelevant and should be disregarded.

Cited: Moore v. R. R., 165 N. C., 447.

W. G. LASSITER v. SEABOARD AIR LINE RAILWAY.

(Filed 14 April, 1909.)

Railroads—Unloading Cars—Master and Servant—Accident—Damages.

When it appears that plaintiff was injured while unloading rails from a flat car, caused by a rail bounding back in an unusual and unexplained

way and striking him; that the method employed for unloading was considered the safest way; that the car had been properly loaded with the rails, and sufficient help furnished in unloading them, the injury was an accident, and the plaintiff can not recover for consequent damages.

ACTION tried before *Webb, J.*, and a jury, at November Term, 1908, of CHATHAM.

Action for personal injury, alleged to have been sustained by reason of defendant's negligence. The evidence tended to show that plaintiff was, by direction of defendant's superintendent or road master, engaged, with other employees, in unloading iron rails from a flat car; that the rails were laid upon the car in the usual way, and that upon either side of the car "fish bars," or "angle plates," about eighteen inches long, were used as standards. They were put in the "stirrups," or "cuffs," on the side of the car, for the purpose of holding the standards. Some of the rails had been taken up from the cross-ties and were being used to build a siding. The "fish bars" were suitable for standards and "constantly used for that purpose." The rails were loaded in the usual way. There were several cars of rails. In unloading the cars, other than the one on which plaintiff was injured, the standards, or "fish bars," were removed and the rails thrown upon the ground. When the hands undertook to unload the car upon which the plaintiff was injured, it was found that the rails pressed against the standards, so that (484) they could not be removed. The plaintiff and other hands were directed to unload by raising one end of the rail, lifting it over the standard and letting it fall to the ground, and then lifting the other end over in the same manner; or, as plaintiff says, the order was, "Pick up the end of the iron and throw it off." He says that, as he did so, "it bounded some way or other and dashed back to the car." In reply to the question, "When you picked up the end of the rail to toss it over, it caught at the other end and flew back—is that the way you described it?" "It bounded and flew back. . . . I was not thinking about it; I was just trying to carry out orders. I thought it would go to the ground."

Mr. Cain, the section master, a witness for plaintiff, says that Captain Tussey, the road master, ordered the hands to throw the rails off. "He said he could not get the standards out until after he got the rails from around the standards; they were piled against the standards." This witness said the car was loaded in the usual way; that the fish bars made good standards—were constantly used for that purpose; that he had unloaded rails in that way before, and had often seen it done; they had thrown out two or three rails before the plaintiff was injured. The rail struck plaintiff's leg as it "bounded back," and inflicted the injury for which he sues.

The foregoing is the substance of the evidence on behalf of the plaintiff in regard to the way in which he received the injury. He alleges that defendant was negligent in several respects. His Honor instructed the jury that there was no evidence that the car was not properly loaded or that there was not a sufficient number of hands for that purpose. The defendant requested his Honor to instruct the jury, "From all of the evidence in this case, the cause of the injury was an accident, and that they will answer the first issue 'No.'" This was refused, and defendant excepted. His Honor instructed the jury that if they found that, as the plaintiff picked up the rail to toss it off the car, the other end of the rail was caught or hung, and if they should further find that Cain or Tussey knew that the rail was caught or hung, (485) or that they could have known by observation or ordinary care that it was caught, and failed to do so, and, after knowing it was caught at the end, it was tossed over and rebounded, and, by reason of the fact that it was caught before it was picked up or after it was picked up, it hurt plaintiff, they would answer the first issue "Yes." Defendant excepted. There was a verdict for plaintiff. Judgment and appeal.

Long & Long for plaintiff.
Murray Allen and Hayes & Bynum for defendant.

CONNOR, J., after stating the case: The defendant lodged several exceptions to his Honor's refusal to give special instructions, and to the instructions given, but error is assigned only for the refusal to nonsuit and, what is equivalent, to instruct the jury that the injury sustained by plaintiff was the result of an accident. The uncontradicted evidence is that the rails were loaded in the usual way, and that the "fish bars" were suitable and usually used for standards. His Honor instructed the jury that there was no evidence that the cars were not properly loaded or that there were not a sufficient number of hands to assist in unloading. It is evident that plaintiff and Mr. Cain, who helped him, were able to and did lift one end of the rail over the standard. It does not appear that the fact that the standards were not removed was the proximate cause of the injury. We do not find any suggestion in the evidence that the method of handling the rails was unusual or dangerous, provided a sufficient number of hands were furnished to lift them over the standard. His Honor eliminated every suggestion of negligence, other than the question whether Tussey, who gave the order, and Cain, who assisted the plaintiff in executing it, saw or could have seen by the exercise of ordinary care that the rail was hung. We see no ground for exception to the measure of duty imposed

upon them. It was undoubtedly the duty of the person giving the order to unload the rails to use ordinary care to see that they could be handled with safety, in the manner directed by him. There is no evidence or suggestion that either of them did in fact see that the rail was "hung," nor does it very clearly appear how it was "hung." We are unable to find any evidence that there was anything in the (486) position of the rail to suggest to them that the end lifted over the standard would not, as others had done, similarly situated and handled, fall to the ground. All of the witnesses concur in saying that the rails were loaded in the usual way; two or three had been unloaded without accident. The method pursued in unloading was not unusual; therefore unusual results could not be reasonably anticipated. We are unable to find any suggestion in the evidence explaining why the end of the rail, when lifted over the standard, rebounded. We, of course, know that there was some obstruction to the anticipated action of the other end of the rail which should and, but for some obstruction, would have moved upwards as the end next plaintiff went to the ground. The plaintiff, in answer to the question, "What caused it to spring back?" said: "I suppose it got caught at the other end, or some way; it got down so quick it bounded in some way and flew back and struck me." He further says: "I could not say how it was done; it came back with pretty smart force—very quickly."

In *Keck v. Tel. Co.*, 131 N. C., 277, where it appeared that there was nothing unusual in the conditions under which the work was done—no lack of hands and "no mishap or danger anticipated"—the injury was held to be the result of an accident, which is "an event from an unknown cause, or an unusual and unexpected event from a known cause—chance, casualty." *Crutchfield v. R. R.*, 76 N. C., 322. In *Martin v. Manufacturing Co.*, 128 N. C., 264, it is said: "Injuries resulting from events taking place without one's foresight or expectation, or an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected, must be borne by the unfortunate sufferer."

In *Bryan v. R. R.*, 128 N. C., 387, *Douglas, J.*, said: "The employer is not responsible for an accident simply because it happens, but only when he has contributed to it by some act or omission of duty." In this case a new trial was ordered, with the suggestion that a nonsuit should have been granted. *Alexander v. Manufacturing Co.*, 132 N. C., 428; *Frazier v. Wilkes*, 132 N. C., 437. While we regret the painful injury which the plaintiff sustained, we are unable to see how, by reasonable human foresight or precaution, the eccentric course of (487) the rail could have been anticipated and therefore prevented. We can not think that it was negligent to pursue a course which none of the

witnesses suggest was either unusual or hazardous. Mr. Tussey says that he had been at that kind of work fourteen years; that he had ample force. "It is always customary to take hold of the rail and throw one end off to prevent accident: Some men will throw quicker than others and let the rail fall down, and for this reason we have adopted the plan to throw one end off at the time. It makes it much safer than trying to throw the entire rail off. It was the method adopted by all of the roads that I have worked for in unloading rails." W. C. Wooten, who was section foreman and present when the accident occurred, says of the method of unloading: "It is safer, one end at a time. If you try to pick up both at the same time, sometimes the rail will turn and catch your fingers." This is not contradicted, and is consistent with plaintiff's evidence. We think that his Honor should have granted the motion for nonsuit. Upon the whole of the evidence the plaintiff's injury was the result of an unforeseen and unavoidable accident.

There is

Error.

Cited: Dunn v. R. R., 151 N. C., 315; *Simpson v. R. R.*, 154 N. C., 53; *Briley v. R. R.*, 160 N. C., 92; *Lloyd v. R. R.*, 168 N. C., 648; *Morris v. R. R.*, 171 N. C., 534.

IN RE WILL OF JAMES M. THORP.

(Filed 14 April, 1909.)

1. **Evidence—Statements—Silence—Admissions.**

Statements made in the presence of one (who did not reply), to become his implied admissions, must have been made on an occasion when a reply would properly be expected; and testimony as to statements made in a plea for mercy to the court by an attorney, in the hearing of his client and not denied by him, as to his mental incapacity, is inadmissible upon an issue of *devisavit vel non* attacking the probate of his will on that ground.

2. **Evidence—Wills—Devisavit Vel Non—Records—Book of Settlements—Originals—Copies.**

Upon an issue of *devisavit vel non* upon the question of the mental capacity of the testator to make a will, the book of settlements, kept in the clerk's office in accordance with the provisions of section 21, chapter 156, Laws 1883, recording copies of original papers, is not competent evidence of the contents of such papers. The original papers or the records of the executive committee of the State Hospital are competent. *Quære.*

3. Evidence—Wills—Devisavit Vel Non—Mental Capacity—Book of Settlements—Harmless Error.

Upon an issue of *devisavit vel non* the testimony of both sides showed that the testator had been confined in and discharged from a State's hospital about twelve years previous to his death; and the conflicting evidence upon his mental capacity to make a will was directed almost exclusively to his mental condition during the last few years of his life: *Held*, (1) in the absence of any evidence to the contrary, the law will presume the discharge was based upon the restoration of the testator's mind; (2) that the erroneous admission in evidence of the book of settlements in the office of the Superior Court clerk was harmless error.

4. Evidence—Wills—Mental Capacity—Burden of Proof—Instructions.

After placing the burden of proof on the caveator to establish the insanity of the testator at the time of making the will, by the preponderance of the evidence, it is correct for the judge to charge, in effect, that if the jury find from the evidence that the testator signed the writing offered in evidence as and for his last will; that at the time he had mental capacity to know and understand what he was doing, to know his property and its disposition, his relationship to his property and the persons benefited, the nature and effect of his act, he had mental capacity sufficient to make a will.

AN ISSUE of *devisavit vel non,* tried at February Term, 1909, of (488) GRANVILLE, before *Long, J.*

The issue was found by the jury in favor of the propounder.

From the judgment rendered, the caveator, William H. Thorp, appeals.

B. S. Royster, H. K. Lassiter and T. T. Hicks for propounder.
Graham & Devin for caveator.

BROWN, J. The ground upon which the will of the testator, James Thorp, was contested is stated in the *caveat* to be "for the reason that at the time of the execution thereof, and continuously thereafter until his death, the said James M. Thorp did not have the (489) capacity to make and execute a will, for that he was not of sound and disposing memory at and during said time." The evidence on both sides is quite voluminous. That introduced for the propounders, including that of the witnesses to the will, tends to prove that the testator, a colored man, was eccentric, had been committed to the asylum for the insane in 1894 for about two years and then discharged; that he returned to his home and managed his affairs successfully up to his death—so much so that he surpassed all of his race in that community in making money and in keeping it, and got decidedly the better of two lawyers on a land trade; that up to his death he kept his houses insured,

collected his rents, could read and write and kept accounts accurately, and that he had ample capacity to make a will.

The evidence offered for caveator tends to prove that testator was of unsound mind, suffered from mental delusions, and that he did not have testamentary capacity at the time of the execution of the will.

There are two exceptions to the evidence relied upon in the brief of counsel for appellant:

1. To the exclusion of evidence of witness Nat Venable, by whom caveator proposed to show that a few years before the death of testator he pleaded guilty to trespass, and his counsel, in his plea to the court for mercy, stated in the presence of testator that he had lately returned from the insane asylum and was still of weak mind and not responsible for his acts. It would be hard measure to charge a person in after life with everything an attorney may say for him in fervent plea to the judge for mercy upon his client. But in any event the occasion was one when the testator was not called upon to speak for himself, and under such circumstances he will not be held to have acquiesced in what was said by another. To make the statements of others evidence against a person, on the ground of the implied admission of their truth by silent acquiescence therein, they must be made on an occasion when a reply might be properly expected.

(490) It would have been indecorous for the testator to have interrupted the speech of his counsel while addressing the court. *Tobacco Co. v. McElwee,* 96 N. C., 74; *Guy v. Manuel,* 89 N. C., 86; *S. v. Jackson, post,* 831.

2. To the admission in evidence of certain pages of the "Book of Settlements," No. 3, of the Superior Court of Granville County, upon which was recorded the following:

THE EASTERN HOSPITAL.

DR. J. F. MILLER, *Superintendent.*

GOLDSBORO, N. C., 2 June, 1896.

To the Board of Directors of the Eastern Hospital.

This is to certify that Mat Thorp, an insane person, was sent to this hospital from Granville County, and that, in my opinion, he having become of sane mind, is recommended for discharge. A duplicate of this certificate is made to the clerk of the Superior Court of said county, in accordance with the provisions of section 21, chapter 156, Laws 1883.

Very respectfully, J. F. MILLER,
Superintendent.

THE EASTERN HOSPITAL.

DR. J. F. MILLER, *Superintendent.*

GOLDSBORO, N. C., 2 June, 1896.

To DR. J. F. MILLER,
Superintendent of the Eastern Hospital.

SIR:—The Board of Directors of the Eastern Hospital having considered your certificate, made in accordance with the provisions of section 21, chapter 156, Laws of North Carolina, Session of 1883, to the effect that Mat Thorp, an insane person in this hospital, was sent from the county of Granville, and that, in your opinion, he having become of sane mind, you recommend that he be discharged, it is hereby ordered that the said Mat Thorp be discharged.

Very respectfully,

J. F. SUTHERLAND,
T. B. PARKER,
Executive Committee.

These appear to be the discharge papers of the testator, (491) required by law (Revisal, sec. 4596) and issued in pursuance of the statute. It is possible the originals, or the record of the Executive Committee of the Eastern Hospital, containing them, would be competent evidence, if proven and identified, but it is quite clear that the book of settlements, upon which the papers are recorded, is not competent.

We have been cited to no statute which authorizes the recording of such certificates upon the book of settlements, and our own researches fail to discover any.

It is familiar learning that when the law does not require or authorize an instrument or paper to be recorded, a copy of the record is not admissible in evidence. 1 Greenleaf Ev., sec. 485, p. 551 (n). But a majority of the Court are convinced that the error was harmless and evidently did not affect the result.

The record discloses that a large majority of the witnesses of both sides spoke of the fact that the testator was confined in the hospital, and that he was discharged, after being there some eighteen months or two years, and returned to his home. The law will presume, in the absence of anything to the contrary, that the testator was discharged because he had become of sane mind again.

It is not even contended that the testator was ever a raving maniac or hopelessly incurable. On the contrary, for most of the period covered by the evidence of the caveator, the testator had occasional delusions and was sensitive about any reference to the asylum. The will was made some twelve years after testator's discharge, and it is only in the very last years of his life that witnesses for caveator declare

he was "mighty bad off." All the evidence in the record, outside of these certificates, indicates clearly that the testator was confined in the asylum for a period and then discharged because it was thought he had been restored to normal sanity. In fact, the testimony on both sides is directed almost exclusively to the mental condition of the testator in the last few years of his life, and there is nothing tending to prove that immediately after leaving the asylum he was otherwise than normally sane, something which may well be presumed from the admitted fact that he had been duly discharged and resided at home for twelve
(492) years thereafter, undisturbed. For these reasons we are unable to see anything prejudicial in the admission of the book of settlements.

3. The several exceptions to the charge of the court are without merit. His Honor properly placed the burden of proof on caveator to establish insanity at the time of the making of the will, by a preponderance of the evidence, and charged as follows: "If you find from the evidence that Mat Thorp signed the paper-writing offered in evidence as and for his will, and you find that at the time he signed the alleged will he had mental capacity to know and understand what he was doing, the property he owned and wished to dispose of; knew and understood the relation he bore to his property and the persons to whom he was giving it; understood the nature of the act in which he was engaged, and its extent and effect; if he possessed the mental capacity so defined, and you find the facts so to be, from a review of all the evidence, he had mental capacity sufficient to make a will. But if at the time he executed the paper you find that he did not know what he was doing, and you find that he was suffering from an insane delusion or delusions, so that he did not understand what property he had and what he was doing with it, or did not know how and to whom he was giving his property, and did not understand and know the nature or extent and effect of his act; and if you find the facts so to be, from the greater weight of the evidence, then he did not have sufficient capacity to make a will." This charge is in line with an array of well-settled precedents. *Horne v. Horne,* 31 N. C., 106; *Cornelius v. Cornelius,* 52 N. C., 595; *Lawrence v. Steel,* 66 N. C., 586; *Paine v. Roberts,* 82 N. C., 453; *Horah v. Knox,* 87 N. C., 489; *Bost v. Bost,* 87 N. C., 479; *Crenshaw v. Johnson,* 120 N. C., 274; *Snow's will,* 128 N. C., 102.

Upon a review of the entire record we are of opinion that the appellant has shown no substantial error which warrants us in directing another trial.

No error.

Cited: Freeman v. Brown, 151 N. C., 113; *Rollins v. Wicker,* 154 N. C., 561; *Daniel v. Dixon,* 161 N. C., 381; *In re Broach,* 172 N. C., 522.

RUFUS BLEVINS, BY HIS NEXT FRIEND, v. THE ERWIN COTTON MILLS.

(Filed 21 April, 1909.)

1. **Jurors, Incompetent—Employee—Challenge—Peremptory—Harmless Error.**

While an employee is an incompetent juror for the trial of a cause involving the rights or interest of the employer, it is not reversible error when a party follows his objection to such juror by a peremptory challenge and it does not appear that his rights were in any way prejudiced by the ruling of the court. (*S. v. Gooch*, 94 N. C., 987, cited and approved.)

2. **Evidence—Negligence—Defective Machinery—Subsequent Condition.**

In an action to recover damages alleged to have been received as the result of a defective machine, evidence is competent which tends to show the condition of the machine twenty-two months after the occurrence, and that there was no change therein in the meantime. (*Myers v. Lumber Co.*, 129 N. C., 252, relative to voluntary changes made by an employer after the injury, cited and distinguished.)

3. **Master and Servant—Negligence—Safe Appliances—Duty of Employer—Instructions.**

It is the duty of employers to provide a reasonably safe place for their employees to do the work they are employed to do, and to supply them with machinery, implements and appliances which are suitable, and such as are approved for the purpose, in general use, etc.; and under conflicting evidence a charge to the jury is correct that if the injury complained of was by reason of a breach of such duty, to answer the issue as to defendant's negligence in the affirmative.

4. **Master and Servant—Safe Appliances—Negligence—Defective Machinery—Notice.**

In an action for damages sustained by an employee, alleged to have been caused by a defect in a machine, at which he was at work in the course of his employment, it is necessary for him to show that his injury was caused by the defect, and that the employer had actual notice thereof, or constructive notice, implied by failure to exercise reasonable inspection or care, or from the length of time the defective condition had previously existed.

5. **Master and Servant—Safe Appliances—Negligence—Defective Machinery—Instructions.**

When the complaint alleged, and there was evidence tending to show, that plaintiff received personal injury by reason of a defective fastening of a door in a carding machine, where he was at work, and attributed to defendant's negligence, and there was also evidence, admitted without objection, that there was at the time no "stripping stick" on the machine: *Held*, no reversible error that the charge confined the inquiry to the condition of the door and its fastening, omitting all reference to the "stripping stick," when it appeared that this "stripping stick" was not intended or relied upon as a safety appliance or that it could be considered in any way as the proximate cause of the injury.

(494) ACTION to recover damages for personal injury, caused by alleged negligence of defendant company, tried before *Jones, J.*, and a jury, at October Term, 1908, of DURHAM.

Plaintiff objected to a juror because he was an employee of defendant company; objection overruled; plaintiff excepted. The juror was then challenged peremptorily; the challenge was allowed.

The negligence alleged against the defendant, as indicated in the complaint, was that the door of one of the machines, where the plaintiff was required to work and at which he was injured, "was defective, and had been for many weeks, in that the catch on said door was very weak, so that the door was liable to fly open, and that defendant well knew or ought to have known the dangerous condition of the cylinder when said door was open, and well knew or ought to have known the dangerous condition of the fastenings on said door, and that said machine was old and had been used for many years; but defendant negligently and carelessly failed to warn plaintiff of the danger of working thereat, and carelessly and negligently failed to equip said door with proper and suitable fastenings, and that the defective condition of the door was unknown to plaintiff."

During the trial the defendant was allowed, over plaintiff's objection, to show by a witness, John Burroughs, and some others, that they had examined the machine a short time before the trial, and the door was all right and the catch thereon in good order. This, in connection with the statement of a witness, E. K. Poe, manager of defendant, who had testified that the catch and door were in exactly the same condition

(495) as they were at the time of the injury, "The same catch there now that was then; same knobs and same latch; no repairs or changes had been made, and nothing done to them since." Plaintiff excepted.

There was evidence on the part of plaintiff tending to show that, on or about 26 December, 1906, the plaintiff, an employee of defendant company, had his hand caught in a carding machine, where he was at work, and crushed and mangled to such an extent that amputation was necessary; that the cards were on a cylinder, some six feet in diameter, and which revolved when the machine was in operation 160 to 200 times per minute; that this cylinder was enclosed in a casing, and in front there was a door, some ten inches wide and extending across the frame, forming, when closed, a part of this casing; that this door was on hinges and opened downwards, and as it was raised and closed, and when in two and one-half or three inches of the closing point it would fall, shut of itself, and was held shut by gravity, and also by a latch and catch, which held it securely when in place and in good order; that the door was for the purpose of enabling a person to open the same and clean the cylinder,

and was kept shut, except when the cylinder was being cleaned; that above the door there was in some of the machines a stripping stick, which also revolved when the machine was in motion, its service being to catch and hold the waste cotton rejected by the cards and thrown from the machine through a slight opening by the movement of the cylinder. At the time of the injury, plaintiff, in the line of his employment was engaged in running fronts on cards, *i. e.*, "doffing out the cans, taking down the strippings from over the cylinders, and taking off the waste from over the sticks," making an excerpt from the plaintiff's own testimony: "While so engaged I was hurt in the cylinder of a carding machine; my hand was cut off at the wrist. Over the cylinder was a steel or iron case. There was a door in the case, which fitted over the cylinder. I was taking down the stripping and went to card off the stripping with my left hand, when the cylinder caught my fingers. The door was open; I did not know it was open. If the door had been closed, my hand would not have gotten in the cylinder; could not see that the door was open, because cotton waste was lying over it. I did not open the door. If the stripping stick had been on, this waste cotton would have rolled around the stripping stick and not fallen on the face of the (496) machine," etc. That when he went to work in the evening the stripping stick was off and there was a lot of waste cotton lying on the machine, and in brushing this away his hand was caught and mangled, by reason of the open door, as stated, and that this cotton piled on the machine prevented him from seeing that the door was open.

Will A. Carden, a witness for the plaintiff, testified, among other things, that "In operating these carding machines, when the spring is in position, as it ought to be, there is nothing that will knock the door down; but if the spring is weak and up and the door does not catch, a lump of cotton will knock it down and cause the door to fall open on the machine. When the door is closed it is a part of the casing that covers the cylinders. If there is no stripping stick over the card, the waste cotton falls down in the casing, and when it does it conceals the door."

There was evidence on the part of the defendant that the machine at which plaintiff was injured was a standard machine and in good order at the time of the injury; that it had been continuously in use since, and that no change or repairs had been made, and that it was in good order now. Several witnesses who examined the machine testified to its being in excellent condition. E. K. Poe, manager of defendant, testified to the good condition of machine on the day of the injury, and no notice or complaint had ever been made concerning it. R. P. Kirley, overseer of the card department, testified as to the good condition of the machine; that he was continuously in the room and passed the ma-

chine frequently during the day; that its condition was all right and no defect in it, and no notice or complaint had ever been made by any one. This witness further testified that it was no part of defendant's duty to strip this machine, and nothing in the line of his work that called him to go nearer than two feet of it; the work plaintiff was engaged in at the time being the work of one S. C. Howell, a coemployee.

There was further evidence on part of the defendant that the stripping stick was there more for gathering the waste cotton and putting it in a more compact form, and both plaintiff's and defendant's (497) witnesses testified that the stripping stick was in no way connected with the door or its uses as a structural part of the machine, and that when the door was closed there was no danger in doing the work at which plaintiff was engaged when the injury occurred.

There were four issues submitted:

1. As to the negligence of defendant.
2. As to contributory negligence on part of plaintiff.
3. As to assumption of risk.
4. Damages.

The jury answered the first issue "No." Judgment on the verdict; and plaintiff, for errors properly assigned, excepted and appealed.

Manning & Foushee for plaintiff.
Aycock & Winston and Bryant & Brogden for defendant.

HOKE, J., after stating the case: We have carefully considered the exceptions noted in the record, and find no reversible error to plaintiff's prejudice. It is very generally held that an employee is an incompetent juror for the trial of a cause involving the rights or interests of the employer, and the plaintiff's objection should have been sustained. *R. R. v. Mitchell,* 63 Ga., 173; *R. R. v. Mask,* 164 Miss., 738. But the juror was challenged peremptorily, and it does not appear that the plaintiff's rights were in any way prejudiced by this ruling of the court. We have uniformly held that this right of challenge is given to afford a party litigant fair opportunity to remove objectionable jurors, and was not intended to enable them to select a jury of his own choosing. In *S. v. Gooch,* 94 N. C., 987, the doctrine is stated as follows: "The right to challenge jurors is not a right to select such as the prisoner may desire, but is only the right to take off objectionable jurors and to have a fair jury to decide the cause."

On the admission of testimony as to the condition of the machine not long before the trial of the cause and twenty-two months after the occurrence, the authorities are very generally to the effect that when the condition of an object at a given time is the fact in issue its (498) condition at a subsequent period may be received in evidence,

when the circumstances are such as to render it probable that no change has occurred. There are decisions which hold that after a long period the subsequent conditions should be rejected as a circumstance too remote (*R. R. v. Eubanks,* 48 Ark., 460), but this qualification of the principle does not obtain when there is direct evidence, as in this case, that no change in the meantime has occurred. Wigmore on Evidence, sec. 437; Thompson's Commentary on Negligence, sec. 7870.

It may be well to note that the doctrine we are now discussing refers to the objective conditions, where, from the facts and circumstances, it is reasonably probable that no change has occurred, and must not be confused with the position which obtains with us, that voluntary changes made by an employer after an injury to an employee, and imputed to the employer's negligence, are not, as a rule, relevant on the trial of an issue between them. *Myers v. Lumber Co.,* 129 N. C., 252. This position involves facts and considerations of a different character, and in this State, as stated, has been subjected to a different ruling.

On the trial below the court imposed on the defendant the duty of providing for its employees a reasonably safe place to work and supplying them with machinery, implements and appliances safe and suitable for the work in which they are engaged, and such as are approved and in general use, etc., and charged the jury, in effect, that if the plaintiff was injured by reason of a breach of duty in the respects indicated the issue as to the defendant's negligence should be answered "Yes." This position is well recognized and is in accord with numerous decisions of the Court. *Fearington v. Tobacco Co.,* 141 N. C., 80; *Hicks v. Manufacturing Co.,* 138 N. C., 325; *Lloyd v. Hanes,* 126 N. C., 359.

In response to prayers for instructions, preferred by defendant in apt time, the court, among other things, charged the jury as follows:

(*a*) "Even if you should find it was the duty of the plaintiff to strip cards at the machine at which he was injured, and that he was engaged in the line of his duty at the time he was injured, and (499) that the catch was defective, but should also find that the defendant had had no notice of the defective catch or that it had not been defective long enough for the defendant to have constructive notice of this defect, and that this defective catch was the cause of the plaintiff's injury, you will answer the first issue 'No.'

(*b*) "Before the plaintiff can recover, it is necessary for him to show that his injury was due to a defect in the machine at which he was working for the defendant, and that the defendant had notice or could by reasonable care have had notice of the defect in the machine."

These positions, also, are fully supported by our cases on the subject. *Nelson v. Tobacco Co.,* 144 N. C., 418; *Ross v. Cotton Mills,* 140 N. C., 115; *Hudson v. R. R.,* 104 N. C., 491.

Again, at the request of the defendant, the court charged the jury as follows:

(*c*) "The plaintiff alleges in his complaint and contends that his injury was due to a defective catch upon the machine at which it was his duty to work, and but for this he would not have been injured. The defendant denies the catch was defective, and insists that it was sound then and is in the same condition now. If you find from the evidence in this case that the catch or door lid referred to was not defective, then you will answer the first issue 'No,' for the plaintiff does not contend there was any other defect about the machine at which he was injured."

This is the exception chiefly urged by plaintiff for error in the charge of the court, and is raised in different ways by several other exceptions noted in the record; the objection being that in this portion of the charge his Honor below entirely ignores the evidence of plaintiff, tending to show that there was no stripping stick in place at the time of the injury, and its probable effect in producing the result; but the objection can not, in our opinion, be sustained. The negligence charged in the complaint, and the only negligence chargeable to defendant on this testimony, is in reference to a defective fastening to the door; and
(500) if there were no default in this respect, no responsibility should attach. If the door were improperly opened by the plaintiff himself, or a coemployee, the defendant company would not be liable, for our statute on the subject, by which coemployees are made vice principals of the employer, in reference to injuries arising from their negligence, only applies to railroads (*Wade v. Contracting Co.,* 149 N. C., 177); and this stripping stick, to which reference is more especially made in the exception, was not a safety appliance, and there is no evidence which showed or tended to show that plaintiff or any of the employees were accustomed to use or rely on it as such, as in *Wallace v. R. R.,* 141 N. C., 646.

It was only an implement for greater neatness, or perhaps for greater convenience, in gathering or removing the waste cotton rejected by the cards and thrown from the machine. All of the testimony is to the effect that this stripping stick had no connection with the door, and that if this door were in proper place and the fastenings in proper condition no danger was to be apprehended. If there were no negligence, therefore, imputable to the defendant as to the door, the absence of the stripping stick should not be allowed to affect the question. No action should arise by reason of negligent default, unless there had been a breach of some legal duty which leads to the result in continuous and natural sequence, "unless a person of ordinary prudence could foresee that the result complained of would naturally and probably ensue." *Brewster v. Elizabeth City,* 137 N. C., 392.

The court did right, therefore, in directing the minds of the jury to the real question at issue and excluding irrelevant matters from their consideration. We find nothing in the rulings, or charge of the court on the last three issues, which is in any way calculated to confuse or mislead the jury in their determination of the first issue; and, this being true, the exceptions as to the disposition of these last three issues have become immaterial and have not been further considered.

After a fair and impartial trial, the jury have determined the real and controlling question in dispute between the parties—the condition of the door and its fastenings—in favor of defendant, and we find no error which would warrant or permit that the Court should dis- (501) turb the conclusion they have reached. The judgment for defendant is therefore affirmed.

No error.

Cited: Norris v. Mills, 154 N. C., 480; *Russ v. Harper,* 156 N. C., 450; *Pritchett v. R. R.,* 157 N. C., 100; *Featherstone v. Cotton Mills,* 159 N. C., 431; *Kiger v. Scales Co.,* 162 N. C., 136; *Boggs v. Mining Co., ibid.,* 394; *Ainsley v. Lumber Co.,* 165 N. C., 126; *Walters v. Lumber Co., ibid.,* 389; *McAtee v. Mfg. Co.,* 166 N. C., 457; *Morton v. Water Co.,* 168 N. C., 587; *Oliphant v. R. R.,* 171 N. C., 304; *Orr v. Rumbough,* 172 N. C., 758.

D. H. FRALEY ET AL. v. G. W. FRALEY ET AL.

(Filed 21 April, 1909.)

1. **Deeds and Conveyances—Fraud—Undue Influence—Mental Capacity—Preponderance of Evidence.**

Mental incapacity of a grantor, and fraud and undue influence on the part of the grantee in procuring his deed, is only necessary to be shown by the greater weight of the evidence, and a charge of the judge imposing a greater burden is erroneous. (*Harding v. Long,* 103 N. C., 1; *Chaffin v. Manufacturing Co.,* 135 N. C., 95, cited and approved, and the terms, "to the satisfaction of the jury by the greater weight of the evidence," reconciled and explained by HOKE, J.)

2. **Deeds and Conveyances—Evidence—Fraud—Transactions With Deceased—Independent Facts—Res Gestæ.**

In an action to set aside a deed, made by a deceased grantor, for fraud and undue influence, admittedly executed by him, evidence is admissible which tends to show, as an adequate consideration for the deed, that prior to its execution, and with a view thereto, the grantor had three persons to pass upon the value of the land granted, with the benefits conferred by the

grantees, who decided that one was a fair equivalent for the other, and immediately thereafter told the grantor, who afterwards executed the deed for the consideration indicated. This evidence is not a conclusive or a controlling fact in the inquiry, but relevant as an independent fact in the *res gestæ*, and not excluded by the statute as a transaction or communication with the deceased. (The meaning of the term "*Res gestæ*" discussed by HOKE, J.)

ACTION tried before *Long, J.*, and a jury, at November Term, 1908, of ROWAN.

The action was instituted to set aside a deed made by Jacob Fraley, now deceased, to Jane E. Stokes, daughter of said Jacob, and one of the defendants, and G. W. Fraley, his son, another one of defend-
(502) ants, on the ground of mental incapacity and of fraud and undue influence. Issues were submitted:

1. As to the mental capacity of Jacob Fraley.
2. As to fraud and undue influence.

It was shown that, in March, 1900, Jacob Fraley died, leaving surviving a number of children and grandchildren, his descendants and heirs at law, who were parties plaintiff or defendant in the action; that about sixteen months before his death Jacob Fraley's home having burned, he went to live with Jane Stokes, his daughter, and G. W. Fraley, his son, staying a portion of the time with either; and that, not long after making the move, to wit, on 19 October, 1898, he executed to Jane E. Stokes, the daughter, and G. W. Fraley, the son, the deed in question, conveying to them his home tract, of 109 acres, and ten days thereafter he executed to these same grantees a deed for 40 acres of land in Stanly County, on which there was a mortgage for $300, or over; the two deeds conveying practically all of his property.

There was evidence on part of the plaintiff tending to show mental incapacity on the part of Jacob Fraley, grantor, at the time of execution of these deeds, and of fraud and undue influence on the part of the grantees and of J. F. Stokes, husband of Jane E. Stokes, one of the grantees.

There was evidence for the defendants tending to show that Jacob Fraley, at the time the deeds were executed, was of sound mind and memory, and that he made them of his own mind and will. Among other circumstances offered in support of defendants' position was the fact that, some time before the execution of the deeds, three neighbors were called in, at the instance of Jacob Fraley and the grantees, and perhaps other members of the family (the record not being clear as to this last statement), to consider and decide whether "his property was worth too much, or not, for taking care of him"; and J. D. Austin, one of those who took part in the consultation, was allowed, over plaintiffs' objection, to state

that, pursuant to the request of Jacob Fraley and the others, the three men selected met at a given time on the premises and, after consulting over the matter, decided, in substance, that the proposed service—taking care of the old man the remainder of his life—was about a fair equivalent for the property he had. The consultation seems to (503) have been partly in the presence of Mr. Fraley, but the decision was not made in his immediate presence, but he was immediately informed of what their decision was. Plaintiffs excepted.

There was judgment for defendants, and from judgment on the verdict the plaintiffs appealed, having in apt time assigned for error, among other things, the ruling of his Honor on the question of evidence, as indicated, and in charging the jury on the second issue in part, as follows: "That the plaintiffs were required to make out their contentions by clear, strong and convincing proof."

R. Lee Wright, P. S. Carlton and T. J. Jerome for plaintiffs.
Clement & Clement and T. F. Kluttz for defendants.

HOKE, J., after stating the case: There was error in the charge of the court as to the degree and quality of proof required on an issue as to the execution of a deed by fraud and undue influence. The question was directly presented in *Harding v. Long,* 103 N. C., 1, and the principle declared and sustained in an elaborate and learned opinion by *Associate Justice Avery,* that, on the issue indicated, the plaintiff was required to establish the allegation to the satisfaction of the jury by the greater weight of the evidence. The main purpose of this decision was to withdraw an issue of this character from the principle announced in *Ely v. Early,* 94 N. C., 1, that in a certain class of cases, notably where it was sought to correct or alter a written deed, or superimpose a trust thereon by parol, the proof must be clear, strong and convincing, and place it within the rule which ordinarily obtains in the determination of civil issues—that is, by the preponderance or greater weight of the evidence; the language of the opinion on the point in question being as follows: "But, on the other hand, when the relief demanded by a party is that a deed shall be declared void because its execution was procured by false and fraudulent representations or undue influence, or that it was executed with intent to hinder, delay or defeat creditors, the allegations material to establish the fraud must be *proven, so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, or to the satisfaction of the jury.*"

In saying here that fraud must be proven to the satisfaction of (504) the jury, etc., the learned justice was only describing or defining the result to be attained in the mind of the jury, and did not, as stated,

intend to lay down any special rule of proof differing from that usually applied in the determination of civil issues. This interpretation of the words, "proof to the satisfaction of the jury," is fully supported in a later opinion of the Court, in *Chaffin v. Manufacturing Co.*, 135 N. C., 95, where, in an action to recover for damages caused by the erection and maintenance of a dam, the trial judge had charged the jury that "It is not sufficient for plaintiffs to show that their land has been damaged; they must further prove to the satisfaction of the jury that this damage was caused by the erection of the dam." It was objected that this required of plaintiffs a greater degree of proof than the law imposed upon them; and *Justice Walker*, in disallowing the exception, said: "The use of the word 'satisfied' did not intensify the proof required to entitle the plaintiffs to their verdict. The *weight* of the evidence must be with the party who has the burden of proof, or else he can not succeed. But surely the jury must be satisfied or, in other words, be able to reach a decision or conclusion from the evidence and in favor of the plaintiff which will be satisfactory to themselves. In order to produce this result, or to carry such conviction to the minds of the jury as is satisfactory to them, the plaintiff's proof need not be more than a bare preponderance, but it must not be less. The charge, as we construe it, required only that plaintiffs should prove their case by the greater weight of the evidence."

In *Neal v. Fesperman*, 46 N. C., 446, the Court, by *Pearson, J.*, in stating the true rule in civil cases, said that "The party affirming a fact must prove it to the satisfaction of the jury, because the *'onus probandi'* is upon him. If he does prove it to the satisfaction of the jury, it is settled that, in civil actions, he is entitled to a verdict in his favor upon the issue." And intimation of like tenor is given in *Ferrall v. Broadway*, 95 N. C., 551.

There was error, therefore, in the charge of the court on the second issue, as to the degree of proof required. It is urged by defendants
(505) that this should be regarded as harmless error, for the reason that there was no evidence presented in favor of plaintiffs' position sufficient for a jury's consideration; but we can not so hold. At this stage of the action we do not think it desirable to state in detail the testimony, which makes only for plaintiffs' claim, but will say, in general terms, that we have carefully considered the entire evidence, and are of opinion that plaintiffs are entitled to have their cause submitted to the jury, under a correct and proper charge, and that the mistake, in the respect indicated, constitutes reversible error.

As the case goes back for a new trial we deem it proper to say, further, that the court below made a correct ruling as to the evidence of J. D. Austin, admitted over plaintiffs' objection. It appears that at some time prior to the execution of the deed in question, and with a view to its

execution, this witness, with two others, was called in by Jacob Fraley, the grantor, and the grantees, to consider and decide whether the property owned by Jacob Fraley and to be included in the deed was too much for taking care of him and the payment of his debts, amounting to about three hundred dollars. The persons called in met on the premises, and, having considered the matter, decided that one was about a fair equivalent for the other; and while Jacob Fraley, it seems, was not present at the precise time when the decision was made, he was then and there immediately informed of the conclusion reached, and the deed was afterwards executed for the consideration indicated. This decision, followed by the immediate announcement of it to Jacob Fraley, under the circumstances presented, was admissible as part of the *res gestæ*—not as conclusive on the question decided, but as a circumstance occurring as a part of an entire transaction which resulted in the execution of the deed, and in any event its announcement to the grantor was relevant as an independent fact in the *res gestæ* and as tending to affect the mind of the grantor in reference to the execution of the deed.

It is said by an intelligent writer (Chamberlayne), in his notes to Taylor's Evidence, 391 (1), that "It would probably be difficult and perhaps impossible to give a wholly satisfactory definition of the term *res gestæ,* and possibly this very ambiguity constitutes no small part of the attractiveness of the phrase." After this comment the (506) writer makes the statement that "Legal liability in any case is predicated upon the existence of some particular transaction or state of affairs, and it is this group of facts or events which make up its *res gestæ.*"

And Greenleaf on Evidence, sec. 108, after making comment not dissimilar as to any satisfactory definition of the term, intimates that the phrase *res gestæ* consists of the principal fact and surrounding circumstances consisting of kindred facts materially affecting its character and essential to be known in order to a right understanding of its nature.

And both of these authors, and others of repute, lay it down as essential to the inclusion of a given fact, within the meaning of the term, that it should be cotemporaneous with the principal fact and so connected with it as to illustrate its character. And this term, "cotemporaneous," does not always of necessity refer to any single or ultimate fact, however important to any precise or definite time; for a "transaction" may, and not infrequently does, include a series of occurrences extending over a great length of time, and a relevant fact in any one of them, and until the close of the matter, may come within this term, "cotemporaneous," and constitute a part of the *res gestæ. Greenleaf v. Taylor, supra;* Brander on Evidence, 325; *Knox Co. v. Bank,* 147 U. S., 90; *Ahern v. Goodspeed,* 72 N. Y., 108. In this last case, it was held: "Representa-

tions made by one offering to sell property to another negotiating therefor are part of the *res gestæ* and binding upon the maker, although a bargain is not concluded at the time, if afterwards, as a continuation of the negotiation, the person to whom they were made becomes a purchaser." And so it is here.

The ultimate fact of the execution of the deed is not an important or controlling fact in this inquiry, nor the point of time to which the admission of testimony must be necessarily referred. It is not even the issuable fact, for the execution of the deed is admitted, and the issuable fact is whether the grantor executed the deed of his own mind and will or was induced to do it by fraud and undue influence; and any fact taking place in the treaty between the parties which resulted in the execution of
(507) the deed, and any relevant fact occurring at any time during the treaty, tending to throw light upon the transaction, which was intended, and reasonably calculated to affect the mind of the grantor, in reference to the execution of the deed, would be competent as part of the *res gestæ,* or an independent fact in the *res gestæ,* and so admissible in evidence. And see Chamberlayne's Best on Evidence (Int. Ed.), p. 463, 1893-'94, where the annotator puts down as an exception to the rule excluding facts which are *res inter alios acta* such acts as reasonably tend to show the "existence of knowledge, intent and motive, or any bodily or mental state whatever, in any case, when the existence of such knowledge, intent or state is a fact in issue or a fact relevant thereto."

On authority and the reason of the thing, we hold that the decision and its announcement to the grantor were properly received.

For the error in the charge there will be a new trial on all the issues.

New trial.

Cited: Moore v. Moore, 151 N. C., 558; *S. v. McDonald,* 152 N. C., 807; *Lamm v. Lamm,* 163 N. C., 74; *Lamb v. Perry,* 169 N. C., 444; *Land Co. v. Floyd,* 171 N. C., 546.

IN RE WILL OF WILLIAM BOWLING, DECEASED; NANNIE L. UMSTEAD ET AL., CAVEATORS, AND E. H. BOWLING ET AL., PROPOUNDERS.

(Filed 21 April, 1909.)

1. Wills—Witnesses—Signed in Testator's Presence—Transaction With Deceased—Independent Facts.

Upon the trial of a *caveat* to a will, evidence pertinent to the inquiry is competent which tends to show the relative positions of the deceased

and the witnesses to the will at the time of their signing in attestation, etc., that the testator rode with the witness to town to have the will attested, etc., as such, are independent matters and do not involve transactions or communications with the deceased prohibited by the statute.

2. Same—Evidence.

Evidence tending to show that the testator produced the paper-writing purporting to be his last will and testament, and had it signed, at a desk near by and in his plain view, by the subscribing witnesses, is sufficient to be submitted to the jury upon the question of whether the will was signed by the witness in his presence; and it is not necessary to prove that the testator actually saw the witnesses sign, if he were in position to do so without moving from where he was, the object of the law being to prevent the fraudulent substitution of another writing for that containing the will.

3. Wills—Fraud—Evidence—Questions for Court.

When it is shown that testator had children living by a first and second marriage, had made provision for those of the first marriage by deed a few days before making the paper-writing purporting to be the will, and therein stated he had given them all he had intended; that he was eighty-four years old at the time, and died about four years thereafter, and there is nothing further to show undue influence, there is no evidence sufficient to be submitted to the jury on that question.

ACTION tried before *Long, J.*, and a jury, at January Term, (508) 1909, of DURHAM.

The propounders offered a paper-writing purporting to be the last will and testament of William Bowling, deceased, for probate before the Clerk of the Superior Court of Durham County. The caveators filed a *caveat* in due form, and filed the bond as prescribed by the statute, whereupon an issue was prepared and transferred to the Superior Court for trial. The jury answered the issue in the affirmative, and judgment was rendered in accordance therewith. The caveators noted exceptions to his Honor's rulings upon the admission of testimony and instructions to the jury, and appealed. The exceptions are set forth in the opinion.

Manning & Foushee, J. F. Cothran and D. W. Sorrell for plaintiffs.
Aycock & Winston and Bryant & Brogden for propounders.

CONNOR, J. The caveators lodged a large number of exceptions, but in their brief discuss only those which go to the merits of the controversy. The evidence tended to show that the testator signed the paper writing at his home and took it with him to Rougemont, a village near by, where he requested Mr. Flintom and Mr. Lawson to witness it. B. P. Bowling, son of the testator, one of the executors and devisees, testified: "I saw the paper writing, now shown me, purporting to be the will

(509) of Captain Bowling. My father signed it before he carried it down to the store that morning. He signed it that day, before he left home. It was in the evening, right after dinner. I went with my father to Rougemont. We traveled in a buggy." Counsel proposed to ask the witness, "State what your father said and did, when he reached Rougemont, when he saw 'Squire Flintom and Mr. Lawson." Caveators objected; overruled; exception. "Where was this paper, now shown you, purporting to be his will, at that time, if you know?" Objection. "The court allowed witness to state, if he knew, the locality of the paper—where he saw it—but does not allow him to make any statement as to any transaction or communication between himself and his father." Exception. The witness proceeded to say that he carried his father in his buggy to Rougemont; that his father got out of the buggy, in front of the store of Carver & Lawson; that he (witness) drove down the road, tied his horse and went back to the store, and that his father and Flintom and Lawson had gone into the store. He described the position of his father and the other persons in the store, saying that, from where his father was standing at the time Lawson and Flintom were at the desk, his father could see them and the top of the desk and a paper on the desk. Caveators excepted. The first five exceptions are directed to the admission of this testimony, and are based upon the alleged incompetency of the witness to testify to any transaction or communication with his father. The record shows that his Honor carefully confined the testimony to what he saw his father do, and excluded any evidence of declarations or conversations. It will be noted that no objection was made to the testimony of the witness that his father signed the will before going to Rougemont. It is decided, in *Pepper v. Broughton,* 80 N. C., 251, that the inhibition of section 1631 of the Revisal applies to the trial of an issue of *devisavit vel non,* that persons excluded on account of interest to testify in regard to transactions or communications with the deceased, the validity of whose alleged will is involved, are within the statute. The correctness of his Honor's ruling depends upon whether the witness was permitted to testify to a communication or transaction with the deceased. It has been found impracticable to give a satisfactory definition to the words used in the statute for the purpose of establishing a precedent for cases as they arise. Many of (510) the cases found in the reports are very near to the line which separates those which come within the language and mischief intended to be avoided. The interpretation of the words "transaction or communication," as they are used in the statute, which was introduced into our law by the Code of Civil Procedure of 1868, was first considered in *Whitesides v. Green,* 64 N. C., 307, in which *Rodman, J.,* said: "No interested party shall swear to a transaction with the de-

ceased to charge his estate, because the deceased can not swear in reply. . . . But there is no prohibition against the witness testifying as to any matter other than a transaction or communication with the deceased." In *Gray v. Cooper,* 65 N. C., 183, it was held that the plaintiff was competent to prove that the defendant's intestate "had and enjoyed the services of slaves," for whose kin the suit was brought, because it was "a fact which the plaintiff might know and which he says he did know otherwise than from a transaction or communication with the intestate." In *March v. Verble,* 79 N. C., 19, plaintiff was permitted to testify that he had but one animal, for the price of which the action was being tried. *Smith, C. J.,* said: "The plaintiff did not testify to any *conversation* or *transaction* with the intestate, within the meaning of the statute, but to a substantive and independent fact." In *McCall v. Wilson,* 101 N. C., 598, it is said that an interested witness may testify what he saw the deceased do, as that he "saw the deceased stand off with the money and bring back the deed." *Lane v. Rogers,* 113 N. C., 171. In *Davidson v. Bardin,* 139 N. C., 1, *Clark, C. J.,* said: "The plaintiff was competent to testify that he went to the house of the defendant's intestate, and his condition and what she saw or heard, so long as these were independent facts and did not tend to show a 'communication or personal transaction.'" *Johnson v. Rich,* 118 N. C., 268. With the light thrown upon the subject by these decisions, and "upon the reason of the thing," we conclude that the witness B. P. Bowling was competent to testify within the limitations prescribed by his Honor. The fact that the testator rode to Rougemont with the witness, and that he left him in front of the store, can not reasonably be said to be personal transactions or communications. The testimony in regard to the position of the attesting witnesses and the desk and counter in the store (511) are manifestly independent facts. We do not express any opinion upon the competency of witness to say that his father signed the will before he left home, because there is no objection to the admission.

Caveators insist that the testimony does not show that the attesting witnesses signed their names in the presence of the testator. The testimony upon this point tended to show that Captain Bowling, the testator, went to the home of Mr. Flintom and said to him that he wanted him to witness his will—wanted to know where Mr. Lawson was, wanted them to witness his will. They met Mr. Lawson at the store. He says: "Immediately after, Captain Bowling pulled out his paper and gave it to me and Mr. Lawson, and we went in the store, in a little room where Mr. Carver did his writing, and I signed the paper. The Captain was twenty or twenty-five feet from the front door of the store when he handed me the paper. . . . The desk was opposite the door. The gap was two feet from the desk. There was a little screen, about two

and a half feet square, placed on the desk; this cut the view from the desk, if you stand in the floor opposite the desk. The screen don't cut off the view of a person who was in the gap between the counter. When I signed my name I was in that place. The paper was on a little writing desk, or table, which desk had the screen to it. . . . Mr. Lawson signed it at the same time; we were both together, in each other's presence. . . . I think a person standing where Captain Bowling was when he handed me the will could have seen the desk through the window that I speak of. . . . The bench on which Captain Bowling was sitting was ten or twelve feet from the window opposite the desk." Mr. Lawson testified substantially as the other attesting witness in regard to the place at which they signed and the position of testator. He also testified that Captain Bowling said to him that he had a paper which he wanted Mr. Flintom and himself to sign for him—that it was his will; that he took it from his pocket and handed it to Mr. Flintom; it was folded. William Mangum, who was present at the time and described the location of the parties, said: "It seems to me that
(512) Captain Bowling was in plain view of that desk from where I last saw him; could not have been more than three feet." E. W. Thacker said: "I happened to be at Rougemont when Captain Bowling, Lawson and Flintom came in and went behind the counter. I was standing back of the store, and Captain Bowling said something to me; said he came to have his will signed. I said, 'You did?' He said 'Yes,' and some one passed along and said, 'What did he say?' and I said, 'He came to have his will signed.' I was standing twelve or fifteen feet from the desk. Captain Bowling was standing at the gap. The gap is only two feet from the desk. He was standing at the gap, and could see both the desk and paper." H. L. Carver said: "A man standing in the gap could easily see the desk." The testator was eighty-four years of age when he signed the will. The caveators introduced no evidence. They submitted a large number of prayers, involving different phases of the testimony in regard to the position of the testator at the time, to the witnesses attaching their name to the will and his ability to see them do so. Several were given as asked, and to the refusal to give others and the giving of general instructions they assigned error. It is neither necessary nor practicable to set out all of the prayers or discuss all of the assignments of error. We have carefully examined them, and think that they are embraced in the instructions given, in so far as they were correct propositions of law. While the subscribing witnesses do not testify directly that the testator was in a position from which he could see them at the time they signed the will, and it may be conceded that their testimony leaves the question in doubt, the other witnesses, who were present and in a position to observe the transaction, testified very

clearly as to this point. The other witnesses do not contradict the testimony of the attesting witnesses, but make the matter very much clearer.

His Honor instructed the jury that it was not essential to the valid execution of the will that the testator signed in the presence of the witnesses. This is sustained by authority. It is sufficient if he acknowledge his signature and declare the paper to be his will, and that they sign as attesting witnesses at his request and in his presence. Whether this requirement is met is usually for the jury, under (513) the direction of the court. We think that there was evidence proper for the consideration of the jury. The only question presented upon the exception is whether his Honor correctly instructed them upon the law. He instructed the jury: "If you find from the evidence, and by the weight of the evidence, that P. A. Flintom and J. J. Lawson signed their names as witnesses to the paper offered in evidence at the time they say they signed or subscribed their names as witnesses to the paper writing, that William Bowling was in a position where he did or could have seen them sign or subscribe their names, this would be a signing in the presence of William Bowling in compliance with the law, if you find the facts to be as herein recited. In order to make a valid will it was not necessary that Mr. Bowling sign in the presence of the subscribing witnesses at the time they subscribed their names to it, provided he had signed the same when he handed it to them to witness the paper. If you find that the two witnesses signed their names to the script that has been offered in evidence, and that the same was already signed by William Bowling before these parties signed their names to the paper; and if you find from the evidence that at the time the two witnesses signed the paper William Bowling was standing between the gap in the counter and within three or four feet of the desk upon which the witnesses were signing the paper; and if you find from the evidence, further, that Mr. Bowling had his face in the direction of where the witnesses were signing the paper and actually saw them, and also the paper writing that they were signing; and if you find that he was standing close enough to them to see them and the paper writing, if he desired to do so, and there was nothing obstructing the view between him and the witnesses as they were signing the paper and the paper they were signing; and if you find that, at the time when they were thus engaged in signing the said paper writing, he was in a position to see the paper writing and see them and see what it was they were subscribing their names to; and if you find that they, under these circumstances, did sign their names to the paper, this would be a signing of the paper, agreeable to the requirements of the statute; and, nothing (514) else appearing, you would answer this issue in favor of the propounders—that is to say, you would answer it 'Yes.' At the time they

signed this paper, if you find they did sign it, if you find that he was in a position where he could not see them nor see the paper, nor see them sign the paper, and you find that under these circumstances they did sign this script—that is to say, at a time when he was not in a position where he could see them nor the paper writing, nor see them sign it—this would not be a signing of the paper in his presence, as required by the statute, and you would answer it 'No.' If you find from an examination of the evidence that Mr. Bowling was standing on the porch, not far away from where the witnesses Flintom and Lawson were, and that he was in a position that he could see the witnesses and the paper writing in controversy, and could see them sign their names to the paper writing; and if you further find that he was only a few feet away at the time, and you further find that he had himself, prior to that time, signed the paper writing, these facts, if you find them to be so, would be a compliance with the statute, and, nothing else appearing, you would answer the issue 'Yes.' But if you find that he had signed the paper, and the witnesses themselves had subscribed their names to it, but, at the time that they did so, that he was on the porch and at a place where he could not see them nor the paper they were signing, this would not be a compliance with the statute; and if you find the facts so to be, your answer to it would be 'No.' If you find from the evidence that William Bowling was in the store at the time the paper writing was witnessed by Mr. Flintom and Lawson, and that he was in such a position that he could see the instrument as it was placed upon the desk and at the time they subscribed it as witnesses; and if you find that they did so, and further find he was in such a position at the time that he might see them sign their names to the instrument and see the instrument and see them sign it; and you further find he had previously signed the instrument himself, these facts, if you find them so to be, nothing else appearing, would be a compliance with the statute, and you would answer the issue 'Yes.' You may consider also whether this was
(515) openly done—whether the room where the alleged signature was made was light at the time—and whether the said witness returned the said paper to Mr. Bowling. The jury will also consider the evidence that relates to the size of the room, to the distance of Mr. Bowling from the subscribing witnesses, the position of the window and that of the counter, and especially of the desk; the localities of the parties, both the witnesses and Mr. Bowling, and all of the other facts and circumstances that have been given in evidence by the defendant's witnesses. If, after reviewing all the evidence, your minds reach the conclusion, from the evidence and by the greater weight of it, that the paper writing was executed by the said William Bowling, witnessed by Flintom and Lawson in his presence, you would answer the issue 'Yes.' The de-

ceased, William Bowling, must have actually seen, or have been in a position to see, not only the witnesses, but the paper writing itself, at the time the witnesses signed the same; and if the jury shall believe from the evidence that he did not see the paper writing and the witnesses at the time that the witnesses signed it, they should answer the issue 'No.'"

We think these instructions are fully sustained by the authorities. In *Bynum v. Bynum,* 33 N. C., 632, *Ruffin, C. J.,* said: "Actual view is never necessary, but it is sufficient if the party might see the witnesses attest, though in a different as well as in the same room; for, if actual sight were requisite, if a man did but turn his back, or look off, though literally present by being at the spot when the thing was done, the attestation would be invalid." In *Cornelius v. Cornelius,* 52 N. C., 593, *Judge Manly* said: "The strictest interpretation of the law has gone no further than to require that the testator should be in a position and have power, without a removal of his person, to see what was done. It is not necessary for him, in fact, to see." *Burney v. Allen,* 125 N. C., 314. The examination of the testimony in these cases will show that they are direct authorities to sustain his Honor's instructions. If the testator is able to see the attestation by the witnesses, it is not material to prove that in fact he did not see it. But he must be able to see the witnesses subscribe the will or, to define the rule more clearly, their relative position to him at the time they are subscribing (516) their names as witnesses, whether they are in the same room with him or not—must be such that he may see them if he thinks proper to do so; . . . for the purpose of the law is not so much to secure a signing of the names of the witnesses in the actual view of the testator as to afford him an opportunity to detect and to prevent the substitution of another will in the place of that which he has signed." 1 Underhill Wills, sec. 196. The instructions are very full and present every phase of the testimony.

His Honor instructed the jury that there was no evidence of fraud or undue influence. The testimony showed that the testator had been married twice and had living children by both wives; that two days before making his will he executed deeds for several tracts of land, aggregating 2,400 acres, to his children by his second marriage. It will be observed that in the fourth item of the will he says: "To the children of my first marriage I have heretofore given as much property as I intended for them, and therefore I make no further provision for them." He directs payment of a bond of $849, which he had given to the clerk, to his children by his first marriage. He had given them some lands of small value. He was eighty-four years of age when the will was executed, in 1903, and died in 1907. There is no suggestion of any other circum-

stances relied upon to show undue influence. We concur with his Honor that there was no evidence fit for the consideration of the jury tending to sustain the allegation. We have examined the entire record and the briefs of counsel, and find no error. The case was carefully tried and fairly submitted to the jury. We note a want of uniformity in the manner of stating cases involving the trial of an issue of *devisavit vel non*. It would seem that, in view of the fact that there are no parties, in the usual sense of the term, the case should be stated *"In re* will of," etc.

No error.

Cited: *In re Broach,* 172 N. C., 522.

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(517)

WALTER A. SUTPHIN ET AL. v. JAMES A. SPARGER ET AL.

(Filed 21 April, 1909.)

1. **Roads and Highways—County Commissioners—Appeal, When Taken.**
   Exceptions to a report of road commissioners, in proceedings to change the grade of and straighten a public road, under chapter 407, Laws 1907, should be made at the confirmation of the report by the county commissioners, and appeal should then be taken, to be effective.

2. **County Commissioners—Appeal, When Docketed—Procedure.**
   Appeals from orders of the county commissioners are governed by the rules applying to appeals from a justice of the peace, and, to be effective, must be docketed at the first ensuing term of the Superior Court, or the appeal will be dismissed.

3. **Same—Appeal bond.**
   In order to perfect an appeal from an order of the county commissioners it is necessary to give the appeal bond required by the Revisal, sec. 2690.

4. **Roads and Highways—Injunction—Motion to Dissolve—Supreme Court.**
   A motion to dissolve an order restraining the working of a public road, ordered by the county commissioners, under the provisions of chapter 407, Laws 1907, will be allowed in the Supreme Court, when it appears that the appeal from the order of the county commissioners was neither properly taken nor perfected.

APPEAL from SURRY, *Webb, J.,* upon motion to dissolve a restraining order, 29 February, 1909, at Wentworth.

Under authority conferred by chapter 407, Laws 1907, the county commissioners of Surry, on the first Monday in March, 1908, appointed three road commissioners for said county. By section 1 of said act the road commissioners of said county were authorized, upon petition of a prescribed number of citizens and landowners, to lay out or change any

public road of said county. Soon after their appointment the road commissioners, acting upon a petition presented to them to change the grade and straighten the road in question at certain points, after viewing the same, and upon notice of the hearing, laid off and staked out the changes. Some of the parties made no charge for damages, and the total amount assessed for those who claimed damages was $40.
The road commissioners made their report to the county com- (518) missioners at their regular session on the first Monday in April, 1908, who confirmed the same. No exception was filed and no appeal was taken. An overseer was appointed, who worked out the road, as laid off, and made his report to the county commissioners at an adjourned meeting, 21 September, 1908, when the report of the overseer was confirmed and the road turned over to the supervisors of that township. On 26 September a notice of appeal by plaintiff was served. The next term of the Superior Court for Surry was held in November, but the appeal was not docketed at that term, nor till February Term, 1909. The plaintiff obtained, in February, 1909, a restraining order against the defendant Sparger, the road overseer, to prevent his working the road. The defendants moved to dissolve the restraining order. The court refused the motion and continued the restraining order to the hearing. The defendants appealed.

V. E. Holcomb for plaintiffs.
W. F. Carter for defendants.

CLARK, C. J. The plaintiffs' appeal did not put the case in the Superior Court.

1. The appeal should have been taken at the April term of the county commissioners, when they confirmed the report of the road commissioners and ordered the changes in the road to be laid out and worked. *McDowell v. Asylum,* 101 N. C., 656. The plaintiff should not have waited till after the work was done and the expense incurred by the public.

2. The plaintiff has further slept on his rights, in that when he did appeal he did not docket his appeal at the first term of the Superior Court thereafter, in November, 1908. Appeals from county commissioners are governed by the rules applying to appeals from justices of the peace (*Blair v. Coakley,* 136 N. C., 405), and must be docketed at the first ensuing term of the Superior Court. The docketing at February Term was a nullity. *Davenport v. Grissom,* 113 N. C., 38.

3. Besides, it seems that the plaintiffs did not give the appeal bond required by the Revisal, sec. 2690.

The new road having been laid off and worked, and the old (519) road abandoned, it is a serious inconvenience to the public to

enjoin the working of the new road, which alone can be used, for the old road has been discontinued and there is no authority to use it.

The restraining order was improvidently granted, and the motion to dissolve it should have been allowed. An order to that effect will be entered here. *Griffin v. Railroad, ante,* 312.

Reversed.

Cited: Keaton v. Godfrey, 152 N. C., 17.

MARLER-DALTON-GILMER COMPANY v. WADESBORO CLOTHING AND SHOE COMPANY.

(Filed 21 April, 1909.)

1. **Writs—Recordari—Purposes—New Trial—Erroneous Judgments.**

A writ of *recordari* may issue from the Superior Court to a justice's court for the purpose of obtaining a new trial of the case on its merits or reversing an erroneous or false judgment.

2. **Justices of the Peace—Jurisdiction—Nonresidents—Joinder of Parties—Summons—Service—Appeal and Error.**

When a plaintiff has sued a resident and a nonresident of a county in a justice's court, issued the summonses under the provisions of the Revisal, sec. 1447, and obtained judgment thereon, and the Superior Court has denied a petition of the nonresident defendant for a writ of *recordari,* based upon the jurisdictional ground of improperly joining the resident defendant, the judgment of the Superior Court will be upheld when it appears that the resident defendant was joined in good faith and not for the purpose of conferring jurisdiction.

3. **Process—Summons—Endorsements—Presumptions.**

The return upon a summons by the proper officer that he had served it is *prima facie* sufficient, as it implies that it has been served as the statute directs; and the service will be upheld as valid, in the absence of evidence to the contrary.

MOTION for *recordari,* heard by *Councill, J.,* at September Term, 1909, of FORSYTH.

Motion denied, and defendant appealed.

(520) *L. M. Swink for plaintiff.*

B. S. Womble and McLendon & Thomas for defendant.

WALKER, J. The plaintiff sold a case of merchandise to the defendant for $118.18, and shipped the same to the defendant, at Wadesboro,

N. C., by the Southern Railway Company, and the Seaboard Air Line Railway Company, taking a bill of lading therefor. The defendant represented to the plaintiff that it had not received the goods, and refused to pay the debt, whereupon the plaintiff sued the two railway companies and the defendant, before a magistrate in Forsyth County and caused a summons to be issued for the defendant, in the manner prescribed by the statute, to Anson County. This summons was returned by the sheriff of the latter county, with an entry of service endorsed on the summons. At the trial before the justice the defendant did not appear. Upon the evidence introduced, judgment was rendered against the defendant for the amount of the debt, with interest and costs, and in favor of the railway companies. The defendant received notice of the judgment on 9 July, 1908. The next regular term of the Superior Court of Forsyth County commenced on 27 July, 1908. At the next or September Term, in the year 1908, the defendant applied to the Superior Court for a writ of *recordari* and a *supersedeas,* upon the general ground that the Southern Railway Company had been improperly joined as a party defendant in the suit before the justice for the purpose of conferring jurisdiction upon him. The judge, at the request of the defendant, found and stated the facts, and among other findings are these: that the defendant admitted the debt, and that the plaintiffs acted in good faith in joining the railway companies as defendants, and that the joinder was not made for the purpose of conferring jurisdiction. He further found that the defendant's prayer for relief before him was that it be allowed to plead to the original action. In the petition for the *recordari* the plaintiff prayed that the papers in the cause be transmitted to the Superior Court by the justice.

The writ of *recordari* may be used, under the statute (Revisal, sec. 584), either as a substitute for an appeal or as a writ of false judgment. In *Weaver v. Mining Co.,* 89 N. C., 198, it was said (521) by the Court that "The writ of *recordari,* under the former practice and retained in the new, as has been often declared, is used for two purposes—the one, in order to have a new trial of the case upon its merits, and this is a substitute for an appeal from a judgment rendered before a justice; the other, for a reversal of an erroneous judgment, performing in this respect the office of a writ of false judgment." See, also, *Caldwell v. Beatty,* 69 N. C., 365; *Morton v. Rippy,* 84 N. C., 611. In the two cases last cited it is held that the writ may be resorted to in the first instance and without moving before the justice to set aside the judgment, where it is alleged that the latter had no jurisdiction of the defendant, no process having been served upon him, and that the judgment is therefore void. But the facts of this case, as found by the judge, at the request of the defendant, do not bring it within the prin-

ciple announced in either of those cases, for here the judge has found all the essential facts in favor of the plaintiff and against the defendant. He has found specifically that the railway companies were joined in good faith, and not for the purpose, alleged by the petitioner, of conferring jurisdiction upon the magistrate who issued the process and tried the case. The defendant does not contend that the summons was not actually served upon it, but attacks the sheriff's return as insufficient to show a proper service. That officer returns that he did serve the summons upon the defendant, and we have decided that when such a return is made, it carries with it, *ex vi termini,* the idea of a full performance of all that the law requires, or, in other words, that the process has been served as the statute directs. It is *prima facie* sufficient until it is made to appear in some proper way that in fact there was no service. There is no such evidence or finding in this case. Indeed, the defendants are silent as to the fact of actual service, in their affidavits, and the judge states in his findings of fact that the only position taken before him by the defendant was that the suit had been improperly brought before the justice in Forsyth County. As to this matter, the findings of fact, as we have said, are all against the defendant. Whether there was a misjoinder of defendants is a question which is not
(522) now before us as upon demurrer or answer. There seems to have been a fair contention, raising a serious doubt, as to whether the defendants were liable to the plaintiff. At least this is a reasonable deduction from the findings of the court.

The statute (Revisal, sec. 1447) is as follows: "No process shall be issued by any justice of the peace to any county other than his own, unless one or more *bona fide* defendants shall reside in, and also one or more *bona fide* defendants shall reside outside of, his county; in which case, only, he may issue process to any county in which any such nonresident defendant resides." The language of the statute would seem to make the question of jurisdiction, or the right to serve process on a defendant outside the county of the justice, to depend somewhat upon the good faith of the plaintiff in joining the defendants as parties. In certain cases, perhaps, it may be so plain that the plaintiff has no real or *bona fide* claim against the defendant, who is a resident of the county in which the suit is pending, that the question of misjoinder may be presented as one of law. However this may be, it is found in this case that the railway companies and the defendant were joined as defendants *bona fide,* and not for the fraudulent purpose alleged by the defendant.

It is generally held that the applicant for the writ of *recordari* must show merit in his case, and also that he has not been guilty of *laches. Pritchard v. Sanderson,* 92 N. C., 41; *March v. Thomas,* 63 N. C., 249;

In re Brittain, 93 N. C., 587. Whether this rule applies where the sole question is one of jurisdiction, we need not decide.

This case was ably presented for the defendant by counsel; but the facts having been found against the defendant by the court, we are concluded by them, and it follows that there was no error in the order dismissing the petition.

Affirmed.

Cited: Taylor v. Johnson, 171 N. C., 85.

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(523)

B. A. PRICE ET AL. v. G. O. GRIFFIN AND WIFE.

(Filed 21 April, 1909.)

1. **Deeds and Conveyances—Interpretation—Words and Phrases—"Surviving Heirs"—Surplusage.**

   The word "surviving," in a conveyance of land "to P. for life, and at his death to his surviving heirs," is surplusage, and can not affect the legal interpretation of the words employed.

2. **Same—Rule in Shelley's Case.**

   A conveyance of an estate "to P. for life, and at his death to his surviving heirs," conveys the fee simple to the grantee, under the rule in *Shelley's case.* (*May v. Lewis,* 132 N. C., 115, cited, approved and distinguished.)

3. **Deeds and Conveyances—Interpretation—Context—Estates—"Living Heirs"—Surplusage.**

   In construing the meaning of words contained in a deed the court may examine the context of the deed; and for the purpose of shedding light upon the value or extent of the estate described in the conveyance clause —in this case, "to P. for life and at his death to the surviving heirs"— the warranty and covenant clause may be resorted to, when the language is applicable, as some evidence that the word "living," thus used, should be treated as surplusage.

ACTION tried before *Neal, J.,* upon demurrer to complaint, at November Term, 1908, of WAKE.

Demurrer sustained. Plaintiff appealed.

The pertinent facts are stated in the opinion.

M. T. Dickerson and H. L. Stevens for plaintiffs.

Isaac F. Dortch, F. A. Daniels and Aycock & Winston for defendants.

WALKER, J. This is an action for the partition of land. In March, 1879, Jesse Price, Sr., who was then the owner of the land in controversy, conveyed the same by deed to his son, John C. Price, during the term of his lifetime, and at his death to his surviving heirs, reserving to Jesse Price, Sr., the grantor, an estate for life in the land. Jesse Price, Sr., died in 1879, and John C. Price, on 15 January, 1883, conveyed the land by deed to W. P. Price in fee simple. John C. Price died on 6 April, 1906, leaving as his heirs four children, B. A.
(524) Price, E. H. Price, A. B. Price and Bettie Pearsall, who are the plaintiffs, and W. P. Price, Lewis H. Price, John T. Price and C. D. Price. The defendant G. O. Griffin has acquired the interest of W. P. Price and C. D. Price by deeds duly executed to him in 1884, before this proceeding was commenced. If the deed from Jesse Price, Sr., to John C. Price conveyed a fee-simple estate to the latter, the plaintiffs are not entitled to recover; so that the only question in the case is whether it conveyed a fee or only a life estate, with remainder, to his children surviving him. The difficulty presented in the case arises from the use of the word "surviving," prefixed to the word "heirs," but we do not think this is sufficient to render inapplicable the rule in *Shelley's case* to this limitation. It is said that as one of the principal reasons for establishing this rule was to prevent the abeyance or suspension of the inheritance, it only applied to those limitations in which the word "heirs" (or some equivalent word of inheritance) is used, on account of the maxim, *nemo est hæres viventis.* As, under this maxim, no one can be heir to a living person, the word "heirs" must necessarily refer to those who survive the ancestor, and the word "surviving," therefore, is mere surplusage, just as we have held that the word "lawful," in a limitation to the "lawful heirs" of a person, has no significance and does not restrict the ordinary meaning of the word "heirs." *Wool v. Fleetwood,* 136 N. C., 460. In *Caswell's appeal,* 41 Pa. St., 288, *Judge Strong* (afterwards a Justice of the Supreme Court of the United States), for the Court, said: "It is said there could be no other heirs than such as were living at the death of the ancestor; that the words 'then living' would be superfluous, unless the testator intended children by 'heirs,' and that in order to give meaning to those words the technical words of limitation must give way and be treated as only a description of persons. We are not convinced by the argument. Let it be admitted that the words 'then living' are strictly of no legal meaning, when applied to heirs. This is no sufficient reason for holding that the testator, in the use of technical words of limitation, intended to depart from their ordinary legal meaning. It is not so easy to overcome the presumption. The words 'heirs' and 'heirs of the body' will
(525) retain their significance, though the effort be to make unmeaning

other words in the will not technical, and even though there may be inconsistent expressions. If the words are repugnant, why should the word 'heirs' give way, rather than the words 'then living'? In the will of an unlettered man, however, they can hardly be called repugnant. Lawyers may understand that there are no heirs of a living person, or that the phrase 'living heirs' is a superfluous addition to a gift to heirs, but laymen may not." He adds that the books are full of cases in which it has been held that superfluous expressions in a will do not suffice to reduce the word "heirs" or "heirs of the body" into words of purchase, so as to make them the root of a new inheritance or the stock of a new descent, or *descriptio personarum. Chancellor Kent* (4 Kent Comm., 13 Ed., 226) says that Mr. Hargrave, in his observations on the rule, is for giving it a most absolute and peremptory obligation. "He considered that the rule was beyond the control of intention when a fit case for its application existed. It was a conclusion of law of irresistible efficacy, when the testator did not use the words 'heirs' or 'heirs of the body,' in a special or restrictive sense, for any particular person or persons who should be the heir of the tenant for life at his death, and in that instance inaptly denominated 'heir,' and when he did not intend to break in upon and disturb the line of descent from the ancestor, but used the word 'heirs' as a *nomen collectivum* for the whole line of inheritable blood. It is not, nor ought to be, in the power of a grantor or testator to prescribe a different qualification to heirs from what the law prescribes, when they are to take in their character of heirs; and the rule, in its wisdom and policy, did not intend to leave it to the parties to decide what should be a descent and what should be a purchase." The heirs of a man are his descendants who survive him and are capable of inheriting at the time of his death. At no other time can it be ascertained who his heirs will be. They may be his lineal descendants or those only who are related to him collaterally. *Hardage v. Strooks,* 58 Ark., 306. In *Watts v. Clardy,* 2 Fla., at pp. 389, 390, where the limitation was very much like the one in this case, it is said: "The term 'surviving heirs' is one of unusual occurrence (526) in the books, for whilst we have 'survivors,' 'surviving children,' 'sons,' 'issue' and 'daughters,' there is in the books no such word attached to heirs, as far as we have been able to discover; and we are inclined to the opinion that, so connected, it is without meaning, neither enlarging nor contracting the estate. The heirs of Mrs. Clardy, from necessity, are those who survive her at her death; they could not have preceded her. *Nemo est hæres viventis.* There is no heir until the death of the ancestor. The fair import of the clause, then, would seem to be that the estate is to go to the heirs of her body at her decease. If this view be correct, the case is freed from difficulty, and the deed is a naked grant

to the heirs of the body. Obviously those who take as surviving heirs claim as heirs to the mother at her death, and, taking as heirs, they take by descent. According to our view, the property would descend to the whole class of heirs of Mrs. Clardy, and they would become entitled to the estate in the same manner and to the same extent and with the same descendible qualities as if the grant had been simply to her and her heirs." The same conclusion was reached by the Court in *Heister v. Yerger,* 166 Pa. St., 445, in which the Court said that "There is no distinction between the expressions 'his then surviving heirs' and 'heirs then living at the time of their deaths.' In each case the word 'heirs' refers to those who, under the intestate laws, would inherit from the first taker *qua* heirs." In *May v. Lewis,* 132 N. C., 115, this Court construed the following devise: "I loan unto my son Benjamin May my entire interest in the tract of land (describing it), to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee simple, forever; and if he should die without heirs, said land to revert to his next of kin." We held that the rule in *Shelley's case* did not apply, because of the closing words, which changed the ordinary course of descent; but it was said that if the devisor had concluded the limitation with the words "to his heirs, *if any,* to be theirs in fee simple, forever," the rule would have applied and given to Benjamin May a fee simple. In other words, that the expression, "if any" would not in such a case prevent the application of the rule. By the
(527) words "if any" the devisor evidently meant if any living or surviving, or, to state it differently, to the "living" or "surviving" heirs, "if any." The Court further said in that case that the person designated by the technical word "heir" is he on whom the law casts an inheritance at the time of the ancestor's death, citing *Croom v. Herring,* 11 N. C., 393, where *Henderson, J.,* so defines the word. The limitation in this case can not be differentiated from one to a person and, at his death, to his heirs, for his heirs must be ascertained at that time. They are those upon whom, at his death, the inheritance or descent is cast. In the case of *Richards v. Bergavenny,* 2 Vernon, 324, the estate was limited to the Lady Bergavenny and such heirs of her body as should be living at her death, and, in default of such heirs of her body, the remainder over. The Court held that the Lady Bergavenny took an estate in fee tail, and did not attach any importance to the words "living at her death" as having the effect to restrict the words "heirs of her body" so as to cut down her estate to one for life. This case has often been cited as an authority in support of the position that such words can not be allowed to reduce the quantity of the estate or to free the limitation from the operation of the rule in *Shelley's case.* We are authorized to examine the context of the deed in order to ascertain the true meaning

of words which we are required to construe, when they are ambiguous. *Gudger v. White,* 141 N. C., 507; *R. R. v. R. R.,* 147 N. C., 368. In this way we may determine whether the words "surviving heirs" were used as *desigantio personarum,* or as descriptive of those persons upon whom the law casts the inheritance, under the canons of descent, as heirs of John C. Price and not as purchasers from Jesse Price, or as those who take under the law and not under the deed. Looking at the instrument in its entirety, we find that, in addition to the words we have already taken from the deed, the clause of warranty contains a covenant for quiet enjoyment, which runs, not to John C. Price for life, and then to his "surviving heirs," but "to him and to his heirs and assigns forever." This may be slight evidence of what the grantor meant when he used the words "surviving heirs"; and while this may be so, it is not to be disregarded, but may be considered as shedding some light upon the question in controversy. The form of the covenant is (528) in perfect harmony with the interpretation we have given to the words of the limitation, "to him during the term of his lifetime," and, at his decease, "to the surviving heirs of the said John C. Price." It evinces a purpose to give him the fee, and not merely a life estate, by the use of proper words of inheritance which are sufficient for the application of the rule of law laid down in *Shelley's case.*

We believe our conclusion to be supported by recent decisions of this Court as to the application of the rule in *Shelley's case. Leathers v. Gray,* 101 N. C., 162; *Nichols v. Gladden,* 117 N. C., 497; *Chamblee v. Broughton,* 120 N. C., 170.

As John C. Price acquired by the deed from his father a fee simple estate, he conveyed the same estate to the defendant G. O. Griffin by the deeds executed in 1884, and the plaintiffs consequently have no interest in the land as tenants in common with the defendants. The ruling of the court was therefore correct.

No error.

Cited: Cotten v. Moseley, 159 N. C., 5; *Robeson v. Moore,* 168 N. C., 389.

J. T. BORDEAUX, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 28 April, 1909.)

1. Evidence—Nonsuit—Waiver.

A motion as of nonsuit upon the evidence, made at the close of plaintiff's evidence and not renewed at the close of all the evidence, is waived and will not be considered on appeal.

2. Master and Servant—Railroads—Yards—Employees—Negligence—Rules of Employer—Enforcement.

The failure to enforce a reasonable rule made for the protection of employees of a railroad company engaged in repairing cars upon an extensive repair and switching yard is evidence of a waiver or abrogation of the rule.

3. Master and Servant—Railroads—Rules of Employer—Habitual Violation—Knowledge—Waiver.

A printed and bulletined rule made for the safety of employees engaged in repairing cars on an extensive repairing and switching yard of a railroad company, requiring that flags of warning should be placed in a certain manner at such times, will not relieve the company of liability for its negligence, when the employees fail to observe the rule while engaged in "short jobs," when it was actually or constructively known to the company that the rule was habitually and continually disregarded in such instances to such an extent as to amount to an abrogation.

4. Master and Servant—Railroads—"Kicking" Cars—Railroad Yards—Rules of Safety—Enforcement—Employer.

While the rules of liability of railroads in regard to "kicking" cars or making "flying switches" at a public crossing do not apply to the constant changing or switching of cars on extensive repairing and switching yards, it is still the duty of the company to establish and enforce proper rules for the protection of the employees in such yards from injuries otherwise likely to occur to them when engaged in repairing cars therein.

5. Master and Servant—Railroads—Rules of Employer—Waiver—Contributory Negligence—Evidence—Questions for Jury.

When there is evidence of a waiver by a railroad company of its rule that employees at work on cars on its extensive repairing and switching yard must put out blue flags as warnings, and that plaintiff and two other employees agreed that the job would be a short one—from a half minute to two minutes—discussed the matter and decided not to put out the flags, but have one of their number keep a lookout, and while thus engaged the plaintiff's intestate was killed by a shifting engine "kicking," at fast speed, cars onto the one where he was working, the question of contributory negligence is one for the jury.

(529) ACTION to recover damages for the alleged negligent killing of L. W. Bordeaux, tried before *Biggs, J.*, and a jury, at October Term, 1908, of WAYNE.

These issues were submitted to the jury:

1. "Was the plaintiff's intestate killed by the negligence of the defendant company?" Answer: "Yes."

2. "Did the plaintiff's intestate, by his own negligence, contribute to his death?" Answer: "No."

3. "What damages, if any, is plaintiff entitled to recover?" Answer: "Six thousand dollars."

Defendant appealed.

The facts are stated in the opinion of the Court.

W. C. Munroe and George E. Hood for plaintiff.
Aycock & Daniels and R. W. Winston for defendant.

BROWN, J. The evidence discloses a state of facts which, with (530) the exception hereinafter noted, is practically uncontested.

Plaintiff's intestate was a car repairer, employed in defendant's switching and repair yards at South Rocky Mount, whose duty it was to repair cars standing on the numerous tracks therein. For the protection of its workmen the defendant had long since adopted and published rules which required those employed in repairing cars on tracks in the yards to place a blue flag on the car, so as to give notice to the switch enginemen not to move such cars or run other cars in on them, so as to endanger the workmen employed in repairing them.

On 13 March, 1907, the intestate with Denby and Wilkens, fellow-workmen, went out to repair a tank car on track No. 1, carrying with them a blue flag furnished by the defendant. There was much shifting going on at the time on the yard tracks. Instead of putting out the flag, the repairers discussed the matter and decided that this was a short job and to put Denby out to watch, who failed to keep proper lookout. While Bordeaux, the plaintiff's intestate, was under the car repairing it, the engineer of a switch engine "kicked" or "pitched" a box car loaded with lumber onto track No. 1, which struck another car and forced that against the tank car, running it over intestate and killing him.

1. It is contended by defendant that his Honor erred in denying the motion to nonsuit. We are precluded from considering this exception, because, while made at the close of plaintiff's evidence, it was waived by not renewing it at the end of all the evidence. Revisal, sec. 539; *Parlier v. R. R.*, 129 N. C., 263.

2. It is contended that there is no evidence of negligence. This contention would be well founded but for the fact that there is evidence in the record sufficient to go to the jury that the rule promulgated by defendant for the protection of those engaged in working around and under cars in its yards had been allowed by the superintendent and foreman of defendant to relapse into "innocuous desuetude," especially as to "short jobs." We admit that the rulings of the court in regard to "kicking" cars, or making flying switches at public or much frequented crossings, do not apply to the constant changing or (531) switching of cars that is inevitable in the extensive repair and switch yards of a large railway system. But while such methods may be necessary, it is equally necessary that the company should not only establish proper rules for the protection of employees on the yards, but also should enforce them.

A rule to protect employees should be so framed as to guard them to

a reasonable extent against the consequences, not only of the carelessness of coemployees, but of their own carelessness also. It is well known that men are prone to run risks in order to save time and trouble, especially where the risks last but a moment, and the precaution necessary to guard against it requires a considerable period of time.

A rule which has been habitually violated, with the knowledge or acquiescence of the master, actual or implied, is almost universally regarded as waived or abrogated. *Wright v. R. R.,* 5 R. R. Rep., 483; *Biles v. R. R.,* 139 N. C., 538; *Haynes v. R. R.,* 143 N. C., 165; *R. R. v. Meckles,* 50 Fed., 722; *Devoe v. R. R.,* 174 N. Y., 1.

There is evidence *pro* and *con* upon the question of the waiver of the rule, which was submitted to the jury by the learned judge in a well-considered, clear and correct charge as to the law bearing thereon.

It is doubtless true, as contended, that defendant's superintendents and foremen in charge of the yards can not tell whether a job will be a long or a short one. Therefore it follows that the only safe course to pursue is to enforce obedience to the rule in respect to all jobs done on the yards, whether long or short, by discharging those who fail to observe it.

It appears in evidence that, notwithstanding the printed and bulletined rule, it was a custom of long standing in these yards, and well known, that if the workmen found the job a short one, that could be done in from two to five minutes, they would not put up flags, and if it were a longer job they would put them up. Mozingo, the engineer who caused the catastrophe by "kicking" in the loaded box car, knew of the custom, for he states in his testimony: "I could see car repairers at work, and I knew the customary way of repairing the cars for a month previous to the death of the plaintiff's intestate. For short jobs
(532) in repairing cars the repairers didn't put up any flags. It was the custom not to put them up. It would seem that they took the chances on short jobs. The flags were the only guides I had. If no flag up, I would run the cars right in; wouldn't know whether long or short jobs, and so had to rely on flags."

There is further evidence that the speed limit fixed by rule for the yards is six miles per hour, and that the box car was pitched onto track No. 1 at a much faster rate of speed, so that it rolled uncontrolled over a hundred yards and crashed into the intervening car with such force that it was thrown violently against the tank car which the intestate was repairing.

With the rule in abeyance, and the custom of the workmen well known to the engineer, to "kick" the car in on track No. 1 under such conditions and at such speed, is undoubtedly culpable negligence. *Hudson v. R. R.,* 142 N. C., 198; *Wilson v. R. R.,* 142 N. C., 336; *Allen v.*

R. R., 145 N. C., 214; *Ray v. R. R.*, 141 N. C., 84; *Doing v. R. R.*, 151 N. Y., 579; *Dowd v. R. R.*, 170 N. Y., 459; *R. R. v. Lowe*, 1 R. R. Rep., 363.

3. It is contended that the uncontradicted evidence shows that the plaintiff's intestate was guilty of contributory negligence, and that his Honor erred in refusing so to charge. Upon this issue he charged the jury: "Even though you should find that the rule requiring the putting out of the blue flags when the employees were engaged in such work as the plaintiff's intestate was engaged in when he was injured was habitually violated, yet if the work in which the plaintiff's intestate was engaged at the time of the injury were of so dangerous a character that an ordinarily prudent man would not have undertaken to have done the work without putting out blue flags, then in such case the plaintiff could not recover, and you should find the second issue 'Yes.' "

It appears in evidence that, upon examination, the repairers all agreed that the job would be a very short one—from half minute to two minutes—and that they discussed the matter and decided not to put out the flag, but to have one of their number keep a lookout.

Of course, if there were no evidence of a waiver or abrogation (533) of the rule, such clear disobedience of it would effectually bar a recovery; but if the rule is taken to be in abeyance, then it practically did not exist, and the question must be determined accordingly. With the rule out of the way, we are not prepared to hold as matter of law, in any view of the evidence, that the intestate was guilty of such contributory negligence as will prevent a recovery.

Whether under such circumstances a man of ordinary prudence, having to go under the car for such a short space of time, would have reasonably trusted to the vigilance of his companion, instead of the more certain and reliable signal flag, is a question properly and fairly submitted to the jury.

We have examined all the exceptions in the record, and find

No error.

Cited: Crawford v. R. R., post, 621, 623; *Farris v. R. R.*, 151 N. C., 489.

JOHN P. NAIL v. BROWN & WILLIAMSON.

(Filed 28 April, 1909.)

1. **Evidence Rejected—Subsequent Offer to Admit—Harmless Error.**

When the trial judge has excluded certain evidence, which he thereafter, at the close of all the evidence, offered to admit, and there is no suggestion that the witnesses had been discharged, the error, if any, was cured.

2. **Instructions, Special—Offered Too Late—Appeal and Error.**

It is necessary to offer a prayer for special instruction in apt time, and the refusal of the trial judge to give a correct instruction, when tendered too late, is not reviewable on appeal.

3. **Negligence—Safe Appliance—Selection—Rule of the "Prudent Man."**

It is culpable negligence, and not a mere error in judgment, which renders an employer liable to the employee injured by reason of the use of an appliance furnished with which to work; and when the employer has selected one of several methods which are approved and in general use, with that degree of care that a person of ordinary prudence would have used, no liability will attach by reason of such selection.

ACTION for personal injury, tried before *Ward, J.*, and a jury, at May Term, 1908, of FORSYTH.

(534) Issues were submitted and answered by the jury, who found the first issue, relating to the alleged negligence of the defendants, in the negative. From the judgment rendered the plaintiff appealed.

J. E. Alexander, A. E. Holton and Lindsay Patterson for plaintiff.
Watson, Buxton & Watson and Manly & Hendren for defendants.

BROWN, J. The plaintiff, while working in the factory of the defendants, was injured by the breaking of a belt, causing one of the hooks which fastened the belt together to strike him on the head and embed itself therein. The belt was running parallel with the ceiling, some four or five feet above the head of the plaintiff and some twenty feet from where he was standing. While the machinery was in motion, in the usual manner, the belt parted, with a report like the sound of a gun, the belt hooks flying in several directions, one of them striking the plaintiff. It was the duty of the plaintiff to run the machine. The evidence tended to prove that the belt was nearly new, having been in use only six months at the machine run by plaintiff.

The allegation of negligence, stated in the complaint in different forms of expression, is a failure by defendants to furnish reasonably safe machinery and instrumentalities.

It is admitted in the brief of the learned counsel for plaintiff that

the belt was new and without fault, but it is claimed that its ends were fastened together with belt hooks, and that they were not reasonably safe appliances for fastening belts. The negligence averred relates not so much to the quality of the hooks used as to the method employed.

1. Among other exceptions to the evidence, it is contended that his Honor erred in refusing to permit plaintiff to offer evidence tending to prove that on other occasions similar hooks had been seen flying out of the same belt and also out of similar belts.

We find evidence of this character in the record, admitted without objection; and if further testimony along that line were desired or permissible, his Honor opened the door for it by offering at (535) the close of all evidence to permit plaintiff to offer it.

There is no suggestion that plaintiff had discharged his witnesses at the time; and we therefore think, if the exception had merit in it, the offer of the judge destroys it.

The remaining exceptions to evidence, we think, upon examination, are untenable and need no discussion by us.

2. The plaintiff assigns as error the failure of the court to instruct the jury that if they believed the evidence they should answer the first issue "Yes." This issue relates to the alleged negligence of the defendants. As the plaintiff failed to ask such instruction, "in writing, in apt time," as stated in the record, the trial judge was not bound to give it, even if the plaintiff were entitled to it.

We fail to see, however, upon the evidence, that the plaintiff would have been entitled to any such instruction had he duly asked it.

The employer does not insure the safety of his workmen. He does not contract, expressly or impliedly, to furnish them an absolutely safe place to work in, but is bound only to exercise reasonable care and prudence in providing such a place. He does not contract to furnish the very best appliances, but only such as are reasonably fit and safe for the purposes for which they are used.

He satisfies the requirements of the law if in the selection of his appliances he uses that degree of care which a person of ordinary prudence would use, having regard for his own safety, if he were supplying them for his own use.

Where there is one appliance only which is approved and in general use for performing a certain function, it is the master's duty to use it. Where there are several appliances used for the same purpose, all of which are approved and in general use, the master fills the measure of his duty if he exercises reasonable care in making a selection. It is culpable negligence which makes him liable—not a mere error of judgment. We think this is the consensus of the best authorities. *Horne v. Power Co.,* 141 N. C., 50; *Phillips v. Iron Works,* 146 N. C., 217;

Young v. Construction Co., 109 N. C., 618; *Harley v. Car Co.,* 142 N. Y., 31; *O'Neal v. R. R.,* 66 Neb., 638.

(536) Mechanical devices are almost as numerous as medicinal remedies, and the only sure test of either is that of experience. Until that has pronounced a definitive judgment, a master who, in the exercise of ordinary care, selects that which in his opinion is best calculated to accomplish the purpose can not be held responsible for the consequences. This record discloses that there are four ways of fastening belts—with hooks, leather lacing, wire lacing, glue or cement—all of which methods are approved and in general use. When an employer of labor is confronted with this condition of affairs he can not be held negligent if he select one of these known methods.

We think that the instructions of the learned judge are clear and full, and that they fairly and accurately presented to the jury the contentions of the plaintiff and defendants and the law bearing thereon.

No error.

Cited: Mercer v. R. R., 154 N. C., 401; *Reid v. Pelk,* 155 N. C., 233; *Mincey v. R. R.,* 161 N. C., 471; *Nelson v. R. R.,* 170 N. C., 172.

CAROLINA ALEXANDER v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 28 April, 1909.)

1. Life Insurance—Applications—Untrue Statements—False Representations.

Statements made in an application for life insurance, upon which the policy was issued, that the applicant had never had any disease of the kidneys or been under the care of a physician within two years preceding the date of the application, are material as an inducement for the insurance company to issue the policy, and when untrue will invalidate it.

2. Same—Judgment Upon Verdict.

It was established by the verdict, in a suit upon a life insurance policy, matured by the death of the insured, that certain material statements in the application upon which the policy was issued were untrue, though no false representations had been therein made by the applicant: *Held,* it appearing that the company had been imposed upon, from the very nature of the representations, it was immaterial whether the representations were fraudulent or not, and the defendant's motion for judgment upon the issues should have been granted.

APPEAL from justice of the peace, tried before *Justice, J.*, and (537) a jury, at October Term, 1908, of CABARRUS.

This action was based on a life insurance policy, issued by the defendant company on the life of Pearl Alexander in favor of Caroline Alexander, the appellee, as beneficiary. The defense to the action was based on certain provisions of the policy, declaring it void if the insured, before its date, had been attended by a physician for any serious disease or complaint or had any disease of the kidneys.

The following findings were made by the jury:

1. "Did Pearl Alexander, the insured, in her application for insurance, falsely represent that she had not been attended by a physician for any complaint within two years prior to making such application?" Answer: "No."

2. "Was Pearl Alexander attended by a physician for any serious disease or complaint within two years before the policy was issued for the plaintiff?" Answer: "Yes."

3. "Did Pearl Alexander falsely represent that she had not had kidney disease?" Answer: "No."

4. "Had Pearl Alexander kidney trouble prior to making application for the policy sued on?" Answer: "Yes."

The defendant moved for judgment upon the issues, and assigns the refusal to grant same as error. The court denied the motion and gave judgment for plaintiff. Defendant excepted and appealed.

W. G. Means for plaintiff.

Adams, Armfield, Jerome & Maness for defendant.

BROWN, J. The insured, Pearl Alexander, was a child about fifteen years of age, whose life was insured on 18 March, 1907, by defendant, for the benefit of plaintiff, her mother by adoption and great-aunt by blood. Insured died in April, 1908, according to the evidence, of an abscess in the kidney.

There is a statement in the application, which is the basis of the policy, that insured had never had any disease of the kidneys. The evidence fully sustains the finding of the jury, that prior to the application for insurance the girl had kidney disease and was being treated for it by a physician.

The insurance contract contains the following clause: (538)

"This policy is void if the insured, before its date (meaning date of policy), had been rejected for insurance by any other company or has been attended by a physician for any serious disease or complaint, or has had before said date any pulmonary disease or chronic bronchitis, or cancer, or disease of the heart, liver or kidneys," etc.

It must be conceded that the representation is a most material one, within the meaning and scope of the statute (Revisal, sec. 4808). *Bryant v. Insurance Co.,* 147 N. C., 181. Such a representation undoubtedly influenced the judgment of the company in accepting the risk, and it is therefore a material representation.

Under the facts of this case it matters not that the insured made no false representation. She made a most material representation, which was untrue, for she had kidney disease before the application for insurance, was being treated for it at the time, and died of the disease thirteen months thereafter.

The company was imposed upon (whether fraudulently or not is immaterial) by such representation and induced to enter into the contract. In such case it has been said by the highest Court that, "Assuming that both parties acted in good faith, justice would require that the contract be canceled and premiums returned." *Insurance Co. v. Fletcher,* 117 U. S., 519. The case at bar is governed by the principles laid down in *Bryant v. Insurance Co., supra.*

It appears in the record that the premiums have been voluntarily paid into the Superior Court by the defendant. It is ordered that they be applied to the costs of this appeal, and that the remainder, if any, after paying costs below, be paid to plaintiff.

The motion for judgment for defendant is allowed. Let the costs be taxed against plaintiff.

Reversed.

Cited: Williams v. Casualty Co., post, 598; *Annuity Co. v. Forrest,* 152 N. C., 625; *Gardner v. Ins. Co.,* 163 N. C., 374; *Daughtridge v. R. R.,* 165 N. C., 193, 195, 199; *Schas v. Ins. Co.,* 166 N. C., 58; *Hardy v. Ins. Co.,* 167 N. C., 23; *Cottingham v. Ins. Co.,* 168 N. C., 265; *Hines v. Casualty Co.,* 172 N. C., 229; *Ins. Co. v. Woolen Mills, ibid.,* 538, 539.

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(539)

MRS. C. J. QUANTZ v. CITY OF CONCORD.

(Filed 28 April, 1909.)

Municipal Corporations—Cities and Towns—Widening Streets—Damages.

A city is liable to the owner for taking his land in widening its streets in the full amount of the damages, reduced by the value of the benefits conferred by the improvements; and the owner may sue and recover therefor, in contradistinction to those laid in tort where recovery may not be had unless the work were done in an unskillful manner. (The doctrine established in *Jones v. Henderson,* 147 N. C., 120, and that line of cases, distinguished by WALKER, J.)

QUANTZ *v.* CONCORD.

ACTION tried before *Councill, J.*, and a jury, at January Term, 1909, of CABARRUS.

Defendant appealed.

Montgomery & Crowell for plaintiff.
W. G. Means and L. T. Hartsell for defendant.

WALKER, J. This is a proceeding for the condemnation of a part of the plaintiff's lot, on East Corbin Street, in Concord, for the purpose of widening the street, under Private Laws 1907, ch. 344, sec. 90. The court charged the jury that the plaintiff is entitled to recover the damages which resulted from taking the property, and laid down the correct rule as to the facts and circumstances they might consider, and which the evidence tended to establish, in determining the amount of the damages. In this respect the charge was as favorable to the defendant as the law allowed. It is not necessary to set out the instructions to which exceptions were taken, as the defendant's contention is that the city of Concord is not liable for damages resulting from the grading of streets unless the work is done in an unskillful manner, and for this position counsel cite the following cases: *Wolf v. Pearson,* 114 N. C., 621; *Wright v. Wilmington,* 92 N. C., 156; *Meares v. Wilmington,* 31 N. C., 73; *Jones v. Henderson,* 147 N. C., 120. In those cases the plaintiffs did not sue for compensation rightfully due for the taking of their property, under the power of condemnation given by the charters of the respective cities, but in tort, for the damages (540) resulting from the negligent and unskillful manner of repairing or grading the streets. They were seeking to recover damages, not due by the defendants in the lawful exercise of the right of eminent domain, but for those which were caused by acts not authorized to be done in the appropriation or condemnation of property for public purposes, and the cases cited do not, therefore, apply to the facts of this case. Here the plaintiff has recovered only such damages as resulted from the taking of and injury to the property, without regard to the manner of doing the work, allowing the defendant a deduction from the damages of any special benefits to the plaintiff's property derived by her from the improvement of the street, and in this respect the court instructed the jury correctly. *R. R. v. Platt Land,* 133 N. C., 266, in which the rule for measuring the damages in such cases is fully stated and considered by *Justice Connor* for the Court. The plaintiff has recovered nothing more than the just compensation to which she is entitled for the land appropriated by the city for widening and grading the street.

After a careful examination we find in the trial

No error.

C. M. BILLINGS v. THE CHARLOTTE OBSERVER.

(Filed 29 April, 1909.)

1. **Power of Court—Discretion—Questions of Law—New Trial on One Issue—Appeal and Error.**

Unless some question of law or legal inference is involved, the granting or refusing a new trial upon all or any one of the issues rests in the discretion of the lower court, and in the exercise of this discretion his action is not subject to review on appeal.

2. **Same—Punitive Damages.**

Where, on facts in evidence, the question of punitive damages is properly presented, the award of such damages and the amount thereof, under a proper charge, is for the jury, and can never be directed by the court as a matter of law; but the court has the same right in its discretion to set aside a verdict on an issue involving an award of punitive damages as on any other issue.

3. **Power of Court—Discretion—New Trial on One Issue—Damages—Appeal Premature.**

When, in the proper exercise of his discretion, the trial judge has set aside an issue and verdict thereon as to the amount of damages the plaintiff has sustained in an action involving them, an appeal therefrom is premature and will be dismissed.

4. **Same—Exceptions—Procedure.**

When the trial judge sets aside an issue and finding of the jury upon the question of damages alone, awards a new trial thereon, and leaves the other issues and answers fixing the defendant's liability, the proper procedure is by exception taken, and an appeal is premature until the case has been tried thereon in the lower court.

(541) ACTION to recover damages for alleged libel, tried before *Ward, J.*, and a jury, at June Term, 1908, of ROCKINGHAM.

There was allegation, with evidence, on the part of plaintiff tending to show the publication of a libelous article in defendant paper, charging plaintiff with improper conduct at Blackville, S. C., and at Waynesville, N. C.

Defendant company, admitting the publication of the articles in question, averred the truth of the facts contained therein, and introduced testimony tending to support its position.

On issues submitted, the jury rendered the following verdict:

1. "Did the defendant publish of and concerning the plaintiff the matters and things alleged in the complaint?" Answer: "Yes."

2. "Were the matters and things published of the plaintiff and alleged to have occurred at and around Blackville, S. C., true?" Answer: "Yes."

3. "Were the matters and things published of the plaintiff as happening at Waynesville, N. C., true?" Answer: "No."

4. "What damages, if any, is the plaintiff entitled to recover?" Answer: "Five thousand dollars."

Upon the coming in of the verdict the defendant moved for a new trial on the last issue, on the ground that the amount was excessive, and order was thereupon made as follows:

"The court, being of opinion that the amount of damages was (542) excessive, hereby sets aside, in its discretion, said issue of damages and awards a new trial thereon. WARD,
Judge."

Plaintiff moves the court to set aside the second issue, for errors to be assigned in the case on appeal. Overruled, and exception by plaintiff. Plaintiff appeals to the Supreme Court.

Morehead & Sapp, Justice & Broadhurst, Glidewell & Lane and A. D. Ivie for plaintiff.

Osborne, Lucas & Cocke, Burwell & Cansler and Scott & Reid for defendant.

HOKE, J., after stating the case: We do not advert to the questions chiefly raised in the plaintiff's case on appeal, for the reason that, under numerous and well-considered decisions of this Court, the appeal must be dismissed as having been prematurely taken. This position is well established, and the question has usually been raised on an issue as to damages, the very case presented here. *Rogerson v. Lumber Co.*, 136 N. C., 266; *Benton v. Collins*, 121 N. C., 66; *Hilliard v. Oram*, 106 N. C., 467; *Hicks v. Gooch*, 93 N. C., 112.

In *Benton v. Collins, supra, Faircloth, C. J.*, delivering the opinion, said: "The appeal is premature. He should have noted his exception and proceeded with the trial and brought the whole case to this Court on final judgment. This course would not affect any substantial right. This question has been so often decided as to need only a reference to *Hilliard v. Oram*, 106 N. C., 467, and the numerous cases cited."

In *Hilliard v. Oram, supra, Clark, J.*, said: "The appeal of the defendants is premature. They should have noted their exceptions, and after the trial is completed, by a finding upon the other issue and a final judgment, an appeal will lie. The Court will not try causes by 'piecemeal.'"

To like effect, *Smith, C. J.*, in *Hicks v. Gooch, supra*, referred to the question as follows: "The general principle is that when a trial is entered upon it should embrace and determine the whole subject-matter

in controversy, so that a final judgment may be entered, any
(543) errors committed in its progress being open to revision and correction in one appeal, while the Court could not tolerate a succession of appeals upon separate and fragmentary parts. The ruling has been frequently since recognized and acted on. We refer to but a few of them, the most recent: *Commissioners v. Satchwell,* 88 N. C., 1; *Lutz v. Cline,* 89 N. C., 186; *Jones v. Call, ibid.,* 188; *Grant v. Reese,* 90 N. C., 3; *Arrington v. Arrington,* 91 N. C., 301. The practice thus established, upon its intrinsic merits, and to avoid useless and prolonged litigation, must be upheld."

The authorities with us are also to the effect that, unless some question of law or legal inference is involved, the granting or refusing a new trial upon all or any one of the issues rests in the sound discretion of the lower court; and where it appears that the question has been determined, in the exercise of this discretion, the action of the court thereon is not subject to review. *Abernethy v. Yount,* 138 N. C., 337; *Benton v. Collins,* 125 N. C., 94; *Carson v. Dellinger,* 90 N. C., 226; *Moore v. Edmiston,* 70 N. C., 481.

True, as stated in *Jarrett v. Trunk Co.,* 144 N. C., 302, and in *Benton v. Collins,* 125 N. C., 94, the issues in a case may be so involved, the one with the other, that the granting of a new trial on one issue and not the other might present a question of law or legal inference, but no such case is presented on an issue as to damages. That was the only question presented and decided in the *Benton case,* where *Montgomery, J.,* for the Court, said: "There are conflicting decisions on this question in the courts of several of the States, but we believe that the conclusion arrived at by the English court, in the case quoted from, is the correct conclusion, and we will adopt it as the conclusion of this Court. Holding, then, as we do, that the Superior Courts of this State have the power to set aside verdicts for inadequacy of damages, we logically conclude that such power is discretionary with them, and that it is not reviewable by us. The power to correct prejudiced and grossly unfair verdicts must be vested somewhere, and, in our judgment, it is best that such power be confined to the judges who preside over the trials. They are
(544) presumed to be learned in the law, impartial in their judgments and upright in their conduct, and, with most rare exceptions, they have measured up to the standard of that presumption."

And while approving the caution expressed by the Court in *Jarrett's case, supra,* as to the careful use of this power in any class of cases, it is, as stated, only in those where a matter of law or legal inference is presented that the exercise of the judge's discretion can be reviewed. As said by *Bynum, J.,* in *Moore v. Edmiston, supra,* "He is clothed with this power because of his learning and integrity, and of the superior

knowledge which his presence at and participation in the trial gives him over any other forum. However great and responsible this power, the law intends that the judge will exercise it to further the ends of justice; and though doubtless it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere."

The position of the plaintiff, that the power to grant a new trial in the present case did not exist because the determination of the issue involved to some extent an award of punitive damages, is without merit. In numbers of cases expressions will be found to the effect "that the question and amount of punitive damages is for the jury, or always for the jury," etc., but these expressions have reference to the established principle that the court can never direct the award of punitive damages as a matter of law; but where an award of such damages is permissible on the facts, the judge shall lay down the law applicable, and it is for the jury to determine in all cases whether or not they shall be allowed, and also the amount; but it was never intended to withdraw issues of this character, and verdicts upon them, from the supervisory power of the courts. Accordingly, in one of the authorities cited and relied on by plaintiffs (*Canfield v. R. R.*, 59 Mo., 355), it was held that "The amount of punitive damages is always left with the jury, subject to be reviewed by the court, if excessive."

This power of the court to supervise verdicts to the extent indicated is one of the most commendable features of our system of trials by jury. It is on issues of the kind presented here that its influence is chiefly desirable, and when wisely and fearlessly exercised by (545) a just and learned judge it is one of the surest safeguards to a true and righteous deliverance.

For the reasons indicated, the appeal must be dismissed as having been prematurely taken.

Appeal dismissed.

Cited: Drewry v. Davis, 151 N. C., 298; *Harvey v. R. R.,* 153 N. C., 575; *Blow v. Joyner,* 156 N. C., 143; *Shields v. Freeman,* 158 N. C., 127; *Beam v. Fuller,* 171 N. C., 771; *Wheeler v. Telephone Co.,* 172 N. C., 11; *Hodges v. Hall, ibid.,* 30.

GEORGE D. WITT SHOE COMPANY ET AL. v. J. L. PEACOCK AND R. W. FULLER.

(Filed 29 April, 1909.)

1. **Writing—Notes—Construction—Entire Instrument.**
When there is no repugnancy in the expression of the various parts of a written instrument the court will so construe it as to give effect to every part.

2. **Notes—Guarantor—Surety—Liability Enlarged—Construction.**
The liability of a guarantor or surety can not be enlarged by construction.

3. **Same.**
P. and F. gave a note to R., reading, "We promise to pay to R. the sum of $1,000, to be applied to the payment of all claims for collection R. had against P., and to all such others as he may receive for that purpose, until the full amount is paid." It was stipulated therein that its purpose was to secure and guarantee said claims to the extent and in the sum specified. R., having claims to the amount of $1,800, received from P. the sum of $647, with instructions from him to prorate that sum on the amount of claims held: *Held*, under the terms of the guarantee, such would enlarge the liability of the guarantor, and the sum so received should have been applied to the reduction of the guaranty.

ACTION tried before *Jones, J.*, and a jury, at February Term, 1909, of DAVIDSON.

Plaintiff company sues upon the following instrument:

"$1,000. 7 December, 1907.

"Sixty days after date, we, or either of us, promise to pay to Emery E. Raper, attorney, or order, the sum of one thousand dollars, for value received, which money, when received by him, to be applied to (546) the payment of all claims he has now in his hands for collection against the said J. L. Peacock and to such others as he may receive for collection, until the full amount is applied. This note executed for the purpose of securing and guaranteeing the payment of the said claims to the extent of one thousand dollars.

"Said claims now in hand are as follows:_____

J. L. PEACOCK. [Seal.]
R. W. FULLER. [Seal.]"

A list of the claims is attached, aggregating $896.

Defendant R. W. Fuller admitted the execution of the obligation, and by way of defense alleged that he has never been indebted to the plaintiffs in any sum whatever, except as surety on an obligation in the amount of $1,000, guaranteeing the payment of $1,000 to plaintiffs and other creditors of J. L. Peacock; that he is informed and believes that

since the execution of said obligation as surety, aforesaid, the said Emery E. Raper has received other claims for collection than those mentioned and set out in the complaint, and that he has received moneys from J. L. Peacock and his agents, to be applied to said accounts and the accounts mentioned in the complaint, to more than a sufficient amount to relieve this defendant from any obligation or responsibility as surety aforesaid. It was in evidence that other claims against Peacock were placed in the hands of Mr. Raper for collection, amounting to $1,016.87, aggregating about $1,800. Peacock paid $50 on the note, which was duly credited.

The following is the only evidence introduced: "About 10 February, 1908, J. L. Peacock sold to Z. I. Walser and Emery E. Raper his equity of redemption in his home, there being mortgages on same, and on account of the price of this lot the sum of $647.50 was paid on the claims in the hands of Emery E. Raper, which amount was, by express agreement of J. L. Peacock, applied to all the creditors, *pro rata,* on their claims of $1,816.33, the creditors being those set out in the complaint. After 10 February, 1908, other claims were placed with Emery E. Raper, but nothing has been collected on them and no claim is made for them."

The following issue was submitted to the jury: "What amount (547) has been paid on said note of $1,000 by J. L. Peacock and R. W. Fuller, or others, since the execution of the note, 7 December, 1907?" The court instructed the jury that if they believed the evidence to answer the issue "$730.50"; that there should not only be included in the amount paid the $50 admitted, but also the further amount paid by Peacock, the $647.50. Plaintiff excepted to the charge on the issue as to the item of $647.50. There was an item of $33 credited on the note, not necessary to be noted. Judgment was rendered for $270. Plaintiff appealed.

E. E. Raper and Walser & Walser for plaintiff.
J. A. Spence and H. M. Robins for defendant.

CONNOR, J., after stating the case: The sole question presented by plaintiff's exception is whether the $647.50 received by Mr. Raper shall be applied to the obligation of defendant Fuller in reduction of his liability for $1,000, the amount of the bond. Plaintiff insists that Peacock had the right to apply the $647.50 to the payment, *pro rata,* of all of the debts against him in the hands of Raper for collection, including those received subsequent to the execution of the bond. Applied in this way to the total amount of the debts, $1,816, there remains due on them $1,181.81, for which, to the extent of $1,000, plaintiff insists, defendant Fuller is still liable. The obligatory words

of the bond, "promise to pay," are explained by the last clause, "This note is executed for the purpose of securing and guaranteeing the payment," etc. The obligation, therefore, assumed by Fuller is to secure and guarantee the payment by Peacock of $1,000, "which money, when received by Raper, to be applied to the payment of all claims he has now in his hands for collection against the said J. L. Peacock, and to such others as he may receive for collection, until the full amount is applied." It is evident that the words "full amount" refer to the claims then in Mr. Raper's hands and such others as he might receive for collection. Thus Fuller's liability is expressly restricted to $1,000, and the guarantee is, by the last words of the note, limited to "the payment of the claims to the extent of $1,000." It was immaterial to Fuller what amount of claims came into Raper's hands for collection
(548) subsequent to the execution of the bond. This was doubtless uncertain. The evident meaning of the language is that Fuller guaranteed that Peacock would pay on all of the claims against him in Raper's hands so much as $1,000, and that, when paid or "received by him," it was to be applied to such claims. When, therefore, the $647.50 was paid by Peacock, his express agreement that it should be applied, *pro rata,* to all of the claims had no other effect than to comply with the terms of his bond. He could not change or enlarge Fuller's liability. If the payment be applied, as contended for by plaintiff, Peacock could impose upon Fuller the obligation to pay the full amount of the bond, disregarding the express provision that the money, "when received," should be applied to the debts until the full amount is applied. In other words, Peacock may have paid the whole amount for which Fuller was liable, and yet leave him liable for the balance of his indebtedness to the extent of one thousand dollars. This would do violence to the language and evident purpose of the parties when the bond was executed. It is an elementary rule of interpretation that where there is no repugnancy every part of an instrument must be given effect. It is also well settled that the liability of a guarantor or surety is not to be enlarged by construction. His obligation is to be fixed by the language of his bond and not carried beyond its terms. It is *strictissimi juris.* No question of the right of the debtor to make such application of a payment by him from his general funds, as he wishes, is presented in this appeal. It was a matter of no concern with Fuller how the $647.50 was applied as between the creditors of Peacock. His right, under the terms of his contract, was to have it applied to the reduction of his guaranty. We concur with his Honor in the instruction given the jury. There is

No error.

Cited: Bank v. Furniture Co., 169 N. C., 182.

(549)

JOHN S. RICHARDSON v. JOHN S. RICHARDSON, JR.

(Filed 5 May, 1909.)

1. **Husband and Wife—Marriage—Adoption of Constitution—Vested Rights—Wife's Separate Property—Disposition By Will—Husband's Curtesy.**

By marriage, before the adoption of the Constitution of 1868, the husband acquired no vested rights in the lands of his wife before a child was born capable of inheriting; and when the first child born of the marriage was after the adoption of the Constitution, which gives a married woman the power, among other things, of disposing, by will, of her property acquired before marriage (Article X, sec. 6), she may accordingly dispose of it by will and deprive him of his interest therein as tenant by the curtesy.

2. **Husband and Wife—Wife's Separate Property—Marital Interests—Vested Rights—Common Law—Statutory Change—Wills.**

The common-law doctrine that the husband, upon the marriage, was seized in right of his wife of a freehold interest in her lands during their joint lives, and that as tenant by marital right he was entitled to the rents and profits of her estate, etc., was changed by the act of 1848 (now Revisal, sec. 2097); and thereafter no vested right of his therein could be impaired by giving effect to the provisions of the Constitution of 1868, Art. X, sec. 6, allowing her to absolutely dispose of her separate real property by will, free from any claim therein of her husband, as such.

3. **Husband and Wife—Wife's Separate Property—Lease—Privy Examination—Void Lease.**

A written lease of land for a term of five years, made subsequent to the passage of the act of 1848 (now Revisal, sec. 2097), without the privy examination of the wife, is void as to the wife and passes no interest to the husband in the rents and profits thereof.

ACTION heard on case agreed by *Long, J.*, at October Term, 1908, of ANSON. Plaintiff appealed.

J. A. Lockhart and F. J. Cox for plaintiff.
Robinson & Caudle for defendants.

WALKER, J. This action was brought to recover the value of five bales of cotton which have been sold, the parties agreeing that the proceeds shall be held to await the determination of this case. (550) Judgment was entered for the defendants, and the plaintiff appealed.

The facts are that the plaintiff and Charlotte Leak were married in 1867, she being then seized of land in Anson County, known as the Brown Creek tract and containing 878 acres, which is described by its metes and bounds in the record. They had five children, the oldest of

them having been born in November, 1868. In December, 1905, the said Charlotte Richardson and her husband leased the land, by a written agreement, for the term of five years, to R. J. Beverly, who agreed to deliver, as rent, five bales of cotton, on the first day of November of each year during the term. Charlotte Richardson died in October, 1907, leaving a will, by which she devised and bequeathed all of her property and estate to persons other than the plaintiff. The lessee delivered to Charlotte Richardson, just before her death, 2,004 pounds of cotton, it being part of the rent for the year 1907, and after her death the lessee delivered the remainder of the cotton in full payment of the rent for that year.

The question presented for our consideration is whether the plaintiff, the husband of Charlotte Richardson, or the defendant, John S. Richardson, Jr., her executor, is entitled to receive the proceeds of the sale of the cotton.

The plaintiff contends that by virtue of the marriage and the ownership of the land by his wife he acquired a vested interest, as tenant by the curtesy initiate, in all crops grown upon the same, without regard to the fact that the first child of the marriage was born after the adoption of the Constitution of 1868, and that he is therefore entitled to the rent due by the terms of the lease; while the defendants assert title to the rent upon the ground that, by the Constitution of 1868, the land, with its rents and profits, became the separate property of the wife, the testatrix of the defendant Richardson, as the plaintiff's right or interest in the land as tenant by the curtesy was a contingent one until the birth of issue, which occurred after the adoption of the Constitution, and therefore there was no interference with any vested right of the plaintiff by the provision of that instrument that the property of

(551) the wife acquired before marriage shall belong to her as her separate estate, with the power to dispose of it by will, and also by deed, with the written consent of her husband, as if she were unmarried. Constitution, Art. X, sec. 6. We must therefore determine what is the husband's interest in his wife's property by the rules of the common law, as modified by the Constitution, if, under the facts of this case, any change in those rights as they existed at common law has been wrought by that instrument.

Blackstone says: "There are four requisites necessary to make a tenancy by the curtesy: marriage, seizin of the wife, issue, and death of the wife." He is referring here, of course, to a tenancy by the curtesy consummate. In regard to the time when the husband first becomes vested with an interest or estate in his wife's land he says: "As soon, therefore, as any child is born, the father began to have a permanent interest in the lands; he became one of the *pares curtis,* did homage to

the lord, and was called tenant by the curtesy *initiate;* and this estate, being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant." 2 Blackstone, 127. This is in harmony with the former decisions of this Court. As is said in *Morris v. Morris,* 94 N. C., 617, "The husband, by the birth of issue, became tenant by the curtesy initiate to a separate estate, for his own life, in his wife's land, the usufruct or profit of which, during that period, was absolutely and exclusively his own property. This has not been questioned in this State since the decision in *Williams v. Lanier,* 44 N. C., 30, and others following that case. *Halford v. Tetherow,* 47 N. C., 393; *Childers v. Bumgarner,* 53 N. C., 297; *McGlennery v. Miller,* 90 N. C., 215; *Osborne v. Mull,* 91 N. C., 203." We see, therefore, that the husband's right to the usufruct, or rents and profits of the land, is contingent upon the birth of issue. It is a mere expectancy or possibility, and when this is the case the Legislature may deprive him of his expectant interest at any time before the event occurs, upon the happening of which it would become vested. We said, in *Anderson v. Wilkins,* 142 N. C., 158: "So long as the interest remains contingent only, the Legislature may act, for a bare expectancy or any estate depending for its existence on the happening of an uncertain event is within its control, not being a vested right (552) which is protected by constitutional guaranties. If this be so, the nature of estates and their enjoyment must, to a certain extent, and indirectly, be subject to legislative control and modification in order to promote the public welfare. Smith on Statutory and Const. Constr., 412. In this country estates in tail have very generally been turned into estates in fee simple by statutes, the validity of which is not disputed. *DeMill v. Lockwood,* 3 Blatch., 56; *Lane v. Davis,* 2 N. C., 277; *Minge v. Gilmour, ibid.,* 279." *Judge Cooley,* in his treatise on Constitutional Limitations (7 Ed.), at p. 513, puts the very case we now have under consideration, and thus states the law applicable to it: "At the common law, the husband, immediately on the marriage, succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away. But other interests were merely in expectancy. He could have a right as tenant by the curtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estates. This right would be property, subject to conveyance and to be taken for debts, and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely—that is to say, until it

becomes initiate—the Legislature must have full right to modify or even to abolish it. And the same rule will apply to the case of dower, though the difference in the requisites of the two estates is such that the inchoate right to dower does not become property or anything more than a mere expectancy at any time before it is consummated by the husband's death. In neither of these cases does the marriage alone give a vested right. It gives only a capacity to acquire a right. The same remark may be made regarding the husband's expectant interest in the after-acquired personalty of the wife; it is subject to any changes in the law made before his right becomes vested by the acquisition."

(553) We are therefore of the opinion that the plaintiff acquired no right to the cotton as rent for the land of his wife by virtue of any estate in him as tenant by the curtesy initiate, because of the constitutional provision (Article X, section 6), by which it is declared that a married woman's real and personal property shall be and remain her sole and separate estate, and that she may devise and bequeath the same, thus depriving her husband of any interest therein. *Walker v. Long,* 109 N. C., 510; *Tiddy v. Graves,* 126 N. C., 620. As that article of the Constitution was a valid enactment, under the facts and circumstances of this case, the plaintiff has no interest, either as tenant by the curtesy initiate or consummate in rent which was reserved in the lease, his wife having bequeathed the same to other persons. *Tiddy v. Graves, supra.*

It is true that at common law the husband, upon the marriage, was seized in right of his wife of a freehold interest in her lands during their joint lives, and that either as tenant by marital right or as tenant by the curtesy initiate he was entitled to the rents and profits, and might lease or convey his estate, and it might be sold under execution against him. But radical changes in this respect were effected by the act of 1848 (Revisal, sec. 2097). Construing this act, in *Jones v. Coffey,* 109 N. C., 515, the Court said: "Whatever may be the rights of the husband in the wife's land after she may die intestate, the authorities concur in the view that the husband holds no estate during the life of the wife as tenant by the curtesy initiate which is subject to execution and which he can assert against the wife. He has the right of ingress and egress and marital occupancy, but can assume no dominion over her land, except as her properly constituted agent." In *Walker v. Long,* 109 N. C., 510, we find the following reference to the act: "By virtue of the act of 1848, and the further modification made by the Constitution of 1868, the tenancy by the curtesy initiate is stripped of its common-law attributes until there only remains the husband's bare right of occupancy with his wife, with the right of ingress and egress (*Manning v. Manning, supra*) and the right to the curtesy consummate contingent

upon his surviving her. . . . The husband is still seized in law of the realty of his wife, shorn of the right to take the rents and of the power to lease her lands. . . . He has by the curtesy (554) initiate a freehold interest, but not an estate in the property."

It would seem that the more recent decision in *Taylor v. Taylor,* 112 N. C., 134, is a direct authority against the claim asserted by the plaintiff. In that case the Court, speaking by *Shepherd, C. J.,* says: "In all of these cases the actual *decision* (as distinguished from several expressions founded upon the common law) may, it is thought, be reconciled with the recent ruling of this Court in *Jones v. Coffey, supra,* that under the act the husband has no right which he can assert *against* the wife in her real property. This appears to be in accord with the early declaration of the Court that 'the sole object of the act was to provide for her a *home,* of which she could not be deprived, either by the husband or by his creditors.' Conceding that the cases may not be altogether harmonious, we must adopt the later decisions, and according to these the plaintiff is entitled to recover; for, admitting that a divorce *a mensa et thoro* can not, as it is claimed, affect the property rights of the parties (*Taylor v. Taylor,* 93 N. C., 418), the defendant, as against the wife, had no property rights whatever, but simply a right of ingress and egress for the purpose of enjoying her society, and these he has forfeited during the coverture, or until a reconciliation, by his own misconduct. Taking the other view, however, and admitting that the husband had a right to the rents and possession of the land during coverture, we think that such rights must yield when they come in conflict with the paramount rights of the wife, as indicated by the act of 1848."

It appears in this case that there was a written lease, signed by the plaintiff and his wife, but there was no privy examination of the latter, as required by the act of 1848 (Revisal, sec. 2097), and also by the Revisal, sec. 2096. The lease was therefore void as to the wife, and passes no interest to the husband in the rents and profits of the land, if otherwise he would have acquired an interest.

Our conclusion is that there was no error in the judgment of the court. Affirmed.

Cited: Jackson v. Beard, 162 N. C., 116; *Bullock v. Oil Co.,* 165 N. C., 68.

(555)

C. J. S. BOOKER v. H. C. ELLER, JR., ET AL.

(Filed 5 May, 1909.)

Notes—Joint Principals—Fraud as to One, Valid as to the Other.

In an action upon a note, when it appears from its face that it was signed by two persons as joint principals, and the jury have found it was obtained by fraud as to one, but was valid as to the other, as to whom there was no evidence that fraud had been used, a judgment upon the note in plaintiff's favor and against such other principal was properly rendered.

ACTION upon a note, tried before *Justice, J.,* and a jury, at January Term, 1909, of WILKES.

The defense was that the note, appearing upon its face to have been made by two joint principals, H. C. Eller, Jr., and H. C. Eller, Sr., was procured by the false and fraudulent representations of the plaintiff. The jury found that it was fraudulent as to H. C. Eller, Jr., but not as to H. C. Eller, Sr., and judgment was rendered accordingly in plaintiff's favor against H. C. Eller, Sr., who excepted and appealed.

Finley & Hendren for plaintiff.
W. W. Barber for defendant.

WALKER, J. This action was brought to recover the amount of one of a series of notes executed by H. C. Eller, Jr., and his father, H. C. Eller, Sr., to the plaintiff. The defendants admitted the execution of the notes, and alleged that they were procured by fraudulent representations made by the plaintiff. We need not inquire whether the fraud is sufficiently pleaded, as we are of the opinion that there was no error committed by the court in its refusal to sign the judgment tendered by the defendants in rendering the judgment, which appears in the record.

The note in controversy is as follows:

$84. WILKESBORO, N. C., 31 May, 1901.

20 August, 1901, after date, I promise to pay to the order of C. J. S. Booker eighty-four dollars, value received.

H. C. ELLER, JR.
H. C. ELLER, SR.

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

1. "Were the notes sued upon procured from H. C. Eller, Jr., by the false and fraudulent representations of the plaintiff?" Answer: "Yes."

2. "Were the notes sued upon procured from H. C. Eller, Sr., by the false and fraudulent representations of the plaintiff?"

The jury, under instructions of the court, answered "No."

It will be seen that the jury found in favor of the defendant H. C. Eller, Jr., and against the defendant H. C. Eller, Sr. The defendant H. C. Eller, Sr., by his counsel, tendered a judgment to the effect that the plaintiff was not entitled to recover as to him upon the verdict. The judge refused to sign the judgment, but signed a judgment as above set forth.

The defendant H. C. Eller, Sr., did not request the court to give any instructions to the jury, so far as appears in the case, although he relied, in argument, upon the defense that he was a surety for his son, H. C. Eller, Jr.; and if the note is void as to him, as principal, it is also void as to H. C. Eller, Sr., as surety. The evidence as to whether H. C. Eller, Sr., was merely a surety is vague and unsatisfactory. Upon the face of the note he appears to be a principal. But we need not complicate a simple case by any consideration of this question. We are restricted to the assignments of error. The jury have found that H. C. Eller, Sr., was a principal and that as to him there was no fraud. There is not a particle of evidence that he was influenced by any fraudulent representation to sign the note, even if in the state of the record we are permitted to go behind the verdict. It all comes to this: that the jury have found that H. C. Eller, Sr., made a valid contract to pay the plaintiff the sum of money which he claims in this action, and we are unable to see why, upon the verdict, he is not entitled to judgment.

No error.

(557)

FRANK HAUSER v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 5 May, 1909.)

1. Negligence—Proximate Cause—Burden of Proof.

In order to recover upon an issue involving defendant's negligence, the plaintiff must show that the damages claimed arose as the proximate cause of the negligence as well as the negligence alleged.

2. Same.

When it is shown that, notwithstanding the negligent delay in the delivery of a telegram sued on, there were two routes the plaintiff could have taken and avoided the injury alleged, upon which an issue was made, whether by the exercise of ordinary diligence the plaintiff could have avoided the injury, the burden of proof is on plaintiff on the issue, he being required to show that defendant's negligence was the proximate cause of the alleged injury.

ACTION tried before *Justice, J.*, and a jury, at February Term, 1909, of ALEXANDER.

Defendant appealed.

J. H. Burke and L. C. Caldwell for plaintiff.
Armfield & Turner and Tillett & Guthrie for defendant.

WALKER, J. This action was brought to recover damages for mental anguish, alleged to have been caused by the negligence of the defendant in transmitting and delivering a telegram informing the plaintiff of his sister's death. It is alleged that by reason of the negligence he was prevented from attending the funeral. The message is as follows:

ROCKFORD, N. C., 20 July, 1908.

FRANK HAUSER,
Taylorsville, N. C.

Gertrude Williams dead. Come at once.

A. HAUSER.

It appears that the plaintiff's sister died at Yadkinville, which is about ten miles from Rockford. He could have gone by either one of two routes from Taylorsville, where he lived, to Yadkinville: (558) (1) by train from Taylorsville to Statesville, and thence by driving to Yadkinville, a distance of 36 miles; (2) by driving to Wilkesboro from Taylorsville, a distance of 20 miles, and thence by rail to Rockford, and thence by driving to Yadkinville. He did not know that he could have gone to Yadkinville by way of Wilkesboro in time for the funeral, and he did not intend to go after he received the message, as it was delayed, and he thought it was too late for him to reach Yadkinville before the funeral; but he would have gone if the message had been delivered before the train left for Statesville. There was other testimony as to whether the plaintiff had exercised care and diligence in attempting to go to Yadkinville after he received the telegram.

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

1. "Did the defendant negligently fail to deliver the telegram as alleged in the complaint?" Answer: "Yes."

2. "Could and would the plaintiff have attended the funeral of deceased if the telegram had been delivered in reasonable time?" Answer: "Yes."

3. "Notwithstanding the negligence of defendant, if any, could the plaintiff, by the exercise of ordinary diligence, have attended the funeral of deceased?" Answer: "No."

4. "What damage, if any, is the plaintiff entitled to recover of defendant?" Answer: "Two hundred dollars."

Numerous exceptions were taken by the defendant during the trial of the case, but the only one which we think it necessary to consider is

the following objection to an instruction of the court, which the plaintiff assigns as error: "The defendant contends that if the said plaintiff had exercised due care and reasonable diligence, such as the law exacts of him, he could have attended said funeral after the said telegram was delivered; and if you should so find from the evidence, you will answer this issue 'Yes.' (The burden of proof upon this issue is on the defendant.)" The burden of proof was not upon the defendant to show that the plaintiff had not exercised diligence, but upon the plaintiff to show not only that the defendant had been guilty of negligence, but that its negligence was the proximate cause of the damage to him. *Hocutt v. Telegraph Co.,* 147 N. C., 186. It is not enough to show that there has been negligence in order to entitle a plaintiff to recover; (559) he must, in addition, show that the defendant's negligence was the proximate cause of his injury. Negligence is not actionable unless it is the proximate cause of the damage. *Brewster v. Elizabeth City,* 137 N. C., 392. The burden is always upon the plaintiff to prove every requisite of his cause of action. This is not a question of contributory negligence which would shift the burden of proof to the defendant, but it is one of the essential elements of the cause of action that the negligence of the defendant should proximately cause the damage.

There was error in misplacing the burden of proof by the instruction to which the defendant excepted.

New trial.

Cited: Lanning v. Tel. Co., 155 N. C., 345; *Barnes v. Tel. Co.,* 156 N. C., 153; *Mullinax v. Tel. Co.,* 156 N. C., 552; *Hoaglin v. Tel Co.,* 161 N. C., 398; *Alexander v. Statesville,* 165 N. C., 532; *Medlin v. Tel. Co.,* 169 N. C., 506.

R. H. PIERSON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 5 May, 1909.)

1. Telegraphs—Negligence—Office Hours—Efforts to Deliver—Defenses.

The observance of reasonable office hours is not a valid defense to the delayed delivery of a message by a telegraph company, when it is shown that it was received on Saturday night as a night message, delivered on Monday morning between 9 and 10 o'clock, and under the rules of the company it appeared that it should have been delivered on Sunday morning to the addressee, who resided within a short distance of the telegraph office, and no effort was made to do so.

2. Telegraphs—Messages—Negligence—Failure to Deliver—No Train—Evidence—Questions for Jury—Instructions.

When it appears that the delivery of a telegram announcing an extreme illness had been negligently delayed by the defendant telegraph company from 8 A. M. Sunday morning until between 9 and 10 A. M. Monday morning, that no train ran from that place on Sunday which plaintiff could have taken, and the defense was that defendant's negligence was not the proximate cause of the injury, for that the plaintiff could not have reached his destination before the funeral had the message been promptly delivered, testimony of plaintiff tending to show he could have driven a great distance through the country and have taken a train at another station in time was sufficient evidence to be submitted to the jury, under an instruction that such fact must be shown by the plaintiff to the satisfaction of the jury.

3. Telegraphs—Messages—Notice of Importance—Relationship—Mental Anguish—Evidence Sufficient.

A telegram announcing the dying condition of a child, with request to "come," puts the company upon notice of its importance to the sendee and that it was sent for his benefit, and when the testimony shows that the child was a niece, to whom sendee was much attached, and had lived with her in his brother's house, it is sufficient evidence for the jury to consider in awarding damages for mental anguish.

(560) ACTION tried before *Ward, J.*, and a jury, at August Term, 1908, of CALDWELL.

Action for damages, arising from delay in delivering a telegram to plaintiff, as follows:

"STATESVILLE, N. C., 13 October, 1916.

"R. H. PIERSON,
Lenoir, N. C.

"Come to Statesville at once. Hamp's child dying.

J. H. HOLDEN."

These issues were submitted:

1. "Was the defendant guilty of negligence in respect to the transmission and delivery of the telegram to the plaintiff, R. H. Pierson?" Answer: "Yes."

2. "If so, was the plaintiff, R. H. Pierson, injured thereby?" Answer: "Yes."

3. "What damages, if any, has the plaintiff sustained?" Answer: "Three hundred dollars."

From the judgment rendered defendant appealed.

W. C. Newland, Thomas Newland and Lawrence Wakefield for plaintiff.

Avery & Avery and George H. Fearons for defendant.

BROWN, J. The message was filed with defendant company as a night message, for transmission on Saturday, 13 October, 1906, at 8 P. M. It was delivered to the plaintiff on Monday morning, between 9 and 10 o'clock. That this is gross negligence is not open to discussion. Assuming that it was filed and accepted as a night message, (561) under the rules of the company, it should have been delivered next morning about 8 o'clock, according to the testimony of defendant's operator. It was not received at Lenoir until 9:42 A. M. Sunday, and when received at Lenoir it was addressed to the care of Jim Betler instead of Jim Booth, but there is no evidence that plaintiff is chargeable with that error. There is no evidence of any effort being made Sunday morning to find plaintiff or Jim Betler in Lenoir, although the former resided within two hundred yards of the telegraph office. We think his Honor did not err in directing the jury that if they believed the evidence to answer first issue "Yes."

The real defense of the defendant is based upon the theory that if the telegram had been delivered on Sunday morning, according to contract, the plaintiff could not have reached Statesville in time to attend the funeral, and that therefore the plaintiff has failed to show that defendant's negligence was the proximate cause of the injury. It is plain that there was no train leaving Lenoir on Sunday morning which he could have taken, as the only Sunday train left at 5 A. M.; but plaintiff testified that he would have gone to Statesville Sunday morning had he received the message, and that he could have gotten there for the funeral by driving to Hickory. The possibility of such an achievement was contested by defendant, but we think his Honor properly submitted the question to the jury when he told them "that the plaintiff must show to your satisfaction that he could have gone to Statesville before the funeral." Upon this contention his Honor fairly submitted to the consideration of the jury the evidence and facts relied on by defendant as well as plaintiff.

It is further contended that there is no evidence that the plaintiff suffered any mental anguish.

The character of the message put defendant upon notice of its importance to the sendee and that it was sent for his benefit. The testimony shows that the dying child was plaintiff's niece, with whom he had lived in his brother's house, and that he was much attached to her. It is true that plaintiff does not use as strong language in en- (562) deavoring to portray his grief as is sometimes employed, but facts sometimes speak louder than words, and both together made out a case sufficiently strong to be submitted to the jury.

No error.

Cited: *Cotton Mills v. R. R., post,* 611.

C. A. BAKER, ADMINISTRATOR, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 5 May, 1909.)

1. **Railroads—Infants—Negligence—Evidence—Nonsuit.**

When it is shown by the evidence that plaintiff's intestate, a boy nearly fifteen years of age, was riding, by permission, on defendant railway company's flat car, and, of his own volition, unexpectedly jumped from the car when the train was moving at the speed of thirty miles an hour, and was killed, his act of thus jumping amounted to such negligence on his part as will bar recovery in a suit for damages against the company by his administrator, and a motion for judgment as of nonsuit upon the evidence should be granted.

2. **Railroads—Infants—Negligence—Questions for Court—Evidence—Nonsuit.**

The age at which an infant's responsibility for his own negligence will be presumed is a question of law; and when, at the age of fifteen, it is shown that an infant was killed as the result of his own negligent act in jumping from a car of a train moving at a speed of thirty miles an hour, a motion for judgment as of nonsuit upon the evidence should be allowed.

3. **Evidence—Supreme Court—Nonsuit Allowed.**

A motion to nonsuit upon the evidence may be allowed in the Supreme Court, on appeal, when it appears to have been improperly refused by the trial judge.

ACTION tried before *Long, J.*, and a jury, at October Term, 1908, of ANSON, to recover damages for the negligent killing of Carl Baker, a boy within one month of fifteen years of age.

The usual issues of negligence, contributory negligence, and damages were submitted and found for plaintiff.

From the judgment rendered defendant appealed.

(563) *Robinson & Caudle and L. Medlin for plaintiff.*
John D. Shaw and Murray Allen for defendant.

BROWN, J. The defendant, in apt time, entered motions to nonsuit, upon the ground that upon plaintiff's own evidence he is not entitled to recover—first, because no negligence is shown; second, because the intestate was guilty of contributory negligence. We are all of opinion that this last contention is so plainly with the defendant that it is unnecessary to consider the first.

These facts appear from plaintiff's evidence: His son, Carl, fifteen years of age, lacking one month, was killed by jumping from defendant's work train while running about thirty miles an hour. The train consisted of flat cars, equipped with machinery for ditching.

Witnesses for plaintiff, who testify concerning the occurrence, say that on the afternoon of 15 August, 1906, the boy, Carl, and his younger brother, Luther Baker, came up to the train from their home, about three-quarters of a mile away. When they arrived at the train Herman Shannon, another boy, was standing on a flat car. Carl Baker asked the conductor if he could ride, and the conductor told him to get on the rear end of the train, on a flat car, out of the way. Carl then climbed upon the flat car and pulled his younger brother up with him. The train continued the work of ditching. The boys remained on the car an hour. It became necessary for the train to take a siding to let another train pass, going towards Monroe. After this train passed, the ditching train pulled out for Waxhaw, two miles away. When the train had gotten up good speed and was running at a rate of about thirty miles an hour Carl Baker got up from where he was sitting, on a scantling, and sat down on the rear of the flat car and jumped off between the rails.

Herman Shannon, who was on the car with plaintiff's intestate, testified that he remained on the train, in the position occupied by himself and Carl Baker until it reached Waxhaw, without injury to himself. This witness was nearly a year younger than Carl Baker.

According to the testimony of the plaintiff, his son, Carl, was an "intelligent, smart boy, and of average size for his age," and (564) for two years had been residing within three-quarters of a mile from the railroad.

It is settled beyond controversy by the decisions of this and all other courts in this country that the act of the intestate in jumping off the rapidly moving train of defendant was one of such recklessness as will bar recovery if the intestate is held, in law, responsible for his conduct. *Owens v. R. R.*, 147 N. C., 357; *Morrow v. R. R.*, 134 N. C., 92.

The learned counsel for plaintiff, Mr. Caudle, in an able and elaborate argument, endeavored to show that the intestate, on account of his age, should not be held responsible for his act. But an examination of the authorities in this and other States discloses that they are overwhelmingly against him. The case is not to be judged by the length of experience of the boy, Carl, with railroads, although the evidence discloses that for two years he had resided near one, and that his twelve-year-old brother, Luther, is by no means a stranger to them. Carl wore long trousers, was well grown, bright, smart and intelligent. He was not an infant of tender years, and in the absence of evidence to the contrary, had the capacity of an adult to appreciate danger. He was three years beyond the age at which he could be employed in a factory, around dangerous machinery, without violating the child-labor law, and was old enough to be held responsible for a violation of the criminal law of the land.

An infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger and to have power to avoid it, and this presumption will stand until rebutted by clear proof of the absence of such discretion as is usual with infants of that age. At what age this presumption arises is not a question of fact, but one of law. The inquiry, At what age must an infant's responsibility for negligence be presumed to commence? can not be answered by referring it to a jury. That would furnish us with no rule whatever. It would simply produce a shifting standard, according to the sympathies or prejudices of those who composed each particular jury. One jury might fix the age at fourteen, and another at eighteen, and another at twenty. The responsibilities of infants are clearly defined by text writers and courts. (565) At common law, fourteen was the age of discretion in males and twelve in females. At fourteen an infant could choose a guardian and contract a valid marriage. After seven an infant may commit a felony, although there is a presumption in his favor, which may, however, be rebutted. But after fourteen an infant is held to the same responsibility for crime as an adult. 1 Sharswood's Blackstone, 20, 435, 404.

Inasmuch as an infant, after fourteen, may select a guardian, contract marriage, is capable of harboring malice and of committing murder, it is no great imposition on him to hold him responsible for his own negligence.

In *Tucker v. R. R.*, 124 N. Y., 308, the Court of Appeals of New York says: "The question at what age an infant's responsibility for negligence may be presumed to commence is not one of fact, but of law. In the absence of evidence tending to show that a boy twelve years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult."

To same effect is *Nagle v. R. R.*, 88 Pa. St., 35. That infants are to be held for the consequences of their own negligence in actions for injuries to them has long been settled by this and other courts, and so declared by text writers. Shearman & Red. Neg., sec. 49; Wharton on Neg., 314; *Manly v. R. R.*, 74 N. C., 655; *Murray v. R. R.*, 93 N. C., 94; *R. R. v. Gladmon*, 15 Wall., 401; *R. R. v. Stout*, 17 Wall., 657.

From all these and other approved authorities the principle is deduced that an infant, so far as he is personally concerned, is held to such care and prudence as is usual among children of the same age; and if his own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the infant to the possibility of an

injury, the latter can not recover. The Supreme Court of the United States has substantially held the same to be sound law in the cases above cited.

We find in the books many cases where children of various (566) ages from seven years upwards, have been denied a recovery because of their own negligence. *Roland v. R. R.*, 36 Mo., 484; *Meek v. R. R.*, 52 Cal., 605; *Conley v. R. R.*, 4 A. & E. Railroad Cases, 533; *Mathis v. Manufacturing Co.*, 140 N. C., 530; *Murray v. R. R., supra; Beck v. R. R.*, 148 N. C., 62.

In *Meredith v. R. R.*, 108 N. C., 616, the plaintiff, a bright boy, about thirteen years old, while passing along the highway, was struck and injured by an engine while attempting to avoid another, coming from the opposite direction. The Court held that his administrator was not entitled to recover for his death. *Judge Avery* says: "The witnesses concur in the statement that the boy who was injured was an intelligent youth, about thirteen years old. In the absence of knowledge or information to the contrary, the engineer was justified in supposing that he would look to his own safety, even when trains were moving on three parallel tracks, if there was manifestly an opportunity to escape by walking across the railway to a neighboring sidetrack."

Again, he says: "The boy injured was described by witnesses as being bright and 'smart'; but if he were *apparently capable of appreciating his peril* or his situation, it is sufficient to relieve the servants of the company from the imputation of carelessness in assuming that he would step aside before the engine reached him." This principle has been applied in other States, regardless of whether the child was over the age of fourteen years.

In *Dull v. R. R.*, 21 Ind. App., 571, it is held that a child eleven years old and of sufficient intelligence to know the difference between safety and danger is a person *sui juris*, so as to be charged with contributory negligence, resulting in his being struck by a train.

"A boy of eleven years of age knows as well as an adult does what a railroad is, and the use to which it is put, and the consequence to a person who should be struck by a passing train, and knows that he should not stop to play and lounge amid a network of tracks. It is true that a boy of that age can not be presumed to have the judgment of an adult, but it does not require much judgment to keep from walking in dangerous places, the dangers of which are fully understood." (567) *Masser v. R. R.*, 61 Ia., 602; also, *Powers v. R. R.*, 52 Minn., 332.

In *Mendenhall v. R. R.* (Kan.), 61 L. R. A., 120, a fifteen-year-old boy paid a brakeman on a passenger train twenty-five cents to permit him to ride on the train. The brakeman told him to get on the platform of the baggage car, and to get off at stopping places and keep out of sight.

The plaintiff rode upon the platform to a nearby station, and in getting off the train, while in motion, on the opposite side from the depot, stumbled over a semaphore board, fell under the train and received the injury complained of. The demurrer to the complaint was sustained. The Court says that "He was a trespasser and not a passenger. The company owed him no duty in regard to the construction of its semaphore, or otherwise, except to avoid willful and wanton negligence. The plaintiff was injured, not because he was riding on the platform, but because he got off the train while in motion, and on the opposite side of the car from the depot. The allegation is insufficient to show the defendant to have been guilty of any willful or wanton negligence or to relieve the plaintiff from the responsibility of his own wanton recklessness."

The Massachusetts Court holds that "A street railway corporation is not liable for an injury caused to a boy ten years old, who was, when injured, playing with other children upon a car, left without guard for several days on a public street of a city." *Gay v. R. R.,* 159 Mass., 238.

In *Studer v. R. R.,* 121 Cal., 400, recovery was denied in an action for the death of a child between twelve and thirteen years of age, who was killed in attempting to pass between the cars of a freight train. The Court says: "The fact that deceased was only about twelve years of age did not require the court to submit to the jury whether his attempt to pass between the cars constituted negligence. The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid danger as may reasonably be expected in persons of their age and capacity; and children as well as adults must use discretion (568) which persons of their years ordinarily have, and can not be permitted with impunity to indulge in conduct which they know or ought to know to be reckless."

In *Sheets v. R. R.,* 54 N. J. L., 518, an intelligent child, thirteen years old, was struck by a street car while crossing a public street. Recovery was denied. The Court says: "The trial judge laid down the rule of law with respect to her responsibility with substantial accuracy. She was evidently *sui juris,* and the jury were told to consider the degree of care and discretion which would be expected from her. The jury found by their verdict that she was not guilty of contributory negligence; in other words, she was at the time of the occurrence in the exercise of that degree of care which would reasonably be expected from a child of that age and intelligence."

This presumption of discreet judgment which arises after fourteen years of age must stand until it is overthrown by clear proof of the absence of such natural intelligence as is usual with infants of similar age. If such evidence is offered by the plaintiff to rebut such presumption its weight and value are for the jury to estimate.

In this case the plaintiff does not attempt to rebut such presumption, nor does he offer even a suggestion that the engineer, after he started his train, caused the injury or could have prevented it. The intestate was sitting on the rear end of the last flat car, while it was moving at great speed, and suddenly and voluntarily jumped off and was instantly killed. What his motive was in so doing is immaterial. The conclusion is irresistible that had the intestate imitated the wholesome example of his more youthful yet more prudent companion, who sat beside him, and had gone on the short distance to Waxhaw, he would have easily returned to his home in safety.

The motion to nonsuit is allowed. *Hollingsworth v. Skelding,* 142 N. C., 252.

Reversed.

Cited: Vaden v. R. R., post, 702; *Burnett v. Mills Co.,* 152 N. C., 37; *Mitchell v. R. R.,* 153 N. C., 117; *Zachary v. R. R.,* 156 N. C., 501; *Foard v. Power Co.,* 170 N. C., 51.

(569)

E. W. HIGHTOWER ET AL. v. CITY OF RALEIGH ET AL.

(Filed 5 May, 1909.)

1. **Municipal Corporations—Cities and Towns—Bond Issues—Necessary Buildings—Legislative Powers—Power of Court.**

A municipal building in cities the size of Raleigh is a recognized municipal necessity, and bonds issued for that purpose, under proper authority given by the Legislature, in consequence of a resolution of the board of aldermen declaring such building a necessity and a necessary municipal expense, are valid without the approval of a majority of the qualified voters. (Article VII, section 7, Constitution.)

2. **Municipal Corporations—Cities and Towns—Necessary Buildings—Discretion—Power of Court.**

The courts may determine what are necessary public buildings and what class of expenditures fall within the definition of the necessary expenses of a municipal corporation, but the authority for determining the kind of building or its reasonable cost is vested in the Legislature, and to a municipal corporation when it is delegated to it, and not in the courts.

3. **Municipal Corporations—Cities and Towns—Necessary Buildings—Special Commission—Discretion.**

An act conferring the authority upon a commission of taxpayers to employ a competent architect to prepare and furnish plans for the erection, etc., of a necessary municipal building for a city, to be approved by

the commission, without defining what is a proper municipal building or limiting the power of the commission to determine the quality of the structure, leaves such matters to the sound judgment and discretion of the commission.

4. **Municipal Corporations—Cities and Towns—Necessary Buildings—City Hall—Discretion—Injunction.**

The fact that a city contemplates having a city hall on one of the floors of a municipal building, to be built under authority conferred by statute to erect a necessary municipal building, does not invalidate a bond issue likewise authorized for the purpose, or furnish reason for enjoining their issuance.

5. **Municipal Corporations—Cities and Towns—Necessary Buildings—Bond Issue—Diverting Funds—Purchaser—Application of Funds.**

The purchasers of bonds lawfully issued by a city under legislative authority for the purpose of erecting a necessary municipal building are not required to look after the application of the proceeds, and the bonds will not be affected by the municipal authorities diverting the proceeds to an unlawful purpose, though the authorities themselves may be liable therefor.

(570) ACTION heard by *Lyon, J.*, upon motion for injunction, at April Term, 1909, of WAKE.

From the judgment of the court refusing the injunction plaintiffs appeal.

The facts are set out in the opinion of the Court.

James H. Pou for plaintiffs.
W. B. Jones and Aycock & Winston for defendants.

BROWN, J. This action is brought by the plaintiffs against the City of Raleigh and others to restrain the city from issuing bonds of said city in the sum of $125,000 for the purpose of erecting a municipal building in said city, and to restrain the building commission from proceeding with the erection of said building. The bonds are to be issued under the authority of an act of the General Assembly, ratified 8 March, 1909, entitled "An act to erect a municipal building in the City of Raleigh." The Board of Aldermen of the City of Raleigh had, before the passage of said act, adopted the following resolution:

"*Be it resolved by the Board of Aldermen of the City of Raleigh,* That the building now used as a police station and occupied by the municipal officers of the said city is totally inadequate, unsafe and unsanitary, and not suited to the purposes for which it is used, and the good of the city demands the immediate erection of a building suitable for said purpose.

"2. That the senators and representatives of Wake County in the

present General Assembly are hereby requested to introduce into said General Assembly a bill conferring upon the board of aldermen, and such subsidiary commission as they think proper, authority to issue bonds, to the amount of $125,000, to sell the same, and use the proceeds thereof in the erection, furnishing and equipment of such building, and the General Assembly is requested to enact the said bill into a law."

The findings of the board of aldermen declare that a municipal building is a necessity and a necessary municipal expense. Upon such finding the General Assembly has empowered and directed the (571) issue of the bonds now sought to be restrained.

While legislative authority is desirable and even necessary to authorize the special tax and sinking fund, it was not absolutely necessary to enable the municipal authorities to contract this debt. They have that power under the Constitution, inasmuch as a municipal building in cities the size of Raleigh is a recognized municipal necessity, as much so as a courthouse is to a county. McQuillan on Mun. Ord., sec. 511; *Bates v. Bassett,* 1 L. R. A., 166; *Greely v. People,* 60 Ill., 22.

The approval of a majority of the qualified voters is not necessary to validate a debt contracted in order to procure the necessary funds for constructing such building. Constitution, Art. VII, sec. 7; *Swinson v. Mt. Olive,* 147 N. C., 612; *Faucette v. Mt. Airy,* 134 N. C., 125; *Wilson v. Charlotte,* 74 N. C., 748; *Vaughan v. Commissioners,* 117 N. C., 429.

Without legislative authority a special tax could not be levied or a sinking fund created. *Commissioners v. McDonald,* 148 N. C., 126. To give value to these bonds there is both the constitutional power of the board of aldermen as well as the special legislative enactment authorizing them and providing for their payment. But it is contended that the bonds ought not to be issued because the building commission provided for by the act of 1909 has in contemplation the erection of a municipal building containing a city hall in some part of it.

While it is within the province of the courts to determine what are necessary public buildings and what classes of expenditures fall within the definition of the necessary expenses of a municipal corporation, the authority for determining the kind of building that is needed, or what would be a reasonable cost for it, is not within the purview of the judicial authority. It is vested in the legislative and municipal authority, and not in the courts. *Vaughan v. Commissioners, supra.*

"For the exercise of powers conferred by the Constitution," says *Chief Justice Pearson,* "the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties. The court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by

(572) the Constitution upon the legislative department of the Government or upon the county authorities." Quoted in *Vaughan v. Commissioners, supra, Broadnax v. Groom,* 64 N. C., 244, where this question is first discussed by the learned *Chief Justice.*

The act confers upon a commission of five taxpayers and citizens of Raleigh full power "to employ a competent and reputable architect to prepare and furnish plans for the erection, completion and furnishing of the said municipal building," which plans are to be approved by the commission. The act nowhere defines what is a proper municipal building, nor does it put any limitation upon the power of the commission to determine the quality and character of the structure. Those matters are left to the sound judgment and discretion of the building commissioners. It is presumed that they will in good faith carry out the letter and spirit of the statute.

The allegation in the complaint that they contemplate having a city hall upon one floor of the building does not invalidate the bonds, and furnishes no reason for enjoining their issue. Their validity is to be determined by the purpose for which they are issued, as appears upon the resolutions of the board of aldermen and the act of Assembly. If the courts adjudge that, upon the face of the act and resolutions authorizing the bonds, they are to be issued for a necessary municipal expense, then they are valid, without the approval of the qualified voters. The purchaser will not be required to look to the application of the proceeds.

If, after the bonds are issued and sold, the proceeds are diverted by the municipal authorities to some purpose unauthorized by law, the bonds will not be affected in the hands of purchasers, although the authorities themselves would be liable for any such misapplication.

Affirmed.

Cited: Jones v. N. Wilkesboro, post, 655; *Burgin v. Smith,* 151 N. C., 567; *Highway Commission v. Webb,* 152 N. C., 711; *Hotel Co. v. Red Springs,* 157 N. C., 139; *Charlotte v. Trust Co.,* 159 N. C., 390; *Robinson v. Goldsboro,* 161 N. C., 673; *Comrs. v. Comrs.,* 165 N. C., 634.

(573)

R. H. BATTLE AND WALTER CLARK, EXECUTORS OF ELEANOR SWAIN, *v.* B. R. LACY, STATE TREASURER.

(Filed 5 May, 1909.)

Bond Issues—Repurchase by State—Treasury Assets—Legislative Authority—Constitutional Law—"Aye and No" Vote.

An act authorizing and directing the State Treasurer to deliver certain State bonds, repurchased and held as a cash asset, to the payment and satisfaction of a debt against the State does not require the "aye and no" vote and the readings upon the several days, in accordance with Article II, section 14, of the Constitution. The bonds having theretofore been legally issued, no new debt is created by the act, and they are subject to the disposal by the Legislature as any other property in possession of the department.

CLARK, C. J., took no part in the decision of this case.

CONTROVERSY without action, submitted to *Lyon, J.*, at April Term, 1909, of WAKE.

From the judgment in favor of the plaintiffs the defendant appealed.

Walter Clark, Jr., and James H. Pou for plaintiffs.
Attorney-General Bickett for defendant.

BROWN, J. At the session of 1909 the General Assembly enacted a law intended to be in full settlement of a claim of the estate of David L. Swain against the State, which has been the subject of negotiation between the estate of the late Governor Swain and the State authorities for many years. This settlement has been accepted by the representatives of said estate, but the Treasurer refuses to deliver the bonds called for, because the act was not passed in accordance with Article II, section 14, of the Constitution, providing that "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, . . . unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall be on three different days and agreed to by each house, respectively, and unless the yeas and nays on the second (574) and third readings shall have been entered on the journal." The act in question reads as follows:

"Section 1. That the State Treasurer be and he is hereby authorized and directed to deliver to the said Walter Clark and Richard Battle, executors of Eleanor H. Swain, deceased, $3,500, par value, of the four-per-cent bonds of this State, of the series issued under the act of March

4, 1879, with interest coupons attached, only from the ratification of this act. This payment is to be in full satisfaction and discharge of said indebtedness.

"Sec. 2. This act shall be in force from and after its ratification.

"In the General Assembly read three times, and ratified this 6 March, 1909."

From the facts agreed it appears that the act of 4 March, 1879, was enacted in strict accordance with the section of the Constitution above cited, and that the bonds referred to in the act of 1909 are bonds heretofore issued under the act of 1879 and purchased by the State Treasurer as a cash investment and carried as treasury bonds or cash, and not canceled. It appears also that since the Legislature of 1879 authorized the issue of certain bonds it has been customary for the Treasurer to buy and sell the said bonds, as the condition of the treasury might require; and from time to time certain of said bonds have been repurchased and held in the treasury, and the same were available for resale or for such other disposition as might be made of them by the General Assembly; that the General Assembly of 1887 directed that the claim due the estate of the Rev. Solomon Pool be settled and discharged by the delivery of certain of said bonds, and the said debt was so discharged by the delivery of the same, and other claims against the State or departments of the State Government have been liquidated by the delivery of bonds in like manner.

Upon these facts it would seem that the act of 1909 does not raise money on the credit of the State and does not pledge the faith of the State. The act simply directs the payment of the sum agreed upon out of the cash assets of the treasury, and does not create a new debt.
(575) The bonds in question are not due and have never been canceled. They are negotiable securities, in daily circulation.

It is not pledging the faith of the State for the General Assembly to order the State Treasurer to pay a debt with money. Upon the same principle it is not pledging the faith of the State for the General Assembly to order the State Treasurer to pay a debt by delivering over some of these bonds, previously issued, in lieu of money.

These bonds having been legally issued, the faith of the State is pledged absolutely until they mature and are redeemed by the State; and if any of these bonds, by any means, come into the possession of any department of the State, they are subject to such disposal as the General Assembly may order, as much so as any other property in the possession of that department.

While, of course, the State Treasurer has no power to invest his surplus cash in other bonds and securities, there can be no reasonable objections to his investing it temporarily in the State's own obligations which

have not matured for the purpose of saving interest, and holding the same as cash assets, to be reconverted into money or paid out as such, as the exigencies of the State require. At least, such has been the custom, and in accordance with that custom the bonds covered by the act of 1909 are held in the treasury as so much cash. The judgment is Affirmed.

W. B. GARRISON v. SOUTHERN RAILWAY COMPANY.

(Filed 5 May, 1909.)

1. **Interpretation of Statutes—Intention—Impossible Requirements—Punishment.**

In the construction of a statute the court will avoid attributing to the Legislature the intention to punish the failure to do an impossible thing.

2. **Carriers of Freight—Penalty Statutes—Refusal to Accept Freight—Tender—Accumulated Penalties.**

When the common carrier permits a shipper to load a car with his goods and refuses to receive it for shipment or to issue a bill of lading, it is a refusal to receive the goods for shipment, under the Revisal, sec. 2631; and when the shipper leaves the goods in the car, with request for shipment, and by his conduct, understood by the railroad, makes his tender continuous, each day's delay is a separate refusal, within the meaning of the statute, to which the penalty will apply.

3. **Carriers of Freight—Penalty Statutes—Refusal to Accept Freight—Defenses at Common Law—Insufficient Defense—Evidence Rejected.**

A railroad company may show, in defense to an action for refusal to receive goods for shipment when tendered (Revisal, sec. 2631), such matters as would excuse its failure to do so at common law, unavoidable conditions then existing, over which it had no control; when a carrier has refused a shipment of the nature and kind it was its business to receive, and which it could have received at the point tendered without working a hardship or oppression, it is no defense for it to show that, for the reason of the consignee's blocking the freight yards at destination, an embargo had been placed by the railroad for shipments tendered to be forwarded to him there.

4. **Carriers of Goods—Embargo—Discrimination.**

A common carrier can not place an embargo on its customer or patron so as to discriminate against him or those dealing with him, and for such unjust discrimination the carrier is indictable in this State. (Revisal, sec. 3749.)

5. **Carriers of Goods—Penalty Statutes—Refusal to Accept Freight—Constitutional Law—Interstate Commerce.**

A statute imposing a penalty on a common carrier for refusing to accept freight when tendered (Revisal, sec. 2631), and which gives it every

available defense in court, is within the police powers of the State in enforcing the duties and liabilities of the carrier to its patrons, and is not void as an interference with interstate commerce, in the absence of inhibited congressional legislation or orders of the Interstate Commerce Commission made in pursuance thereof.

6. Carriers of Goods—Penalty Statutes—Refusal to Accept Freight—Due Process—Defense—Reasonable Penalty—Constitutional Law—Interstate Commerce.

When, in an action for the recovery of the penalty prescribed by the Revisal, sec. 2631, for the failure of shipment when tendered, every legal right of the carrier is safeguarded, as trial by jury, regular procedure, defense and appeal, and the penalty is not unreasonable or oppressive, the act does not contravene the provisions of the Federal Constitution in relation to interstate commerce or the Fourteenth Amendment.

(577) ACTION tried before *Guion, J.*, and a jury, at September Term, 1908, of BUNCOMBE.

This action is instituted for the recovery of the penalty imposed by section 2631 of the Revisal, for failure to receive a carload of lumber tendered defendant by plaintiff at Black Mountain station, to be shipped to W. H. Westall, at Asheville, both points being within this State.

The facts, as stated in defendant's brief, are: Plaintiff had contracted to sell lumber, f. o. b. cars at Black Mountain, to Westall, at Asheville. Plaintiff hauled the lumber to Black Mountain, loaded it on cars, furnished by defendant 7 June, 1906, and demanded a bill of lading, which defendant's agent declined to give to him, upon the ground that an embargo had been placed upon shipments of lumber consigned to W. H. Westall and English & Co., at Asheville, on account of accumulation of business for them at that point. When the embargo against Westall was placed, there were many loaded cars on defendant's yard at Asheville for him, which he could not or would not handle, and this, with other conditions, created a congested condition of the Asheville yards and caused the embargo to be placed upon shipments to him. There was evidence tending to show that the defendant's yards and tracks at Asheville were congested by an unusual number of cars of freight which were left unloaded; that on 30 May, 1906, defendant's superintendent issued the following notice: "To all agents, Asheville Division: Until further notice, place embargo on all shipments of lumber consigned to W. H. Westall and English & Co., at Asheville, N. C., account accumulation of business for these people at Asheville." On 16 June the embargo against Westall was canceled.

There was evidence tending to show that, before and during the time of the embargo, defendant had on its yards and tracks at Asheville for Westall some eighteen or twenty cars of lumber—had more than could be placed on his tracks for unloading—and they occupied other tracks;

that they congested the yard and occupied cars that defendant required to move other freight on the line. The traffic in the summer of 1906 was one-third heavier than ever before. Plaintiff testified that he made several demands upon defendant's agent for a bill of (578) lading, each of which was refused, until 20 June, 1906, when he gave him the bill and shipped the car.

The only issue submitted to the jury was directed to the number of days which defendant refused to receive the carload of lumber. Under instructions of his Honor the jury found a delay of "nine days, deducting two Sundays." His Honor rendered judgment for the penalty of $50 a day imposed by the statute, amounting to $450. Defendant excepted and appealed, assigning errors set out in the opinion.

Craig, Martin & Winston for plaintiff.
W. B. Rodman, Moore & Rollins and R. G. Lucas for defendant.

CONNOR, J. The exceptions to the rulings of his Honor are not very clearly stated in the record, but in the well-considered brief of defendant's counsel the questions argued before us are thus formulated:

1. "Was the defendant entitled to have its reasons and excuses for not issuing the bill of lading, on demand, considered by the jury?

2. "Can the plaintiff recover a penalty for each day of delay to ship without showing a daily renewal of the tender?

3. "Is the statute (Revisal, sec. 2631) void, (*a*) as a regulation of interstate commerce in conflict with Article I, section 8, clause 3, of the Constitution? (*b*) as being in conflict with the Fourteenth Amendment to the Federal Constitution?"

In discussing the first question we are uncertain whether his Honor was of the opinion that the statute imposed upon the defendant an absolute duty to receive plaintiff's lumber for shipment to Westall, and that no defense was open to it other than "the act of God or the public enemy," or whether, taking all of the evidence as true, it failed to show such a condition as excused the defendant from receiving the lumber for shipment to Westall. Having received the testimony, over plaintiff's objection, it would seem that his Honor was of the opinion that no valid defense was established. As the construction of the (579) statute has in this and other appeals been pressed upon our consideration, we think it well to discuss and decide it. Section 2631 provides that transportation companies "whose duty it is to receive freight for shipment" shall, for refusing to receive all freight "whenever tendered" to its agent, etc., forfeit and pay a penalty of $50 for each day it refuses to receive said freight, together with actual damages sustained. The freight must be tendered at a regular depot and within business

hours. *Alsop v. Express Co.,* 104 N. C., 278. It is well settled that when statutes give new and additional remedies for the enforcement of rights and duties given or imposed by the common law, unless a contrary intention is manifested, the courts will not assume that the Legislature intended to enlarge or modify the common-law right or duty. This, we think, is illustrated by the decisions of this Court. In *Branch v. R. R.,* 77 N. C., 347, the first case in which a statute imposing a penalty upon a common carrier came before the Court, it was insisted by the defendant that, although the language of the statute was imperative and contained no exonerating or excusing exceptions, it was open to the defendant to show that conditions existed which excused it from performance of the duty and liability for the penalty. The statute (Laws 1874-'75; The Code, 1883, sec. 1967) imposed a penalty of $25 a day for "permitting freight to remain unshipped for more than five days, unless otherwise agreed." *Mr. Justice Rodman,* in an able opinion, held that "The act does not supersede or alter the duty or liability of the company at common law. The penalty in the case provided for is superadded. The act merely enforces an admitted duty." He further says that it was not necessary to decide whether "any excuse, short of the act of God or the king's enemies, would suffice," because "the excuse offered was insufficient." He proceeded, however, to discuss the reasons assigned for not discharging the duty, and concludes that the conditions which were shown "were brought about by its own acts in inducing large shipments from points beyond its southern terminus." The defendant was an intrastate road. In *Keeter v. R. R.,* 86 N. C., 346, defendant showed that there was an accumulation of cars at its depot at
(580) Halifax, N. C. The Court, without discussing the question, said that the excuse was insufficient, citing *Branch's case, supra.* It did not appear how the conditions at Halifax were brought about. The Court disposed of the question by saying that "It was the duty of defendant to provide cars for the transportation of all the freight delivered." This language indicated the opinion that the duty was absolute and that no excuse could be heard to avoid the recovery of the penalty, when it was not discharged. At the next term *Whitehead v. R. R.,* 87 N. C., 255, was before the Court. The conditions urged by defendant as an excuse for failing to ship within five days were found by the Superior Court and set out upon the record. Plaintiff relied upon the language used in *Keeter's case, supra. Ashe, J.,* who wrote the opinion in this case, said: "It may be well to observe that the Court did not go into the discussion of that question," because the delay did not go beyond five days. The learned and always candid *Justice* said: "The Court could not have intended to hold that there could be no excuse when it was citing *Branch's case* with approval, in which it is con-

ceded that excuses may be admitted." After discussing the facts found by the judge, he concludes: "The delay in making the shipment, then, it seems, has not been caused by any act of negligence or default on the part of the defendant, but resulted from the concurrence of circumstances entirely beyond its control." *Smith, C. J.,* in a concurring opinion, after citing authorities holding that exonerating conditions may be shown, says: "This seems to me a just view of the carrier's liability at common law; and the statute, as this Court declares in the case cited, does not enlarge or extend the obligation, but merely provides an additional method of enforcing it." *Justice Ruffin* dissented from the conclusion reached, in regard to the sufficiency of the conditions shown, to excuse defendant from discharging the duty, but concurred that the statute created no new duty and that conditions could be shown in excuse. He said that the effect of the statute was not to enlarge a common-law duty, but "is intended simply to enforce an admitted duty." In regard to the conditions which would, in his opinion, be held sufficient to excuse the carrier, he says: "Nothing short of that diligence which would acquit the defendant of his common-law duty (581) and liability should be allowed to exonerate it from the penalty prescribed by the statute." We conclude from these decisions, sustained by reason, that when the carrier shows the existence of conditions for which it is not responsible, preventing or rendering impossible the discharge of the duty, it will not be liable for the penalty. The principle, which commends itself to us as just, is thus stated by *Judge Ashe:* "When the facts show that, by force of circumstances for which it was in no way responsible, the carrier was disabled from performing the duty imposed by the statute, it would be unjust to punish it for failing to comply with its requirements." Keeping this principle in view, the validity of the claim for excuse or exoneration must depend very largely upon the facts in each case as they are presented. While the policy of the legislation which has for its object the enforcement of the performance of the duty to the public by transportation companies should be sustained, the statutes should be so construed and enforced as to advance the remedy and suppress the evil without at the same time becoming harsh, unjust and oppressive. When a new and additional duty is imposed by the statute we can see no reason why the same principle should not prevail. It is an elementary rule in the construction of statutes that the court will not attribute to the Legislature the intention to punish the failure to do an impossible thing. "No text imposing obligations is understood to demand impossible things." *Walker v. R. R.,* 137 N. C., 163; *Stone v. R. R.,* 144 N. C., 226. "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be by a literal construction punished or endangered."

Pier Co. v. Hannam, 3 Barn. and Ald., 266. The court should enforce the legislative will, as expressed in the statute, remembering "The letter killeth while the spirit giveth life." The validity of statutes enacted for the purpose of compelling common carriers to discharge their duty to the public by the imposition of penalties has been in some instances successfully attacked by reason of harsh and literal construction given them by the court. This is illustrated in *R.R. v. Mayes,* 201 U. S., 321, strongly urged upon our attention in this and other cases. The statute of
(582) Texas, upon which that decision is based, required the carrier, upon demand, to furnish cars. No excuse was named in the statute, other "than strikes or other public calamities." The Texas Court held that the duty was imperative and no other excuse than that named in the statute could be heard for failure to comply with the demand for cars. The validity of the statute was called into question upon a writ of error from the Supreme Court of the United States. It was insisted that the statute violated the commerce clause of the Constitution, as is contended by defendant in this case. *Justice Brown* said: "An absolute requirement that a railroad shall furnish a certain number of cars on a specified day, regardless of every consideration except strikes and other public calamities, transcends the police powers of the State and amounts to a burden upon interstate commerce." In *R. R. v. Loving,* 42 Tex. Civ. App., 331, the Court of Civil Appeals held that the duty imposed by the statute was imperative. This Court has never so held. The principle announced in *Branch's case, supra,* and approved in the other cases cited, has never been called into question. In *Stone's case, supra,* we said: "We should be slow to find in the language of a statute the imposition of a penalty for the omission to perform a duty, the standard of which is fixed by the law, which did not, either in terms or by necessary intendment, except from its operation causes which a high degree of foresight and precaution could not anticipate or prevent." In *Alsop v. Express Co.,* 104 N. C., 278, it was held, in an able and well-sustained opinion by *Mr. Justice Avery,* that the act of 1879 (Revisal, sec. 2631) enlarged the common-law duty of common carriers to receive all freight tendered them for shipment by requiring them to do so "whenever tendered." In other words, the statute prescribes what is the reasonable time within which they must perform the duty—receive the freight. It must be tendered at a regular depot and during business hours. *Alsop's case, supra.* While, both at common law and with the superadded duty imposed by the statute, the carrier must receive the freight whenever tendered, yet, upon the authority of the cases cited, if it is shown that by reason of controlling conditions for which the carrier is not
(583) responsible, such as the destruction by fire of warehouses, wharfs, platforms, tracks, etc., before a reasonable time to rebuild has

elapsed or the unexpected tendering of an extraordinary quantity of freight at a depot, and probably other unforeseen causes, the duty can not be performed, it would not be liable for the penalty. It is not practicable in the discussion of this appeal to do more than apply these general principles to the facts in the case.

This brings us to a consideration of the defense offered by defendant as an excuse for not receiving plaintiff's freight. Do they establish or tend to establish any valid, legal excuse? While plaintiff was permitted to place the lumber on the car at Black Mountain, it is conceded that defendant refused to receive it for shipment or to issue a bill of lading for it. This was a refusal to receive. *Twitty v. R. R.*, 141 N. C., 355. It is not suggested that any conditions existed at Black Mountain which prevented defendant from receiving for shipment all freight tendered, or that it did not have the necessary cars for the purpose of transporting, or that the track was obstructed. For any and all other persons except Westall and English & Co. the defendant was ready and able to perform its duty to receive freight for shipment. It will be observed that the plaintiff had contracted to sell the lumber and deliver to Westall f. o. b.; hence the defendant, upon receipt of the lumber, would have owed no further duty to plaintiff. For any delay in transporting and delivering within a reasonable time, as prescribed by the statute, defendant would have been liable to Westall. The defense, then, comes to this: Conditions at Asheville, to which Westall contributed by failing to unload and remove freight consigned to him, congested defendant's yards and tracks, kept cars "tied up" and prevented it from discharging its duty to other members of the public who might demand its services. We do not think that these conditions excused defendant from performing its duty to plaintiff at Black Mountain. If on account of the conditions existing at Asheville the cars could not be carried there and unloaded, the defendant should have provided reasonable facilities for caring for the freight at Black Mountain until it could transport it. It will be observed that the duty to receive freight is confined to such as is "of the nature and kind received" by such carrier. This relieves (584) the defendant from all unreasonable demands in respect to the character of freight which may be tendered it. When it is remembered that in addition to these protective provisions, the defense is open to the carrier that unforeseen, unexpected conditions not to be anticipated may be successfully urged as a defense, we do not perceive that any harsh or oppressive measure of duty is imposed upon the carrier. In *R. R. v. Mayes, supra,* so strongly urged upon our attention by counsel, *Justice Brown* says that there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, etc. We entirely concur with the learned Judge

when he further says: "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise, by reason of an unexpected turn in the market, a great public gathering or an unforeseen rush of travel or pressure upon the road for transportation facilities, which good management and a desire to fulfill all its legal requirements can not provide for." None of the conditions which are suggested are presented in this case, so far as receiving the freight is concerned. It was tendered at the proper place, at the proper time; was of the nature and kind which defendant shipped; the cars necessary for receiving were at the depot; there was no obstruction of the track or shortage of motive power or labor. The only reason assigned was that Westall, by refusing to unload cars consigned to him at Asheville, contributed to the congestion of the yard and tracks at Asheville. In other words, defendant refused to discharge its duty to plaintiff because Westall refused to discharge his duty to defendant at Asheville. We can not think this a valid excuse.

We do not intimate that defendant has any right to issue an embargo upon one or more of its customers or patrons and refuse to carry or receive any freight for him. To permit this to be done would empower the carrier to discriminate, not only against him, but against other persons from dealing with him. It is a fundamental principle of the common law enforced by statutes and made indictable in this State for a common carrier to unjustly discriminate between members of
(585) the public. Revisal, sec. 3749. It must serve all alike, under the same circumstances. The purpose of the law is the "prevention of unjust discrimination, or, to put the proposition affirmatively, to secure to every person constituting a part of the public an equal and impartial participation in the use of the facilities which the carrier is capable of affording and which it is its duty to afford." *Lumber Co. v. R. R.*, 141 N. C., 171. *Mr. Justice Brewer,* in *R. R. v. Lumber Mills,* 211 U. S., 612, says: "While no one is compelled to engage in the business of a common carrier, yet, when he does so, certain duties are imposed which can be enforced by *mandamus* or other suitable remedy. The Missouri Pacific Railway engaged in the business of transferring cars from the Santa Fe track to industries located at Stratford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stratford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission or or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers." After further discussion, the learned *Justice* concludes: "Indeed, all these questions are disposed of by one well-

established proposition, and that is: that a party engaging in the business of a common carrier is bound to treat all shippers alike, and can be compelled to do so by *mandamus* or other proper writ." In no possible form can this fundamental truth be evaded. It is a "thing fixed" in the common law, enforced by both common-law and statutory remedies, its violation denounced as criminal and subjected to severe punishment. We can not permit any departure from it, however persuasive the reasons assigned may be for doing so. On the other hand, we do not wish to be understood as intimating that one or more patrons of a common carrier may, by refusing or failing to receive freight consigned to him, so monopolize the car tracks, etc., as to prevent or interfere with it in the discharge of its duty to the public. The statute enacted for the enforcement of the duties of common carriers, imposing penalties, are not intended to simply penalize railroads, but to secure prompt, effi- (586) cient service to all and not a favored few. The patrons owe duties to carriers and to other patrons. Reasonable rules and regulations may be made, either by the railroads or the Corporation Commission, to enforce these relative rights and duties.

The evidence shows that at a time when all of the railroads and the people were confronted with an unusual condition in regard to the transportation of freight Westall permitted eighteen or twenty cars loaded with lumber to stand upon the defendant's tracks at Asheville. How far this conduct would have been a valid defense to an action brought by him for penalties for failing to transport and deliver freight is not presented in this case. The Corporation Commission has made rules and imposed penalties for their enforcement in regard to unloading cars. If they are not sufficiently stringent and the penalties not sufficiently large to protect the roads and their patrons from congested yards and tracks, we have no doubt the commission will make them so. We can not weaken the principles of the common law, founded in wisdom and justified by experience, nor construe away the plain provisions of statutes to accomplish this end. If the enforcement of these statutes in some instances work hard results, the appeal must be made to the General Assembly for their modification. We can not think it improper to express the hope that a clear recognition by those who manage railroads, and by those who use them, of their respective rights and duties will remove much of the friction which has resulted in the statutes enacted by our Legislature.

The defendant next urges that the penalty of $50 for each day the said company refuses to receive said shipment can be recovered only when a tender is made on each day. We can not concur in this view. The plaintiff hauled his lumber to the defendant's regular depot and, with its consent, placed it upon the car, demanding a bill of lading,

which was refused. Plaintiff says that he went to the agent two or three times and asked if he had shipped it, and he said that he had not. He wanted plaintiff to unload the car, which he refused to do. The agent said that he was holding the car at plaintiff's expense. Plaintiff explains how, by reason of the refusal to ship the lumber, he was compelled to cancel other orders which he had accepted from West-
(587) all—was compelled to stop sawing, his only occupation, etc. To require the plaintiff to haul the lumber home and return it to the depot each day, or to go through the empty form of making constructive tender, imposes either an unwarranted hardship or savors of trifling with a man's substantial rights. The plaintiff left the lumber on the car, with a standing tender and demand that it be shipped. This was well understood by the defendant's agent when, on 18 June, 1906, without any other reason than that the embargo was raised, he shipped it. It is not shown that conditions at Asheville had changed on that day. If plaintiff had removed his lumber on the refusal to ship—hauled it away—of course, he could claim only for the day when it was tendered; but he made his "tender good" each day and at all hours of the day. The statute would be of little value as a remedy for an existing evil if the narrow construction is given it as contended by defendant. The Legislature evidently intended to impose a penalty for each day upon which the freight was at the depot ready for shipment. If the freight tendered were bales of cotton, hogsheads of tobacco, or other heavy, bulky articles, it would be impracticable to haul and rehaul it to defendant's depot each day. While penal statutes are to be construed strictly as against the party against whom they are enforced, they are not to be so construed as to make them of no force and effect. Upon the defendant's evidence the tender was made on 7 June, and kept good until the lumber was shipped on 18 June. Each day's delay in shipping was "a refusal to ship," within the meaning of the statute.

Defendant contends that the statute is a regulation of interstate commerce and violates the Constitution of the United States. The proposition is founded upon the decision in *R. R. v. Mayes, supra.* In that case the demand was for cars to ship cattle beyond the State. Here the point from which the lumber was to be shipped and its destination were both within the State. Defendant's contention is that, while this is true, as it is an interstate road, engaged in interstate commerce, if it is compelled to receive all freight whenever tendered, it will be prevented from discharging its duty to its patrons engaged in interstate commerce. To state the contention in the words of defendant's brief, "The
(588) statute, if enforced, would interfere with interstate commerce, in that it would require the defendant, under heavy penalties, excessive and unreasonable, to give preference to intrastate shipments." The

contention is also made that "the statute, in terms, includes freight tendered for both interstate and intrastate shipments," and that this Court has in several cases applied this and similar statutes to interstate shipments.

Passing the question whether, in the absence of any suggestion that to receive plaintiff's lumber when tendered in the slightest degree interfered with the duty of defendant to its interstate business, it is in a position to raise the question in this appeal, we think it well to examine the contention and decide it. *St. George v. Hardie,* 147 N. C., 88. In *Mayes' case* we find that, after holding that, as construed by the Supreme Court of Texas, the statute was imperative, making no allowance for defenses, and that it "transcended the police power of the State and amounted to a burden upon interstate commerce," the opinion concludes: "We think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, *as applied to interstate commerce,* it transcends the legitimate power of the Legislature." We hold that, upon well-settled rules of construction, proper allowance is made for the difficulties suggested by *Judge Brown.* In this case the statute is not applied to interstate commerce. *R. R. v. Lumber Mills, supra,* is instructive upon the question presented here. There the mill company applied to the Supreme Court of Kansas for an alternative writ of *mandamus* compelling the railway company to make provisions for the transfer of cars between the lines of the Santa Fe company and the mill and elevators of the plaintiff. *Mr. Justice Brewer* thus states the contention involving the question presented in this appeal: "The Missouri Pacific and the Santa Fe railroads are common carriers, engaged in interstate commerce, and, as such, are subject to the control of Congress and, therefore, in these respects, not amenable to the power of the State. It appears from the findings that about three-fifths of the flour of the mill company is shipped out of the State, while the other two-fifths are shipped to points within the State. In addition, the hauling of the empty cars from the Santa Fe track to the mill was, if commerce at all, commerce within the State. The roads (589) are therefore engaged in both interstate commerce and that within the State. In the former they are subject to the regulation of Congress; in the latter, to that of the State; and to enforce the proper relation between Congress and the State the full control of each over the commerce subject to its dominion must be preserved. How the separateness of control is to be accomplished it is unnecessary to determine. Its existence is recognized in the first section of the interstate-commerce act: "That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one State, and

not shipped to or from a foreign country, from or to any State or Territory, as aforesaid." The following language is quoted with approval from the opinion of *Mr. Justice Brown* in *R. R. v. Illinois,* 177 U. S., 514: "Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good." A number of cases are cited in which State laws, such as those requiring engineers to be examined with respect to their ability to distinguish colors (*R. R. v. Alabama,* 128 U. S., 96); requiring telegraph companies to receive dispatches, to transmit and deliver them with due diligence, as applied to messages outside the State (*James v. Telegraph Co.,* 162 U. S., 650); forbidding running freight trains on Sunday (*Hennington v. Georgia,* 163 U. S., 299); requiring railway companies to fix their rates annually for the transmission of passengers and freight, and to post a printed copy at stations (*R. R. v. Fuller,* 17 Wall., 560); regulating the heating of passenger cars and directing guards and guardposts to be placed on bridges and trestles (*R. R. v. New York,* 165 U. S., 628), and others, (590) in regard to which it is said: "In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce." *Mr. Justice Hoke,* in *Morris v. Express Co.,* 146 N. C., 167, has discussed the same question as it applies to section 2634 of the Revisal, citing the same line of authorities. In that section the penalty is imposed for failing to adjust and pay a valid claim for damages sustained to goods shipped from another State. See, also, *Porter v. R. R.,* 63 S. C., 169.

Without extending this discussion further, we find in the decisions of the Supreme Court of the United States the principle uniformly announced and enforced, that "until specific action by Congress or the commission, the control of the State over these incidental matters remains undisturbed." It is not claimed that either Congress, directly or through the Interstate Commerce Commission, has enacted any statute or made any rule with which the statute conflicts or interferes. Of course, neither has any power, by statute or rule, to enforce the duty of carriers to receive or transport all intrastate shipments; hence it must follow that if the State can not do so because possibly its enforcement may indirectly affect interstate commerce, they may receive and transport such freight at such times as suits their convenience or pleasure,

free from any control whatever. It would work a strange result if the State has lost so essential an element of her police power without surrendering it to the Federal Government—that it is not lodged in either government. It is not denied that the State must exercise the police power in subordination to the power which she has conferred upon the Federal Government to regulate interstate commerce, and all statutes are to be construed and applied in the light of this fact. The law in this respect is thus stated by *Justice Matthews* in *Smith v. Alabama,* 124 U. S., 465: "There are many cases where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce, so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the (591) part of the State, *to the extent of that conflict,* must be regarded as annulled. . . . A carrier exercising his calling within a particular State, although, engaged in interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages, under the laws of the State, in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, a right of action is given him by the local laws. In neither case would it be a defense that the law giving him the right to redress was void as being an unconstitutional regulation of commerce by the State. If it is competent for the State to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has the power to redress and punish?" *Sherlock v. Alling,* 93 U. S., 99; *Plumley v. Massachusetts,* 155 U. S., 155. In *R. R. v. Kentucky* it is said: "It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers."

Discussing the same objection to a statute enacted by the Legislature in Ohio requiring a road engaged in interstate commerce to run three

trains a day each way, and to stop at a certain class of stations, *Justice Harlan,* in an able and vigorous opinion, said: "We perceive in the Legislature of Ohio no basis for the contention that the State has invaded the domain of national authority or impaired any right secured by the national Constitution. . . . The State of Ohio, by
(592) the statute in question, has done nothing more than to so regulate the use of a public highway, established and maintained under its authority, as will reasonably promote the public convenience. It has not unreasonably obstructed freedom of commerce among the States. Its regulations apply equally to domestic and interstate railroads. Its statute is not directed against interstate commerce, but only incidentally affects it." Calvert on Interstate Com., 159.

It is said that we have held that the statute applies to interstate shipments. In *Bagg v. R. R.,* 109 N. C., 279, it was held that the statute of 1874-'75 (section 1967, The Code of 1883) applied to an interstate shipment because it was in aid of commerce. The discussion by *Mr. Justice Avery* is full and satisfactory. *Currie v. R. R.,* 135 N. C., 535, was decided upon the authority of *Bagg v. R. R., Walker v. R. R.,* 137 N. C., 168, and *Twitty v. R. R.,* 141 N. C., 355, were intrastate shipments. In *Harrell v. R. R.,* 144 N. C., 532, the transportation was completed and the action was for the recovery of the penalty for refusing to deliver freight. Revisal, sec. 2533. In *Reid v. R. R.,* 149 N. C., 423, the shipment was beyond the limits of the State. We do not think that, in the light of the authorities, it is material whether the shipment is interstate or, as in this case, intrastate. We do not doubt that if in either case it was shown that the enforcement of the statute interfered with or prevented the carrier from discharging its duties in regard to interstate commerce or meeting any demand imposed upon it by an act of Congress or a rule of the Corporation Commission, such condition would constitute a valid defense to an action for the penalty imposed by the statute. This result does not invalidate the statute, but affects its enforcement by introducing an additional excuse for nonperformance. We do not understand how the enforcement of the statute gives preference to intrastate shipments. The construction which we have given it has the opposite result. What was said in *Branch v. R. R., supra,* applies only to an intrastate road which did not come under the control of Congress or its agencies.

After an anxious consideration of the very full briefs and the authorities cited, we are unable to concur with the defendant that the
(593) enforcement of the statute regulates or interferes with interstate commerce, nor do we see how, under the conditions existing at Asheville, N. C., the receipt for shipment of plaintiff's lumber at Black Mountain, N. C., could directly or indirectly affect its duty to the public as an interstate carrier.

But defendant urges that the statute is harsh and oppressive—takes its property without due process of law, and therefore violates the Fourteenth Amendment. The power of the State to impose penalties upon carriers for failure to discharge public duties is not denied. *Branch v. R. R., supra; Stone v. R. R., supra.* The same contention was made in *R. R. v. Emmons,* 149 U. S., 364, to an action based upon a statute requiring railroads to maintain fences and, for a failure to do so, subjecting them, in case of litigation, to treble damages. The Court said: "The answer to this is that there is no inhibition upon a State to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements, . . . and the extent of the penalties which should be imposed by the State for any disregard of its legislation in that respect is a matter entirely within its control. It was not essential that the penalty should be confined to damages for the actual loss to the owner of cattle injured by the want of fences and guards." Speaking for myself, I do not doubt that, under the constitutional prohibition against the imposition of excessive fines and cruel and unusual punishments, as well as the protective provisions of the State and Federal Constitutions securing life and property against governmental invasion, except by the "law of the land," the Court has the power and, in a clear case, it would be its duty to declare invalid a statute imposing penalties so enormous in amount and out of proportion to the gravity of the offense and its effect upon private and public interest as to come within the inhibition of the Constitution. I could never assent to the proposition that by legislative enactment a person, either natural or corporate, could be destroyed and its property taken by the imposition of excessive and unusual penalties, leaving no power of prevention in the judicial department of the Government. I think that the correct limitation upon legislation of this character is stated by *Mr. Justice Peckham* in *Ex parte Young,* 209 U. S., 123. If the penalties are so enormous that the person upon whom they (594) are imposed is prevented from resorting to the courts to determine the validity of the statute—that is, that an unsuccessful effort to do so would work their destruction—they are invalid. No such result could follow the enforcement of the statute under consideration. While it may be that in some cases the penalty imposed may be large, as compared with the value of the property involved or the actual damage sustained, yet, as in the case before us, the refusal to receive freight may work serious injury, destructive of the business of the party aggrieved. The plaintiff was engaged in operating a sawmill, cutting and selling lumber for sale in other markets. He had contracted to sell to Westall other carloads of lumber, which, by reason of the refusal of the defendant to receive for shipment, Westall refused to take; he "had

to shut down his mill for months." It is not difficult to see what disastrous results would naturally follow to plaintiff from the refusal of defendant to discharge its duty; and yet in an action for damages it would be difficult for him to recover full compensation for such injury. It is to compel obedience to its manifest duty and protect the public from just such results that penalties are imposed upon the carrier. We do not find in the amount of the penalty any ground for questioning the validity of the statute as violating any provision of either the State or Federal Constitution. In regard to the remedy prescribed for its enforcement, every legal right of the defendant is safeguarded. The penalty can be recovered only by an action in a court of competent jurisdiction, in which trial by jury, regular procedure and the right to appeal is secured. The statutory presumptions are made to relieve the plaintiff from proving his case. It may be, and doubtless is, sometimes difficult for those engaged in the management of railroads to meet and discharge all of the duties imposed upon them. We venture to hope that, with a clear understanding of the relative rights and duties of carriers and the public, more satisfactory business relations will prevail. We have discussed the questions presented upon this record at more than usual length because several appeals are pending in the Court in which they are involved. Upon a careful consideration of the entire record we find

No error.

Cited: Cotton Mills v. R. R., post, 610; *S. c., post,* 614; *Hardware Co: v. R. R., post,* 706; *Reid v. R. R., post,* 758, 763, 769; *Lumber Co. v. R. R.,* 152 N. C., 73, 74; *Reid v. R. R.,* 153 N. C., 492; *Tilley v. R. R.,* 162 N. C., 40; *Bane v. R. R.,* 171 N. C., 331.

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URSULLA LYNCH ET AL. v. RALPH MELTON ET AL.

(Filed 5 May, 1909.)

Wills—Construction—Devises Upon Condition—Unforeseen Circumstances.

A will must be so construed as to effectuate the evident intent of the parties; and a devise by a testatrix of all of her property to her child by adoption and the object of her affection and solicitude, "provided she lives with her said uncle until she becomes free by age or marriage," will not be construed to divert the estate of the niece, who lived with her uncle after testatrix's death, because she was forced to leave him for her safety, owing to his subsequent unsoundness of mind and insanity, a condition not to have been anticipated by the testatrix before her death.

LYNCH *v.* MELTON.

APPEAL from *Justice, J.*, who found the facts, by consent, at November Term, 1908, of CLEVELAND.

Plaintiffs appealed.

Ryburn & Hoey for plaintiffs.
Quinn & Hamrick for defendants.

CLARK, C. J. By consent, the judge found the facts, which may be succinctly stated as follows: The testatrix, wife of J. D. Simmons, was childless, and took her orphan niece, L. E. Melton, to live with her, at the age of four years, on the death of the latter's mother. When the child had reached ten the testatrix died, leaving a will, with the following clause therein: "I give and devise to my beloved husband, J. D. Simmons, the tract of land on which we now reside, containing thirty-three acres of land, and also all my personal effects, of whatsoever character, for his special benefit during his natural life, then to go to my niece, L. E. Melton, if anything left at his death, *provided she lives with her said uncle until she becomes free, by age or marriage,* otherwise to go as the law directs." After the death of the testatrix the little girl continued to live with her uncle a few months, when he evinced symptoms of insanity, and, being conscious of it, he asked her father to take the child to his home in Oklahoma, which he did. The child was willing and anxious to stay with her uncle, but it was unsafe to remain, and he had decided to break up his home. Soon after, he was admitted to the insane asylum, and died something over two (596) years after the testatrix.

A will must be so construed as to effectuate the evident intent of the testator. Here the child was evidently the object of the testatrix's bounty, and the just construction of the clause of the will above quoted is that she devised a life estate in the land to her husband, with a vested remainder in fee to her niece, defeasible if she voluntarily failed to live with her uncle until she became married or of age. Without her fault and contrary to her will, she was compelled to leave, by the insanity of her uncle and his determination to break up his home, and at the uncle's request the child was removed by her father to his own home.

His Honor properly held that the fee was vested in remainder in L. E. Melton, expectant, upon the death of the life tenant, and had not been divested. The performance of the condition having become impossible without any fault on the part of the devisee, the condition, in the eye of the law, was not broken and there was no defeasance. *Woods v. Woods,* 44 N. C., 290; *Thomas v. Howell,* 1 Salk., 170; 1 Inst., 206; *Hammond v. Hammond,* 55 Md., 575; *Merrill v. Merrill,* 10 Pick., 511.

Where plaintiff, to whom a tract of land was devised upon condition that he should remain with the widow of the testator until her death, was wrongfully ejected from the land by the agent of the widow (who was a devisee of the land of which the plaintiff's was a part), the plaintiff's estate, upon the widow's death, can not be defeated upon the ground that the condition was not performed by the plaintiff's not remaining on the plantation until the widow's death. *Harris v. Wright,* 118 N. C., 422.

In *Finley v. King,* 3 Pet., 711, *Marshall, C. J.,* said: "It was admitted in argument, and is certainly well settled, that there are no technical or appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the will shows that the particular clause, or if the whole will show that the act on which the estate depends must be performed before the estate can vest, the condition is, of course, (597) precedent, and unless it be performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting, and where the estate had previously vested, it will become absolute by the death of such person."

Again in the same case he says: "Conditions belong to cases where all means to accomplish the testator's purpose are in his view and being; but when subsequent events change the existing state of things so essentially as to render the performance impossible—for instance, if a devise be made on condition that the devisee consent to marry a particular person and that person dies—the performance is rendered impossible by the happening of an event subsequently which the testator never contemplated; and where the estate had previously vested, it will become absolute on the death of such person."

The appellants rely upon *Tilley v. King,* 109 N. C., 461, but the facts in that case are not similar to this. There the testator clearly intended to provide support and attention for himself and wife in their declining years, and the devise to his grandson was made to compensate him for his services if he "stays with us until after our death and takes care of us." The devisee, P. H. Tilley, voluntarily left the wife of the testator about one year after the death of testator and seven or eight years before her death. There was no providential hindrance to his compliance with the prescribed conditions, as in the case at bar.

The judgment below is

Affirmed.

Cited: Taylor v. Brown, 165 N. C., 161.

A. B. WILLIAMS v. UNITED STATES CASUALTY COMPANY.

(Filed 5 May, 1909.)

Insurance—Contracts—Policies—Sick Benefit—Notice to Company.

Accepting a sick-benefit policy of insurance, with a provision that written notice shall be given the company by the insured, or his attending physician, of such disease as is therein insured against, within ten days after its contraction, binds the insured by the contract, the stipulation being to prevent imposition, and in the absence of such notice he can not recover thereon.

APPEAL from a justice of the peace, heard before *Justice, J.*, (598) and a jury, at January Term, 1909, of WILKES.

Plaintiff appealed.

F. D. Hackett and Finley & Hendren for plaintiff.

W. W. Barber for defendant.

CLARK, C. J. The plaintiff seeks to recover on a sick-benefit policy. The policy promises a payment of $8 a week, not exceeding twenty-six consecutive weeks, for loss of time from illness, if caused exclusively and directly by any one of certain diseases specifically named. Then follows the following provision in the policy: "*Provided* such disease is contracted not earlier than fifteen days after this policy takes effect and, independently of any and all other causes, renders the insured wholly and continuously unable to transact each and every part of the duties pertaining to the occupation described herein, and necessitates continuous confinement indoors and treatment by a regularly qualified physician; and *Provided* written notice of such disease be given by the insured, or his attending physician, to the company, at its office, within ten days after its contraction."

It is admitted that the plaintiff did not give the notice in ten days; in fact, he delayed for fifty days. This provision was doubtless intended to prevent imposition. But, at any rate, the plaintiff accepted the policy with that provision, and he is bound by his contract. He did not comply with the conditions which would entitle him to recover, and his Honor properly held that he could not recover. *Alexander v. Insurance Co., ante,* 536.

If one should suddenly become unconscious, as from apoplexy, for instance, so as to be unable to give the stipulated notice within ten days, whether he would be excused and therefore entitled to recover, notwithstanding the failure to give notice, is a question which does not arise upon the evidence in this case.

No error.

Cited: Guy v. Casualty Co., 151 N. C., 466.

(599)

RUFUS NORRIS v. JOHN W. LAWS ET AL.

(Filed 5 May, 1909.)

1. Estates—Waste—Permanent Injury—Evidence.

In an action of waste for damages and forfeiture of the premises by the life tenant of lands, evidence that the life tenant was cutting and using valuable standing timber thereon, beyond the quantity necessary to properly keep up the estate or for his reasonable enjoyment as such tenant, and selling it or using it in a manner not to benefit the estate or in repairing houses thereon which he had permitted to fall into disrepair, is properly submitted to the jury upon the question as to whether the inheritance had been permanently injured, or whether, under the facts and circumstances of the particular case, the life tenant acted with the same care as a prudent owner of the fee in possession would have used.

2. Estates—Waste, Voluntary and Permissive—Definition.

Voluntary waste consists of some positive act of destruction; permissive waste, in the neglect or omission to do what will prevent injury to the estate or freehold.

3. Estates—Waste—Timber Lands—Comparative Value—Instructions—Facts Assumed.

In an action of waste, for the alleged cutting of timber by the life tenant, to the permanent injury of the inheritance, there was evidence upon the one hand tending to show that the land had improved in value by the cutting, and upon the other that the price of timber was getting higher and that the land was of greater value if not cleared: *Held*, it was error for the trial judge to charge the jury that they could consider the increased value of timber lands as compared with cleared lands in concluding whether clearing any part of the land was necessary, as such an instruction assumed as a fact that clearing the land had diminished its value, which was a question for the jury, under the conflicting evidence.

4. Estates—Waste—Timber Lands—Life Estate—Right of Life Tenant—Instructions.

The life tenant of lands has the right to make additional clearings thereof, if in the exercise of prudence and judgment it was required for his support and reasonable enjoyment of his estate; and an instruction is erroneous which makes this right to depend solely upon the value of timbered land as compared with the value of cleared land.

(600) ACTION tried before *Neal, J.*, and a jury, at October Term, 1908, of WAKE.

This action was brought to recover damages for waste, alleged to have been committed by the defendant, Lovie Laws, upon the land described in the pleadings. There was evidence on the part of the plaintiff tending to show that in 1901 James Norris died, owning eighty-six acres of land and leaving a will, by which he devised ten acres to a nephew, subject to the control of testator's wife, Lovie Norris (now

Lovie Laws), until said nephew should become of age. He was seventeen years of age at the time of the trial. James Norris devised another ten acres to his brother, subject to the life estate of his widow, and the remainder of the land, sixty-six acres, he devised to his wife, Lovie Norris, for life, and at her death to his father, Rufus Norris, the plaintiff in this action. The waste is alleged to have been committed upon the sixty-six acres of land. At the death of James Norris, in May, 1901, there were about twenty acres of land in cultivation, being a part of the sixty-six acres in which plaintiff had a remainder. The land and the buildings thereon, though old, were in fairly good condition. James Norris made a living for himself and wife on the place. The first year after his death the land was leased by his widow to her father-in-law, the present plaintiff, Rufus Norris, but on account of the heavy rains her tenant did not make much on the land and paid her very little rent. Afterward the *feme* defendant leased the land for a bale of cotton per annum, and thereafter worked for wages, until some two or three years later, when she was married to her codefendant, John W. Laws, since which time the defendants have been living upon the land of John W. Laws, which is about eight miles distant from the sixty-six acres of land above described. During the year 1906 the defendants began to cut and remove wood from a portion of the land, and sold the standing timber which was fit for saw logs to one J. H. Weaver, and thereafter cut the timber on ten or twelve acres of the land, making about thirty-two acres, in all, of open land, including two or three acres "turned out," or abandoned. The timber was cut from ten or twelve acres in one place and from four acres on another part of the land, some distance away, and the wood was sold by the defendants. The wood so cut was not dead or fallen trees. The ten or twelve (601) acres cleared were heavily timbered and were on a hillside near a branch. There was other land just as good, and perhaps better for farming purposes, being level, thinly timbered and adjoining the body of cleared land, which would require no diking. The land which was cleared by the defendants had to be diked to keep it from washing away, and was not a proper clearing for farming purposes, but was about the roughest part of the land. The defendants sold ten or twelve car loads of cord wood, which was cut on the premises and was worth about $20 a car, and 58,800 feet of lumber, worth about $2.50 per thousand feet. The timber or wood cut was in excess of what was necessary for farming purposes. The farm had not been properly cultivated since James Norris' death, until 1908. The land which was cleared at the time of Norris' death, if it had been properly cultivated, would have supported the widow, who had no children; but since his death it has been injured by poor cultivation, and nothing has been done to

restore fertility to the soil, though it was susceptible of improvement. Defendants cultivated a part of the cleared land, sublet a part and turned out about three acres as old field; the land thus turned out or abandoned being strong land. If the farm had been properly cultivated, there would have been no need of clearing any of the said land. The former owner, F. M. Norris, had lived and raised a large family on the place by farming, and there was sufficient land already open. The defendants allowed the buildings to fall into decay and the fences about the house to be destroyed. No repairs of any kind were made upon the premises until the spring of 1908, after this suit was brought. The proceeds of sale of wood and timber were used in improving the premises of the defendant John Laws, and none of it was used in repairs or improvements on the land in question. Defendants contended that this was not so. There was further evidence on the part of the plaintiff tending to show that cutting the wood and standing timber on the land permanently damaged the premises $200, and that the damage done the premises as a whole amounted to between $200 and $400. The *feme*

defendant told the plaintiff that she intended to have the timber
(602) while she was living, as she could not use it after she was dead.

There was also evidence on the part of the plaintiff tending to show that the timber is now worth more than the land, and timbered lands more than cleared lands; that all lands, especially timbered lands, owing to the growing scarcity of timber in that vicinity, have greatly risen in value since James Norris' death—that is, from 50 to 150 per cent—and that a railroad was built shortly before his death and ran within a few hundred yards of the premises. The land was sold for taxes in 1905, and was not redeemed by the defendants until after notice from the plaintiffs of their default.

There was evidence on the part of the defendants tending to show that the clearing was necessary for farm purposes and was done in good faith; that the land was not damaged thereby, but improved in value, and would rent for more than it did before; that the land was worth more than when James Norris died—as much as $200 or $300 more; that the clearing of the ten or twelve acres was in a proper place. The land was worn out and run down by bad methods of farming when James Norris died, and would not produce sufficient crops to support *feme* defendant, and the two or three acres turned out were worthless, worn-out and wet bottom lands. There was not enough cleared land for the reasonable support of the *feme* defendant. The buildings and stables have, since this suit was brought, been repaired by the defendants, and are now in as good condition as when Norris died. The crop of 1908 was the best which has been raised on the land since his death, and the farm will sell or rent for more than it would when he died; one

witness testifying that it would rent for twice as much and sell for $300 or $400 more. The ten or twelve acres on which the timber was cut was cleared in the spring of 1908 and put into cultivation. It was not cultivated immediately after the timber was cut, because it would have required "grubbing," which was costly, and the defendants let the land lie idle for two years for the roots to rot, and then diked it, to prevent washing, and cultivated it.

The plaintiffs offered evidence tending to prove that the defendants did not intend to cultivate at all, but were cutting and selling wood and timber and using the proceeds in making improve- (603) ments on the land of the defendant John Laws, and that the claim that the defendants were clearing the lands for cultivation was an afterthought and first set up after the institution of this suit.

Exceptions taken by the defendants were to the charge of the court, which were as follows:

1. "If the jury shall find from the evidence that the *feme* defendant sold timber trees and used the proceeds of such sale, either cash or lumber, in improving other buildings than those on the premises, and neglected to repair the buildings on the premises described in the complaint, this is waste.

2. "If the *feme* defendant had firewood or timber cut on the premises, or allowed it to be cut in excess of what was necessary for farm purposes, and sold the same for profit, it is waste, unless the wood or timber cut and disposed of was from dead or fallen trees.

3. "It is the province of the jury, and it is their duty, to consider the changed conditions as to the greatly increased value of timber and timber lands in proportion to cleared or farm lands in arriving at a conclusion as to the necessity for clearing any part of the premises. The jury should also consider the growing scarcity of timber and wood and its increasing value; also the improved methods of farming, the improved methods of improving the fertility of 'old fields' and lands depleted of fertility by long cultivation, in arriving at a conclusion as to what was a proper use of the premises; also, in arriving at a conclusion, the character of the cultivation of said lands since the life estate of the *feme* defendant vested in her, and whether the same was such as an ordinarily prudent owner of the fee would have used in its cultivation; for exhausting the land by improper tillage is waste.

4. "If the life tenant, Lovie Laws, negligently allowed the premises to fall into decay, it would be waste; and this is so, even though there were no timber on the place suitable for the purpose of repairing buildings thereon.

5. "It is left to you, gentlemen of the jury, to say whether in (604) your 'discretion' the destruction of the timber or giving up a

cultivated field, in the light of all of the evidence in the case, had proved a lasting injury to the inheritance.

6. "The defendants would not be liable for mere error in judgment, provided they acted in a prudent manner, exercising that usual good judgment that would be exercised by the ordinarily prudent person under similar circumstances and surroundings; and, touching the question of permitting the buildings to decay and go to waste, the question is as to whether the condition of the buildings was such that a prudent owner of the fee would have felt that he ought to repair and keep them up in order to prevent permanent injury to the inheritance."

The defendants in apt time excepted to each of the instructions given by the court.

The following issues were submitted to the jury:

1. "Did defendants commit waste upon the lands in which plaintiff has a remainder?

2. "If so, what are plaintiff's damages?"

The jury returned as their verdict that the defendants had committed waste upon the premises, and assessed the plaintiff's damages. Judgment was entered upon the verdict for the damages assessed and the forfeiture of the premises, whereupon the defendants appealed.

B. C. Beckwith for plaintiff.
J. H. Pou for defendants.

WALKER, J., after stating the case: The accepted definition of "waste" is a spoil or destruction, done or permitted with respect to lands, houses, gardens, trees or other corporeal hereditaments, by the tenant thereof, to the prejudice of him in reversion or remainder or, in other words, to the lasting injury of the inheritance. 2 Blk. Com., 281. Voluntary waste is active or positive, and consists in some act of destruction or devastation. Permissive waste is such as is merely permitted by the tenant, and consists in the neglect or omission to do what will prevent injury to the estate or freehold, as, for example, to suffer a house to become decayed for want of proper repair. Black's Dict., (605) p. 1236, and authorities cited. The plaintiff alleges that the inheritance, or remainder, belonging to him has been damaged by both kinds of waste committed and permitted by the defendants upon the premises in question. We have held that what is a permanent injury to the inheritance must often depend upon the facts and circumstances of the particular case under consideration, and the jury must determine, under proper instructions from the court, whether the tenant for life, in what he has done or omitted to do, has acted with the same care as a prudent owner of the fee would have exercised if he had been in pos-

session, cultivating and using the land for a support or for profit. *Shine v. Wilcox,* 21 N. C., 631; *King v. Miller,* 99 N. C., 583, and *Sherrill v. Connor,* 107 N. C., 630, and other authorities therein cited. The charge, in many respects, is sustained by the authorities we have cited, but in one respect the court committed an error. The jury were instructed as follows: "It is the province of the jury, and it is their duty, to consider the changed conditions as to the greatly increased value of timber and timber lands in proportion to (as compared with) cleared or farm lands in arriving at a conclusion as to the necessity for clearing any part of the premises." In this and other parts of the instruction the court assumed that facts had been established about which the testimony was conflicting. There was evidence that, instead of diminishing the value of the land, the cutting of the timber and clearing the land had enhanced it, and also evidence that cleared land had risen in value more than timbered land. It was misleading, therefore, to assume the contrary to be true, and upon that assumption to base an instruction to the jury which might control them in rendering their verdict. That the error was a material and prejudicial one can not admit of a doubt. The instruction was erroneous in another respect: The right of the tenant for life to clear land sufficient for her support and a reasonable enjoyment of her estate can not be made to depend solely upon the value of the timbered land as compared with the value of cleared land, because, if this were true, the tenant for life could not clear any land, or not a sufficient quantity for her support, if the timber cut from it or the land with the timber standing upon it is more valuable than the land would be when cleared. She would have no right, at least ordi- (606) narily, to cut the timber merely for the purpose of selling it, as is held in the cases we have cited; and if this can not be done and there is not sufficient land already cleared for her support, she could not use the land at all, but must let the trees stand and continue to grow for the benefit of the reversioner, or remainderman, if the timbered land is more valuable than if it were cleared. It is very true that there should be a due or proper proportion between timbered and cleared land—such, it is said, as a prudent husbandman would maintain in the use and management of the premises. But this is far from saying that the relative value of timbered and cleared land determines the right of the tenant for life to make additional clearing if, in the exercise of prudence and judgment, it were required for her support and the reasonable enjoyment of her estate. The standard by which the conduct of the life tenant is to be gauged, or the test as to whether waste has been committed or not, is that stated in *Sherrill v. Connor* (which we now approve) and the cases therein cited. It is the rule of the prudent husbandman and what he would do, under the circumstances, if owner of

the fee. This is quite strict enough in its application, and the life tenant should not be held to too rigid an accountability. *Judge Gaston,* in *Shine v. Wilcox, supra,* said it will not do to hold that the clearing of the forest so as to to fit it for the habitation and use of man is waste, and, we add, whether it is or not must depend upon the peculiar facts of any given case, and the finding of the jury thereon, when properly directed by the court, under the rule of law we have laid down and which has been generally adopted by the courts.

The question presented in this case was not confined alone to the relative value of timbered and cleared land, but the jury should have been so instructed as to ascertain the general result in respect to whether there had been a lasting injury to the inheritance and especially as to how much land the plaintiff was entitled to clear for her reasonable support in the exercise of that degree of prudence which the careful husbandman would observe in the cultivation and management of the land. It is true that the jury may consider all the facts and
(607) circumstances of the case in order to reach a just conclusion, and, among others, the value of timbered and of cleared land may be considered for the purpose of determining whether the clearing had been done in a prudent manner; but we think the instruction which we have quoted was too broad and was calculated to mislead the jury in passing upon the respective rights of the parties. This error was not corrected by any other instruction given by the court. His Honor finally brought the case to the true test in his concluding instruction, but it did not reach and remove the error we have pointed out. The question as to whether timbered land was more valuable than cleared land should have been left to the jury for their determination upon the conflicting testimony, without any assumption of the fact that timbered land was the more valuable. This was not an incurable error, but it was not corrected by anything said by the court in the other parts of the charge. Other errors are assigned, but it is not necessary to discuss them, as the questions raised by these assignments may not again be presented. The case must be submitted to another jury, with proper instructions of the court upon the issues and evidence.

New trial.

CLARK, C. J., dissenting: The charge called in question was an instruction to the jury that they could "consider the changed conditions as to the greatly increased value of timber and timber lands in proportion to cleared or farm lands in arriving at a conclusion as to the necessity for clearing any part of the premises. The jury should also consider the growing scarcity of timber and its increasing value; also the improved methods of farming, the improved methods of improving

the fertility of 'old field' and land depleted of fertility by long cultivation, in arriving at a conclusion as to what was a proper use of the premises; also, in arriving at a conclusion, the character of the cultivation of said lands since the life estate of the *feme* defendant vested in her, and whether the same was such as an ordinarily prudent owner of the fee would have used in its cultivation."

It is difficult to see how the judge erred in so charging. He did not assume any facts in regard to which there was conflicting evi-
dence, nor did he make the reasonable enjoyment of the life (608) estate "depend solely" upon the relative value of timbered and arable land. The learned judge simply placed before the jury for them to *"consider"* the surrounding and attendant circumstances as the jury might find them to be, with the object in view of finding whether or not the conduct of the life tenant was "such as an ordinarily prudent owner of the fee would have used." This conforms to the rule laid down in *Sherrill v. Connor,* 107 N. C., 630. What in one age or community, under the recognized conditions of agriculture, would not be waste, because such as a prudent owner would do with his own, might be waste in another age or in another community, under changed conditions, because no ordinarily prudent owner would so act. The fact is eminently one for a jury to pass upon.

It would seem that the charge was unobjectionable and there was no error for which a new trial should be awarded.

HOKE, J., concurs in this dissent.

Cited: Person v. Person, 154 N. C., 455; *Thomas v. Thomas,* 166 N. C., 629; *Fleming v. Sexton,* 172 N. C., 256.

WAMPUM COTTON MILLS v. CAROLINA AND NORTHWESTERN RAILWAY COMPANY.

(Filed 5 May, 1909.)

PLAINTIFF'S APPEAL.

Railroads—Penalty Statutes—Tender of Freight—Placing it on Platform—Evidence—Questions for Jury.

The mere placing of freight on the freight platform of a railroad company and asking the agent when he could ship it does not amount to a tender of shipment, the refusal of which will make the company liable for the penalty prescribed by the statute (Revisal, sec. 2631); and when from the evidence it appears that the language used and the conduct of the parties left it in doubt as to whether a tender or daily tenders had been made and refused, it is for the jury to find whether any or how many of such tenders had been made.

ACTION tried before *Justice, J.*, and a jury, at September Term, 1908, of LINCOLN.

(609) Plaintiff sued for a penalty of $50 a day for seventy-two days, alleging that defendant refused on each day to receive freight tendered for shipment. The evidence tended to show that plaintiff deposited on the defendant's platform, the usual place for receiving freight, twenty-five bales of cotton waste, and tendered it to defendant's agent for shipment, which was refused. The bales were left on the platform. Plaintiff's president says: "Later on I called to see the agent, from time to time, as I was passing from my place of business. Every day or two I stopped to see whether or not he was in a position to ship the waste, and he said he was not," etc.

Mr. Carter, defendant's agent at Lincolnton, after testifying in regard to the transaction substantially as the president of plaintiff company, said: "After that, Mr. Abernathy made a further tender of this shipment of waste, once that I remember. That was some little time after. I could not give the exact date. It was along the latter part of March or first of April. . . . He told me he would tender it to me again for shipment."

His Honor instructed the jury that it was not enough to constitute a tender that the plaintiff placed the freight on defendant's platform merely as a matter of convenience, but that it must tender it for shipment; that simply asking the agent when the freight could be shipped was not a tender; that the president must have made an actual tender, and the defendant a refusal, to entitle plaintiff to the penalty; that it was not essential that any particular language be used to constitute a tender and refusal, but that if such language was used as "amounted in common understanding" to a tender and refusal, that would be sufficient. The plaintiff excepted. Plaintiff tendered a number of prayers for special instructions not necessary to be set out. The jury answered the third issue, "Two days," and the fourth, "One hundred dollars." Judgment was rendered upon the verdict. Plaintiff excepted and appealed.

A. L. Quickel for plaintiff.

O. F. Mason, C. E. Childs and J. H. Marion for defendant.

(610) CONNOR, J., after stating the case: The evidence left the question of the status of the freight, after the first tender and refusal, in doubt. It seems that the freight was placed upon the defendant's platform in accordance with a custom, but without any express contract with defendant. After completing the number of bales constituting a car load, the president tendered it to the agent for shipment,

which was refused. The freight remained on the platform, and the president of plaintiff company frequently talked with the agent about shipping. There is evidence that, some thirty days after the tender, he made a second tender. In *Garrison v. R. R., ante,* 575, it was conceded that defendant furnished the car upon which plaintiff loaded the lumber, and it remained on the car until shipped. There the facts were conceded. We concur with his Honor's instruction to the jury, that the status of the freight was uncertain. This is shown by the conduct of the parties. It was therefore a question for the jury, and was properly left to them. If the plaintiff wished to insist upon a daily tender and refusal, its president should have made it clear to defendant's agent that he was keeping the tender good. We can not undertake to do more than dispose of each case as it arises in regard to what constitutes a tender and refusal. When the conduct and language of the parties leaves the matter in doubt it must be submitted to the jury. His Honor correctly told the jury that they must find that there was a tender and refusal each day. Upon an examination of the entire record and the charge of the court we find

No error.

CLARK, C. J., dissenting: Concurring entirely in the opinion in the defendant's appeal in this case, I must dissent from the conclusion reached in the plaintiff's appeal.

The court should have instructed the jury that if they believed the evidence to find a verdict in favor of the plaintiff for the penalty prescribed by the law, for seventy-two days. The evidence is uncontradicted that the plaintiff placed on the defendant's platform, the usual place for receiving freight, twenty-five bales of cotton waste, and tendered it to the defendant's agent for shipment, which was refused. The bales were left on the platform. The plaintiff's chief officer called to see the defendant's agent every day or two thereafter to learn if he were ready to ship the waste, and he said he was not. (611)

The law of tender is as old as the hills and as well settled. When one tenders money, for instance, it is not necessary to tender it again every day. It is sufficient if it is "kept good." Here the tender was made and kept good. The cotton remained on defendant's platform, a standing tender, irrespective of the constant reminder by the plaintiff's agent.

The statute makes, and was intended to make, the common carrier liable for every day that he thus refuses to accept freight.

The people of this country make and have a right to make its laws. The business interests of the country, great and small, are absolutely at the mercy of the railroads, and can be destroyed at will, unless these

great common carriers are subject to public regulation. Experience having demonstrated that the common-law remedy by damages is not always adequate where common carriers refuse to receive freight when tendered, or fail to ship and transport in a reasonable time, the people have enacted, through their Legislature, that in such cases a prescribed penalty, in the nature of liquidated damages, shall be recovered by the "party aggrieved."

If such penalty is high in this case, it is because the defendant persisted in its violation of the law.

The courts have no choice but to obey the law themselves. For seventy-two days the plaintiff's bales stood on defendant's platform awaiting shipment. The bales had been tendered for shipment, and refused. For seventy-one more days they stood on that platform awaiting shipment. Every day the defendant's agent saw them and knew they were there for shipment, besides being constantly reminded by the plaintiff's officer. Every day the bales remained there the defendant's agent knew they were a standing tender, and his not shipping them was a refusal, for "actions speak louder than words." *Pierson v. Telegraph Co., ante,* 559. Had the defendant's agent each day said, "I will ship them," and then had not shipped, could it be said that in fact he had not refused and therefore that the defendant would not be liable? Such construction would be but trifling with the law.

The law says that for each day the carrier refused to ship
(612) the plaintiff was entitled to recover $50. The Legislature thought this penalty necessary to compel respect for the rights of shippers. The evidence being uncontradicted, the court should have told the jury that if they believed it they should return a verdict in favor of the plaintiff for seventy-two days, at $50 per day. When the law is enforced it will be respected and obeyed.

DEFENDANT'S APPEAL.

1. **Railroads—Penalty Statutes—Connecting Lines—Embargo—Tender by Initial Carrier.**

   The penalty imposed by the Revisal, sec. 2631, is enforcible against a railroad company refusing to receive freight when tendered, though to reach destination it was necessary for another road to receive and transport it beyond the junctional point; and it is no valid excuse that the connecting line had laid an embargo on the consignee, for it was the duty of the initial carrier to transport the goods and make a tender to the connecting line to be relieved of the penalty.

2. **Railroads—Penalty Statutes—Interstate Commerce.**

   The penalty imposed by the Revisal, sec. 2631, is not a burden upon interstate commerce when shipments are intrastate.

COTTON MILLS *v.* R. R.

ACTION for recovery of penalty for failing to receive goods for shipment.

The facts, as stated in defendant's brief, are: Defendant is a common carrier, with track and equipment running from Lenoir, N. C., to Chester, S. C., through Lincolnton, N. C., intersecting with the Southern Railway at Gastonia, N. C., both roads using the same depot, the property of the Southern. The Southern runs from Gastonia to Charlotte, N. C. Defendant receives freight for shipment to Charlotte, delivering to the Southern at Gastonia. The Seaboard Air Line Railway runs from Lincolnton to Charlotte. The defendant and the Seaboard use at Lincolnton a depot in common. On 6 March, 1907, B. G. Fallis, superintendent of the Southern Railway at Charlotte, sent the following notice to the general manager of defendant company at Chester: "Until further notice, we will not accept any cotton waste from your road consigned to the South Atlantic Waste Company, Charlotte, N. C. Please be governed accordingly." This embargo was raised (613) 20 May, 1907, and then only as to three cars per day from defendant. On 11 March, 1907, plaintiff tendered to defendant company, at Lincolnton, N. C., twenty-five bales (one car load) of cotton waste for shipment to the South Atlantic Waste Company, Charlotte, N. C. The agent of defendant declined to receive this shipment, assigning as a reason that he had instructions from his company not to receive it because of the embargo against the South Atlantic Waste Company. Thirty days later the agent of defendant company offered to issue a bill of lading to plaintiff, "Subject to delay, on account of embargo at Gastonia." The plaintiff declined to accept this proposition, and suggested to defendant's agent to carry the waste to Gastonia and tender it to the Southern. There is evidence tending to show that it would not have been received by the Southern at Gastonia. There was evidence tending to show that defendant's manager and officers made several efforts to induce the Southern Railway Company to accept this particular shipment, but in each instance was notified that the Southern would under no circumstances accept the shipment. A request was also made to the Seaboard company and refused. There was no contention that the defendant did not have room to store and care for the freight at Lincolnton, nor that it did not have motive power and cars sufficient to carry it to Gastonia. There was evidence that the tracks and yards of the Southern at Gastonia were congested. His Honor was of the opinion that the statute (section 2631, Revisal) made it the duty of the defendant to receive the freight for shipment, carry it to Gastonia and tender it to the Southern Railway Company; that the embargo placed upon shipments to the waste company was not a legal excuse for defendant's refusal to receive it for shipment at Lincolnton, and so in-

structed the jury. Defendant excepted. There was a verdict and judgment for plaintiff. Defendant excepted and appealed.

CONNOR, J. This action is prosecuted for the recovery of the penalty imposed by section 2631, Revisal, for refusing to receive for shipment freight tendered defendant at Lincolnton, N. C., to be transported (614) to Charlotte, N. C. We have discussed and decided many of the questions presented and argued upon this record in *Garrison v. R. R., ante,* 575. As we then endeavored to point out, there is no question of transportation and delivery involved in this case. The sole question is whether the reasons assigned by defendant for refusing to receive for shipment constitute a legal excuse. There is no suggestion that the defendant's warehouse at Lincolnton was insufficient to care for the freight until it could be shipped, or that defendant did not have the cars, motive power and other facilities for carrying the freight to Gastonia and tendering it to the Southern Railway. Defendant's agent says that it could have been handled as far as Gastonia. It was clearly its duty to comply with the requirement of the statute by receiving for shipment and throwing upon the Southern Railway the responsibility for failing to perform its duty at Gastonia. The fact that the Southern Railway maintained an embargo upon shipments to the waste company at Charlotte could not excuse the defendant from discharging its duty at Lincolnton. We have no doubt that the defendant's officers and agents acted in good faith in endeavoring to induce the Southern Railway to promise to take the freight at Gastonia, but this did not measure up to the standard of its common-law or statutory duty. It should have received the freight, carried it to Gastonia and then tendered it to the Southern Railway. If, by simply ordering an embargo against one of its customers at Charlotte, the Southern Railway could paralyze all of the connecting roads and relieve them from the duty to receive shipments to such person, the common law would fail and the statutes passed to enforce the public duty be of no avail. One company could destroy the business of any person or corporation, starve it out of existence, bankrupt it by ordering an embargo and notifying all other roads that it would not receive freight for the person selected as the subject for discrimination. Each company must discharge its duty and cast the responsibility for refusing upon the one which is derelict. There is no question of interstate commerce involved in this case. It is immaterial that plaintiff asked for a bill of lading to Charlotte. If defendant had received the freight for shipment to Gastonia, its terminus (615) for Charlotte freight, or offered to do so, it would have met and discharged the duty imposed upon it. This it failed to do, but, thirty days after refusing to receive the freight, offered a bill of

lading containing a provision which would have deprived plaintiff of any redress against the Southern Railway if it had refused to receive at Gastonia. The defendant company was placed by the action of the Southern Railway in an embarrassing position. We are not able to understand, upon the evidence, why the Southern Railway selected the Carolina Waste Company, of Charlotte, as the subject of its embargo for more than two months. It is true that there is evidence that the general demand upon its capacity for transporting freight was very heavy, and that a large number of unloaded cars were on its tracks and yards at Charlotte and Gastonia, but this certainly does not justify it in imposing upon one manufacturing plant an embargo for seventy-two days, cutting off its supply of raw material, not only over its own line, but from its connecting lines. If this can be done with impunity, the power of control and regulation, so essential to the protection of the rights of all persons complying with the law to be served without discrimination, would be of but little value. We concur with his Honor that it was the duty of defendant to receive the freight for shipment and cast upon the Southern Railway the responsibility of discharging its duty. It elected to obey the Southern Railway Company rather than the law. The fact that the discharge of its duty to the plaintiff would have imposed the liabilities of a common carrier is no excuse for refusing to do so. It is given by the State the franchise and the right to do business as a common carrier in consideration of its assuming and performing the duties incident to the business.

Upon a careful examination of the entire record we are of the opinion that his Honor correctly instructed the jury. There is

No error.

Cited: *Reid v. R. R., post,* 759, 767; *Bane v. R. R.,* 171 N. C., 331.

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(616)

FANNIE WHITLOCK v. J. C. DIXON ET AL.

(Filed 5 May, 1909.)

1. Deeds and Conveyances—Fraud—Grantor and Grantee—Consideration of Marriage—Proper Relationship—Evidence—Instructions.

When the evidence to set aside a certain deed for fraud and undue influence tends only to show that the grantor, a colored man of about seventy years of age, left the home of his son-in-law, where his grandchildren were, of whom he was fond, and for whose benefit the suit was brought after his death, to board with a colored woman of the same hum-

ble station of life, whom he desired to marry, to be taken care of, and in a relationship proper and lawful and to whom he made the deed, the subject of the controversy, it was not error in the trial judge to charge the jury that there was no evidence that the grantor was not of a sound and disposing mind or that he did not know what he was doing when he executed the deed.

2. **Deeds and Conveyances—Fraud—Grantor and Grantee—Proper Relationship—Burden of Proof.**

The fact that a deceased grantor in a deed was a colored man about seventy years old, and boarded with the grantee, a colored woman, whom he desired to marry, to be taken care of, thus living in a lawful manner, is not such a relationship between them as will affect the rule that the burden of proof is upon the plaintiffs seeking as heirs at law to set aside the deed for fraud and undue influence.

ACTION tried before *Councill, J.*, and a jury, at March Term, 1909, of MECKLENBURG.

Action to recover possession of a lot in the city of Charlotte. It was admitted that, prior to 30 November, 1907, the title was in Malachai Reinhardt. Plaintiff claims title by virtue of a deed executed by Reinhardt to her, 30 November, 1907, and duly recorded. The infant defendants claim as heirs at law, being the children of a deceased daughter. The adult defendant represents the infants, who are his children. The plaintiff introduced the deed and rested. Defendants alleged that the grantor was mentally unsound when he executed the deed, and that it was obtained from him by fraud and undue influence. The controversy was tried upon the general issue, which the jury answered for plaintiff. Defendants assigned errors and appealed from the judgment.

(617) *Shannonhouse & Jones for plaintiff.*
W. F. Harding for defendants.

CONNOR, J. The evidence tended to show that Reinhardt, at the time he executed the deed, was about seventy-two years old; that after the death of his wife he resided with his son-in-law, in the home which belonged to him; that several years prior to his death he suffered a stroke of paralysis, "but got over it, so that he returned to his work." He "got hurt," in November prior to his death, in the shop in which he worked. Some time prior to the date of the deed he "quit staying" with his son-in-law, Dixon, and stayed at the house of plaintiff, where he died, 3 February, 1908. There was evidence that he was fond of his grandchildren and frequently said that he was going to provide for them. The deed was dated 30 November, 1907, reciting a consideration of $5 and reserving an estate for his own life. On 9 December, 1907, Reinhardt executed a will, in which he devised to his grandchildren a lot in

Charlotte, worth about $150, giving to plaintiff his other property. The will was drawn and witnessed by a lawyer. Defendant's witnesses testified that Reinhardt was a man of good sense—seemed all right, except that he complained of a "hurting in his head." Plaintiff testified that she was engaged to be married to Reinhardt and that he proposed to make deed to her for property—said he was going to see a lawyer; that he told her that he had made a will—brought her the papers, sealed, and told her if he died to take them to Mr. Whitlock, an attorney in Charlotte, as he was executor; that he said he was getting old and had no one to take care of him, and that their relations were proper and lawful. One witness said that he had heard reports affecting plaintiff's character. A number of witnesses testified to her good character. His Honor instructed the jury that the burden of proof was upon defendants to show incapacity and undue influence. He further instructed them that there was no evidence that Reinhardt "was not of a sound and disposing mind" or that he did not know what he was doing when he executed the deed. Defendants assign this for error. We have examined the evidence carefully and concur with his Honor. We do not find any suggestion that he was mentally unsound, unless his age and his engaging himself to marry plaintiff be so taken. This we could not do, in the light of human observation and experience. It (618) may not have been a wise step for a man of seventy-two, but he said "he was getting old and had no one to take care of him." This is not an unusual reason given by men in his condition. His Honor, at the request of defendant, instructed the jury that "if they found from the greater weight of the evidence that the plaintiff exercised such an influence over Reinhardt as to induce him against the free exercise of his own will in executing the deed, they should answer the issue 'No.'" The defendants' contention, that, under the decisions of this and other Courts, the burden of proof is cast upon the plaintiff, is based upon the assumption that a relationship has been shown to exist between Reinhardt and plaintiff, lawful or otherwise, from which a presumption of control or power over him arose. Such was the case in *Westbrook v. Wilson,* 135 N. C., 404. While his Honor presented this view to the jury, we think it doubtful whether the evidence sustained it. We do not find any evidence of any improper relations, or certainly, if any, it is very slight, consisting of loose and unsatisfactory declarations. Reinhardt was an old colored man, who had no family, except his son-in-law and his grandchildren. He boarded for awhile with one of the witnesses, and then went to the home of plaintiff, who, it seems, was an ignorant colored woman, of his own station in life, and paid her board. There is no contradiction of his purpose to marry her. No immoral act is shown on the part of either. Even if the burden were upon her to

explain the circumstances under which the deed was executed, she went upon the stand and made a full statement of her relations with Reinhardt, and was sustained by other witnesses. The jury accepted her evidence as true. He made provision in his will for his grandchildren by giving them a lot. It does not appear how much his entire property was worth, but it is evident that it did not amount to much. He was a laboring man, making small wages.

We have examined the entire evidence and find no error in his Honor's charge. He followed the decisions of this Court, and the jury found that plaintiff's version of the transaction was correct. There is

No error.

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(619)

LEE P. CRAWFORD, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY.

(Filed 13 May, 1909.)

1. **Railroads—Master and Servant—Coupling Cars—Rule of Employer—Abeyance—Positive Instructions.**

A rule of a railroad company, made for the protection of its employees, to guard them against their own carelessness in jumping on the pilot of a moving engine, which, by habitual and continued violation, may be considered as in abeyance, does not lessen the force of a positive instruction to an employee, given by those in authority, not to jump upon the pilot of a moving engine while engaged in his duty of coupling cars, when such act was not necessarily done to perform the required service.

2. **Same—Negligence—Instructions.**

In an action for damages arising from the killing of plaintiff's intestate, alleged to have been caused by a defect in the pilot to a moving switching engine, upon which intestate jumped while engaged in his duty of coupling cars, there was evidence that a rule of the company, made to protect the employees by prohibiting them from thus jumping on the pilot of a moving engine, had become in abeyance from habitual and continued violation; and uncontradicted evidence that plaintiff's intestate had been positively and frequently and, up to the time of the injury, forbidden to do such act: *Held*, the judge should have charged, as requested, that if the injury was caused by plaintiff's intestate thus jumping upon the moving engine, in violation of the personal orders given him, and they so found the facts to be, it was not through defendant's negligence he was injured, and this without reference to whether the rules of the company were in abeyance at the time.

3. **Master and Servant—Rule of Employer—Abeyance—Positive Instructions—Revisal.**

Though a rule of a railroad company, made to protect its brakemen, while engaged in the scope of their employment, from the effects of their own carelessness, may have become in abeyance from habitual and con-

tinued violation, the company is not thereby deprived of its right to give specific orders to its brakemen and insist on obedience to them, or to revive the rule.

4. Master and Servant—Disobedience of Servant—Negligence—Proximate Cause.

When an injury to the servant is occasioned by his disobedience to the orders of the master, such disobedience is the proximate cause of the injury and bars recovery.

5. Issues, Form of—Facts Assumed—Negligence.

An issue which assumes the negligence of the defendant, one of the questions involved by the pleadings, is not in a good or usual form.

ACTION to recover damages for the negligent killing of Robert (620) Lytle, tried by *Adams, J.*, and a jury, at February Term, 1909, of McDOWELL.

These issues were submitted:

1. "Did the negligence of the defendant cause the death of the plaintiff's intestate, as alleged in the complaint?" Answer: "Yes."

2. "Did Bob Lytle, by his own negligence, contribute to his injury, as alleged in the answer?" Answer: "No."

3. "Did the defendant, after the original injury to Bob Lytle, cause his death by its neglect of him while he was in its charge, as alleged?" Answer: _____

4. "What damage, if any, has the plaintiff sustained?" Answer: "Fifteen hundred dollars, with no interest."

The court rendered judgment against defendant, from which it appealed.

Craig, Martin & Winston and Pless & Winborne for plaintiff.
S. J. Ervin and Avery & Ervin for defendant.

BROWN, J. The intestate, Robert Lytle, was a brakeman, in the employ of the defendant, on its yards at Old Fort, and was injured while attempting to mount the pilot of one of defendant's engines while the same was in motion and running on the track, about dark, on the evening of 20 January, 1907; and of the injuries sustained defendant died, on 26 January, six days later.

There was evidence on the part of the plaintiff tending to show that the intestate mounted the pilot, on the engineer's side, and that the step on this side of the pilot was loose and gave way, and (621) that the intestate fell to the ground and was injured, and shortly thereafter died.

There was evidence that the rules and regulations of the defendant forbid employees to mount the pilot while the engine was in motion,

and there was also evidence that these rules and regulations were frequently disobeyed by the employees, who were accustomed to mount the pilot while the engine was running.

The defendant contended that, according to the evidence in the case, the intestate had personally received specific orders not to mount the pilot of the engine while moving, and that the violation of such orders was the proximate cause of his death.

In order to present this view, defendant, in apt time, handed up several similar prayers for instruction, one of which is as follows:

"If the jury find from the evidence that Robert Lytle had been ordered by the conductor in charge of the train, or the yardmaster in directing his work, not to mount the pilot while the engine was in motion on the track, and you further find that he did mount the pilot, or attempt to mount it, while the engine was in motion on the track, and that in consequence thereof lost his footing and fell, and by reason thereof sustained the injuries which resulted in his death, then it is your duty to answer the first issue 'No,' although you may find that the step on the pilot was defective."

His Honor gave the prayer, but added these words, "unless you shall find, under the charge heretofore given, that the rule was waived or abrogated."

We are of opinion that his Honor erred in making such addition to the prayers. The defendant was entitled to have the instruction given without the added words.

This is not a question of the abrogation of a rule by such long-continued violation of it that it becomes obsolete, as in *Bordeaux v. R. R., ante,* 528. The question involved is the right of the defendant to exact of its brakeman obedience to the specific orders of his superiors, given in good faith and meant to be obeyed.

Assuming that the defendant's rule, forbidding its employees
(622) from mounting the pilots of moving engines, has been violated so long that it may be regarded as in abeyance, that did not deprive the defendant of its right to give specific orders to its employees and to insist on obedience to them. If the company is to be deprived of this right, then there is an end to all discipline. The evidence upon which the prayer was based is clear and uncontradicted. Burgin, the conductor of the train on which the intestate was brakeman, testified: "I had told Bob Lytle that it was very dangerous to catch the pilot while the train was in motion. I gave him instructions several times not to do this. I saw him doing this, and told him it was against instructions." Again: "I had a right to direct the work on the yard. Couplings were made under my direction. I had directed Bob Lytle not to mount the pilot while the engine was in motion. I had given

him such orders several times. I gave such an order to Bob only a few days before the injury. He was on the yard when I gave this order and at the time of the injury." Again witness says: "I had been giving orders to Bob and others forbidding mounting moving cars. I always told them not to do it every time I saw it done. It was done often, and I would tell them not to do it. It was the most dangerous thing they could do. I could have had Bob discharged."

E. L. Winslow testified: "I live at Old Fort. Engineer, in employ of defendant. Robert Lytle fired for me and helped me couple and switch; helped switch and couple about two weeks before the injury. I instructed him not to jump on pilot of the engine while the engine was in motion; told him several times. It is not necessary for the coupler to ride on the pilot in order to make coupling." Assuming that the intestate was compelled to mount the engine's pilot in order to perform his duty (which is denied), he was not compelled to mount it when the engine was running. It was his duty to get on it before it started. Had the intestate done so, he would not have been run over, although the step had given way. We have recently said that it was the duty of railway companies to frame rules for the protection of its employees, not only to protect them from the carelessness of their fellow-servants, but to guard them, as far as practicable, from their own carelessness as well. *Bordeaux v. R. R., supra.* We have here (623) such a rule, well calculated to guard the brakemen and switchmen from their own recklessness, which is the usual result of constant exposure to danger. It is said that the rule had been violated so much that it was in abeyance. Assuming that to be so, it can not be denied that the defendant had a right to revive the rule and enforce it. That is what the conductor and the engineers were endeavoring to do in regard to the intestate, for the evidence shows that these orders were given repeatedly, and almost up to the very time of the accident.

There is not a scintilla of evidence, or even a suggestion, that the conductor and engineer were "joking" or indulging in "mere talk," as is said in *Smith v. R. R.,* 147 N. C., 609. If words mean anything, then their orders were given in earnest, with the expectation and intention that they should be obeyed. They were not suffered to become stagnant, but were reiterated and repeated, almost up to the hour of the disaster. It is difficult to understand what more the conductor or engineer could do to enforce obedience. They could not commit an assault and punish the disobedient servant without subjecting themselves to indictment and the company to damages.

This Court has repeatedly said that where the injury to the servant is occasioned by his disobedience to the orders of the master, such disobedience is the proximate cause of the injury and bars recovery.

Stewart v. Carpet Co., 138 N. C., 64, and cases cited. In that case *Mr. Justice Walker* well says: "When he chose to disregard the instructions he had received, and do the work in his own way, the resultant injury to himself will be referred to his own negligence or willful disobedience as its proximate cause, and not to any fault of his employer."

There being no evidence that the orders given to the intestate by the conductor and engineer, under whose control he worked, were in any way revoked or modified, his Honor erred in not giving the instructions as prayed. The additions he made were unwarranted.

(624) As this case is to be tried again, we will suggest that the first issue is not in very good or the usual form. It seems to assume that the defendant was guilty of negligence, which is denied in the pleadings and contested in the proof.

New trial.

M. A. POOL ET AL. V. A. T. ANDERSON AND WIFE.

(Filed 13 May, 1909.)

Deeds and Conveyances—Contracts to Convey—Grantee in Possession—Evidence of Payment—Burden of Proof—Cancellation of Note—Payee's Possession.

While the burden of proof to show payment is upon the grantee in possession of lands under a contract to make title, when both the grantor and grantee are dead, and the grantee, and those claiming under him, have been in continuous possession for a long lapse of time (in this case twenty-eight years), evidence of payment is sufficient to go to the jury which tends to show that the bond for title, and a note of less amount wrapped in it, with the payer's signature to the note cut out, were found among the papers of deceased payer, written upon the same kind of paper, witnessed by the same person, and no note corresponding with that mentioned in the bond was suggested or produced.

ACTION tried before *Adams, J.*, and a jury, at January Term, 1909, of MCDOWELL.

Action for recovery of land. Plaintiffs claim under John E. Gray, who, on 12 March, 1879, executed a bond obligating himself to make title to S. N. Stockton upon the payment of $300, "as stipulated by note or otherwise." The signature to the bond was attested by H. W. Wise. Stockton went into possession of the land upon the execution of the bond, and remained thereon until his death, devising it to the *feme* defendant, Cordelia Anderson, who has been in possession at all times since the death of said Stockton. Defendants alleged that the purchase money for the land was paid by Stockton. There was evidence of acts and

declarations of Gray and Stockton tending to sustain the conten- (625) tion of both parties. For the purpose of sustaining the allegation of payment, defendants offered to introduce a note, of which the following is a copy:

"$200.

"On or about 15 April, 1879, I promise to pay John E. Gray the sum of two hundred dollars for value received of him. Witness my hand and seal, this 12 March, 1879."

The defendant A. T. Anderson testified that he found the note wrapped in the bond for title, among the papers of S. N. Stockton, after his death; that when he first saw it, it had Harve Wise's signature as a witness. He does not know Harve Wise's initials. The clerk of the court testified that the note and bond for title are on the same kind of paper and in the same handwriting, and appear to have been written about the same time, though it might appear this way if one had been written one year after the other. H. W. Wise is dead. The note had no signature, but the paper appeared to have been cut off at the place for the signature. Plaintiff objected to the introduction of the note. His Honor, being of the opinion that there was some evidence to identify the paper as a part of the note referred to in the bond, admitted it to be read to the jury, leaving to them the question of its identity. Plaintiffs excepted. There was a verdict and judgment for defendants. Plaintiffs assigned as error the admission of the note, and appealed.

Pless & Winborne for plaintiffs.
Sinclair & McBrayer for defendants.

CONNOR, J. Conceding that, notwithstanding the fact that Stockton, and those claiming under him, have been in possession of the land since the execution of the bond for title, the burden of proof to show that the purchase money had been paid was on defendant, we think that his Honor correctly held that the note was competent evidence to be considered by the jury upon that issue. Plaintiff's counsel strongly urges that there is no evidence connecting the note with the bond for title. We think that there is evidence tending to show that it was given in part payment of the purchase money for the land. In every respect except amount it is shown to correspond with the recitals in the bond. It bears the same date. There is evidence tending to (626) show that it was written and witnessed by the same person, at the same time, and that the name of the payer has been cut off. If the jury found that it was given in part payment of the purchase money, we think the fact that it was found in its present condition, wrapped

in the bond for title, among Stockton's papers, after his death, is a pregnant circumstance tending to show that it was paid by him; especially is this so, in view of the long-continued possession of the land under the bond. It is true that the mere possession, by the payer, of a note without any endorsement thereon is not evidence of payment unless it appears that it was delivered to the payee. When, however, the bond for title, executed by the payer, reciting the execution of a note, accompanied with the possession of the land by the payee for twenty-eight years, both parties to the transaction being dead, the note is found in the possession of the payer, wrapped in his muniment of title, it should not be excluded from the jury. The possession does not raise any presumption of payment or change the burden of proof. It is a circumstance—a condition, open to explanation, but of sufficient relevancy to the fact in issue to entitle it to be considered in connection with other evidence to aid the jury in arriving at a correct conclusion. It is a mistake to say that rules governing the admissibility of evidence, where the question of relevancy is involved, are technical. They are based upon conclusions, drawn from experience rather than logic. For instance, it is well known that among persons not engaged in trade, banking or other occupations requiring the keeping of books containing a record of their transactions, where a note is paid, the payer usually cuts or tears his name out of it and preserves it. Any one having occasion to examine the papers of persons deceased knows that he usually finds the notes which such persons have paid canceled, as the one in controversy. It may be said that such is the general custom. The possession of a note under the conditions found in this case would be regarded as very strong evidence of its payment. This conclusion would be strengthened when the person claiming that the debt for which the note was given has not been paid is unable to produce another note corresponding to the debt, in date, amount and other respects. (627) It was suggested that the declaration by Stockton that he had paid the note would not be admissible. This is true, but its exclusion would not be based upon the suggestion that such declaration was not relevant, but upon the principle that a man's declarations, made in his own interest, are not admissible. Here we have an act consistent with admitted facts and conditions and inconsistent with the theory that he had not paid for the land. The other evidence bearing upon the issue is not set out in the record. It is simply stated that declarations of both parties to the transaction were admitted. Certainly, in the condition of the case, it would aid the jury to show that the note was found in the possession of the payee, wrapped in his bond. Jurors are men of experience and observation; they usually attach proper weight to facts and circumstances relating to the transactions which they

are investigating. While the courts should carefully exclude such evidence as is misleading or confusing, they should admit such as experience has shown to be enlightening and helpful in getting at the truth, which is the ultimate end to which every judicial investigation should be directed. We concur with his Honor's ruling. There is

No error.

FRED. H. BAILLIERE ET AL. v. ATLANTIC SHINGLE, COOPERAGE AND VENEER COMPANY ET AL.

(Filed 13 May, 1909.)

1. **Deeds and Conveyances—Commissioner's Deed—Decree—Specific Description.**

   A commissioner to sell land in partition proceedings may not extend or change the boundaries from those given in the decree, but he may make the description of the land sold by him more specific and certain.

2. **Deeds and Conveyances—Cities and Towns—Streets—Dedication Irrevocable—Acceptance.**

   When a grantor conveys lands with reference to an authorized city map, containing the line of city blocks and streets and describing the property conveyed, so as to reserve the streets to the city, the dedication is complete and irrevocable, and subject to the acceptance at any time thereafter for the enjoyment of the public, under the control and regulation of the proper city authorities. (*Boyden v. Achenbach*, 79 N. C., 539, and *Kennedy v. Williams*, 87 N. C., 6, cited and distinguished.)

3. **Deeds and Conveyances—Cities and Towns—Streets—Description—Trespass.**

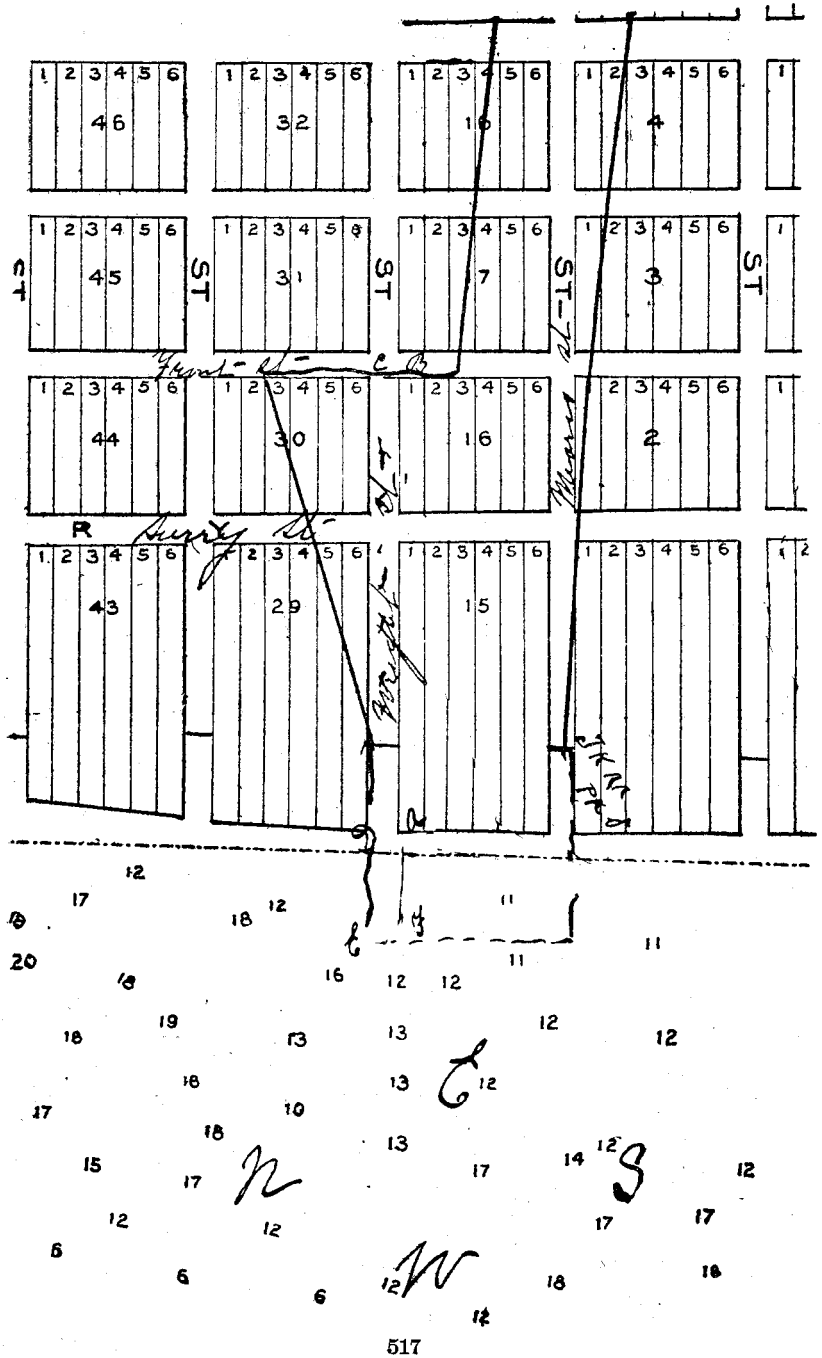
   One who has acquired title to a lot of land under a deed conveying a tract and recognizing and describing certain streets thereon, in accordance with an authorized city map defining them, is not guilty of trespass in using the streets thus referred to, for ordinary street purposes, though the city may not have accepted the streets thus dedicated.

ACTION tried before *Lyon, J.*, who found the facts, by consent, (628) at December Term, 1908, of NEW HANOVER.

Plaintiffs claim title to a strip of land within the corporate limits of the city of Wilmington, beginning at low-water mark on the eastern shore of the Cape Fear River; A, running thence eastwardly 726 feet to the southern line of Front Street; B, thence northwardly along the line of said street 66 feet to C; thence westwardly 726 feet to the low-water mark of said river; D, thence the same course to the channel of the river; E, thence southerly 66 feet; F, thence westwardly to the beginning.

Plaintiffs, and those under whom they claim, were, prior to 22

August, 1892, the owners of a lot in the city of Wilmington. On the said day they instituted a special proceeding in the Superior Court of New Hanover County for the purpose of obtaining a decree for sale of said lot and making partition of the proceeds. In the petition in said proceeding they described the said lot as follows: "Beginning, a stone P K D and T K M, at the foot of Meares Street; thence S. 89 deg. 5 min. E. 114 chains, to a stone, P K D and T K M; thence N. 1 E. 4 chains and 82 links, to a stone, P K D, E B D; thence N. 88 deg. 35 min. W. 103 chains, to the western line of Front Street, at a point 119 feet and 3 inches from its intersection with the southern line of Wright Street; thence with said western line of Front Street northwardly 386 feet; thence S. 78¾ deg. west about 1,650 feet, to the channel of the river; southwardly about 643 feet, to a point bearing S. 79¾ deg. west from the stone marked P K D and T K M, first above-named as the beginning corner, and thence N. 79¾ deg. E. 800 feet, more or less, to the beginning." This description includes the *locus in quo,* as will be seen by reference to the map. The petition was duly verified by the plaintiff Evelina M. Bailliere. A decree was duly made in said
(630) proceeding ordering a sale of the property and appointing Daniel O'Connor, Esq., a commissioner to make said sale. The portion of the decree material to this appeal is in the following language: "And it is hereby ordered that so much of the said land as is bounded on the north by Wright Street, on the south by Meares Street, on the east by Front Street, and on the west by the Cape Fear River be sold by the commissioner," etc. On 5 November, 1892, the commissioner made report that, pursuant to said decree, he had sold the "land which lies between the Cape Fear River on the west and Front Street on the east, and Wright Street on the north and Meares Street on the south," to David C. Gaslin, who transferred his bid to Stephen L. Cowan, etc. Said sale was duly confirmed. The description of the land in the decree is in the language of the report. On 7 November, 1892, the commissioner executed a deed for the lot sold to Cowan, containing the following description: "Lying and being in the city of Wilmington, aforesaid, and beginning at low-water mark on the eastern shore of the Cape Fear River, at the intersection of the southern line of Wright Street with said river, and running thence eastwardly along said line of Wright Street 1,650 feet, more or less, to the western line of Front Street; thence southwardly along said line of Front Street 396 feet to the Northern line of Meares Street; thence westwardly along the said line of Meares Street 1,650 feet, more or less, to the low-water mark of the Cape Fear River, and thence northwardly with the river 396 feet to the beginning; the same being all of blocks or squares Nos. 15 and 16, according to the official plan of said city, together with, all and singular,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the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining." The commissioner collected the purchase money and paid same to the petitioners, less the cost and expense, filing their receipts therefor.

On 22 March, 1900, plaintiffs instituted a second special proceeding in said court for the purpose of bringing the remainder of said property to sale for partition. In the petition filed in said second proceeding the land is described in separate lots as bounded by the streets as they are laid out on the official map of said city. Block 29 is de-
(631) scribed as "That certain lot or lots beginning at the intersection of the northern line of Wright Street with the western line of Surry Street, running thence north along said western line of Surry Street 156 feet; thence in a westerly or southwesterly direction to the eastern shore of the Cape Fear River, at a point 252 feet south from the southern line of Dawson Street; thence southwesterly along the shore of the Cape Fear River about 144 feet to the northern line of Wright Street; thence eastwardly along the northern line of Wright Street to the western line of Surry Street, the point of beginning, being part of lot 4 and all of lots 5 and 6, in block 29, according to the official plan of said city. That certain lot or lots beginning at the intersection of the northern line of Wright Street with the eastern line of Surry Street, running thence east with said northern line of Wright Street 330 feet to the western line of Front Street; thence along said western line of Front Street 208 feet; thence west____degrees south 332 feet, more or less, to a point in the eastern line of Surry Street, 173 feet north from the northern line of Wright Street; thence along said eastern line of Surry Street south 173 feet, to the point of beginning, in the northern line of Wright Street, being part of lots 3 and 4 and all of lots 5 and 6 in block 30, according to the official plan of said city."

After completing the description of the property included in said petition, the following language is used: "But so much of the said property as is contained in blocks 15 and 16 of the present plan of the said city are excepted as having been conveyed by one Daniel O'Connor, commissioner, to Stephen L. Cowan." Mr. O'Connor was again appointed commissioner, and made sale of a number of said lots. He reported that he had made sale of the portion of blocks 29 and 30 covered by description in the petition to Malcolm McKenzie, describing the same as follows: "Beginning at the intersection of the southern line of what is designated on the plan of the City of Wilmington as Wright Street and the low-water line of the eastern shore of the Cape Fear River, running thence an easterly course with the southern line of the so-called Wright Street, as shown on said plan, 1,650 feet, more or less, to the western line of Front Street; thence northwardly along

the western line of said Front Street 266 feet and 9 inches, thence (632) south 78¾ deg. west about 1,650 feet, more or less, to the channel of the said river, southwardly, about 247 feet, more or less, to a point in said river channel where it would intersect with the southern line of said so-called Wright Street if extended into the river; thence an easterly course to the point of beginning, on the eastern shore of said river. The above embraces the two tracts described in the petition as Nos. 20 and 21, with the intersecting streets and river channel, which streets have never been laid out." The commissioner thereafter reported that "It has been ascertained that a portion of said property is involved in a complication relative to the ownership of the parties to this proceeding as to certain lands on what is called Wright Street, according to the official map of the city of Wilmington, between the river frontage and Front Street." He reports that the purchaser is unwilling to take said property until the question is settled, unless a reduction in the price is made. Thereupon a decree was made directing the commissioner to convey to the purchaser the portion of said property, exclusive of the "so-called Wright Street," at a reduced price. The official map of the city of Wilmington, referred to in the petition and introduced in evidence, was made, pursuant to an act of the General Assembly, in 1870. It shows all of the streets in said city, with number of blocks, and lots in each block.

His Honor found, in addition to the foregoing, the following facts: "There has been no legal proceeding had by the defendant city to condemn the *locus in quo* in this action to the public use as a street; and the court finds that the defendant city has never opened the same as a street; that the defendants, and those under whom they claim, have never, in fact, by any acts, accepted the dedication of the same as a public street, unless the deed of Daniel O'Connor, commissioner, to Stephen L. Cowan, bearing date 2 October, 1892, operates by law to dedicate as a public street the *locus in quo;* and that the public has never used the same as a public street. The defendant shingle company claims under S. L. Cowan. The defendant has trespassed on said land." His Honor, upon these findings of fact, was of the opinion that the deed of Daniel O'Connor, commissioner, to Stephen (633) L. Cowan, hereinbefore mentioned, does not operate in law to dedicate the *locus in quo* as a street, and thereupon adjudges that the plaintiffs are the owners of the strip of land described in the complaint, and that defendant shingle company has trespassed thereon. Judgment was rendered for nominal damages. Defendants excepted and appealed.

Meares & Ruark for plaintiffs.

E. K. Bryan for Shingle Co. and M. Bellamy, Jr., for Wilmington.

CONNOR, J., after stating the case: Judgment was rendered, upon the pleadings, against the defendant city of Wilmington at a former term of the court, and exception duly noted. The appeal by both defendants was argued at this term. Before discussing the merits of the case it will be well to notice the distinction between this and several cases in our reports relied upon by the plaintiffs. In *Boyden v. Achenbach,* 79 N. C., 539, the plaintiff was seeking to establish a right to a private way. It is true that in the opinion something is said about the manner in which a public right of way could be acquired by prescription, but there was no suggestion that such a right of way in that case was dedicated. In *Kennedy v. Williams,* 87 N. C., 6, the right to a public pathway was asserted by reason of long user. In both cases the principle was announced and enforced, that before the lands of a private citizen could be subjected to an easement for a public road or highway the assertion by the public authorities of such claim must be shown by working, etc. The claim of the defendants in this case is founded upon an alleged dedication by the owners of the land to the public as a street. We know as a matter of history that the city of Wilmington is one of the oldest municipalities in the State; that the public streets have been laid out and used in its corporate limits for more than a century. It appears from the evidence in this record that at the session of the General Assembly of 1870-'71 an act was passed directing the aldermen to cause a plan of said city to be made, on which should be designated

(634) the lines of such streets and public alleys as then existed and of such as might be established by them. The act directed that two copies be made, one of which should be deposited in the office of the Secretary of State and the other in the office of the Clerk of the Superior Court of New Hanover County. It further appears, by reference to a copy of the map in evidence, that Wright Street, Front Street and Meares Street are laid out and run through plaintiffs' property. This was known to plaintiffs in 1892, when they filed their petition for a sale of the land for partition. The beginning point is located at a marked stone "at the foot of Meares Street"; a line is called for on "the western line of Front Street" and another at "the intersection with the southern line of Wright Street." In the decree directing the sale a specific portion of the property is directed to be sold for a fixed sum—"bounded on the north by Wright Street, on the south by Meares Street and on the east by Front Street." The plat shows that this property thus described consists of blocks 15 and 16. The same description is set forth in the report of the commissioner and the decree of confirmation. The commissioner, in the deed which he executed to Cowan, gives a more specific description, concluding with the words "being all of blocks, or squares, 15 and 16, according to the official plan of said city."

The plaintiffs insist that the use of these words by the commissioner was without authority and did not bind them. Conceding that the commissioner could not by his deed extend or change the boundaries, as contained in the decree, it is manifest that he has not done so. He has only made more specific and certain the description of the land sold by him. Whatever doubt may have arisen from the language used in the first proceeding is removed by the description contained in the second. The portion of the land not sold is described in separate blocks, or squares, each paragraph concluding with the words "according to the official plan of said city." This language is repeated thirty times in the petition, and in concluding the description it is said: "So much of said property as is contained in blocks 15 and 16 of the present plan of said city are excepted as having been conveyed by Daniel O'Connor, commissioner, to Stephen L. Cowan." Thus we have the most unmistakable recognition of the existence of the official map and the sale of lots described in accordance with it. The land (635) covered by streets is carefully excluded from the description of the lots conveyed. It does not appear what, if any, use or acts of ownership have been exercised over the strip of land of 276 feet in length and 66 feet in width, now claimed by plaintiffs, since the sale of blocks 15 and 16 to Cowan, in 1892, until the institution of this action, in 1904. Conceding the facts found by his Honor, what, if any, effect did the conduct of plaintiffs in respect to the sale of the property have upon the right of the city to use, whenever the public necessity demanded, the *locus in quo* as a street? In *Shea v. Ottumwa*, 67 Iowa, 39, it appeared that lots had been sold according to a map "dividing the property into town lots and dedicating the streets to public use." Thirty years thereafter the city proposed to open the streets. The map was not recorded as the statute required. Plaintiff sought to recover damages from the city for entering upon and grading the streets. *Beck, C. J.*, after saying that the execution of deeds "bounded according to the description of the plat" would establish the *animus dedicandi* sufficient to establish a way or street, added: "But it is urged that there was no acceptance of the dedication by the public, or by the city for the public, for more than thirty years after the dedication, when the street was graded. It is shown that the street remained unenclosed, that the land was rough and hilly, and for that reason it was used but little by the public. It appears that when the wants of the public demanded it the city proceeded to grade the street at the point in dispute. It would not do to hold that city streets dedicated to the public over hilly, rough land would revert to the dedicator if they were not improved and used by the public until the wants of the public travel demanded it. . . . They have not been used for the reason that, until graded, they are incapable of use. The

dedication will be presumed to have contemplated this state of things and imposed no condition on the public to use the streets until the public wants demanded and secured their improvement." *Bennett, J.*, in *Schneider v. Jacob,* 86 Ky., 101, says: "These principles apply primarily in the interest of purchasers of lots who invest their money upon the faith of the assurances of the seller that the streets and
(636) alleys which are defined in the plat and which are called for in the deeds of conveyance are dedicated to the use of the purchasers and to the public. The purchasers invest their money with the assurance that they shall have all the advantages arising from the streets and alleys, as defined and delineated in the plat or plan of the newly created town, and that these streets and alleys, as soon as lots are purchased, with clear reference to them, become irrevocably dedicated, not only to the personal convenience and necessities of the purchasers, but to the use of the public; and although they may not be actually opened by the authority of the city or town, although they may be repudiated as public thoroughfares by the city, as in this case, and different streets and alleys opened up in their stead, yet the purchasers of the lots, with clear reference to the streets and alleys as defined in the map or plan, are entitled, as between them and the seller, to the benefits of the dedication. . . . Where the land is laid out in town lots, with streets, and the owner sells a lot which fronts on a street, and the deed calls for the street as the front boundary of the lot, he receives a full consideration for the street in the increased value of the lot." So, in *Sherer v. Jasper,* 93 Ala., 536, it is said: "The general rule that where a landowner lays off his land into blocks and lots, setting apart and designating certain portions as streets, with a view of establishing a town, a sale of lots with reference to a map defining and delineating the streets is a complete dedication thereof to the use of the purchasers and the public—governs when the proprietor of land sells and conveys lots in conformity and with reference to a city map on which his land is so laid off. Such sales and conveyances are a recognition and adoption of the maps, and amount to a dedication of the designated street to public use, of which the purchase of lots is an acceptance. It is not necessary that the street should be opened at the time of the sale and conveyance." In *Trustees v. Hoboken,* 33 N. J. L., 13, *Depue, J.*, says: "When, there being a city map on which the land is so laid off, the owner adopts such maps by a reference thereto, his acts will amount to a dedication of the streets." In *Vannotte v. Jones,* 42 N. J. L., 561, the owners of land as tenants in common filed proceedings for partition, adopting
(637) and recognizing a map on which streets had been laid out. Partition was made: *Held,* that the streets were dedicated to public use. In *Derby v. Alling,* 40 Conn., 410, streets were laid out on

a map, but not opened, and lots sold, calling for them. *Seymore, C. J.*, said: "The public enters upon a part in the name of the whole, to enjoy the parts as from time to time such enjoyment of them becomes necessary. This is carrying into effect the manifest intent of the grantor and of those for whose benefit the grant is made, and we see no difficulty in allowing this intent to prevail and to call it a dedication *in presenti*, to be carried into effect *in futuro*." *Henshaw v. Hunting*, 67 Mass., 203; *Mayor v. Canal Co.*, 12 N. J. L., 547; *Wright v. Tokey*, 57 Mass., 290.

The decisions of this Court, while not exactly in point, are in harmony with the uniform current of the authorities cited in holding that a sale of lots in accordance and recognition of a map or plat in which streets are laid out constitutes a dedication of the streets to the use of the purchasers and the public. In *Moose v. Carson*, 104 N. C., 431, the streets were laid out and the lots sold by the town. It was held that the owners of lots were entitled to have them kept open. *Smith v. Goldsboro*, 121 N. C., 350, and *Conrad v. Land Co.*, 126 N. C., 776. In *Collins v. Land Co.*, 128 N. C., 563, the Court held that when the lots were sold and conveyed by referring to a plat in which streets were laid out, the map became a part of the deed, as if it were written therein. In *Hughes v. Clark*, 134 N. C., 457, it was held that where the deeds conveying the lots referred to a map, the purchasers' rights were not affected by the acceptance or nonacceptance of the dedication. It was held in that case that the town authorities could not, as against an abutting owner, by resolution or ordinance, narrow the street as laid out on the plat or map. The more recent decisions of this Court cite these cases with approval. The intention to dedicate the land covered by the streets, as indicated on the map, is manifested in the most unmistakable manner. For what other purpose did the parties in the partition proceedings carefully exclude the streets from the description in the deeds? It can not be contended, with reason, that they intended to sell off town lots (638) and hold the strips of 66 feet between them for the purpose of preventing ingress and egress to the lots. Without the streets, lots of 66 feet width were of little value. It will be observed, by referring to the map, that the blocks are 396 feet in width and are divided into six lots making each 66 feet wide. Having sold the lots by reference to the official city map, the dedication is complete and irrevocable. Elliott on Roads and Streets, 131. The dedication is not confined to a mere private way or easement. It is to the public, to be enjoyed under the control of the city authorities, who have charge of the streets. *Trustees v. Hoboken, supra.* The attempt to limit the dedication made in 1892 by the use of the words "so-called Wright Street" can not affect the rights of the city or the owners of the lots.

Upon the facts found by his Honor judgment should have been rendered for defendants. The legal title of Wright Street is in plaintiffs, subject to an easement in the city to use the land as and for a public street, to be opened and subjected to regulation as the growth of the city demands. The defendant corporation, in using it in the manner described in the complaint, did not commit a trespass. The judgment will be set aside and judgment entered in the Superior Court of New Hanover that defendants go without day, etc.

Reversed.

Cited: Green v. Miller, 161 N. C., 30; *S. v. Haynie,* 169 N. C., 280; *Sexton v. Elizabeth City, ibid.,* 390; *Guilford v. Porter,* 171 N. C., 359.

J. M. GREENLEE, ADMINISTRATOR, v. J. HARVEY GREENLEE ET AL.

(Filed 19 May, 1909.)

1. **Reference—Exceptions to Report—Right of Jury Trial—Exceptions Withdrawn.**

   A plaintiff, in an action referred under the statute, who has filed exceptions, but made no demand for a jury trial, can not, by virtue of the consent of the defendant that a jury trial be had under the exceptions, prevent such other party withdrawing his own exceptions, upon which he had made demand, and force him to a jury trial.

2. **Appeal and Error—Reference—Exceptions—Fragmentary Appeal—Procedure.**

   An appeal from an order permitting a party to an action to withdraw exceptions to a referee's report, and his demand for a jury trial, is premature. The objecting party should note his exception, to be reviewed on appeal from final judgment.

(639) ACTION heard, upon report of referee, by *Ferguson, J., at* September Term, 1908, of MCDOWELL.

Plaintiff appealed.

A. C. Avery and W. T. Morgan for plaintiff.
Pless & Winborne for defendants.

CLARK, C. J. The defendants filed exceptions to the report of the referee and demanded a jury trial. The plaintiff filed exceptions, but made no such demand. The defendants asked leave to withdraw their exceptions and demand for jury trial, and that the plaintiff's exceptions

be heard. The plaintiff insisted that although he had not asked for a jury trial and had no exceptions which he desired submitted to the jury, yet, because defendants had made such demand and the plaintiff had consented to defendants having it, the court could not permit the withdrawal of either the exceptions or the demand for the jury, and insisted that, although he was satisfied with the findings of fact, the defendants having said they were not, they had to fight further, whether they so desired or not.

This is the whole case. The plaintiff withdrew his objection to the defendants' demand for a jury trial. If this had any effect it was against the plaintiff. It could not estop the defendants from withdrawing their exceptions or their demand for a jury trial.

The plaintiff, having excepted to the order permitting the defendants to withdraw their exceptions and their demand for a jury, insisted on an immediate appeal. His Honor properly ruled that no appeal lay from such order, but that the plaintiff could note his exception, which has now come up for review on this appeal from the final judgment. Clark's Code (3 Ed.), sec. 458, pp. 733, 734.

Affirmed.

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(640)

MRS. S. A. MITCHEM v. A. D. K. WALLACE ET AL.

(Filed 19 May, 1909.)

1. **Deeds and Conveyances—Escrow—Contracts, Breach of—Damages—Evidence—Burden of Proof.**

In an action for damages for breach of contract for the sale of land, evidence showing that the deed was signed by defendant and placed in escrow, upon condition that the other parties in interest should first sign before delivery, that the other parties refused to sign, the plaintiff refused to take only the interest of the defendant, and the deed was never delivered, is insufficient upon the issue as to whether the defendant violated his contract, the burden of proof being on plaintiff, and a motion to nonsuit upon the evidence should have been sustained.

2. **Same—Purchase Price—Tender.**

When it is shown by the evidence that defendant had only a one-fourth undivided interest in the land, of which he informed plaintiff, and signed a deed, to be held in escrow, upon condition that the other owners would convey their interests, and thereafter offered, upon their refusing to do so, to pass his own interest upon payment to him of his proportionate part of the purchase price, the vendee, the plaintiff in the action, can not recover damages for an alleged breach of the contract without first showing a tender of the purchase price.

MITCHEM *v.* WALLACE.

ACTION for damages for breach of contract in sale of land, tried before *Justice, J.*, and a jury, at August Term, 1908, of RUTHERFORD.

The defendants moved to nonsuit; motion overruled. Defendants except.

His Honor submitted these issues:

1. "Did Defendant contract and agree with plaintiff to sell her his interest in the land mentioned in the complaint, as therein alleged?" Answer: "Yes."

2. "Did defendant fail and refuse to convey to the plaintiff his interest in said land, in violation of his contract, as alleged?" Answer: "Yes."

3. "What damage, if any, is plaintiff entitled to recover?" Answer: "Fifty dollars."

From the judgment rendered defendants appealed.

(641) *D. F. Morrow and R. S. Eaves for plaintiff.*
McBrayer, McBrayer & McRorie for defendants.

BROWN, J. The evidence, taken in its most favorable light for plaintiff, tends to prove that the land, the subject-matter of the contract, belonged to the defendant A. D. K. Wallace and to the other codefendants. A contract for the sale of the land was drawn up and signed by said Wallace and the plaintiff and deposited with C. W. Goode, to be held by him until released by mutual agreement of plaintiff and A. D. K. Wallace. It was evidently deposited to await the consent of the other owners, who refused to sell, as claimed by Wallace; but we will assume, as contended by plaintiff, that it was held by Goode to await the payment of the purchase money, and was then to be delivered to plaintiff. This contract was never delivered to plaintiff, but according to Goode, her own witness, it was taken from his granddaughter by William Mitchem, plaintiff's brother-in-law, without either Goode's or defendants' knowledge or consent. It is manifest from plaintiff's own evidence that Wallace informed her fully and particularly as to the ownership of the land, and did not undertake to bind the other "sixteen heirs." We are not furnished with the charge of the judge, but we infer from the issues that the action was finally tried as one against A. D. K. Wallace alone for damages for refusal to convey his individual fourth interest, although the complaint charged the breach against all the owners. Certainly no cause of action is made out, upon plaintiff's own evidence, against the other defendants, and we think, upon consideration, that none is made out against A. D. K. Wallace himself. There is an entire failure of evidence upon the second issue, and it was incumbent upon plaintiff to establish the affirmative of that issue by a preponderance of the evidence. The only evidence bearing thereon is that of plaintiff herself and defendant Wallace.

Upon direct examination, plaintiff stated that, after the others refused to sell, she asked Wallace to give her a chance at his part, and that he refused to consent. On cross-examination, however, the plaintiff seems to have retracted that statement for she expressly admits that Wallace agreed "that he would let me have his part, which was one-fourth interest." The defendant Wallace testifies: "Mrs. Mitchem came (642) to see me in October, 1905, and I told her that the other heirs had repudiated the contract. I told her that I would let her have my part, and she said that she did not want my part or interest unless she could get it all. J. C. Hampton and H. B. Morgan were present." These two witnesses corroborate the statement of Wallace.

Although plaintiff admitted that Wallace offered her his share of the land, and although Wallace testified to the same fact, yet plaintiff admits that she never offered to pay Wallace a penny of the purchase money and never tendered a penny to Goode, the depositary of the contract.

It seems quite plain to us that there is nothing in the evidence to sustain the finding upon the second issue, and that, upon her own showing, the plaintiff is not entitled to recover damages for breach of a contract which she made no attempt to perform on her part. If Wallace had refused to sell his part of the land, after contracting to do so, plaintiff might have been relieved of the necessity of tendering to him, or to Goode, Wallace's portion of the purchase money, which was one-fourth. But Wallace did not refuse, according to plaintiff's own admission, as well as his own testimony, and it therefore was incumbent on her to tender his part of the purchase money before she could call for specific performance or sustain an action for damages for a breach of the contract.

The motion for nonsuit is allowed.

Reversed.

(643)

THOMAS SETTLE ET AL. v. SOUTHERN RAILWAY COMPANY AND YANDLE BROS., CHARLES YANDLE COMPANY AND CHARLES YANDLE.

(Filed 19 May, 1909.)

1. **Evidence, How Construed—Nonsuit.**
The plaintiff's evidence must be accepted as true and construed in a light most favorable to him, upon an appeal from a motion as of nonsuit upon the evidence.

2. **Negligence—Evidence—Blasting—Dynamite—Nonsuit—Questions for Jury.**
Evidence of negligence, in an action for damages caused by blasting, is sufficient to be submitted to the jury, and to refuse a motion as of

nonsuit upon the evidence, which tends to show that plaintiff's house was injured by concussions and vibrations resulting from defendant's blasting, causing 200-pound rocks to be hurled a great distance across a river, and no attempt was made to confine or smother the blasts, in which over two hundred pounds of powder and twenty sticks of dynamite were used at a time.

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

ACTION tried before *Ward, J.*, and a jury, at September Term, 1908, of BUNCOMBE.

Defendants appealed.

J. C. Martin, J. H. Merrimon and J. G. Merrimon for plaintiffs.
Wells & Swain for defendants.

BROWN, J. This action was originally instituted against the Southern Railway Company and the above-named defendants, Yandle Bros., Charles Yandle Company and Charles Yandle, contractors, for damages to plaintiff's house from blasting operations, conducted by the said contractors in constructing a track for the railway company. The suit was not prosecuted against the latter, and judgment was obtained against the contractors. The jury found that the defendants were guilty of negligence and that the property of plaintiffs had been injured by
(644) reason thereof. The only exception is to the refusal of the court to nonsuit the plaintiffs. On such motion the plaintiff's evidence must be accepted as true, and construed in the light most favorable to him. *Millhiser v. Leatherwood,* 140 N. C., 235.

There is much more than a scintilla of evidence in this case. The plaintiff's house was injured by concussions and vibrations, which were the result of blasting. Rocks weighing 200 pounds were hurled a great distance and across the French Broad River. No attempt was made to confine the blasts or to smother them. In making the blasts, as much as eight kegs (over two hundred pounds) of powder and twenty sticks of dynamite were used at a time. The evidence is much stronger than the evidence in *Blackwell v. R. R.,* 111 N. C., 151, and *Kimberly v. Howland,* 143 N. C., 398.

We are not prepared to say that there is no evidence of negligence sufficient in probative force to be submitted to a jury.

The motion to nonsuit was properly overruled.

No error.

Cited: Christman v. Hilliard, 167 N. C., 6.

ALFRED McDEVITT v. GEORGE McDEVITT.

(Filed 19 May, 1909.)

Partition—Report of Commissioners—Exceptions, When Taken—Amended Exceptions—Waiver of Time—Appeal and Error—Cause Remanded—Procedure.

One of the parties to a partition proceeding appealed within the twenty days fixed by the statute, and had the clerk enter upon record his objection and exception to the report of the commissioners. After twenty days had expired, said party and his attorney appealed and filed amended exceptions, which were received and filed by the clerk. Some months later the motion to confirm was heard by the clerk, who declined to consider the exceptions: *Held* to be error, as exception was duly entered within twenty days, and the clerk had power to allow amended exceptions after the expiration of twenty days, and the action of the clerk was in effect allowing such amendments. Cause remanded.

APPEAL from judgment of *Ferguson, J.*, at January Term, (645) 1909, of MADISON, affirming the order of the Clerk of the Superior Court of Madison confirming the report of commissioners in partition proceedings.

Defendant appealed.

Gudger & McElroy for plaintiff.
W. W. Zachary for defendant.

BROWN, J. This was a special proceeding, begun before the Clerk of the Superior Court of Madison County, for the purpose of partitioning land between tenants in common. There was a decree entered up, by consent, appointing commissioners to divide the land. The commissioners proceeded, on 16 May, 1908, to divide the lands, and filed their report on 20 May, 1908. During the month of May, 1908, and before the twenty days for filing exceptions had expired, the defendant went to the clerk and notified him that he desired to file exceptions to the said report, whereupon the clerk, in the presence of the defendant, made the following memorandum: "George McDevitt, the defendant, comes into court and objects to the report of the commissioners in this cause and asks that the same be not confirmed. This the __ day of May, 1908. J. H. White, C. S. C." On 13 July, 1908, the defendant, through his counsel, filed amended exceptions, setting out various grounds why the report should not be confirmed. The amended exceptions were received by the clerk, without objection, and the matter remained *in statu quo* until 15 October, 1908, when the clerk confirmed the report, upon the ground that no exception had been filed within twenty days from the

filing of the report. The clerk's judgment, upon appeal, was affirmed by the judge of the Superior Court.

This Court has held, in *Floyd v. Rook,* 128 N. C., p. 10, that exceptions must be filed within the twenty days after the report is filed. But we do not construe either the decision or the statute as forbidding amendments to the exceptions after the expiration of that time; nor are we prepared to hold the clerk upon good cause shown, may not extend the time for filing exceptions.

(646) In this case, however, the defendant did except and object to the report within the twenty days, and later on filed amended exceptions, without objection. They were received by the clerk and filed by him thereby signifying his official consent to such amendments. They remained on file for several months, and when the cause was heard, on 15 October, the clerk erred in not considering them on their merits.

The cause is remanded to the clerk, with directions to give notice to plaintiff and defendant, fixing a day, and hear the report and exceptions thereto.

Reversed.

P. C. JONES ET AL. V. TOWN OF NORTH WILKESBORO.

(Filed 19 May, 1909.)

1. **Injunction—Cities and Towns—Municipal Powers—Contract for Watershed—Application to Rescind Contract—Pleadings—Demurrer.**

   In an action for injunction against the board of commissioners of a city acquiring certain property for a watershed to supply the town with water, which is alleged in the complaint to be a nuisance, threatening the lives of the citizens if so used, a demurrer on the ground that it does not appear that plaintiffs, citizens and property owners, had applied to the municipal authorities to rescind the contract of purchase, is bad.

2. **Injunction—Cities and Towns—Municipal Powers—Corruption—Water Supply—Health of Citizens—Demurrer—Answer.**

   It is not necessary for the complaint to allege corruption or moral turpitude on the part of a board of town commissioners in purchasing property for a watershed and waterworks to supply the citizens with water; and a demurrer to a complaint, in a suit brought by citizens and property owners to restrain such action, alleging that it would be a public nuisance and endanger the health and lives of the people, admits the truth of such matters and should be overruled. In this case the defendant was required to answer, and, upon notice, the motion for injunction to be heard before the judge having jurisdiction.

(647) ACTION for injunctive relief, heard by *Justice, J.,* at March Term, 1909, of WILKES.

The plaintiffs allege:

1. That they are citizens and property owners of the town of North Wilkesboro, N. C., and as such are interested in the welfare of said town and its inhabitants, and have started a suit in the Superior Court of Wilkes County against the above-named defendant.

2. That an election was held by the voters of said town on the question of issuing bonds to put in a system of waterworks in said town, at an election held on the ___ day of _____, 1908, in the sum of $30,000 for said waterworks, which election was declared carried.

3. That, a short time prior to said election, the Mayor and Board of Commissioners of North Wilkesboro, fearing that said bond issue would not carry, caused to be published and circulated among the voters the following circular: "To the voters of North Wilkesboro: As there seems to be quite a misunderstanding as to the position of mayor and commissioners on the waterworks question, we wish to state that each and every member of said board are in favor of the gravity system, with water brought from Brushy Mountain preferred, and are not in favor of taking water from Reddie's River. We wish to state, further, that there is not any proposition on foot to purchase the Hackett Bros. water power. J. E. Finley, J. R. Combs, R. W. Gwyn, H. O. Absher, J. D. Moore, commissioners; Oscar C. Dancy, mayor."

4. That since such election, in utter violation of their pledge, three of the above-named commissioners are attempting to close a deal with Hackett Bros., or rather with the Gordon Manufacturing and Power Company, for the purchase of said mill tract of land, with all its appurtenances, for said town, and out of the mill pond are proposing to supply a system of waterworks by pumping water with an engine, which water is to be used for drinking purposes by the inhabitants of said town.

5. That Reddie's River, which flows into Hackett's mill pond, passes through one of the most populous sections of Wilkes County, as well as many creeks and smaller tributaries that flow into said river, and it would be utterly impossible for the town authorities to comply (648) with sections 3045 and 3048 of the Revisal in protecting the watersheds.

6. That by reason of many families living upon the numerous watersheds for the first fifteen miles, to say nothing of the many who live beyond the fifteen-mile limit, but are upon the watersheds, it will be impossible to use this water for drinking purposes, and it will render the inhabitants of the town liable to the great scourge of typhoid fever which frequently rages to considerable extent upon the watersheds of Reddie's River, as affiant believes.

7. That several years ago typhoid fever prevailed in the town to a

very considerable extent, and your affiants have heard that the doctors attributed it to the use of ice taken from Hackett's mill pond, and directed that the use of ice from said pond be stopped.

8. That not only are the watersheds on Reddie's River outside of the corporate limits of said town so thickly settled that it renders its water unfit for use, but the watersheds of said river within the corporate limits of said town, if there were no other objection, would render the use of said water dangerous to the life of the citizens.

9. That upon the watersheds within said town there are many dwelling houses, and the only drainage is into Reddie's River, and only at enormous expense to said residents of the town, or to the town itself, can this drainage be brought into the river below the mill pond.

10. That if permitted to buy this property and operate from said mill pond a system of waterworks, irreparable damage and loss will be sustained, not only by the plaintiffs, but the health and well-being of the citizens of the town will be greatly endangered.

It was further alleged that a supply of pure water could be had from the Brushy Mountains, etc., all of which was duly verified.

Plaintiffs ask that a restraining order issue, etc. Defendant demurred to the complaint, and assigned as grounds for demurrer (649) that—

1. It does not appear that plaintiffs made application to the town or its authorities to rescind the contract for the purchase of the Hackett property.

2. That the petition, taken as a whole, does not set forth grounds sufficient to justify injunctive relief, in that (*a*) it does not show that the commissioners of said town grossly abused their discretion in making a contract for the purchase of the Hackett property; (*b*) it does nothing more than question the ability of the town to maintain a waterworks system, using the water from Reddie's River, inspecting its watershed and filtering said water, as to which the court can not interfere.

His Honor sustained the demurrer, refused the injunction, and adjudged that plaintiffs pay the costs of the action. Plaintiffs appealed.

W. W. Barber for plaintiffs.
Finley & Hendren for defendant.

CONNOR, J. While the court does not in express terms dismiss the action, it is evident that such is the effect of the judgment. The only relief asked is that defendant be enjoined from installing the system of water supply for the people of the town, as set out in the complaint. For the purpose of disposing of this appeal, the facts set out in the complaint must be taken as true. The defendant relies upon the principle an-

nounced in *Merrimon v. Paving Co.*, 142 N. C., 539, to sustain its first ground of demurrer. That case is not in point. There the corporate authorities had made a contract with the paving company to pave the streets, and plaintiff thought that the company was not performing its contract, and that the officers, whose duty it was to compel it to do so, in accordance with its terms, were derelict in the discharge of their duty. Without applying to the governing board of the municipality to do so, they brought the action. Upon a well-settled principle and uniform line of decisions, we held that they could not maintain it without making the essential averments, showing that the authorities refused to perform their duty, or such other averments as showed that a demand was useless and would be of no avail. Here the allegation is that the municipal authorities are threatening to establish and maintain a public nuisance, endangering the health and lives of the people. (650) The demurrer admits the truth of the allegation. The first cause of demurrer can not be sustained. The second cause assigned involves the proposition that, unless a gross abuse of the discretion vested in the authorities is alleged, the court has no power to interfere. The rule by which the courts have been governed in the exercise of the injunctive power is well stated by *Mr. Justice Hoke*, in *Rosenthal v. Goldsboro*, 149 N. C., 128. There the authorities, deeming it conducive to the public health, directed the removal of shade trees on the street upon which plaintiff resided. It is said in the opinion: "The Court will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare, unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion." This is sustained by a number of authorities cited in the opinion, and, we think, correctly marks the limitation upon the exercise of discretionary municipal authority. It falls short of holding that the discretion is without any limitation. It is not consistent with our conceptions of a municipal government of granted powers—certainly in the method of exercising them—that there should be no limitation, or, at least, that when called into question, in good faith, by those who are interested in the result, officers may admit such allegations as are made here and successfully maintain the position that the citizens are without remedy. Conceding that the rule is correctly stated in the decision cited, we think that plaintiffs' allegations bring their case within the power of the Court to interpose. It is not necessary to allege corruption or moral turpitude. It is manifest that a municipal corporation has no legal right to establish and maintain a condition which creates a public nuisance, *per se*—that is, a condition which seriously endangers the health and lives of the people. *Harper v. Milwaukee*, 30 Wis., 365. The injunctive power of the court will

be exercised with great caution, and only in a clear case. We decide in this appeal that the defendant was called upon to answer the allegations in the complaint. We do not think it should be permitted to dismiss charges so serious in their character. It may be that,
(651) upon the filing of an answer, the authorities can show that the conditions are not correctly stated, and that by proper precaution the proposed water supply is either not impure or that by proper methods it can be purified. Of course, the Court could not undertake to direct the method of supplying the town with water. As the case is before us only upon demurrer, we forbear discussing the question further than is necessary to dispose of the exception to his Honor's judgment. The defendant will file such answer as it may be advised, and upon notice the motion for an injunction will be heard before the judge having jurisdiction in the premises.

There is

Error.

HOKE, J., dissenting: I differ from the Court in the disposition made of the present case. While there are allegations in the complaint which seemingly tend to show that a public nuisance will be created if defendant is allowed to proceed, a perusal of the entire complaint will disclose that such allegations rest necessarily in surmise, and are not in reality stated as facts, but deductions made by plaintiff from certain recognized and admitted physical conditions, and that the real controversy presented is a difference between the governing authorities of the town and certain citizens therein as to the most desirable plan or scheme for obtaining a good water supply for the municipality and the citizens thereof.

In passing upon the questions presented we should not close our minds to recognized facts, and are allowed to take judicial notice of certain physical conditions which appear and are essential to a proper decision of the matter. We know that Reddie's River is a bold mountain stream, and at the point indicated, not far from its source; and we know, too, that there are methods very generally in use by which water far more unpromising than this is made available for domestic as well as general purposes, and there is no good reason to doubt that, by a simple and feasible way of treating the water of the stream in question, a copious, satisfactory and healthful supply of water can be obtained.
(652) One grave objection to adopting and acting on plaintiff's statements—made apparently as facts, though it clearly appears that they amount to nothing more than apprehensions on their part, from conditions and actual facts fully set out—is that, under our decisions, the same position which calls for a restraining order may, and likely

will, require, if the complaint is reasonably supported by affidavits containing allegations of the same general character, that the question should be referred to a jury for ultimate decision; and thus the people who have sanctioned the measure by their votes will be indefinitely deprived of the water desired and necessary for their comfort, convenience and safety. If this plan is checked, any other is liable to be arrested on just such indefinite allegations, and it will prove well-nigh impossible for the municipal authorities ever to carry into effect their lawful and beneficent purpose of securing for the inhabitants of the town a satisfactory and sufficient water supply.

It is well recognized, and chiefly for the reasons presented here, that these matters of local concern are and should be matters largely of local regulation, and only in rare and extreme cases are the courts allowed to interfere in any way, and should never undertake to direct and control local authorities as to how they should act on matters which rest in their judgment and discretion. While there are general allegations of serious injury threatened if the present plan of defendant is carried out, on considering the complaint as a whole, it is clear that such statements rest only in apprehension and surmise, and that on the real and ultimate facts this suit is but an effort to compel the municipal government of North Wilkesboro to adopt a different plan than that on which it has entered, and one which plaintiffs think will better promote the welfare of the town.

This is clearly a matter which rests in the judgment and discretion of the town government, and, as heretofore stated, it is a principle fully established, here and elsewhere, that courts will never undertake to direct and control these municipal authorities as to how they shall act or what plan or method they should adopt on matters which the law has wisely referred to their judgment and discretion. *Board of Education v. Commissioners, ante,* 116; *Kinston v. Wooten, ante,* (653) 295; *Ward v. Commissioners,* 146 N. C., 534; *Brodnax v. Groom,* 64 N. C., 244; *People v. Knickerbocker,* 114 Ill., 539; *Cecott v. Wayne,* 59 Mich., 509.

I am of opinion that the position of the defendant should prevail and the judgment of the court below dissolving the restraining order should be affirmed.

BROWN, J., dissenting: I concur in the dissent of *Mr. Justice Hoke.*

It is true that a demurrer technically admits the truth of the facts alleged in the complaint, but it also raises the question of the power of the courts to grant the relief prayed for in the case, and that relief, broadly stated, is that the court take away from the municipal officers

of the town the right to determine what is best for their municipality and to substitute in their places the judgment of a jury.

The real question involved on this appeal is, does the complaint state a good cause of action? This is raised, as well by the demurrer as by the motion made by defendant in this Court to dismiss the action, which motion, it is conceded, can be made at any time in the court below or in this Court.

Assuming that the defendant had filed an answer and denied every allegation in the complaint, it could then make the same motion. I see nothing alleged in the complaint which, if denied by the answer, can properly be submitted to a jury or determined by a judge. The only issue which can be raised upon this complaint is as to whether the commissioners of the town of North Wilkesboro have agreed upon and are about to install a water-supply system which may be deleterious to the health of its inhabitants.

There is no suggestion, much less allegation, that the commissioners, or any of them, are acting in bad faith or have any personal or pecuniary interest in the lands comprising the watershed, or in Hackett's pond, or are acting in any dishonest or fraudulent manner. Therefore I am of opinion that, under our Constitution, laws and form of gov-
(654) ernment, the courts are not vested with a supervision and control of the honest exercise of the powers of the commissioners of the town. Under the law governing the town of North Wilkesboro the duty of providing a supply of wholesome water is left to the sound discretion of the town authorities whom the electors have chosen to administer their affairs. It is hardly to be supposed that such authorities have adopted a system of water supply which will bring on an epidemic of typhoid fever, and we are bound to assume that they have given the matter a thorough investigation, with, perhaps, expert assistance, before deciding so important a matter. Are twelve persons or five judges any better able to determine what is best for the welfare of the town than its chosen authorities, who reside there, drink the same water, breathe the same air, pay the same taxes and are in all respects identified with the interests of all other citizens? The power to determine the matter is delegated, under the Constitution and laws of the State, to the board of commissioners of the town. What right has this Court to substitute a jury of twelve men in their places, or to enjoin the honest exercise of powers conferred exclusively upon the defendants?

I know of no case to which the words of a great judge are more applicable than to this: "For the exercise of powers conferred by the Constitution," says *Chief Justice Pearson,* "the people must rely upon the honesty of the members of the General Assembly and of the per-

sons elected to fill places of trust in the several counties. The Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the Government or upon the county authorities." *Brodnax v. Groom*, 64 N. C., 250.

Again the *Chief Justice says*: "In short, this Court is not capable of controlling the exercise of power on the part of the General Assembly or of the county authorities, and it can not assume to do so without putting itself in antagonism as well to the General Assembly as to the county authorities and erecting a despotism of five men, which is opposed to the fundamental principles of our Government and the usages of all times past."

We have affirmed and acted upon these heretofore well-settled (655) principles at this term, in *Hightower v. Raleigh, ante*, 569.

In the absence of any allegation impeaching the good faith of the commissioners in adopting a water-supply system, I think the motion to dismiss the action should be granted.

Cited: Hines v. Rocky Mount, 162 N. C., 418.

R. G. McMANUS v. SOUTHERN RAILWAY COMPANY.

(Filed 19 May, 1909.)

1. Nuisance, Public—Private Rights—Special Damages.

The doctrine that a private citizen can only recover damages by reason of a public nuisance, by showing some injury peculiar to himself and differing in kind and degree from that suffered by the public generally, applies only to that class of nuisances which are, in strictness, public nuisances, without more—*i. e.*, an unlawful interference with a public right—a right enjoyed by the general public, as in case of user of a public highway; but the doctrine does not obtain where the nuisance, though public from its extent and placing, by its very existence involves the invasion of the personal and private rights of individuals.

2. Same—Evidence.

In nuisances of this second class, sometimes termed "mixed nuisances," an actionable wrong arises in favor of all persons who come within its effect and influence, and whose rights of person or property are injuriously affected; and it is not required to sustain such an action that the person injured should establish damage different in kind and degree from others in like circumstances, however numerous they may be. The right of action in such case is sustained by showing the existence of appreciable damage to the plaintiff, whether such damage be special or otherwise.

3. Same—Irreparable Injury.

To sustain an action for a nuisance, public or private, which does not involve the physical invasion of the property of another, it is always required to be shown that some appreciable damage has been suffered or that some serious or irreparable injury is threatened; and unless this is made to appear, a right to nominal damages does not arise.

4. Issues, Insufficient—Judgment—New Trial.

In an action to recover damages for a "mixed nuisance," where the defendant answered, denying the existence of the alleged nuisance, and also denying that the plaintiff was the owner or lawful occupant of property adjacent thereto or within its influence, and two issues were submitted—(1) as to the existence of the nuisance, and (2) as to the existence of special damages—and the verdict on the first issue established the existence of the nuisance, and on the second issue negatived the existence of special damage, the plaintiff was not entitled to judgment on such a verdict, because no damage to him of any kind was shown to exist, and, so far as appears, he may not own any property adjacent to the nuisance or injuriously affected by it; nor should the defendant have judgment, for the reason that, in order to sustain his action for the alleged injury, plaintiff is not required to show special damage—that is, damage differing in kind and degree from others injuriously affected by the nuisance, but only that the nuisance exists and that he has suffered damage thereby. The two questions submitted, therefore, did not determine all the essential and issuable facts involved in the action, and the cause should be referred to another jury on issues adequate and fully determinative of the controversy.

(656) ACTION for an alleged nuisance, known as the Old Rock Quarry of Charlotte, tried before *Councill, J.*, and a jury, at January Term, 1909, of MECKLENBURG.

There was allegation, with evidence, on the part of plaintiff, tending to show that plaintiff was the owner of a dwelling house and tenement property adjacent to the Old Rock Quarry, in the city of Charlotte, and that—

"3. In or about the year 1890 the said defendant, or its grantors, leased and let the said tract or lot of land in the city of Charlotte for the purpose of opening a rock quarry, and the said defendant has knowingly, carelessly and unlawfully permitted, allowed and tolerated its lessee, the city of Charlotte, to open up a rock quarry on said tract or lot of land, and to maintain a nuisance upon said premises, and is now permitting, allowing and tolerating a nuisance to exist and to be maintained on said premises, as hereinafter set out in this complaint.

"4. That the city of Charlotte, about the year 1890, commenced to open up a rock quarry on defendant's said tract or lot of land, and continued to so use said premises as a rock quarry until some time during the year 1906, when it ceased to use said premises as a rock quarry.

"5. That while operating the rock quarry on said premises the (657) city of Charlotte used violent explosives, blasting the rock, throwing large pieces of rock upon the house of this plaintiff, which blasting of rock damaged plaintiff's dwelling by causing the plastering to fall from the walls, by making great holes in the roof, and by damaging the outside walls; the said excavation reaching within a few feet of the plaintiff's premises on South College Street; and at the time of ceasing to use said premises as a rock quarry a large and dangerous excavation was left open, said excavation being from forty to fifty feet deep, and about one hundred yards wide and about one hundred and twenty-five yards long, the said excavation being left exposed and unprotected.

"6. That since the city of Charlotte abandoned the use of the rock quarry the defendant has permitted water to collect and remain in said excavation from five to thirty feet in depth, much of the water being emptied from different parts of the city; which water in said excavation becomes stagnant, emitting an unwholesome odor, to the discomfort and annoyance of this plaintiff and his tenants.

"7. That after the city abandoned the use of said rock quarry the defendant permitted, allowed and tolerated the city to haul and throw into said excavation street cleanings, rotten eggs, decayed fish, dead chickens, dead cats, and various other filth and dead carcasses from all portions of the city, which, together with the stagnant water, sent forth and emitted nauseous and loathsome odors, making the plaintiff's property almost uninhabitable, causing sickness, making the plaintiff's tenants to abandon the property and greatly reducing the rental value of all the plaintiff's property.

"8. That besides a good dwelling house, the plaintiff has on said lot a small dwelling house and several other buildings for business purposes, and on account of the nuisance allowed and permitted by the defendant on said adjoining lot, as above set out, this plaintiff has been unable to rent or get any substantial income from some of these buildings.

"9. That the defendant is guilty of a wrongful and unlawful act in maintaining, permitting and allowing said nuisance, above (658) set out, to exist on its lot or tract of land, on account of which this plaintiff has suffered and continues to suffer special and peculiar damages, being an adjoining lot owner, and not only has he been damaged in his health, but he has been and is greatly damaged in his property rights and interests, in that the market value of his said property and the income therefrom has been greatly decreased and diminished on account of the maintenance of said nuisance; all to his great damage in the sum of two thousand dollars ($2,000)."

There was general denial on the part of defendant of the essential

portions of the complaint, and evidence tending to support same. On issues submitted the jury rendered the following verdict:

1. "Did the defendant maintain or permit to be maintained on the premises a public nuisance, as alleged in the complaint?" Answer: "Yes."

2. "What special damages, if any, has the plaintiff suffered on account of said nuisance?" Answer: "Nothing."

On the verdict, both plaintiff and defendant having moved for judgment, the court signed judgment for plaintiff, ordering an abatement of the nuisance within ten months, and defendant, the Southern Railway, excepted and appealed.

Plummer Stewart and Burwell & Cansler for plaintiff.
W. B. Rodman and Tillett & Guthrie for defendant.

HOKE, J., after stating the case: It is very generally held, uniformly so far as we have examined, both here and elsewhere, that in order for a private citizen to sustain an action by reason of a public nuisance, he must establish some damage or injury special and peculiar to himself and differing in kind and degree from that suffered in common with the general public. *Pedrick v. R. R.*, 143 N. C., 485. This limitation on a right of action, so expressed in many well-considered decisions, must be understood to apply in strictness where the wrong complained of consists in the unlawful interference with some public right, a right held by a plaintiff in common with all members of a community, and does not obtain when a public nuisance involves also the invasion
(659) of the private right of the litigant. In these cases, a person who is injured in some substantial right of person or property is not deprived of his action because the wrong done is so extensive and of such a character and placing that it amounts to an indictable offense. This apparent exception may perhaps be referred to the more general rule at first stated, by considering that any and all persons who come within the sphere and influence of a nuisance to an extent that subjects them to an injury of the kind stated suffer the special or peculiar damage required to the maintenance of an action by the individual. Mr. Wood, in his work on Nuisances, so treats the question (Wood on Nuisances (2 Ed.), sec. 16), referring cases coming within the exception to the head of mixed nuisances, "public, in that they produce injury to many persons, or all the public, and private, because at the same time they produce a special and particular injury to private rights, which subjects the wrongdoer to indictment by the public and also to damages at the suit of the person injured."

The distinction to which we were adverting is very well brought out in *Wesson v. Washburn*, 95 Mass., 95, in which it was held—

"*Private Action for Nuisance General in its Operation.*—Action will lie against owners of a mill for injuring plaintiff's dwelling by shaking and jarring the same, and surrounding it with noisome odors and vapors, although all the other residents of that locality have suffered like injury. The rule that where the right invaded or impaired is a common and public one which every subject of the State may use and enjoy, an individual action does not lie, does not apply to cases where the alleged wrong is done to private property, or the health of individuals is injured or their comfort destroyed by the carrying on of offensive trades, or the creation of noisome smells or disturbing noises, no matter how extensive or numerous may be the instances of discomfort or injury to persons or property thereby occasioned."

And in the opinion, *Chief Justice Bigelow,* speaking to this question, said: "Where a public right or privilege common to every person in the community is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which (660) subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offense would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown distinct, not only in degree, but in kind, from that which is done to the whole public by the nuisance.

"But there is another class of cases, in which the essence of the wrong consists in an invasion of private right, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong so as to take away from the persons injured the right

which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act. . . . The real distinction would seem to be this: that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individ-
(661) uals. In such case, the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong, by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance." See *Manufacturing Co. v. R. R.*, 117 N. C., 579.

The nuisance established by the verdict on the first issue is of the kind considered in the opinion just quoted, and would give a right of action to any and all persons who come within its influence and effect, to the extent of suffering injury to their private rights either of person or property; but plaintiff is not entitled to the judgment given him, by reason of the verdict on the second issue, to the effect that no special damage has been suffered by plaintiff on account of the nuisance, and for the lack of any finding or fact established in the record showing that plaintiff has suffered either injury or damage of any kind done or threatened. There is evidence on the part of plaintiff tending to show both, but neither has been authoritatively established, and the Court is not at liberty to infer or act upon it till this is done.

Where a nuisance has been established, working harm to the rights of an individual citizen, the law of our State is searching and adequate to afford an injured person ample redress, both by remedial and preventive remedies, as will be readily seen by reference to numerous decisions of the Court on the subject. Revisal, sec. 825. *Cherry v. Williams,* 147 N. C., 452; *Pedrick v. R. R., supra; Reyburn v. Sawyer,* 135 N. C., 328; *Manufacturing Co. v. R. R., supra; Raleigh v. Hunter,* 16 N. C., 12; *Bell v. Blount,* 11 N. C., 384; *R. R. v. Baptist Church,* 108 U. S., 318. But in wrongs of the kind presented here, not involving any physical interference with the personal or proprietary rights of another, a recovery can not be had, even for nominal damages, by simply showing that a nuisance has been created or maintained; but plaintiff must go fur-
ther and show that it has injuriously affected him in some
(662) substantial right or there is imminent danger that it will do so.

Where the essential or issuable facts are referred to a jury for decision, and there are no additional facts admitted in the pleadings, or

otherwise, and none of the kind of which a court takes judicial notice, the judgment must follow as a conclusion of law upon the verdict. In the case before us the defendant, in its pleadings, has denied that plaintiff is the owner of any property adjacent to this alleged nuisance, or that any property of his is injuriously affected thereby; and, while a perusal of the evidence discloses that no debate was made on that point in the trial below, the Court, as stated, is not at liberty, in a case of this kind, to act upon the evidence, but can only award or refuse relief upon facts established in some authorized way; and, so far as appears, there are no facts so established which show that plaintiff's property comes within the influence and operation of the alleged nuisance, and no damages, special or otherwise, have been shown which in any way affect him. Nor do we think that defendant is entitled to judgment on the verdict as rendered, for the reason that the issues are not fully responsive to the pleadings. As we have heretofore endeavored to show, the nuisance alleged in the complaint, and established by the verdict on the first issue, is of a kind and character which involves the invasion of the rights of all owners or lawful occupants of adjacent property whose individual rights are injuriously affected, and a right of action on any one of them is in no way impaired because the injury done him is the same or similar in kind to that of all others in like circumstances, however numerous. Such owner is not required to establish the existence of damage or injury special and peculiar in reference to the injury generally suffered by other adjacent owners who are similarly situated. As to them, therefore, or any one of them, the second issue imposes a greater burden than is required to establish an actionable wrong against the defendant; and in view of the kind of nuisance alleged and established, we are of opinion that the verdict is not sufficiently full and responsive to entitle either the plaintiff or defendant to judgment, in that it does not determine all the issuable facts embraced in the pleadings, and the cause should be referred to another jury. *Bryant v. Insurance Co.*, 147 N. C., 181.

For the error indicated, the judgment in favor of the plaintiff (663) will be set aside and the cause remanded, that a trial may be had on issues determinative of the rights of the parties involved in the action.

New trial.

BROWN, J., dissenting: I feel constrained to dissent from the opinion of the Court, because I am convinced that upon the issues as answered by the jury, the action should be dismissed. One question only is presented: Can the plaintiff maintain this action on the complaint, answer and verdict?

In his complaint the plaintiff alleged, in substance, that the defendant

is maintaining a public nuisance in respect to a large abandoned rock quarry in permitting the city of Charlotte to throw filth and refuse into it, whereby plaintiff is damaged. Why plaintiff does not sue the city of Charlotte is not stated. Upon the trial these issues were submitted by consent, without exception or objection, as being the only issues raised by the pleadings:

"1. Did the defendant maintain or permit to be maintained on the premises a public nuisance, as alleged in the complaint?" Answer: "Yes."

"2. What special damages, if any, has the plaintiff suffered on account of said nuisance?" Answer: "Nothing."

The defendant moved for judgment dismissing the action. The court denied the motion, and defendant appeals, assigning such refusal as error.

There is no other question presented upon this appeal.

A plaintiff can not have judgment abating a public nuisance when the jury have found that he has suffered no special damage. The remedy is by indictment. *Pedrick v. R. R.,* 143 N. C., 496. Special damage is such damage as is not common to the public. *Pedrick v. R. R., supra.*

In regard to a public nuisance, *Mr. Justice Connor* says in that case: "It is elementary learning that no private citizen may sue therefor, unless he suffers some damage which is not common to the public; or, to express it affirmatively, he may sue by showing that he sustained some *special* peculiar injury different in kind from the public."

(664) In *Manufacturing Co. v. R. R.,* 117 N. C., 579, the same principle is recognized as well settled in a learned opinion by *Mr. Justice Avery,* who says in opening: "The most interesting question presented by this appeal is whether the plaintiff, in any aspect of the evidence, has shown such special damage as would entitle him to redress by civil action for a public nuisance."

This special damage, as the learned judge proceeds to demonstrate, need not be confined to one person. It must be unusual, extraordinary, but not necessarily singular. Mr. Wood says: "The rule is well established that no person can maintain an action (on a public nuisance) unless he sustains a *special damage* therefrom differing from that sustained by the rest of the public." Section 645, Wood on Nuisances.

That this has been recognized law from the earliest times to the present is shown by an examination of text writers and decisions, too numerous to quote. Coke Inst., 560; *Williams' case,* 5 Coke, 72; Joyce on Nuisances, 267-261; *Reyburn v. Sawyer,* 135 N. C., 336.

Not only do the averments of the complaint state facts which constitute a public nuisance, but plaintiff admits it by consenting to the force

of the first issue. That being so, and the jury having found that plaintiff suffered no special damage, it would seem that ordinarily the action would be dismissed without much controversy.

Although the plaintiff has not excepted or appealed, the Court orders a new trial of the whole case because the issues submitted, it is said, are not determinative of the issues raised by the pleadings. And this is done *ex mero motu* by the Court, although neither appellant nor appellee asks for it, and notwithstanding that the cause is before us solely upon the motion of defendant for judgment upon the issues. If defendant is not entitled to it, then the judgment, it seems to me, necessarily stands affirmed.

There are two answers to the position of the Court which appear to me to be conclusive. The first is that the form of the issues were agreed upon, and if they are not full enough, or if they are not properly worded, it is plaintiff's fault. He should have excepted and (665) tendered others. This has been decided repeatedly. Clark's Code, sec. 395.

In *McDonald v. Carson,* 95 N. C., 377, it is held that where issues are submitted, a party can not be heard to assign error that the court did not submit an issue on a particular question upon which he did not tender an issue. "It is too late," says *Smith, C. J.,* "after the trial, to complain that certain issues were not submitted to the jury if they were not asked for in apt time."

In the case at bar neither party complains of the issues submitted, and the form in which they are expressed are in strict accord with the precedents I have cited. But it is said by the Court that as these issues are not determinative of the issues raised by the pleadings, no judgment whatever can be rendered for either party. It is very singular that no such thought seems to have occurred to the counsel for plaintiff or defendant, both of whom were represented in this Court by some of the ablest lawyers in the State. I am sure they, as well as the learned judge below, will be surprised to learn that the issues they all agreed upon are deemed so wholly insufficient that no judgment for either party can be rendered upon them.

There are only two questions or issues raised by the pleadings. One is the nuisance and the other is the damage, and both were submitted to the jury. The court has not pointed out any other issues raised by the pleadings than those I have named. But the Court says, in effect, that the damages are not to be confined to special damages and that the plaintiff may recover judgment if he "has suffered either injury or damage of any kind done or threatened." While this proposition, I submit, is against all of our own precedents (*Pedrick's case, supra*), yet, admitting it, the fact remains that an issue in respect to damages was submitted

and the form of it was approved by plaintiff. If it were confined erroneously to special damages, it was plaintiff's own fault, and if he does not complain, why should this Court find fault? Surely two issues as to damages should not have been submitted, but if an additional issue in respect to some other kind of damage were proper it was incumbent on plaintiff to tender it.

(666) It is perfectly evident that the learned and astute lawyers for the plaintiff framed the damage issue in its present form, because their complaint specifies with care and particularizes the elements of damage and each item thereof, and they constitute special damages only peculiar to this plaintiff within every known and accepted definition of that term. *Pedrick v. R. R., supra; Manufacturing Co. v. R. R., supra.*

It is universally held in this country that where damages are specified in the complaint the plaintiff can recover for no other; and all damages must be specially pleaded where, as in this case, they do not *necessarily* flow to the plaintiff from the wrong complained of. 5 Enc. Pl. & Pr., 733, and cases cited. In support of his averment that he is peculiarly injured by the nuisance, the plaintiff alleges, and testifies, that he owns property near the rock quarry complained of; that his house was injured by explosions from blasting; that his property was made uninhabitable from nauseous smells, causing sickness to his tenants and himself; that the rental value of his property was reduced, and that, besides a good dwelling house, the plaintiff has on said lot a small dwelling house and several other buildings for business purposes, and on account of the nuisance allowed and permitted by the defendant on said adjoining lot, as above set out, this plaintiff has been unable to rent or get any substantial income from some of these buildings.

These are the only injuries plaintiff sustained, and they not only come within the definition of special damage peculiar to him, but the plaintiff classified them as such, for he sums up his catalogue of grievances in these words: "That the defendant is guilty of a wrongful and unlawful act in maintaining, permitting and allowing said nuisance, above set out, to exist on its lot or tract of land, on account of which this plaintiff has suffered and continues to suffer *'special and peculiar damages,'* being an adjoining lot owner; and not only has he been damaged in his health, but he has been, and is, greatly damaged in his property rights and interests, in that the market value of his said property and the income therefrom has been greatly decreased and diminished on account of the maintenance of said nuisance, all to his great damage in the sum of two thousand dollars ($2,000)."

(667) This Court has repeatedly held that it will not interfere with the discretion of the trial judge in shaping and submitting issues, if opportunity is given to present evidence upon the issues raised by

the pleadings. Clark's Code, sec. 396, and cases cited. Opportunity was not only given, but both plaintiff and defendant did introduce evidence under the issues submitted bearing upon each allegation of the complaint. In fact, if my brethren will read the evidence they will find that the whole of it is strictly pertinent to the issues submitted and that there is none of it applicable to any other issue that could be logically framed as arising upon the pleadings. As no evidence was excluded by the court, we must assume that the plaintiff introduced all he had and all that he could produce on another trial. We are not to assume that the judge erred in charging the jury as to what constitutes special damages, for there is no exception to the charge; both sides seem contented with it, and it is not before us.

Bryant v. Insurance Co., quoted in the opinion, is no authority here, for in that case no issue at all was submitted covering a material matter in dispute necessary to a decision of the controversy. Here, the issue covering the question of damages framed by plaintiff has been submitted, which issue is peculiarly responsive to the allegations of the complaint, and the character of the evidence offered fits it exactly and would fit no other issue.

The learned judge below and the twelve jurors had better opportunity to judge of the value of plaintiff's evidence than we have, and if the "twelve" erred in finding the second issue, the plaintiff seeks not to correct it by excepting and appealing, and why should this Court undertake to do so? In no event, I submit, is the Court justified in setting aside the findings already made and ordering a new trial. They should be permitted to stand, as no error has been assigned by either side affecting them.

If other additional issues are deemed essential and necessary to be determined before any judgment can be rendered for either party, then the Court shall follow established precedents. In *McDonald v. Carson*, 95 N. C., 378, *Chief Justice Smith* says: "Where, in the opinion of the Court, additional findings are necessary in order to do (668) justice between parties, the case may be sent back for trial of *additional issues.*" But inasmuch as every allegation of the pleadings and every word of the evidence are directly pertinent to the issues submitted, I fail to see the necessity for any further findings. To my mind it is plain that the jury have already passed upon the entire case, and, under such circumstances, for the Court of its own motion to order a new trial appears to me, with entire deference for my brethren, to be done at variance with the practice of the Court.

Cited: Butler v. Tobacco Co., 152 N. C., 420; *Vaughan v. Davenport*, 159 N. C., 371.

D. D. SUTTLE v. SOUTHERN RAILWAY COMPANY.

(Filed 19 May, 1909.)

1. **Railroads—Passengers—Caboose Cars—Care Required—Negligence.**

A railway company owes it as a duty to its passengers on a freight train, whether on a passenger coach or caboose, or a car temporarily fitted for the purpose, to exercise the highest degree of care and diligence of which such trains are susceptible; and while the difference in character and purposes of the trains may and should be given due consideration, there is no relaxation as to the degree of care required from the company, and it is responsible for an injury caused to a passenger on a caboose car, occasioned by a breach of its duty to exercise the care indicated.

2. **Same—Questions for Jury.**

Contributory negligence can not be determined as a matter of law upon evidence tending to show that the plaintiff was a passenger on a caboose car of defendant railroad company, got up from his seat, in a natural way, to get a drink of water, at a time his car was at a standstill at a station, while other cars of the freight train to which the caboose had been attached were being shifted, and that, when there was no reason to expect any harm would ensue, the engineer unexpectedly backed other cars onto the caboose with violence great and unusual, throwing him down, causing the serious injury complained of.

3. **Same—Evidence—Contributory Negligence.**

In an action for damages occasioned to a passenger on defendant railroad company's caboose car, caused by coupling other cars onto it in an unusually violent and unexpected manner, it is not necessary for the passenger to anticipate extraordinary and unusual dangers incident to the company's negligence, producing the injury complained of; and when from his testimony it appears that he had been injured by getting up from his seat to go for a drink of water, in the usual and natural manner, his testimony, given in the course of a long cross-examination, that he was paying no attention when the coupling was made, should be understood as meaning that he was not noticing the coupling at the time and was not expecting to be injured by such a severe and unusual shock.

(669) ACTION tried before *Ward, J.*, and a jury, at October Term, 1908, of BUNCOMBE.

The evidence tended to show that, on or about 8 October, 1905, plaintiff was a passenger on a mixed train of defendant company—a freight train, having a passenger coach attached—from Shelby to Asheville, N. C., and while in the coach he was knocked down and seriously injured by a sudden and unusual jolt given by defendant's employees in shifting other cars of the train which had been detached. Speaking to the occurrence, the plaintiff testified, in part, as follows:

Question: "Did you get hurt at any time while on that trip?"

Answer: "Yes. We run out six miles, to a little station called Wash-

burn, and they stopped, and after stopping they cut the coach that I was in loose from the freight—it was a mixed train, and they were shifting some cars out—and while my coach was standing there, I went to the water closet to get some water, and just as I was in the act of getting hold of the dipper the freight struck the front end of the coach, and I was standing in about four feet of the corner post of the water closet, and that post struck me on the side of the head, here, and the blood ran down, and there was the back of a seat right to my left and that was shelving towards me, and when I fell it bent my back over that, and from there I rolled over into the aisle; and I laid there about a minute and a half, and while I was down I could not move or speak. And there was one of the train hands in there, working on his books, and, after I had laid there some time, he asked me if I was hurt, and I did not answer him—I could not answer; and after I revived a little I made an effort to raise my right arm up and could not move it, and then I took hold with my left hand and got hold of this seat in front of me and failed to do it, and then I asked him if he would help (670) me up, and he came and helped me up, and as I went back to my seat I noticed most of the cushions off of the seats on the floor, and my seat was that way. The lick was so heavy that it had driven the seats from under the cushions and many of the cushions were on the floor. After I got in my seat, I was sitting holding to the seat in front of me, and they slashed into it again, and I hollered, and the flagman, or whoever it was that was in with me, jumped up and ran out, and from that on there was no further trouble with the train."

Q. "You say they 'slashed' into it?"

A. "I mean that the freight cars that were shifting—the cars that were making some change—and while I was standing—"

Q. "You say that they slashed into you; the jury don't know what that means."

A. "They backed into it with such force."

Q. "With how much force did they come back the second time?"

A. "Equally as much as the first time, or more."

At the close of plaintiff's testimony defendant moved to nonsuit plaintiff. Motion denied, and defendant excepted.

Under a proper charge, the question of defendant's responsibility was submitted on the three ordinary issues in actions of negligence:

First. As to negligence of defendant causing the injury.

Second. Contributory negligence on part of plaintiff.

Third. Damages.

There was verdict in favor of plaintiff, and from judgment on the verdict defendant excepted and appealed.

Adams & Adams, Frank Carter and H. C. Chedester for plaintiff.
Moore & Rollins for defendant.

HOKE, J., after stating the case: There has been no error committed in the trial of this case which gives the defendant any just ground of complaint.

(671) Where a person has been received as a passenger on one of these mixed trains, whether in a passenger coach or caboose or a car temporarily fitted for the purpose, he is entitled to the highest degree of "care and diligence of which such trains are susceptible." While the difference in the character and purposes of the trains may, and should be, given due consideration in reference to their proper management and control, there is no relaxation as to the degree of care required towards a passenger on the part of the company's employees, and for a breach of duty of the kind indicated the company may be held responsible. *Miller v. R. R.*, 144 N. C., 545; *R. R. v. Horst,* 93 U. S., 291; *Sprague v. R. R.,* 92 Fed., 59; *R. R. v. Holcomb,* 44 Kans., 332.

In *Sprague v. R. R., supra, Goff, Circuit Judge,* for the Court, quotes with appoval from *R. R. v. Horst, supra,* and, in reference to this matter, said:

"The court below seems to have founded its conclusions on the fact that the plaintiffs were traveling in a caboose car, and not on a regular passenger train. But we are of opinion that, as the defendant sold tickets to the plaintiffs, to be used in said car, which was provided for the accommodation of passengers in general, the plaintiffs were entitled to demand and have of and from the defendant the highest possible degree of care and diligence, regardless of the kind of train they were on. A railroad company is liable for the negligence of its servants resulting injuriously to its passengers, whether they are traveling in the luxurious cars of the modern train or in the uncomfortable caboose of the local freight; for in all such cases the law requires that the highest degree of care that it practicable be exercised. The reasons for this rule are well known and are based upon wise public policy and the plainest principles of justice. The Supreme Court of the United States, in alluding to this matter (*R. R. v. Horst,* 93 U. S., 291), said: 'Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight trains. The same dangers are

(672) common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason, in the nature of things, why the passenger should not be as safe upon one as the other. With

proper vigilance on the part of the carrier, he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The public have no choice but to use it . . . The rule is beneficial to both parties. It tends to give protection to the traveler, and warns the carrier against the consequences of delinquency. A lower degree of vigilance than that required would have averted the catastrophe from which this litigation has arisen. *Dunn v. R. R.*, 58 Me., 187; *Tuller v. Talbot*, 23 Ill., 357; *R. R. v. Thompson*, 56 Ill., 138.'"

This being the correct principle, a mere statement of the testimony above set out affords convincing evidence of negligence on the part of the defendant company causing the injury, and justifies the finding of the jury on the first issue. The defendant did not seriously contend that there was error in this respect, but it was earnestly urged that upon the entire testimony the court should have held, as a matter of law, that the defendant was guilty of contributory negligence barring recovery, and this on the evidence above stated, and the additional questions and answers appearing in the course of a long cross-examination, as follows:

Question: "You know that the jolting and jars on a freight train are rougher than they are on a passenger train, don't you?"

Answer: "I don't know about the couplings."

Q. "Did you ever see them handling the trains—the starting and the coupling?"

A. "Yes; I know they are rough."

Q. "I ask you if you were not simply standing in that car, paying no attention when the coupling was made, and you fell over on the side?"

A. "Of course, I was paying no attention, my coach being standing still, and I was struck and knocked down."

There is doubt if this answer should be given any special significance on the subject, coming, as it did, in the midst of a (673) prolonged examination, in which the witness had placed the entire facts before the jury. Clearly the witness did not mean to say that he was at the time entirely unobservant of care for his own safety, but, in reference to the question, and by fair intendment, he should be understood to mean that he was not noticing the coupling at the time, nor expecting to be knocked down by any such severe and unusual shock. Certainly, he had nothing to indicate any lack of care, for he had only gotten up to get a drink of water, and the jolt came just as he was getting hold of the dipper. In any event, the authorities are to the effect that getting up for this purpose, in the usual way, and on a train of this character, does not import negligence as a matter of law. While a passenger on these mixed trains is held to a degree of care commensurate with the increased dangers which are ordinarily incident to their man-

agement, he is entitled to have his conduct weighed and his rights determined in reference to such trains when *carefully* and *properly* managed, and he is not required to anticipate such extraordinary and unusual dangers as are incident to the company's negligence.

This is the rule as stated by *Walker, J.*, for the Court, in *Marable v. R. R.*, 142 N. C., 557, in which it was held that:

"4. In taking passage on a freight train a passenger assumes the usual risks incident to traveling on such trains, when managed by prudent and competent men in a careful manner."

And, in reference to the question directly presented here, it is very generally accepted that standing up, under certain circumstances, or getting up from one's seat for a natural purpose, or going for a drink of water and the like, is not negligence *per se*, but the question should, as a rule, be referred to the jury under a proper charge. *Tillett v. R. R.*, 118 N. C., 1031; *Bunn v. R. R.*, 64 N. J. L., 30; *R. R. v. Masterson*, 16 Ind. App., 323; Hutchinson on Carriers (3 Ed.), sec. 1217.

In *Tillett's case* it was held:

"7. A passenger has a right to presume that the servants of the carrier will properly discharge their duties. Consequently, one (674) who enters a railroad passenger car is not guilty of contributory negligence because he fails to rush into the first seat he reaches, although he knows the train is about to be coupled."

The case to which we were referred by counsel for the defendant (*Smith v. R. R.*, 99 N. C., 241) does not conflict with the positions sustained by these authorities. In that case the plaintiff was held guilty of contributory negligence because, from his own testimony it appeared that he had taken a position on the arm of the car seat, thus inviting the injury from which he had suffered; whether, in the present and improved methods of control and management of these trains, this ruling would now obtain, a question to which we were invited by the argument of plaintiff's counsel, it is not necessary to determine, for in the case before us no such fact appears. The evidence shows that plaintiff, a passenger on defendant's train, got up in a natural way and went for a drink of water, at a time when his car was at a standstill, and when there was no reason to expect that any harm would ensue, and when none would have ensued if defendant's train had been carefully and properly managed.

There is no error, and the judgment below is affirmed.

No error.

Cited: Kearney v. R. R., 158 N. C., 526, 553; *Thorp v. Traction Co.*, 159 N. C., 36.

IDA E. GARRISON ET AL. *v.* R. WILLIAMS ET AL.

(Filed 19 May, 1909.)

1. **Pleadings—Answer—Demurrer.**

When a complaint does not state a cause of action, the defect is not waived by answering, and defendant may demur *ore tenus*, and the Supreme Court may take notice of the insufficiency, *ex mero motu*.

2. **State's Lands—Enterer—Time for Payment—The Code—Revisal.**

The Code, sec. 2766, providing the time limit in which the enterer of the State's vacant and unappropriated lands should pay for them, applies to such entries made before the adoption of the Revisal, sec. 173, making certain changes in that respect.

3. **State's Land—Enterer—Notice of Entry, by Whom Made.**

The legislative intent is that the posting of the notice of an entry of the State's vacant and unappropriated lands should be made by its officer and not by the enterer; and the requirement that the protest should be filed within the ten days during which the notice of entry is posted (The Code, sec. 2765) is mandatory.

4. **State's Land—Enterer—Time of Protest—Condition Annexed—Limitation of Actions.**

The provision that protest must be filed to an entry of the State's vacant and unappropriated land within ten days, etc., is a condition annexed to the right of protest, and not a statute of limitation.

5. **State's Land—Enterer—Protest—Pleadings—Irregularities—Answer—Waiver—Demurrer.**

When it is alleged by an enterer of the State's vacant and unappropriated lands, in his complaint, that defendant protested his entries before the time limited for him to take out his grant, and thus prevented him from doing so, pending the proceedings to determine the validity of the protest, the failure to allege that the notice of entry was seasonably given would be but a defective statement of his cause of action, which an answer would waive, and as against which a subsequent demurrer would be bad, it being equivalent to a motion to dismiss after answer.

ACTION tried before *Ferguson, J.*, on demurrer to complaint, at (675) December Term, 1908, of BURKE.

Plaintiff appealed.

J. M. Mull and S. J. Ervin for plaintiffs.
Avery & Ervin and Avery & Avery for defendants.

WALKER, J. This action was brought by the plaintiffs for the purpose of having the defendants declared trustees for the *feme* plaintiff, Ida E. Garrison, of certain tracts of land, described in the amended complaint, containing about fifteen hundred acres. She alleged that, on 14

August, 1900, she duly entered said land in the office of the entry taker of Burke County, and that, in the year 1902, the defendant Richard Williams entered the same land, and his rights under said entry, if any, have passed to his codefendants, with notice of the prior entry of the *feme* plaintiff. That, on 22 December, 1902, just nine days before the time limited for the *feme* plaintiff to take out her grant, the defendants protested her entries, and thereby prevented her from having a grant issued during the pendency of the proceedings to determine the validity of the protest. That while said proceeding was pending, and dur-
(676) ing the year 1904, the defendants caused grants to be issued upon the entry laid by the said Richard Williams, and thereby acquired, though unlawfully, wrongfully and fraudulently, the legal title to the premises. That the protest of the defendants was, at August Term, 1905, of the Superior Court, decided against them, and the *feme* plaintiff thereupon, and within nine days after the rendition of the judgment of the court in the said proceeding, obtained warrants of survey and received grants from the State for the said lands. Answers were filed by the defendants, denying the fraud alleged in the complaint and asserting title to the land in dispute. When the case was called for trial the defendants demurred *ore tenus* to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained. The plaintiffs excepted and assigned the following errors:

"1. That the court permitted the defendants, who had filed an answer, to demur *ore tenus* to the amended complaint, when the cause was upon the calendar for trial and had been reached and called for trial.

"2. That the court refused to tax the defendants with the cost of the witnesses subpœnaed and in attendance upon the court for the trial of the cause, the same being upon the calendar and having been reached and called for trial upon the pleadings.

"3. That the court sustained the defendant's demurrer *ore tenus* and ruled that the amended complaint failed to state a cause of action.

"4. That the judgment rendered was erroneous."

Disposing of the question of procedure *in limine,* we have repeatedly held that where a complaint states no cause of action such a defect is not waived by answering. The defendant may demur *ore tenus,* and, furthermore, this Court may take notice *ex mero motu* of the insufficiency of the complaint in this respect. If the cause of action, as stated by the plaintiff, is inherently bad, why permit him to proceed further in the case, for if he proves everything that he alleges he must eventually fail in the action. *Blackmore v. Winders,* 144 N. C., 212; *Elam v.*
(677) *Barnes,* 110 N. C., 73. Our decisions upon this matter are in strict accordance with the very letter and spirit of the law. Revisal, sec. 478.

The real question in the case is, whether the *feme* plaintiff was, in contemplation of the law, prevented by the action or conduct of the defendants, or any one of them, from obtaining grants upon her entries from the State. It was provided by The Code, sec. 2766, which was in force when the entries of Mrs. Garrison were made, that "All entries of land made in the course of any one year shall, in every event, be paid for on or before the thirty-first day of December, which shall happen in the second year thereafter; and all entries of land not thus paid for shall become null and void, and may be entered by any other person." The Revisal of 1905, sec. 173, makes a different provision and requires that all entries of land shall be paid for within one year from the date of entry, unless a protest be filed to the entry, in which event the payment shall be made within twelve months after final judgment on the protest; and if the payment is not made within the said time, the entry shall be null and void and the land may be entered by any other person. This case, of course, is governed by the law as contained in The Code. If the land were not subject to entry, any person claiming title to, or an interest in, the same, or any part thereof, was authorized to file a protest with the entry taker against the issuing of a warrant of survey thereon, and the entry taker *thereupon* certified the entry and protest to the Superior Court, where the issue as to the validity of the entry was tried, but the protest was required to be filed within ten days after the posting of the notice of entry by the entry taker. Code, sec. 2765. It was evidently contemplated by the Legislature that the posting of the notice of entry should be made, not by the enterer, but by one of its officers, namely, the entry taker, and that the protest should be filed within ten days during which the notice of the entry was posted. This provision of the law we regard as mandatory. The protest must be filed within the time fixed by the statute. It is a condition annexed to the right of protest, and not a statute of limitation. The time for paying the purchase price and taking out a grant had not expired when the protest was filed.

It does not appear by any allegation in the pleadings whether (678) the entry taker ever posted notice of the plaintiff's entries. If it was necessary for the plaintiff to have alleged that the notice had not been seasonably given by the entry taker, so that the protest was filed in time and she was thereby prevented from obtaining her warrant of survey and her grants, her failure to do so would constitute only a defective statement of her cause of action, and the defendants, having answered, instead of demurring, waived any such defect. They can not avail themselves of the omitted allegation, if it is a defect, by demurring *ore tenus,* which is equivalent to a motion to dismiss after they have answered. *Masten v. Marlow,* 65 N. C., 695; *Halstead v. Mullen,* 93 N. C., 252. We need not now consider the question argued by counsel—

whether, in law, the protest delayed action on her part in perfecting her entry and procuring her grants, so as to entitle her to the relief she demands. We will decide that question when the facts of the case are before us. The complaint sufficiently alleges a cause of action, even if it is defectively stated, and is good as against a demurrer *ore tenus* or motion to dismiss under the circumstances of this case.

The court erred in sustaining the demurrer.

Error.

Cited: Walker v. Parker, 169 N. C., 152, 153.

J. H. WHITE v. HANS REES' SONS.

(Filed 19 May, 1909.)

Attorney and Client—Judgment—Excusable Neglect—Duty of Client.

A person having a suit in court should at least give it such attention as a man of ordinary prudence would usually give to his important business; and when he and a firm of lawyers who represent him have been notified that his case will be called on a certain day of a term of court, and he did not attend and no one attended to represent him, and it does not appear that he had consulted with his lawyers or taken any other steps to protect his interests, excusable neglect to set aside a judgment rendered therein is not shown at a subsequent term by the fact that the member of the law firm having this matter especially in charge was too ill at the time to attend court.

(679) MOTION heard by *Ward, J.,* at August Term, 1908, of MADISON, to set aside a judgment rendered by *Guion, J.,* at October Term, 1907. Motion refused; defendant appealed.

Gudger & McElroy for plaintiff.
Davidson, Bourne & Parker for defendants.

WALKER, J. This is a motion to set aside a judgment upon the ground of excusable neglect, under Revisal, sec. 513. It appears that the case was called for trial on Monday of October Term, 1907, and the defendants failed to appear in person or by counsel. The defendants and their counsel, a firm composed of three members, who resided in Asheville, were notified by telegram that the case would be called at all events on the next day—Tuesday. The member of the law firm who had special charge of the case was too sick to attend, but no sufficient excuse is shown for the failure of the other two members of the firm to attend, nor does

it appear why the defendants did not attend the court. On Tuesday the case was called and tried. Judgment was rendered for the plaintiff. The defendants at the same time moved to set aside the judgment upon the very grounds now assigned, but did not prosecute their motion. There was an appeal at that time from the judgment, upon the merits of the case, to this Court, which was dismissed here under Rule 17. No further action was taken in the matter until August Term, 1908, nearly a year after the judgment was rendered. The court overruled the motion of the defendants to set aside the judgment, and the latter excepted and appealed. In no view of this case was there any excusable neglect. The attorney having special charge of the case was too ill to look after his clients' interests, but the defendants were in fault. They did not attend the court on Monday, and received special notice that their case would be tried on Tuesday. Why did they not consult with their counsel and attend that session of the court and at least ask for a continuance of the case? They had sufficient time to do so. "The least that can be expected of a person having a suit in court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business." Per *Rodman, J.*, in *Sluder v. Rollins,* 76 N. C., 271. To the same effect are *Waddell v. Wood,* 64 N. C., 624; (680) *Kerchner v. Baker,* 82 N. C., 169. As said by *Dillard, J.*, in *Kerchner v. Baker, supra,* "The course of the defendant was not the care of an ordinarily prudent man in reference to his own personal interests, nor was it consistent with the proper deference and attention due from the defendant and every suitor to the known and orderly course and practice of the courts in the administration of the law." The defendants have lost their rights, if they had any to protect, by their own inattention and inexcusable neglect.

We have not deemed it necessary to set out all the findings of fact made by the judge, which would, perhaps, present the case more strongly against the defendants than those we have briefly stated. It is sufficient to say that the judge, upon his findings, committed no error in law in adjudging that the defendants' neglect was inexcusable.

No error.

Cited: McLeod v. Gooch, 162 N. C., 126; *Hunter v. R. R.,* 163 N. C., 283.

MORGANTON HARDWARE COMPANY ET AL. v. MORGANTON GRADED SCHOOL ET AL.

(Filed 19 May, 1909.)

Public Schools—Property in Trustees—Statutory Lien—Materials Furnished —Absence of Legislative Intent.

A public-school building vested in trustees for public-school purposes is not subject to a statutory lien for materials furnished for its construction, in the absence of a statute indicating a legislative purpose to the contrary.

ACTION tried by *Ferguson, J.,* who found the facts, by consent, at December Term, 1908, of BURKE.

Defendants appealed.

Riddle & Huffman, S. J. Ervin and J. T. Perkins for plaintiffs.
Avery & Ervin for defendants.

WALKER, J. The plaintiffs furnished materials to L. W. Cooper, who had contracted to build a schoolhouse for the defendant the Mor-
(681) ganton Graded School, and they filed, and now claim, a lien upon the building for the materials so furnished. The only question for our consideration is whether a public-school building is subject to a statutory lien for materials furnished for its construction. This question we must answer in the negative, if we apply the principle declared in former decisions of this Court and are governed by the great weight of authority in other jurisdictions. *Snow v. Commissioners,* 112 N. C., 336; *Gastonia v. Engineering Co.,* 131 N. C., 363. In 27 Cyc., 25, it is said that such a lien does not attach to public-school buildings, and many authorities are cited in the notes to sustain the proposition. In *Neal v. Trustees,* 121 Ga., 208, it is said: "As a general rule, in the absence of some expression in the statute making it evident that the Legislature intended it so to apply, a mechanic's-lien statute will not be construed to give a lien upon public buildings or other public property devoted to public use. Thus, a lien can not be acquired or enforced against a public-school building, or the lot on which it is situated, a courthouse, a city hall, a public bridge which is part of a public highway, or the waterworks of a municipality. In some cases the reason given for this rule is that to hold otherwise would be contrary to public policy, while in others the rule has been considered to be based upon the fact that the ordinary methods provided by statute for the enforcement of the lien can not be pursued against public property, and hence, there being no mode of enforcing the lien, it can not exist; and it has also been held that the provisions of the mechanic's-lien law could not be applied to public-school buildings, because the relation sustained by

a school district to the school property was not that of owner, within the meaning of the statute, and hence a contract with the district could not give rise to the lien," citing 20 A. & E. Ency., 295, 296. The counsel admitted that, as a general rule, a public building is not the subject of a lien for work done or materials furnished, in the absence of some expression in the statute showing the intention of the Legislature to be otherwise, but they contended that the rule did not apply when the title to the property is vested in a board of trustees. This contention is fully answered in *Neal v. Trustees,* just cited, and especially in *Trustees v. City Council,* 90 Ga., 634, where it is said: "In view of (682) the legislation to which we have referred, there can be no question as to the public character of the institution originally. The property vested in the trustees was public property and was committed to them for a public purpose. No private interest of any kind was acquired. The beneficial interest was in the public, and the trustees were merely agents of the State for the administration of the fund and the management of the institution. Since that time there has been no legislation changing the public character of the trust or parting with the control of the State over the institution or the fund connected with it. Mere noninterference with the control exercised by the trustees could not affect the rights of the State or divest the institution or the property of its public character." The question is carefully discussed in *Fatout v. Commissioners,* 102 Indiana, at p. 232, where the Court, citing *Board v. O'Connor,* 86 Indiana, 531, says: "In the mechanic's-lien law of this State there is no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use; and, in the absence of such a provision, we must hold, in conformity with the weight of authority elsewhere, that such a lien can neither be acquired nor enforced upon or against such property held for such use. The doctrine of the case last cited is decisive, as it seems to us, of the question we are now considering, adversely to the validity of the mechanic's lien which Fatout claims to have acquired, and is seeking to enforce upon and against the public-school house erected by him, in the case in hand. For there is no public property held for a more sacred public use than a public-school house of a public-school corporation, under the Constitution and laws of this State." In *Lessard v. Inhabitants of Revere,* 171 Mass., 294, the same conclusion was reached, which was based upon a full citation of the authorities. *Holmes, J.,* for the Court, said that "The general current of decisions is against the lien when the property upon which it (the lien) is asserted is held for public use." We do not find anything in our statute indicating a purpose on the part of the Legislature to change the general rule of law as thus established by the decisions of the courts in other States and, as we think, also by the decisions of this Court.

(683) The court erred in adjudging upon the findings of fact that the plaintiffs had acquired any lien upon the property of the defendant the Morganton Graded School, and its judgment, as to that defendant, is therefore

Reversed.

Cited: S. c., 151 N. C., 508; *Foundry Co. v. Aluminum Co.*, 172 N. C., 707; *Hutchinson v. Comrs., ibid.*, 845.

MURCHISON NATIONAL BANK v. DUNN OIL MILLS COMPANY AND J. D. BARNES.

(Filed 19 May, 1909.)

DEFENDANT'S APPEAL.

1. Jurors—Party in Interest—Challenge for Cause—Admission—Reversible Error.

In an action against a corporation one of its stockholders is incompetent as a juror, as he has a direct pecuniary interest in the result of the trial. When the objecting party has exhausted his peremptory challenges, the ruling of the trial court retaining such juror is reversible error.

2. Jurors—Challenge for Cause—Party in Interest—Statutory Cause—Cumulative.

The causes of challenge specified in the Revisal are cumulative to that of the incompetency of a person sitting as a juror in a cause in the result of which he is pecuniarily interested.

BROWN, J., did not sit.

ACTION tried before *Lyon, J.*, and a jury, at December Term, 1908, of NEW HANOVER.

Defendants appealed.

E. K. Bryan and Rountree & Carr for plaintiff.

J. D. Bellamy & Son, J. C. Clifford, Woodus Kellum and Godwin & Townsend for defendants.

WALKER, J. This action was brought by the plaintiff to recover the amount alleged to be due upon a promissory note executed by the Dunn Cotton Oil Mills Company to the Merchants and Farmers Bank of Dunn, N. C., and by the latter bank deposited as collateral security for its note to the plaintiff.

(684) The plaintiff sued the Dunn Oil Mills Company and J. D. Barnes jointly, Barnes having signed the note of the oil mills

company in its name, as its president, whereas the by-laws of the oil mills company required that the note should also be signed by its secretary and treasurer, which was not done, and Barnes notified E. F. Young, president of the Merchants and Farmers Bank of Dunn, N. C., of such requirement, and that the note would not be valid without the signature of the secretary and treasurer. The plaintiff alleged that it acquired the note in good faith before maturity and without any notice of the provision of the by-laws of the oil mills company. It therefore sues the oil mills company upon the ground that it is liable upon the note, as Barnes had apparent authority to execute it, and joins Barnes as a defendant upon the ground that, if the oil mills company is not liable, he has falsely represented that he had authority to execute the note, and is therefore liable to the plaintiff by reason of the fraud, or as himself the maker of the note. This briefly states the facts, so far as is necessary for an understanding of the question presented for our decision.

The court rendered judgment for the plaintiff against the oil mills company for $5,000, and ordered a nonsuit as to the defendant J. D. Barnes. The oil mills company excepted and appealed, and the plaintiff excepted to the judgment of nonsuit in favor of J. D. Barnes, and appealed. The defendants, having exhausted their peremptory challenges, objected to a juror, Samuel Bear who admitted that he is a stockholder in the plaintiff bank. The court, upon evidence, found that, notwithstanding the fact of his being a stockholder, he was "a fair and unbiased juror," and overruled the challenge. In this ruling, we think, there was error. It is very true, the cause of challenge is not one of those specified in the statute, but they are merely cumulative, and it was not the intention of the Legislature to repeal the fundamental principle of the common law forbidding a person to sit in judgment when his own interests are involved. Whether there are any circumstances which will justify a departure from this elementary rule by reason of the necessity of the case, we need not consider, as no such necessity arose in the trial of the present action. The only question presented is, Was the juror competent to sit in the case? He was a stockholder of the (685) plaintiff bank, and therefore had a direct pecuniary interest in the result of the trial. This can not well be questioned. He was therefore made a judge in his own cause without any sufficient reason in law to sustain the ruling of the court. Whether he was actually biased or not is immaterial. Suppose a plaintiff in a case is called as a juror. Could we hesitate to declare his incompetency? The difference between such a case and the one before us, where the juror is the holder of stock in the plaintiff bank, is one that relates, not to the fact, but to the degree of interest. We can not do better than quote the language of *Judge Cooley,* when discussing this question, but it must not be understood that

we concur, for it is not necessary that we should do so, in all that he says. The strong language used by him but shows how closely the courts have adhered to the common-law rule and how far they have gone in its application. In Cooley on Const. Limitations (6 Ed.), pp. 506, 507, it is said: "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that *Lord Coke* has laid it down that 'Even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*.' This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause. Nor is it essential that the judge be a party named in the record. If the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party or which will be benefited or damnified by the judgment, he is equally excluded as if he were the party named. Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice Chancellor had (686) rendered a decree, the House of Lords reversed the decree on this ground, *Lord Campbell* observing: 'It is of the last importance that the maxim that "No man is to be a judge in his own cause" should be held sacred. And that it is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. We have again and again set aside proceedings in inferior tribunals because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was, on that account, a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence.' "

The cases cited by him and others, also in point, show that a corporator or stockholder is not a competent juror in a suit to which the corporation is a party. The principle as applicable to a stockholder is clearly and strongly stated in *Page v. R. R.*, 21 N. H., 438, as follows: "The juror, who owned stock in the Concord and Claremont road, was, therefore, by virtue of this contract, directly interested in the result of the cause, which he assisted to try. His interest was probably very

trifling in amount, and may not have influenced his judgment at all on the question of damages. But the principle is extremely well settled that any, even the smallest, degree of interest in the question pending is a decisive objection to a juror." Citing *Hesketh v. Braddock,* 3 Burrows, 1856; *Hawkes v. Kennebeck,* 7 Mass., 464; *Wood v. Stoddard,* 2 Johns. (N. Y.), 194. The authorities are quite uniform to the effect that a stockholder is not a competent juror if the corporation in which he is a stockholder is a party to the action. *R. R. v. Howard,* 20 Mich., 18; *Fleeson v. Savage,* 3 Nevada, 157; *Silvis v. Ely,* 3 Watts and Serg. (Pa.), 420; *Essex v. McPherson,* 64 Ill., 349; *R. R. v. Hart,* 60 Ga., 550. See, also, *Zimmerman v. State,* 115 Ind., 129; *R. R. v. Barnes,* 40 Mich., 383; *Dimes v. Canal,* 3 H. L. Cases, 759. It was held that, by the common law, a stockholder, on account of his interest in the corporation, could not be a competent witness for it. *Porter v.* (687) *Bank,* 19 Vermont, 410; *McAuley v. York Co.,* 6 Cal. 80. In *Silvis v. Ely, supra, Rogers, J.,* said: "The first error (assigned) is in rejecting a person because he was a stockholder and director in the Farmers Bank of Reading. Interest is a principal cause of challenge, and for that reason the juror was incompetent in a cause in which the bank had an interest." In this case the defendants joined in the challenge, as they had the right to do, and the oil company can avail itself, on this appeal, of the error of the court in overruling the challenge. It has been compelled to try the case with a juror in the box to whom it had objected and who was incompetent to serve. The erroneous ruling of the judge as to the competency of the juror compels us to order a new trial in the appeal of the oil company.

New trial.

PLAINTIFFS' APPEAL.

Appeal and Error—Appeal by Both Parties—Relative Merits—New Trial as to Both.

The liability of each defendant in this case depends to a great extent upon the liability of the other; and a new trial having been awarded as to one, it is therefore granted as to both.

PER CURIAM. While a nonsuit was ordered as to the defendant J. D. Barnes, we award a new trial in this appeal, without passing upon the errors assigned, because the liability of the oil company depends, to a great extent, upon the liability of Barnes, and *vice versa.* For this reason the case must be tried again as to both defendants, upon proper issues and with correct instructions as to the liability of the defendants, or either of them, according as the facts may appear.

New trial.

(688)

R. M. FOSTER AND WIFE v. JOE LEE.

(Filed 19 May, 1909.)

Wills, Interpretation of—Devises—Husband and Wife—Restraint on Alienation Void—Public Policy.

When an item of a will gives a married woman a fee in testator's land, and it is followed by an item that the "above-devised lands shall not be disposed of, but shall descend to the children of my above-mentioned daughter," the words employed in the subsequent item are an attempted restraint upon alienation, contrary to public policy, and void.

ACTION tried by *Adams, J.*, upon the pleadings and agreed facts, at April Term, 1908, of POLK.

Defendant appealed.

J. E. Shipman for plaintiffs.

S. Gallert and Simpson & Bomar for defendant.

CLARK, C. J. The sole question presented by this appeal is whether Clara May Foster is owner in fee of the land contracted to be conveyed by her and can convey a good title thereto.

It is agreed that J. M. Hamilton died seized and possessed of the premises. By item 4 of his will he devised the land in question to his daughter, "Clara May Foster, wife of R. M. Foster, and her heirs forever." By item 5 he provided that the "above-devised lands shall not be disposed of, but shall descend to the children of my above-mentioned daughter."

Item 4 gave the plaintiff Clara May a fee simple. The words of item 5 did not convert this into a life estate. There is no devise to the grandchildren; there is simply an attempted restraint upon alienation, which is contrary to public policy and void. This is settled by a long line of authorities, but it is sufficient to refer to *Wool v. Fleetwood,* 136 N. C., 460, a recent case, in which the subject is fully discussed and authorities cited by *Mr. Justice Walker.*

It is admitted that Clara May Foster has not encumbered or conveyed the premises. His Honor properly held that she owned the land in fee and had a right to convey the same, and rendered judgment against her vendee for the purchase money.

Affirmed.

Cited: Schwren v. Falls, 170 N. C., 252.

(689)

J. B. RIDDLE v. BRIDGEWATER MILLING COMPANY.

(Filed 19 May, 1909.)

1. **Justice of the Peace—Contract—Jurisdictional Amount—Interest on Excessive Principal.**

The Constitution (Article IV, section 27) and the Revisal (section 1419, subsection 1) limit the jurisdiction of justices of the peace in actions upon contract, to where the sum demanded does not exceed two hundred dollars, exclusive of interest; and a justice of the peace has no jurisdiction in an action to recover the balance of the principal due upon a note when it and the interest on the original amount thereof exceeded the sum named.

2. **Justices of the Peace—Jurisdictional Amount—Application of Payment—Interest.**

A payment made upon a note with interest then due must be applied first to the extinguishment of the interest and the remainder only upon the principal; and the holder may not apply such payments to the reduction of the principal in order to reduce the amount to that cognizable by a justice of the peace, and maintain an action in his court for the principal, as thus reduced, and the accumulated interest in an amount exceeding two hundred dollars.

3. **Justices of the Peace—Jurisdictional Amount—Summons—Demand—Remitter—Action Dismissed.**

The jurisdiction of a justice of the peace in actions upon contract is determined by the amount of the recovery demanded in the summons; and when this amount exceeds the jurisdictional amount and there is no remitter for the excess, the action will be dismissed on appeal.

ACTION tried by *Ferguson, J.*, at December Term, 1908, of BURKE. Plaintiff appealed.

Riddle & Huffman and J. T. Perkins for plaintiff.
Avery & Ervin for defendant.

CLARK, C. J. This action was begun before a justice of the peace, and dismissed, on appeal, in the Superior Court, upon the motion of the defendant, for want of jurisdiction in the justice's court.

The complaint of the plaintiff, as set out in the summons, was (690) "for the nonpayment of the sum of $200, with interest on $938.18 from 22 February, 1907, due by promissory note, being the balance unpaid, and demanded by said plaintiff."

The demand for interest on a greater sum than two hundred dollars defeats the jurisdiction of the justice.

In *Hedgecock v. Davis,* 64 N. C., 650, where the interest is held to be "a mere legal incident," it is evident that interest on the jurisdictional

amount of $200, or less, is meant, and not on any sum in excess of $200; and, therefore, that case has no application where interest on a larger sum is claimed.

The constitutional limit of the jurisdiction of a justice of the peace in civil action founded on contract is "wherein the sum demanded shall not exceed $200." Constitution, Art. IV, sec. 27, and Revisal, 1419 (1), limit such jurisdiction in such cases "wherein the sum demanded, exclusive of interest," does not exceed $200. This does not include interest on a larger sum.

The note here was $938.18. As the payment amounts to $738.39, the interest should have been calculated and added to the principal and the payment deducted, leaving the difference as a new principal. As this new principal was much in excess of $200, it was necessary to remit such excess if the plaintiff desired to bring action before a justice of the peace. The plaintiff conceived the idea that he could avoid that requirement by applying all the payment to the principal, leaving the balance due on principal $199.80. He therefore sued for "$200 principal and interest on $918.33." This was beyond the jurisdiction of a justice of the peace, who can not adjudge recovery of interest on a sum greater than $200. Besides, a payment must always be applied first to extinguish the interest, and the remainder only upon the principal.

It is the "demand," *i. e.*, what the plaintiff could recover on the face of the summons if there is no defense, which determines the jurisdiction. *Knight v. Taylor,* 131 N. C., 85; *Noville v. Dew,* 94 N. C., 45; *Allen v. Jackson,* 86 N. C., 321. There being no remitter of the excess before the justice, he had no jurisdiction, and the action was properly dismissed on appeal.

Affirmed.

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(691)

E. C. THORNTON v. SOUTHERN RAILWAY.

(Filed 19 May, 1909.)

1. **Railroads—Negligence—Burning Lands—Damages—Ownership—Possession—Evidence—Paper Title.**

To recover for the negligent burning of woods, timber, etc., in a suit against a railroad company, evidence of ownership is sufficient which shows actual and long-continued possession of plaintiff, for more than the statutory period, claiming the land as his own; and defective links in his paper title would not necessarily bar a recovery.

2. **Railroads—Negligence—Burning Lands—Ownership—Continued Possession.**

Evidence of possession of lands, in a suit against a railroad company for their negligent burning, etc., is sufficient to sustain a recovery of

damages which tends to show that plaintiff's husband had been in possession for fifty years to the time of his death, and the plaintiff since then, through tenants, who cultivate all the lands that are fit for the purpose.

ACTION for damages for negligent burning of plaintiff's timber land, tried before *Ferguson, J.*, and a jury, at December Term, 1908, of BURKE.

The following issues were submitted:

1. "Were the woods, lands, timbered trees of the plaintiff, E. C. Thornton, set on fire and burned over by the negligence and carelessness of the defendant, the Southern Railway Company, as alleged in the complaint?" Answer: "Yes."

2. "If so, what damage has the plaintiff sustained?" Answer: "Nine hundred dollars."

From the judgment rendered the defendant appealed.

M. H. Yount and John T. Perkins for plaintiff.

S. J. Ervin for defendant.

BROWN, J. There appears to be abundant evidence in the record to warrant the conclusion that the fire originated on the right of way of defendant and was caused by sparks from its engine. There is also evidence that the right of way where the fire started was in a foul condition.

The assignments of error all relate to the title to the land (692) which had been burned, and more particularly to the ruling of the court admitting in evidence the will of John Rutherford and the McPheeters grant. In the view we take of the case it is unnecessary to discuss those assignments.

There is ample evidence in the record tending to prove that, at the time of the fire, the land burned over was not only claimed by the plaintiff, but that she and her representatives were in the actual possession thereof. As a sample of the evidence, one witness testifies:

"I have heard the description contained in the deeds and grants. I know the boundaries. I have known the land for fifty years; John Rutherford had been in possession until he died, then his widow, Mrs. Thornton, ever since." Grant for 100 acres read. "I know where that land lies. John in possession of it all the time, and his widow, Mrs. Thornton, since, for fifty years; the McPheeters grant covers the home place; the residence of John Rutherford located on this tract. John Rutherford had lived on the place fifty years in my recollection; since his death Mrs. Thornton has had tenants on it. Walker Lyerly occupies it as tenant of Mrs. Thornton and cultivates all that is fit for cultivation."

That such testimony is some evidence of possession, although subject to cross-examination as to what constitutes possession, is held in *Bryan v. Spivey,* 109 N. C., 68, where the use and meaning of the terms are learnedly discussed by *Mr. Justice Shepherd.*

There being abundant evidence to go to the jury that, at the time of the fire, plaintiff had actual possession of the land burned and claimed it as her own, the alleged defective links in her paper title would not necessarily bar a recovery.

As is said by *Chief Justice Smith,* in the oft-cited case of *Aycock v. R. R.,* 89 N. C., 324, "But no harm has come to the defendant by the reception of the copies of the grants, since, under the deed from Leak, the plaintiff was, in law, in possession, through his tenant, of all the land described therein up to the boundaries, and, in the absence of other evidence, *prima facie* the owner, and he may recover for all the damage done to his possessory and proprietary rights." See, also, *Jack-*
(693) *son v. Commissioners,* 18 N. C., 177; *Ruffin v. Overby,* 88 N. C., 369; *Osborne v. Ballew,* 34 N. C., 373; *Lamb v. Swain,* 48 N. C., 370.

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

No error.

J. M. THRASH ET AL. v. COMMISSIONERS OF TRANSYLVANIA COUNTY.

(Filed 21 May, 1909.)

School District—County Board of Education—Special Tax—Proceedings—Regularity Presumed—Burden of Proof—Instructions.

In an action to impeach the validity of a local election for the levy of a special tax the presumption of law is in favor of the regularity of the conduct of the authorities, with the burden on the objecting party to show the contrary; and when the regular filing of the petition and the order for the election by the county commissioners, and their confirmation of the election, are shown, no irregularity appearing, it is not error for the judge to charge the jury that, if they believed the evidence, the plaintiffs had not made out a case.

ACTION for *mandamus* and injunction, heard before *Ward, J.,* and a jury, at November Term, 1908, of TRANSYLVANIA.

Plaintiffs appealed.

W. B. Duckworth and George A. Shuford for plaintiffs.

Shepherd & Shepherd and W. W. Zachery for defendants.

CLARK, C. J. This was an action to impeach the validity of a local election for the levy of a special tax in a special school district, held under the provisions of Revisal, sec. 4115, and the amendment thereto in 1907. The petition of the freeholders, approved by the county board of education, was regularly filed before the county commissioners, who ordered the election. The report of the judges of election was confirmed by the county commissioners.

At the close of the evidence, his Honor intimating that he would instruct the jury that, if they believed the evidence, the plaintiffs had not made out a case, they thereupon took a nonsuit and appealed.

The presumption of law is in favor of the regularity of the conduct of the authorities, and the burden was upon the plaintiff (694) to show the contrary. *Quinn v. Lattimore,* 120 N. C., 426. A careful examination of the testimony causes us to concur with the judge below. There being no legal proposition involved, but merely an examination of the evidence, it can serve no purpose to recapitulate it.

No error.

C. C. CURRIER v. W. M. RITTER LUMBER COMPANY.

(Filed 21 May, 1909.)

Contracts, Written—Construction—Employment by Month—Yearly Contracts Not Implied.

Letters merely showing an offer and acceptance of employment at a certain price per month can not be construed as implying a contract by the year.

ACTION tried before *Peebles, J.,* and a jury, at Spring Term, 1909, of MACON, to recover upon an alleged contract of employment.

From the ruling and judgment the plaintiff appealed.

Robertson & Benbow and Busbee & Busbee for plaintiff.

Shepherd & Shepherd, Fred S. Johnston and L. C. Bell for defendant.

BROWN, J. The material points in this appeal are embraced in the second and fourth issues—that is to say, whether there was a contract of employment for the entire year of 1907. The action is brought upon the assumption that there was such a contract of employment, and the plaintiff seeks to recover damages for the entire year, although he did no work after the first few days in July, 1907. If there were such a contract and he was wrongfully discharged, he would be entitled to such

damages less what he might have earned upon reasonable effort. *Smith v. Lumber Co.*, 142 N. C., 26.

(695) His Honor instructed the jury that upon the letters and other undisputed testimony there was no such contract for the entire year of 1907, but that the employment was from month to month. It is admitted that the correctness of this ruling is the only question presented.

In contracts for personal service the English rule is that when no time is fixed and no stipulation as to payment made, it is presumed to extend for a year. In this country, when no time is fixed and no stipulated period of payment made, the contract is terminated at the will of either party. 20 A. & E. Cyc., 14; *Soloman v. Sewerage Co.*, 142 N. C., 445; *Edwards v. R. R.*, 121 N. C., 490.

The evidence of the contract is wholly in writing, in the form of correspondence, and there is no evidence of any other contract subsequent thereto.

We think his Honor's interpretation of the letters is correct, and in accord with the case of *Edwards v. R. R.*, 121 N. C., 490.

No error.

Cited: Wagon Co. v. Riggan, 151 N. C., 306.

CONNIE E. FORTUNE v. SOUTHERN RAILWAY COMPANY.

(Filed 21 May, 1909.)

1. Carriers of Passengers—Negligence—Platform—Seeing Passengers Off—Custom—Invitation Implied—Ordinary Care—Trespass.

When a wife who has accompanied her husband to the train (the latter a passenger, about to depart thereon) is injured while upon the platform of a stationary coach which her husband was to take, by being suddenly thrown to the ground by the negligent and violent contact of another car run into it, the railroad company is liable in damages; the custom in such instances being an implied invitation to the wife, imposing upon the company the duty to exercise ordinary care for her safety, and not merely that of not willfully injuring her, as in a case of trespass.

2. Carriers of Passengers—Contributory Negligence—Seeing Passengers Off—Attaching Coach—Custom.

When there was evidence that a railroad company customarily left an empty coach at a station and opened it for passengers ten minutes before the departure of the train to which it was to be attached, for the use of passengers to further points on the same road, and that the plaintiff and

her husband (the latter having taken passage on this coach and the former seeing him off) attempted to enter the coach a few moments before train time, but found it locked, and while there, thus engaged, another car was suddenly run into this coach with great violence, throwing *feme* plaintiff to the ground and violently injuring her: *Held*, under the evidence of this case, not to constitute contributory negligence.

ACTION tried before *Peebles, J.*, and a jury, at July Term, (696) 1908, of HAYWOOD, to recover damages for a personal injury alleged to have been received by plaintiff, Connie E. Fortune, caused by the negligence of the defendant.

These issues were submitted:

1. "Was the plaintiff, C. E. Fortune, injured by the negligence of the defendant, as alleged in the complaint?" Answer: "Yes."

2. "Did the plaintiff, Connie E. Fortune, by her own negligence, contribute to her injury, as alleged in the answer?" Answer: "No."

3. "What damage, if any, is plaintiff, Connie E. Fortune, entitled to recover?" Answer: "Three hundred and fifty dollars."

Thereupon his Honor, upon the ground that he had committed an error in not sustaining defendant's motion to nonsuit, set aside the findings of the jury and allowed the motion, from which judgment plaintiff appealed.

In this Court it was agreed by counsel that if the opinion of the Court should be with the plaintiff, judgment should be entered for the sum assessed by the jury.

W. B. Ferguson, Frank Carter and H. C. Chedester for plaintiff.
Moore & Rollins for defendant.

BROWN, J. The evidence in this case tends to prove that the plaintiff accompanied her husband to defendant's station at Waynesville for the purpose of seeing him off as a passenger for Asheville. For the purpose of accommodating the increased travel in summer, defendant had daily an extra coach left at a certain place on the side track close to the station at Waynesville, which was attached to the train when it arrived at Waynesville from the west. It was customary to open this extra coach some ten minutes before train time and to permit passengers to enter it. On the date of the injury the car was standing at the usual place on the side track, where passengers were accustomed to board it. The plaintiff and her husband stepped on the platform of this car, with the view of entering it, about two minutes before train time, but finding the door locked, they were on the point of stepping off, when the collision occurred which caused the plaintiff's injury. They were not on the platform exceeding two minutes. At this time

there was a large concourse of persons at the station, waiting for the train. Under these conditions, and just as plaintiff and her husband were about to leave the platform, an engine was run into the side track, at a dangerous rate of speed, variously estimated by the witnesses at from fifteen to thirty miles an hour, and was caused to strike a car standing at the station platform and to drive it against the car upon which plaintiff and her husband were standing, with such force that the ends of the two cars buckled and rose from the track, and the shock threw the plaintiff down and injured her.

The learned counsel for defendant, in his argument before this Court, rested his defense very largely upon the defense of contributory negligence upon the part of the plaintiff in attempting to enter the car. We do not think there is any foundation for such defense upon the facts of the case. The evidence discloses no negligent conduct upon the part of the plaintiff, while on the car, which in the least degree contributed to the injury she received. It will not be contended in this day and generation that it is negligence for a wife to escort her husband to the station and to board a car momentarily to bid him good-bye.

The defense must properly rest upon the theory that the plaintiff was on the car without defendant's consent, and that, being a trespasser, the defendant owed her no duty, except to refrain from willful injury, and therefore as to her is guilty of no negligent conduct. This view of the evidence is properly presented under the first issue.

It is undoubtedly true that if plaintiff had been a trespasser, stealing a ride, as in *Bailey v. R. R.*, 149 N. C., 169, or a huckster (698) entering the train to sell his wares, as in *Peterson v. R. R.*, 143 N. C., 263, she could not recover. But plaintiff was not in any sense a trespasser, and under the circumstances of this case her presence on the car platform was neither wrongful nor negligent. Her presence there was not wrongful, because a wife who escorts a husband, or a husband a wife, to a seat on a railway train is not a mere trespasser to whom the company owes no duty except to abstain from willful injury. It is true, plaintiff was not a passenger towards whom the defendant was bound to exercise the highest degree of care, but she was on its premises by its implied invitation, and it was bound to exercise ordinary care for her safety. Railway companies owe this duty at least to those whom, in practice, they allow to accompany passengers in order to see them off on trains without asking special permission. *R. R. v. Lawton,* 55 Ark., 428; *Packet Co. v. Wilson,* 95 Tenn.; 1 Hutchinson on Carriers, sec. 237; *Whitley v. R. R.*, 122 N. C., 987; *Morrow v. R. R.*, 134 N. C., 92; *Moore v. R. R.*, 119 Mich., 613. This implied invitation and consequent duty to those who, impelled by ties of relationship and affection, go to "welcome the coming, or speed the parting, guest," is

founded on recognized social observances which have become a universal and inseparable concomitant of modern railway traffic.

Nor do we think the husband and wife were wholly unwarranted in attempting to enter the car at the time and under the circumstances in evidence. The car was an extra coach, brought up every morning from Asheville and left at Waynesville for the afternoon train returning there. It usually remained at the station on the side track at the place the accident occurred. It was the defendant's custom to open the car at that place ten minutes before train time, and passengers for Asheville, at once boarded it and, upon arrival of the train, it was coupled on.

In accordance with this custom, inaugurated and permitted by defendant, plaintiff and her husband boarded the car two minutes before train time in order that he might secure a seat. Finding it locked, they started back to the station, remaining on the car platform in all not more than two minutes, but were caught in the col- (699) lision. There is no evidence that they lingered on the platform unduly long or did any act that a person of reasonable prudence would not be expected to do under the circumstances. We think his Honor's first impressions of this case were the best.

The cause is remanded, with direction to enter judgment for the damages ($350) assessed by the jury.

Reversed.

J. T. HOOD v. SHERMAN MERCER ET AL.

(Filed 21 May, 1909.)

Husband and Wife—Lands—Estates—Jus Accresendi—Judgment—Against One—Lien.

A judgment against the husband does not constitute a lien on lands conveyed to him and his wife in fee, so that execution and sale thereunder of his interest can be had to satisfy the judgment debt against him, for they take by entireties, with the right of survivorship, and the interest of neither, during their joint lives, becomes subject to the lien of a docketed judgment against them or either of them.

CONTROVERSY without action submitted to *Allen, J.*, at Spring Term, 1909, of JONES.

From the judgment rendered the plaintiff appeals.

Thomas D. Warren for plaintiff.
Simmons, Ward & Allen for defendants.

BROWN, J. The plaintiff is the owner of a judgment, duly docketed on 25 October, 1907, in the Superior Court of Jones, against the defendant Sherman Mercer. On 14 February, 1908, certain tracts of land in said county were conveyed by deed executed to said Sherman Mercer and his wife as grantees in the premises as well as the *habendum*. The said Sherman Mercer and wife have subsequently conveyed certain of the lands by deed to the codefendants Jones and Bryant. The question presented on this appeal is as to whether the judgment con-
(700) stitutes a lien upon the lands to the discharge of which they can be subjected by execution.

We agree with his Honor that the judgment is no lien on the lands, and that they therefore can not be sold under execution. The estate of Sherman Mercer and wife is an anomalous one, but it still exists in this State. It would be well for the General Assembly to abolish it as to all future conveyances and let the grantees hold as tenants in common.

While, to some extent, former decisions of this Court in respect to this estate have been modified, we have held, in recent years, that under a conveyance of land in fee to husband and wife they take by entireties, with right of survivorship, and that the interest of neither during their joint lives becomes subject to the lien of a docketed judgment. During the wife's life the husband has no such interest as is subject to levy and sale to satisfy a judgment against him. *Bruce v. Nicholson,* 109 N. C., 202; *West v. R. R.,* 140 N. C., 620. It is true that where the husband had conveyed the land by deed with warranty without the joinder of the wife, and survived her, his grantee acquired title, but this was by way of estoppel.

The judgment is

Affirmed.

Cited: Edwards v. Sorrell, post, 716; *Morton v. Lumber Co.,* 154 N. C., 280; *Highsmith v. Page,* 158 N. C., 228; *Finch v. Cecil,* 170 N. C., 73; *Harris v. Distributing Co.,* 172 N. C., 16.

CHARLES E. VADEN, ADMINISTRATOR, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 21 May, 1909.)

Railroads—"Kicking" Cars—"Flying" Switches—Streets of Towns—Evidence —Negligence per se—Nonsuit.

It is negligence *per se* for those in charge of a railroad engine and train to "kick" cars or make "flying" switches along the streets of populous

towns; and when there is evidence that plaintiff's intestate, with other employees of a factory, was leaving his work at a factory in a populous town, and the intestate was in this manner killed by the defendant, in front of the factory, a motion as of nonsuit upon the evidence should be denied.

ACTION tried before *Long, J.,* and a jury, at January Term, (701) 1909, of GUILFORD, to recover damages for the negligent killing of plaintiff's intestate.

The usual issues of negligence, contributory negligence and damage were submitted and found against defendant. From the judgment rendered the defendant appealed.

The facts are stated in the opinion of the Court.

W. P. Bynum, Jr., and R. C. Strudwick for plaintiff.
Wilson & Ferguson for defendant.

BROWN, J. The defendant in apt time entered a motion to nonsuit, which the court overruled, and defendant excepted. The undisputed evidence tends to prove that the intestate, a boy thirteen years of age, was struck and killed on defendant's tracks, by a car which had been shunted onto the switch track and was moving quite rapidly towards Tomlinson Street crossing. The car had no brakeman on it and had been "kicked" onto the track by the engine, thereby making what is called a flying switch. The switch tracks were located in a populous part of the city of High Point and the intestate was killed immediately in front of Tomlinson's factory, where he worked. The evidence for plaintiff tends to prove that he was killed about thirty feet from where Tomlinson Street crosses the tracks. The evidence for defendant locates him farther from the crossing. All the evidence shows that these switch tracks were situated in a populous part of the city and adjacent to and close by factories where many persons of all ages were employed. At the time the intestate was killed the factory had just closed for the day, and the employees were filling the streets and crossings. The court permitted evidence to the effect that there is much passing by school children, factory hands, and citizens generally, along Tomlinson Street and in the vicinity of the accident, to which defendant excepted. We see no objection to this evidence. It tended to establish conditions that should have put the defendant on notice as to the necessity for caution in moving its cars at this point. *R. R. v. Smith,* 18 L. R. A., 66.

This case presents none of the features of *Bailey v. R. R.,* 149 (702) N. C., 169. The intestate in that case had wrongfully entered the switching yards and climbed on the tender of an engine and was killed in a collision.

Making "flying switches" on the railway tracks and sidings running across and along the streets of populous towns is *per se* gross negligence, and has been so declared by all courts in this country and by text writers generally. It is stated in one of the best-known text-books that the use of a running switch in a highway in the midst of a populous town or village is of itself "an act of gross and criminal negligence on the part of the company." Sherman and Red. Neg. (3 Ed.), sec. 466; *Wilson v. R. R.*, 142 N. C., 333; *Allen v. R. R.*, 145 N. C., 214; *Bradley v. R. R.*, 126 N. C., 742.

In the voluminous notes to *R. R. v. Smith*, 18 L. R. A., cited above, will be found innumerable cases selected from many courts of last resort, condemning the practice of making flying switches along the streets of towns and cities and pronouncing such practice *per se* negligence.

Upon the issue of contributory negligence upon the part of a child thirteen years of age, we think his Honor's instructions are clearly in line with what we have laid down in *Baker v. R. R., ante*, 562, and that in all respects he followed well-settled precedents.

We have examined all the exceptions and think it would be of no value to discuss them *seriatim*. It would be traveling over ground that has been much traveled before.

No error.

Cited: *Farris v. R. R.*, 151 N. C., 487; *Johnson v. R. R.*, 163 N. C., 445; *Lutterloh v. R. R.*, 172 N. C., 118.

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(703)

MURPHY HARDWARE COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 21 May, 1909.)

1. **Carriers of Freight—Penalty Statutes—Refusal to Receive—Strikes—Unavoidable Conditions—Defense.**

In an action to recover the penalty for the failure of the carrier to accept a drove of cattle for shipment (Revisal, sec. 2631) it is a valid defense for the carrier to show that the shipments were refused by reason of strikes and other conditions over which it had no control, rendering it impossible for it to make the shipments, if accepted.

2. **Same—Stock.**

The penalty against a carrier for refusing to receive (Revisal, sec. 2631) and that for failure to transport within a reasonable time (Revisal, sec. 2632) must be construed together to ascertain the entire burden placed on the carrier; and it is a valid defense, in an action for the penalty for

refusing to receive shipments of cattle, for the carrier to show that, owing to strikes and other conditions over which it had no control, it could not have transported them, if received; and the carrier, under such conditions, is not compelled to keep and feed a shipment of cattle for an indefinite time.

3. Carriers of Freight—Penalty Statutes—Legal Excuse—Defense.

A carrier may show, in defense to an action brought for the penalty under the Revisal, sec. 2631, for refusing to accept a shipment tendered, any legal defense or excuse it may have against the shipper for failure to discharge its common-law duty.

ACTION against a carrier to recover penalties, tried by *Guion, J.*, at Spring Term, 1908, of CHEROKEE.

His Honor rendered judgment against the defendant, and the defendant appealed to the Supreme Court.

The facts are stated in the opinion of the Court.

E. B. Norvell for plaintiff.

Moore & Rollins, W. B. Rodman and Dillard & Bell for defendant.

BROWN, J. The facts as set out in the record present this case:

On 4 February, 1907, the plaintiff instituted eight separate actions against the defendant to recover the sum of $2,000 penalties in each action (total, $16,000), under section 2631 of Revisal of North Carolina, for failure of defendant to receive a drove of 80 head (704) of cattle, tendered to the defendant at Murphy, N. C., for shipment to Richmond, Va. The eight actions came on for hearing at the Spring Term, 1908, of the Superior Court of Cherokee County, and for convenience and by consent were consolidated by *Guion, J.* Upon the admissions contained in the record his Honor signed judgment in the consolidated case in favor of the plaintiff, and against the defendant, for $200, it being one penalty of $50 for each day for the four days the defendant refused to receive the entire lot of cattle for shipment. The defendant demanded a trial by jury upon the issues raised by the pleadings and excepted to the refusal of the court to submit said issues, and also to the action of the court in signing judgment for $200; and further moved to dismiss said action for the reason that upon the face of said complaint it appeared that the court was without jurisdiction to try and determine said cause, for that the same was an interference with interstate commerce, and for that the statute providing such penalty upon interstate shipments was contrary to the Constitution of the United States. The court rendered the judgment in the record, from which the defendant appealed.

The statute which imposes the penalty sued for is section 2631 of the

Revisal of 1905, and reads as follows: "Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at nearest regular
(705) station at which there is an agent that such car is loaded and ready for shipment."

In its answer the defendant avers that it was prevented from furnishing cattle cars to the plaintiff on account of a strike of the machinists on its road, numbering some two or three thousand, which strike it could not control, in consequence of which a large per cent of defendant's motive power got out of order and could not be used.

The decision of the court is put upon the ground that the action is brought to recover a penalty for not receiving the cattle and not for a failure to transport, and that therefore the defense pleaded can not avail the defendant, even if true.

We are advertent to the general rule that the carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee. *Stock Yard v. Keith,* 139 U. S., 133. But we think that general rules must sometimes give way to particular cases, and that if the defense set up be true, the defendant could not be compelled to receive cattle and feed them indefinitely when it was impossible to foresee when they could be shipped. Otherwise, at a cattle-shipping point like Murphy, the carrier might, in cases of a breakdown or burning of its bridges, or a long-continued strike of its employees, find itself, in a short while, with hundreds of cattle on hand which it must feed and care for. No reasonable foresight and judgment can provide against such contingencies.

But that is not the only reason why this defense should be allowed. The penalty statutes must be taken together, so as to ascertain the entire burden imposed on the carrier. In case the defendant had received these cattle in its then unavoidably crippled condition, it would have incurred very shortly thereafter another penalty for delay in shipping, for section 2632, immediately following, imposes a penalty

for failure to transport within a reasonable time and fixes the limit of time within which to start the shipment from the initial point at two days. So it follows that if defendant had received the cattle and penned them, its inability to ship them within two days would have brought upon it another and continuing penalty for thirty days. *Bagg v. R. R.*, 109 N. C., 279. As between these two statutes (706) and in the crippled condition it could not provide against, the defendant would be placed in a helpless condition. It seems unreasonable to require a carrier to continue to receive such a commodity as live stock, especially when conditions it can not control or avoid will prevent their shipment within the time required by law. To hold that these penalty statutes admit of no defense whatever would render them amenable to the forcible criticism of the Supreme Court of the United States in *R. R. v. Mayes,* 201 U. S., 329: "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars, by reason of their temporary and unavoidable detention in other States or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather."

For these reasons we think that a statute which imposed such penalties and which permitted no defense and no excuse, however just, practically takes the property of the carrier without due process of law, because, while the carrier may be brought into court, it is denied the right to make defense or excuse, however reasonable. But we do not so construe the law.

We have considered this question at length in the case of *Garrison v. R. R., ante,* 575, in a well-considered opinion by *Mr. Justice Connor,* and have held that these penalty statutes are enacted in aid of the common law and to compel a discharge of those duties only which the common law itself imposes upon the carrier, and that (707) where the carrier has a legal defense or excuse for failure to discharge such duty it may be pleaded in an action to recover the penalty.

Upon the principles laid down in that opinion we think his Honor erred in holding that the statute admitted of no defense.

In this view of the case we deem it unnecessary now to consider the other question of interstate commerce presented on the record.

New trial.

Cited: *Reid v. R. R., post,* 769.

J. A. McCOLMAN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 May, 1909.)

Carrier of Passengers—Contracts—Charterer of Trains—Negligence—Verdict—Exemplary Damages—Immaterial as to Issue.

In an action for exemplary damages for the alleged wanton and willful failure of defendant carrier to comply with its contract to furnish and run for plaintiff an excursion train, the verdict of the jury, under competent evidence and a properly framed issue, finding that the defendant was not guilty of any breach of duty thereunder, puts an end to the action and renders unnecessary the form of the issue submitted upon the question of defendant's wanton and willful acts.

ACTION tried before *Long, J.,* and a jury, at October Term, 1908, of SCOTLAND.

The record discloses the following case:

Plaintiff, on 5 July, 1904, entered into a contract with defendant company as "charterer" of an excursion train, consisting of one baggage car and not less than five passenger coaches, to be run from Gibson, N. C., to Wilmington, N. C., and return. The schedule was set out in the contract, "subject to such changes as may be made necessary for the safe operation of the train by other train schedules of the company and such unavoidable delays as may be occasioned by damages to the equipment of the company." The other provisions of the contract are not material to the decision of this appeal. The train was fur-
(708) nished in accordance with the contract, and the excursion run on 27 July, 1904. It seems that, by reason of the weight of the rails on the portion of the road from the main line to Gibson, it was necessary to use a light engine, which was exchanged at Fayetteville for another of heavier weight. On the return trip, when the train reached Fayetteville, some difficulty was experienced in making the exchange, and a delay occurred of some five hours, from 11 o'clock P. M., until sometime the following morning. The plaintiff alleged that the engine

was defective and of insufficient capacity, that the cars were not supplied with water, and that in this and other respects the defendant company was guilty of reckless, wanton and willful negligence, whereby he sustained large damages, etc. The plaintiff, in apt time, requested the court to submit the following issues to the jury:

1. "Did the defendant wrongfully fail to transport the plaintiff, as alleged in the complaint?

2. "Was the failure to transport the plaintiff willful and wanton?

3. "What compensatory damages, if any, is the plaintiff entitled to recover?

4. "What exemplary damages, if any, is the plaintiff entitled to recover?"

The court declined to submit the issues, and the plaintiff excepted. The following issues were submitted to the jury:

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

2. "Was the plaintiff injured by the wanton and willful negligence of the defendant, as alleged in the complaint?

3. "What damages, if any, has plaintiff sustained?"

Plaintiff excepts.

The jury responded to the first issue "No," and did not answer the second and third. Judgment was rendered, upon the verdict, for defendant, and plaintiff excepted and appealed. The exceptions are discussed in the opinion.

Gibson & Russell for plaintiff.
McLean, McLean & Snow for defendant.

Connor, J. The plaintiff noted a number of exceptions to (709) the ruling of his Honor upon the competency of testimony. They were not pressed on the argument, and we find no merit in them. It was conceded that plaintiff did not sustain any substantial damage other than inconvenience and discomfort. The portion of the charge to which exception was taken and pressed upon our attention is as follows: "The plaintiff must also show that he received injuries as the direct and proximate cause of the alleged negligence by the defendant." "Has the plaintiff satisfied you, by the greater weight of evidence, that the defendant was negligent, and has he also satisfied you, by the greater weight of evidence, that as the result and proximate result of that negligence that he himself suffered the injuries of which he complains? If so, your answer to this issue would be 'Yes.' But if he failed to so satisfy you, by the greater weight of evidence, your answer to the first issue would be 'No.'" The learned counsel earnestly contends

that if his Honor had submitted the issues tendered by him, and the jury had found that defendant was guilty of a breach of the duty which it owed him as a passenger, he would have been entitled to nominal damages, which would have entitled him to ask for punitive damages upon the theory that the negligence was willful and wanton. The difficulty which he encounters is found in the fact that upon a properly framed issue the jury acquitted the defendant of any breach of duty or negligence. It is difficult to see how the question of punitive damages can arise when no cause of action is established. The plaintiff's rights and the defendant's duty are fixed by the terms of the contract, and this the jury finds has not been broken. This put an end to the action.

We have examined the record and find

No error.

(710)

WILL LOVIN ET AL. v. R. CARVER ET AL.

(Filed 21 May, 1909.)

State's Lands—Entry—Vague Descriptions—Second Enterer—Trusts and Trustees—Notice.

Prior to the Laws of 1905 (Revisal, sec. 1722) an entry of the State's vacant and unappropriated lands too vague to give notice of the boundaries of the land intended to be entered is not sufficient notice to a second enterer who has perfected his grant in ignorance of the first; and the mere running of the lines of the lands by survey or the making of a map by the first enterer which he could keep in his possession, or the warrant to the county surveyor, necessarily no more definite than the original entry, can not remedy the defective description of the entry.

ACTION tried before *Ward, J.*, and a jury, at Spring Term, 1909, of GRAHAM.

The facts, as stated in the record, are: One A. L. Adams, under whom plaintiffs claim, on 6 February, 1901, laid the following entry in the office of the entry taker of Graham County: "A. L. Adams enters and locates 300 acres of land in said county and State, in District Ten, on waters of Little Santeetla Creek, beginning on a chestnut tree and runs various courses for complements." A warrant of survey was issued 29 June, 1903, and the survey made 12 September, 1903. A grant issued 13 October, 1903. On 16 February, 1903, one Jenkins, under whom the defendants claim, laid an entry, No. 1948, and, on 6 March, 1903, another entry on land in said county. Both of these entries were surveyed, and land located, 23 June, 1903, and grants issued 20 June, 1904. These entries were also vague and indefinite. It was

admitted that the Jenkins entries covered the land described in the Adams grant. Plaintiffs had no notice of defendants' survey. Defendants claimed that plaintiffs held the legal title to the land in trust for them. An issue directed to this inquiry was submitted to the jury and, under instruction of the court, answered in the negative. Judgment was rendered, declaring plaintiffs to be the owners of the *locus in quo* and removing the cloud from their title, etc. Defendants excepted, assigned as error his Honor's instruction, and appealed.

John H. Dillard for plaintiff. (711)
A. S. Barnard and A. D. Raby for defendant.

CONNOR, J. It is well settled that when a valid entry is laid, followed by a survey and grant, a prior grantee claiming under subsequent entry will be declared to hold the legal title in trust for the subsequent grantee claiming under the first entry. The decisions in our reports in which this doctrine is held are based upon the well-settled principle that one who lays an entry acquires an equity, or, as sometimes called, a right of preëmption, which, when followed by a survey and grant, ripens into the legal title. If, during the time intervening between the entry and grant, another lay an entry and acquire a grant prior in date to the grant of the first entry, he shall hold the legal title as trustee for him. This is founded on the well-understood equitable doctrine that he who takes the legal title with notice of an equity takes subject to such equity. In *Plemmons v. Fore,* 37 N. C., 312, *Ruffin, C. J.,* says: "An entry creates an equity which, upon the payment of the purchase money to the State, in due season, entitles the party to a grant and, consequently, to a conveyance from another person who obtained a prior grant under a subsequent entry *with knowledge of the first entry.*" It is conceded that both entries were vague and indefinite, coming within the definition of a "floating entry." *Johnson v. Shelton,* 39 N. C., 85; *Munroe v. McCormick,* 41 N. C., 85; *Currie v. Gibson,* 57 N. C., 26; *Fisher v. Owens,* 144 N. C., 649; *Call v. Robinett,* 147 N. C., 616. It is also well settled that an entry void for uncertainty may be made certain and definite by a subsequent survey, and that a grant based upon it will be valid. *Harrison v. Ewing,* 21 N. C., 369; *Grayson v. English,* 115 N. C., 358. While this is true, as between the State and the grantee, the question still remains open, whether a survey of a "floating entry" will put a subsequent enterer and prior grantee upon notice. If the original entry were so vague and uncertain as to fail to give notice of the boundaries of the land intended to be entered, we are unable to perceive how a mere survey, without marking lines or fixing monuments, afford any such notice. The statute did not, at the date

of these entries or surveys, require that the survey should be recorded in the office of the entry taker. Merely running the lines and (712) making a map which the enterer could keep in his possession until he took his grant certainly could not afford notice of boundaries of the land to be surveyed. The warrant to the county surveyor was no more definite in its description than the original entry —it could not be so. If, by reason of the vagueness of the first entry, no notice is given to a second enterer, who, in ignorance of such entry, proceeded to survey the land, pay his money and takes a grant from the State, no equity can be invoked against him. He holds the legal title free from any claims of the first enterer. We therefore concur with his Honor's instruction to the jury. By virtue of Laws 1905, ch. 242 (Revisal, sec. 1722), a record of the survey is required to be made and kept in the office of the entry taker; this will give notice of all surveys, and the difficulty experienced by the defendants will not hereafter arise.

Upon a careful examination of the record, we find

No error.

Cited: Cain v. Downing, 161 N. C., 597.

H. F. EDWARDS v. A. V. SORRELL.

(Filed 21 May, 1909.)

1. **Arrest and Bail—Interpretation of Statutes—Construed as a Whole—Revisal.**

The Revisal, secs. 735, 737 and 1920 *et seq.*, prescribing the methods by which a prisoner may be discharged, in certain instances, before final judgment, should be construed together; and, so construed, the remedies given in section 1920 *et seq.* are in addition to those given in sections 735 and 737.

2. **Arrest and Bail—Alienating Wife's Affections—Insolvent Debtors—Inventory of Property—Release.**

A suit by one charging defendant with alienating the affections of his wife, and arresting him and holding him for bail, under the affidavits required (Revisal, sec. 7271, subsec. 2), is one entitling defendant to the benefit of the statute for the relief of insolvent debtors; and upon his filing "a full and true inventory of his estate, real and personal, with encumbrances existing thereon," etc., in accordance with the Revisal, sec. 1930, he is entitled to his discharge from custody.

3. Arrest and Bail—Alienating Wife's Affections—Insolvent Debtors—Inventory of Property—Statements—Surplusage—Issue—Fraud.

One who has another arrested and held to bail for alienating the affections of his wife does not raise an issue or suggestion of fraud (Revisal, sec. 1934) by answering the petition for discharge and denying a statement therein made by petitioner that he is advised by counsel that, owing to the condition of the title to certain lands scheduled, an execution could not issue against it, as such statement is surplusage. (*Adams v. Alexander*, 23 N. C., 501, cited and distinguished. The procedure upon the question of fraud, when the husband has scheduled lands in which he claims his wife has no interest, and he has paid the purchase price, discussed by CONNOR, J.)

APPEAL from *Long, J.*, at chambers, Greensboro, 6 April, (713) 1909, from judgment rendered in an action from DURHAM.

This was an appeal from an order of his Honor, *Judge Long*, refusing to discharge defendant from custody. The plaintiff sued for damages, charging that defendant had alienated the affection of his wife and caused her to separate herself from him. At the time of instituting the action he procured, upon proper affidavit an order for the arrest of defendant, holding him to bail. Defendant was arrested and placed in jail pursuant to the order of the clerk. On 24 March, 1909, defendant filed his petition before the clerk, pursuant to section 1920 *et seq.*, of Revisal, for discharge. The petition contained the averments required by section 1922, and was accompanied by a schedule of his property. Among other properties set forth in the schedule were certain pieces of real estate, described by reference to the deeds under which they were held, conveyed to defendant and his wife, especially, "One lot, corner of Dowd and Cleveland streets, which lot was conveyed by H. A. Foushee, commissioner, 28 June, 1907, to Albert V. Sorrell and wife, Quinnette Sorrell, registered 29 June, 1907; consideration, $1,111," giving book and page of registry. In reference to his real estate, defendant set forth in his petition that "Your petitioner is advised by counsel learned in the law that since the conveyance of the real estate described in Exhibit 'B' are to your petitioner and his wife, they hold the same as tenants by entireties, and that he has no interest therein which he can convey or encumber without the assent of his wife, and that no interest of his can be sold under execution so as to pass any title during their joint lives or as against the survivors after (714) the death of either one of them, and that all of the real estate described in Exhibit 'B' is exempt from sale under execution; that his said wife, Quinnette Sorrell, refuses and declines to convey and encumber said estate in any manner whatsoever; that your petitioner herewith surrenders all property whatsoever in excess of $50, which exemp-

tion of $50 he desires to be allotted to him in his wearing apparel and in the personal property described in Exhibit 'B.'"

Plaintiff, replying to the petition, denied that the real estate described in the schedule was exempt from execution by reason of the condition of the title, as set out. He further says that "He denies that the petitioner has surrendered all property whatsoever in excess of $50, and he is advised and believes that the petitioner is not entitled to any discharge from the order of arrest herein, or released from custody without making an actual surrender of all his property and all interest in the property." For a further answer plaintiff says, as to each piece of real estate described in the schedule, that "The deeds referred to in Exhibit 'B' do convey to A. V. Sorrell an estate which he has not surrendered, and which he must surrender before he is entitled to any discharge herein, and plaintiff suggests a fraud on the part of defendant in withholding, or attempting to withhold, the same." He further says that "The plaintiff is informed and believes that the consideration for the real estate described in said deed was paid by the defendant himself, and that the improvements erected on some, or all, of said lots represent the property and accumulations of the defendant himself, and the defendant is guilty of fraud in withholding, or attempting to withhold, said property from the trustee, and to protect it from liability for his indebtedness, and in attempting to secure his discharge without a full surrender of the same." Plaintiff moves the court to make up an issue of fraud and set it down for trial, as provided by statute. Upon the hearing of the petition and answer before the clerk, he denied the prayer of defendant, and directed that an issue of fraud be made up and transferred to the civil-issue docket of the Superior Court for trial. Upon appeal to *Long, J.*, holding the courts of the Ninth Judicial District, judgment of the court was affirmed. The bond required of defendant was reduced from $5,000 to $2,500. The defendant excepted and appealed.

(715) *Bryant & Brogden and R. O. Everett for plaintiff.*
Manning & Foushee and D. W. Sorrell for defendant.

CONNOR, J., after stating the facts: The petition for discharge complies, in terms, with the provisions of section 1930 of the Revisal, subsection 2 of which provides that the petitioner must file with his petition "a full and true inventory of his estate, real and personal, with encumbrances existing thereon, and all books, vouchers and securities relating thereto." Section 1934 provides that "Every creditor opposing the discharge of the insolvent may suggest fraud and set forth the particulars thereof in writing, verified by his oath," etc. The statutes

applicable to cases of this kind are not so clear as they should be. Defendant was arrested and is in custody, pursuant to the ancillary proceeding prescribed by subsection 2, section 727, Revisal. The method by which he may be discharged before judgment is prescribed by sections 735 and 737, neither of which contemplate the procedure provided by sections 1920 *et seq.* The language of section 1920 is sufficiently comprehensive to include defendant's case: "The following persons are entitled to the benefits of this chapter: (1) Every person taken or charged on any order of arrest or a surrender of bail." Subsection 2 provides that any person taken "on execution of arrest for any debt or damages rendered in any action whatever," thus making a distinction between a person in custody on an order of arrest which includes such order made before judgment and a person in custody under final process. Whatever contradiction may appear to exist between the several sections of the Revisal—originally different statutes—is met by construing them as one statute, as, by their enactment as a part of the Revisal, they become. The right to be discharged by complying with the last-named sections is in addition to the remedies given in sections 735 and 737. The Constitution prohibits imprisonment for debt, except in cases of fraud. Without undertaking to discuss the question whether the cause of action set out in complaint comes within the exception, we are of the opinion that the defendant is entitled (716) to the benefit of the provisions of the statute for the relief of insolvent debtors. The sole question presented by the appeal, therefore, is whether the answer of plaintiff to the petition for discharge raises an issue of fact. Defendant having filed the schedule of his property, it was not only proper, but necessary, that he should set out the facts showing what right, title, estate and interest he held in the real estate. This he has done by making specific reference to the deeds showing the title conveyed by them. He simply says to the plaintiff, "Here is a schedule of my property; I surrender such right, title and estate as the court may decide I have therein." The fact that he further says that he is advised by counsel that, by reason of the condition of the title, it is not subject to execution, while not improper, is surplusage. What the law is, in that respect, will be for the ultimate decision of the Court. It can not be decided at this time nor in the present state of the record. The plaintiff, recognizing the fact that he must do something more than merely "suggest fraud"—that is, set out the particulars, etc.—has, in compliance with the statute, done so. The suggestion and particulars set out simply raise a question of law—that is, he differs from the opinion of defendant's counsel as to the legal effect of the deeds under which defendant holds title to the land. If he is correct in his opinion, the land will be subject to execution upon such judgment.

as he may recover in his action. The defendant has surrendered such title as he has; how can he do more?

We have discussed the question as to the liability of lands conveyed to husband and wife for the debts of either in *Hood v. Mercer, ante,* 699, where the authorities are collected. It is suggested, however, that defendant paid the purchase money for the lot conveyed by Mr. Foushee, commissioner, and that, in having the title made to his wife and himself, he was guilty of fraud. If plaintiff's view of the law be correct, the land is liable to his debts. If the fact be that defendant furnished the purchase money for the land, the legal effect of it would depend upon the date when plaintiff's cause of action accrued. The allegation in the complaint is that "during the month of March, 1909, (717) and during many months preceding," the defendant was guilty of the wrongs which constitute plaintiff's cause of action. The deed from Mr. Foushee, commissioner, was executed 28 June, 1907. It does not appear with sufficient certainty that defendant then owed any debts or had incurred any liability to plaintiff to render his payment of the purchase money for the land fraudulent. If the fact be as suggested, the right of the plaintiff would be enforced by an action brought by the trustee, to be appointed pursuant to the statute, in which the wife would be a necessary party. We do not perceive how these questions can be passed upon in this proceeding. *Adams v. Alexander,* 23 N. C., 501, is relied upon. There the debtor had executed a deed of assignment of his property for the payment of debts. In his schedule he surrendered only his interest after the payment of the debts named in the assignment. The creditor, in opposing his discharge, alleged that the assignment was made with intent to defraud his creditors. This Court held that, as the debtor had scheduled "only the resulting trusts, which affirms the other trusts to be *bona fide* and good and is an assignment of the surplus only after all the other purposes of the deed have been answered, he had not complied with the statute." *Hutton v. Self,* 28 N. C., 285. Here the petitioner schedules the property or the muniments of his title. Whatever he has passes to and vests in the trustee, to be applied to his debts. It would be a hardship on a debtor if, because, with no fault on his part, the title to his property is involved in doubtful questions of law, he must remain in prison until, after litigation, they are settled by the courts. The purpose of the law is to compel him to make an honest surrender of his property to his creditors. If he does that, he is entitled to be discharged. He is not imprisoned as a punishment for his inability to pay his debts. That was the conception of a discarded past. This case is a striking illustration of the hardship which could be perpetrated if the law were different. The plaintiff sues *in forma pauperis,* claiming $10,000 damages. He gives

a bond, in the ancillary proceeding, in the sum of $100 and holds defendant to bail in the sum of $2,500. If he may, after defendant has surrendered his property to meet such judgment as may be rendered against him, hold him in custody until, after long (718) litigation, the end is reached, the defendant, if he should successfully defend the action, would have suffered great wrong without any redress. If the plaintiff shall succeed in obtaining a judgment, he has all of defendant's property bound for it and a right to sue out execution against his person.

We are of the opinion that the answer did not raise any issue to be submitted to the jury and that petitioner is entitled to his discharge as prayed for. The court will proceed to secure the property to meet the final result of the action. This opinion and judgment will be certified to the Clerk of the Superior Court of Durham County, to the end that further proceedings may be had in accordance herewith.

Reversed.

MURCHISON NATIONAL BANK v. DUNN OIL MILLS COMPANY.

(Filed 21 May, 1909.)

1. **Negotiable Instruments—Restrictive Endorsements—"For Deposit or Collection"—Intermediate Agents—Notice—Payment Arrested.**

   A draft or bill transferred to a bank by restrictive endorsement, as "for deposit" or "for collection," is taken and held by the bank as agent for the endorser; and for the purpose indicated, and subject to the right of the endorser to arrest payment or divert the proceeds in the hands of any intermediate or subagent who has taken the paper for like purpose and affected by the restriction.

2. **Negotiable Instruments—Restrictive Agreement—Dehors—Notice—Payment Arrested.**

   A drawer of a draft, ordinarily standing towards subsequent parties as a general endorser, may, by appropriate words appearing on the paper, or by agreement *dehors* the instrument as to persons affected with notice, retain the right to arrest payment.

3. **Negotiable Instruments—Restrictive Agreement—Principal and Agent—Holder in Due Course—Drawee and Endorsee—Liability.**

   When an agent, for collection or deposit of a negotiable instrument (a draft in this case), has acted within the apparent scope of his authority and exceeds his power, so that a holder in due course acquires the paper for value and without notice of a restrictive agreement between the original parties, the drawer may be held responsible to such holder.

4. **Negotiable Instruments—Holder in Due Couse—Purchase—Consideration.**

A bank which acquires a draft by purchase from another bank for an existing indebtedness is a holder for value, such indebtedness constituting value by express provision of the statute (Revisal, sec. 2173).

5. **Negotiable Instruments—Restrictive Agreement—Notice—Evidence—Questions for Jury.**

When a bank to which a draft, appearing on its face to be negotiable, is forwarded by another bank, purchases it for value, without notice of an agreement restricting its negotiation, the drawer may not stop payment of the draft as against the rights of the bank so holding the paper; and when there is conflicting evidence as to whether the purchasing bank acquired without notice, the question is properly submitted to the jury.

(719) ACTION to recover the amount of a draft, tried before *Lyon, J.*, and a jury, at December Term, 1908, of NEW HANOVER.

There was evidence tending to show that, on 4 February, 1904, defendant company drew a draft in words and figures as follows:

"$286. DUNN, N. C., 4 February, 1904.

DUNN OIL MILLS COMPANY.

Three days sight, pay to the order of Merchants and Farmers Bank, Dunn, N. C., two hundred and eighty-six and 00-100 dollars. Invoice No. 1072. January 13, 1904.

Value received, and charge the same to account of

DUNN OIL MILLS COMPANY,
McD. HOLLIDAY, *Treasurer.*

To C. R. ADAMS & Co., Four Oaks, N. C. No. 576."

Said draft contained the following added words and endorsement across the end of face: "No protest. Tear this off before presenting." Also on the face, stamped thereon, the following words: "Cash item. Do not hold. If not paid on presentation, return at once." On the back thereof, "Pay to the order of any bank or banker. The (720) Merchants and Farmers Bank, Dunn, N. C. V. L. Stephens, Cashier." The added entries on the face of the paper were made by plaintiff bank after receipt of same from the Dunn bank.

That this paper was drawn pursuant to a custom and understanding between defendant company and the Merchants and Farmers Bank of Dunn; that amount was to be entered subject to check and charged back in case same was not paid or collected; that this draft, endorsed as stated, was forwarded to plaintiff bank on 4 February, and entered as cash item to credit of Merchants and Farmers Bank subject to check.

There was evidence, on the part of plaintiff, tending to show that,

under this endorsement, the plaintiff bank became the owner outright of the draft and the holder of same in due course. There was also evidence, on the part of defendant, tending to show that the draft was forwarded to plaintiff bank for collection, and under an arrangement that same was to be charged back against the Merchants Bank in case same was not paid or collected.

The evidence further tends to show that the Merchants and Farmers Bank, the original payee of the draft, failed, on or about 9 February, 1904, owing the defendant company a large balance—over $6,000—and that at the time this endorsement to plaintiff bank was made, and during the entire period covered by this transaction, the Merchants and Farmers Bank was largely indebted to plaintiff bank, to the amount of some thousand dollars, and was so indebted at the time of the failure; that C. R. Adams & Co., the drawee, was indebted to the defendant to the amount of the draft, and payment of same was stopped by defendant after failure of Merchants and Farmers Bank, and amount was recharged to Adams, on 29 May, 1904.

On issues submitted the jury rendered the following verdict:

1. "Is plaintiff the owner of the draft sued upon?" Answer: "Yes."

2. "What amount, if any, is the defendant indebted to plaintiff on account of draft sued on?" Answer: "Two hundred and eighty-six dollars?"

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

Rountree & Carr and E. K. Bryan for plaintiff. (721)

J. C. Clifford, J. D. Bellamy & Son, Woodus Kellum and Godwin & Townsend for defendant.

HOKE, J., after stating the case: Where a draft or bill is transferred to a bank by restrictive endorsement, as "for deposit" or "for collection," the instrument is taken and held by the bank as agent for the endorser, and for the purpose indicated, and subject to the right of the endorser to arrest payment or divert the proceeds in the hands of any intermediate or subagent who has taken the paper for like purpose and affected by the restriction. *Boykin v. Bank,* 118 N. C., 566; *Bank v. Hubble,* 117 N. Y., 384; *Balback v. Frelinghyser,* 15 Fed., 675; *Tyson v. Bank,* 77 Md., 412. And the drawer of a draft, who ordinarily stands towards subsequent parties as a general endorser, may, by appropriate words appearing upon the paper, or by agreement *dehors* the instrument, and as to persons affected with notice, likewise restrict his obligation and retain the right to arrest payment. Eaton and Gilbert on Commercial Paper, p. 405 and note 7. And this right of the endorser, or drawer, is not

affected by the fact that the amount of such draft is usually entered subject to check, where it is shown to be the custom or agreement to charge back such amount against the depositor in case the paper is not paid on presentation, or deduct the same from the next deposit.

This doctrine is illustrated and well sustained in the opinion of this Court in *Packing Co. v. Davis,* 118 N. C., 548, in which it was held as follows:

"1. A negotiable instrument deposited in a bank, endorsed 'for collection,' remains the property of the depositor, and the same rule holds when the written endorsement appears unrestricted, but, as a matter of fact (evidenced by express collateral agreement or a tacit understanding, to be reasonably inferred from the course of dealing between the bank and its depositor) the instrument is taken by the bank, not as a purchase, but for collection simply.

(722) "2. The fact that a bank has given a depositor credit for the amount of a negotiable instrument, regularly endorsed, is not conclusive evidence that the bank had purchased the paper and was not a mere bailee thereof.

"3. When a bank habitually credits a depositor's account with negotiable instruments endorsed to it by depositor, giving permission to the depositor to draw against such credits, but charges up to the depositor all such papers as are not paid on presentation, or deducts such items from the next deposit, such a course of dealing stamps the transaction, with reference to the title to instruments so endorsed, as being unmistakably a bailment for collection simply, and no greater title is vested in the bank."

Where the restrictive nature of the endorsement appears by proper entry upon the paper, this right of the drawee or endorser, so clearly stated in this opinion, can be made effective in the hands of any holder, and through any number of subsequent endorsements; for, as said by *Knowlton, J.,* in *Bank v. Tube Works,* 151 Mass., 417: "An unbroken succession of such endorsements would indicate that each endorser was acting by direction of the next preceding endorser, who was himself an agent of the owner for whom the collection was to be made."

And where it arises by reason of facts *dehors* the instrument, it can be made available as between the original parties and subsequent endorsees who take for collection only or who take with notice of the original restrictive agreement, unless and until the instrument is acquired by a holder in due course. Where, however, the rights of a restrictive endorser or drawee of a draft must rest in facts *dehors* the instrument, and the draft has been drawn in the usual form for circulation as a negotiable instrument and has been acquired by a "holder in due course," such drawee or endorsee may be held responsible to such holder:

for though his agent for collection or deposit, as the case may be, has exceeded his power, he has acted within the apparent scope of his authority; and this on the recognized principle that "when one of two persons must suffer by the fraud or misconduct of another, he first who reposes the confidence or, by his negligent conduct, makes it possible for the loss to occur, must bear the loss." *Rollins v. Ebbs,* 138 N. C., 140; *R. R. v. Kitchin,* 91 N. C., 39; *Vass v. Riddick,* 89 N. C., (723) 6; and see *Ditch v. Bank,* 79 Md., 192.

In the case before us, and under the principles stated, the right of defendant to arrest the payment of this draft as against the Merchants and Farmers Bank of Dunn is clear. There is also abundant testimony on the part of defendant tending to establish such right against the plaintiff bank, the Murchison National Bank of Wilmington. There was evidence, however, on the part of plaintiff, tending to show that plaintiff bank acquired and holds this draft as purchaser for value and without notice, the existing indebtedness constituting value by express provision of statute. Revisal, 1905, sec. 2173; *Manufacturing Co. v. Summers,* 143 N. C., 103. See evidence of J. V. Grainger, record, p. 18. The case then was properly made to depend on the question thus presented, whether plaintiff was the holder of the draft in due course, and this question the jury have resolved in plaintiff's favor.

Under a full and comprehensive charge, every position available to defendant on the testimony and under these authorities was submitted for consideration, and we find no reversible error in the record.

No error.

Cited: Tarault v. Seip, 158 N. C., 378.

J. Q. BARKER v. J. L. AND C. F. DENTON.

(Filed 21 May, 1909.)

State's Lands—Enterer—The Code, sec. 2766—Time for Payment.

The end of the year in which an entry of the State's vacant and unappropriated lands is made, and not the day of the year, is the date from which the enterer may compute the time in which he must pay for the lands entered, under The Code, sec. 2766, requiring that the land "shall in every event be paid for on or before the 31st day of December which shall happen in the second year thereafter," or the entry shall be null and void. Hence lands entered thereunder on 16 November, 1904, and paid for 31 December, 1906, meets the requirement of the statute.

(724) ACTION from GRAHAM, Spring Term, 1909, heard by *Ward, J.*, by consent, at Murphy.

Defendants appealed.

Dillard & Bell for plaintiff.

A. S. Barnard for defendant.

WALKER, J. The plaintiff, J. Q. Barker, entered the land in controversy, on 16 November, 1904, and caused a survey thereof to be made, but did not pay the purchase money to the State until 31 December, 1906, when a grant was issued to him. The defendants, C. F. Denton and J. L. Denton, entered the same land, on 7 December, 1906, and, on 5 January, 1907, the plaintiff, J. Q. Barker, filed a protest against the issuing of a warrant of survey thereon, as allowed by the statute. The court sustained the protest, and defendants appealed. The question presented for our consideration is, whether the entry of the plaintiff had lapsed when the defendants laid their entry. In other words, whether the plaintiff had until 31 December, 1905, or until 31 December, 1906, to pay the purchase money, and this depends upon the meaning of section 2766 of The Code, which is as follows: "All entries of land made in the course of any one year shall, in every event, be paid for on or before the thirty-first day of December which shall happen in the second year thereafter; and all entries of land not thus paid for shall become null and void, and (the land) may be entered by any other person." The question was decided against the present contention of the defendants in *Harris v. Ewing,* 21 N. C., 369.

The Court in that case construed the act of 1808, which was substantially like section 2766 of The Code, the only difference being that, by the act of 1808, the purchase money was required to be paid on or before the 15th day of December, while by section 2766 of The Code it is required to be paid on or before the 31st day of December. In other respects the two statutes are identical. In *Harris v. Ewing, supra,* the Court, *by Ruffin, C. J.,* said: "The act of 1808 (Revisal, ch. 759) enacts, 'as the standing law in the future, that entries made in the course of any one year shall be paid for on or before the 15th
(725) day of December in the (second) year thereafter.' Upon these words, the period is not to be computed from the day of the entry, so as to make the price payable in the second December that may succeed the making of the entry. If that had been meant, it would have been easy to express it much more explicitly than it is. We think the year of the entry, and not the day, is the epoch from which the computation of the act begins. The 15 of December of the second year after the expiration of the year of entry is the time, as seems almost necessarily

inferable from the words 'made in the course of any one year,' which make 'thereafter' referable to that whole year, and not the particular day of that year. This construction is so obvious that its correctness was taken for granted by this Court in *Nunn v. Mulholland,* 17 N. C., 381. If it were doubtful, the Court would not be at liberty now to depart from it, as we learn, upon inquiry at the executive offices, that a similar one was adopted there upon the passage of the act of 1804, ch. 653, and has been acted on ever since. A very clear wording could alone authorize a construction in opposition to one so long settled by the officers to whom the execution of the act is immediately confided, and under the annual practical sanction of the members of the Legislature, through whose hands, it is well known, their constituents remit a large portion of the purchase money due on entries. Our opinion, therefore, is that the plaintiff's payment was made in due time." This ruling was afterwards expressly approved in *Bryson v. Dobson,* 38 N. C., 138, and *Horton v. Cooke,* 54 N. C., 270, and has been understood to be the settled construction of this law. It is true that in several more recent cases there are some expressions indicating that the payment of the purchase money was required to be made, under The Code, on or before December 31 of the second year after the entry was made, but it is evident that the Court, or the judge speaking for it, was not advertent to the phraseology of the statute, nor to the previous decisions of this Court, in which it had been construed. The case upon which the defendants chiefly rely is *Wilson v. Land Co.,* 77 N. C., 445. It will be observed, upon reading that case, that the Court cites *Plemmons v. Fore,* 37 N. C., 312, for the statement, which appears to be a *dictum,* that the money should have been paid by G. N. Folk, the enterer, (726) on or before December 31 of the second year after the entry was laid. Referring to *Plemmons v. Fore,* we find that the question was not presented in the case. The opinion in the latter case was written by *Chief Justice Ruffin,* who also wrote the opinion in *Harris v. Ewing,* which is cited by the learned *Chief Justice* in *Plemmons v. Fore* as the leading authority for determining the time within which the purchase money should be paid under the act of 1808.

In the other two cases cited by the defendants, *Gilchrist v. Middleton,* 108 N. C., 705, and *Kimsey v. Munday,* 112 N. C., 816, the expressions upon which they rely were *dicta* contained in a casual reference to the statute without paying any special regard to its wording. We must adhere to the ruling of the Court made in cases where the very question was presented and decided, and this requires us to affirm the judgment of the court below by which the protest of the plaintiff was sustained upon the facts as found by the judge.

Affirmed.

THE STATE COMPANY ET AL. v. A. A. FINLEY.

(Filed 21 May, 1909.)

1. **Deeds and Conveyances—Cities and Towns—Streets—Title Acquired—Subsequent Purchasers—Sleeping on Rights.**

A land company acquired certain lands, laid them off into lots, with streets, platted them and incorporated a town therewith, sold a part thereof to defendant for a farm, conveying the title to the streets within the boundaries of his conveyance, and defendant obtained a quitclaim deed from the town authorities to the streets thus conveyed: *Held*, (1) subsequent purchasers of lots in a different part of the town so laid off could not maintain an action to enjoin defendant from blocking up the streets thus acquired by him on his own land; (2) an action begun more than ten years after defendant had acquired the deed from the land company and the quitclaim deed from the town would be barred by plaintiffs having slept on their rights, if any they had.

2. **Deeds and Conveyances—Cities and Towns—Streets—Title Acquired—Equitable Rights—Parties in Interest—Parties to Conveyance—Estoppel.**

When some of the plaintiffs claim as heirs at law of one who was an officer of defendant's grantor corporation, and, as such, a party to his conveyance, and the other plaintiffs are two corporations, the majority stock of which was held by one also an officer of defendant's grantor, no equitable rights can be asserted by them.

(727) ACTION tried before *Justice, J.*, and a jury, at January Term, 1909, of WILKES.

In 1890, upon completion of the railroad to a point opposite Wilkesboro, the Winston Land Company purchased the land around the new station and laid it off into lots, streets and alleys for a town. They made a map of the new town, which they procured to be incorporated as North Wilkesboro. The streets designated by the letters of the alphabet run east and west—B, C and D running westwardly to Reddie's River. The streets named by number—First, Second, Third, and so on—run north and south. The town is laid off in the northeast angle formed by the junction of Reddie's River with the Yadkin. Lying between the town and these rivers, on the south and west of the town, is low bottom land, suitable for farming and subject to overflow. No lots were ever laid off in this bottom land, save between B, C and D streets, and no lots were sold west of an alley which was laid off 170 feet west of Tenth Street. In 1893, the Winston Land Company laid off an alley 30 feet wide, running from A to D streets, 170 feet west of and parallel with Tenth Street. It laid off the lots on this 170-foot strip lying between Tenth Street and this 30-foot alley, facing these lots westwardly on Tenth Street. All the land west of this 30-foot alley north of B Street the land company sold to the defendant, by the acre, for farming

purposes, and quitclaimed the streets and alleys which had been laid out thereon. In February, 1897, the town commissioners passed an ordinance vacating the streets and alleys which had been laid out by the land company on the land sold as above to the defendant and, in addition thereto, the town executed a deed conveying to the defendant whatever rights the town had in said discontinued streets and alleys. Upon these discontinued streets, lots and alleys, dwellings and (728) manufacturing plants have since been erected. The streets, lots and alleys thus discontinued had been surveyed and laid down on the map, but the streets and alleys were never graded and no lots facing upon them were sold. Upon the conveyance to the defendant, in 1893, he fenced off his purchase. The plaintiffs are owners of lots in the other parts of the town, but all these lots, except one, were acquired by them after the sale to the defendant, and the owners of that lot are the heirs of W. M. Absher, who was a large stockholder and director in the Winston Land Company, and, in his official capacity, party to the deed to the defendant. The only other plaintiffs are the State Company and the Deposit Bank, of both of which W. F. Trogden is president and owner of a majority of the stock. He was secretary, treasurer and managing agent of the Winston Land Company, and as such was a party to the deed to the defendant. The summons herein issued 30 April, 1907. On motion the action was dismissed as on nonsuit.

W. W. Barber, Louis M. Swink, F. D. Hackett and C. G. Gilreath for plaintiffs.

Manly & Hendren and Finley & Hendren for defendant.

CLARK, C. J., after stating the case: This action is to compel the defendant to open the streets and alleys on the land sold to him, and is governed by *Church v. Dula,* 148 N. C., 262. This section of the proposed town was, it is true, laid off on the map, but it was cut off, conveyed to defendant and fenced out before any of the streets and alleys were ever used, and no lot was ever sold in this abandoned section. The land company conveyed this section, including the proposed streets and alleys, to the defendant, in 1893, and, in February, 1897, the town authorities quitclaimed to the defendant any rights it might have to the streets and alleys in this abandoned and discarded "cut-off." This action began more than ten years thereafter—30 April, 1907. The plaintiffs have slept on their rights, if any they had. *Staton v. R. R.,* 147 N. C., 428.

Besides, the plaintiffs are in no situation to assert any equitable rights. All the lots they hold were acquired after the land company had conveyed this "cut-off" to the defendant, except one (729)

held by the heirs of W. M. Absher, who was a party, as an officer of the land company, to the deed to the defendant, and the other plaintiffs are two corporations, the president and owner of the majority of the stock in both of which companies (W. F. Trogden) was likewise an officer of the land company and a party to the conveyance to the defendant.

The judgment dismissing the action as of nonsuit is

Affirmed.

J. E. SNELL ET AL. v. PAUL CHATHAM.

(Filed 21 May, 1909.)

1. **Nuisance—Ponds—Public Health—Arbitration—Consent Order—Pleadings—Agreement—Scope of Action Enlarged.**

In an action for injury from the maintenance of a pond, and to enjoin the rebuilding of a dam, the parties may, by a consent order of arbitration, voluntarily enlarge the scope of the controversy to include in the award a scheme of drainage proper to safeguard the public health; and when there is no evidence impeaching the award, a judgment rendered in accordance therewith is valid and binding.

2. **Nuisance—Ponds—Public Health—Arbitration—Consent Order—Agreement—Drainage—Scope of Action Enlarged—Consideration.**

When, by consent of the parties to an action for damages and to enjoin the rebuilding of a dam alleged to be against the interest of the public health, an order of arbitration is made by the court, under which the complaining party agreed to execute such plan or scheme as the majority of the arbitrators should award as "proper to safeguard the public health in the premises," an exception to the power of the court to enforce an award requiring the drainage of an area of land which was in its natural condition can not be sustained, the agreement of arbitration being a sufficient consideration.

ACTION for damages and injunction, heard by *Justice, J.*, at November Term, 1908, of MECKLENBURG.

This was an action brought upon the ground that the defendant, owner of a tract of land near Charlotte, had, in 1907, erected a (730) dam across a small branch on the said land and thereby created a pond or lake; that in August, 1908, by reason of heavy rainfall, the dam having been broken, the defendant was rebuilding the dam; that the effect of rebuilding the dam would be to create a pond of stagnant water, which would produce mosquitoes and communicate malaria to the plaintiffs and other residents of their neighborhood,

thereby injuring the public health and creating a nuisance; and the plaintiffs prayed that the defendant be enjoined and restrained from the reconstruction of the dam.

A temporary restraining order was issued, and an order to show cause why the temporary restraining order should not be made permanent was served upon the defendant. A hearing was had before *Judge Justice* upon affidavits filed by the plaintiffs and the defendant. At the hearing it was agreed between the parties that the matter in controversy should be submitted to Doctors Gibbon, Montgomery and Misenheimer as arbitrators, the language of the agreement being as follows: "In the above-entitled action it is, by consent of parties, ordered and decreed that the temporary restraining order heretofore made in the cause be continued and in full force until the next civil term of this court. That the following experts, to wit: R. L. Gibbon, J. C. Montgomery and C. A. Misenheimer, be and they are hereby appointed as arbitrators and empowered to hear, at such times and places in this county as they may fix, the evidence that may be submitted to them by the parties; and they are hereby made arbitrators to settle and decide upon the matters in controversy in this action, and to submit to this court, at the next civil term thereof, their findings and awards, or that of any two of them, including such plan or scheme as they shall deem and find proper to safeguard the public health in the premises; and all parties to this action hereby agree to be bound by the findings and award of said arbitrators or of any two of them, their findings and award to be made the judgment of this court in this action." And this cause is retained for further direction.

The majority of the arbitrators filed their award as follows, at December Term, 1908, of Mecklenburg:

"The undersigned arbitrators, appointed by this honorable (731) court, at October Term, 1908, to settle and decide upon the matters in controversy in this action, and to submit to this court their findings and awards, including such plan or scheme as they would deem and find proper to safeguard the public health in the premises, beg leave to report as follows: That, after due notice to the parties litigant, they met at the office of Dr. J. C. Montgomery, in the city of Charlotte, on 2 December, 1908, having first, by consent and at the instance of the parties, inspected and carefully examined the premises whereon was formerly maintained the dam and pond, all of which are more particularly described in the complaint and in the affidavits of the parties and their witnesses, which affidavits were, by consent, used as evidence before us at the hearing, the parties expressly waiving their rights to offer other evidence. From our inspection and examination of the said marshy tract upon the land of the defendant Chatham and from the evidence produced before us, we find as follows:

"First. That stagnant water, in the light of present-day medical opinion, is obnoxious to health in this country, chiefly as it serves for a breeding place for a certain species of malaria-carrying mosquito—the only means at present known by which that disease is disseminated. The life and habitat of the mosquito has received the most careful investigation at the hands of the United States health authorities, and, as bearing upon the question before us, we beg to briefly quote a description of the natural breeding places of these insects, which appears in Vol. XXIII, 17 July, 1908, of the Public Health Report of the United States Marine Hospital Service: 'The domestic species may be found breeding in any collection of water in or about the houses in which they lodge; they have been found in discarded tin, bottles, and broken crockery on the garbage heap; in buckets, tubs, barrels, cisterns and wells; in baptismal and other fonts; in flowerpots and sagging roof gutters; in street and roadside puddles, gutters and ditches, and in cesspools and sewers. The semidomestic (which is the malaria-carrying mosquito) species may occasionally be found breeding in tins, barrels, hoof prints, post holes and holes in trees or tree stumps, but they usually prefer grass-
(732) bordered pools, slowly flowing ditches, the margins of lakes and streams, even such as are stocked with fish, provided the margins are shallow or are more or less choked with reeds and water plants so that the fish can not reach them.' Accepting the above as authoritative, and applying the knowledge to the matter in hand, after a visit and examination of the locality in question, we reach the conclusion that the said marsh and bed of pond, now drained, furnishes an abundant breeding ground for the mosquito, but that it is not, in our opinion, worse in this respect than are numerous other low and badly-drained areas in and about the suburbs of the city of Charlotte, and some of them are contiguous to the neighborhood in which it is alleged that sickness has developed as a result of the pond formerly on the Chatham place. The sanitary method of handling the areas in dispute may be decided upon the general principles governing such matters, the dominant idea of which is the elimination of stagnant water. There can, of course, be no question that this can most thoroughly be done by simple drainage and filling in—the latter particularly is not always practical, the former, so far as our knowledge goes, is much more available. The drainage must, however, be thorough, and the ditches large enough and sufficiently well laid out to avoid the dangers of stagnation, as "slow-flowing" ditches, as previously shown, do not accomplish the object aimed at. In the specific case before us we would recommend thorough ditching, properly drained to suit existing conditions, as the ideal method of treating said area, and we find and award accordingly.

"Second. We further adjudge and award that the drainage, ditching

and filling aforesaid shall be done by the defendant during the winter months and prior to spring, and so as to completely prevent the accumulation of stagnant water upon said premises.

R. L. GIBBON,
C. A. MISENHEIMER,
Arbitrators."

"3 December, 1908.

The other arbitrator, Dr. J. C. Montgomery, filed a dissent, recommending instead of drainage a "free-flowing sanitary lake," *i. e.*, that the defendant be allowed to put back the dam.

There were no exceptions filed to the award by either party, (733) and his Honor entered the following judgment:

"This cause came on to be heard before me at chambers, in the city of Charlotte, on the twentieth day of October, 1908, upon an order to show cause why the restraining order heretofore granted in this cause should not be continued to the hearing.

"At said hearing both plaintiffs and defendant were represented by counsel and argument was heard by me.

"During the argument a certain proposition was made by the defendant's counsel, and certain other propositions were made by the plaintiffs' counsel looking towards an amicable settlement of the matter in dispute. These propositions were rejected by the parties, and thereupon the court announced its conclusion that the restraining order should be continued till the hearing.

"Thereupon the defendant's counsel stated to the court that, rather than submit to such an order, the defendant would agree to accept one of the propositions made during the argument by the plaintiffs' counsel to the defendant's counsel in the presence of the court, and of the parties to the action.

"The plaintiffs' counsel thereupon signified their willingness, on the part of their clients, to still make with the defendant the agreement referred to.

"And thereupon the hearing was adjourned in order that the counsel of the respective parties might put in writing the agreement entered into orally by them in the presence of the court at the said hearing.

"Thereafter there was submitted to me, by the counsel of the respective parties, a consent order, which I signed, which order is on file in the papers in this action.

"The arbitrators appointed by that consent order having made their report, as will appear by reference thereto, now to carry out the agreement of the parties to this action as expressed in the aforesaid consent order, it is now ordered and adjudged as follows:

"It is ordered and adjudged that the said report of the said arbitrators

be in all respects approved and confirmed, and the findings of said arbitrators and their award, as set out in their said report, is made
(734) the judgment of this court in this action.

"It is therefore further considered and adjudged by the court that the restraining order heretofore granted in this cause be and the same is hereby made permanent, and the defendant is therefore perpetually restrained and enjoined from reconstructing and maintaining the pond or lake described in the complaint.

"And it is further considered and adjudged by the court that the defendant, within four months from this date, be required to drain the area of land heretofore covered by said dam or pond, as in the report of said arbitrators prescribed for the safeguarding of the public health in its vicinity.

"And the cause is held for further direction."

The defendant excepted and appealed.

Burwell & Cansler and Clarkson & Duls for plaintiffs.
Tillett & Guthrie for defendant.

CLARK, C. J., after stating the case: There was no exception to the award of the arbitrators. After his Honor had entered judgment in conformity therewith, the defendant excepted, assigning four grounds:

"1. That upon the award the court should not have signed judgment enjoining the erection of the dam.

"2. That the arbitrators went beyond the scope of their powers in recommending the drainage of the pond.

"3. That the plaintiffs have no right to any relief not set up in the complaint.

"4. That the court had no power to require the defendant to drain an area of land which was in its natural condition."

The first three exceptions are based upon the proposition that the complaint sets out a cause of action for injury from the maintenance of the pond and sought only to enjoin the rebuilding of the dam. But the parties, by their consent order, voluntarily enlarged the scope of the controversy and unequivocally submitted to the arbitrators, not only "to settle and decide upon the matters in controversy in this action" (which means the controversy upon the pleadings), but added *"including such plan or scheme as they shall deem and find proper to safeguard the public health in the premises;* and all parties to this action agree
(735) to be bound by the findings and award of said arbitrators or any two of them, their findings or award to be made the judgment of the court in this action."

This was an inadvertent or hasty agreement. His Honor sets out

in his judgment the care and deliberation with which the consent order was made and the adjournment taken, that the parties might have a full understanding and that the able and experienced counsel might have the assent of their clients and put their agreement in writing, which was done. That the consent order embraced an agreement to settle, not merely the question of the re-erection of the dam, but was to include also "*such plan or scheme* as they shall deem and find proper to safeguard the public health in the premises" appears by the explicit language of the agreement. The arbitrators all three so understood and acted, for while two recommended drainage, the other recommended a "free-flowing lake or pond" as the better scheme or plan.

There is nothing to impeach the award, and by the previous consent of the parties it was properly entered as the judgment of the court.

Nor do we find any ground for the fourth exception, nor any difficulty in enforcing the order of the court as to drainage. If the defendant had made an agreement with the plaintiffs that, upon certain consideration paid or upon the ascertainment of certain facts he would drain his pond, this would be enforcible by a decree for specific performance. Here the defendant agreed to execute such plan or scheme as the majority of the arbitrators should award as "proper to safeguard the public health in the premises." One arbitrator thought a "free-flowing lake or pond" the plan. This would have suited the defendant, as this would have enabled him to put back and keep up his dam without fear of damages, and if the majority had so awarded, the plaintiffs must have acquiesced in the infliction of mosquitoes and malaria (if the lake did not remove them) and the loss of all claim for damages. The majority of the arbitrators, however, said "drainage" was the remedy, and the defendant should know how to be "a good loser," for, after all, the majority of an impartial board of arbitrators are more likely to be right than either party to the litigation.

It is an old saying that "fragments of all the sciences are (736) taken up in ashes of the law." It is not long since that our progressive brethren of the medical profession have discovered that one kind of mosquito (anopheles) causes malaria; that another (stegomyia) carries yellow fever, and another still spreads the Asiatic cholera; that house flies spread typhoid fever, that fleas on rats communicate the dreaded Bubonic plague, and lesser germs, as *bacteria* and *bacilli,* are the agents of other diseases. For thus do "the weak things of the world confound the things which are mighty." I Corinthinians, 27. Acting on these discoveries, under authority of law the stegomyia and yellow fever have been extirpated in Cuba and the Bubonic plague was stayed in San Francisco, because mosquitoes and rats were systematically destroyed by the officers of the law. There is no reason that the plaintiff's

home shall not be freed of malaria by authority of a judgment based upon medical advice, especially as the parties agreed that such remedy (whatever the majority of the medical arbitrators should find it to be) should be entered as the judgment of the court.

Affirmed.

J. DAN FREE v. THE CHAMPION FIBER COMPANY.

(Filed 21 May, 1909.)

Master and Servant—Safe Appliances.

There being plenary evidence that plaintiff was free from blame and was injured in the course of his employment by defendant's negligence in furnishing him with a defective equipment or appliance with which to work, the verdict awarding damages to plaintiff, under a correct charge, was a proper one.

ACTION tried before *Guion, J.*, and a jury, at February Term, 1908, of HAYWOOD.

On issues submitted the jury rendered the following verdict:

1. "Was plaintiff injured by the negligence of the defendant?" (737) Answer: "Yes."

2. "Did plaintiff, by his own negligence, contribute to his injury?" Answer: "No."

3. "Did plaintiff voluntarily assume the risk?" Answer: "No."

4. "What damages, if any, is plaintiff entitled to recover?" Answer: "Three hundred dollars."

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

W. B. Ferguson, J. W. Ferguson and Frank Carter for plaintiff.
Smathers & Morgan for defendant.

PER CURIAM. In this case there was plenary evidence, on the part of plaintiff, tending to show that he was an employee of defendant company, engaged at the time in the proper performance of his duties, and was injured by reason of a defective equipment or appliance, disclosing a breach of duty on the part of defendant company, and that plaintiff himself was free from blame in the matter. The jury, under correct charge, have accepted the plaintiff's version of the occurrence, and, under numerous decisions of this Court, plaintiff's right of action is established. *Fearington v. Tobacco Co.*, 141 N. C., 80; *Pressly v. Yarn Mills*, 138 N. C., 410.

The case, in many respects, is not unlike the one last cited, *Pressly's case, supra.* It would serve no good purpose to write a minute and extended description of the machine and the defective appliance which caused plaintiff's injury, and we think it sufficient to say that we have carefully examined and considered the facts appearing in the record, and are of opinion that no error in the trial to defendant's prejudice was committed. The judgment below is therefore affirmed.

No error.

(738)

ASHEVILLE SUPPLY AND FOUNDRY COMPANY v. JOHN MACHIN, THOMAS S. ATKINS ET AL.

(Filed 25 May, 1909.)

1. **Appeal and Error—Issues—Instructions as to Findings—Procedure.**

When the judge charges the jury, upon a certain issue, to find for defendant, if they believe the evidence, the better practice is for the plaintiff to except to the charge and appeal, than to do so upon exceptions to the evidence and the refusal of a motion for judgment upon the whole evidence.

2. **Sales—Estoppel in Pais—Attorney at Law—Declarations.**

When personal property of another is sold at public sale an estoppel *in pais* can not be shown against the owner by acts and declarations of his attorney at law, then present, as such authority is not deemed within the scope or purview of his employment as such attorney.

3. **Sales—Estoppel in Pais—General Manager—Declarations.**

A general manager of a corporation will not be presumed in law to have authority to estop by his acts and declarations the corporation from asserting its title to property sold by another at public sale.

4. **Sales—Purchaser—Interest Acquired.**

A purchaser at a bankrupt sale, or sale under execution, acquires only such title or interest in the property sold as the bankrupt or debtor may have had therein.

5. **Sales—Estoppel in Pais—Questions for Jury—Evidence Insufficient—Scintilla.**

When the trial judge has taken an erroneous view of the authority of an attorney at law or a general manager of a corporation to estop the corporation, by matters *in pais*, from asserting title to its property sold by another at public sale, and held the corporation estopped as a matter of law, such questions being exclusively for the jury, and it appears that all the evidence upon the issue should have been excluded as insufficient, a new trial will not be granted on appeal.

6. Appeal and Error—Record—Stenographer's Notes—Immaterial Matter—Costs.

Stenographer's notes of the trial should be sent up on appeal only as to matters involved in the inquiry; but when settlement of the case was delayed so long that the trial judge could not separate the material parts, a motion that costs of such should not be taxed against appellee will not be granted.

(739) CONSOLIDATED actions tried before *Cooke, J.*, and a jury, at April Term, 1907, of BUNCOMBE.

The record discloses the following facts, in regard to which there is no controversy: One D. S. Russell, was on and prior to 21 September, 1900, the owner of one Junior Westinghouse engine, No. 629, two band wheels and one 60-horse-power boiler, with the fixtures attached thereto. On or about said date he entering into a contract with the defendants Machin and others, trading under the firm name and style of the Ottalay Novelty Company, to sell said company said engine, boiler and machinery at the price of $450, cash, which amount was to be paid to the plaintiff, the Asheville Supply and Foundry Company, for the benefit and on account of said Russell. Pursuant to the terms of the contract the engine and boiler were turned over to the purchasing company to enable it to make certain tests of the boiler. The defendant company failed to comply with its contract or to return the property. The Asheville Supply and Foundry Company and Russell, at the November Term, 1900, brought this action for the purpose of recovering possession of the property. At the institution of the action plaintiffs obtained an order for the immediate delivery of the property, and defendant company executed an undertaking with O. D. Revell as surety for its forthcoming, if the final judgment so directed. At the September Term, 1901, the defendants having failed to file an answer, judgment was rendered by default against defendants and for plaintiffs, adjudging them to be the owners of the property and entitled to the immediate possession thereof. The cause was retained for the purpose of assessing damages for the detention and deterioration. It was further adjudged that, if possession could not, for any reason, be had, the plaintiffs recover of the surety on the undertaking the sum of $900, to be discharged by the payment of such amount as should be assessed by the jury as the value of the property and damages. The plaintiffs did not immediately take out execution for the delivery of the property. The defendants Machin and Atkins delivered it to the Asheville Woodworking Company, a corporation in which they and said O. D. Revell were stockholders. This corporation was adjudged bankrupt, and the property went into the possession of Mr. Whit-

(740) son, trustee. On 1 September, 1902, the said trustee sold all of the property of the Asheville Woodworking Company, including

the engine and boiler in controversy, at public auction, when it was purchased by W. H. Westall, who took immediate possession. On 20 January, 1903, an execution was issued, at the suggestion of Revell, upon the judgment of the Asheville Supply and Foundry Company, to the Sheriff of Buncombe County, directing him to take possession of the property and deliver it to the plaintiffs. The sheriff, J. H. Reed, took the property into his possession, whereupon W. H. Westall brought an action against the said sheriff, claiming that he was the owner and demanding possession, and took possession thereof. Defendant Reed filed an answer denying that the plaintiff Westall was the owner of the property. On 28 September, 1904, the defendants in the original action, together with O. D. Revell, the surety on the undertaking, filed a supplemental answer in which they alleged the facts herein set forth, and further alleged: "That the defendants are informed and believe that, at said sale of the property of the Asheville Woodworking Company by said trustee in bankruptcy, the plaintiffs in said action, in person and by attorney, appeared at said sale, and, a question being raised as to whether or not the said sale by the said trustee in bankruptcy would pass a good title to the property described in the complaint herein, the said plaintiffs and their said attorney, publicly and in the hearing of those persons then and there assembled, announced and declared, in substance, that the plaintiffs in this cause had no claim to the property described in the complaint herein and did not own the same, and did not expect to contest the title thereto, and the purchaser at said bankrupt sale would acquire a good title to said property, freed and discharged from all other claims of the plaintiffs in this action. And the defendants further say that they are advised and believe that the said Westall, relying upon the said statements of the plaintiffs and their attorney, bid off the said property at said bankrupt sale in good faith, believing that he would get a good title thereto, and that the said W. H. Westall now claims the title to said property by virtue of said conduct of the plaintiffs at said sale. And these defendants further say that they are advised, informed and believe that the said plaintiffs, (741) by the reason of their conduct hereinbefore set forth, are estopped to recover the possession of said property, or the value thereof, from these defendants, since they have, by their conduct, put it beyond the power of the defendants or O. D. Revell, their surety, to deliver the possession of said property to said plaintiffs. And the defendants further say that they are advised, informed and believe that said W. H. Westall is a necessary party to this action. The defendants further aver that, by reason of the acts, conduct and disclaimer of title by the plaintiffs, as recited in paragraph 3 above, and their refusal to take possession of said property, O. D. Revell, the surety on the defendant's

replevin bond, is forever released and discharged from all liability on said bond."

An order was made making Westall a party to the original action. The two cases were consolidated and brought to trial. The jury found, upon issues submitted to them—

"First. That at the time of the sale of the property in controversy by Whitson, trustee in bankruptcy, it belonged to the plaintiffs Asheville Supply and Foundry Company and D. S. Russell.

"Second. That Whitson, trustee, at the time of the sale had no title to the property.

"Third. That D. S. Russell had been paid for his interest in the property by the Asheville Supply and Foundry Company."

The following additional issues, in regard to which there was controversy, were submitted to the jury:

5. "Were the acts and conduct of the plaintiffs in said original claim and delivery action, or either of them, on the day of the sale by Whitson, trustee, such as to estop him or it from claiming any further title or interest in the boiler and engine sold by Whitson, trustee, at said sale?

6. "Did plaintiffs in said original claim and delivery action, or either of them, by his or its conduct or acts on the day of the sale by Whitson, trustee in bankruptcy, release the surety, O. D. Revell, from further liability on the replevin bond executed by said Revell on 23 September, 1900?

7. "Did W. H. Westall acquire good title to the said property by his purchase at the sale by Whitson, trustee in bankruptcy, by reason
(742) of the waiver or estoppel of said plaintiffs in said original claim and delivery action, or either of them, to thereafter claim said property, to wit, boiler and engine?"

At the close of all of the evidence "Mr. Bourne moves the court for judgment in behalf of the Asheville Supply and Foundry Company and D. S. Russell against Machin and Atkins and the surety on their bond in claim and delivery for the sum of $450, with interest thereon from the date of the seizure of the property." Motion overruled and exception allowed.

This motion was based upon all of the evidence introduced in the case and the record of the consolidated cases. The court instructed the jury that if they believed the evidence they should answer the fifth issue "Yes." The court answered the sixth and the seventh issues "Yes," upon the coming in of the verdict, to all of which no exception was taken. The court rendered judgment upon the verdict against the plaintiffs, except as to a small amount for damage not material to this appeal.

Plaintiff, the Asheville Supply and Foundry Company, excepted and appealed.

Davidson, Bourne & Parker for plaintiff.
Moore & Rollins for Westall and J. D. Murphey for Revell.

CONNOR, J., after stating the case: The trial of this case took quite a wide range and the record comes to this Court in a somewhat confused condition. Much of the testimony and a number of the exceptions are rendered immaterial by the elimination of Russell, one of the original plaintiffs, by the verdict of the jury in finding that his interest in the property passed to his coplaintiff the Asheville Supply and Foundry Company. The jury having found that the title to the property was, prior to the sale by Whitson, trustee, in the Asheville Supply and Foundry Company, the sole question is, whether this corporation has lost or been deprived of its title by what occurred at the time of the sale by Whitson, trustee. There is no suggestion that it has sold the property or, by any contract, parted with its title. It is, however, alleged in the supplemental answer and testimony introduced to sustain the contention that it has lost its title by way of estoppel (743) *in pais*. His Honor, being of the opinion that if the evidence bearing upon this issue was believed by the jury they should answer it in the affirmative, so instructed them. The contention of the plaintiff corporation to the contrary, while not presented by an exception to the charge, is presented by exceptions to the admission of the evidence and by motion for judgment upon the whole of the evidence. It would have been better practice to have excepted to the instruction on the fifth issue, but we think its other exceptions fairly present its contentions. The answers to the sixth and seventh issues are, as his Honor held, dependent upon the correctness of the instruction upon the fifth, hence the question upon which the decision of the appeal must rest is, whether his Honor correctly admitted and interpreted the evidence relevant to the alleged estoppel. It is unquestionably true, and quite elementary, that title to property may pass, or at least the true owner may be precluded from asserting his title, as against a purchaser from one having no title, by conduct which comes within the definition of an estoppel *in pais*. In *Mason v. Williams,* 53 N. C., 478, it appeared that the plaintiff was the owner of an engine; that, at a sale made by Pescud, trustee, he was present and upon the statement being made in his hearing that Pescud's title was good, made no objection, and bid on the property. It was purchased by defendant. Mason thereafter sued him for the property. The court, upon an agreed state of facts, held that plaintiff was estopped. *Battle, J.,* thus states the contention of the defendant: "The argument is that it must be taken either that the plaintiff had waived his title and thereby authorized Pescud to sell the engine, or that he can not now be allowed to assert it, because it would be

a fraud upon the defendant to permit him to do so." The judgment was reversed because the court did not submit the questions, upon which the estoppel depended, to the jury. The principle upon which the rights of the parties depended is thus stated by the learned *justice*: "When one purchases a chattel from one who is not the owner of it, and it is admitted by the parties or found by the jury as a fact that the purchaser was induced to make the purchase by the declarations and acts of the true owner, the latter will be estopped from impeaching
(744) the transaction." This principle lies at the base of the doctrine of estoppel which, as said by *Pearson, J.*, in *Armfield v. Moore*, 44 N. C., 159, "lies at the foundation of all fair dealing between man and man." *Mason v. Williams* came before this Court, upon a second appeal, and is reported in 66 N. C., 564. The court below, *Barnes, J.*, charged the jury that "If the evidence satisfied them that the defendant was induced to make the purchase by the declarations or acts of the plaintiff, the latter would be estopped from impeaching the transaction." The majority of the Court sustained the charge and affirmed the judgment for the defendant. *Pearson, C. J.*, and *Dick, J.*, dissented, not from the language of the instruction, but from its application to the facts, and *Justice Boyden* "concurred in the principles set out in the dissent, but felt bound by the verdict of the jury." Conceding, for the purpose of this discussion, that the language used by Mr. Bourne, the attorney for plaintiff, and of Mr. Woody, comes within the principle of *Mason v. Williams* and other cases, and that, if they or either of them had been the owners of the property, the jury would have been justified in finding that they were estopped, the question arises whether they bore such relation to the corporation as entitled them or either of them to authorize Whitson, trustee, to sell its property or to make it a fraud upon Westall to assert its title against him. Mr. Bourne was counsel at the time of the sale for plaintiff corporation and for Whitson, trustee. He says: "At the trustee's sale I attended as counsel for the trustee. My firm was general counsel for the Asheville Supply and Foundry Company." An inspection of the testimony does not disclose that Mr. Bourne had any other or further power to bind his clients in respect to the property than pertained to his employment as an attorney at law. We do not find that he was attorney in fact. Giving, therefore, the full legal import to his language at the time of the sale contended for by defendant, and conceding that it was sufficient, as a matter of law, to estop him, we do not think it could have such effect upon the rights of his client. He certainly had no authority to sell the property, or to authorize Whitson, trustee, to do so. "The powers of an
(745) attorney are to be determined, in a large measure, from the purpose of his employment; he has an implied authority to do any-

thing necessarily incidental to the discharge of the purpose for which he was retained, but beyond this his power ceases." 3 A. & E. Enc., 345. In *Moye v. Cogdell,* 69 N. C., 93, it was said: "An attorney can not compromise his client's case without special authority to do so, nor can he receive in payment of a debt due his client anything except the legal currency of the country." It was held, in that case, that an attorney employed to collect a debt by judgment could not release the judgment by taking a draft at sixty days. We are of the opinion that the evidence of Mr. Bourne's declarations at the time of the sale was not admissible for the purpose of affecting plaintiff's title, nor, after being admitted, could they be given such effect. In regard to Mr. Woody's authority to bind the corporation, there is more doubt. Mr. Westall says, "He is the manager of the Asheville Supply and Foundry Company and, I think, president, but I am not sure. . . . I know he claimed to be general manager—managing the business." Mr. Woody was dead at the time of the trial. It seems that Mr. Speed was president of the plaintiff corporation. In the affidavit to the complaint Mr. Woody describes himself as the "general manager." It does not appear what his duties or powers are, or to what extent he was empowered to represent and act for the corporation in respect to the sale of this property, or compromise its rights in the litigation. The extent of the power of the general manager of a corporation to dispose of its property out of the usual course of its business depends largely upon the character of the business, the charter, by-laws, etc. We could not say, as a matter of law, in the absence of any evidence upon these points, that he had such power. *Judge Thompson* says that "The general manager has power to bind the corporation by acts done in the ordinary course of its business." 10 Cyc., 924. In *Trent v. Sherlock,* 24 Mont., 255, it is held that a bill of sale of a portion of the mining company's property by the superintendent, which he has no authority to make, was not *prima facie* binding on the corporation and did not tend to show that he had an implied power to make it. "His implied power and authority are limited to do only those things which are incident to the usual business (746) of the corporation, or to that branch of it entrusted to his management. Such general manager's authority is as broad as, and no broader than, the scope of his employment and agency and the nature of the corporate business." 2 Purdy's Beach Private Corp., 1200. It is impossible to do more than lay down and apply this general principle. Each case involves so many elements peculiar to itself that it must be decided in the light of the facts disclosed, guided by this general principle.

Thus considered, we do not find any evidence of authority in Woody to attend the sale by Whitson, trustee, and, by his acts and declara-

tions, estop the plaintiff corporation from asserting title to its property or release the surety from his liability on the judgment. The plaintiff had successfully prosecuted its claim to the property, established its title in an action in which defendants made no defense. It filed no answer to the complaint. For reasons apparent on the face of the record the cause was retained for final judgment against the bondsman. The amount of his liability could not be fixed otherwise than by a verdict of the jury. By the wrongful conduct of defendants Machin and Atkins, the property was put in the possession of a corporation of which they and Revell, the surety, were the principal stockholders and, in this way, passed into the possession of Whitson, trustee in bankruptcy. He undertook to sell it, together with the other property of the bankrupt corporation. It seems that, some question having arisen between the attorneys present at the sale, Mr. Bourne stated that his clients did not claim the property, but looked to the bond for its value. This was not a statement of any fact which bound the client, but rather an opinion of Mr. Bourne as its attorney. The fact that the property belonged to the plaintiff corporation was known, and constituted the basis of the conversation. No fact was concealed or misrepresented. Every person buying at a bankrupt sale, as at one made by the sheriff, must take notice that nothing is proposed to be sold except the interest of the bankrupt or the defendant in the execution. We do not think that the plaintiff corporation has, by any officer empowered to act for it, (747) either authorized Whitson, trustee, to sell its property, or done anything which makes it fraudulent to assert its title against Westall. This is the test of defendant's claim, as laid down in *Mason v. Williams, supra.*

In the view of the record most favorable to defendants, the jury should have been permitted to pass, not only upon the testimony, but make such reasonable inferences as should be drawn therefrom. In *Mason v. Williams, supra,* although there was an agreed state of facts, this Court held that the ultimate decision of the existence of the constituent elements of an estoppel should have been submitted to the jury. This view of the case would work a new trial. It is evident, however, that with the testimony in regard to Mr. Bourne's and Mr. Woody's declarations excluded, as we think they should be, there would be nothing to go to the jury upon the fifth issue. The motion for judgment made by plaintiff should have been allowed.

The cause will be remanded to the Superior Court of Buncombe, with direction to set aside the verdict on the fifth, sixth and seventh issues and render judgment upon the verdict on the other issues, fixing the value and damages in such way as the parties may agree, or may be in accordance with the course and practice of the court.

Defendants moved in this Court that appellant be not allowed to tax defendants with the cost of sending up and printing the testimony. It appears from the record that the case on appeal was not sent to his Honor until 28 April, 1909, the cause having been tried at the March Term, 1907. His Honor made the following statement at the end of the case settled by him:

"This is the case on appeal settled by me at Greenville, N. C., on 28 April, 1909. I am now inclined to the opinion that more of the evidence than is necessary is in the case, but the case was tried more than two years ago. The appellants have sent down the cases on appeal, and the record, to me today. While I am engaged in Pitt Court, it is not possible for me now, in the time allowed on the appeal to go up for the approaching term of the Supreme Court, to eliminate what may be the unnecessary parts of the evidence, which appears to be the only objection to this statement. It is better to send it up as it is (748) or to avail myself of the right to refuse to settle the case, because of *laches* in the appellant, and I elect to pursue the former course."

It is manifest that his Honor could not, after two years' delay, undertake to do more. It was unfortunate that the settlement of the case was delayed so long; there were valid reasons for the delay. It would be impossible for us to separate such part of the evidence as was unnecessary from that which was so. It may not be improper to suggest that, while the stenographer properly took notes of all that occurred upon the trial, such parts as have no relevancy to the exceptions should be eliminated from the record on appeal.

Error.

Cited: Lynch v. Johnson, 171 N. C., 630.

J. H. METZ, ADMINISTRATOR, v. CITY OF ASHEVILLE.

(Filed 25 May, 1909.)

Cities and Towns—Sewerage—Police Regulations—Governmental Powers—Torts—No Liability.

In establishing a free public sewer system for the benefit of its citizens for the use of which no charge is made, a city is exercising a governmental function and is not responsible therein for damages alleged to have been caused by fever communicated to plaintiff's intestate by reason of the condition of a branch in which one of the sewer pipes emptied. (Cases in which the city exercises a power conferred for private purposes, distinguished by BROWN, J.)

ACTION tried before *Peebles, J.*, and a jury, at March Term, 1908, of BUNCOMBE, to recover damages for the negligent killing of William Smith.

At the conclusion of the evidence the court intimated an opinion that, upon the entire evidence, the defendant, as matter of law, was not liable, and that he would so instruct the jury.

In deference to this intimation of opinion the plaintiff submitted to nonsuit and appealed.

(749) *Charles E. Jones for plaintiff.*
H. B. Carter and Davidson, Bourne & Parker for defendant.

BROWN, J. Plaintiff sues to recover damages for the death of his intestate, caused by typhoid fever communicated by the condition of Reed Branch, a small stream emptying into the French Broad River, and which ran near the house where said intestate resided. The defendant, under its charter, maintained a free public sewerage system, the mouth of which emptied into Reed Branch, a short distance beyond the city limits, above the house where intestate resided.

It is admitted that, with full knowledge of the conditions necessarily caused by the constant discharge of the sewerage of the city into the branch, the intestate rented the house and moved into it, in February, 1905, and died, in August following, of typhoid fever, although his wife and children did not take it. There is evidence tending to show that the fever was caused by the sewerage in the branch. It is contended that the sewer system should have emptied into the French Broad River, and that emptying it into Reed Branch created a nuisance, for which defendant is liable.

Whatever may have been held by some other courts, it is plain that under the previous decisions of this Court the opinion of his Honor is well founded. The principle upon which our decisions have been based is clearly stated by the present *Chief Justice*, speaking for a unanimous Court, in *McIlhenny v. Wilmington*, 127 N. C., 146: "The law may, on a review of the authorities, which are uniform, be thus stated: When cities are acting in their corporate capacity or in the exercise of powers for their own advantage, they are liable for damages caused by the negligence or torts of their officers or agents; but where they are exercising the judicial, discretionary or legislative authority conferred by their charters, or are discharging the duty imposed solely for the public benefit, they are not liable for the torts or negligence of their officers, unless there is some statute which subjects them to liability therefor." *Moffitt v. Asheville*, 103 N. C., 237; *Pritchard v. Commissioners*, 126 N. C., 908; *Hill v. Commissioners*, 72 N. C., 55; *Coley v. Statesville*, 121 N. C., 316.

The same principles are recognized and set forth in an elab- (750) orate opinion by *Mr. Justice Walker,* in *Hull v. Roxboro,* 142 N. C., 453. See, also, *Peterson v. Wilmington,* 130 N. C., 77. The theory upon which municipalities are exempted from liability in cases like this is, that in establishing a free sewerage system for the public benefit it is exercising its police powers for the public good and is discharging a governmental function and, as expressed by the Supreme Court of Illinois, "It is a familiar rule of law, supported by a long line of well-considered cases, that a city in the performance of its police regulations can not commit a wrong through its officers in such a way as to render it liable for a tort." *Craig v. Charleston,* 180 Ill., 154; Dillon Mun. Corp. (4th Ed.), sec. 975. The distinction between cases in which a power is conferred upon a municipality for private purposes and those where such power has relation to public purposes only, and of the liability or nonliability of the municipality therein, is thus aptly and clearly stated in 1 Smith's Modern Law of Municipal Corp., sec. 780: "When power conferred has relation to public purposes and for the public good, it is to be classified as governmental in its nature and appertains to the corporation in its political capacity. But when it relates to the accomplishment of private purposes in which the public is only indirectly concerned, it is private in its nature, and the municipality, in respect to its exercise, is regarded as a legal individual. In the former case the corporation is exempt from all liability, whether for nonuser or misuser; while in the latter case it may be held to that degree of responsibility which would attach to an ordinary corporation."

Recognizing this well-defined distinction in the liability of municipal corporations, it is held that where by statute it is made the duty of the city to remove garbage, it is a governmental function and the city is not liable for the manner of its discharge. *Davidson v. Mayor,* 54 N. Y., sec. 51. So a city is held not to be liable for permitting its hydrants to become clogged, since the neglect is in the discharge of a public governmental function. *Miller v. Minneapolis,* 75 Minn., 131. Therefore, a city is not liable for damages of any sort arising from the negligence of its fire department. *Irvine v. Chattanooga,* 101 Tenn., 291. Nor in the performance of governmental duties (751) generally. *Bartlett v. Clarksburg,* 45 W. Va., 393; *Snyder v. Lexington,* 20 Ky. L., 1562; *Love v. Atlanta,* 95 Ga., 129. Applying this same principle, the town of Greenville was exempted from liability for damages for illness caused by a foul condition of its public sewer, this Court holding that "Where a drain constructed by a municipal corporation through its negligence becomes choked with refuse and overflows the premises of a landowner, the corporation is liable only for

damages to the property, not for bills of physicians, increase in expenses of his family, loss of time or mental anguish, the result of illness caused by the condition of the drain." *Williams v. Greenville,* 130 N. C., 93.

The reason of this distinction in regard to property seems to lie in the fact of ownership, vested rights, which no one can invade, not even the government, unless for public purposes, and then only by paying the owner for it. Where, in the discharge of its governmental functions and police powers, the officers of a municipality invade property rights, the doctrine of *respondeat superior* applies and the corporation is liable for their acts.

The identical question presented on this appeal was decided by the Court of Appeals of New York, in *Hughes v. Auburn,* 46 L. R. A., 636, where it is held: "(1) A city is not liable in damages for disease suffered by an individual in consequence of the neglect of the city authorities to observe proper sanitary precautions in the construction and maintenance of a sewer system. . . . (3) The statutory right of action for damages by reason of death caused by wrongful act, neglect or default, does not extend to an action against a city by the representatives of one who dies from disease superinduced by the neglect of sanitary precautions on the part of the public authorities in the construction or maintenance of a sewer system."

So it was held by the Massachusetts Court that where a private party sued a city for personal damages arising from the creation of a nuisance by the city upon his premises in constructing a sewer system with so narrow an outlet that the sewage was set back into plaintiff's cellar through a drain which he had constructed, by permission of the city, to connect with the public sewer, the action (752) could not be maintained. *Buckley v. New Bedford,* 155 Mass., 64. See, also, *Markey v. Queens County,* 39 L. R. A., 46; *Hughes v. Monroe,* 39 L. R. A., 3; *Kavanagh v. Barber,* 131 N. Y., 211.

The village of Keesville, as authorized by statute, maintained, by a public charge in the nature of taxation, a waterworks system which it used for the purpose of extinguishing fires. The Court of Appeals of New York held that the corporation was not liable for damages arising from the negligence of its agents in operating the waterworks at a fire. The Court holds that was an exercise of the police power of the village for the public benefit for the purpose of extinguishing fires, and remarks that "Cases have arisen, and may still arise, where an extensive conflagration might bankrupt the municipality, if it could be rendered liable for the damages or losses sustained." *Insurance Co. v. Keesville,* 148 N. Y., 46.

The distinction between the exercise of municipal corporate func-

tions for the public benefit and those undertaken by such corporations for pecuniary profit is clearly recognized by *Mr. Justice Connor,* in *Fisher v. New Bern,* 140 N. C., 506, a case relied upon by plaintiffs. In that case it appeared that the city of New Bern, through a commissioner created by law, operated an electric-light plant for profit and furnished lights only to those who paid for them. From negligence in permitting a live wire to remain on the ground a person was killed. The Court held that operating an electric-light plant for profit for the benefit of those who paid for the service was not an exercise of police power, nor a governmental function, and that the city was liable for the negligence of its agents.

It must be admitted that the city of Asheville was exercising its police power when it established a free public sewer system, for the use of which no charge is made, for the benefit of its citizens. Certainly, nothing is more necessary to the health of a city than that its filth should be removed and its area well drained.

That the establishment of a public sewer system is an exercise of a governmental function is recognized by all the authorities I have quoted.

The serious consequences of holding a municipality liable for (753) disease arising from nuisances of this kind is portrayed by the Court of Appeals of New York in an opinion of marked ability, in *Hughes v. Auburn, supra:* "The right of the plaintiff to maintain this action depends upon the right of the deceased herself to maintain it had she survived the sickness resulting in her death, and this suggests the inquiry whether an individual who has suffered from disease superinduced by the neglect of the authorities of a city or village to observe sanitary laws in the construction or maintenance of a system of sewerage, can recover damages for the injury from the municipality. If one member of a family can, so can every member; and if one family may, so may every family, and every person who can give proof enough to carry the case to the jury. It matters not what the disease may be or the cause, so long as it may be traced by proof to some act or neglect on the part of the municipal authorities. There are few communities where places or conditions may not be found that generate disease, and, if the municipality may be charged with the results traceable to these conditions, it is indeed subject to a liability more serious and far-reaching than has heretofore been recognized."

Affirmed.

Cited: Little v. Lenoir, 151 N. C., 418; *Moser v. Burlington,* 162 N. C., 144; *Hines v. Rocky Mount,* 162 N. C., 412, 416; *Rhodes v. Durham,* 165 N. C., 685.

REID & BEAM v. SOUTHERN RAILWAY COMPANY.

(Filed 25 May, 1909.)

1. **Railroads—Penalty Statutes—Carriers of Goods—Refusal to Accept Freight—Constitutional Law.**

Section 2631 of the Revisal of 1905, imposing a penalty on a railroad for refusing to accept freight tendered for shipment, is a valid regulation in direct and reasonable enforcement of the duties incumbent on defendant company as a common carrier, and is not in conflict with the Fourteenth Amendment of the Constitution of the United States.

2. **Same—Interstate Commerce.**

Nor is said section repugnant to or in contravention of Article I, section 8, of the Constitution of the United States, conferring upon Congress the power to regulate commerce between the States. The penalty is in direct enforcement of the duties incumbent on defendant company as common carrier, is imposed for a local default, is not a burden on interstate commerce, but in aid thereof, and, in the absence of inhibitive congressional legislation or of interfering action by the Interstate Commerce Commission, the matter is a rightful subject of State legislation.

3. **Railroads—Carriers of Goods—Schedules—Congress—Statutory Requirements—Presumptions—Interstate Commerce.**

The law presumes that a railroad company has complied with the requirements of an act of Congress, and the orders of the Interstate Commerce Commission made thereunder, in publishing its rates to and from stations on its road.

4. **Railroads—Schedules—Publication—Congress—Statutory Requirements—Purpose—Penalty Statutes.**

The purpose for which railroad companies are required to publish their schedule of rates by the act of Congress and the orders of the Interstate Commerce Commission, made in pursuance thereof, is entirely different from and inapplicable to that involved in an action for the penalty accruing from the refusal of the company to accept freight when tendered, under the Revisal, sec. 2631.

5. **Railroads—Penalty Statutes—Carriers of Goods—Refusal to Accept Freight—Due Process—Constitutional Law.**

The defendant having been afforded full opportunity to make defense, and the evidence failing to disclose any substantial excuse or explanation for its default, on the facts appearing in this case, a recovery of the penalty imposed by the statute is not an interference with or a burden on interstate commerce, prohibited by the United States Constitution or statutes or by regulations of the Interstate Commerce Commission, made in pursuance thereof.

(754) ACTION under section 2361, 1905, for wrongful failure to receive freight for shipment, tried before *Justice, J.*, and a jury, at January Special Term, 1909, of RUTHERFORD.

There was evidence, on the part of plaintiffs, tending to show that, on or about 25 June, 1906, the plaintiff firm, having received an order for a carload of shingles from one James Haddox, at Scottsville, Tenn., applied to P. B. Gunnels, who was then agent of defendant company at Rutherfordton, N. C., for a car; the same was furnished and loaded with the shingles by plaintiffs, on 2 July, shipping instructions given, prepayment of freight tendered and bill of lading demanded; that the agent of defendant refused to give bill of lading, or ship the goods, assigning for reason that he did not know where Scottsville, (755) Tenn., was, nor the rate thereto. Plaintiffs demanded that the goods be shipped, and told the agent they would prepay any additional amount found to be due, and requested that when the agent got ready to ship to 'phone to plaintiffs and they would come over and pay the freight due; that defendant's agent failed and refused to ship the shingles, till 17 July, when one Castle came to take over the agency, and being told, on inquiry of plaintiffs about the carload of shingles, and what the trouble was, he asked for shipping instructions, which were given, to James Haddox, Scottsville, Tenn., and on 19 July, the freight was paid, the bill of lading given, and shingles shipped as directed, arriving at their destination without further let or hindrance.

Plaintiffs further testified that they had received no pecuniary injury by reason of the delay; that Gunnels still had charge of the depot when the shingles were shipped, and that he left about that time, and Castle took charge.

There was evidence, on the part of defendant, that Scottsville, Tenn., was an industrial siding on the Knoxville and Augusta road, eight or ten miles out of Knoxville, Tenn., established for the convenience of persons shipping brick from that point; that there was no depot or regular agent there, but goods were rebilled to that point at Rockford, a regular station on the same road, some two miles distant.

One W. P. Hood, testifying for defendant, stated that he was superintendent of the Knoxville and Augusta road, and that this road was operated as an independent line; that there was no such place on that road as Scottsville, but an industrial siding called Scottsville, at the point indicated, a flag station, eight or ten miles out from Knoxville, and that bills of lading for goods to and from that point were made out at Rockford, a regular station, some two miles distant. On cross-examination the witness stated that his remittances from the operation of the road were made to the treasurer of the defendant company; that his reports were made to the auditor of such company, and that, since the consolidation of the East Tennessee and Virginia Railroad with the old Richmond and Danville, the defendant company had paid all the employees of the Knoxville and Augusta road their (756) salaries.

The court below charged the jury, in part, as follows:

"The burden is on the plaintiffs to show, by the greater weight of the evidence, that the defendant is indebted to plaintiffs. This suit is brought to recover penalty for refusal on the part of the defendant, Southern Railway Company, to receive a carload of shingles for shipment to James Haddox, Scottsville, Tenn. In order to entitle plaintiffs to recover it is necessary for the jury to find from the evidence, by the greater weight thereof, first, that the defendant is a common carrier; that is admitted; second, that the plaintiffs tendered the carload of shingles for shipment, and, third, that defendant refused to receive the same for shipment. If the jury finds from the evidence, by the greater weight thereof, first, that the plaintiffs, Reid & Beam, tendered the carload of shingles to Gunnels, the defendant's agent at Rutherfordton, and furnished him with shipping directions and offered to prepay the freight, and demanded a bill of lading, and that the plaintiffs demanded that the car be shipped, then the plaintiffs would be entitled to recover, unless you find from the evidence that the defendant failed and refused to ship by reason of facts intervening which defendant, by the exercise of reasonable care, could not have prevented or overcome. The defendant contends that the agent did not know where Scottsville was, and did not know the freight rate, and that therefore defendant is excused. If you find from the evidence, by the greater weight thereof, that Scottsville or Scottville was a flag station on a branch road under control of defendant company, then it was the business of the agent of defendant company to know where it was and to know the freight rate to that point; or if you so find that the plaintiffs told the agent that Scottsville or Scottville was a ag station on a branch road under control of Knoxville and Augusta Railroad and some seven or eight miles from Knoxville, and that statement was true, and further so find that, by the exercise of reasonable care and diligence on the part of the agent, he could have ascertained where the place was, and the rates, it was his duty to do so, and failure on his part to exercise such reasonable care would not excuse the defendant company. If
(757) you find from the evidence, by the greater weight thereof, that defendant refused, on 2 July, to receive the car, simply on the ground that the agent did not know and could not, by the exercise of reasonable care, have ascertained the locality and rates, and you further find from the evidence, by the greater weight thereof, that the failure to ship up to the 19th was on the same ground and no other, then the plaintiffs would be entitled to recover $50 a day, as a penalty for such failure, for 14 days; this would exclude the day of shipment and also exclude the Sundays included between the dates, which would be $700."

The jury rendered a verdict as follows:

"Is the defendant indebted to the plaintiffs for the unlawful failure to receive a carload of shingles to be transported to Scottsville, Tenn., as alleged? If so, in what sum?" Answer: "Three hundred and fifty dollars."

There was judgment on the verdict for plaintiffs, and defendant excepted and appealed, and, having made eighteen exceptions, duly noted in the record, under different forms of statement, assigns for error—

"1. That the statute in question, Revisal, 1905, sec. 2631, is unreasonable and oppressive and in conflict with the Fourteenth Amendment to the Federal Constitution.

"2. That, as applied to interstate commerce, the same is in conflict with Article 1, sec. 8, clause 3, of said Constitution, (*a*) as an unlawful attempt to regulate commerce; (*b*) and, on the facts presented here, as amounting to distinct burden upon it."

W. B. Rodman and Joseph M. Carson for defendant.
No counsel contra.

HOKE, J., after stating the case: The validity of these penalty statutes has been before the Court for consideration in many recent cases, and, in *Efland v. R. R.,* 146 N. C., 138, this being a decision on a statute of kindred nature, the Court, in speaking to the power of a government to enact regulations of this character, said: "The right of the State to establish regulations for these public-service corporations, and over business enterprises in which the owners, cor- (758) porate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is now and has long been too firmly established to require or permit discussion." Citing *Harrill v. R. R.,* 144 N. C., 532; *Stone v. R. R.,* 144 N. C., 220; *Walker v. R. R.,* 137 N. C., 168; *McGowan v. R. R.,* 95 N. C., 417; *Branch v. R. R.,* 77 N. C., 347; *R. R. v. Florida,* 203 U. S., 261; *R. R. v. Helms,* 115 U. S., 513; *Mobile v. Kimball,* 102 U. S., 691; *Munn v. Illinois,* 94 U. S., 112.

The opinion then quotes from that of *Associate Justice Field,* in *Helms v. R. R.,* 115 U. S., 513, both on the right to enact such statutes and the necessity for their proper enforcement, as follows: "The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The

statutes of nearly every State of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase, in many cases, double, and in some cases treble, and even quadruple the actual damages." And proceeds further: "And the right to establish such regulations for certain classes of pursuits and occupations, imposing these requirements equally on all members of a given class, has been made to rest largely in the discretion of the Legislature." *Tullis v. R. R.*, 175 U. S., 348; *Insurance Co. v. Daggs*, 172 U. S., 562; *McGowan v. Bank*, 170 U. S., 286.

And the very statute in question here (Revisal, 1905, sec. 2631) has been approved and upheld in several of these cases as a just and reasonable exercise of the power indicated and both as to inter- and intrastate commerce. *Garrison v. R. R., ante*, 575; *Twitty v. R. R.*, 141 N. C., 355; *Currie v. R. R.*, 135 N. C., 536; *Baggs v. R. R.*, 109 N. C., 279.

In *Twitty v. R. R., supra*, we have held that a refusal to receive goods for "transportation" and to issue a bill of lading therefor (759) amounts to a violation of this section, though the goods were received for storage.

In *Garrison v. R. R., supra*, it was held that the placing of goods for shipment in the car of the company, permitted by the agent, with a demand for shipment, and accompanied by a continuous offer of prepayment of freight, were facts from which a tender day by day should be inferred until the shipment was made.

Cotton Mills v. R. R., ante, 608, in no way conflicts with this position. That case only holds that where goods were on a platform, under circumstances leaving it doubtful whether they had been taken charge of by the company, with other facts which left the matter of a tender day by day in doubt, the question was properly referred to a jury to decide as to whether such tender had been made. And the opinion of the Court, on a former appeal in this cause (149 N. C., 423) is a direct decision on the validity of the statute to be enforced by orderly and proper procedure; the Court holding, on facts substantially similar to those presented here, as follows:

"1. A refusal by the carrier's agent to receive, at its depot, freight and transportation charges therefor, destined for a point on the carrier's road which was only a siding, and was not a regular station, is wrongful, and subjects the carrier to the penalty prescribed by Revisal, sec. 2631, when the refusal is on the ground that the agent did not know where the given destination was, and it appears that he could have ascertained that freight was ordinarily shipped there on waybills made out to a regular station on the carrier's road some two miles distant therefrom.

"2. When a shipment of freight and transportation charges are re-

fused by carrier's agent, because he did not know where its given destination was, and it appears that the name given was very slightly changed from that appearing on the 'Official Railway Guide and Shipping Guide' used by the carrier, the fact that another agent, who afterwards took the place of the first, promptly learned the location of the destination and the rate, and gave bill of lading and made shipment, is evidence that the rate and destination could have been ascertained by the first from the information given him, in an action for the (760) penalty prescribed by Revisal, sec. 2631.

"3. The penalty arising under Revisal, sec. 2631, from the wrongful refusal of carrier's agent to accept an interstate shipment of freight bears no relation to the commerce clause of the Federal Constitution, for the penalty accrues before the freight is accepted for transportation.

"4. The shipper of the goods is the 'party aggrieved,' and is the one entitled to sue for the penalty prescribed in Revisal, sec. 2631, which arises from the wrongful refusal of the carrier's agent to accept them for transportation."

It was chiefly urged for error, on the part of the defendant company, that the statute in question was invalid because an unlawful interference with interstate commerce, and we were referred by counsel to several decisions of the Supreme Court of the United States as tending to support their position; notably *McNeil v. R. R.*, 202 U. S., 543; *R. R. v. Mayes*, 201 U. S., 321; *R. R. v. Murphy*, 196 U. S., 194.

It may be, as indicated in the former opinion in this cause, that the commerce clause of the Federal Constitution is not involved in the case, on the ground therein stated, that the penalty accrues before the "freight is accepted for transportation," and on the principle applied in *Coe v. Errol*, 116 U. S., 517; but conceding that the goods, when tendered for transportation to another State, as to matters involved in such transportation and in reference to these penalty statutes, should be considered and dealt with as interstate commerce, we are of opinion that the position of the counsel can not be sustained, and that they do not correctly interpret the cases cited and relied on by them.

In the case of *Morris-Scarboro-Moffitt Co. v. Express Co.*, 146 N. C., 167, the plaintiffs sued for penalty imposed by section 2634 of the Revisal, for unlawful failure on part of defendant company to adjust and pay a valid claim for loss or damages to goods shipped from another State, and it was held—

"2. Revisal, sec. 2634, is not repugnant to or in contravention of Article I, section 8, of the Constitution of the United States, conferring upon Congress the power to regulate commerce be- (761) tween the States. The penalty is in direct enforcement of the duties incumbent on the carriers by law to adjust and pay for damages

due to their negligence; is imposed for a local default arising after the transportation has terminated; is not a burden on interstate commerce, but in aid thereof, and, in the absence of inhibitive congressional legislation, the matter is the rightful subject of State legislation."

And in the opinion, page 171, the Court said: "The decisions of the Supreme Court of the United States have uniformly held that under this clause of the Constitution commerce between the States shall be free and untrammeled by any regulations which place a burden upon it; and these decisions also hold that, in the absence of inhibitive congressional legislation, a State may enact and establish laws and regulations on matters local in their nature which tend to enforce the proper performance of duties arising within the State, and which do not impede, but aid and facilitate, intercourse and traffic, though such action may incidentally affect interstate commerce. Calvert on Regulation of Commerce, pp. 76, 152, 159." Citing in support of this position *Mobile v. Kimball,* 102 U. S., 691; *Smith v. Alabama,* 124 U. S., 465, 476; *Telegraph Co. v. James,* 163 U. S., 650; *R. R. v. Solan,* 169 U. S., 133-137, and other authorities, and quoting from the opinion of *Mr. Justice Matthews,* in *Smith v. Alabama, supra,* as follows:

"It is among these laws of the States, therefore, that we find provisions concerning the rights and duties of the common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier, exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee, at the right time or place, he is liable, in action for damages, under the laws of the State in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought
(762) from another State, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in *Sherlock v. Alling,* above cited."

The Court then referred to the cases cited, and relied upon by defendant, as follows:

"We were referred by counsel to *R. R. v. Murphy,* 196 U. S., 195; *R. R. v. Mayes,* 201 U. S., 321; *McNeal v. R. R.,* 202 U. S., 543, but we do not think that these decisions are in conflict with the views we have held to be controlling in the case before us. As we understand them, they all proceed upon the idea, not that the regulations in question

were void because they affected, in some way, interstate commerce, but because they interfered directly with intercourse and traffic between States and were of a character that imposed an undoubted and distinct burden upon them."

As showing that this is a correct deduction from these authorities, in *McNeill v. R. R., supra, Mr. Justice White,* for the Court, said: "Without at all questioning the right of the State of North Carolina, in the exercise of its police authority, to confer upon an administration agency power to make reasonable regulations concerning the place, manner and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subjects made by the State, or under its authority, which directly burdens interstate commerce, is a regulation of such commerce and repugnant to the Constitution of the United States."

In *Mayes v. R. R., supra, Associate Justice Brown,* among other things, said: "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and amounts to a burden (763) upon interstate commerce. It makes no exception in cases of sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather."

And, in *R. R. v. Murphy, supra, Mr. Justice Peckham,* delivering the opinion, said: "The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the State, with regard to the transportation of articles of commerce; it prevents a valid contract of exemption from taking effect, except upon a very onerous condition, and it is not of that class of State legislation which has been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract, unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another car-

rier to give, and yet, if the information is not obtained, the carrier is to be held liable for the negligence of another carrier, over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it."

In *Garrison v. R. R., ante,* 575, the Court has held, *Connor, J.,* delivering the opinion, that the statute in question here is not an arbitrary requirement permitting no defense, but that "When the carrier shows the existence of conditions for which it is not responsible, preventing and rendering impossible the discharge of the duty, it will not be liable for the penalty," and quotes with approval from an opinion by *Ashe, J.,* as follows: "When the facts show that by force of circumstances for which it is in no way responsible the carrier was disabled from (764) performing the duty imposed by the statute, it would be unjust to punish it for failure to comply with its requirements."

To like effect is *Whitehead v. R. R.,* 87 N. C., 255; *Keeter v. R. R.,* 86 N. C., 346; *Branch v. R. R.,* 77 N. C., 347. The statute, therefore, does not come under the condemnation expressed in these decisions of the United States Supreme Court, but it is always open to defendant to offer satisfactory excuse and explanation for an apparent default, and this opportunity was given the defendant on the trial of the present case.

Since the decision of *Morris-Scarboro-Moffit Co. v. Express Co.* was rendered, the Supreme Court of the United States, the final authority on these matters, has held, on a question relevant to this inquiry, that "Notwithstanding the creation of the Interstate Commerce Commission and the delegation to it by Congress of the control of certain matters, a State may, in the absence of express action by Congress or by such commission, regulate for the benefit of its citizens local matters indirectly affecting interstate commerce."

This principle was announced and sustained in *R. R. v. Flour Mills,* 211 U. S., 612, a case which involved the right of the court to compel a railroad or a common carrier to place cars on a siding which had been prepared for the purpose and for the benefit and convenience of a flouring mill, engaged in making shipments of interstate commerce. So far as we have been enabled to discover, there has been no act of Congress or regulation of the Interstate Commerce Commission which undertakes to deal directly with this question of the reception of freight for shipment, certainly none in reference to its safety and prompt dispatch; and, until this is done, we are of opinion that the matter comes within the principle of the numerous authorities referred to, and continues to be a subject for proper and reasonable State regulation.

It does not appear from the testimony that the defendant has not filed its schedule of rates with the Interstate Commerce Commission to

Scottville, Tenn., for it can hardly be seriously contended that the difference between Scottville, Tenn., and *Scottsville,* Tenn., is of the substance. The presumption is that the company has complied with the law. And if it were otherwise, we are of opinion that the act of Congress and the orders of the commission made thereun- (765) der requiring the publication of rates, was made for an entirely different purpose from that involved in this inquiry, and does not constitute such interfering action. See *Harrell v. R. R.,* 144 N. C., 540, 541.

Nor do we think that the statute imposes any burden upon interstate commerce as applied to the facts of this particular case. While one of defendant's witnesses stated, in his examination-in-chief, that the Knoxville and Augusta road was operated as an independent line, the witness evidently could have meant only that a separate organization was maintained for purposes of local management and control. This is, no doubt, required by its charter or the general statutes of the State of Tennessee, but it is also conclusively established, from the statement of the witness on his cross-examination, that the Knoxville and Augusta road is operated by defendant company, all the money being sent to its treasurer, the reports being made to its auditor, and all salaries of all employees being paid by the defendant. This being true, the agent of the defendant should have known of the placing of this siding and the rate thereto, or should have ascertained the same in the exercise of reasonable care, and this was the only burden which was placed upon the defendant, and any fact or circumstance which might have tended to indicate hardship or oppression would seem to be effaced by the fact admitted, that in two days after the coming of a new man, and while the former agent was still in charge, the goods were received and shipped, and reached their destination in due course without further annoyance or delay.

Nor is there any merit in the suggestion that the plaintiffs suffered no pecuniary injury by reason of the delay. Speaking to this question, in *Summers v. R. R.,* 138 N. C., 298, this Court said: "These penalties are not given solely on the idea of making pecuniary compensation to the person injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment."

We are of opinion that, in the absence of inhibitive congressional legislation, or of interfering action on the part of the Interstate Commerce Commission, the statute in question is a valid regu- (766) lation in direct and reasonable enforcement of the duties incumbent on defendant as a common carrier; that on the trial the defendant was afforded full opportunity to make defenses, and the facts presented

disclose no substantial excuse or explanation for its default; that no error appears in the record which gives the defendant any just ground of complaint, and the judgment against it is therefore affirmed.

No error.

BROWN, J., dissenting: This is a civil action to recover a penalty, under section 2631 of the Revisal of 1905, for failure to receive a carload of shingles to be shipped from Rutherfordton, N. C., to Scottsville, Tenn. The following issue was submitted:

"Is the defendant indebted to the plaintiff for the unlawful failure to receive a carload of shingles to be transported to Scottsville, Tenn., as alleged? If so, in what sum?" Answer: "Three hundred and fifty dollars."

1. I am of opinion that, upon the entire evidence, there was but one tender and that in no event can a penalty for more than one day be recovered. When the agent of defendant refused to issue the bill of lading, and gave his reasons for it, then and there plaintiff told the agent that when he found what the freight rate was, to let him know, and he would prepay it, agent replying that when he got instructions how to ship, he would issue bill of lading and ship shingles. Plaintiff never had a further conversation with the defendant's agent from 2 July, 1906, to 17 July, 1906, when one Castle came to plaintiff's place of business to inquire about the car. Plaintiff further testified that he never lost a cent by the shipment being delayed.

On 17 July, Castle came to relieve defendant's agent, Gunnels, and went in to see Reid about the car of shingles. Reid showed him correspondence that he had received from James Haddock relative to the delay of the shipment of shingles, stating that Scottsville was on the Knoxville and Augusta Railroad. In the meantime the freight office at Columbia, S. C., was also trying to locate Scottsville, and received a wire from defendant's agent at Knoxville that Scottsville was
(767) a siding on the Knoxville and Augusta Railroad a few miles out from Knoxville. The information was forwarded to Gunnels on 19 July, and the bill of lading was issued and the car was moved that day. The standard railroad guides and directories do not show a Scottsville or a Scottville anywhere in Tennessee.

These undisputed facts show that there was only one tender and that the plaintiff made no further tender, but acquiesced in the delay incident to locating Scottsville, the place of destination, admitted to be not on defendant's lines of railway.

This puts the case, in my opinion, squarely on "all fours" with the opinion of this Court in *Cotton Mills v. R. R., ante,* 608.

2. I think this transaction from its inception related solely to interstate commerce and that the State statute can not apply.

The car was ordered for the purpose of shipping shingles to a point in Tennessee. The act of furnishing cars for such shipments was held to be interstate commerce by the Supreme Court of the United States, in *R. R. v. Mayes,* 201 U. S., 321, because it was one of the steps necessary to the culmination of the transaction.

The car in this case had been duly furnished, and was loaded with the shingles or articles to be shipped. The next step to complete the transfer of the title and the exchange of commodities was for the shipper to give shipping instructions and receive from the railroad company a bill of lading. The shipper claims that he gave instructions to ship to James Haddock, at Scottsville, Tenn., thus making it an interstate transaction. The statute in question, and under which this action is brought, undertakes to regulate the terms and conditions upon which the bill of lading shall be issued by the carrier. The bill of lading demanded was not to a point in this State, but to a point in Tennessee.

The contract which the defendant was required to enter into was a contract of carriage of freight from one State to another. Such contracts not only partake entirely of the character of interstate commerce, but they are actually regulated by the Interstate Commerce Commission under the authority of Federal law. Congress has legislated on the subject, and made regulations in reference to (768) the publication of rates for interstate commerce and otherwise taken control, through the commission, of all matters relating to the shipment of freight from one State to another. Act of 29 June, 1906, sec. 6. This section of the Interstate Commerce Act provides: "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff, filed and in effect at the time."

It is undisputed that the defendant company had never filed with the Interstate Commission and had never published a tariff to Scottsville or Scottville, Tenn., for the reason that its officials had never heard of any such place. This appears in the plaintiff's own testimony.

It turns out, upon investigation, that Scottsville is not and never has been a shipping point upon any railway, but that it is only a flag station and siding on the Knoxville and Augusta Railroad and that all freight destined to it is billed to Rockford, Tenn. Thus it appears that if defendant's agent had issued the bill of lading to Scottsville and fixed the freight rates thereto, and received the money, he would have violated the act of Congress which I have referred to and would have subjected the defendant to prosecution by the Federal Government. Surely the defendant can not be penalized by a State for not issuing a bill of lading in violation of the act of Congress in a matter over which the latter has exclusive control.

3. It is admitted that the plaintiff, when he tendered the car, demanded a bill of lading to a point in Tennessee not on defendant's system. The evidence is undisputed that defendant's agent consulted standard railway guides and endeavored to locate Scottsville, and was delayed in finding it, for the reason that all freight destined to (769) Scottsville was waybilled or consigned to Rockford; all freight originating at Scottsville was waybilled or consigned from Rockford. There is a siding at Scottsville, put there for the accommodation of a brick plant, and up to the time of this shipment the Knoxville and Augusta Railroad, upon whose line Scottsville is situated, had never received any shipments for that siding.

Upon these facts it is contended that defendant's agent was required to receive the car *eo instanti,* issue bill of lading to Scottsville (the first and only shipment from any point), enter into a contract for the carriage of the shingles to this point, and state the freight rate, when none had been established. The mere statement of the contention, I think, demonstrates its unreasonableness.

A common carrier may contract to deliver freight to a point beyond its own lines, but it can not be compelled to do so. Hutchinson on Carriers, sec. 145, and cases cited in notes. The liability of the carrier beyond the terminus of its own line must be based on contract, and no authority has been shown, and none exists, so far as my researches have discovered, to the effect that a State can compel an interstate carrier to enter into such a contract and give a through bill of lading to points in another State beyond its own lines and penalize the carrier for its refusal.

The condition of the tender of the car was that the defendant should contract to deliver it to a point in another State beyond its own line. It necessarily follows that if defendant can not be compelled by the State to enter into such a contract against its will, it can not be penalized for refusing to receive the car. A defense that may be interposed against the shipper for damages may be interposed in a suit for the

penalty. *Garrison v. R. R., ante,* 575; *Hardware Co. v. R. R., ante,* 703; *R. R. v. Mayes, supra; McNeill v. R. R.,* 202 U. S., 543.

For the reasons given I think the defendant's motion to nonsuit should have been allowed.

WALKER, J., concurs in dissenting opinion.

Reversed on writ of error, 222 U. S., 444.

Cited: Lloyd v. R. R., 151 N. C., 542; *Lumber Co. v.* R. R., 152 N. C., 72, 73, 74, 77; *Reid v. R. R.,* 153 N. C., 492.

(770)

FARMERS AND MERCHANTS BANK OF WILLIAMSTON v. GERMANIA LIFE INSURANCE COMPANY.

(Filed 25 May, 1909.)

1. **Principal and Agent—Negotiable Instruments—"Kiting" Checks—Purchaser—Lack of Authority—Notice Implied.**

The "kiting" of checks from one bank to another, a method to sustain a false credit at the banks or to temporarily raise funds, will not be implied as being within the scope of the authority conferred by a life insurance company upon its general State agent; and a bank having actual or implied notice of such transactions will be presumed to have knowledge of the agent's lack of authority.

2. **Principal and Agent—Negotiable Instruments—"Kiting" Checks—Authority of Agent—Evidence—Questions for Jury.**

When it appears that a general State agent of a life insurance company has been "kiting" the company's checks between banks for his individual purposes, and that one of these checks, purchased by the plaintiff bank, was drawn by the cashier of the insurance company to the general agent, and by him, as such, endorsed for value, and when there is evidence that both the cashier and general agent had authority to draw checks, and that the bank was a purchaser without notice, the question of notice is for the jury, and their finding the issue in the negative, under correct instructions, will not be disturbed on appeal, though the greater weight of the evidence may be to the contrary.

3. **Principal and Agent—Negotiable Instruments—"Kiting" Checks—Authority of Agent—Evidence—Burden of Proof.**

In an action to recover upon one of a series of "kiting" checks, alleged to have been made by the cashier or general State agent of an insurance company, under authority conferred by his company, and to have been acquired for value by the plaintiff, the burden of proof is on plaintiff to show that the cashier or general agent had the authority alleged.

4. Verdict Set Aside—Trial Court—Discretion—Preponderance of Evidence—Exception to Verdict—Appeal and Error.

It is within the discretion of the trial judge to set a verdict aside as being against the preponderance of the evidence, and this question will not be considered on appeal upon exception to a verdict and judgment thereon, at least in the absence of gross abuse in the exercise of the discretion.

5. Issues Sufficient—Issues Tendered.

When the issues submitted to a jury are sufficient to present all the controverted matters in the case, there is no error in refusing issues tendered.

(771) ACTION tried before *Biggs, J.*, and a jury, at June Term, 1907, of MARTIN.

Defendant appealed.

H. W. Stubbs, Wheeler Martin, H. A. Gilliam and W. W. Clark for plaintiff.

J. W. Hinsdale and Shepherd & Shepherd for defendant.

WALKER, J. This action was brought to recover $1,250, the amount of a check alleged to have been drawn by Lula Parham, cashier of the defendant, on the Mercantile Bank of Memphis, Tenn., to the order of R. B. Hall, manager of the defendant, and endorsed by him for value to the plaintiff, and also the protest fee, $2.50, making, in all, $1,252.50. The check was presented to the bank on which it had been drawn and payment refused, whereupon it was protested for nonpayment. The defendant denied its liability upon the ground that Lula Parham had no authority to draw the check, and that it had received no benefit therefrom. It further alleged that R. B. Hall, as manager, in August, 1906, opened an account with the plaintiff, in the defendant's name, but really for his own benefit, and for many months did a "kiting" business with the plaintiff, depositing with it checks and drafts on other parties, who owed him nothing, and making the same good by checks upon the plaintiff and others, the principal transactions in the way of "kiting" checks having been carried on between the said R. B. Hall, as manager, and the said Lula Parham, as cashier, of the defendant.

The court submitted to the jury two issues, which, with the answers thereto, were as follows:

1. "Is the defendant indebted to the plaintiff? If so, in what amount?" Answer: "Two hundred and seventy-six dollars and forty-eight cents, with interest from 17 January, 1907."

2. "Upon what item of debit appearing in the account of the defendant company with the plaintiff bank was the credit balance of $976.02,

dated 16 January, 1907, applied?" Answer: "The $1,250-check in controversy."

The answer to the first issue was arrived at by deducting the "credit balance" of $976.02 from the amount of the check, with the protest fee added, the plaintiff having charged the amount of the (772) check to the defendant when payment of it was refused.

There was much evidence introduced tending to show that R. B. Hall, as manager, and Miss Parham, as cashier, of the defendant, were "kiting" checks in their dealings with the plaintiff bank, and while this evidence may be very strong and convincing, we do not think it was of such a conclusive nature as to require the court to instruct the jury, as requested to do by the defendant, that, as matter of law, it charged the defendant with notice of the fact, so as to defeat the plaintiff's recovery. Frank F. Fagan, cashier of the plaintiff bank, testified that he did not know Hall was "kiting" checks, nor did he know that there was anything wrong in his transactions with the bank. On 13 December, 1906, he wrote the following letter to the defendant:

"Mr. R. B. Hall, manager of your company at Raleigh, N. C., carries an account at this bank as R. B. Hall, manager Germania Life Insurance Company of New York. We desire to know if his signature to checks meets with your approval, and if the same is authorized by you. We also would like to know if the signature of Lula Parham, cashier Germania Life Insurance Company, to checks drawn on the Mercantile Bank of Memphis, Tenn., is authorized by you. As Mr. Hall is manager of your company for North Carolina and Tennessee, we presume that he has authority to sign your checks, but we desire this information for the files and records of our bank, and will very much appreciate a prompt reply.

"Yours truly, FRANK F. FAGAN,
Cashier."

To this letter he received, 22 December, 1906, the following answer:

"GENTLEMEN:—We reply to yours of the 18th inst. in the affirmative, Mr. Hall and Miss Parham being authorized to draw checks, as indicated by you.

"Respectfully yours, N. S. WESENDONCK,
Second Vice President."

The judge charged the jury fully as to the extent of the authority of R. B. Hall and Lula Parham to draw checks in the name of the defendant, and that they had no authority, as agents, to do a "kiting business," and that the plaintiff is presumed to have (773) had notice of such lack of authority. He then charged the jury as follows:

"Checks are always supposed to be drawn upon a previous deposit of funds. If you find from the evidence that the check in controversy was one of a series of kiting checks and that the plaintiff knew or ought to have known this fact, in the exercise of reasonable care as prudent bankers, you will answer the first issue 'No.' Knowledge of any facts and circumstances reasonably calculated to put a man on inquiry makes it his duty to make inquiry, and he will be fixed with notice of all facts which such inquiry would have elicited. If you find from the evidence that the plaintiff did not have actual notice of such kiting, or constructive notice, that is, knowledge of such facts and circumstances as would put it upon notice by proper inquiry and investigation—in other words, if you find that the plaintiff neither knew nor had reasonable ground to believe that Hall was engaged in kiting checks, but, on the contrary, plaintiff reasonably believed that the account with plaintiff was being used by Hall as the company's account, and not his own private account, for his own benefit, then you will proceed to consider whether the defendant authorized the check in controversy. If the plaintiff has not satisfied you that it neither knew nor had reasonable ground to believe that Hall was engaged in kiting checks and using the deposit for his own personal benefit, you will answer the first issue 'No.'

"Now, as to the authority to draw the check in controversy, the burden is upon the plaintiff to satisfy you, by the greater weight of evidence, that Lula Parham had authority to draw the check in controversy. Unless the plaintiff has so satisfied you, you will answer the first issue 'No.'"

The court then directed the attention of the jury to the facts and circumstances tending to show whether Lula Parham had authority to draw the check in controversy, and whether the defendant had notice that R. B. Hall and Lula Parham were "kiting" checks, and that the check for $1,250 was drawn without the authority of the defendant. The court further instructed the jury as follows:

"The defendant is bound by such acts of its agents as it ex-
(774) pressly authorized, or such acts as are committed by its agents within the apparent scope of their authority—that is, such acts as it reasonably led the plaintiff to believe the agent possessed."

The charge was exceedingly favorable to the defendant and presented its contentions with reference to the issues and evidence in the case as strongly as the law permitted with a due regard to the rights of the plaintiff.

The law in regard to the duty and authority of an agent in the transaction of the business of his principal and the liability of the principal for the acts of his agent were fully explained to the jury with reference to the special facts and circumstances of this case, and

the charge in this respect was in accordance with the authorities upon the subject. *Bank v. Hay,* 143 N. C., 326, and cases cited therein. The real and vital questions in the case were, whether R. B. Hall and Lula Parham had been engaged in a "kiting business," and if so, whether the fact was known to the plaintiff, or could have been known by the exercise of reasonable care and diligence. It was conceded that if they had been "kiting" checks, and the check in controversy was one of the series of such checks, and, further, that the plaintiff knew, or should have known, such to be the case, then there was no liability on the part of the defendant. Upon the evidence, as we view it, these were facts for the jury to find, and the court properly left the matter to the jury as one of fact, instead of instructing them, as matter of law, to answer the first issue in favor of the defendant, upon the assumption that the dealings of R. B. Hall with the plaintiff were not within the scope of his authority as manager of the defendant company and that, in law, the plaintiff had notice thereof. The court properly placed the burden upon the plaintiff of showing the authority of Lula Parham to draw the check, and correctly instructed the jury to ascertain whether such authority existed under the facts and circumstances of the case as they might find them to be. In other words, whether she had the actual or apparent authority to draw the check, under the evidence and the principles of law concerning the liability of a principal for the act of his agent, as already explained to them.

As we have stated, there was very strong evidence to show that R. B. Hall and Lula Parham were engaged in kiting trans- (775) actions—that is, they were interchanging commercial paper for the purpose of temporarily raising money or sustaining credit; but, on the contrary, the defendant had informed the plaintiff, about ten days before the check for $1,250 was deposited with the plaintiff bank, that R. B. Hall and Lula Parham had authority to draw checks in the name of the defendant as its agents, and Frank F. Fagan, cashier of the plaintiff bank, testified that he did not know that the checks drawn by them respectively were not authorized, nor did he know that there was anything wrong in their transactions with his bank or the bank in Memphis. There was testimony sustaining the contention of each of the parties, and, under the circumstances, it was proper to submit the case to the jury with proper instructions as to the law bearing upon it. The court instructed the jury fully and correctly as to what would constitute notice that R. B. Hall and Lula Parham were not acting within the scope of their authority as agents of the defendant. While the preponderance of the evidence may have been on the defendant's side, we do not think, if this be so, it authorized peremptory directions to the jury to find in favor of the defendant in answering the issues.

If the verdict were against the weight of the evidence, the judge could have set it aside, and if he failed to do so upon proper application, we can not review his decision here and correct the error. There are few, if any, controverted questions of law in the case, and we have not deemed it necessary, therefore, to cite the authorities which sustain the charge of the court, and have confined our discussion to the pivotal question, whether the case should have been submitted to the jury to find the facts under proper instructions as to the law, as was done by the court, or whether the court should have charged substantially, as requested by the defendant's counsel, that, upon the evidence, they should answer the first issue in the negative.

The issues were sufficient to present all the controverted matters in the case, and there was no error in rejecting those tendered by the defendant. *Deaver v. Deaver,* 137 N. C., 240.

Upon a review of the whole case we find no error in the rulings and judgment of the court.

No error.

(776) CONNOR, J., dissenting: An examination of the record in this case, containing all of the evidence, forces me to the conclusion that, taking the whole evidence as true, the plaintiff bank was put upon notice that Hall and Miss Parham were "kiting" checks; that there was no fund upon which these checks were drawn, and this must have been known to the officers of the bank. If the check sued upon in this action were the only one drawn by Hall, I should concur in the opinion of the Court, but it is only one of a series of checks, all of which, when considered together with other admitted circumstances, show to my mind conclusively that the account is made up of a number of checks, all of which were drawn in accordance with the system of "kiting" carried on by the parties. The authorities cited in defendant's brief establish its contention that the checks were not drawn against any fund in bank, but upon other checks crossing each other in the mail for the purpose of maintaining an apparent balance. I am, therefore, compelled to dissent from the conclusion reached by the majority of the Court. In consequence of the late day of the term upon which the opinion is filed, I am unable to set out in full and discuss the evidence. I can, therefore, only express, with all possible deference, my dissent.

HOKE, J., concurs in dissenting opinion.

Cited: In re Herring, 152 N. C., 259.

R. M. SHEPPARD v. ROCKINGHAM POWER COMPANY.

(Filed 25 May, 1909.)

1. **Corporations—Shares of Stock—Voting Trust or Pool—Public Policy—Rights of Individual Owner.**

A stock agreement which takes away from the stockholders all right to vote for a period of three years after a certain future time, and provides for a voting committee to decide upon facts or conditions to conclude and bind all parties in interest, is contrary to public policy and void, as each stockholder must be free to cast his vote for what he deems for the best interest of the corporation.

2. **Corporations—Shares of Stock—Voting—Legal Title—Beneficial Ownership—Illegal Trust—Public Policy.**

An agreement which separates the beneficial ownership of stock in a corporation from the legal title is contrary to public policy and void.

3. **Corporations—Shares of Stock—Voting Trust—Proxy—Period of Duration.**

An agreement pooling stock in a corporation which creates a voting trust, with absolute powers to decide upon matters arising for a period exceeding three years, can not be considered as a proxy authorized by the Revisal, sec. 1184. A proxy is only good for the period of three years.

4. **Corporations—Shares of Stock—Voting Trust—Proxy—Powers Revocable.**

An agreement to pool shares of stock in a corporation for voting purposes, if considered as a proxy (Revisal, sec. 1184), can not be made irrevocable.

5. **Corporations—Shares of Stock—Demand—Voting Trust—Lawful Intent—Answer Insufficient.**

An answer of an illegal pool for the voting of corporation stock to a demand for possession of his stock by a purchaser of the stock so held, that it would not vote such stock illegally, etc., is insufficient.

6. **Corporations—Voting Trust—Shares of Stock—Rights of Purchaser—Injunction.**

A purchaser of shares of corporation stock held by an illegal voting trust may enjoin the voting thereof by the trust or its carrying out a contemplated plan of reorganization, and may vote the same in all stockholders' meetings.

ACTION from NEW HANOVER, heard upon injunction by *Lyon,* (777) *J.*, at chambers, 5 December, 1908.

Defendant appealed.

Davis & Davis for plaintiff.
Shepherd & Shepherd for defendant.

CLARK, C. J. This is a suit to declare illegal and void a stock deposit or voting trust agreement, and restrain the voting trustees from

using or exercising any power or control over the common stock of the defendant, Rockingham Power Company, and from voting the same in any meeting, and to declare the holders of the stock-deposit certificates issued by the trustees to be the *bona fide* owners of the common stock of the Rockingham Power Company, and for the election of officers
(778) and for the transfer and assignment of ten shares of common stock to the plaintiff in lieu of a stock-deposit receipt, issued by the voting trustees, calling for ten shares of stock.

The stock agreement takes away from the stockholders all right to vote for a period of three years after the first installation of the power plant of the Rockingham Power Company, and provides that the decision of the voting committee as to any of the facts or conditions of the said stock-deposit agreement shall be conclusive and bind all the parties in interest. The agreement is not made for the protection of bondholders, but to enable the stockholders to pool the stock and to control the corporation by a voting trust. The plaintiff was not a party to said agreement, but is a purchaser of ten shares of the stock thus pooled.

The agreement deprives the stockholders of the right to vote, and is therefore contrary to public policy and void. *Harvey v. Improvement Co.,* 118 N. C., 693; *Cone v. Russell,* 48 N. J. Eq., 209; *Shepaug Voting Trust Cases,* 60 Conn., 579; *Clark v. R. R.,* 50 Fed., 338; Cook Stockholders (4 Ed.), sec. 622.

Harvey v. Improvement Co., supra, is "on all fours," except that the agreement here is, if anything, more objectionable. In *Harvey's case* we said: "Every stockholder must be free to cast his vote for what he deems for the best interest of the corporation, the other stockholders being entitled to the benefit of such free exercise of his judgment by each; and hence any combination or device by which any number of stockholders shall combine to place the voting of their shares in the irrevocable power of another is held contrary to public policy."

In that case, as in this, the action was brought by the holders of a certificate issued by the voting committee. The voting-trust agreement in *Harvey's case* provided that if a vacancy occurred among the trustees it should be filled by the votes of the holders of the majority of the stock represented in the agreement, and that the holders of a majority of such stock should have the right, whenever they saw proper to do so, to instruct the trustees how to vote upon matters arising in the meeting, and also to remove the trustees and fill their places at any time.

No such agreements or stipulations appear in this case. The
(779) power is absolute in the trustees to do as they see fit, and any instructions from the majority of the stockholders would be useless.

Chief Justice Baldwin, of Connecticut, in a recent article (Yale Law Journal, 1891), says: "It is obvious that a trust of this character virtually severs the ownership of the stock from the power to vote on it. The legal owner casts the vote, but at the dictation of a third party who is not the equitable owner. And not only is the third party not the equitable owner, but he may, in the progress of time, be directly opposed to his interests. He represents the interests of the original constituents of the trust as they existed years before. Their interest in the stock meantime may have been sold to others, of different views, but these can take no share in the management of the corporation during the life of the trust. The legal theory of the relation between the State and those who receive from it a corporate franchise is that it is one resting on a personal confidence. The State issues, so to speak, its commission to the corporators, as its trusted and well-beloved servants, fit to do this special work which it commits to them. They can, therefore, no more alienate the right to vote on their stock at corporate meetings than the citizen can alienate his right to vote at public elections. Delegation is a temporary alienation, and therefore proxy voting is not recognized at common law at meetings of corporations. As was said in *Taylor v. Griswold,* 14 N. J. L., 222, 'The obligation and duty of corporators to attend in person and execute the trust or franchise reposed in or granted to them is implied in and forms a part of the fundamental constitution of every charter in which the contrary is not expressed.'"

Any agreement which separates the beneficial ownership of the stock from the legal title is contrary to public policy and void. *Harvey v. Improvement Co.,* 118 N. C., 693; *White v. Fire Co.,* 52 N. J. Eq., 178; *Shepaug Voting Cases,* 60 Conn., 576; *Cone v. Russell,* 48 N. J. Eq., 208; Beach on Corporations, sec. 306; *Clark v. R. R.,* 50 Fed., 338; *Kriessel v. Distilling Co.,* 61 N. J. Eq., 5.

"A sale by a stockholder of the power to vote upon his shares is illegal for very much the same reason that a sale of his vote (780) by a citizen at the polls, or by a director of a corporation at a meeting of the board, is illegal. Each is a violation of duty; in effect, if not in purpose, a betrayal of the trust." *Guernsey v. Cook,* 120 Mass., 501; *Woodruff v. Wentworth,* 133 Mass., 309; *Fremont v. Stone,* 42 Barb., 169; *Noel v. Drake,* 28 Kan., 265. This agreement can not be justified as a proxy, for a proxy is good only for three years. Revisal, 1184. A proxy is always revocable, and even when by its terms it is made irrevocable, the law allows the stockholder to revoke it. Frequently an attempt is made to permanently unite the voting power of several stockholders and thus control the corporation by giving irrevocable proxies to specified persons, but the law allows the stockholder to revoke this proxy at any time. Cook on Corporations (4 Ed.), sec.

611; *Woodruff v. R. R.*, 30 Fed., 91; *Cone v. Russell*, 48 N. J. Eq., 208; *Bridgers v. Staton, ante*, 216.

It is true that the voting trustees deny that they have any intention of voting the said stock, or causing the same to be voted, to bring about a reorganization of the company, and are advised by counsel and believe that they have absolutely no power whatever to vote said stock or cause said stock to be voted to bring about a reorganization of the company without the assent of all the holders of all said deposit receipts. This is not a sufficient answer for their refusal to transfer and assign the stock and deliver it to the plaintiff upon his demand. Plaintiff demanded the stock of the voting trustees prior to the institution of this action. In *Griffith v. Jewett*, 15 Weekly Law Bulletin, 419, the Court said: "We are dealing with the rights of property, and it is no answer, to one's demand for the possession and control of his own property, to say that he who withholds it does not intend to use it for an illegal purpose. The law gives to every one not under disability the control of his own property, and imposes upon him the duty of making lawful use of it."

Restrictions on the right to vote stock, like restrictions on the right to sell stock, are not favored by the courts, and the courts have held that any holder of trustee's certificates issued under similar contracts
(781) and agreements as this one, might at any time demand back his part of the stock. 2 Cook Corporations (4 Ed.), sec. 622; *Fisher v. Bush*, 35 Hun, 641; *Guernsey v. Cook*, 120 Mass., 501.

A *mandamus* or mandatory injunction lies to compel a corporation to transfer stock and to compel election of officers. Cook on Corporations, sec. 309; *Trust Co. v. Moran*, 29 L. R. A., 212; *R. R. v. Pennsylvania Co.*, 54 Fed., 741, 745, 750-752; High Inj., sec. 2; *R. R. v. Felton*, 69 Fed., 273.

The illegality of voting trusts having been held by this Court, in *Harvey v. Improvement Co.*, 118 N. C., 695, and *Bridgers v. Staton, ante*, 216, his Honor properly enjoined the voting trust in this case from using or exercising any control over the common stock of the Rockingham Power Company and from voting the same in any meeting whatsoever, and in adjudging that all *bona fide* owners of such stock and holders of receipts issued therefor by said voting committee shall be entitled to vote the number of shares to which they are entitled in all meetings of the stockholders of said company, and enjoined the voting trust from carrying out any plan of reorganization.

Affirmed.

Cited: *Worth v. Trust Co.*, 151 N. C., 193; *Bridgers v. Bank*, 152 N. C., 298, 302.

MERCANTILE NATIONAL BANK v. MRS. L. J. BENBOW ET AL.

(Filed 25 May, 1909.)

1. **Husband and Wife—Wife's Separate Personalty—Wife's Note—Consent of Husband—Charge Specific by Intendment.**

   A note signed by a *feme covert* alone, but with the written consent of her husband, will not bind her separate personal property to its payment when it does not expressly or by clear intendment and application create a specific charge against her property, sought to be bound for its payment.

2. **Husband and Wife—Wife's Separate Realty—Wife's Note—Consent of Husband—Charge Specific—Equity—Privy Examination.**

   For a *feme covert* to bind her real property to the payment of a note given by her, she must execute a formal conveyance or some paper-writing which in equity may be a charge upon her separate estate, accompanied by the written assent of her husband and her privy examination.

CLARK, C. J., dissenting, *arguendo.*

ACTION tried before *Murphy, J.,* and a jury, at October Term, (782) 1908, of WILKES.

These issues were submitted:

1. "Is the *feme* defendant indebted to the plaintiff? And if so, in what sum?" Answer: "Yes; indebted $163.20, with interest from maturity."

2. "Were the acceptances sued on signed by the *feme* defendant by the written consent of her husband?" Answer: "Yes."

3. "Did the *feme* defendant own a separate personal estate at the time the acceptances were signed and suit brought? And if so, how much?" Answer: "Yes; from six hundred to eight hundred dollars."

4. "Did the *feme* defendant own a separate personal estate at the time of the trial And if so, how much?" Answer: "Yes; $13,000."

His Honor rendered judgment against the *feme* defendant, Mrs. Benbow, upon the issues as found, directing that it be collected out of her personal estate only. The said defendant duly excepted and appealed.

L. M. Lyon and Manly & Hendren for plaintiff.
C. G. Gilreath and H. C. Caviness for defendant.

BROWN, J. The *feme* defendant was the owner of and conducting a store in the town of Wilkesboro. Through her husband she purchased certain jewelry from Bixler & Co., and, in payment therefor, executed six promissory notes, signed by herself alone, but with the written consent of her husband, which was found by the jury to have

been given in certain letters appearing in the record. These notes or acceptances were assigned to the plaintiff for value and before maturity.

The complaint declares upon the notes, and asks for a judgment against the *feme* defendant only. The male defendant is a nominal party, no relief being asked against him.

The form of all the notes is the same, to wit:

"CLEVELAND, Ohio, 19 June, 1903.

"Two months after date pay to the order of M. F. Bixler & Co., limited, the sum of thirty-two dollars, without interest, at their office in Cleveland, Ohio.

(Mrs.) L. S. BENBOW."

Appropriate prayers for instruction and exceptions present for
(783) our consideration the liability of the *feme* defendant upon the contract as herein set out.

There is no specific charge upon her personal estate contained in the evidence of debt, or any other paper-writing executed in connection therewith, and there is nothing in the writing from which an intent to charge her separate estate may be implied.

That being so, we think the ruling of the court below contravenes the principles of law governing the executory contracts of married women as enunciated in numerous decisions of the Court since 1875, when the subject was first considered, in *Harris v. Jenkins,* 72 N. C., 183, and *Pippen v. Wesson,* 74 N. C., 437. From the adjudged cases covering a period of thirty years this rule of law may be deduced. In order that a married woman may make an executory contract enforcible against her personal estate it must be done with the written assent of her husband, and the contract must expressly or by clear intendment and implication create a specific charge against her personal estate. In order that she may bind her real property, the *feme covert* must execute either a formal conveyance or some paper-writing which in equity may be charged upon her separate estate, accompanied by the written assent of her husband and her privy examination. An example of the latter is to be found in *Ball v. Paquin,* 140 N. C., 85.

In the *Pippen case* this Court held that neither the Constitution nor statute law of the State conferred upon a married woman any power to enter into an executory contract except in the specific instances mentioned in the statute, now section 2094 of the Revisal. Since that case, in a long unbroken line of decisions, this Court has held that a married woman is incapable of making a contract of any sort, and that her attempted contracts, unless such as are authorized by the statute, are void. These decisions have been repeated and reaffirmed so often by

this Court that in *Ball v. Paquin, supra,* they are regarded by *Mr. Justice Connor* as "controlling decisions," who refers to them in these words: "In the absence of controlling decisions to the contrary, we should unanimously hold that she could make all manner of contracts with the written assent of her husband, and that for a (784) breach of them her property was liable as if she were a *feme sole.*"

This subject has been so much discussed in decisions of this Court that to review them again is unnecessary and unprofitable. Both sides of the controversy are presented fully in the opinion of the Court by *Mr. Justice Walker* and in the dissenting opinion of the *Chief Justice* in *Harvey v. Johnson,* 133 N. C., 353.

There is no pretense of any express or implied charge in the contract sued on upon the personal estate of the *feme* defendant which can be enforced by a court of equity. Because the jury have found that the *feme* defendant owns a separate personal estate affords no ground for charging it with the performance of such contract.

Our laws provide in what manner married women may become free traders, so that their contracts may be enforced as readily as if they were unmarried. Their status is easily ascertained by reference to the register of deeds by those who deal with them in business. If they neglect to obtain such information, it is the loser's fault.

His Honor erred in declining to give the defendant's prayer for instruction. As there was no motion to nonsuit, there must be a

New trial.

CLARK, C. J., dissenting: The liability of *feme* defendant is settled by Rev., 2118, and the judgment of court below should be affirmed.

The most diligent research shows no statute that forbids a married woman to make a contract *"with* the assent" of her husband. The statute which has been relied on is The Code, 1826, now Revisal, 2094, which forbids her to make any contract *"without* the assent" of her husband, except in three cases, named, *i. e.,* for necessaries, for support of the family, and to pay antenuptial debts, for which she can contract *without* his assent. The prohibition to contract without the husband's assent in the other cases than the three cases named is certainly not a prohibition of the power to contract with his assent, but a recognition that she can contract *with* the husband's assent.

The right to act as free trader (Revisal, 2112) is a dispensa- (785) tion with the prohibition to contract *without* the husband's assent in all cases. As this is conferred by the husband's assent once for all, certainly he can give his assent to each contract as it arises.

The Constitution allows a woman to *convey* her land with the written

assent of her husband, and the Court has often held that, as the assent is only required as to land, she can draw checks and dispose of personal property *without* his assent. It was so held in *Vann v. Edwards,* 135 N. C., 661. *A fortiori* can she contract *with* his assent.

A married woman can draw checks and drafts *without* her husband's assent, and, of course, is liable on them if not paid. Revisal, 2095. She is liable upon her real estate for buildings or repairs put thereon by her verbal assent or acquiescence *without* the assent of her husband. Revisal, 2016; *Finger v. Hunter,* 130 N. C., 529. Of course, she must be liable when the contract is made with his assent.

Ever since the Statute of Frauds (29 Chas. II) it has been held that land can be conveyed only in writing. But it has never been held that in consequence one can not make a contract verbally which could be enforced by a sale of land. But if such were the law, as a married woman can convey her land with the assent of her husband, certainly she can contract *with* his assent.

The courts have no right to enact a statute forbidding married women to contract with the assent of the husband. The Legislature has not done so. The Constitution has emancipated married women by giving them full control of their property and earnings, with the right to dispose of it by will or otherwise, save that as to conveyances of real estate there must be the written assent of the husband—in analogy to the joinder of the wife in the conveyance of the husband's realty.

That there is no prohibition of the wife to contract freely *with* the husband's assent is held in *Brinkley v. Ballance,* 126 N. C., 396, and *Bates v. Sultan,* 117 N. C., 100. There is no statute requiring "charging," and the Court has no power to enact it. It is against the spirit of the Constitution and in violation of the enfranchised status of
(786) married women created by it. Every student of the history of the law knows that the doctrine of "charging" was created in England in an effort to confer upon married women of wealth the power to contract on the faith of their property, at a time when the law there did not, as now, give them unrestricted control of their property and freedom to contract even without the assent of their husbands. See *Century of Law Reform,* 354-358, 368-373, 376; *Dicey Law and Opinion in England,* 369-393. Certainly, the doctrine is obsolete and an anachronism here, when the wife has contracted *with* the assent of her husband and she can convey her realty with his assent and all her other property without it.

If there are any decisions of this or preceding courts which forbid a married woman to contract *with* the assent of her husband, they should be modified or overruled. A court should overrule its own errors (as this Court has shown it is strong enough to do), as well as the errors

of a court below. Indeed, errors of the higher court more imperiously demand correction, for they are more injurious. Ten times zero is only zero, and an error ten times repeated acquires thereby no approximation to being correct. It is an error still, only more harmful by repetition. As we have as precedent *Brinkley v. Ballance, supra,* we can follow that, if a precedent is essential.

The *feme* defendant bought the plaintiff's goods, at the price $163.20, with the written assent of her husband and, indeed, through his agency. She has kept the goods and now refuses to pay for them, though the jury find that she is worth $13,000 in personal property, besides realty. It is but common honesty that she be adjudged to pay the $289. There is no sign or shred of a statute that provides that she is not liable for such contract when made *with* the assent of her husband.

The decisions that a wife can not contract with the assent of her husband, though she can convey realty with his assent, and can make many contracts and dispose of personalty without his assent, have not become a rule of property, and to correct the error can not affect any title. As the husband's assent is not required for her protection in disposing of her personalty, and such assent is sufficient protection in conveying her realty, there can be no reason why the husband's assent was not enough protection in purchasing these goods when (787) there is no statute that requires more.

In *Bank v. Howell,* 118 N. C., 273, this Court, in effect, recommended a statute permitting a wife to contract as a *feme sole, without* the assent of her husband in all cases, as is the law in England, New York, and our adjoining States. But that would require amending Revisal, 2094, which forbids her to contract without her husband's consent except in certain cases. Here she contracted *with* the assent of her husband, and there is no statute making her incompetent to buy these articles. Her estate has benefited to the extent of the jewelry bought.

Cited: Council v. Pridgen, 153 N. C., 446; *Bushnell v. Bertolett, ibid.,* 565; *Rea v. Rea,* 156 N. C., 536; *Robinson v. Jarrett,* 159 N. C., 166; *Jackson v. Beard,* 162 N. C., 107; *Warren v. Dail,* 170 N. C., 416.

NOTE.—The law is now settled by the "Martin Act" of 1911, ch. 109. *Warren v. Dail,* 170 N. C., 406. This case (*Bank v. Benbow*) was practically overruled before that by *Scott v. Ferguson,* 152 N. C., 346.

ROBERT EATMAN v. ALBERT EATMAN.

C. C. Daniels for plaintiff.
F. W. Woodard and Pou & Finch for defendant.

Plaintiff appealed.

PER CURIAM: The ten assignments of error relating to questions of evidence are without merit and present no reversible error, and require no discussion at our hands.

The controversy was submitted fairly to the jury by the judge below, and we find no error in his charge, and the exceptions to it can not be sustained.

Affirmed.

(788)

JANE STRICKLAND, ALIAS ROGERS, v. D. C. EZZELL.

(Filed 10 March, 1909.)

ACTION tried before *Lyon, J.*, and a jury, at October Term, 1908, of DUPLIN.

Defendant appealed.

Stevens, Beasley & Weeks for plaintiff.
D. L. Carlton and Kerr & Gavin for defendant.

PER CURIAM: We have considered the two exceptions presented in the record and find no reversible error.

No error.

A. B. CRUMPLER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 March, 1909.)

ACTION tried before *Lyon, J.*, and a jury, at October Term, 1908, of SAMPSON.

Defendant appealed.

George E. Butler for plaintiff.
Junius Davis for defendant.

PER CURIAM: Upon a consideration of the entire record the Court is of opinion that, upon all the evidence, the plaintiff is entitled to recover the penalty sued for, as found by the jury in response to the third issue. The Court is of opinion that there is no evidence of actual damage which in law entitles the plaintiff to recover and that the court below should have so ruled. The defendant's contention in respect to the fifth issue is sustained. The judgment for the penalty of $85 is affirmed.

Modified and affirmed.

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(789)

DAVID CLARK AND THE CLARK MANUFACTURING COMPANY ET AL. v. CROMPTON & KNOWLES LOOM WORKS ET AL.

(Filed 1 April, 1909.)

For digest see *Clark, Eugenia Mfg. Co. et al. v. Saco-Pettee Machine Co. et al., ante,* 372.

THIS is a proceeding brought under section 1199 of the Revisal for the dissolution and settlement of a corporation, the Clark Manufacturing Company, doing business in Jonesboro, N. C., formerly in Moore, but now in Lee, County.

The cause is now pending in the Superior Court of Lee. His Honor, *Judge Long,* made a decree, at chambers in Richmond County, to which defendants excepted and appealed.

Womack & Pace and Aycock & Winston for plaintiffs.
A. A. F. Seawell and K. R. Hoyle for defendants.

PER CURIAM: The matters presented upon this appeal are the same as are involved in the case of *David Clark, The Eugenia Manufacturing Company et al. v. Saco-Pettee Machine Company et al.*

The assignments of error are covered by and disposed of in the opinion of *Justice Brown,* delivered for the Court in that case, *ante,* 372.

Affirmed.

A. P. GILBERT AND W. R. KUKER v. J. H. HOWARD AND A. LYON ET AL.

(Filed 7 April, 1909.)

In this case no error was found on appeal, and the rights of the parties were determined in a former appeal (147 N. C., 314.)

SUPPLY CO. *v.* DOWD.

APPEAL by defendants from *Jones, J.*, at October Term, 1908, of DURHAM.

Fuller & Reade, Aycock & Winston and Bryant & Brogden for plaintiffs.

Bramham & Brawley for defendants.

PER CURIAM: We agree with counsel for appellant that the (790) matter involved "is largely a question of construction and interpretation of the written agreement" between the parties.

We further agree with counsel for appellees that "When this case came before the Court (147 N. C., 314) before, the contract sued on was interpreted" and the rights of the parties to it were determined.

The matters presented on this appeal are entirely of fact, and in the trial we find

No error.

CHASMAR-KING SUPPLY COMPANY v. DOWD AND KING.

(Filed 28 April, 1909.)

ACTION tried before *Justice, J.*, and a jury, at October Term, 1908, of MECKLENBURG. Plaintiff appealed.

Stewart & McRae for plaintiff.

T. C. Guthrie and Pharr & Bell for defendant.

PER CURIAM: This cause was before this Court at Fall Term, 1907 (146 N. C., 191), and a new trial granted. The majority of the Court are of opinion that the evidence introduced on the second trial is substantially the same as that introduced on the first and that the questions now presented are covered by the former opinion.

Mr. Justice Hoke is of opinion that there is some new evidence which should have been submitted upon the issue as to the statute of limitations.

The judgment is

Affirmed.

(791)

J. B. WEBB v. W. M. RITTER LUMBER COMPANY.

(Filed 5 May, 1909.)

ACTION for damages, tried before *Murphy, J.*, and a jury, at November Term, 1908, of CALDWELL.

Defendant appealed.

W. C. Newland and M. N. Harshaw for plaintiff.
Jones & Whisnant for defendant.

PER CURIAM: The Court is of opinion, upon an examination of this case, that the matters involved are almost entirely of fact and that no error was committed upon the trial.

No error.

S. F. MAUNEY v. UNITED STATES LEATHER COMPANY.

(Filed 13 May, 1909.)

ACTION tried before *Ferguson, J.*, and a jury, at September Term, 1908, of MCDOWELL.

Defendant appealed.

Hudgins, Watson & Johnston for plaintiff.
Pless & Winborne and E. J. Justice for defendant.

PER CURIAM: The Court is of opinion, on examination of the record in this appeal, that there is evidence of negligence to be submitted to the jury, and that the case was fairly presented by the judge in the court below.

We find nothing in the record which warrants a new trial.

No error.

(792)

H. B. NEWTON AND W. L. PARSLEY v. H. A. BROWN, JR., ET AL.

(Filed 13 May, 1909.)

ACTION tried before *Lyon, J.*, and a jury, at September Term, 1908, of PENDER. Defendants appealed.

E. K. Bryan and C. E. McCullen for plaintiffs.

Meares & Ruark, Stevens, Beasley & Weeks, and J. T. Bland for defendants.

PER CURIAM: The plaintiffs claimed title to the land in controversy by color and possession. Upon an examination of the record we find no error in his Honor's rulings upon the evidence.

The contested matters were largely of fact, and they were submitted to the jury in a charge following well-settled principles and free from error.

No error.

STATE v. W. L. BARCO.

(Filed 17 February, 1909.)

1. Mainland—Water Ways—Islands—Statutes, Interpretation of.

The word "mainland," used in the statute prohibiting a float house to be anchored more than a certain distance therefrom, should be given the definite and precise meaning the word has, "the principal land opposed to island," and indicates there were other lands within the prescribed territory at the time of the passage of the act that did not come within the meaning of the term.

2. Same.

When, at the time of the passage of a statute making it unlawful for one to anchor a float house more than three hundred yards from the mainland, a point of land projecting into the waters of a sound had been cut off by the action of the wind tide, so as to cause a channel forty and more feet wide, sufficient for the passage through it of small boats, and through which the tide flowed, the land thus cut off is an island, and not "mainland," within the meaning of the statute.

(793) ACTION tried before *Guion, J.*, and a jury, at September Term, 1908, of CURRITUCK.

This is an indictment under section 3474 of the Revisal for anchoring a float house in shoal water on the west side of Currituck Sound and more than three hundred yards from the mainland.

John Forbes, a witness for the State, testified: "During the year 1907 I saw the defendant in the float. He was on the eastern side of Duce Quarter Island, after dark. I do not remember the month. It was after November and while he was gunning. He was aboard his float house, after dark. I saw the defendant hunting duck from time to time. I went there on that occasion, after dark, at night; it was on the eastern side, right at the island; it was shoal water. Duce Quarter Island is an

island surrounded by water. It is about three miles in length, in some parts about six or seven hundred yards across. The ditch that cuts through is narrow. The creek (or ditch) at the north end is about forty-eight feet wide and at the south end about sixty or seventy-five feet. As you go out of the creek, north, you go into Currituck Sound; on the south, into Duce Island Bay, which empties into Currituck Sound. Can not say what is the average width, but in some places fifty to sixty or seventy feet; narrowest place is forty-eight feet; tide there is generally by the wind. The water at the mouth is about two feet deep; have never known it to be dry; boats pass through there. After crossing the creek you come to the marsh; then you get to woods. Part of the woodland makes down to the marsh. I was there after dark and saw Barco on his boat. I saw him aboard his float house one night; never saw him but one night; he was anchored right to the island. The land was cultivated. There is one house on Duce Quarter Island. I stayed there that night. Part of it is woods and part of it is marsh, and it goes through to the other marsh. It is called Duce Quarter Island. It is part of Powell's Point; it is the part of Powell's Point that goes right out into the water. There are from forty to fifty acres that can be cultivated. There has been, in my recollection, twenty-five to thirty acres cultivated. Each end of it is marsh and part of it is woods. I think the creek has been washed larger and larger for years between the island and the land. Several thousand live on Powell's Point. (794) The soil is deeper and the land heavier on Duce Quarter Island than on Powell's Point. It is about three miles long, and parts of it are six or seven hundred yards wide. I guess part of it is half a mile wide. The water at average tide is about two feet deep. I remember hearing of Mr. Brumsey cutting a ditch there. I don't know that anybody dug the ditch. The tide passed through it."

William Barco testified: "I have been acquainted for forty years with the creek separating this island. I never saw it dry. After you get inside of the creek the water gets eight feet deep. I have seen five towboats go through it. The island has always been called Duce Quarter Island. It is surrounded by water. The creeks flow into Currituck Sound, and Duce Quarter Bay into the sound. I have seen where the creek or ditch has been cut out. The creek was very crooked. Brumsey cut through this place to get mud. I remember Duce Quarter Island and the people living on it and farming on it. There was a two-story house on it, and also a house a story and a half. Gunners and fishermen have landed on it many years. The ditch was cut out to get what we call marsh turf to put under watermelons."

Mr. Harrison, a witness for the defendant, pointed out on the Government map and located Duce Quarter, and then testified: "When I was

a boy, one Mercer owned the place and cultivated and lived on it. Duce Quarter was the same place as I pointed out on the map. Mercer lived in the two-story house near Duce Quarter Bay, on the mainland side. I went up this little bay in front of his house, and he had cut through a large body of marsh to get to his house. I could see no place cut through at that time. It was marsh grass there. It was all bullgrass marsh. This was about 1846. It was called Duce Quarter. Part of the land was in cultivation and part was fenced off for stock. My father and I started, some time between 1862 and 1871, to pass through the slough between Duce Quarter and Powell's Point, in a boat twenty feet long and five or six feet wide, and we could not pass, as the stream between Duce Quarter and Powell's Point was not wide enough to pass through. At this time Mercer had a store and fish market on
(795) this island, and there was a bridge built across this ditch to cross over. It was part of Powell's Point. I never heard it called 'island' then. The bridge was not more than seven or eight feet wide, and buggies and carts could cross it. It is on the west side of Currituck Sound. The land was in cultivation before I was born. I have been there buying corn. Fishermen and gunners all stop on the east side of Duce Quarter. I saw it yesterday. It is not different from what it was when I first knew it, except the ditch is wider. I know there was a ditch there from 1862 to 1872. I don't say but that nature dug it out. I don't know who dug it out. It was called Duce Quarter Island in 1907. It is divided from the mainland by the water I speak of."

Mr. Bunch, a witness for defendant, testified: "I knew Duce Quarter Island. It was called Duce Quarter when I first knew it. They got to calling it, in late years, Duce Quarter Island. I moved from there eighteen years ago. I lived on it. When I was on it there were three houses there. I lived on the east side. There was high land on it; some woodland. I have twenty to twenty-five acres in cultivation, but not all could have been cultivated. The narrowest place I knew on the bay was about seven or eight feet wide, and was called 'Cat Hole.' It has gotten wider and wider, caused by the tide and winds."

The defendant requested the court to charge the jury as follows: "If you find that Duce Quarter Island was farm land and woodland and marsh, as testified to, and that the stream of water between Duce Quarter Island and Powell's Point was made by cutting a ditch through part of it and by the tide and winds washing it larger, and that the same was three miles long and from six hundred yards to half a mile wide, and there is land suitable for cultivation on it, then, within the meaning of the statute, it would be mainland, and it would be your duty to find the defendant not guilty." The court refused to give this instruction, and charged the jury that if they found, beyond a reasonable doubt, the facts

to be as stated by the witnesses, they should return a verdict of guilty. The defendant excepted. There was a verdict of guilty, upon which judgment was entered, and the defendant appealed.

Attorney-General for the State. (796)
Aydlett & Ehringhaus for defendant.

WALKER, J., after stating the case: The general rule has been settled by authority that "The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced. This meaning and intention must be sought, first of all, in the language of the statute itself, for it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose and do express that will correctly." Black's Int. of Laws, p. 35. "It is not allowable to interpret what has no need of interpretation and, when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning" (page 37). The decision of this case turns upon the meaning of the word "mainland," which is used in the statute to express the intention of the Legislature. That word has a single and definite meaning, which is "the principal land—opposed to *island.*" Webster's Int. Dict. We must give it that sense, as, under the rule we have stated, the Legislature is presumed to have intended that to be its true meaning. Besides, the use of the word clearly implies that there is other land in Currituck Sound which is not within the description of "mainland," and that land must be such as is separated or insulated by water from the mainland. This is insular land, or islands. This brings us to the consideration of the other question raised, whether what is called "Duce Quarter Island" is in fact and in law an island or a part of the mainland. At one time, many years ago, it was a part of the mainland, but then the statute in question was enacted, and at the time of the commission of the offense alleged in the indictment, it had been severed from the mainland in the manner described by the witnesses. The owner of the land had dug marsh turf to put under his watermelons, and at the place from which the turf was taken a creek or slough, of the size stated in the evidence, was formed by the action of the wind tide, there being no ocean tide, or ebb and flow of the water, in the sound. The body of land which was cut off by the stream thus formed was about three miles in length and six or seven hundred feet in width. The stream, which was gradually formed by the washing of the tide, and widened and deepened from time to time, (797) ranges in width from forty-eight to sixty feet and is navigable by small boats. The tide passes through it. It seems to us that the land

cut off by this stream is an island, within the meaning of that word, which is defined by the authorities to be "a body of land surrounded by water." 23 Cyc., 357; 17 A. & E. Enc. (2 Ed.), 530, and notes; *Webber v. Boom Co.*, 62 Mich., 626; *Stover v. Jack*, 60 Pa. St., 339. We have attached no importance to the fact that it was called "Duce Quarter Island," but have based our decision solely upon the other facts showing its physical characteristics.

Robinson v. Lamb, 131 N. C., 229, which is cited by the defendant in his brief, does not support his contention, that "Duce Quarter" is a part of the mainland. That case merely decided that "Goat Island" is a part of the territory of Camden County, because it lies northeast of Pasquotank River and is within the general boundaries described in the statute creating Camden County. It is recognized as an island by the Court, though a part of Camden County, for the reason that the water or slough which divides it from the mainland is no part of Pasquotank River. The island may be within the boundaries of Camden County and yet not be mainland. So in this case "Duce Quarter" is an island, though the land composing it may still belong to the person who owned it before it was cut off by the new stream.

We conclude that the court correctly instructed the jury as to the legal effect of their findings of fact.

No error.

Cited: S. v. Colonial Club, 154 N. C., 181; *Battle v. Rocky Mount*, 156 N. C., 334; *S. v. Burnett*, 173 N. C., 752.

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(798)

STATE v. ELKANY HATHAWAY.

(Filed 4 March, 1909.)

Larceny—Conviction—Evidence Insufficient.

Indictment for larceny of fish from a "fish slide." The evidence for the State tended to prove that the owner of a fish slide gave permission to defendant to fish the slide until repaired, and that such permission had not been revoked: *Held*, error to refuse an instruction that there was no evidence of felonious intent and that the jury should acquit.

ACTION tried before *W. R. Allen, J.*, and a jury, at August Term, 1908, of NASH, for the larceny of fish.

The defendant was convicted, and from the judgment of the court appealed.

Attorney-General for the State.

Austin & Grantham for defendant.

BROWN, J. The defendant stands convicted of the larceny of three fish, the property of William Boothe, taken on 28 April, 1908, from a "slide," located below the falls of Tar River, on the property of the Rocky Mount Mills. The slide belonged to one Crusenberry, who told Boothe that "he might have all the fish he could get on it." The slide has not been repaired or used by Crusenberry during the year 1908, as the superintendent of the mill would not permit its repair.

Jim Crusenberry, for the State, testified that he owned the "slide" and got William Boothe to fish it for him on half shares during the year 1907, while he moved away; that he moved back the first of the year 1908 and expected to fish it himself, but moved away later, before the fishing season began; that he told Boothe when the fishing season came in he would come back and repair the slide, and would get him to fish it again after that, and that until the slide was repaired he (Boothe) might have all the fish he could get from it; that he told him that he had heard that Mr. Ferguson would not permit the slide to be repaired, and that he did not think it would catch unless it was repaired; that some time early in April, not knowing that Boothe and Williams had repaired the slide, so that it would catch fish, he told the (799) defendant that he considered the slide public plunder. He also stated to the defendant at that time that if Mr. Ferguson allowed it to be repaired he would then give Boothe permission to fish it again.

The defendant does not deny that he got fish from the slide on 28 April, 1908, but contends, and the entire evidence tends to show, that he had the same right to fish that Boothe had.

Crusenberry had told both the prosecutor and the defendant, according to the State's own evidence, in effect, that they might have whatever fish they could get from the slide. The right to fish the slide, under contract claimed by Boothe, expired with the year 1907, and whatever right to fish it he had during 1908 was not an exclusive right, but in common with the defendant. The owner of the slide had tcld defendant that the slide was open to the public and that he had practically abandoned it.

The defendant requested the court to charge the jury that there was no sufficient evidence of ownership in Boothe or of felonious intent upon the part of defendant. In refusing such prayer there was error.

New trial.

STATE v. J. DANNENBERG.

(Filed 4 March, 1909.)

1. **Intoxicating Liquors, Sale Prohibited—Town Ordinance—Nonintoxicants—Charter Powers.**

A town ordinance prohibiting the sale of a drink for which a license is required by the United States statutes is invalid when the power to enact such an ordinance is not conferred by its charter.

2. **Same.**

A town ordinance is void which prohibits the sale of nonintoxicating drinks when there is no power to pass such an ordinance given in its charter.

3. **Intoxicating Liquors, Sale Prohibited—Town Ordinance—General Statutes—Variances.**

Where the sale of intoxicating drinks is prohibited by legislative enactment, which makes it an indictable offense, a town ordinance covering the same subject-matter is void.

4. **Intoxicating Liquors—Town Ordinances—Sale Prohibited—General Law—License.**

Except in specially prohibited territory, the sale of spirituous, vinous or malt liquors was licensed in this State up to 1909 and the character of license required in incorporated towns specified, with penalties for violation: *Hence*, a town ordinance then prohibiting the sale of such drink, made without any charter provision authorizing it, is void.

5. **Police Powers—Cities and Towns—Municipal Corporations—Charter Powers.**

Municipal corporations can only exercise such police powers as are granted by their charters, and all fair and reasonable doubts as to whether such powers have been so conferred are resolved by the courts against their being exercised.

(800) ACTION heard before *O. H. Allen, J.*, and a jury, at Fall Term, 1908, of CARTERET.

The defendant was tried and convicted in the mayor's court of Morehead City for violating the following ordinance of said municipality:

"That it shall be unlawful for any person, firm or corporation to sell any drink within the said town of Morehead City for which the said person, firm or corporation has been required by or has secured a license from the United States Government for the sale of spirituous or malt liquors before selling said drink."

Upon appeal the defendant was tried in the Superior Court of Carteret County. From the judgment of guilty and sentence of the Superior Court the defendant appealed.

Attorney-General for the State.
W. D. McIver and E. J. Justice for defendant.

BROWN, J. It appears in the special verdict that the revenue officials of the United States, pursuant to statute, require that all drinks or liquids sold containing as much as one-half of one per cent alcohol should subject the seller to a special tax of $20 per annum for malt liquor. Further, that prior to 1 July, 1908, the defendant paid the $20 Federal tax upon malt-liquor drinks, and on 31 July, within the corporate limits of Morehead City, sold to one Styson a drink of a certain beverage whose alcoholic part was derived from malt, in the definition of United States statute, containing over one-half of one per cent of alco- (801) hol and less than two per cent. We find nothing in the charter of Morehead City (chapter 111, Private Laws 1887) which conferred upon the municipal authorities the right to prohibit the sale of the beverage of the character described in the special verdict. It is admitted by the State that the beverage is not intoxicating in its effect, and no such finding is to be found in the record. Assuming that it was intoxicating, it is admitted that the sale of intoxicating liquors has long been prohibited within the county of Carteret by legislative enactments which make the violation of them indictable offenses under the laws of the State. Municipal ordinances must harmonize with such laws, and where the offense is covered by the latter the former must give way. This has long been settled. *Washington v. Hammond,* 76 N. C., 33. *S. v. Langston,* 88 N. C., 692; *S. v. Brittain,* 89 N. C., 575.

The sale of spirituous, vinous or malt liquors (except in specially prohibited territory), up to 1 January, 1909, was licensed in this State by the general law, and the character of licenses required in incorporated cities and towns is specified by the Revisal, sec. 3529, and penalties for its violation are prescribed.

In the absence of chartered authority, the municipality of Morehead City could not prohibit their sale absolutely. *S. v. Brittain, supra.*

If the drink were not intoxicating, we find nothing in the charter of the town or any finding of facts which warrant the authorities in prohibiting its sale upon other grounds. There is nothing in the case from which it can be reasonably inferred that such an ordinance tends "to insure good order, improve the streets or preserve the health, comfort or convenience of the citizens of said town," as set out in the municipal charter.

Municipal corporations have no inherent police powers and can exercise only those conferred by the State. 1 Dillon on Mun. Corp., sec. 89; *S. v. Ray,* 131 N. C., 816.

Any fair, reasonable doubt concerning the exercise of such powers

is resolved by the courts against the corporation. *S. v. Webber,* 107 N. C., 962; *S. v. Thomas,* 118 N. C., 1221.

(802) If the purpose of the ordinance is to repress the sale of intoxicating drinks (which it evidently was), we find that it is not in harmony with the statutes of the State, and therefore must give way.

If it has some other purpose it is so obscure that ordinary perception can not discover it, and it can not be referred by reasonable construction to any of the chartered powers of the corporation. It therefore becomes an invasion of the natural rights and inherent personal liberty of the citizen. Nor can we answer affirmatively the inquiry of the Attorney-General, "But is there not somewhere between buttermilk of the 'pure in heart' and the brandy of the 'morally stunted' a 'twilight zone,' and does not the drink sold by the defendant lie within this zone?" We are of opinion that the entire zone has been preëmpted by the statutes of the State and that there is no territory open to entry.

The cause is remanded to the Superior Court of Carteret County, with direction to enter a judgment of not guilty.

Reversed.

CLARK, C. J., and HOKE, J., dissenting.

Cited: S. c., 151 N. C., 721; *S. v. Darnell,* 166 N. C., 301.

STATE v. TIM WILLIAMS.

(Filed 10 March, 1909.)

1. **Landlord and Tenant—Abandonment of Crop—Imprisonment—Constitutional Law—Indictment Quashed.**

   The provisions of the Revisal, sec. 3366, making it a misdemeanor in certain counties, and punishable by imprisonment, for a tenant or cropper to procure advancements from his landlord for the purpose of making a crop on his land and then willfully abandoning the crop without good cause and before paying for the advances, contravene Article I, section 16, of our State Constitution, prohibiting imprisonment for debt, except in cases of fraud; and an indictment thereunder, without averment of fraud, will be quashed.

2. **Indictment Insufficient—Landlord and Tenant—Abandonment of Crop—Indictment Quashed.**

   An indictment under the provisions of the Revisal, sec. 3366, which does not charge that the abandonment of the crop by the tenant or cropper was "without cause" and "before paying for such advances," should be quashed as insufficient.

ACTION heard before *W. R. Allen, J.,* at December Term, 1908, (803) of MARTIN.

Appeal by the State.

Attorney-General for the State.
Martin & Critcher for defendant.

CLARK, C. J. The defendant was tried, on appeal from a justice of the peace, for violation of the Revisal, sec. 3366, which makes it a misdemeanor in certain counties "If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and *before paying for such advances.*" The statute further provides the same punishment for the landlord if he shall willfully fail to make the advances promised.

The court quashed the proceeding on the ground that the statute contravened the Constitution, Art. I, sec. 16: "There shall be no imprisonment for debt in this State, except in cases of fraud." This is in effect decided in *S. v. Norman,* 110 N. C., 484, which was a warrant for violating what is now the Revisal, sec. 3431: "Where any person, with intent to cheat and defraud another, shall obtain any advances," etc. The Court approved there the following charge below: "In order to convict, the State must show to the full satisfaction of the jury something more than obtaining the advances, a promise to pay for the same, and a breach of the promise. Nothing else being shown, these facts would constitute only a breach of contract, and for this the defendant could not be prosecuted criminally. The jury must be fully satisfied of an element of fraud in the transaction."

In *S. v. Torrence,* 127 N. C., 550, which was an indictment, under The Code, sec. 1027 (now Revisal, sec. 3434), for obtaining advances under the false pretense that the person is the owner of (804) specific property, which he agrees to apply to the debt so created, that statute is upheld solely on the ground that the offense is not the failure to pay the debt, but the fraudulent conversion or withholding the property, the offense being analogous to "disposing of mortgaged property," the property being pledged, in writing (as the statute required), to be applied to the discharge of the lien for such advances. In *S. v. Whidbee,* 124 N. C., 796, which was an indictment under the same section as in *S. v. Torrence, supra,* the court quashed the indictment, because the pay check pledged was not then in existence, but was to become due to the pledgor at a future date, hence "not a false representation of an existing fact."

S. v. Robinson, 143 N. C., 620, was an indictment under the Revisal, sec. 3367, almost identical with the Revisal, sec. 3366, now before us, but the case went off on another point and the constitutionality of the statute was not passed upon. The concurring opinion (page 631) refers to it, but only for the purpose of noting that the constitutionality of the

statute had not been decided. The offense here charged has no element of fraud, and as the statute imposes imprisonment it can not be sustained. Speaking only for myself, there is nothing, however, which forbids the General Assembly to authorize the imposition of the fine upon the tenant or the landlord for the conduct described in the statute, but the party could not be imprisoned for nonpayment of the fine or costs, since that would be to allow by indirection what can not be done directly.

But the warrant was properly quashed, in any view, because it simply charged abandonment of the crop, without alleging that this was done "without cause" and "before paying for such advances." Unless those things were alleged and shown, there could be no conviction under the statute.

Affirmed.

Cited: S. v. Mooney, 173 N. C., 799.

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(805)

STATE v. THAD. CALE.

(Filed 10 March, 1909.)

1. **Pleas—Former Conviction—Nature of Action—"Not Guilty"—Joinder of Action—Agreement.**

The plea of former conviction is not treated in many respects as one involving the substantial question of guilt or innocence, but as one approaching more nearly the determination of a civil issue, and such plea with that of "not guilty" may, upon agreement of parties, be determined before one and the same jury.

2. **Process, Defective—Warrant—Arrest—Special Officer, Appointment of—Waiver—Jurisdiction—Judgment Valid.**

Defective process, by reason of a warrant of arrest not being signed or the deputation of a special officer not being in writing (Revisal, secs. 3158, 935), may be waived by the appearance of the prisoner before a court having jurisdiction which decides the case; and whatever may be the rights of the defendant against the officers making the arrest the validity of the judgment is not thereby affected.

3. **Judgments—Collusion, What is Not—Validity of Trial—Pleas—Former Conviction.**

A conviction before a justice of the peace is not objectionable upon the ground that it is collusive and not adversary, when it appears that the defendant informed the magistrate that he had had a fight and would have to suffer for it; that he requested him to set a time for trial convenient to his work; that affidavit was made, at the justice's instance, by a third party, several eye-witnesses were summoned and examined at the trial, and the assaulted party and his brothers, who were eye-witnesses, were notified of the time and did not appear, though waited for; and the validity of this trial will be upheld and the plea of former conviction of the same offense sustained.

STATE *v.* CALE.

INDICTMENT for assault with deadly weapon on one Grover Harrell, tried before *W. R. Allen, J.,* and a jury, at September Term, 1908, of EDGECOMBE.

Defendant entered the plea of "not guilty" and "former conviction," it having been agreed by consent that the two pleas could be heard together. After the evidence was all in, there being no material dispute in the same on the question of former conviction of simple assault, it was further agreed that the court should submit the question of assault with a deadly weapon to the jury and take a verdict (806) thereon, subject to the determination of the plea of former conviction by the court as on facts agreed, in case there was a verdict of simple assault only. The jury rendered a verdict of not guilty of assault with a deadly weapon, but guilty of simple assault; thereupon the court found the facts as to the alleged former conviction, and the same seem to be correctly epitomized in the following statement:

The defendant had a fight with one Grover Harrell, in No. 9 Township, on 14 March, 1908. On 15 March, 1908, the defendant saw J. L. D. Corbett, a justice of the peace, and told him that he had a fight and expected he would have to pay for it, and asked that, if a warrant were issued for him, the justice would make it returnable about 12 o'clock M., as he and his hands were at work in the woods and would be at home at that time for dinner. He also gave the names of those present at the fight, among which was the name of Silas Crisp, who worked with the defendant and who is a cousin of the prosecuting witness, Grover Harrell. During the morning Crisp was seen by the justice in the town and required to make the usual affidavit upon which to have a warrant for an affray. The usual warrant was issued, but, while Crisp actually swore to the affidavit, neither he nor the justice signed the affidavit or warrant. There being no constable or other officer in said township authorized to serve process, the justice delivered the warrant to one Walston, directing him to summon the prosecuting witness, Grover Harrell, and also his brother, who was at the fight, and his father, as well as the witnesses for the defendant. Walston went to the house of the prosecuting witness with the warrant, and upon the return reported to the justice that the Harrells said they would not attend. Neither the authority to Walston to excute nor his return were in writing. The defendant was not arrested, but while Walston had gone to summon the witnesses the justice saw the defendant and informed him of the warrant and the time of trial, and the defendant voluntarily attended. The justice delayed the trial until 2 o'clock P. M. to see if the prosecuting witness would attend. He did not appear, and the justice examined several witnesses who saw the fight, two of whom were not related to the defendant, but were cousins of the (807)

prosecuting witness. He also examined Dr. C. B. Walton, who had seen and talked with the prosecuting witness since the fight, and, upon the testimony of all these, adjudged the defendant guilty and that he pay a fine of $1 and $6.65 costs. This judgment was in writing and signed by the justice, and was paid. The witnesses examined by the justice were defendant's witnesses in this trial, and the justice who tried him was his friend in the Superior Court and aided his counsel in the trial and was surety for his appearance at September Term, 1907.

Upon these facts the court overruled the plea of former conviction, and, on the verdict of guilty rendered by the jury, imposed a fine of $1, and defendant excepted and appealed.

Attorney-General for the State.
G. M. T. Fountain for defendant.

HOKE, J., after stating the case: According to the strict rules of criminal procedure, the pleas of "not guilty" and "former conviction" could not be entertained and determined before one and the same jury; and it is further recognized and established that, on a plea of former conviction, when material questions of fact are involved in the issue, as in the case of dispute as to the identity of the parties, the determination of such plea is for the jury. But, as shown in a learned opinion by the present *Chief Justice,* in *S. v. Ellsworth,* 131 N. C., 773, the plea of former conviction is not treated in many respects as one involving the substantial question of guilt or innocence of defendant, but as one approaching more nearly the determination of a civil issue, and by consent it may be entertained and determined at the same time with a plea of not guilty, and, when so agreed upon, may be heard and decided by the court. There was no error, therefore, in the method by which the cause has been determined. *S. v. Taylor,* 133 N. C., 755; *S. v. White,* 146 N. C., 608; *S. v. Ellsworth,* 131 N. C., 773; *S. v. Akerman,* 64 N. J. L., 99.

While we hold that the proceedings below have been in all respects regular, we do not take the same view of the facts relevant to (808) defendant's plea of former conviction which seems to have impressed the learned judge who tried the cause below. From the facts it appears that defendant, convicted and fined in the present proceedings for a simple assault on Grover Harrell, has heretofore been convicted and fined for the same offense before a justice of the peace, and has paid the fine and the costs incident to that prosecution. The justice's court had jurisdiction of the crime, the parties and the offense are the same, and, unless the proceedings before the justice were a nullity, the defendant has a constitutional right to go quit of further

molestation by reason of this charge. A second conviction in such case would be contrary to the law of the land.

True, the warrant of the justice was unsigned and the deputation of the special officer was unwritten, and the statute in express terms requires the one (Revisal, sec. 3158), and by fair intendment would seem to require the other (Revisal, sec. 935), certainly when the precept is written, and, except in cases of great emergency, this last form should be observed; but both of these requirements are for the better protection of the officers, general or special, and for the protection and security of the defendant. When considered in reference to process by which a defendant may be brought into court on a criminal charge, they may be waived by him; and if a defendant voluntarily appears or is forcibly brought before a court having jurisdiction to hear and determine the cause, and such court does hear and decide it, whatever may be the rights of the defendant against the officers, in the absence of other objection, the defects suggested in the process do not in any way affect the validity of the judgment rendered. *Commonwealth v. Henry,* 61 Mass., 512; Bishop's New Criminal Procedure, sec. 235, subsec. 1; 12 Cyc., 303.

In *Commonwealth v. Henry, supra, Metcalf, J.,* for the Court, said: "As the magistrate had jurisdiction, and everything was right except the process, we are of opinion that the defendant, by not objecting to the process while before the magistrate, waived all objections to it, and the ruling of the court was correct."

And in Bishop, *supra,* the author says: "From the principles stated, it seems, if a warrant of arrest is insufficient or void, yet (809) if the accused person is brought before the magistrate under it, he is not, therefore, to be set at liberty, whatever may be his rights as against the officer and others connected with its proceedings."

Nor do we think it permissible to hold the proceedings before the justice void, under the doctrine recognized and applied with us in the case of *S. v. Moore,* 136 N. C., 581, to the effect that a conviction of a person before a justice of the peace which is collusive and not adversary is void. In that case it appeared and was admitted that defendant swore out a warrant against himself, and that the justice, without notice to the injured party or to any one else, and without hearing any evidence except defendant's own statement, disposed of the case. And on these facts *Justice Walker,* in his well-considered opinion, states the principle and the reason upon which it is properly made to rest, as follows: "If one procures himself to be arrested and prosecuted for an offense which he has committed, thinking to get off with a slight punishment and to bar any future prosecution carried on in good faith, and if the proceeding is really instituted and managed by himself, he is, while thus holding his fate in his own hand, in no jeopardy. The State is no

party in fact, but only such in name. The magistrate, under such circumstances, adjudicates nothing. 'All is a mere puppet show, and every wire is moved by the defendant himself.' The judgment, therefore, is a nullity and is no bar to a real prosecution. 1 Bishop's Cr. Law (6 Ed.), sec. 1010. In *Holloran v. State,* 80 Ind., 586, the Court fully sustains and approves the doctrine as thus substantially laid down by Bishop, and adds: 'If the whole case is controlled and managed by the accused, there are no adverse parties, and when this is so, there can not in the true sense of the term be a former conviction or acquittal.' "

But no such facts are presented in the case we are considering. It is true, the defendant is said to have first notified the magistrate of the occurrence, but the case states the facts as to this notice to be that defendant told the justice he had had a fight and would have to suffer for it, and only asked if a warrant were issued it would be made returnable at 12 o'clock, as defendant and his hands would at that hour (810) be in from the woods, where they were at work. The affidavit was made, at the instance of the justice, by one Crisp, who is marked on the warrant as a State's witness; several eye-witnesses of the occurrence were summoned and examined, and Grover Harrell, the assaulted party, and his brothers, who had been present at the fight, and his father, were notified to attend, and the case was delayed some time for their coming; and, referring to the trial, the case further states: "None of them (Grover Harrell, his brothers, etc.) appeared, and the justice examined several witnesses who saw the fight. Two of them were not of kin to the defendant, but were cousins of Grover Harrell, and also Dr. C. B. Walton, who had seen and talked with Grover Harrell since the fight occurred." And thereupon defendant was adjudged guilty and that he pay a fine of $1 and costs amounting to $6.65. As the case appears to us, there was no evidence of collusion, and there does not seem, wittingly or unwittingly, to have been any imposition, for the court made the same disposition of the case as the trial justice. We are of opinion, therefore, and so hold, that there was a valid trial and disposition of this cause before the justice of the peace; and, on the facts presented and agreed upon, the plea of former conviction should have been determined in defendant's favor.

This will be certified, to the end that the verdict of guilty rendered by the jury be set aside, the plea of former conviction sustained, and that defendant go without day. *S. v. Taylor, supra.*

Reversed.

WALKER, J., concurs in result.

Cited: S. v. Freeman, 162 N. C., 602; *S. v. Turner,* 170 N. C., 702; *S. v. Dockery,* 171 N. C., 830.

(811)

STATE v. NEILL BRITT AND ILA DAVIS.

(Filed 24 March, 1909.)

Indictment, Bill of—Sufficiency—Fornication and Adultery.

A bill of indictment for fornication and adultery sufficiently alleges the offense, under the statute (Revisal, sec. 3350), when it charges that a certain man and woman, by name, "did unlawfully bed and cohabit together." (Revisal, sec. 3254.)

INDICTMENT for fornication and adultery, tried before *Biggs, J.*, and a jury, at December Term, 1908, of ROBESON.

Defendants appealed.

Attorney-General for the State.

Wishart & Britt and McLean, McLean & Snow for defendants.

CLARK, C. J. The defendants were convicted of the misdemeanor denounced by the Revisal, sec. 3350, commonly styled the offense of fornication and adultery. Motion in arrest of judgment for defect on the face of the bill was denied, and defendants appealed.

The Revisal, sec. 3350, provides: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor." This indictment charges that "Neill Britt, man, and Ila Davis, woman, not being married to each other, . . . did unlawfully bed and cohabit together." This charges every essential element of the offense. It certainly gave the parties full notice of the crime for which they were tried, which is the sole object and office of the indictment. In *S. v. Jolly*, 20 N. C., 113, *Gaston, J.*, says: "To prevent future controversy, we deem it proper to say that, as we understand the law, the offense is sufficiently described by charging an unlawful 'bedding and cohabiting together.'" That is conclusive of this case.

The Revisal, sec. 3254, provides that any warrant or indictment "shall be sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible and explicit manner, and the same shall not be quashed nor the judgment thereon stayed by reason of any informality or refinement, if in the bill or pro- (812) ceeding sufficient matter appears to enable the court to proceed to judgment." The charge that two persons of opposite sex did "unlawfully bed and cohabit together" can convey but one signification. It has long been held that the words "lewdly and lasciviously" are not necessary to be used. *S. v. Stubbs*, 108 N. C., 776; *S. v. Lashley*, 84 N. C., 754; *S. v. Lyerly*, 52 N. C., 158; *S. v. Tally*, 74 N. C., 322. In the last-named case *Settle, J.*, says of the indictment: "I believe it is a

copy of an old and well-approved form, long in use by the solicitors of this State, yet it contains manifestly needless averments." In *S. v. Lashley, supra, Smith, C. J.*, held that failure to allege that the parties were of different sex and were not married was cured by inserting the word "adulterously."

The word "bed" is here a verb and means to habitually go to bed with, *i. e.*, habitual sexual intercourse. The Supreme Court of Pennsylvania, discussing the meaning of these words, says: "In all times, in every age, and by all writers, sacred and profane, in the language of scripture and in the language of law, these words, except as between man and wife, signify and impute illicit intercourse, and with them it imports the rite of hallowed love." *Walton v. Singleton,* 10 Am. Dec., 473. So that, if the indictment had simply alleged that the defendants, not being married to each other, did habitually bed together, it would have charged the offense denounced by the statute.

The bill here charges, "did unlawfully bed and cohabit together." What does "cohabit" mean when applied to persons of opposite sex? The Standard Dictionary says: "(1) Law. To dwell together as man and wife, popularly, in the sense of having sexual intercourse." Anderson's Law Dictionary: "In criminal statutes, to live together as husband and wife." The words "bed and cohabit" are the words chosen by the statute to express the charge of illicit intercourse. From long use in criminal statutes they have been translated as the equivalent of "fornication and adultery." But these latter words are not in the statute. The indictment follows the statute, omitting only redundant words. "Fornication and adultery" may require some definition or explanation; "bedding" and "cohabiting" require none. The facts can not be stated in stronger or clearer language.

Affirmed.

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(813)

STATE v. JUNIUS McKAY.

(Filed 24 March, 1909.)

1. Murder—Evidence, Circumstantial—Sufficiency.

When circumstantial evidence points clearly to the guilt of the one accused of murder, and is sufficiently strong to convince the jury, a conviction of murder will be sustained.

2. Same.

Defendant's repeated threats to kill deceased, his following deceased, armed with brickbats, and when deceased was last seen, 8 or 9 o'clock at night, defendant was thus following him on a certain street, saying he

would get him if he could come up with him, taken in connection with the testimony that the next day a brickbat with hair and blood stains on it were found on that street, and some five weeks thereafter deceased's body was found hidden in a hole, is sufficient evidence of the actual killing by premeditation to sustain a verdict of murder in the first degree.

3. Same—Bad Feeling—Malice Presumed—Deadly Weapon.

Evidence that defendant had repeatedly threatened to kill deceased, and when last seen was following him with brickbats and threatening him, and that deceased was killed with some blunt instrument, a deadly weapon, is sufficient upon the questions of bad feelings and malice to sustain a verdict of murder in the first degree.

4. Murder—Evidence—Manslaughter—Instructions.

When there is no evidence of manslaughter it is correct for the judge to charge the jury, upon competent evidence, to return a verdict of murder in the first or second degree, or not guilty, against the defendant, tried for the unlawful killing of deceased.

5. Murder—Verdict—Polling Jurors—Power of Court—Retirement—Proper Verdict.

Upon the returning of a verdict of guilty of murder in the first degree, "with mercy," it is not error for the judge, in open court, upon polling the jurors and finding that only one recommended mercy, to direct the jury to retire and bring in a proper verdict.

6. Murder—Verdict—Guilty, with Recommendation for Mercy—Surplusage.

The words used by the jury in their verdict to recommend mercy are merely surplusage and do not vitiate or affect the verdict.

INDICTMENT for murder, tried before *Biggs, J.*, and a jury, at (814) November Term, 1908, of ROBESON.

The prisoner was convicted and sentenced to death. From the judgment of the court he appealed.

Attorney-General for the State.
Robert E. Lee for defendant.

BROWN, J. A careful review of the record in this case discloses no just ground for awarding to the prisoner another trial.

Exception 1. It is contended by the prisoner that there is no evidence of murder in the first degree. The evidence adduced against the prisoner is circumstantial in its character, but that species of evidence is sufficient to convict, where it points clearly to the guilt of the accused and is sufficiently strong to fully convince the jury.

The evidence tends to prove that deceased, one Alex. McKay, was killed by a blow on his head with some heavy instrument, on the night of 23 February, and his body secreted in a hole, some three hundred yards from the place where he was killed, on a side street in the town

of Rowland. The prisoner repeatedly threatened to kill deceased on the night aforesaid, charging that he was a liquor spy, and followed him around, armed with brickbats. The deceased was last seen alive going along a side street, between 8 and 9 o'clock P. M., the prisoner following him, saying he would get him if he could come up with him. The next morning the hat of deceased, with a brickbat with hair and blood stains on it, were found on the side street, and some five weeks thereafter the body of deceased was found in the hole aforesaid. The evidence is voluminous, and it is noticeable that there is no exception taken by prisoner to any part of it.

(815) In charging the jury upon the character of circumstantial evidence, and as to its probative force, the learned judge gave the prisoner's prayer for instructions, and followed carefully well-established rulings of the court.

We think there is ample evidence to connect the prisoner with the actual killing, as well as to show that it was the result of premeditated design, and that it was properly submitted to the jury, accompanied with clear, careful and correct instructions.

Exception 2. The court substantially gave the prisoner's instruction, and we are unable to see any difference between the prayer and the instruction given.

Exception 3. The defendant requested the court to charge: "There being no evidence in this case of any bad feeling existing between the prisoner and the deceased, the jury can not return a verdict of murder in the first degree." There is abundant evidence of "bad feeling," if such evidence is necessary, and, besides, there is evidence that the homicide was committed with some kind of an instrument which may have been deadly in its character, and from the use of which malice may be presumed. *S. v. Booker,* 123 N. C., 713; *S. v. Adams,* 136 N. C., 617.

Exceptions 4 and 5. The instructions of his Honor explaining what constitutes murder in the first degree are in line with all the opinions upon the subject rendered by this Court since the statute dividing murder into two degrees was passed.

Exception 6. The court further instructed the jury that they should return a verdict of murder in the first degree, murder in the second degree, or not guilty. There was no evidence in the case to reduce the crime to manslaughter, and therefore, it would have been improper for the judge to have submitted to the jury a view of the case unsupported by any testimony whatever. *S. v. Hicks,* 125 N. C., 636; *S. v. White,* 138 N. C., 704.

Exception 7. The jury came into court in a body, and announced, through their foreman, that they had agreed upon a verdict. The foreman then announced, "Guilty of murder in the first degree, with

mercy." On the request of counsel for the prisoner, the jury was polled, and one juror answered, "Murder in the first degree, with mercy," and the other eleven jurors answered, "Murder in the first degree." The court, immediately thereupon, in open court, in the presence of prisoner, directed the jury to retire and bring in a proper verdict, and in doing so gave instructions, of which the prisoner certainly has (816) no reason to complain. The jury retired, and later returned and rendered a verdict that the prisoner, Junius McKay, was guilty of murder in the first degree. At request of the prisoner's counsel, the jury was again polled, and all answered, "Guilty of murder in the first degree." The exception is to the refusal of the court to accept the verdict of murder in the first degree, with mercy, tendered by the jury. We do not think the added words, "with mercy," vitiated the verdict, had it been so received. Those words simply amounted to a recommendation for mercy, and did not leave in doubt the character of the verdict rendered. They were mere surplusage and no part of the verdict. It was plainly a conviction of murder in the first degree, and so intended by the jury. The course his Honor took was the prudent one, and in no manner prejudiced the prisoner, but gave him another chance. It was fully warranted by what is said in *S. v. Godwin,* 138 N. C., 583, and cases there cited. In that case the Court says: "Before a verdict returned into open court by a jury is complete it must be accepted by the court for record. It is the duty of the judge to look after the form and substance of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records of the court. For that purpose the court can, at any time while the jury are before it or under its control, see that the jury amend their verdict in form so as to meet the requirements of the law. When a jury returns an informal, insensible or a repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to retire and consider the matter and bring in a proper verdict—that, is one in proper form."

Upon a review of the record we find

No error.

Cited: *S. v. Hancock,* 151 N. C., 700; *S. v. Parker,* 152 N. C., 791; *S. v. Gregory,* 153 N. C., 647; *S. v. Wilson,* 158 N. C., 600; *S. v. Bagley, ibid.,* 610.

(817)

STATE v. E. E. HIGHT.

(Filed 24 March, 1909.)

Embezzlement—Other Articles—Intent—Evidence.

In a trial upon an indictment for embezzlement, evidence that defendant had pawned and disposed of other articles of the same character identified as belonging to his employers about the same period of time is competent upon the question of guilty intent.

INDICTMENT for embezzlement, heard before *W. R. Allen, J.*, and a jury, at October Term, 1908, of VANCE.

Defendant was charged with the embezzlement of a watch, known as the "Moss watch," the property of his employers, A. W. Gholson & Co. The State introduced A. W. Gholson, who testified that defendant was in the employment of the firm as clerk and repairer during the years 1907 and 1908; that he had access to the goods—kept a key to the store; that they owned the watch described in the indictment; that it was missed from the store in March, 1907; that he found it in the possession of K. W. Edwards, in June, 1908; that he took possession of it and identified it as the "Moss watch." He was permitted, over defendant's objection, to testify that he lost other watches and goods while defendant was in the employ of the firm. He testified to the loss of two watches which he found in the possession of the Jolly-Wynne Company, Raleigh, in June, 1908; one watch found in possession of J. C. Kittrell; one other found in possession of S. R. Harris; some rings and a locket in possession of J. R. Teague. He could not give the exact date of the loss of any of the articles. He found them all in a few days after finding the "Moss watch." To the admission of all of the testimony in regard to the loss of other articles defendant excepted. Some of the articles were the subject of separate indictments pending against defendant.

K. W. Edwards testified that defendant pawned the "Moss watch" with him, in May, 1907; that he said it was his watch, and that he kept it as a timekeeper.

S. R. Harris testified that defendant pawned two watches with him, which Mr. Gholson identified and he surrendered to him.

(818) F. M. Jolly testified that defendant was in his store in Raleigh. Witness produced two watches; he did not see defendant sell them. They were not there before he came, but were there afterwards. Witness produced the watches; they were identified by prosecutor.

Evidence of a similar character was introduced in regard to the watch and jewelry found with Mr. Harris and Mr. Kittrell. Mr. Gholson

identified all of the property. To the admission of all of this evidence defendant duly excepted.

Defendant introduced no evidence. He asked his Honor to instruct the jury: "The defendant is only on trial for the embezzlement of the 'Moss watch,' obtained by the prosecutor from K. W. Edwards. If you shall find as a fact that he did convert to his own use the other property of the prosecutor, that does not prove, nor ought to be considered by you as tending to prove, the guilt of the defendant in respect to the Moss watch." This was declined, and defendant excepted.

His Honor explained to the jury the essential elements of embezzlement, and told them that defendant was on trial for embezzling the Moss watch only; "that if they should be satisfied from the evidence that defendant, while in the employ of the prosecutor as clerk, took the other watches and other property named in the evidence, other than the Moss watch, for which he was being tried, and converted it to his own use, or any of it, then such taking and conversion might be considered upon the question of the intent with which the watch charged in the bill on trial was taken, if they should find from the evidence that he took and converted that watch." Defendant excepted. There was a verdict of guilty. Judgment and appeal.

Attorney-General and T. T. Hicks for the State.
T. M. Pittman and A. J. Harris for defendant.

CONNOR, J., after stating the case: It is undoubtedly true, as a general rule, that evidence of the commission of other crimes is not admissible to prove defendant guilty of that for which he is on trial. To this general rule there are certain clearly-defined exceptions. The exception upon which his Honor based the admission of evidence tending to show the loss of other watches and property of the prosecutor from the store in which defendant was employed, and (819) which was traced to his possession, is that where the intent with which the property is taken is an essential element to be shown, such evidence is competent. *Judge Ashe,* with his usual clearness, states and applies the exception in *S. v. Murphy,* 84 N. C., 742. He says: "Where, in the investigation of an offense, it becomes necessary to prove the *quo animo,* the intent, design or guilty knowledge, etc., in such cases it has been held admissible to prove other offenses of like character, as, for instance, in indictments for passing counterfeit money, the fact that the defendant, about the same time, had passed other counterfeit money of like kind, has been uniformly held to be admissible to show the *scienter* or guilty knowledge." The opinion cites *Rex v. Davis,* 6 Car. & P., 117, where, on a trial for receiving stolen goods, for

the purpose of showing guilty knowledge of the defendant, evidence was admitted that other goods found at the same time were stolen, although they were the subject of an indictment then pending. The case is strikingly illustrative of the principle applicable in this case. *S. v. Weaver,* 104 N. C., 761; *S. v. Jeffries,* 117 N. C., 729. The cases relied upon by defendant (*S. v. Frazier,* 118 N. C., 1257; *S. v. Graham,* 121 N. C., 627, and *S. v. Battle,* 126 N. C., 1038) do not come within the exception. If defendant had taken only the Moss watch, and pawned it, the jury may well have had a reasonable doubt whether he did so with a guilty intent; but when it is shown that during the two years of his employment he repeatedly took other property of his employers', under his control as clerk, and disposed of it, applying the proceeds, or the amount borrowed, to his own use, it is difficult to reach any other conclusion than that he took and converted the Moss watch to his own use with a criminal intent. The time within which the other articles were taken, and the circumstances under which they were found, tend to show a systematic course of criminal conduct, of which the taking of the Moss watch was a part. We concur with his Honor that the evidence was competent for the purpose for which he instructed the jury to consider it. Upon an examination of the entire record we find

No error.

(820)

STATE v. CARY QUICK.

(Filed 1 April, 1909.)

1. **Evidence—Dying Declarations.**

Declarations of deceased as to the manner in which wounds were inflicted by defendant, causing his death within a few hours thereafter and at or about the time he said he knew he was going to die, are competent as dying declarations.

2. **Evidence—Impeaching—Witnesses—Character.**

It is harmless error, if erroneous at all, to ask witness, who testified to the good character of defendant, on trial for murder, whether he would consider one who had acted as defendant had admittedly done, as a man of good character, it being a test of witness' conception of what constituted good character.

3. **Manslaughter—Deadly Weapon—Malice Presumed—Burden of Proof—Evidence—Justification—Mitigation.**

When it is established or admitted that defendant, on trial for murder, intentionally killed deceased with a deadly weapon, malice is presumed, and the burden of proof is on defendant to satisfy the jury of the truth of such testimony as justifies his act or mitigates it to manslaughter.

4. Evidence—Murder—Manslaughter—Instructions—Harmless Error.

When it appears that the jury has discarded the plea of self-defense, contended for by defendant on trial for murder, and it is clear, from the evidence and admissions, that defendant was guilty of murder in the second degree at least, the defendant can not be prejudiced by a charge to the jury by the trial judge, under which he was convicted of a lesser degree of homicide.

5. Same—Self-defense—Excessive Force—Questions for Jury.

Evidence that defendant was assaulted by deceased with a pistol, and, acting in the heat of blood, but not exclusively in his own defense, shot a greater number of times than was necessary for self-defense, and killed him, is sufficient to sustain a verdict of manslaughter, and the question of excessive force is one for the jury.

6. Instructions—Extracts from Opinions—Harmless Error.

While the wisdom of reading lengthy extracts from the opinions of the Supreme Court to the jury is doubted, as their reasoning is generally based upon the facts of each case, and the facts may differ, in this case there could be no error to defendant's prejudice, as the extracts were of a general character and the law charged with such clearness as not to be misunderstood.

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

INDICTMENT for murder, tried before *Long, J.*, and a jury, at (821) September Term, 1908, of RICHMOND.

The defendant, Cary Quick, was convicted of manslaughter. The other defendants named in the bill were acquitted. From the judgment of the court the defendant, Cary Quick, appealed.

The facts are stated in the opinion of the Court.

Attorney-General for the State.

Morrison & Whitlock, A. S. Dockery, John P. Cameron, and W. M. Kelly for defendant.

BROWN, J. The defendant was tried for murder in the second degree and convicted of manslaughter. It appears from the evidence set out in the record that this defendant, with Lone Knight, Ebb Quick and Lauder Quick, had an altercation with Jule Combs, at the latter's saloon in Richmond County, over the price of a pint of gin. There were several pistol shots fired, and Combs was wounded, and in consequence thereof died.

1. The defendant excepts to the ruling of the court below admitting the dying declarations of the deceased. There can be no question that the declarations are pertinent and material, as they tend to prove that all the defendants were participants in an unjustifiable assault upon the deceased at the time he was shot.

The wife of the deceased testified concerning her husband's condition: "He was weak and continued to grow weaker. He could not help himself at all. He remained in bed, after being brought home, until he died. He said that he was going to die—about the first word he said after he came home; he said this several times. There was nothing said by him about his getting well during this time." On cross-examination witness stated that her husband "said he was going to die, soon after he got there; said he could not live. About two
(822) hours after he got there the doctor came. He said he was going to die before the doctor came. After the doctor came he did not say anything about dying, because the doctor gave him something to put him to sleep. Can not be certain whether he told how he was shot before or after he told he was going to die."

The deceased was shot about 6 or 7 o'clock P. M. on Sunday, 11 November, 1906, and died at 12 o'clock that night.

Under our precedents, we think it was proper to admit the declarations of the deceased as dying declarations. *S. v. Peace,* 46 N. C., 251; *S. v. Whitt,* 113 N. C., 716.

2. Witness Adams, for defendant, testified that his general character is good. On cross-examination by the solicitor, the court permitted the following question: "Witness is asked if he thinks that a man who would visit a barroom on Sunday afternoon, carrying concealed on his person a pistol, and remain at the barroom, drinking whiskey, etc., would entitle such a person to be considered a man of good character."

We see no objection to the question. The evident purpose was to test the witness' conception of what constituted good character, and not to prove a bad character by affirmative evidence of specific acts. Assuming that it was objectionable in form, it was harmless, as the defendant had already testified as a witness in his own behalf, and admitted the very facts embodied in the inquiry.

3. The defendant excepts to the instructions of the court placing the burden of proof upon the defendant to justify the killing of the deceased, contending that the burden of the issue never shifts from the State to satisfy the jury beyond a reasonable doubt upon the entire evidence in the case of the defendant's guilt. For this position the learned counsel cite *Stewart v. Carpet Co.,* 138 N. C., 60, and *Board of Education v. Makeley,* 139 N. C., 31, and insist that the rule upheld in those cases is applicable here.

We do not think those precedents have any application in an indictment for homicide. The position of counsel is one of the propositions laid down by *Judge Wilde* in his dissenting opinion in the well-known case of *Commonwealth v. York,* 9 Metc., 93, and was taken by
(823) counsel before this Court in *S. v. Willis,* 63 N. C., 26. But the

proposition was repudiated in that case, and the doctrine reiterated that in all indictments for homicide, where the intentional killing is established or admitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (now in second degree), unless he can satisfy the jury of the truth of facts which justify his act or mitigate it to manslaughter. The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him. This rule has been uniformly adhered to by this Court in indictments for homicide, and it was reiterated in the recent case of *S. v. Worley,* 141 N. C., 764, where the cases are cited.

The defendant, Cary Quick, was examined in his own behalf, and not only admits the intentional killing, averring that he did it in self-defense, but states that he fired at the deceased four times.

His Honor's ruling was in accord with the unvarying precedents in this State, which have ever followed the common law. I East P. C., 279. The exception can not be sustained.

3. The defendant contends that the court erred in instructing the jury "that if the jury found there was a mutual affray between deceased and Cary, into which they both willingly entered, and during the progress of the fight Cary shot and killed deceased in the transport of passion aroused by the fight, but without malice, it would be no more than manslaughter, but if Cary had satisfied the jury that he was without fault in entering the fight, and that he fired the fatal shot in self-defense, agreeably to the principles governing this defense, set out hereafter, to acquit him."

We see nothing in this instruction of which the defendant can reasonably complain. The charge of the court is very full, and presented clearly and fairly to the jury the defendant's plea of self-defense and the evidence in support of it.

Suppose the court erroneously submitted to the jury a view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the State, and not to him. His plea of self-defense had been (824) fully and fairly presented to the jury and rejected by them as untrue. What, then, was the duty of the jury, if there was no evidence of manslaughter? Clearly, under the law, they should have convicted the defendant of murder in the second degree. How, then, can the defendant, his plea of self-defense having been wholly discarded by the jury and the burden being upon him to reduce the offense to something less than murder in the second degree, reasonably complain of a charge,

however erroneous in that respect, which permitted the jury to convict of a lesser degree of homicide?

The appellant, in all cases, civil as well as criminal, is not only required to show error, but that he was injured by it.

The deduction seems to us to be founded in the very logic of the law that evidence which is amply sufficient to support a conviction of murder must of necessity be sufficient to sustain a conviction of manslaughter. But, independent of that, there are phases of the evidence which warranted a verdict for manslaughter and not for murder, and therefore his Honor's charge is unobjectionable.

There is evidence tending to prove that the quarrel was a "drunken brawl," started suddenly by an altercation over some gin; that the deceased whipped out his pistol and shot at defendant about the same time, if not a little sooner, than defendant shot at him; that the parties fought willingly, suddenly and upon equal terms. This brings the case within those precedents which hold that if two men fight upon a sudden quarrel, and one kills the other, the chances being equal, this constitutes manslaughter. *S. v. Massage,* 65 N. C., 480; *S. v. Hildreth,* 31 N. C., 429; *S. v. Brittain,* 89 N. C., 481; *S. v. Ellick,* 60 N. C., 450. Killing, the result of passion produced by fight, is manslaughter. *S. v. Miller,* 112 N. C., 878; *S. v. Crane,* 95 N. C., 619. It is further held that if a person upon whom an assault is made with violence resent it immediately by killing the aggressor, and act therein in heat of blood and not exclusively in his own defense, it is manslaughter. *S. v. Tackett,* 8 N. C., 210; *S. v. Roberts,* 8 N. C., 350; *S. v. Smith,* 77 N. C., 488; *S. v. Barnwell,* 80 N. C., 466.

There are phases of the evidence, and reasonable inferences (825) which may be drawn from it, which support this theory.

Again, there is evidence tending to prove that while the defendant may have entered the affray unwillingly and have fired at first in self-defense, yet he continued to fire, as is contended, unnecessarily. The defendant himself admits that he was the only person who shot deceased, and that he fired four times at him. There are circumstances in evidence which surround the occurrence from which it may be fairly inferred that the defendant's repeated firing was unnecessary, and possibly further wounded the deceased after the latter had ceased to fire and was disabled.

It is well settled that if the defendant entered the fight in self-defense and, without malice, used unnecessary force, which resulted in death, it is manslaughter, and that the question of excessive force is one peculiarly for the jury.

4. The defendant excepts because the judge read to the jury lengthy extracts from opinions delivered by this Court in certain cases. We

doubt the wisdom of such practice, as the language and reasoning of an opinion is generally based upon the facts of that particular case, and the facts may differ; but we are unable to see that any appreciable harm was done to the defendant by the extracts read as a part of his Honor's charge in this case, as they were of a very general character.

The plea of self-defense, and the evidence in support of it, was put before the jury by the court with such clearness that the jury could not possibly have been misled by any of the extracts read to them.

The jury having repudiated the defendant's plea of self-defense, he is fortunate, upon the evidence adduced, that he escaped with a conviction for manslaughter only.

Upon a review of the entire record, we find

No error.

WALKER, J., concurring in result: My assent to the conclusion reached by the Court in this case is based upon the opinion, which I entertain, that there is some evidence of manslaughter. I can not concur in the view taken by the Court in its opinion that a defendant in a criminal action can, under any circumstances, be convicted of and punished for an offense where there is no evidence to support the verdict, even though the offense of which he is convicted may be (826) embraced by the general charge in the indictment, and may therefore be considered by the jury where there is evidence that will sustain a conviction. It is said that if the jury rejects the defendant's plea of self-defense they should convict him of murder in the second degree, if there is no evidence of manslaughter. Conceding this to be true, provided the jury have repudiated the plea of self-defense as unsupported by evidence, why is it not equally true that, as we *know* the jury have acquitted the defendant of murder, either in the first or the second degree, they should have acquitted him entirely if there had been no evidence of manslaughter? The conclusion that they should thus have acquitted him is, indeed, sustained by the better reason, for they have actually and certainly acquitted him of murder in any degree, and their refusal to acquit altogether may have been caused by the erroneous instruction of the court as to manslaughter. Can it be that, if there is no evidence of the offense for which the defendant has been convicted, the verdict can be justified, because he could have been convicted of a higher offense and the jury has merely failed to acquit him? In a prosecution for a homicide, where the jury acquit of murder, there are only two other verdicts they can render, namely, "guilty of manslaughter" or "not guilty." If there is no evidence of manslaughter, is it not more accurate to say that they should acquit, or is there a rule of law that they may convict of manslaughter, even

though there is no evidence of that offense having been committed, merely because they could have convicted of the higher felony? I do not think so, and for this reason I am unable to concur in all that is said in the opinion of the Court. I think that a conviction must be founded not alone upon the charge preferred in the indictment, but upon some evidence sufficient in law to establish it.

Cited: *S. v. Fowler,* 151 N. C., 732; *S. v. Cox,* 153 N. C., 642; *S. v. Simonds,* 154 N. C., 200; *S. v. Rowe,* 155 N. C., 449; *S. v. Grainger,* 157 N. C., 632; *S. v. Bagley,* 158 N. C., 610; *S. v. Casey,* 159 N. C., 474, 475; *S. v. Laughter, ibid.,* 490; *S. v. Bradley,* 161 N. C., 293; *S. v. Vann,* 162 N. C., 542; *S. v. Blackwell, ibid.,* 684; *S. v. Cameron,* 166 N. C., 384, 385; *S. v. Lane, ibid.,* 339; *S. v. Heavener,* 168 N. C., 164; *S. v. Pollard, ibid.,* 120.

(827)

STATE v. TOM HINSON.

(Filed 1 April, 1909.)

1. **Murder—Declarations—Res Gestæ.**

When there is testimony tending to show that prisoner, on trial for murder, made violent and determined assault on deceased, his brother, who was backing from him, knocked him down and struck him three or four times after he got up, his declarations, "I am cut," and those of the father endeavoring to separate them, "I told you to quit; you are going to get cut," are competent evidence, as a part of the *res gestæ*, that a cut with a knife which caused the death soon thereafter was inflicted by the defendant.

2. **Same—Evidence—Instructions.**

When there is evidence tending to show that prisoner and deceased were knocking, that prisoner knocked deceased down and struck him several times after he got up, and that immediately thereafter deceased was discovered to have been cut in his right breast, a wound which caused his death, and there were declarations, competent as a part of the *res gestæ* tending to show that deceased was then cut, it is sufficient to sustain a verdict of murder in the second degree and a charge of the court respecting it.

3. **Same.**

When the evidence is sufficient, it is not error, to defendant's prejudice, in the trial court to charge the jury that if they were satisfied beyond a reasonable doubt that the prisoner and his deceased brother were engaged in a mutual fight, on equal terms, without use of deadly weapons; that the father interfered, endeavored to separate them, and prisoner pressed the fight and cut his unarmed retreating brother, who had quit the combat at the entreaty of his father, with a knife, which resulted in death, the prisoner would be guilty of murder in the second degree.

STATE *v.* HINSON.

INDICTMENT for murder, tried before *Long, J.,* and a jury, at September Term, 1908, of ANSON.

Before the jury was impaneled, the solicitor stated to the court, in the presence of the prisoner and his counsel, that he would not ask for a verdict of murder in the first degree, but for a verdict of murder in the second degree or of manslaughter, as the facts might warrant. In apt time the court was requested, for the prisoner, to charge the jury:

1. "That if the State has failed to satisfy you beyond a rea- (828) sonable doubt that Tom Hinson made the wound that caused the death of Ernest Hinson, you will find the defendant not guilty." (Given.)

2. "The court charges you that you shall render a verdict of not guilty." (Not given.)

3. "Proof to convict in this case must be such as to exclude every other reasonable hypothesis than that of the defendant's guilt; and if the State has failed, by its evidence, to exclude every other reasonable hypothesis than that the defendant killed the deceased, you will find the defendant not guilty." (Given.)

The court gave the first and third and declined to give the second prayer for instructions, and defendant excepted. In a portion of the charge the court instructed the jury as follows:

"That if the State had furnished evidence from which the jury found, and were satisfied beyond a reasonable doubt, that the prisoner and his brother, the deceased, engaged in a mutual affray and entered into a mutual combat, by consent, on equal terms, and without use of deadly weapons and without serious injury to each other, and that during the progress of the fight their father interfered, came between them, endeavored to separate them and pushed the deceased off; that if the jury further found beyond a reasonable doubt that the prisoner followed up and pressed the fight and used a knife and stabbed and cut his brother and inflicted the wound described by the witnesses, from which he soon thereafter died, and that the deceased was at the time unarmed and going back or in retreat, or in the act of quitting the combat, at the entreaty of his father, the offense of the prisoner in taking life, and with a knife inflicting the wound described, under these circumstances, if so found by the jury, would be murder in the second degree."

To this instruction the defendant excepted. There was a verdict of guilty of murder in the second degree, and from judgment on the verdict the defendant appealed.

Attorney-General for the State.
J. A. Lockhart for defendant.

HOKE, J., after stating the case: It was chiefly urged for error that the portion of the charge set forth was predicated on evidence suggested therein, and entirely without support in the testimony. (829) The position contended for is sound, as a general rule, certainly where it appears that the prisoner's cause has or may have been prejudiced by the course indicated; but we are of opinion that the facts presented do not bring the case within the principle. On the trial Landy Edwards, a witness for the State, testified as follows: "I looked and saw the defendant and Ernest and Wyatt Hinson. Ernest was backing out and Tom was advancing on him, both knocking. Ernest didn't get more than five or six steps. I next saw his father, Wyatt, come between the boys. He pressed Ernest off. Defendant hit at Ernest. I thought this lick hit Wyatt. Then Tom, the defendant, ran around his father and struck Ernest with his fist and knocked him down. Ernest got up; then the defendant hit him (Ernest) two or three times. Did not see what the defendant had in his hand. If he had a knife I could not tell; was not close enough. Then Ernest went to the doctor's shop, and I saw a cut in his breast, right on left breast. It was a bad-looking place. The defendant's father was holding the wound while the doctor was working on the place. Blood was oozing out of the place. Ernest is dead now. The cutting took place between 9 and 12 o'clock."

Duncan Patterson, for the State, testified: "The boys were fighting when I saw them. Ernest came out of the shed, backwards, six or eight feet, and defendant was advancing and fighting with his fist. Defendant was advancing. Couldn't say whether either had a knife. The father came between them and pressed Ernest south; was pushing Ernest more than Tom; then Tom reached back and got a piece of plank, about one inch thick and four inches wide and four or five feet long, and hit Ernest or his father; then the father pressed them apart; then Tom (the defendant) ran around and hit Ernest with his fist and knocked Ernest down. When Ernest got up, the defendant hit Ernest three or four times on the shoulder. Don't know whether he had a knife or not. About this time I said, 'Quit, boys,' and Ernest, 'I am cut.' The father then put his hand on Ernest and pressed the gash, and said, 'I told you to quit; you are going to get cut.' Then they quit. Ernest stooped for his hat; told me to get his hat; I did so. He (830) clutched his breast and went to the doctor. He was cut in the right side of the breast. He was gashed to the hollow, near the middle of the side of the breast. Didn't notice clothing. I saw the wound at the doctor's. Fight took place about 10 or 11 o'clock A. M. He lived near a day. He died that night. Saw the corpse between 11 and 12 that night. Died at the doctor's office."

The doctor testified that "The deceased died from a wound in the right side of the breast, entering below the second rib, ranging downward, cutting the third and fourth ribs completely in two, and partially into the fifth rib. The wound was two or three inches deep, and into the lung from one-half to one inch. He died from the wound in the breast."

The mere statement of this evidence affords a complete answer to the objections urged for the prisoner. Here was testimony showing that the prisoner was making a violent and determined assault on the deceased, who was backing away from him; that he knocked the deceased down and struck him three or four times after he got up. Near the end of the fight, if it can be properly termed a fight, the deceased exclaimed, "I'm cut!" and just at the close the father, who had interfered, in an effort to separate his sons, was heard to say, "I told you to quit; you are going to get cut," and he died soon thereafter from a fatal cut into the lung. These exclamations of the deceased and the father come clearly within the principle and simplest instances of declarations competent as part of the *res gestæ* [*S. v. Jarrel,* 141 N. C., 722; *S. v. McCourry,* 128 N. C., 594; McKelvey En. (2 Ed.), 343], and taken in connection with the other facts, fully justify the action of the court below in refusing the prisoner's second prayer for instructions, and in the charge as given.

No error.

Cited: *S. v. Spivey,* 151 N. C., 681; *S. v. Bradley,* 161 N. C., 293.

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(831)

STATE v. L. C. JACKSON.

(Filed 7 April, 1909.)

1. **Evidence—Statements—Silence—Admissions.**

The silence of a party as an admission of statements made in his presence is to be received in evidence with great caution, and except under well-recognized conditions, is altogether inadmissible.

2. **Same—Judicial Investigations.**

The silence of a person present at a judicial or *quasi* judicial investigation, when statements are made by a witness, is no evidence of his admission of the truth of the statements, unless he was afforded fair opportunity to speak.

3. Same.

Defendant had sworn out a warrant before a justice of the peace against S., and gave testimony upon the trial that S. had unlawfully stolen a ballot, pending a municipal election. Said S. was bound over to court, but no true bill found by the grand jury. Upon the trial of defendant for perjury, by reason of the oath and testimony, a State's witness was permitted to testify, over defendant's objection, that defendant was present, pending a hearing or investigation had before the county commissioners concerning this election, and said nothing at that time about S. having taken the ballot: *Held*, error.

4. Evidence—Statements—Silence—Admissions—Interests.

The silence of one in whose presence statements are made is no evidence of his admission of the truth of the statements, when they were made under such circumstances as would not naturally call for a reply, nor ordinarily when the person silent respecting them had no present interest specially involved.

INDICTMENT for perjury, tried before *W. J. Adams, J.*, and a jury, at January Term, 1909, of CUMBERLAND.

There was evidence tending to show that an election had been held in Rockfish Township, in said county, on the question of graded schools for District No. 5½, and that one Thomas Seals had been arrested and tried for unlawfully disturbing said election and stealing a ballot from the ballot box being used in the same; that the present defendant swore out the warrant against Seals and testified against him in the hearing before the justice that he saw said Seals steal a ballot from the box, pending said election; that Seals was bound over by the justice, and, the grand jury having ignored the bill, the defendant was in-
(832) dicted for perjury, by reason of the oath and testimony, as above stated.

There was evidence on the part of the State tending to show that the said testimony was wrongfully and corruptly false, and on the part of the defendant that the facts stated and testified against Seals were true; and in the trial below, one John Calhoun, a witness for the State, was allowed to testify, over defendant's objection, that in a hearing or investigation had before the county commissioners concerning this election defendant Jackson was present and said nothing at that time about Seals having taken the ballot. To the admission of this testimony defendant excepted. Again, Edgar Hall, a witness for the State, was allowed, over defendant's objection, to testify that "Some time after the election (date not given in record) Henry Ratley said to some one that he (Ratley) did not understand the election, but it certainly was fair; that defendant was present and could have heard this remark, and did not say anything." Defendant excepted.

There was a verdict of guilty, and from judgment on the verdict defendant appealed, assigning for error the rulings of the court on the admission of evidence, as above stated.

Attorney-General and A. S. Hall for the State.
Thomas H. Sutton for defendant.

HOKE, J., after stating the case: The silence of a party, in the presence and hearing of statements relevant to a matter undergoing investigation may, under given circumstances, be received in evidence against him by way of admission or acquiescence. Although the statements, under the circumstances indicated, are necessarily to be heard, it is the silence of the party and the inferences fairly deducible from that fact which constitutes the evidence; and while this silence may at times have strong probative force, it is a fact so liable to misinterpretation and abuse that the authorities uniformly consider it as evidence to be received with great caution and, except under well-recognized conditions, hold it to be altogether inadmissible. The very terms of the maxim to which the admission of such evidence is referred give clear indication that this is a proper estimate and a correct position concerning it. *"Qui tacet consentire videtur."* The general principle, and the conditions required for its admissibility, will (833) be found very well stated in 2 Taylor on Evidence, with American notes by Chamberlayne, pp. 523, 525, 555 (5), 588 (5). Thus (page 523): "Admissions may also be implied from the acquiescence of the party. Acquiescence, to have the effect of an admission, must exhibit some act of the mind and amount to voluntary demeanor or conduct of the party; and, whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known or such language fully understood by the party before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated."

And on page 527: "Admissions are, too, sometimes inferred from *acquiescence in the oral statements of others.* At the same time the maxim, *'Qui tacet consentire videtur,'* must be applied by the lawyer with careful discrimination. 'Nothing,' it has been observed, 'can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be received at all unless the evidence is of direct declarations of that kind which naturally calls for contradiction—some assertions made to the party with respect to his right, which by his silence he acquiesces in.' Moreover, to affect one

person with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence, or even to himself, by parties interested, but they must also have been made on an *occasion when a reply from him might be properly expected.*"

And on page 554 (5): "To render an unchallenged declaration, made in a person's presence, evidence against him, it is essential that he be in a position to reply, if so minded. 'If a party is so situated that he is not called upon to say anything, and does not say anything, his silence under such circumstances is not to be taken as furnishing any ground for an inference that he thereby made any admission.' Citing *Proctor v. R. R.,* 154 Mass., 251 (1891); *Corser v. Paul,* 41 N. (834) H., 24 (1860); *Gibney v. Marchay,* 34 N. Y., 301, 305 (1866); *Loggins v. State,* 8 Tex. App., 434, 444 (1880); *Kaelin v. Com.,* 84 Ky., 354, 367 (1886); *Peck v. Ryan,* 110 Ala., 336 (1895)."

And again, on page 588 (5): "The inference that silence is tantamount to an admission of guilt must rest upon the idea of acquiescence, and it is not consistent with sound reason to imply an acquiescence from silence, unless the circumstances are such as to afford the party an opportunity to act or speak, but such, also, as would naturally call for some action or reply from prudent men similarly situated. The rule is well and tersely settled in *Commissioners v. Brown,* 121 Mass., 69, as follows: 'A statement, made in the presence of a defendant, to which no reply is made, is not admissible against him unless it appears that he was at liberty to make a reply and that the statement was made by such person and under such circumstances as naturally to call for a reply, unless he intends to admit it; but if he makes a reply, wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence. *Commissioners v. Kennedy,* 12 Metc. (Mass.), 235.'"

The doctrine so stated is fully supported by the decisions of our own Court on the subject, and others of recognized authority. *Tobacco Co. v. McElwee,* 96 N. C., 71; *Guy v. Manuel,* 89 N. C., 83; *Francis v. Edwards,* 77 N. C., 271; *Peck v. Ryan,* 110 Ala., 336-341; *S. v. Mullins,* 101 Mo., 514.

A perusal of these authorities and a proper consideration of the subject will establish that, when admissible, it is always open to the party affected to impair or destroy the force of the testimony by showing that he did not or could not hear the statements, or that he was ignorant of the facts and not in a condition to make intelligent reply, or other circumstances of like tendency; and unless the party at the time was afforded fair opportunity to speak, or the statements were made under circumstances and by such persons as naturally called for

a reply, the evidence in question is not admissible at all. The first of these conditions, suggested as positive limitations on the reception of the evidence in question, more usually arises where the statements are made in the course of some judicial or *quasi* judicial investigation, and of these an instance is afforded in *Tobacco Co. v.* (835) *McElwee, supra,* where the statements were made by a witness when a deposition was being taken, and the party affected was present and did not make reply. *Chief Justice Smith,* for the Court, said: "In our opinion, it would have been rude and indecorous in him to do so orally; nor was it to be expected that he should interfere with the course of his examination as a witness, conducted by counsel, for the mere purpose of contradiction. The testimony was taken for use in a case then depending, and its pertinency and materiality were under the control of counsel. It was not required that the witness should use the occasion to correct every erroneous statement made in the deposition of another witness, even to his own prejudice, under the penalty of having the omission construed into an admission of the truth of what was said, and more especially when he is a mere hearer and no party to the conversation, so to denominate what was then going on."

Another appears in *S. v. Mullins, supra,* where it was held that "Statements of a witness made at a coroner's inquest, in the presence of the defendant, are not subsequently admissible against him on the trial of the charge." In this case *Black, J.,* for the Court, said: "The rule of evidence which allows the silence of a person to be taken as an admission or confession of the truth of the matters stated in his presence should be applied with caution, for it is often much abused. The rule is based on the assumption that the party is at liberty to speak and proceed upon the ground that the circumstances are such as call on him for a reply. The rule has no application whatever to statements given in evidence in a judicial proceeding, for in such case he is not at liberty to interfere or contradict the evidence whenever he pleases."

And the second limitation suggested, that the declarations should be made under such circumstances and by such persons as naturally call for a reply, can rarely if ever arise when the party had no present right or interest involved or to be affected. This is illustrated in *Guy v. Manuel, supra,* where it was sought to use the silence of the party in the hearing of declarations of a person deceased as to boundary, and it appeared that at the time the declarations were made the party to be affected had then no interest in the property, but acquired (836) it later. *Ashe, J.,* for the Court, said: "The plaintiff, at the time of the survey, had no interest in the land, nor does it appear that he then had its purchase in contemplation. He was then a stranger to the

controversy about the location of the land, which was being surveyed. If he had at the time any interest in the question sought to be settled by the survey, his failure to object to the oral statements of the person present, we are ready to admit, would have been some evidence of his acquiescence in what was said in regard to the corner in his presence and hearing. To make the statements of others evidence against one, on the ground of his implied admission of their truth by silent acquiescence, they must be made on an occasion when a reply from him might be *properly expected.* Taylor on Ev., 738; *S. v. Sugg,* 89 N. C., 527. But where the occasion is such that a person is not called upon or expected to speak, no statements made in his presence can be used against him on the ground of his presumed assent from his silence."

An application of these authorities leads to the conclusion that the court below made an erroneous ruling in the reception of the evidence objected to. On the first exception noted, the investigation as to the election before the board of commissioners, it does not clearly appear from the record what was the nature or purpose of the investigation, nor does it appear that the defendant was especially interested or, if he was, that he was given opportunity or called on to speak in any way concerning it; and in the second, the statements testified to by the witness Hall, they appear to have been made by one Henry Ratly to some third person, at a time when this defendant had no present interest specially involved, and when there was no call or occasion for him to reply.

We are of opinion that the admission of the evidence constitutes reversible error, and the defendant is entitled to have his cause tried before another jury, and it is so ordered.

New trial.

Cited: In re Thorp, ante, 490; *Boney v. Boney,* 161 N. C., 622; *S. v. Walton,* 172 N. C., 932.

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(837)

STATE v. ROBERT ROBERSON.

(Filed 7 April, 1909.)

1. **Murder—Deadly Weapon—Malice—Presumption—Premeditation—Burden of Proof.**

While the law presumes malice from an admission of the killing of a human being with a deadly weapon, a pistol, the burden is on the State to fully satisfy the jury that it was deliberately and premeditatedly done to justify a conviction of murder in the first degree.

2. **Murder—Deliberation and Premeditation—Evidence Sufficient.**

Evidence of threats made by the prisoner, who was angry with deceased, that he would give deceased trouble unless he paid him certain wages

due; that he went to deceased's place of business with a concealed weapon and shot three times with a pistol from the outside of the structure in which deceased was standing, killed him when unarmed, and ran away, is sufficient to sustain a verdict of murder in the first degree, upon the question of deliberation and premeditation.

3. **Same—Intent.**

The evidence tended to show that deceased had employed the prisoner and another and refused to pay them; that prisoner was angry with deceased and used threats, and had a concealed weapon, a pistol, on his person, and went to deceased's place of business and shot him down, firing three times while he was standing on the outside and deceased, unarmed, on the inside of the structure. The prisoner's own evidence made out a clear case of self-defense, but the State's evidence tended to show deliberation and premeditation to kill in the event the money claimed was not paid: *Held*, evidence that the prisoner went on this occasion, in consequence of being told by the other person with whom prisoner had worked that he had received his money, threw no light upon the intent of the prisoner to kill in the event he should not be paid, and was properly excluded.

4. **Murder—Deliberation and Premeditation—Time—Evidence.**

In order to convict of murder in the first degree, there must be evidence that the fact of the killing was weighed and considered, resulting in the fixed purpose to kill; but the length of time between forming the purpose and the act is not material.

5. **Murder—Deliberation and Premeditation—Circumstantial Evidence.**

Upon the question of murder in the first degree, premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining as to whether there were such the jury may consider evidence of absence of provocation, absence of quarrel at the time of the killing, and threats, if there were such evidence.

6. **Murder—Deadly Weapon—Malice Presumed—Instructions—Premeditation and Deliberation.**

Malice, which is a necessary element of murder in the first and second degrees, means killing without legal excuse, and is presumed from the killing with a deadly weapon; and an instruction to the jury accordingly does not intimate a presumption of murder in the first degree, when the charge further states that the defendant must have weighed and determined the matter and formed a fixed purpose to kill, and must have killed as a consequence of this fixed purpose.

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

INDICTMENT for the murder of Charles Whichard, tried at (838) September Term, 1908, of the Superior Court of MARTIN, before *W. R. Allen, J.*

The prisoner was convicted of the capital felony, and from the judgment of the court appealed.

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

Attorney-General for the State.

Wheeler Martin and Winston & Everett for defendant.

BROWN, J. 1. The most important contention made by the prisoner upon this appeal is that there is no evidence of a premeditated and deliberate homicide.

The prisoner having admitted that he slew the deceased with a pistol, the law presumes malice, but nevertheless places the burden on the State to fully satisfy the jury that it was deliberately and premeditatedly done to justify a conviction of murder in the first degree.

The State examined several witnesses, whose testimony, set out fully in the record, tends strongly to prove that the prisoner and Will Roberson had been employed by deceased, and that there was a dispute about their wages, which had greatly incensed prisoner. On the day of the homicide prisoner armed himself with a pistol and threatened that unless the deceased paid him his money he was going to give him trouble about it; that he had the pistol in his bosom while at the
(839) shop of one Moore, and there made threats against deceased that if he did not pay him he would give him trouble; that he took the pistol from his bosom and started from Moore's place towards the butcher shop of deceased, near by. The butcher shop has a lattice window, which was raised. Deceased was inside, leaning on the butcher's block. Prisoner fired at him three times from the outside of the market house and then ran. The evidence tends to prove that deceased was unarmed, that a small knife was on the block and a hatchet under the counter, but that deceased had hold of neither.

The only witness examined for the prisoner was the prisoner himself. His evidence makes out a clear case of self-defense. He testifies that he saw Will Roberson come from Whichard's shop, and that Will said, "I have got mine"; that he went to the shop to get his money, and asked deceased for it; that deceased cursed him and refused to pay him; that the deceased grabbed the hatchet and endeavored to kill prisoner, and that then prisoner fired on him.

We think that the evidence was amply sufficient to justify his Honor in submitting the question of premeditation and deliberation to the jury. The prisoner was angry with deceased about the wages he claimed; he had armed himself with a pistol the morning of the homicide and concealed it in his bosom; he made threats against the deceased that unless he was paid he would give deceased trouble. Such threats, coupled with the character of the weapon with which the prisoner had armed himself, justify the inference that he meant to kill or do serious bodily harm. He carried the pistol concealed, but took it out at the market house and fired at the unarmed man from the outside of the structure, as deceased was leaning on the block, and repeated his fire until he had shot three times, and then ran. From these facts, supported by abundant evidence, the inference that the shooting was de-

liberately and purposely done, with intent to kill, if the prisoner did not get his money, is well warranted. *S. v. Hunt,* 134 N. C., 684; *S. v. Teachey,* 138 N. C., 587; *S. v. Exum,* 138 N. C., 599; *S. v. Daniel,* 139 N. C., 549; *S. v. Conly,* 130 N. C., 683, are cases somewhat in point.

The prisoner was evidently "taking the law in his own hands" and avenging his own wrongs. In this connection we may well (840) quote from an eminent English writer: "Let it be observed that in all possible cases deliberate homicide upon a principle of revenge is murder. No man, under the protection of the law, is to be the avenger of his own wrongs. If they are of such a nature for which the laws of society will give him an adequate remedy, thither he ought to resort; but be they of what nature soever, he ought to bear his lot with patience." Foster's Crown Law, 296.

2. J. D. Moore, a witness for the State, testified: "I was sitting in front of my shop, when I heard the report of a pistol and saw the prisoner shoot Whichard three times and then run. Just before the shooting the prisoner was sitting down at my stove and talking to me. He said that Whichard (the deceased) owed him some money and he was going to have it or give Whichard some trouble about it. After a while he got up and went immediately to the market. He took his pistol out of his shirt front and commenced firing. I saw Will Roberson come across the railroad from Whichard's market just before the defendant went there." On cross-examination of this witness the prisoner proposed to show that Will Roberson, who had been at work with the prisoner for Whichard, came from Whichard and held up some money and said to prisoner, "I got mine." Defendant's counsel stated that the purpose was to show that witness induced defendant to think that Whichard had changed his mind and was paying off, and that this showed why defendant went to the market. This evidence, on objection by the State, was excluded, and defendant excepted.

We are of opinion that the rejected evidence tended to throw no light upon the real question at issue, and could not possibly have been of any value to the prisoner had it been admitted, and could not have affected the result.

The reason assigned for its competency is that this declaration of Will Roberson conveyed to the prisoner the information that Will Roberson had received his money and induced the prisoner to go at once to Whichard in order to get his pay, in the belief that he would get it, and thus to disprove any premeditation.

The rejected declaration is a circumstance tending to prove only (841) one fact, viz., that the prisoner went to Whichard's market to demand the money he claimed that Whichard owed him, but it failed to throw any light whatever upon the prisoner's purpose in

case Whichard still refused to pay him. It was offered solely upon the question of premeditation, and upon no other phase of the case, and if it fails to disprove that, then it is worthless for any purpose.

An examination of the evidence and contentions of the State and of the prisoner discloses the worthlessness of the rejected declaration.

The evidence of the State is very strong, and tends to prove that prisoner armed himself and went to the deceased, intending to kill him or do him bodily harm *only in the event that he did not get his money;* that he did not get his money, and that without any sort of provocation he shot the deceased, who was unarmed, three times, and killed him.

The defense of the prisoner is self-defense, and rests entirely upon his own evidence. It is evident that the jury utterly rejected the prisoner's evidence, or else they must have acquitted him. Had they credited his evidence, they could not have done otherwise, under the instructions of his Honor.

It is thus perfectly plain that the rejection of the declaration of Will Roberson, "I got mine," did not in the least affect or detract from the prisoner's defense. Did the rejection of it militate in any degree against prisoner upon the question of premeditation? The State did not contend that the prisoner went to the market armed and with one purpose to kill the deceased *in any event,* but only in the event that deceased refused to pay him. The deceased did refuse, and the prisoner carried out his previously formed purpose and killed him. The rejected declaration tends to prove why prisoner went to the market at the time he did, viz., to get his money, a fact admitted by the State, and had he received his money there would have been no homicide. But the contention and evidence of the State is that the prisoner went to the market to get his money, and that he intended to kill the deceased only in the event he failed to do so.

The rejected declaration throws no light whatever on pris-
(842) oner's intentions in case of such failure. On the contrary, the decided probability is that the knowledge that the deceased had paid Will Roberson and refused to pay him "added fuel to the flame" and but hardened the prisoner's previously formed purpose to kill the deceased if he did not pay him.

3. The prisoner submitted some prayers for instruction upon the question of premeditation, and excepted because the court declined to give them, and further specifically excepted to the charge of the court, as follows: "By premeditation and deliberation is meant that the reason and judgment is exercised, that the fact of the killing is weighed and considered, and that as a result there is in the mind the fixed purpose to kill. The fixed purpose to kill must precede the act of killing, although the length of time between the time it is formed and carried into effect

is not material. This premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining there was such the jury may consider evidence of absence of provocation, absence of a quarrel at the time of the killing, and threats, if there is such evidence. Not that you are compelled to find premeditation and deliberation from such evidence, but that if there is such evidence you may consider it in determining whether there was such premeditation and deliberation as I have indicated."

Almost every word in this charge has been repeatedly upheld by this Court. It follows all the decisions from *S. v. Fuller,* 114 N. C., 885, to *S. v. Banks,* 143 N. C., 652. The charge is substantially the charge which was approved by this Court in *S. v. Teachey,* 138 N. C., 598. See, also, *S. v. Exum, supra; S. v. Booker,* 123 N. C., 713. The prisoner excepts to the following charge: "Malice, which is a necessary element of murder in the first and second degrees, means killing without legal excuse, and is presumed from killing with a deadly weapon."

This is a correct proposition of law. The killing with a deadly weapon raises a presumption of malice. That is all the charge says. There is no intimation that it raises a presumption of murder in the first degree. Such a charge would be obnoxious to *S. v. Locklear,* 118 N. C., 1154.

In another part of the charge the court gave the jury explicit instructions that the defendant must have weighed and deter- (843) mined the matter and formed a fixed purpose to kill, and must have killed as a consequence of this fixed purpose.

The portion of the charge excepted to is evidently a part of the judge's charge, that murder is the unlawful killing of another with malice aforethought, and that killing with a deadly weapon raises a presumption of malice. The jury could not, in any view of the charge as to deliberation and premeditation, have possibly thought that the judge intended to say that the killing with a deadly weapon raised a presumption of murder in the first degree, and as a matter of fact the judge did not say it.

The able and painstaking judge who tried this case below delivered a most exhaustive and clear charge to the jury, in which he did the prisoner full justice.

We have examined the entire record, and each exception taken, with the care demanded in a matter of such solemnity, and we find no error of which the prisoner can justly complain.

No error.

WALKER, J., dissenting: While I concur with the majority in the rulings upon the other exceptions, I think the court below erred in not admitting what was said and done by Will Roberson, in the presence

and hearing of the defendant, before he went to the market for the purpose of seeing Whichard about his wages. That he went there to get his money was shown by the testimony of the State's witness, J. D. Moore, for he told Moore, not that he intended to give Whichard trouble because he had refused to pay him, but that he intended to have his money or give Whichard some trouble, implying that he would first demand it of Whichard. The defendant and Will Roberson had worked together for Whichard, and the latter had before refused to pay their wages. It seems that afterwards Whichard changed his mind and paid Will Roberson what was due to him, and the latter then, in the presence of the defendant and J. D. Moore, held up his hand, with the money in it, and said, "I have got mine." We must assume this to be true, as the court excluded the testimony. This was not hearsay evidence. It was itself a fact or circumstance, and its competency and relevancy depend upon what impression it made on the mind of
(844) the defendant. It was surely competent for the defendant to show, if he could, that he went to see Whichard with a peaceful and not a hostile purpose. The State had introduced evidence tending to show that his purpose was a hostile one, and any fact or circumstance tending to show the contrary would seem to be relevant to the issue. It was not an unreasonable inference for the defendant to draw, from what Will Roberson said and did, that Whichard had changed his mind and intended to pay both of them what he owed. Why should he pay the one and not the other? They had both worked under the same circumstances and were equally entitled to their hire. No reason appears from the evidence why he should distinguish between them or discriminate against the defendant. The jury may have convicted the defendant of murder in the first degree, because they found from his previous threat, or the conversation with Moore, that he went to the market with the deliberate intent to kill Whichard, and not that he had formed his purpose to kill after he had reached there. In this view it was material for the defendant to show, if he could, that he approached Whichard with no homicidal intent, but, believing from what he had heard Will Roberson say, that he would receive his wages and would have no trouble with Whichard. The jury should have been permitted to hear the excluded evidence, so that they might determine, in the light of all the facts and circumstances, whether there had been premeditation and deliberation on the part of the defendant. I can not say the evidence was so slight as to render harmless the ruling of the court by which it was rejected. The state of the defendant's mind was the question involved. If the evidence had been admitted, and upon it, when considered in connection with the other facts, the jury had found that the defendant went to see Whichard for the sole purpose of getting his

money, thinking that Whichard would pay him, as he had paid Will Roberson, and that there would be no trouble, the question of premeditation and deliberation would naturally have been restricted to evidence of what occurred after the defendant had reached the market. It is true, the jury, with the evidence admitted, might have found that the defendant had fully made up his mind to kill Whichard if he refused to pay his wages, although he may have thought that he would get his money without any trouble, but the question of premeditation (845) and deliberation must be decided by the jury from all the facts as they may find them to be; and the slightest circumstance, forming substantially a part of the *res gestæ* and closely connected with the act of killing, may sometimes turn the scales in favor of the defendant.

If we are permitted to draw only that inference from the rejected testimony which is favorable to the State and unfavorable to the defendant, it may be the judge's ruling was correct. But is this the proper method of interpretation? Where the question is one of intent, the slightest circumstance, especially where it accompanies an act of the defendant immediately preceding the homicide, may be of sufficient weight to change the verdict. The jury in this case may have rejected the plea of self-defense and convicted the defendant, for the very reason that the testimony he offered was excluded by the court, as he was thereby left with nothing except his own testimony (viewed, of course, with some suspicion) and the State's testimony as to the threat alleged to have been made to J. D. Moore. If he had at one time conceived the purpose to kill Whichard in the event of his refusal to pay him, may not the jury have found upon the rejected testimony, if it had been admitted, that he had abandoned that purpose and approached Whichard fully believing that there would be no occasion for trouble, as there was no reason why he should not be paid, which did not apply with equal force to Will Roberson? The question was as to the state of his mind when he went to the market, where Whichard was, and not what he may have decided to do after Whichard refused to pay him, if there were such refusal. The defendant was entitled to have the jury consider every fact or circumstance tending to enlighten them upon this question. The exclusion of the evidence was tantamount to an absolute acceptance of the State's theory and the truth of the evidence supporting it, that he went to the market for the purpose of killing Whichard if he refused to pay his wages. It is true the rejected testimony tended to prove that the defendant went to collect his money, but this is not all it tended to prove, as I have shown.

HOKE, J., concurs in dissenting opinion.

Cited: S. v. Johnson, 172 N. C., 923; *S. v. Walker,* 173 N. C., 782.

(846)

STATE v. SIMEON COX.

(Filed 14 April, 1909.)

Husband and Wife—Indictment—Witness—Tender by State—Refusal—Evidence Against Each Other—Improper Comments of Counsel—Appeal and Error.

The State having the wife of the accused under subpœna, tendered her, and the solicitor commented on the refusal of the defendant to use her in corroboration of his own evidence. Upon objection by the defendant, it became the duty of the trial judge to caution the jury that this refusal of the accused should not be considered by them, and the judge's failure to so caution the jury was reversible error; and his telling them that the State could not use the wife as a witness, but the accused could, was an unintentional accentuation of the error.

INDICTMENT for incest, tried before *Long, J.*, and a jury, at December Term, 1908, of RANDOLPH.

Defendant appealed.

Attorney-General for the State.
Morehead & Sapp for defendant.

CLARK, C. J. The State called the wife of the defendant, who was present under subpœna, and tendered her to the defendant. The court ruled that the State could not examine her as a witness—that she was a competent witness only for the defendant. The solicitor, in his argument to the jury, commented on the failure of the defendant to corroborate his own testimony by his wife. On objection made, his Honor stated that "the wife was not competent and would not be allowed to bear witness against the husband; that her testimony would be competent only in behalf of her husband, and that as the wife was not permitted to testify against her husband, and had not done so, the jury could not consider what she knew or did not know." And in his charge the court told the jury "it was not for the State to examine the wife of the defendant as a witness against her husband, but it was competent for the defendant to use her as a witness."

The Revisal, sec. 1634, provides: "The husband or wife of
(847) the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense." The tender of the wife by the State and the remarks of the solicitor sharply called attention to the failure of the defense to examine the defendant's wife. Objection was made, but the court, instead of telling the jury that they should not let that fact prejudice the defendant, on

both occasions rather accentuated the matter by telling the jury that the State could not use the wife of the defendant as a witness, but that he could. The effect, though unintentional on the part of his Honor, was to throw the fault of the wife not being a witness upon the defendant, since he could have put her on and the State could not. There was no caution that such failure to use the wife as a witness should not be considered by the jury. Yet the tender, and the remarks of counsel being called to the judge's attention, called for such caution, and his failing to give it was prejudicial.

Error.

Cited: S. v. Spivey, 151 N. C., 682.

STATE v. EPHRAIM MOODY.

(Filed 21 April, 1909.)

1. Procedure, Criminal—Demurrer to Evidence.

Demurring to the evidence is now regulated by statute, is peculiar to civil actions, has no place in criminal proceedings, and tends only to delay.

2. Procedure, Criminal—Demurrer to Evidence—"Demurrer" Defined—State's Appeal.

In determining the right of the State to appeal in a criminal action upon demurrer, the word "demurrer" must be taken in its usual and ordinary significance as relating to a pleading and as understood and defined in criminal proceedings. The State may not appeal when the trial judge sustains defendant's demurrer to the State's evidence.

3. Same—Questions for Jury—Verdict Directing.

The jury must pass upon the weight of the State's evidence in criminal cases. Instead of demurring to the evidence, the proper practice is for the defendant to move the court to direct the jury that the evidence is insufficient to convict, and to enter a verdict of not guilty. If the trial judge so directs the verdict, the State can not appeal.

4. Procedure, Criminal—Demurrer to Evidence Sustained—Mistrial.

In this criminal action the trial judge sustained the prisoner's demurrer to the State's evidence, the State appealed, and no verdict was rendered: *Held,* the case is still pending, and the solicitor should proceed to try the defendant again under the indictment, as upon a mistrial.

ACTION tried before *Guion, J.,* and a jury, at February Term, (848) 1908, of SWAIN.

The defendant was indicted in a bill containing two counts, the first

for disturbing a religious congregation, and the second, under the Revisal, sec. 3706, for being intoxicated at a place of public worship.

The State introduced one B. M. Peek, who testified: "I was at Yellow Mountain Church. There was preaching there on that day. Services had been concluded about five minutes. I was one of the first to come out of the church, and as I came out I saw defendant within about five steps of the church; he was drunk. The majority of the congregation were still in the church. He did not create any disturbance."

At the conclusion of this evidence the State rested its case. Defendant demurred to the evidence; demurrer sustained by the court. Exception by solicitor for the State. Notice of appeal by the State given in open court.

Assistant Attorney-General for the State.
Walter E. Moore for defendant.

BROWN, J. While we are of opinion that the evidence as to the second count in the bill was sufficient to go to the jury, we are of opinion that the State can not appeal from such a ruling, and that the appeal must be dismissed. The proper practice is for the defendant to move the court to direct the jury that the evidence is insufficient to convict, and to enter a verdict of not guilty. If the judge is with the defendant, and so directs, that ends the case, and it is well settled that the State can not appeal. That is evidently what was intended to be done on the trial of this case.

(849) In order to prevent subjecting a person charged with crime to the harassment of several trials, the statute allows the State to appeal from the judgment of the court in only four instances: (1) upon a special verdict; (2) upon a demurrer; (3) upon motion to quash; (4) upon arrest of judgment.

The statute does not provide for an appeal from a judgment upon a demurrer to the evidence, but only upon a demurrer. The word is used in the statute in its usual and ordinary significance, as understood and defined in criminal pleading. In criminal law "A demurrer is a pleading by which the legality of the last preceding pleading is denied and put in issue, and the issue is then determined by the court. A demurrer is pleaded either to the indictment or to a special plea." 1 Archbold Crim. Prac. and Pldg., 354.

The reason the State is permitted to appeal from the judgment upon demurrer to an indictment is because it has the effect in criminal cases of opening the whole record to the court, and under it the jurisdiction of the court may be challenged, as well as the sufficiency of the subject-matter of the indictment itself.

The expression, "demurrer to the evidence," is not strictly accurate, as applied to criminal proceedings, for the reason that the trial judge, if he overruled the demurrer, could not direct a verdict against the defendant or give judgment against him upon the demurrer, as it has been held he could do in civil actions. In a criminal trial the jury must still pass on the weight of the State's evidence.

In reference to a demurrer to evidence, Black says: "This proceeding (now practically obsolete) was analogous to a demurrer to a pleading. It was an objection by one of the parties to an action at law to the effect that the evidence which his adversary had produced was insufficient in point of law to make out his case or sustain the issue. Upon joinder in such demurrer the jury was discharged and the case was argued to the court, who gave judgment upon the facts as shown in evidence." Law Dictionary: title, Demurrer to Evidence.

The practice of demurring to the evidence appears to be of ancient origin, and is thus described by Blackstone: "But a demurrer to evidence shall be determined by the court out of which the record is sent. This happens where a record or other matter is produced in evi- (850) dence, concerning the legal consequences of which there arises a doubt in law; in which case the adverse party may, if he pleases, demur to the whole evidence, which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue, which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court. But neither these demurrers to evidence nor the bills of exceptions are at present so much in use as formerly, since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*."

After joinder in the demurrer to the evidence, if the proper facts or admissions have been made to appear, the court may direct a verdict. 6 Enc. Pl. & Pr., 451. This the court is inhibited from doing upon the trial of a criminal action.

Our statutes use both the word "demurrer" and the phrase "demurrer to the evidence," and in declaring what is meant by the latter the statute confines its use to the trial of issues of fact in civil actions exclusively. Revisal, sec. 539.

From the statute it is plain that the General Assembly, when it adopted the Revisal, did not use the word "demurrer" in section 3279 in the sense that it used the phrase "demurrer to evidence" in section 539.

Demurring to the evidence is now regulated by statute, and is peculiar to civil actions and has no place in criminal proceedings, and tends only to delay.

In this State there is no such procedure as trying a defendant upon an "agreed state of facts" or upon a demurrer to the evidence. He must be tried by the jury and a verdict rendered. If it is a special verdict it must nevertheless be rendered by the jury, and it is their finding and not that of the judge. *S. v. Holt,* 90 N. C., 750.

Inasmuch as his Honor stopped the trial and no verdict was rendered, the case is still pending in the Superior Court, and it is the duty of the solicitor, as upon a mistrial, to proceed to try the defendant again under the indictment.

Appeal dismissed.

Cited: S. v. Andrews, 166 N. C., 353; *S. v. Killian,* 173 N. C., 794.

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(851)

STATE v. WALTER DAVIS.

(Filed 5 May, 1909.)

1. False Pretense—Indictment—Proof—Variance—Instructions.

When the indictment charged that defendant induced an exchange of horses with another by means of false and fraudulent representations, the jury should be instructed, when the evidence is directed to a different defense and there is no evidence of such representations, that there was fatal variance between the allegation and proof.

2. False Pretense—"Calculated to Deceive"—Evidence—Instructions.

When the evidence, considered in the light most favorable to the State, on a trial for obtaining goods by false pretenses, tends only to show that the prosecutor has once been deceived by defendant in a horse trade, returned the horse and refused to take others because defendant refused to warrant any of his horses, and, finally, without examining him, ordered a certain other horse to be sent to his stable upon the guarantee of defendant that the horse was sound and all right, and as soon as the horse was examined by the prosecutor the defect complained of was so patent as to be noticed at once, it is not sufficient as showing a false representation, "calculated to deceive," and it was error in the trial judge to refuse defendant's requested instructions, that if the jury believed the evidence they should render a verdict of not guilty.

INDICTMENT for obtaining goods by false pretenses, tried before *Councill, J.,* and a jury, at February Term, 1909, of GASTON.

There was verdict of guilty, and from judgment on the verdict defendant appealed.

Attorney-General for the State.

George W. Wilson, Tillett & Guthrie, O. M. Gardner and S. B. Sparrow for defendant.

HOKE, J. The charge in this bill of indictment was, in substance, to the effect that the defendant, by means of false and fraudulent representations in reference to the qualities of a certain sorrel horse, obtained from the prosecutor, G. E. Ford, a claybank mare, in good condition, sound and gentle, and worth $225. The proof on the part of the State tended to show that the claybank mare was obtained by defendant in exchange for a bay "saddle horse," and in reference (852) to this trade there was no charge, or evidence tending to support it, that the exchange was effected by means of false representations. Under the authorities cited, there would seem to be a clear case of variance between the allegation and the proof, and the jury should have been so instructed. *S. v. McWhirter,* 141 N. C., 809; *S. v. Corbett,* 46 N. C., 264. Apart from this, there was no sufficient evidence presented in the case to sustain a conviction of the offense charged or to justify the submission of the question to the jury. Considering the proof offered in the light most favorable to the prosecution, it appears that, after the exchange of the mare for the bay horse, the prosecutor, having kept the horse about a week, became dissatisfied and sent him back to defendant's stable, with a message that the horse did not suit, and that he would call to see defendant about it later; that the prosecutor did call, and told defendant that the horse taken in exchange for the mare was not sound and he wished to set aside the trade. The defendant declined to do this, but offered to let the prosecutor have another horse if he could suit him, and showed prosecutor one of the horses in the stable. Prosecutor asked defendant if he would guarantee the horse to be sound and all right. Defendant replied he would not, nor would he guarantee any horse in his stable to be sound and all right. Prosecutor replied, "Well, if you won't you can keep both horses," and started away. Davis then said, "How do you like that sorrel horse there in the wagon?" "Will you guarantee that to be sound and all right?" Defendant replied, "No, I will not guarantee any horse, nor a hair on any horse I have, to you," and prosecutor replied, "Then I don't want it," and started off. When he had gotten away, about thirty yards, defendant said, "If you think the sorrel horse will suit you, I will guarantee him to be sound and all right in every way, and a good worker," and prosecutor said, "Well, then, send it down." The horse was sent, and at dinner time prosecutor went out to his stable to make examination of it, and discovered that it was either blind or had such deficient eyes that it could not see its way in traveling. On cross-examination prosecutor said that (853)

while not a horse trader, he did trade horses sometimes, and was a fair judge of a horse.

In *S. v. Phifer,* 65 N. C., 321, it is said: "This crime of obtaining goods by false pretense is said to exist where there has been a false representation of a subsisting fact which is calculated to deceive, intended to deceive, and which does deceive, and by which one man obtains value from another without compensation." And this definition, in the same or substantially similar terms, has been approved with us in numerous decisions of the Court. Speaking of this offense, and more especially of the requirement that the statement must be "calculated to deceive," in *S. v. Moore,* 111 N. C., 672, *Associate Justice Avery,* for the Court, said: "As well in civil actions, brought to recover of another for losses incurred by false representations, as in criminal prosecutions founded upon the same species of fraud, the burden is on the actor or prosecutor to show, not only the false representation, but that a reasonable reliance upon its truth induced the plaintiff or prosecutor to part with his money or property, the only difference being as to the *quantum* of proof."

There was evidence on the part of defendant tending to exculpate him entirely from the charge; but, considering the testimony in the light most favorable to the State, we do not think the facts bring the case within the principle of these decisions. Claiming to have been already once deceived by defendant, the prosecutor, standing in a few feet of the horse in question, and after having been twice told that no warranty would be given, without making any examination whatever, directs that the animal be sent to his stables on a guarantee by defendant that the horse is sound and all right, and when the alleged defect is so observable and patent that it was at once noticed as soon as the horse was looked at. It is plain that the prosecutor intended to rely on the pecuniary obligations arising by reason of an express warranty, and that the testimony in no sense presents a case of false representations of a subsisting fact reasonably relied upon by the prosecutor. We must not be understood as holding that the presence of an express warranty in a horse trade of itself protects one from liability to a criminal prose-
(854) cution under the statute if the facts otherwise justify it, but a careful consideration of all the facts of this transaction leads to the conclusion that no indictment should be sustained The case comes under the principle announced and sustained in *S. v. Moore, supra,* and, on the testimony as it now appears, the defendant was entitled to the instruction prayed for. "That if the jury believed the evidence they should render a verdict of not guilty."

New trial.

Cited: S. v. Whedbee, 152 N. C., 774; *S. v. Gibson,* 169 N. C., 322.

STATE v. B. S. CLINE.

(Filed 13 May, 1909.)

1. **Indictment, Form of—Substance—Allegations.**

While it is not now necessary, under our statute, to allege mere matters of form in a bill of indictment, the bill itself must sufficiently allege matters of substance, so that the court may see that an indictable offense is charged and the accused may be informed of the accusation.

2. **Indictment—Allegations—Material Matters—Motion to Quash.**

A bill of indictment for perjury, alleging that the defendant falsely and feloniously asserted on oath certain statements in a certain action, without any averment showing that such were in relation to a matter material to the issue therein, is defective, and a motion to quash should be granted.

3. **Indictment, Form of—Defect—Bill of Particulars.**

A defect or averment in an indictment can not be cured by matters contained in a bill of particulars.

4. **Perjury—Matter at Issue—Burden of Proof.**

A charge which puts the burden on a defendant under indictment for perjury to show the truth of the matter at issue is error.

INDICTMENT for perjury, tried before *Murphy, J.*, and a jury, at November Term, 1908, of CATAWBA.

The defendant was called upon to plead to the following bill of indictment:

"That B. S. Cline, of Catawba County, did willfully, unlawfully and feloniously commit perjury upon the trial of an action in a justice of the peace's court, before J. H. McLelland, in Catawba (855) County, wherein W. H. Marlow was plaintiff and B. S. Cline was defendant, by falsely and feloniously asserting, on oath, that he, the said B. S. Cline, offered to D. M. Boyd, a member of the Board of County Commissioners of Catawba County, the sum of $25 to influence his official action as a member of said board in procuring for and awarding to the said B. S. Cline the contract with the said board of county commissioners as keeper of the Home for the Aged and Infirm of Catawba County for two years, and subsequently paid to the said D. M. Boyd, commissioner, as aforesaid, $10 on the said offer, after having been awarded said contract for one year by said board, and that the said D. M. Boyd accepted the same, knowing said statement or statements to be false, or being ignorant whether said statement was true."

Defendant moved in apt time that the solicitor furnish a bill of particulars; motion allowed; bill of particulars filed; whereupon defend-

ant moved to quash the bill of indictment, on the ground that the same, with the bill of particulars, does not charge any crime in law. Motion denied. Defendant excepted and pleaded "not guilty."

After hearing the evidence, his Honor instructed the jury as follows:

"If you shall find from the evidence, beyond a reasonable doubt, that in the trial of *Marlow v. Cline* the defendant, Cline, made the statements set out in the bill of indictment, under oath, and that after an oath was lawfully administered to him, and that such statements were willfully, corruptly and falsely made, it will be your duty to return a verdict of guilty.

"If you shall find, beyond a reasonable doubt, that the statement or statements were not true, and if you shall further find, beyond a reasonable doubt, that other essential elements or ingredients of perjury, as I have defined it, appear in this evidence, then it will be your duty to return a verdict of guilty.

"But if the defendant has satisfied you, gentlemen, that the statements he made are true, and, further, that they are lacking any of the essential ingredients or elements of perjury, as I have defined it, then it will be your duty to return a verdict of not guilty."

(856) Defendant excepted to the last paragraph. There was a verdict of guilty. Motion in arrest of judgment, for that the bill did not charge any indictable offense; motion denied. Judgment, and appeal.

Attorney-General for the State.

W. A. Self, R. Z. Linney, A. B. Whitener and C. W. Bagby for defendant.

CONNOR, J. Professor Greenleaf, with his usual accuracy, thus defines perjury at the common law: "The crime is committed when a lawful oath is administered in some judicial proceeding or due course of justice to a person who swears willfully, absolutely and falsely in a matter material to the issue or point in question." 3 Greenleaf Ev., 191, citing 3 Inst., 164; 4 Blackstone Com., 1371; Hawk P. C., 69; 2 Roscoe's Crim. Ev., 1045, 836. The indictment in this case conforms to the statute (Revisal, secs. 3246, 3247). The defendant, when called upon to plead, moved the court to quash the indictment because it failed to set forth facts showing that the alleged false testimony was material to the issue being tried in the case in which it was given. His Honor refused the motion. Defendant excepted. The statute relieves the State from alleging mere matters of form, as was theretofore required. It does not, however, do violence to the constitutional provision which requires that before a citizen is called upon to answer a criminal charge he must be informed of the accusation against him. Matters of sub-

stance must be alleged, to the end that the court may see that an indictable offense is charged.

It has always been uniformly held that to constitute perjury the false oath must be in regard to "some material fact tending to injure some person. If it be entirely immaterial it can not affect any one." *S. v. Dodd,* 7 N. C., 226. It is equally well settled that "It must either appear on the face of the facts set forth in the indictment that the matter sworn to and upon which the perjury is assigned was material, or there must be an express averment to that effect." 2 Roscoe's Crim. Ev., 849. "The materiality of the false swearing to the issue or point of inquiry must appear from the indictment, either by general averment or by the facts set forth." Note to *S. v. Shupe,* 16 Iowa, 36; 85 Am. (857) Dec., 485, 498, where the authorities are collected; 2 Wharton's Crim. Law, sec. 1304; 2 Bishop's Crim. Proc., sec. 921. "An indictment for perjury must show upon its face that the oath assigned as perjury was willful and false, and that the alleged false statement was material to the issue or it can not be sustained." *Marvin v. State,* 53 Ark., 395; *S. v. Chandler,* 42 Vt., 446. The bill of indictment in this record contains no averment that the testimony alleged to be false was material. We are, therefore, to ascertain whether the facts appearing upon the face of the indictment are, as matters of law, material to the issue which was being tried. It is well settled that "A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by so doing as to material circumstances which have a legitimate tendency to prove or disprove such fact." 116 Mass., 14. So, in *S. v. Strat,* 5 N. C., 124, it was held that if the question asked the defendant, when testifying as a witness, was for the purpose of impeaching him, a false answer was properly assigned as perjury. "A question having no general bearing on the matters in issue may be made material by its relation to the witness's credit, and false swearing thereon will be perjury." 2 Roscoe, 1062. As if one being examined as a witness be asked for the purpose of impeachment if he had been convicted of larceny, a false answer will undoubtedly be a good assignment of perjury. The principle is stated in *King v. Nicholl,* 1 Barn. and Adol., 21; 20 E. C. L., 336, wherein *Bayley, J.,* said: "An indictment must be good, without the help of argument or inference. In the case of perjury the indictment must show, either by a statement of the proceedings or by other averments, that the question to which the offense related was material." In the indictment before us it is charged that the alleged false testimony was given upon the trial of an action wherein W. H. Marlow was plaintiff and B. S. Cline was defendant. It is not suggested what the character of the action was or what the matter in issue—whether an account, the items of which were disputed; a note, the exe-

cution of which was denied, or a plea of payment interposed. We are left to conjecture in respect to each and all of these matters. The
(858) charge is that he swore that he paid to D. M. Boyd, a member of the board of commissioners, $20 to influence his official action, etc. It does not appear what Boyd's official conduct was, in any respect, under examination, or that it had any relation whatever to the matter in issue or the parties to the action. There is not the slightest suggestion, either directly or by inference, how the matter set out in the indictment was material or could in the most remote degree affect the result. It is suggested that possibly the purpose of the question was to impeach the witness, to affect his credibility. If this be conceded, although it would be the merest conjecture, we are unable to perceive how charging himself falsely with having given a bribe could strengthen his credibility. To deny it might do so. As said by *Bayley, J.*, in *King v. Nicholl, supra,* "We know nothing of the merits of the case, except from the indictment. The inuendoes introduce greater doubt than certainty." To sustain this view we would be compelled to conjecture that the witness was asked whether he did not give Boyd the money as a bribe for the purpose of affecting his credibility, and that he falsely swore that he did so for the purpose of weakening his credibility, whereas in truth he did not do so. In swearing falsely that he gave Boyd a bribe he injured Boyd; but it is difficult to see how, by admitting the truth of the impeaching question, he injures his adversary in the civil action or interfered with the due course of justice. The fact is that the question was not asked the witness for the purpose of impeaching him. He demanded that the solicitor file a bill of particulars. From this it appears that defendant was asked, "What connection, if any, did you have with circulating a report against Sheriff D. M. Boyd, during the political campaign, in which it was charged that you had paid him $10 for securing for you a position as keeper of the county home?" "I had none whatever." He was then asked whether he signed a statement to that effect, to which he answered that he did not. "How, then, was such a report circulated, if you didn't circulate it?" He answered, "I don't know." He then, of his own motion, asked if the counsel wanted the whole truth about it, and proceeded to state the facts set out in the indictment. From this it appears that the
(859) purpose of the cross-examiner was to show that he had spread a false report about Boyd having taken from him a bribe. He denied that he had spread any report whatever, and there is nothing in the indictment charging that he had sworn falsely in that respect. If he had denied spreading the false report, when in truth he had done so, it was well calculated to weaken the credibility of his testimony in the case on trial; but nothing of this kind is suggested. While we have

held, in *S. v. Van Pelt,* 136 N. C., 633, that a bill of particulars can not supply a defect in the indictment, and we adhere to that ruling, if we could look to the bill of particulars to supply the missing link we would fail to find it. The defendant may be guilty of uttering a slander against Boyd, but in no aspect of the case is he guilty of perjury, as defined at common law. We think that in refusing to quash the bill of indictment there was error.

While not necessary to the decision of this appeal, we think it proper to say that exception to the last paragraph of the instruction is well taken. While probably not so intended by his Honor, it was calculated to make the impression upon the jury that it was the duty of the defendant to satisfy them that the statements he made were true and had no other essential elements of perjury. It will be noted, upon that hypothesis alone, he instructed the jury that they could return a verdict of not guilty. In the trial of criminal cases it is always best to adhere closely to well-settled forms of expression. Save in a few exceptional cases, of which this is not one, the State carries the burden of proof to show beyond a reasonable doubt all the essential elements of the crime charged.

Error.

(860)

STATE v. LAWRENCE SPROUSE.

(Filed 19 May, 1909.)

1. Indictment—Unlawful Burning, etc.—Allegation of Ownership—Identification—Description.

On a trial under an indictment containing two counts for unlawfully, etc., setting fire, etc., and also attempting to burn, etc., a certain stable and granary, the property of and in possession of W. (Revisal, secs. 3338, 3336), the evidence was that the stable and granary was owned by a different person than the one named, who had rented it to W., and he had stored corn in the granary end of the building: *Held,* the allegation of ownership was for identification of the property, and it was sufficiently proved by thus showing occupancy.

2. Same—Instructions.

When an indictment charges the unlawful, etc., setting fire to a granary, the property of W., and an unlawful attempt to burn the barn, etc., of W., and the evidence tends to show that S. was the owner, but had rented it to W., who had stored corn therein, it is not error for the trial judge to charge, in effect, that if the jury so find the facts beyond a reasonable doubt, and likewise find beyond a reasonable doubt that defendant willfully set fire to and burned said house, with the corn of the prosecutor in it, it was their duty to return a verdict of guilty.

3. Indictment—Two Counts—General Verdict—Defective Count—Judgment Arrested.

When there are two counts in a bill of indictment charging an unlawful, etc., burning of the house of another, and the jury have returned a general verdict of guilty, judgment may not be arrested upon the ground that one of the counts is defective.

4. Indictment, Sufficient—Setting Fire to Property.

A count in a bill of indictment charging that defendant "did unlawfully, wantonly, willfully and feloniously set fire to a stable and granary, then and there the property and in possession of W.," etc., is good, under the Revisal, sec. 3338.

INDICTMENT for setting fire to and burning property of another, tried before *Ferguson, J.*, and a jury, at February Term, 1909, of MADISON.

Attorney-General for the State.
C. C. Ramsey and Moore & Rollins for defendant.

(861) CLARK, C. J. The defendant is indicted in two counts. In the first count it is alleged that the defendant "did unlawfully, wantonly, willfully and feloniously set fire to a stable and granary, then and there the property and in possession of William Sexton," and in the second count it is alleged that the defendant "did unlawfully, willfully and feloniously attempt to burn the barn and stable of William Sexton by setting fire to a certain lot of flammable matter in said barn and stable, contrary to the statute," etc.

The defendant requested his Honor to charge the jury as follows: "That, if the jury believe the evidence, the stable and granary was the property of E. L. Sprouse, and the jury could not find the defendant guilty under this bill of indictment, which charges that the defendant burned the stable and granary, the property of William Sexton." The court refused to give said instruction, and the defendant excepted.

The evidence was that the title to the stable was in E. L. Sprouse, but that he had rented the building to William Sexton, who had stored 300 bushels of corn in the granary end of the building. This is not a civil action for possession. Ownership is alleged only to identify the property, and is sufficiently proved by showing occupancy. *S. v. Daniel,* 121 N. C., 576; *S. v. Thompson,* 97 N. C., 496; *S. v. Jaynes,* 78 N. C., 507; *S. v. Gailor,* 71 N. C., 88.

The court charged the jury that if they "should be satisfied from the evidence, beyond a reasonable doubt, that William Sexton, the prosecutor, had rented the premises from E. L. Sprouse, and in pursuance of the contract of lease he went into possession of the barn, or a part of it, by storing his corn therein, then the bill properly charges the prop-

erty burnt as the property of William Sexton; and if they shall further be satisfied, beyond a reasonable doubt, that the defendant willfully set fire to and burned said house, with the corn of the prosecutor in it, it is their duty to return a verdict of guilty," to which the defendant excepted, but without good ground.

The only other ground relied on in defendant's brief is that the judgment should be arrested because the first count in the bill is defective. If this were true, there being a general verdict, it would be supported by the valid second count. *S. v. Toole,* 106 N. C., 736. (862) But the first count follows the words of the Revisal, sec. 3338, and the second count is based on the Revisal, sec. 3336.

No error.

STATE v. JIM LUNSFORD.

(Filed 19 May, 1909.)

1. **Intoxicating Liquors—Indictment, Insufficient—Certainty of Charge—Rights of Accused—Judgment.**

While the statutes are sufficiently full to cure mere formal defects in the procedure incident to criminal prosecution, the procedure, whether by indictment or warrant, either alone or in connection with the accompanying affidavit, must inform the accused of the charge against him with sufficient certainty to enable the court to know what offense has been committed and the punishment which may be imposed in case of conviction.

2. **Same—License.**

In order to sustain a conviction for an unlawful sale of spirituous liquors in a town before prohibition went into effect there, whether in violation of a State law or municipal ordinance, and when to constitute the offense it was necessary that such sale be made without license, the procedure must allege a sale without a license; otherwise it would be fatally defective.

3. **Intoxicating Liquors—Sale—Indictment—Ordinance—Certainty of Charge.**

When a warrant and accompanying affidavit charge an unlawful sale of spirituous liquor in violation of some city ordinance, without setting forth or describing the ordinance or referring to it in a way sufficient to identify it, a conviction thereunder can not be sustained.

4. **Same—State Law—Judgment.**

A conviction of selling spirituous liquor contrary to law can not be sustained under a warrant not specifying whether the charge was under a State law or municipal ordinance, when both are in force at the time; for the court could not determine for which offense to impose punishment, and no valid judgment could be pronounced.

(863) INDICTMENT for selling whiskey in the city of Asheville contrary to law, tried on appeal from the police court of the city of Asheville, before *Ward, J.*, and a jury, at November Term, 1908, of BUNCOMBE.

The procedure under which conviction was had is shown in the affidavit and warrant appearing in the record, as follows:

"NORTH CAROLINA—Buncombe County.

City of Asheville, Police Justice's Court.

"Charge: Violation of Ordinance No. State.

"E. C. McConnell maketh oath that on 26 September, 1908, in the city of Asheville, North Carolina, Jim Lunsford did unlawfully and willfully sell spirituous, vinous and malt liquors to one Zeb. D. Grant, in violation of City Ordinance No. State, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State. E. C. MCCONNELL."

"Sworn to and subscribed before me, this 26 September, 1908.

"G. S. REYNOLDS,
"Police Justice."

"STATE OF NORTH CAROLINA.

"To the Chief of Police or any Policeman of the City of Asheville, or other Lawful Officer of said City—GREETING:

"We command you to arrest the body of Jim Lunsford and him safely keep, so that you have him before me at 9 o'clock A. M. on 28 September, 1908, then and there to answer the charge above set forth.

G. S. REYNOLDS,
Police Justice."

"To the Chief of Police or any other Policeman or other Lawful Officer of the City of Asheville—GREETING:

"You are hereby commanded to summon the following witnesses to appear before G. S. Reynolds, police justice of the city of Asheville, at the time and place named for the return of the within warrant and summons, to testify as to the charge contained in the within affidavit and warrant, and to testify on the matters mentioned in the
(864) within summons, and not depart from the court without leave: Zeb. D. Grant, J. H. Fore, Frankie Davis, W. A. Webb.

G. S. REYNOLDS,
Police Justice."

"The within warrant received this 26 September, 1908. Executed 26 September, 1908, by arresting Jim Lunsford and bringing him before G. S. Reynolds, police justice, for trial at 9 o'clock A. M., 28 September.

E. C. MCCONNELL,
Policeman."

Under this procedure the defendant was tried, convicted and sentenced by the police justice to pay a fine of $100. Having appealed to the Superior Court, defendant was there again convicted and sentenced to imprisonment for eighteen months and assigned to work the public roads during his term. From this judgment defendant, having duly excepted, appealed.

Attorney-General for the State.
W. P. Brown for defendant.

HOKE, J. While the statutes in this State are full and sufficient to cure all formal defects in the procedure incident to a criminal prosecution, the requirement remains that in any and every such prosecution, whether by indictment or warrant, either alone or in connection with the accompanying affidavit, the defendant shall be informed of the accusation against him, and this accusation must be set forth with sufficient certainty to enable the court to say what offense has been committed and to know what punishment may be imposed in case of conviction. *Hendersonville v. McMinn,* 82 N. C., 533; Clark's Criminal Procedure, 150.

At the time of this occurrence prohibition had not gone into effect in the city of Asheville, and, in order to constitute a criminal offense in that locality for a violation of either the State or municipal law, it was required that the sale of spirituous liquors should have been without license. The procedure, therefore, under which this conviction was had is fatally defective, in that it contains no allegation of a sale without license. *S. v. Holder,* 133 N. C., 709.

Again, while the warrant and accompanying affidavit give (865) indication that the offense charged was for the violation of some municipal ordinance, the ordinance is not set forth or described, nor is it referred to in any way sufficient to identify it, and for this reason a prosecution can not be sustained under it as an offense against a municipal regulation.

Referring to this position, as well as that first stated, in *Hendersonville v. McMinn, supra, Ashe, J.,* for the Court, said: "The process under which the defendant was arrested is so defective in form and substance as not to warrant the judgment pronounced upon him in the

court below. It should have set out the ordinance, but instead of doing so it charges the defendant with the violation of *one of the ordinances* of the town of Hendersonville, prohibiting the sale of intoxicating liquors, implying that there was more than one ordinance of the town on that subject. Which did he violate? If it were intended to be a criminal prosecution, the warrant is the indictment; and every indictment must state the facts and circumstances constituting the offense with such certainty that the defendant may be enabled to determine the species of the offense with which he is charged, in order that he may know how to prepare his defense and that the court may be in no doubt as to the judgment it should pronounce if the defendant be convicted. Archib. Cr. Pl., 42, 43."

Further, in *S. v. Lytle,* 138 N. C., 738, we have held that, under certain circumstances, one and the same act or sale may constitute distinct offenses, the one being in violation of a State law and the other of a town ordinance requiring a municipal license; and if it be conceded that such a condition obtains here, on conviction under this warrant, as it now stands, the Court is unable to determine whether the punishment should be imposed for the one offense or the other, and therefore no valid judgment can be pronounced.

For the reasons indicated, we are of opinion that the judgment against the defendant should be arrested.

Judgment arrested.

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(866)

STATE v. W. P. BLACK.

(Filed 21 May, 1909.)

1. **Cities and Towns—Police Courts—Excessive Sentence—Appeal and Error—New trial—Procedure—Remand—Resentence.**

   A defendant is not entitled to a new trial upon appeal by reason of a sentence of punishment imposed by a police justice of a city greater than that authorized for the offense committed. The procedure would be to remand the case for resentence in conformity with law.

2. **Misdemeanor—Disorderly Houses—Common-law Offense—Cities and Towns—Void Ordinance.**

   A city ordinance, without statutory authority, which covers acts that are misdemeanors at the common law and punishable under the criminal laws of the State, and which imposes a greater penalty for their violation, is void.

3. **Misdemeanor—Disorderly Houses—Common-law Offense—Asheville Charter, Interpretation of.**

   The common-law offense of keeping a disorderly house is not repealed, in reference to the city of Asheville, by its charter (chapter 100, Private Laws 1901, sec. 77).

STATE *v.* BLACK.

APPEAL from police justice's court, tried, *de novo,* before *Ward, J.,* and a jury, at November Term, 1908, of BUNCOMBE.

Attorney-General for the State.
W. P. Brown, Thomas Settle and Davidson, Bourne & Parker for defendant.

CLARK, C. J. The defendant was convicted in the police court of Asheville for keeping a disorderly house, and appealed to the Superior Court. Upon a trial *de novo* he was found guilty by a jury and sentenced to twenty-two months' imprisonment. He presses but one ground of appeal in his brief, which is that, by the charter of Asheville (Private Laws 1901, ch. 100, sec. 77), keeping a disorderly house in that city is a misdemeanor, punishable by a fine not exceeding fifty dollars or imprisonment not exceeding thirty days.

If this exception were well taken, the defendant would not be entitled to a new trial, but to be remanded for resentence in conformity to law. *S. v. Lawrence,* 81 N. C., 522; *S. v. Crowell,* 116 N. C., (867) 1052; *S. v. Austin,* 121 N. C., 622.

If this had been an ordinance of the city it would be void, because it covers the same acts as are a misdemeanor at common law and punishable under the criminal law of the State. *S. v. McCoy* (from Asheville), 116 N. C., 1059, and cases there cited.

The offense for which the defendant was tried is an offense at common law and has not been repealed. The charter of Asheville (section 77 of chapter 100, Private Laws 1901) does not purport to repeal it. Its object was evidently to make it an offense against the city, in addition to being an offense against the general law of the State. Doubtless the idea was that it might thus be dealt with more promptly and efficiently than in the Superior Court, where the jurisdiction then lay. But there are no words in said section 77 indicating an intention to repeal it as a common-law offense within the limits of Asheville. It remained, as before, a common-law offense throughout the State. The defendant was tried and convicted under the common law. The above section (77), if valid, was not pleaded below or relied on either by the State or the defendant, and its validity is not presented.

No error.

Cited: S. v. Cherry, 154 N. C., 627.

STATE v. ED. BROWN ET AL.

(Filed 21 May, 1909.)

1. **Police Justice—Jurisdiction—City Limits—Evidence—Judgment—Motion in Arrest.**

When a police justice has jurisdiction of offenses only when committed within the corporate limits of a city, a motion in arrest of judgment will be denied when it does not appear that the offense was committed in the limits prescribed.

2. **Larceny from Person—Punishment—Jurisdiction—Superior Court.**

Larceny from the person, regardless of the value of the property, is within the exclusive jurisdiction of the Superior Court. (Revisal, sec. 3506.)

(868) INDICTMENT tried before *Webb, J.*, at February Term, 1909, of FORSYTH, for larceny from the person of a pocketbook of the value of $1.

The defendants were convicted, and moved in arrest of judgment, upon the ground that the recorder's court of Winston had exclusive original jurisdiction of the offense charged in the bill. Motion overruled. Defendants appealed. This constitutes the only assignment of error.

Attorney-General for the State.
J. S. Grogan for defendants.

PER CURIAM: The motion was properly overruled.

1. The act of the General Assembly of 1907 (chapter 573) creating a recorder's court for the city of Winston limits the jurisdiction of that court to offenses committed within the corporate limits of said city, and there is nothing appearing upon the face of this record showing that the offense was committed within those limits.

2. Larceny from the person, regardless of the value of the property, is neither a petty misdemeanor nor a felony, the punishment for which can not exceed one year, under section 3506 of the Revisal.

The punishment for such offense, under sections 3500 and 3506, may be as much as ten years in the State's Prison. Of this offense the Superior Court has exclusive jurisdiction.

Affirmed.

APPENDIX

ADDRESS OF

WILLIAM P. BYNUM, JR.

PRESENTING TO THE COURT A PORTRAIT
OF THE LATE

CHIEF JUSTICE DAVID M. FURCHES

MAY 11, 1909

MR. BYNUM said:

May it please Your Honors:—I have the pleasure of presenting a portrait of DAVID M. FURCHES, late Chief Justice of this Court. In selecting me to perform this friendly office JUDGE FURCHES showed a personal confidence and regard which I keenly appreciate and which I shall endeavor to justify by using that plainness and directness of speech which I think he would approve if he were here. Many of his contemporaries at the bar and on the bench knew him longer and better, perhaps, than I, and could speak more fittingly of his professional and official career. My only qualification is an intimate acquaintance and association with him during the last years of his life, and a sincere admiration of his sturdy qualities as a lawyer, a judge, and a man.

The biography of JUDGE FURCHES has already been written. I need not repeat it here or refer to it further than to recall some important events which throw light upon his career. Indeed, his life throughout was so plain and unpretentious, so free from display and the pomp which usually attends the noisy honors of ambitious public life, that its record is little more than the simple story of a steady country lawyer who, by unremitting industry and the practice of the principles of strict integrity and honor, won his way surely and steadily to the highest judicial office of the State. This was the ambition of his life; this he set out to attain, and with its attainment came only the earnest desire to discharge its duties faithfully and acceptably to all of his fellow-citizens.

The ancestors of JUDGE FURCHES were from Delaware. His grandfather came to North Carolina from that State about the close of the Revolution. A relative of the family had died unmarried in that part of Rowan which is now Davie County, and left his estate to a kinsman, the Judge's great-grandfather, of Kent County, Delaware; and a son of that legatee was sent here to look after the property. He found it, and, what was better, he also found for himself a wife among the daughters of Rowan and decided to make his home amongst her people. This settler named one of his sons Stephen Lewis, after the old bachelor relative who had bequeathed his estate to the ancestor in Delaware, and this Stephen Lewis Furches, a country gentleman noted for his generosity and kindness, was the father of the Judge, the eldest child, who was born 21 April, 1832.

The future Chief Justice was a typical country boy. He helped his father on the farm; in the winter he attended such schools as the community afforded,

and when he grew older he was sent to the high school or academy a few years, and that completed his education. He had already chosen his profession, and at the age of twenty-four passed from the academy to the law school of Judge Pearson, at Richmond Hill. There he remained for the usual period, and at the age of twenty-six received his license and established an office in Mocksville, the county seat. His legal ability as well as his hold upon the confidence of his fellow-citizens, were soon attested by his election to the office of Solicitor of the County Court, a position most helpful and stimulating to the young lawyer. That position, with the exception of a few months during the Reconstruction period, he continued to hold until the county courts were abolished, in 1868.

JUDGE FURCHES was in the Confederate Army only about one month. The shortness of his service there was due to two things: first, the office of County Solicitor which he held exempted him from the provisions of the Conscript Act, and, second, having three brothers and four brothers-in-law in the army, to use his own words, he "concluded to stay out."

When the war was over and the work of restoring the State to its former relations with the Union was begun, JUDGE FURCHES was sent as a delegate from Davie County to the Constitutional Convention which met for that purpose in Raleigh, October, 1865. In that convention, composed of some of the ablest men of the State, he was an active and influential member. How quickly and thoroughly its work was done is known to every one. Among other ordinances which it adopted were those abolishing slavery, declaring the ordinance of secession null and void from the beginning, and repudiating the debt contracted in the prosecution of the war. It provided for the organization of a State Government by calling an election for members of the General Assembly, Governor and other State officers, and also for the election of members of Congress, and thus placed the State in a position to resume at an early day its practical relations with the Union. Other seceding States in similar conventions merely declared the ordinances by which they attempted to sever their connection with the Union null and void. North Carolina alone declared her ordinance void from the beginning. "The said supposed ordinance," the convention resolved, "is now and at all times hath been null and void." This was the view held by Mr. Lincoln and afterwards announced by the Supreme Court in *Texas v. White*. Mr. Lincoln, in his first inaugural address, declared that no State, upon its mere motion, could lawfully get out of the Union, and that resolves and ordinances to that effect were legally void. And in his last speech, 11 April, 1865, referring to certain criticisms on account of the fact that his mind seemed not to be definitely fixed on the question whether the seceding States, so called, were in the Union or out of it, he declared that such a question was practically immaterial—"a mere pernicious abstraction, which it were better not to decide or even to consider." "Finding themselves safely at home," said he, with his usual aptness of expression, "it would be utterly immaterial whether they had ever been abroad."

Mr. Sumner, on the other hand, held that the effect of secession was the destruction of the States, and Thaddeus Stevens was firm and bitter in the contention that the result of the war had left them in the humiliating position of conquered provinces, to be dealt with as the conqueror pleased; while Congress regarded them as disorganized communities which had forfeited all civil and political rights and privileges under the Constitution, and which could be restored thereto only by the permission and authority of the constitutional power against which they had rebelled and by which they were subdued.

Our Convention of 1865 held the view that North Carolina had never ceased to be a State, and a State of the Union; that the ordinance of secession being void *ab initio*, the State, having never ceased to be a member of the Union, had the right and would be allowed to resume her relations with it upon complying with the terms and conditions set forth in the President's proclamation of May, 1865; and, accordingly, in addition to passing the ordinances required by the President, the convention provided for the speedy reorganization of civil government in all its branches in this State, and also for the election of members of Congress, fully believing that when these things should be done the State would be accorded full recognition as a member of the Union. This had been the wish and plan of Mr. Lincoln, and the same was adopted by Mr. Johnson soon after his accession to the presidency.

Governor Worth and his party were equally pronounced in the same opinion and in his inaugural address, in December, 1866, he declared that they were "astounded by the proposition," then advanced, "that North Carolina, one of the original thirteen, was no longer a State, but only a territory of the United States," and that he would "never assent to any scheme of compromise based on the idea that North Carolina was not a State of the American Union."

That position was held to be correct by the Supreme Court of the United States, two years later, in the case of *Texas v. White*—too late, however, to prevent the mischiefs which the opposite view had brought upon us. "Did Texas during the war cease to be a State?" asked Chief Justice Chase, in delivering the opinion of the Court in that case. "Or, if not, did the State cease to be a member of the Union?" Answering these questions, he continued: "The union of the States never was a purely artificial and arbitrary relation. . . . Not only, therefore, can there be no less of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their government are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution in all its provisions looks to an indestructible union composed of indestructible States. . . . The ordinance of secession adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her Legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States remained perfect and unimpaired. It certainly follows that the State did not cease to be a State nor her citizens to be citizens of the Union. . . . Our conclusion, therefore, is that Texas continued to be a State, and a State of the Union."

After the convention JUDGE FURCHES returned to his duties as solicitor and to the practice of his profession generally. To him the arena of practical politics was never very enticing. His ambition was always along the line of his profession, to which, in all, he devoted nearly fifty years of his life. He attained his majority in the expiring days of the old Whig Party, of which he was an enthusiastic adherent, and from which the transition was easy and natural to the Republican Party, in a measure its successor. Loyalty to his party and loyalty to his friends was a governing principle of his conduct, though frequently he did not agree with the policies of the one nor the actions of the other. His party frequently honored him with its nominations for high and responsible office. Twice he encountered the Democratic giants of the West as a candidate for Congress—Major Robbins in 1872 and Judge Armfield in 1880—and, though the champion of a forlorn hope, each time he reduced his opponent's majority more than half. For three years he was a Judge of the

Superior Court, where he presided with patience, firmness and ability. In 1888 he was again called into party service as a candidate for Associate Justice of this Court, and again four years later as a candidate for Governor; but the common fate of all Republican candidates befell him and he, with the others on the ticket, was each time defeated.

But these successive defeats are not to be attributed to any lack of confidence on the part of the public in JUDGE FURCHES or in his fitness for the positions which he sought. On the contrary, I venture to say that he possessed in a marked degree the respect and esteem of his fellow-citizens throughout the State. They recognized his ability and integrity, and were satisfied that he was capable of filling with entire acceptability any of the offices to which he aspired. Yet, he, with others like him, were uniformly defeated as often as they ran for public office. The reasons for this are not hard to discover. It was no fault of theirs nor of the rank and file of their party in this State. But the majority of the white people of North Carolina had not forgiven the National Republican Party for its stupendous blunders in the reconstruction of the State Government in 1867—for the rejection of Mr. Lincoln's plan and the enforcement of that of Congress, and for placing in positions of power in the State men who, in many instances, were distasteful to the people and wholly unfit for leadership in such a crisis. These blunders JUDGE FURCHES and many other patriotic Republicans like him in North Carolina opposed and tried to prevent. The Constitutional Convention of which he was a member had readily complied with what the people of this State understood to be the demands of the President and the people of the North as necessary before the State should be permitted to resume its relations with the Union. The machinery of the State Government had been taken from the hands of those who had adhered to the Confederacy and placed by a loyal electorate in the hands of those who had renewed their allegiance to the United States. The great body of the people had accepted the offered amnesty, taken the oath required, and voted at the elections by which these sweeping changes were made, and the State Government, thus restored, was already performing its functions smoothly and satisfactorily, and peace and order prevailed.

The presence of the State in the Union had been emphatically recognized by submitting to its Legislature the Thirteenth Amendment for ratification, and the Legislature had promptly and almost unanimously approved it. Another recognition of our statehood, equally emphatic, so far as the Executive Department of the National Government could make it, had come when, on 16 June, 1866, the Secretary of State of the United States formally transmitted to the Governor of this State the Fourteenth Article of Amendment proposed to the Constitution of the United States, to be by him submitted to the Legislature for adoption or rejection. To the original conditions to be complied with before the Southern States should be permitted to resume their relations with the Union the ratification of that amendment was added. It was vastly more far-reaching and objectionable to the South than the other. The people of the South were nevertheless expected to face about, to turn their backs on the men they had trusted and followed and adopt the lead of those who had no magnetic hold on their hearts or minds. This they would not do, and it was unreasonable and unnatural to expect them to do it. The Legislature, in the exercise of its rightful powers, refused to ratify or adopt that amendment.

Then, without further reason, the government of this State, which had been duly acknowledged by the President of the United States and which had been organized and in existence for more than twelve months and in the regular and peaceful performance of its functions, along with the governments of other Southern States, was declared illegal and inadequate for the protection of life

or property and virtually abolished by Congress, and the Governor and other State officers who had been duly elected by the people and were in the exercise of their public duties were replaced by others, elected largely by the vote of the freedmen upon whom the elective franchise had recently been bestowed. The majority of the intelligent people of this State felt outraged and offended by these arbitrary and unconstitutional proceedings. They looked with displeasure upon the government and the officers thus thrust upon them against their will. To them the rule of that government was irksome and sure to lead speedily to disorder and trouble. It was unnatural and impossible for it to last. Men like JUDGE FURCHES were not to blame for it. They opposed this scheme of Congress from the beginning and acquiesced in it only in the hope that their fears and misgivings might prove groundless. They rightly believed that reorganized political government, with proper security for person and property, could not exist in the State unless those who were by their intelligence and character the natural leaders of the people, and who would surely lead them by and by, were permitted to lead them in that crisis. And time has proved the correctness of their position.

Nor were such men of the South alone in that belief. Many Republican leaders in the North agreed with them and urged the adoption of such a policy by Congress as the only proper solution of the grave difficulty then confronting the Nation. The sentiments and apprehensions of these Republicans were never so truly and prophetically expressed as they were by the great War Governor of Massachusetts in his valedictory address to the Legislature of that State in January, 1866, more than a year before the first reconstruction act was passed. Said he: "The Southern people . . . fought, toiled, endured and persevered with a courage, a unanimity and a persistency not outdone by any people in any revolution. There was never an acre of territory abandoned to the Union while it could be held by arms. There was never a rebel regiment surrendered to the Union arms until resistance was overcome by force. . . . The people of the South, men and women, soldiers and civilians, volunteers and conscripts, in the army and at home, followed the fortunes of the rebellion and obeyed its leaders, so long as it had any fortunes or any leaders. Their young men marched up to the cannon's mouth a thousand times, where they were mowed down like grain by the reapers when the harvest is ripe. . . . And since the President finds himself obliged to let in the great mass of the disloyal . . . to a participation in the business of reorganizing the rebel States, I am obliged also to confess that I think to make one rule for the richer and higher rebels and another rule for the poorer and more lowly rebels is impolitic and unphilosophical. When the day arrives . . . when an amnesty, substantially universal, shall be proclaimed, the leading minds of the South, who by temporary policy and artificial rules had been for the while disfranchised, will resume their influence and their sway. The capacity of leadership is a gift, not a device. They whose courage, talents and will entitle them to lead will lead. . . . We ought to demand and to secure the coöperation of the strongest and ablest minds and the natural leaders of opinion in the South. If we can not gain their support of the just measures needful for the work of safe reorganization, reorganization will be delusive and full of danger. . . . It would be idle to reorganize those States by the colored vote. If the popular vote of the white race is not to be had in favor of the guarantees justly required, then I am in favor of holding on just where we are. I am not in favor of a surrender of the present rights of the Union to a struggle between a white minority aided by the freedmen on the one hand, against the majority of the white race on the other. I would not consent, having rescued those States by arms from secession, to turn them

over to anarchy and chaos. . . . We ought to extend our hands with cordial good will to meet the proffered hands of the South, demanding no attitude of humiliation from any, inflicting no acts of humiliation upon any, respecting the feelings of the conquered."

To the stubborn refusal of Northern Republican leaders in Congress to heed such warnings and to follow such advice, and to the arbitrary and unreasonable enforcement of a contrary policy, may be justly attributed, in my opinion, the political solidity of the South and the misfortunes of the Republican Party in that section from that day to this. There, in my judgment, was the prime mistake, the inexcusable blunder. Other mistakes, it is true, may have been and, indeed, were made; other offenses undeniably were committed here in the South, where social and political chaos ensued, and the influence and effect of them remain with us to this day. But the origin and cause of these troubles were not wholly in the South, and Southern Republicans were not altogether responsible, nor are they the only proper apologists for them.

The same also has been true with respect to the management of Republican affairs in the South from that day to this. Not all of the blunders, not all of the bad management and mistakes have been made here; just as frequently, just as persistently, and just as disastrously, have they been made at Washington. And wherever and whenever and by whomsoever they have been made, those who have suffered most by them politically have been Southern Republicans of the type and standing of JUDGE FURCHES.

But, happily, we are now assured of the arrival of a better day, in which the unfortunate policy heretofore pursued towards the South shall be abandoned and reversed; when, in the language of Governor Andrew, "the cooperation of the strongest and ablest minds and the natural leaders of opinion in the South" will be sought and, let us hope, will be secured; when the wishes of her people are to be consulted and no effort spared to find out the facts in respect to the character of all proposed appointees to Federal positions, and when, in the language of the President, only those will be selected "whose character and reputation and standing in the community commend them to their fellow-citizens as persons qualified and able to discharge their duties well, and whose presence in important positions will remove, if any such thing exists, the sense of alienism in the Government which they represent."

It remains for me to refer to the most important part of the Judge's life—his career at the bar and on the bench. In 1866 he moved from Mocksville to Statesville, and soon acquired a lucrative practice in Iredell and the adjoining counties. He met as antagonists such men as Armfield, Folk, Clement, Baily, McCorkle, Watson, Linney and others, among whom he was numbered as one of the wisest and the best. As an adviser and counsellor he was always careful and safe; as an advocate he was earnest, forcible and convincing. He never trusted a client or even a brother lawyer to prepare his cases; he prepared them himself, and thus not only performed a duty, but furthered justice and enhanced his chance of success.

He was scrupulously faithful to his clients, but remembered that good faith to a client can never justify or require bad faith to one's own conscience, and that however desirable it may be to be known as a successful and great lawyer it is even better to be known as an honest man, and that there is no incompatibility whatever in the possession of both of these titles. The asserting of truth, the accomplishing of right, the doing of what is just—these he believed to be grander and better than the transitory victories sometimes questionably won in the controversies of the courts. Above all, he was honest, he was honorable in the practice of his profession as in his dealings with his fellowmen, and this gave him a power far superior, more persistent and permanent

than mere skill and strategy. When he spoke to the jury or the judge, his argument carried the weight of sincerity, his eloquence the strength of his conviction.

His elevation to the bench was in strict accordance with his tastes and desires. I have said that he was for three years Judge of the Superior Courts, from 1875 to 1878. In 1894 he was elected an Associate Justice of this Court, and acted as such until January, 1901, when his cherished ambition was gratified by his appointment as Chief Justice. After holding that office for two years, he retired to private life, carrying with him that which he ever so highly prized—the love and respect of his brethren, the confidence of his fellow-citizens, and the consciousness of duty faithfully and courageously performed.

On the bench JUDGE FURCHES was patient, hardworking and thorough in his investigation of questions on which the Court was called upon to pass. While making no pretense to polished or finished style, his written opinions are clear, forcible, and incisive. He always speaks to the point, and when that has been reached and explained he is content.

He was fond of the society of the bench and bar, and was delightfully jovial and reminiscent with all his personal and political friends.

He believed in standing by the old landmarks and the old decisions, and had unbounded admiration for the great judges who had preceded him as members of this Court.

In presenting his portrait to the Court, I have said of him only what all who knew him will readily concede. I render to his memory sufficient tribute when I portray him precisely as he was—"a true and brave and downright honest man." His heart was always open and sincere. He was plain, straightforward and unostentatious in everything he did and in everything he said. In private and in public life he always sought the path of rectitude and righteousness, and nothing pleased him so thoroughly as to be able to perform his duty well. He made no claim to erudition or brilliancy, but he possessed the richer endowment of saving common sense and "stood foursquare to all the winds that blew." He was what Carlyle calls sincere; he was what he seemed to be, no sham or make-believe, but a real, genuine man. In all his relations he was just and charitable. His love and devotion to his wife and kindred were remarkably tender and beautiful. Surrounded by them, in the full possession of his faculties and the love and respect of neighbors, he gently passed away in the early morning hours of 8 June, 1908, leaving a name untarnished and the record of a useful and well-spent life. Here where Justice reigns supreme, in the company of so many of those whom he venerated and loved, may his honest, rugged features ever receive a hearty welcome from those who frequent and abide in this place.

ADDRESS OF ACCEPTANCE

BY

MR. CHIEF JUSTICE CLARK

CHIEF JUSTICE WALTER CLARK, in accepting the portrait, said:

The Court is gratified to receive the portrait of JUDGE FURCHES. For six years he occupied a seat on this bench as Associate Justice by election of the people, and two years as Chief Justice by appointment of Governor Russell. His opinions will be found in the sixteen volumes from 116 to 131 N. C. Reports, inclusive. They will ever be his truest and best monument.

Those with whom he sat on this bench will ever recall the association with pleasure. Patient and thorough in the investigation of every case coming before the Court, he spared himself no labor to arrive at what he deemed a just conclusion. He was always considerate and courteous in his intercourse with his brethren on the bench and towards the bar.

The distinguished speaker has aptly portrayed him as a "true and brave and downright honest man—plain, straightforward and unostentatious." He served his State faithfully and well. It is fit that his portrait should hang on these walls, by the side of his great predecessors, whose learning he had imbibed and in whose footsteps he followed.

The Marshal will hang the portrait in its proper place on the walls of this chamber.

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23. *Record—Stenographer's Notes—Immaterial Matter—Costs.*—Stenographer's notes of the trial should be sent up on appeal only as to matters involved in the inquiry; but when settlement of the case was delayed so long that the trial judge could not separate the material parts, a motion that costs of such should not be taxed against appellee will not be granted. *Ibid.*

APPEAL AND ERROR—*Continued.*

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26. *Same—Questions for Jury—Verdict Directing.*—The jury must pass upon the weight of the State's evidence in criminal cases. Instead of demurring to the evidence, the proper practice is for the defendant to move the court to direct the jury that the evidence is insufficient to convict, and to enter a verdict of not guilty. If the trial judge so directs the verdict, the State can not appeal. *Ibid.*

27. *Cities and Towns—Police Courts—Excessive Sentence—New Trial—Procedure—Remand—Resentence.*—A defendant is not entitled to a new trial upon appeal by reason of a sentence of punishment imposed by a police justice of a city greater than that authorized for the offense committed. The procedure would be to remand the case for resentence in conformity with law. *S. v. Black*, 866.

ARBITRATION.

Nuisance — Ponds — Public Health — Consent Order — Pleadings—Agreement—Scope of Action Enlarged.—In an action for injury from the maintenance of a pond, and to enjoin the rebuilding of a dam, the parties may, by a consent order of arbitration, voluntarily enlarge the scope of the controversy to include in the award a scheme of drainage proper to safeguard the public health; and when there is no evidence impeaching the award, a judgment rendered in accordance therewith is valid and binding. *Snell v. Chatham*, 729.

ARREST. See Process.

1. *Restraint—Evidence Insufficient.*—To constitute sufficient evidence of such personal restraint as will amount in law to an arrest it must be more than an unasserted purpose and intention; and when the evidence only tends to show that defendant's employees threatened the arrest of *feme* plaintiff's husband, in his absence, while she was on defendant's premises, and said they would give her the warrant of arrest and permit her to follow him, upon payment of two dollars on account of a stove her husband had bought and left in its house, which she accordingly paid, it does not constitute such restraint as will amount to an arrest in law, when she made no attempt to leave under circumstances altogether favorable. *Powell v. Fiber Co.*, 12.

2. *Same—Principal and Agent—Corporations—Superintendent.*—An agent authorized to collect for his principal has no implied authority, in

ARREST—*Continued.*

his endeavor to collect, to arrest the debtor upon warrant, or put such restraint upon his wife as will amount to an arrest in law; and the principal is not responsible for such unauthorized or unratified acts. This principle applies to a corporation, as principal, acting through its superintendents as agents. *Ibid.*

ARREST AND BAIL.

1. *Interpretation of Statutes—Construed as a Whole—Revisal.*—The Revisal, secs. 735, 737 and 1920 *et seq.*, prescribing the methods by which a prisoner may be discharged, in certain instances, before final judgment, should be construed together; and, so construed, the remedies given in section 1920 *et seq.* are in addition to those given in sections 735 and 737. *Edwards v. Sorrell*, 712.

2. *Alienating Wife's Affections—Insolvent Debtors—Inventory of Property —Release.*—A suit by one charging defendant with alienating the affections of his wife, and arresting him and holding him for bail, under the affidavits required (Revisal, sec. 7271, subsec. 2), is one entitling defendant to the benefit of the statute for the relief of insolvent debtors; and upon his filing "a full and true inventory of his estate, real and personal, with encumbrances existing thereon," etc., in accordance with the Revisal, sec. 1930, he is entitled to his discharge from custody. *Ibid.*

3. *Alienating Wife's Affections—Insolvent Debtors—Inventory of Property —Statements—Surplusage—Issue—Fraud.*—One who has another arrested and held to bail for alienating the affections of his wife does not raise an issue or suggestion of fraud (Revisal, sec. 1934) by answering the petition for discharge and denying a statement therein made by petition that he is advised by counsel that, owing to the condition of the title to certain lands scheduled, an execution could not issue against it, as such statement is surplusage. (*Adams v. Alexander*, 23 N. C., 501, cited and distinguished.) The procedure upon the question of fraud, when the husband has scheduled lands in which he claims his wife has no interest, and he has paid the purchase price, discussed by CONNOR, J. *Ibid.*

ARREST OF JUDGMENT. See Indictment.

ASSESSMENT. See Constitutional Law.

ASSETS, DISTRIBUTION OF. See Corporations.

ASSIGNMENT. See Mortgagor and Mortgagee; Judgments.

ATTORNEY AND CLIENT. See Principal and Agent.

ATTORNEYS. See Principal and Agent, 14.

1. *Proceedings to Disbar.*—Proceedings to disbar an attorney, brought under the provisions of Public Laws 1907, ch. 941, are of a civil nature. *In re Ebbs*, 44.

2. *Same "Convicted"—Other Jurisdiction—Power of Courts.*—Chapter 941, Laws 1907, does not confer upon the court the power to disbar an attorney because he has been "convicted" in the courts of another State or of the United States. *Ibid.*

ATTORNEYS—*Continued.*

3. *Same.*—Revisal, sec. 211, is a disabling statute, and withdraws from the court the power to disbar attorneys convicted of crimes in another jurisdiction. *Ibid.*

"AYE AND NO" VOTE. See Constitutional Law.

BANKS AND BANKING. See Principal and Agent.

BILLS AND NOTES. See Notes.

BILL OF PARTICULARS. See Indictment.

BOARD OF EDUCATION. See Taxation.

BOND ISSUES. See Cities and Towns.

1. *Townships — Corporate Powers — Legislative Powers — Constitutional Law.*—Under Revisal, sec. 1318, subdiv. 30, enacted in pursuance of the constitutional amendment of 1875, townships are not corporate bodies and have no corporate powers when not specially conferred by statute. *Wittkowsky v. Commissioners*, 90.

2. *Same.*—Townships may issue bonds to aid in the construction of railroads only under authority given by statute passed in accordance with the requirements of Article II, section 14, of the Constitution, respecting its several readings, the roll call, the "aye and no" vote, etc. *Ibid.*

3. *Interpretation of Statutes—Townships—Railroads, Aid to Finish.*—Section 1996, The Code of 1883, does not confer on a township the right to issue bonds to aid in the construction of a railroad upon which work has not been commenced. *Ibid.*

4. *Constitutional Law—Legislative Journals—Notice to Purchaser.*—When township bonds give notice upon their face of the act under which they were issued, and when an examination of the legislative journals would have disclosed that the act was not passed in accordance with the constitutional mandate, a purchaser is put upon notice of the defect in the issue. *Ibid.*

BOTH PARTIES APPEAL. See Appeal and Error.

BOUNDARIES. See Deeds and Conveyances.

BRIEFS. See Objections and Exceptions.

CABOOSE CARS. See Negligence.

CANCELLATION. See Notes; Evidence; Mortgagor and Mortgagee.

CARRIERS OF FREIGHT. See Penalty Statutes.

1. *Consignee—Notice of Arrival—Principal and Agent.*—Notice given by a carrier of the arrival of goods to a transfer company in the habit of hauling consignor's goods from the depot is not of itself sufficient notice to the consignee. The transfer company is the agent of the consignee only to the extent of the goods actually hauled by it. *Hockfield v. R. R.*, 419.

2. *Consignment Missent—Rebilled—Intrastate Shipment—Penalty—Interstate Commerce.*—An interstate shipment of goods which was missent, bill of lading lost, and rebilled from one point in the State to another

CARRIERS OF FREIGHT—*Continued.*

therein, is an intrastate shipment, and upon the carrier's violating the provisions of the Revisal, sec. 2633, the penalty therein accrues. *Ibid.*

3. *Delay in Delivery—Interstate Commerce—Burden.*—The penalty for failure of a common carrier to deliver freight, as prescribed by the Revisal, sec. 2633, shipped from beyond the State, after it has been unloaded from its cars and while in its depot, is constitutional and not a burden upon interstate commerce. *Ibid.*

4. *Delivery—Wrongful Detention—Storage Charges.*—A carrier can not enforce collection of storage charges arising from its wrongful refusal to deliver goods to consignee. *Ibid.*

5. *Carriers of Goods—Embargo—Discrimination.*—A common carrier can not place an embargo on its customer or patron so as to discriminate against him or those dealing with him, and for such unjust discrimination the carrier is indictable in this State. (Rev., 3749.) *Garrison v. R. R.*, 575.

CASE SETTLED. See Appeal and Error.

CAUSAL CONNECTION. See Negligence; Contributory Negligence.

CERTIFICATE. See Taxation.

CERTIORARI. See Appeal and Error.

CHALLENGE. See Jurors.

CHAMPERTY.

1. *Maintenance—Officious Interference.*—A contract or agreement will not be held within the condemnation of the principle relating to champerty or maintenance unless the interference by the party charged therewith is clearly officious and for the purpose of stirring up strife and continuing litigation. *Smith v. Hartsell*, 71.

2. *Same—Interest.*—An agreement of a party to give aid in the prosecution of a suit in the determination of which he has an actual interest is not invalid for maintenance or champerty. *Ibid.*

3. *Same.*—A party who has a valid debt against an estate of deceased may make a valid contract with the heirs at law to "do everything proper and legitimate and to aid them in every way to recover said estate," in a suit to be instituted for that purpose, in consideration of payment of his debt upon recovery; and the contract is not officious or objectionable as being one of maintenance or champerty, and is enforcible upon the recovery of the estate, the subject of the agreement. *Ibid.*

4. *Public Policy—Witness—Contract—Agreement to Testify—Consideration.*—An agreement by a party to give all true evidence when called on in any suit it may be deemed necessary to bring to recover an estate in which he has an interest, is not void as against public policy, when there is no indication that he was to receive payment therefor beyond that which the law allows to a witness and to which he would be legally entitled. *Ibid.*

CHARACTER. See Witnesses.

CHARGE. See Instructions.

CHARTERS. See Cities and Towns; Constitutional Law; Statutes.

CHATTEL MORTGAGES.

1. *Contracts — Mortgages—Damages—Liens—Substitution.*—Plaintiff, under agreement with defendant, giving a lien for advancements, and to enable him to fulfill his contract to cut and deliver certain lumber, took up a mortgage on defendant's mules, etc. Plaintiff claimed that defendant had not fulfilled his contract, and seized the mules, etc., under the mortgage and the agreement. The jury found that defendant had broken his contract, to plaintiff's damage in a certain sum: *Held*, the amount awarded by the verdict was a lien on the mules, etc. *Walker v. Casper*, 128.

2. *Mortgagor and Mortgagee—Notice—Registration—Priorities—Liens.*—A recital in a registered chattel mortgage of a piano that there was no encumbrance except a certain amount now due "a piano company": *Held*, (1) is not sufficient notice to the mortgagee in the recorded mortgage; (2) if it were otherwise full and sufficient, it could not supply the absence of registration; (3) the words employed were to protect the mortgagor from any charge of improperly conveying mortgaged property and from liability incurred to the mortgagee on that account. *Piano Co. v. Spruill*, 168.

3. *Same.*—A holder of a registered mortgage has a prior lien to that of a holder whose mortgage was first made, but not recorded, notwithstanding a recital in the recorded mortgage that there was no encumbrance except "$115 now due a piano company," which subsequently proved to be due the holder of the unregistered mortgage. (The question of notice and liens by mortgage discussed by CLARK, C. J.) *Ibid.*

CHECKS. See Principal and Agent.

CHILDREN. See Estates.

CITIES AND TOWNS. See Townships.

1. *Bond Issue—Necessary Expense—Streets and Sidewalks—Vote of People—Constitutional Law.*—The cost of maintaining the street of a town, to the extent and in the manner required for its good government and well being, is a necessary expense; and an indebtedness incurred on that account, without first submitting it to a vote of the people, is not forbidden by Article VII, sec. 7, of the Constitution. *Hendersonville v. Jordan*, 35.

2. *Elections—Bond Issue—Statutory Requirements—Private Laws.*—The regulations as to holding elections in the town of Hendersonville are contained in the general law on the subject (Revisal, sec. 2958), and the charter of the town of Hendersonville (chapter 97, Private Laws 1901), where the same is not in conflict with the general law; and when, under the provisions of the general law, a bond issue was authorized by the vote of the people of that town, under the charge and supervision of a registrar and two judges, the same is valid. *Ibid.*

CITIES AND TOWNS—*Continued.*

3. *Bond Issue—Registrar a Freeholder—Requisites—Substantial Harm—Interpretation of Statutes.*—Although the law applicable should require that a registrar of voters in an election held for the purpose of submitting the question of a bond issue to the people of a town should be a freeholder, the objection that he was not one is only an irregularity, and in the absence of any claim or evidence that substantial harm has been done it will not invalidate or affect the result. *Ibid.*

4. *Bond Issue—Vote of the People—Polling Places—Requisites.*—The fixing and advertisement of the polling places is of the substance in an election to be held by the voters of a town; but when the judgment appealed from establishes the fact that they had been fixed and advertised as required by Revisal, sec. 2945, applicable in this case, it will be sustained on appeal. *Ibid.*

5. *Bond Issues—Vote of the People—Majority Vote—Statutory Requirements—Constitutional Law.*—When the statute under which an election upon the question of issuing bonds by a town declares that the result shall be determined by "a majority of those voting on the proposition," and the issue is for a necessary expense and not within the constitutional restrictions as to municipal indebtedness, the statute controls the question as to their validity. *Ibid.*

6. *Same—Fraud.*—The fact that some illegal votes have been cast in an election to determine the question of an issuance of bonds by a town will not affect the result, in the absence of fraud, unless it is made to appear that otherwise a majority of votes would have been cast for the contesting party. *Ibid.*

7. *Basement Stairways—Judicial Notice.*—Stairways to underground basements of buildings, leading down through openings in the sidewalks, are commonly used in the business portions of cities, and of this the courts may take judicial notice. *Edwards v. Raleigh*, 276.

8. *Sidewalks—Basement Stairways—Proper Construction—Negligence.*—It is not actionable negligence, *per se*, for a city to permit an opening for a basement stairway to a business building to remain on the inner part of its sidewalk, next to the building, which is 50 feet long and 3 feet 7 inches wide, when from either end steps the full width of the opening lead down a distance of 8 feet 7 inches, the lengthway is protected by a sufficient railing, and there is sufficient width of the sidewalk left for pedestrians. *Ibid.*

9. *Sidewalks—Basement Stairways—Notice Presumed.*—Persons using the streets of a city should take notice of basement stairways to business buildings constructed with reasonable care along its sidewalks for the purposes of commerce. *Ibid.*

10. *Sidewalks—Basement Stairways—Municipal Powers—Lapse of Time—Presumptions.*—The authorities of a city, in the exercise of the power to regulate and control the streets, may grant the right to construct proper stairways along its sidewalks to the basements of business buildings, and the assent of the city to their construction and use will be presumed after a long lapse of time, in this case forty years. *Ibid.*

11. *Sidewalks — Basement Stairways—Negligence—Evidence—Nonsuit.*—In an action for damages against a city for personal injuries received,

CITIES AND TOWNS—*Continued.*

when it appears that the plaintiff, being partially blind and feeling his way along with a stick, at night, fell into a well-lighted opening in the sidewalk, in which there was a properly constructed basement stairway, of which he knew, but to which he had erroneously estimated the distance, no actionable negligence is established, and a judgment as of nonsuit upon the evidence should be sustained. *Ibid.*

12. *Paving Streets—Assessments—Notice—Due Process—Constitutional Law.* Chapter 338, Private Laws 1905, providing for an assessment by the town of Kinston upon the lands of abutting owners for the purpose of paving public streets and sidewalks, and for an action in condemnation to enforce collection, gives the owner the right to deny the whole or any part of the amount claimed and plead any defense in the course and practice of the courts that may be available to him in the action prescribed; and hence the absence of notice before the assessment was made and determined upon does not affect the validity of the assessment upon the question of due process. *Kinston v. Wooten*, 295.

13. *Paving Streets—Assessments—Burden and Benefits—Power of Courts—Constitutional Law.*—As a general rule, the assessment of adjoining property by a city for the paving of its streets and sidewalks by the front-foot rule will be upheld; but in instances where it is made to appear that in applying this rule to the property of an individual owner there is a marked disproportion between the burden imposed and any possible benefit, so that it is manifest that the principle of equality had been entirely ignored and gross injustice done, the court may interfere and afford proper relief. *Ibid.*

14. *Same—Evidence.*—In an action to declare an assessment made for the purpose of paving a sidewalk and street upon the front-foot rule a lien on the lots of adjoining owners, and to enforce the lien by the sale of the property, the trial court should hear the evidence offered by the defendant, when pertinent to the inquiry. *Ibid.*

15. *Assessments—Paving Streets—Burdens and Benefits.*—Under the facts and circumstances of this case, an assessment of $447 on a lot valued at $1,500 held not to present such a case of imposition as would authorize the court to interfere and arrest its collection. *Ibid.*

16. *Railroads—Use of Streets—Assent of Town.*—A railroad company has the right to use the streets of a town for legitimate railroad purposes, with the assent of a town, having statutory powers, given by resolution of its board of aldermen. (Revisal, sec. 2567, subsec. 5.) *Griffin v. R. R.*, 312.

17. *Railroads—Corporation Commission—Union Depots—Inherent Powers—Use of Streets.*—The statute authorizing the Corporation Commission to order union stations to be built and maintained carries with it the power to do what is reasonably necessary to execute such order, including the use of the streets of a town for legitimate railroad purposes, the laying of tracks, etc., necessary to that end. *Ibid.*

18. *Railroads—Use of Streets—Ministerial Duties—Power of Courts—Injunction.*—The action of the board of aldermen in authorizing a railroad company to use a certain street for legitimate railroad purposes, the laying and use of tracks, etc., when the statutory power is given,

CITIES AND TOWNS—*Continued.*

is not reviewable by the courts at the instance of an owner of land on the street, claiming that some other street should have been so used. *Ibid.*

19. *Railroads—Use of Street—Tracks—Additional Servitude—Remedy—Damages—Injunction.*—The remedy of an owner of land on a street which has been used for railroad purposes, the maintenance of track, etc., against a railroad company using additional tracks necessary to maintain a union depot, is by an action for damages for a superimposed burden upon the street, and not by injunction. *Ibid.*

20. *Railroads—Use of Streets—Tracks—Assent of City—Corporation Commission—Public Good—Injunction.*—The progress of work, apparently for the public good, such as the laying of a track on a city street by railroad companies to maintain a union station authorized by the city and ordered by the Corporation Commission, will not be interfered with by injunction. *Ibid.*

21. *Same—Power of Court—Supreme Court.*—It appearing in this case that certain railroads had been improperly restrained by a private owner of lands from building tracks along a city street, with the approval of the city, and done in order to build and maintain a union depot ordered by the Corporation Commission about two years previously, judgment dissolving the restraining order was entered in the Supreme Court. (Revisal, sec. 1542.) *Ibid.*

22. *Negligence—Dangerous Sidewalks—Notice, Actual—Duty to Repair—Reasonable Time.*—In an action against a city for injuries received by defendant falling into a hole on the sidewalk, insecurely covered, there was evidence tending to show that the city had been notified of the unsafe and dangerous condition of the covering: *Held*, if the jury find that the city had notice of the dangerous condition, it was its duty to make the conditions safe, within a reasonable time after notice, and its failure to do so is actionable negligence. *Revis v. Raleigh*, 348.

23. *Negligence—Dangerous Sidewalks—Notice Implied—Duty to Repair—Reasonable Time.*—A city is responsible in damages for an injury directly and proximately resulting from defects and pitfalls left in the sidewalks of its streets, when by inspecting them with reasonable frequency they should have had notice thereof in time to have made them safe. *Ibid.*

24. *Same—Question for Jury—Burden of Proof—Instructions.*—The question of notice of dangerous places in the sidewalks, implied from a failure of the city to inspect its streets with reasonable frequency, is one for the jury, on the evidence; and a charge, in an action to recover damages for personal injury, that the burden was on the plaintiff to satisfy the jury by the greater weight of the evidence that the city, through its proper officers, knew or should have known of their existence within a reasonable time to make them safe and avoid the injury, is correct. *Ibid.*

25. *Franchises—Powers—General Statutes—Public Utilities.*—The right or power of a municipal corporation "to grant, upon reasonable terms, franchises to public utilities" did not exist by general statute prior to the enactment of section 2916, subsection 6, of the Revisal, effective 1 August, 1905. *Elizabeth City v. Banks*, 407.

CITIES AND TOWNS—*Continued.*

26. *Same—Use of Streets—Legislature.*—The power to grant a franchise to a business corporation over the streets of a municipality rests in the Legislature, and can not be granted by a municipal corporation when authority is not conferred by a general statute or special act. *Ibid.*

27. *Same—Construction of Statutes.*—A municipal corporation can exercise only such powers as are expressly granted or necessarily and fairly implied in or incident to the exercise of the powers which are granted, the courts resolving any fair, reasonable doubt concerning the existence of the power against the corporation. *Ibid.*

28. *Use of Streets—Gas Plants—Public Utilities.*—Whether a franchise granted to a business corporation to lay gas pipes in or over the streets of a municipality for the purpose of supplying gas to the citizens is one for a public utility, *quære*. *Ibid.*

29. *Same—Compensation.*—The title to either the fee in the soil or an easement is vested in a municipality, for the use of the people, as and for a specific highway, which, without legislative authority, can not be diverted from that use. As to whether the Legislature can grant a right to use the streets of a municipality to a business corporation without compensating the adjoining owners, discussed by CONNOR, J. *Ibid.*

30. *Uses of Streets—Gas Plants—Franchise Void—Legislative Powers.*—A franchise to a business corporation by a municipality to lay gas pipes over or under its streets for the purpose of selling gas to its citizens for light, fuel and power, not exceeding a certain rate or price, is void without an express grant of power from the Legislature; and the result is not changed by giving the municipality the right to purchase, after a certain period of time, at a price to be ascertained by arbitration, or by the authority given the business corporation to contract with the municipality for furnishing gas. *Ibid.*

31. *Use of Streets—Gas Plants—Franchise—License.*—The right granted to a municipal corporation to place gas pipes and mains in the public streets of a city for the distribution of gas for public and private use is a franchise and not a license. *Ibid.*

32. *Franchise Void—Bond for Performance—Contracts Unenforcible.*—A bond given to a municipal corporation for the performance of certain work to be done under an *ultra vires* and void franchise granted by it is without consideration and unenforcible. *Ibid.*

33. *Franchises Void—Ratification—Pleadings—Proof.*—When a franchise given by a municipal corporation is void for want of legislative authority to grant it, and the municipality sues the one to whom the franchise was granted on his bond, given for the performance of work to be done thereunder, it is necessary for the municipality to plead and prove acts of ratification under a general statute, when such is relied on, and show, that substantial work had been done since the operative effect of the general statute. *Ibid.*

34. *Municipal Corporations—Widening Streets—Damages.*—A city is liable to the owner for taking his land in widening its streets in the full amount of the damages, reduced by the value of the benefits con-

CITIES AND TOWNS—*Continued.*

ferred by the improvements; and the owner may sue and recover therefor, in contradistinction to those laid in tort where recovery may not be had unless the work was done in an unskillful manner. (The doctrine established in *Jones v. Henderson*, 147 N. C., 120, and that line of cases, distinguished by WALKER, J.) *Quantz v. Concord*, 539.

35. *Municipal Corporations—Bond Issues—Necessary Buildings—Legislative Powers—Power of Court.*—A municipal building in cities the size of Raleigh is a recognized municipal necessity, and bonds issued for that purpose, under proper authority given by the Legislature, in consequence of a resolution of the board of aldermen declaring such building a necessity and a necessary municipal expense, are valid without the approval of a majority of the qualified voters. (Article VII, section 7, Constitution.) *Hightower v. Raleigh*, 569.

36. *Municipal Corporations—Necessary Buildings—Discretion—Power of Court.*—The courts may determine what are necessary public buildings and what class of expenditures fall within the definition of the necessary expenses of a municipal corporation, but the authority for determining the kind of building or its reasonable cost is vested in the Legislature, and to a municipal corporation when it is delegated to it, and not in the courts. *Ibid.*

37. *Municipal Corporations—Necessary Buildings—Special Commission—Discretion.*—An act conferring the authority upon a commission of taxpayers to employ a competent architect to prepare and furnish plans for the erection, etc., of a necessary municipal building for a city, to be approved by the commission, without defining what is a proper municipal building or limiting the power of the commission to determine the quality of the structure, leaves such matters to the sound judgment and discretion of the commission. *Ibid.*

38. *Municipal Corporations—Necessary Buildings—City Hall—Discretion—Injunction.*—The fact that a city contemplates having a city hall on one of the floors of a municipal building, to be built under authority conferred by statute to erect a necessary municipal building, does not invalidate a bond issue likewise authorized for the purpose, or furnish reason for enjoining their issuance. *Ibid.*

39. *Municipal Corporations—Necessary Buildings—Bond Issue—Diverting Funds—Purchaser—Application of Funds.*—The purchasers of bonds lawfully issued by a city under legislative authority for the purpose of erecting a necessary municipal building are not required to look after the application of the proceeds, and the bonds will not be affected by the municipal authorities diverting the proceeds to an unlawful purpose, though the authorities themselves may be liable therefor. *Ibid.*

40. *Deeds and Conveyances—Streets—Dedication Irrevocable—Acceptance.* When a grantor conveys lands with reference to an authorized city map, containing the line of city blocks and streets and describing the property conveyed, so as to reserve the streets to the city, the dedication is complete and irrevocable, and subject to the acceptance at any time thereafter for the enjoyment of the public, under the control and regulation of the proper city authorities. (*Boyden v. Achenbach*, 79 N. C., 539, and *Kennedy v. Williams*, 87 N. C., 6, cited and distinguished.) *Bailliere v. Shingle Co.*, 628.

CITIES AND TOWNS—*Continued.*

41. *Injunction—Municipal Powers—Contract for Watershed—Application to Rescind Contract—Pleadings—Demurrer.*—In an action for injunction against the board of commissioners of a city acquiring certain property for a watershed to supply the town with water, which is alleged in the complaint to be a nuisance, threatening the lives of the citizens if so used, a demurrer on the ground that it does not appear that plaintiffs, citizens and property owners, had applied to the municipal authorities to rescind the contract of purchase, is bad. *Jones v. North Wilkesboro*, 646.

42. *Deeds and Conveyances—Streets—Title Acquired—Subsequent Purchasers—Sleeping on Rights.*—A land company acquired certain lands, laid them off into lots, with streets, platted them and incorporated a town therewith, sold a part thereof to defendant for a farm, conveying the title to the streets within the boundaries of his conveyance, and defendant obtained a quitclaim deed from the town authorities to the streets thus conveyed: *Held*, (1) subsequent purchasers of lots in a different part of the town so laid off could not maintain an action to enjoin defendant from blocking up the streets thus acquired by him on his own land; (2) an action begun more than ten years after defendant had acquired the deed from the land company and the quitclaim deed from the town would be barred by plaintiffs having slept on their rights, if any they had. *State Co. v. Finley*, 726.

43. *Deeds and Conveyances—Streets—Title Acquired—Equitable Rights—Parties in Interest—Parties to Conveyance—Estoppel.*—When some of the plaintiffs claim as heirs at law of one who was an officer of defendant's grantor corporation, and, as such, a party to his conveyance, and the other plaintiffs are two corporations, the majority stock of which was held by one also an officer of defendant's grantor, no equitable rights can be asserted by them. *Ibid.*

44. *Sewerage—Police Regulations—Governmental Powers—Torts—No Liability.*—In establishing a free public sewer system for the benefit of its citizens, for the use of which no charge is made, a city is exercising a governmental function and is not responsible therein for damages alleged to have been caused by fever communicated to plaintiff's intestate by reason of the condition of a branch in which one of the sewer pipes emptied. (Cases in which the city exercises a power conferred for private purposes, distinguished by BROWN, J.) *Metz v. Asheville*, 748.

45. *Police Powers—Municipal Corporations—Charter Powers.*—Municipal corporations can only exercise such police powers as are granted by their charters, and all fair and reasonable doubts as to whether such powers have been so conferred are resolved by the courts against their being exercised. *S. v. Dannenberg*, 799.

46. *Misdemeanor — Disorderly Houses—Common-law Offense—Cities and Towns—Void Ordinance.*—A city ordinance, without statutory authority, which covers acts that are misdemeanors at the common law and punishable under the criminal laws of the State, and which imposes a greater penalty for their violation, is void. *S. v. Black*, 866.

47. *Misdemeanor — Disorderly Houses — Common-law Offense — Asheville Charter, Interpretation of.*—The common-law offense of keeping a disorderly house is not repealed, in reference to the city of Asheville, by its charter (chapter 100, Private Laws 1901, sec. 77). *Ibid.*

CODE, THE.

Section 2766. As to the manner of computing time for payment of State's land by enterer. *Barker v. Denton*, 723.

CONSTITUTION, STATE.

Article I, section 16. An imprisonment of cropper for abandoning crops, under the prohibition of the Revisal, sec. 3366, without paying for advancements, is unconstitutional, in the absence of fraud. *State v. Williams*, 802.

Article II, section 14. Restrictions upon pledging credit of municipalities, etc., applies to townships. *Wittkowsky v. Commissioners*, 90.

Article IV, section 27. A justice of the peace has no jurisdiction in an action on a note when the balance of the principal due on the note and interest on the original amount exceed the sum named. *Riddle v. Milling Co.*, 689.

Article V. Does not restrict Article IX, section 3, in providing for maintenance of public schools by taxation. *Board of Education v. Commissioners*, 116.

Article VII, section 7. Does not restrict Article IX, section 3, in providing for maintenance of public schools by taxation. *Board of Education v. Commissioners*, 116.

Article VII, section 7. Several distinct debts being provided and voted for in one ballot does not invalidate a municipal bond issue. *Smith v. Belhaven*, 156.

Article VII, section 7. Maintaining streets a necessary municipal expense. *Hendersonville v. Jordan*, 35.

Article VII, section 7. Bonds issued for a necessary city municipal building are valid without submitting the question to a vote of the people. *Hightower v. Raleigh*, 569.

Article VII, section 14. Bonds issued and repurchased by the State Treasurer may be sold as other State property. *Battle v. Lacy*, 573.

Article VIII, section 1. Legislative charters may be altered or repealed. *Power Co. v. Whitney Co.*, 31.

Article IX, section 3. This article is not restricted in providing for maintenance of public schools by taxation by Articles V and VII. *Board of Education v. Commissioners*, 116.

Article X, section 6. Married woman may dispose of her property by will when the first child of the marriage was born after the adoption of the Constitution of 1868. *Richardson v. Richardson*, 549.

CLERKS OF COURT.

Railroads—Condemnation Proceedings—Exceptions—Appeal and Error—Trial by Jury.—In condemnation proceedings, questions of fact and law are first determined by the clerk, to whose rulings exceptions may be noted. No appeal lies until after the final report of the commissioners to appraise the value of the land has been made. Upon appeal the entire record is taken up and all of the exceptions are passed upon by the Superior Court. *Abernathy v. R. R.*, 97.

CLOUD ON TITLE. See Equity.

COLLUSION. See Procedure.

COMMENT OF COUNSEL. See Appeal and Error.

COMMON SOURCE OF TITLE. See Deeds and Conveyances.

COMPROMISE.

1. *Deeds and Conveyances—Conditions Precedent—Parol Evidence.*—When in an action to enforce specific performance of a contract to convey lands the defense is that subsequently the parties agreed that the original contract was to be abandoned, conditioned upon the conveyance of a different tract, the party relying upon the compromise must show the fulfillment of the conditions therein in order to avail himself of the defense, and an offer to convey a less number of acres than agreed upon is insufficient. *Rivenbark v. Teachey*, 289.

2. *Same—Conditions Precedent.*—When, in defense to an action for specific performance of a contract to convey lands, it is shown that the parties had agreed that upon the conveyance of a certain other tract of uncertain acreage the original contract sued on would be abandoned, and subsequently had a plat of the boundaries made and attached it to the written contract in evidence as a part thereof, the rights of the parties are to be determined by the acreage included within the boundaries ascertained by the survey, and parol evidence is incompetent to show that a less number of acres was intended. *Ibid.*

CONDEMNATION. See Railroads.

CONDITION ANNEXED. See State's Lands.

CONDITION PRECEDENT. See Contracts; Deeds and Conveyances.

CONSENT ORDER. See Arbitration.

CONSIDERATION. See Champerty; Arbitration; Contracts; notes.

CONSIDERATION OF MARRIAGE. See Deeds and Conveyances.

CONSIGNMENT MISSENT. See Interstate Commerce.

CONSTABLE. See Process.

CONSTITUTION, CONSTRUCTION OF. See Constitutional Law.

CONSTITUTIONAL LAW.

1. *Legislative Powers—Charters—Alterations and Amendments.*—All charters obtained by legislative enactment are subject to the provisions of Article VIII, section 1, of the Constitution, and "may be altered from time to time or repealed." *Power Co. v. Whitney Co.*, 31.

2. *Corporations — Electric Companies — Water Powers — Public Policy — Charters—Reënacting Statutes.*—Plaintiff, an electric company, obtained a charter by chapter 236, Private Laws 1897, whereby it was given the right of eminent domain to acquire water powers against the will of the owner. The corporation was not organized within five years, as required by its charter. Chapter 74, Public Laws 1907, declares that electric companies can not use such right; and thereafter, at the same session, by private act, the Legislature granted plaintiff three years in which to organize, and provided that, as

CONSTITUTIONAL LAW—*Continued.*

amended, chapter 236, Private Laws 1897, "is hereby reënacted": *Held*, (1) that the public policy, as declared in the general law, was not repealed in its application to the plaintiff's charter by the private law subsequently passed at the same session; (2) the private act of 1907 must be taken as reënacting the plaintiff's charter in the same plight, status and condition as it stood at the time the reënacting statute was passed. *Ibid.*

3. *Townships—Corporate Powers—Legislative Powers.*—Under Revisal, sec. 1318, subdiv. 30, enacted in pursuance of the constitutional amendment of 1875, townships are not corporate bodies and have no corporate powers when not specially conferred by statute. *Wittkowsky v. Commissioners*, 90.

4. *Same—Bond Issues.*—Townships may issue bonds to aid in the construction of railroads only under authority given by statute passed in accordance with the requirements of Article II, section 14, of the Constitution, respecting its several readings, the roll call, the "aye and no" vote, etc. *Ibid.*

5. *Same—Interpretation of Constitution—Implication—County Divisions.* The restrictions imposed by Article II, section 14, of the Constitution on counties, cities and towns in pledging their credit or contracting a debt are by necessary implication applicable to townships, as they are but constituent parts of the county organization. *Ibid.*

6. *Bond Issues—Vote of the People—Several Classes of Debt—One Ballot Box.*—An issue of municipal bonds, when approved by the majority of the qualified voters, under the authority of a statute passed according to the constitutional requirements, is not invalid because there were several distinct debts provided and voted for in one ballot box. Article VII, section 7, of the Constitution, does not require that the vote upon each distinct proposition must be in a separate ballot box. *Smith v. Belhaven*, 156.

7. *Bond Issues—Repurchase by State—Treasury Assets—Legislative Authority—"Aye and No" Vote.*—An act authorizing and directing the State Treasurer to deliver certain State bonds, repurchased and held as a cash asset, to the payment and satisfaction of a debt against the State does not require the "aye and no" vote, and the readings upon the several days, in accordance with Article II, section 14, of the Constitution. The bonds having theretofore been legally issued, no new debt is created by the act, and they are subject to the disposal by the Legislature as any other property in possession of the department. *Battle v. Lacy*, 573.

8. *Same—Interstate Commerce.*—Nor is said section repugnant to or in contravention of Article I, section 8, of the Constitution of the United States, conferring upon Congress the power to regulate commerce between the States. The penalty is in direct enforcement of the duties incumbent on defendant company as common carrier, is imposed for a local default, is not a burden on interstate commerce, but in aid thereof, and, in the absence of inhibitive congressional legislation or of interfering action by the Interstate Commerce Commission, the matter is a rightful subject of State legislation. *Ibid.*

CONTEMPT. See Injunctions.

CONTINUING TRESPASS. See Trespass.

CONTRACTS. See Lessor and Lessee; Champerty, 4; Insurance, 15.

1. *Timber—Independent Contractor—Prima Facie Case—Questions for Jury.*—In this case defendant offered no evidence. Plaintiff's evidence made out a *prima facie* case, and the questions of independent contractor and a wrongful cutting of plaintiff's timber were for the jury. *Smith v. Lumber Co.*, 40.

2. *Written Contracts—Parol Evidence—Contradiction.*—Evidence of a contemporaneous oral agreement, that plaintiff agreed to take as much lumber a week as defendant could deliver, is inadmissible when contradicting the written contract between them, that defendant was to cut and deliver not less than 40,000 feet per week. *Walker v. Cooper*, 128.

3. *Breach—Waiver.*—Plaintiff's receiving for several weeks a less number of feet of lumber a week from defendant than he had contracted to cut and deliver under a continuous contract, if considered to be a waiver of plaintiff's rights as to the actual deliveries made, does not bar a recovery of damages incident to a future failure to deliver the stipulated quantity, or of those arising from an ultimate breach of contract involving a severance of the contract relation. *Ibid.*

4. *Material Men—Suit by Contractor—Trusts and Trustees—Parties—Judgment.*—A contractor to build a house can not maintain an action against the owner to the use of those who furnished material for its construction without alleging and proving an express trust. *Perry v. Swanner*, 141.

5. *Material Men—Contractor—Notice to Owner—Parties—Procedure.*—When the contractor furnishes the owner with statements of the amounts due the material men, according to Revisal, secs. 2021, 2022, 2023, a direct obligation of the owner to the material men may be created, upon which the latter may sue in their own names. *Ibid.*

6. *Breach—Abandonment—Damages—Questions for Jury.*—In this case, whether the contract to convey land sued on was abandoned by the subsequent agreement of the grantee to pay rent, or whether the subsequent agreement was to pay an annual sum as interest, were questions of fact to be determined by the jury. *Freeman v. Bell*, 146.

7. *Written Contracts—Subsequent Agreement—Parol Evidence.*—An oral agreement made subsequent to the execution of a written contract is competent to prove a further extension of time of payment to that therein mentioned. *Ibid.*

8. *Contracts to Convey Land—Written Instrument—Fraud—Parol Evidence.*—False and fraudulent representations sufficient to avoid a written contract may be shown by parol as a defense in an action for damages alleged to have been sustained by its breach, as such does not tend to vary or contradict the writing, but to render the entire instrument void. *Tyson v. Jones*, 181.

9. *Executory—Interests Passed.*—The trial judge properly held that the plaintiff was not entitled to recover possession of the lumber described in the complaint. The contract to sell was executory and no title to the lumber passed. *Coles v. Lumber Co.*, 183.

CONTRACTS—*Continued.*

10. *Breach—Occupation of Storage Yard—Measure of Damages—Speculative Damages.*—For the wrongful failure to remove lumber from the yard of another, in violation of a contract, the damages recoverable, in the absence of a special agreement, should be confined to the value of the use and occupation of the yard—that is, a fair rental value. Profits on lumber which could have been sawed and placed on the yard, had the plaintiff removed his lumber, are too speculative and remote. *Ibid.*

11. *Same—Evidence.*—It is necessary to a recovery of a fair rental value of a lumber yard, on which lumber had been left by a party to a contract in violation of his agreement to move it, that evidence of such value be introduced upon the trial; testimony of the use to which the yard could have been put would be relevant. *Ibid.*

12. *Breach—Money Borrowed—Measure of Damages—Interest.*—For the breach of a contract to advance money to one engaged in operating a sawmill the measure of damages is the extra expense incurred in securing the money, and such special damages as proximately resulted from the breach as were within the contemplation of the parties when the contract was made. *Ibid.*

13. *Contracts, Oral—Subsequent Writing—Convenience—No Condition Precedent—Binding Effect.*—When the parties to an oral contract contemplate a subsequent reducing it to writing, as a matter of convenience and prudence and not as a condition precedent, it is binding upon them, though their intent to formally express the agreement in writing was never effectuated. *Gooding v. Moore*, 195.

14. *Consideration—Option—Lease.*—A lease is a sufficient consideration to support specific performance of an option of purchase therein granted. *Pearson v. Millard*, 303.

15. *Same—Unilateral Contract—Acceptance.*—An option of purchase contained in a lease is a unilateral contract, binding the lessors only when it is unconditionally accepted according to its terms. *Ibid.*

16. *Same—Notice Sufficient—Compliance.*—When a lessee of lands with an option of purchase notifies the agent of the lessor of his acceptance of the option of purchase, in accordance with its terms, the notice is sufficient. *Ibid.*

17. *Specific Performance, When Enforced.*—While specific performance of a contract is not a matter of absolute right, yet it will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice and work no hardship upon the parties to the contract. *Ibid.*

18. *Independent Contractor—Burden of Proof.*—When it is shown that an injury is sustained in the operation of machinery belonging to defendant, the burden is upon him to show that it was being operated by an independent contractor. *Midgett v. Manufacturing Co.*, 333.

19. *Contracts to Convey Land—Parol Contracts, Breach of—Equity—Assumpsit Implied—Improvements—Moneys Had and Received.*—While a parol contract to convey land is void, the law will grant relief against the vendor, failing to make title, in favor of the vendee, who has entered into possession, paid a part of the purchase price and put

CONTRACTS—*Continued.*

permanent improvements upon the land, and will permit a recovery of the money paid on account of the purchase price and the cost of the improvements to the extent of the enhanced value, less reasonable rents and profits while in possession. *Ford v. Stroud*, 362.

20. *Contracts to Convey Land—Parol Contract—Purchase Money—Improvements—Possession—Assumpsit.*—A vendee who, while in possession of lands under a parol contract to convey, has paid a part of the purchase price and put permanent improvements thereon is entitled to his equitable remedy, upon an implied *assumpsit*, for money had and received, after surrendering possession, when his vendor can not make title. *Ibid.*

21. *Lessor and Lessee—Contracts to Convey—Sale of Land—Installments—Landlord's Lien—Foreclosure.*—When, under an agreement of lease of lands, containing also a contract to convey the same upon payment of a stipulated rental for a specified period, in full, the lessor treats the lease as continuing after default, he is entitled as lessor to the landlord's lien for rent; but when he puts an end to it by seeking to resume possession, the lessee can assert his equity under the contract to convey, and cause the land to be sold, to be applied to the balance due for the purchase money. *Hicks v. King*, 370.

22. *Same—Prompt Payment of Installments—Default—Equity—Time of the Essence.*—Contracts for sale on installments are similar to mortgages, and the equity is not destroyed by stipulations for prompt payment of the rent or installments of the purchase price; for, upon default, the debtor is entitled to have the balance ascertained, a sale ordered, and to receive the surplus, if any. *Ibid.*

23. *Contracts to Convey—Sale of Land—Installments—Foreclosure—"Balance Due."*—When the full period for installments has passed at the time of judgment ordering the sale of the property under a contract for sale on installments, it is necessary only to deduct the payments made, and direct a sale to pay the balance due; but as to installments not then due, the present value thereof only is a charge against the purchaser. *Ibid.*

24. *Timber Contracts — Options — Deeds and Conveyances — Vendor and Vendee—Tender of Deed.*—An option to purchase standing timber upon condition that when the vendee should signify his acceptance within the time specified the vendor should "at once make, execute and acknowledge" a deed for the timber and deliver it, "upon compliance with the terms of sale," makes it the duty of the vendor to tender the deed upon being notified by the vendee of his acceptance, unless such tender has been waived. (*Allston v. Connell*, 140 N. C., 485; *Trogden v. Williams*, 144 N. C., 192, cited and approved). *Hardy v. Ward*, 385.

25. *Timber Contracts—Deeds and Conveyances—Vendor and Vendee—Options—Acceptance—Tender of Payment.*—When the language of a contract giving an option to purchase standing timber within a specified time does not clearly express the intention of the parties, regard will be had to the conditions and circumstances surrounding the particular transaction, such as the increasing value of the timber, possession, the nominal consideration named, etc., upon the question as to whether time was "of the essence of the contract" for the completion of the purchase. *Ibid.*

CONTRACTS—*Continued.*

26. *Same.*—When a thirty-day-option purchase of standing timber is given for a nominal consideration, specifying that upon a cash payment and notes for the balance of the purchase price the deed will be delivered, it is necessary to tender payment upon the specified terms, and a mere acceptance within the period fixed is insufficient. *Ibid.*

27. *Timber Contracts—Options—Deeds and Conveyances—Vendor and Vendee—Tender of Deed—Waiver.*—When it appears that the vendee, under an option to purchase standing timber, subsequently undertook, with the consent of the vendor, to have his attorney prepare the deed, it was a waiver of the obligation of the vendor, expressed in the option, to tender the deed. *Ibid.*

28. *Entire—Interpretation—Questions of Law—Jury—Harmless Error.*—The interpretation of an entire written agreement is a question of law; and while it is error to submit it to the jury, it is cured by the jury answering it correctly. *Ibid.*

29. *Evidence—False Warranty—Price Paid—Recovery by Purchaser.*—Evidence that certain warranted preservative powders for fruit, sold by defendant to plaintiff, contained sulphur, contrary to the statute, the nature of which was not divulged to plaintiff until after he had paid for them, is incompetent upon the question of deceit or misrepresentation, in an action by the purchaser to recover the price he had paid. *Smith v. Alphin*, 425.

30. *Consideration — Preservative Powders — Use Prohibited by Statute — Value.*—In an action to recover the purchase price paid for certain preservative powders for fruits the fact that such powders contained sulphur, contrary to a statute, does not in itself prove a failure of consideration, as it does not necessarily follow that they would be deleterious or worthless, especially when sulphur in such powders is approved for the purposes intended by the United States Department of Agriculture. Revisal, sec. 3972. *Ibid.*

31. *Writing—Notes—Construction—Entire Instrument.*—When there is no repugnancy in the expression of the various parts of a written instrument the court will so construe it as to give effect to every part. *Shoe Co. v. Peacock*, 545.

32. *Written—Construction—Employment by Month—Yearly Contracts Not Implied.*—Letters merely showing an offer and acceptance of employment at a certain price per month can not be construed as implying a contract by the year. (*Edwards v. R. R.*, 121 N. C., 490, cited and approved.) *Currier v. Lumber Co.*, 694.

CONTRACTOR. See Liens.

CONTRIBUTORY NEGLIGENCE. See Negligence.

1. *Railroads—Evidence—Headlight—Causal Connection—Proximate Cause.* In a suit for damages against a railroad company for negligently killing plaintiff's intestate there was evidence tending to show that deceased was killed on a certain night, not far from the end of defendant's bridge, by one of defendant's trains coming from the other side; that immediately after deceased passed the witness, the witness heard the whistle of the approaching train and the rumble of the train upon the bridge, when he was not in as favorable a position to hear as the

CONTRIBUTORY NEGLIGENCE—*Continued.*

deceased; that the deceased stopped, turned as if hesitating to enter the pump house, where the witness worked, and then walked towards the approaching train in an upright position, apparently in full possession of his faculties, upon the ends of the cross-ties; that deceased could have looked up and have seen the train coming, as the track was level and the view unobstructed; that there was no headlight on the engine of the train: *Held*, upon this evidence, uncontradicted, the deceased was guilty of contributory negligence, the proximate cause of the injury. *Strickland v. R. R.*, 4.

2. *Same.*—The negligent running of a train at night without a headlight is not the proximate cause of the death of plaintiff's intestate, when it appears from the uncontradicted evidence that deceased was in full possession of his faculties, was on the defendant's track at night, at a time he knew the train was scheduled to pass, must have known the train was approaching, had opportunity to get off in time to avoid the injury after hearing the signals and warnings of its approach, and when the engineer could not under the circumstances have stopped the train in time to avoid the injury. *Clark v. R. R.*, 109 N. C., 451, cited and approved. *Ibid.*

3. *Defense—Nonsuit.*—While contributory negligence is a matter of defense, it is proper to nonsuit upon plaintiff's own evidence, when the proof of such defense is thereby fully made out. *Ibid.*

4. *Vessels—Repairing.*—It is incumbent on plaintiff to allege and prove that he used due diligence to discover that defendant's work on his vessel was defective, and that he could not discover the work was so, or that the vessel would leak, until too late to avoid the consequences, in order to recover damages alleged to have resulted from the defective work while the vessel was at sea. *Bell v. Machine Co.*, 111.

5. *Same—Proximate Cause.*—To start a vessel on a voyage upon the assumption that defendant had properly caulked and repaired it, without inspection or trial, is such gross negligence on the part of plaintiff as to be the proximate cause of the vessel's destruction by a leak, in an action for damages on the ground that the leak was caused by defendant's defective work. *Ibid.*

6. *Burden of Proof—Proximate Cause—Instructions—Questions for Jury.* The burden of proof is on defendant to show contributory negligence, and when there is evidence tending to show that negligence on defendant's part caused the injury the court can not fix, as a matter of law, contributory negligence or proximate cause upon plaintiff. *Ives v. Gring*, 137.

7. *Master and Servant—Employer and Employee—Duty of Employer—Rule of the Prudent Man—Instructions.*—While working among dangerous machinery in defendant's mill or plant, it is the duty of the employee to use the same degree of care required of a man of ordinary prudence under the circumstances. Upon the questions of contributory negligence it is proper for the judge to charge the jury, in effect, that defendant's liability for a personal injury caused the employee in the course of his employment would depend upon whether the employee acted as a reasonably prudent man would have done, to foresee the consequences of his act and avoid the injury. *Midgette v. Manufacturing Co.*, 333.

CONTRIBUTORY NEGLIGENCE—*Continued.*

8. *Railroads—Master and Servant—Warnings.*—When an employee on a ditching train, at a place where he should have been, in the discharge of his duties, is suddenly and unexpectedly thrown, by the negligent act of the engineer of the employer, upon a piece of machinery known by him to be dangerous, the fact that he threw his hand forward and got it caught in the machinery, to his injury, is not contributory negligence, when the act was done to save further injury. *Redman v. R. R.*, 400.

9. *Railroads—Master and Servant—Place to Work—Duty to Employee.*—It is the duty of the employee to select such place to work as will be the least dangerous, when the circumstances admit of a choice; and when the evidence is sufficient, it is correct for the trial judge to charge the jury that if plaintiff selected a dangerous place to perform his duties, when there were other places or positions that were available and safe, and that a man of ordinary prudence would have selected a different place than that occupied by plaintiff at the time of the injury, and the plaintiff's failure to do so was the proximate cause, the plaintiff would be guilty of contributory negligence and his recovery barred. *Ibid.*

CONTROVERSY WITHOUT ACTION. See Equity.

CONVICTION. See Attorneys.

CORPORATE POWERS. See Townships.

CORPORATION COMMISSION.

Railroads—Union Depots—Inherent Powers—Cities and Towns—Use of Streets.—The statute authorizing the Corporation Commission to order union stations to be built and maintained carries with it the power to do what is reasonably necessary to execute such order, including the use of the streets of a town for legitimate railroad purposes, the laying of tracks, etc., necessary to that end. *Griffin v. R. R.*, 312.

CORPORATIONS. See Principal and Agent, 1; Arrest, 1.

1. *Electric Companies—Water Powers—Public Policy—Charters—Reënacting Statutes.*—Plaintiff, an electric company, obtained a charter by chapter 236, Private Laws 1897, whereby it was given the right of eminent domain to acquire water powers against the will of the owner. The corporation was not organized within five years, as required by its charter. Chapter 74, Public Laws 1907, declares that electric companies can not use such right; and thereafter, at the same session, by private act, the Legislature granted plaintiff three years in which to organize, and provided that, as amended, chapter 236, Private Laws 1897, "is hereby reënacted": *Held*, (1) that the public policy, as declared in the general law, was not repealed in its application to the plaintiff's charter by the private law subsequently passed at the same session; (2) the private act of 1907 must be taken as reenacting the plaintiff's charter in the same plight, status and condition as it stood at the time the reënacting statute was passed. *Power Co. v. Whitney*, 31.

2. *Deeds and Conveyances—Mortgage—Corporate Act—Mala Grammatica.* A mortgage made by a corporation, regular in its body in all respects,

CORPORATIONS—*Continued.*

except that it recites the corporation "of the first part, their heirs and assigns," is not void, as the name of the corporation is erroneously treated as a collective noun and "*mala grammatica non vitiat.*" *Edwards v. Supply Co.*, 173.

3. *Deeds and Conveyances—Construction—Validity.*—When the attestation clause, the body and the conveying words in a deed purport to make it that of an existing corporation, and it is signed "F. W. F., President (Seal); B. W. E., Sec. and Treas. (Seal)," has the corporate seal affixed, and has been probated by the clerk of the court, upon examination of an attesting witness, and ordered registered, its validity as a corporate act will be upheld. (*Clark v. Hodge*, 116 N. C., 763, cited and distinguished.) *Ibid.*

4. *Deeds and Conveyances—Seal, Failure to Register.*—The validity of a mortgage made by a corporation, duly signed by its proper officers and otherwise regular, is not impaired by the failure of the register of deeds to record the corporate seal affixed to the instrument. *Ibid.*

5. *Deeds and Conveyances—Seal—Authority Prima Facie.*—The common seal of a corporation affixed to its conveyance is *prima facie* evidence that it was affixed and the conveyance executed by the proper authority. *Ibid.*

6. *Stockholders—Pooling Stock—Agreement Void.*—An agreement for the purpose of pooling stock in a corporation to control or apportion the directors is void, and no rights can be acquired thereunder by the parties. *Bridges v. Staton*, 216.

7. *Stockholders—Pooling Stock—Agreement to Vote—Proxy—Limitations of Power.*—A written agreement assigning stock in a corporation with authority to vote, reserving to the assignors, who retain possession, the right to all dividends, amounts only to a proxy (Revisal, sec. 1185) and, after the expiration of three years, it can not be voted. Revisal, sec. 1184. *Ibid.*

8. *Stockholders—Voting Cumulative—Officers—Adjournment.*—The right to cumulative voting given by Revisal, sec. 2831 (3), is with the proviso that the minority stockholders openly announce that they will exercise such rights, when it appears that one person owns or controls more than one-fourth of the capital stock, and it can not be exercised when only one proposition is voted upon or on a motion to adjourn. (The principles and effect of cumulative voting discussed by CLARK, C. J.) *Ibid.*

9. *Stockholders—Illegal Voting—Adjournment—Majority Vote—No Quorum.*—When a motion to adjourn a stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce the number of those present below a majority of all the stock issued and outstanding (Revisal, sec. 1182), an election of officers can not be lawfully held thereafter at that meeting, though the adjournment were carried by an illegal vote. *Ibid.*

10. *Stockholders—Illegal Voting—Adjournment—Status of Meeting—Result—Power of Court.*—The court can only declare the true result of a vote by the stockholders as to some measure or the election of officers illegally announced after a vote thereon, because of the illegal admis-

CORPORATIONS—*Continued.*

sion or rejection of certain votes; but as to an adjourned meeting to be held, stockholders not represented at the first meeting and new stockholders are entitled to vote, and hence the legal status as to the adjourned meeting can not be established until that meeting and the vote taken, and an injunction can not issue against certain stockholders voting at such meeting. *Ibid.*

11. *Stockholders' Meeting—Adjournment—Ordered by Court.*—A *mandamus* sought under the provisions of Revisal, secs. 1188 and 1189, can not issue to compel the reconvening of the stockholders for the election of directors because of an illegal adjournment to a certain date by unlawful voting of stock, when that date has passed. The provisions of section 1188 should be followed, requiring that upon the failure of the directors for thirty days to call a stockholders' meeting for the purpose, after a written request from the owners of one-tenth of the outstanding shares of stock, the judge may, on application of a stockholder and on notice to the directors, order an election, etc. *Ibid.*

12. *Same—Quorum, How Ascertained—Notice to Stockholders.*—A meeting of the stockholders of a corporation ordered upon application by the judge in accordance with the provisions of Revisal, sec. 1188, must be composed of a majority of shares held twenty days before such meeting, as it appears from the stock book or, in case of discrepancy, the transfer book of the corporation. The notice of such call, by custom and by analogy to Revisal, sec. 1190, should be mailed to all stockholders whose address is known. *Ibid.*

13. *Stockholders—Transfer Books.*—When there is a discrepancy between the stock book and the transfer book, the latter controls. Revisal, sec. 1181. *Ibid.*

14. *Insolvency—Mortgage Liens—Assets, Distribution of—Costs.*—It is error to tax the costs against first-mortgage creditors who have established the priority of their lien over the rights of general creditors, in statutory proceedings to wind up the affairs of an insolvent corporation and to distribute its assets. (Revisal, secs. 1207-1226.) *Lumber Co. v. Lumber Co.*, 281.

15. *Shares of Stock—Voting Trust or Pool—Public Policy—Rights of Individual Owner.*—A stock agreement which takes away from the stockholders all right to vote for a period of three years after a certain future time, and provides for a voting committee to decide upon facts or conditions to conclude and bind all parties in interest, is contrary to public policy and void, as each stockholder must be free to cast his vote for what he deems for the best interest of the corporation. *Sheppard v. Power Co.*, 776.

16. *Shares of Stock—Voting—Legal Title—Beneficial Ownership—Illegal Trust—Public Policy.*—An agreement which separates the beneficial ownership of stock in a corporation from the legal title is contrary to public policy and void. *Ibid.*

17. *Shares of Stock—Voting Trust—Proxy—Period of Duration.*—An agreement pooling stock in a corporation which creates a voting trust, with absolute power to decide upon matters arising for a period exceeding three years, can not be considered as a proxy authorized by the Revisal, sec. 1184. A proxy is only good for the period of three years. *Ibid.*

CORPORATIONS—*Continued.*

18. *Shares of Stock—Voting Trust—Proxy—Powers Revocable.*—An agreement to pool shares of stock in a corporation for voting purposes, if considered as a proxy (Revisal, sec. 1184), can not be made irrevocable. *Ibid.*

19. *Shares of Stock—Demand—Voting Trust—Lawful Intent—Answer Insufficient.*—An answer of an illegal pool for the voting of corporation stock to a demand for possession of his stock by a purchaser of the stock so held, that it would not vote such stock illegally, etc., is insufficient. *Ibid.*

20. *Voting Trust—Shares of Stock—Rights of Purchaser—Injunction.*—A purchaser of shares of corporation stock held by an illegal voting trust may enjoin the voting thereof by the trust or its carrying out a contemplated plan of reorganization, and may vote the same in all stockholders' meetings. *Ibid.*

COSTS. See Corporations; Appeal and Error.

COUNTERCLAIM. See Negligence.

COUNTS. See Indictment.

COUNTY COMMISSIONERS. See Taxation, Roads and Highways.

COUPLING CARS. See Master and Servant.

COURSES AND DISTANCE. See Boundaries.

CURTESY. See Husband and Wife.

COURTS. See Jurisdiction; Power of Courts; Equity; Justice of the Peace.

1. *Supreme Court—Motions—Newly Discovered Evidence—Petition to Rehear.*—A motion for a new trial, in the Supreme Court, upon the ground of newly discovered evidence, is a matter for the full Court, and will not be entertained after the case has been certified down, nor will an ungranted petition to rehear, made at the same time to the Justices of the Court, under the rule, put the case in the Supreme Court. *Smith v. Moore*, 158.

2. *Same.*—An order of the Supreme Court to again docket a case in which an opinion has been rendered is based on error of law in the previous decision, and an application to that effect, if not granted, will not permit a motion therein for a new trial for newly discovered evidence, which can be made in the lower court. *Ibid.*

3. *Notice, Service of—Superior Court—Constable.*—The service of a notice in an action in the Superior Court by a town constable is insufficient. *Brown v. Myers*, 441.

4. *Writs — Recordari — Purposes—New Trial—Erroneous Judgments.*—A writ of *recordari* may issue from the Superior Court to a justice's court for the purpose of obtaining a new trial of the case on its merits or reversing an erroneous or false judgment. *Marler Co. v. Clothing Co.*, 519.

5. *Police Justice—Jurisdiction—City Limits—Evidence—Judgment—Motion in Arrest.*—When a police justice has jurisdiction of offenses

COURTS—*Continued.*

only when committed within the corporate limits of a city, a motion in arrest of judgment will be denied when it does not appear that the offense was committed in the limits prescribed. *S. v. Brown*, 867.

COVENANT IMPLIED. See Lessor and Lessee.

CREDITORS. See Mortgagor and Mortgagee; Corporations.

CRIMINAL PROCEDURE. See Procedure.

CUTTING TIMBER. See Deeds and Conveyances.

DAMAGES. See Measure of Damages; Procedure; Issues.

1. *Contracts — Mortgages — Liens — Substitution.*—Plaintiff, under agreement with defendant, giving a lien for advancements, and to enable him to fulfill his contract to cut and deliver certain lumber, took up a mortgage on defendant's mules, etc. Plaintiff claimed that defendant had not fulfilled his contract, and seized the mules, etc., under the mortgage and the agreement. The jury found that defendant had broken his contract, to plaintiff's damage in a certain sum: *Held*, the amount awarded by the verdict was a lien on the mules, etc. *Walker v. Cooper*, 128.

2. *Evidence—Damages—Exceptions—Harmless Error.*—Defendant's exception that under a certain issue permanent damages were awarded plaintiff, when from the character of the injury, or otherwise, the plaintiff was entitled to recover damages, can not be to defendant's prejudice, and it is not reversible error on his appeal. *Spence v. Canal Co.*, 160.

3. *Married Women—Damages to Land—Joinder of Husband—Parties.*—A married woman may maintain an action without joining her husband to recover damages to her land caused by the improper construction of a roadbed and road on a railroad company's right of way thereon. *Willis v. White*, 199.

DEADLY WEAPON. See Evidence.

DEBT, PRE-EXISTING. See Mortgagor and Mortgagee; Corporations.

DECEASED PERSONS. See Evidence.

DEDICATION. See Cities and Towns.

DEEDS AND CONVEYANCES. See Mortgagor and Mortgagee; Chattel Mortgages.

1. *Natural Boundaries—Courses and Distances—Controlling Calls.*—When a deed calls for two natural boundaries at the same place, in this case a chestnut oak on the J line, and one of them (the oak) can be satisfactorily located, and as to the other (the J line) there is no evidence of its placing, the jury is guided by the natural boundary found and established, and the line will terminate at it, however wide of the course called for, or however short of or beyond the distance specified it may be. *Lance v. Rumbough*, 19.

2. *Same—Survey in Contemplation of Deed.*—While as a general rule a call in a deed to an established boundary of an adjoining tract of

DEEDS AND CONVEYANCES—*Continued.*

land will control course and distance, there is an exception when the boundary called for was not located at the time and a survey was made and agreed upon by the parties as establishing the lines and boundaries of the land subsequently and accordingly conveyed; and when there is evidence making for the grantor's contention, that the *locus in quo* fitted into the description of the deed, it is proper for the judge to charge the jury that if they so found the facts from the greater weight of evidence, to answer the appropriate issue for the plaintiff. *Ibid.*

3. *Grants—Descriptions—Fixed Corners—Subsequent Surveys.*—An instruction is erroneous when its effect is to ignore the calls of a grant under which a party claims, and adopts a line from a fixed corner subsequently made by the surveyor by construction and not by the actual survey upon which the patent was issued. *Land Co. v. Erwin*, 41.

4. *Grants—Boundaries—Calls.*—In this case the call in grant No. 893, "beginning at the S. W. corner of entry No. 3058, and running with the line of the entry," refers to the line of entry No. 3058, upon which grant No. 895 was based. (See chapter 173, Laws 1893.) *Ibid.*

5. *Contracts to Convey—Specific Performance—Principal and Agent.*—Where the specific performance of a contract, signed by the owner or principal, is of such character as to be enforcible, it is also enforcible if signed by his agent "thereto lawfully authorized." *Combes v. Adams*, 64.

6. *Same—Written Appointment—Sufficiency.*—A written power given to an agent authorizing him to negotiate for the sale of lands at a certain price, restricting it to a period of thirty days, the owner and principal binding himself to "execute good conveyances to such purchaser as the agent may produce, on the payment of the price," imports authority to the agent to enter into and make a binding agreement of sale in accordance with the provisions of the instrument. *Ibid.*

7. *Contracts to Convey—Registration Laws.*—Contracts to convey land come within the express provision of our registration laws. (Revisal, sec. 980.) *Ibid.*

8. *County Commissioners—Tax Sale—Certificate—Foreclosure.*—A deed to land made by the county commissioners for land sold for taxes and bought in by them (in 1899) without foreclosure of the certificate is void. *Smith v. Smith*, 81.

9. *Intestate's Deed—Fraud—Procedure.*—When intestate has made a *bona fide* conveyance of land, subject to lien by judgment, his administrator can not sell it to make assets to pay the judgment after the expiration of the judgment lien. Questions of fraud in intestate's deed left undetermined in this case can be passed upon on a new trial awarded. Revisal, sec. 87 (5), applies to funds in the administrator's hands. *Matthews v. Peterson*, 134.

10. *Title—Common Source.*—When one claiming to own land, or having deed therefor in fee, grants or conveys to another a restricted estate or limited interest in the same, and it is apparent that the grantee acquired and holds his interest in recognition of the grantor's title, in any action between them concerning the property, the parties

DEEDS AND CONVEYANCES—*Continued.*

ordinarily come under the general rule that when it appears that both parties claim title from the same source neither shall be heard to deny or question the validity of such title. *Sample v. Lumber Co.*, 161.

11. *Same—Outstanding Title—Proof—Superior Title.*—This general rule is not in strictness one of estoppel, but is a rule of justice and convenience adopted by the courts to relieve the parties of the necessity of going back of the common source and deducing title from the State, when it is apparent that both are acting in recognition of the common source as the true title, and the same is subject to the exception that it is always open to the holder of the weaker claim to show a better outstanding title, provided he connects himself with it. *Ibid.*

12. *Same—Evidence.*—When it appeared that defendant had purchased the standing timber on a tract of land of given dimensions, and taken a deed therefor in recognition of the grantor's claim of title, and on the trial between them, this being the plaintiff's only evidence of title, defendant offered evidence tending to show that there was an outstanding title superior to that of plaintiff's, and that defendant had acquired it, such evidence should have been received, and its rejection constitutes reversible error. *Ibid.*

13. *Probate—"Due Form"—Adjudged to be Correct.*—When a deed has been acknowledged before an officer authorized to take it, and it appears that the probate was in fact in due form and was presented for probate to the resident clerk, who examined it and adjudged it to be correct, it is a valid probate, though the clerk did not in so many words certify that it was in due form, and its exclusion from evidence on the ground of defective probate, when otherwise competent, is erroneous. *Cozad v. McAden*, 206.

14. *Escrow—Delivery—Intent.*—In order to the valid delivery of a deed absolute or by way of escrow, it is essential that the instrument should pass from the possession and control of the grantor to that of the grantee or some one for him, with the intent at the time that the same should become effective as a conveyance immediately in the one case and at the happening of a given event in the other. *Gaylord v. Gaylord*, 222.

15. *Evidence—Deeds from Deceased Persons—Ante Litem Motam.*—When, to establish a disputed corner of land, a deed from a deceased person is offered in evidence as a declaration tending to establish it, it is incompetent if the deceased was not a disinterested person at the time he made the deed, or if it was not made *ante litem motam.* (The requisites of such evidence discussed by WALKER, J.) *Lumber Co. v. Branch*, 240.

16. *Interpretation—Words Employed—Construed as a Whole—Intent—Time to Cut and Remove—Injunction.*—A deed conveying timber of a certain dimension on a described tract of land for a fixed price, granting four years in which to cut, haul and remove the same, and granting an extension of two years, at the grantee's option, upon payment of interest on the purchase price, should be construed as a whole and intention of the parties gathered from the language used; and when, by placing the words in their proper relation to each other and the subject-matter of the contract, it appears that the right to cut, as well

DEEDS AND CONVEYANCES—*Continued.*

as to remove, was included in the extension of time, and the grantors were duly notified beforehand of the purpose to exercise the option. the time of commencing to cut is not limited to the first period. The injunction should have been continued to the hearing. *Lumber Co. v. Smith*, 253.

17. *Surveys — Plats Attached — Written Instruments—Parol Evidence.*— When a written contract to convey certain lands is uncertain as to the number of acres, but has a plat attached as a part thereof, and referred to therein, giving the boundaries according to a survey made for the purpose, and there is no allegation or proof of fraud or mistake, parol evidence is incompetent to show that a less number of acres than that to be ascertained by the boundaries was intended, as such would have the effect of varying or contradicting the terms of the written instrument. *Rivenbark v. Teachey*, 289.

18. *Description—Direction, Evident Mistake of—Other Errors—Presumption.*—When it is evident from an otherwise correct description in a deed that "east down a road" should have read "west," no presumption is raised that there are other errors or omissions in the description of the land conveyed. *Brown v. Myers*, 441.

19. *Mistake of Draughtsman—Evidence—Subsequent Deeds—Descriptions Not Vague.*—A part of the description to a conveyance of land read, "down the road to the run of Mill Branch." Plaintiff contends that by mistake of the draughtsman the line should have run straight from a first bend in the road to a certain point on the branch below the point where the road came: *Held*, (1) a second deed made by the grantor subsequent to the deed recorded, without acceptance by the grantee, is no evidence of plaintiff's contention; (2) by reason of description of the line indicated, the description of the *locus in quo* is not void for vagueness or uncertainty. *Ibid.*

20. *Construction—Entire Instrument—Intent.*—In construing a deed the intent of the parties as embodied in the entire instrument should prevail, and each and every part must be given effect, if it can be done by fair and reasonable intendment, before a subsequent clause thereof may be construed as repugnant to or irreconcilable with a preceding one. *Davis v. Frazier*, 447.

21. *Same—Timber—Time for Cutting—Second Cutting.*—A deed to standing timber contained a clause giving the grantee the right to enter upon the lands and cut and remove the timber within five years from a specified date, followed by a clause providing that the grantee shall not have the right to cut over the land for timber a second time; *Held*, the second clause was not repugnant to or irreconcilable with the estate granted in the first, and conveyed a base or qualified fee in the specified dimensions of timber, determinable as to all timber not cut and removed from the land within the five years, and subject to the further provision that the land should not be cut over a second time for timber. *Ibid.*

22. *Same.*—Under a clause in a deed conveying standing timber of a certain dimension, providing that the grantee shall not have the right to cut over the land for timber a second time if the land had been entirely cut over once, within the terms and meaning of the contract, any

DEEDS AND CONVEYANCES—*Continued.*

further cutting would amount to an actionable wrong, and it would not be affected by the fact that here and there trees could be found which were within the dimensions specified; but this would not apply to trees of such dimension, cut within the time limited, upon distant and definite portions of the land which had not been cut over at all. *Ibid.*

23. *Purchaser—Doubtful Title—Suits—Courts—Equity Jurisdiction—Specific Performance.*—A purchaser of land is not required to take a doubtful title; and when parties have entered into a contract to sell land, and the purchaser has refused to comply because of doubts entertained in regard to title, the court will treat an action by the vendor against the vendee as a bill for specific performance. *Campbell v. Cronly*, 457.

24. *Doubtful Title—Actions—Cloud on Title—Courts—Statutory Jurisdiction.*—The Revisal, sec. 1589 (Laws 1893, ch. 6), enlarges the power of the courts to entertain suits to quiet titles, where the conditions were formerly such that a possessory action could not be brought; and this statute is liberally construed, so that the court can acquire jurisdiction to clear up obscure contingent limitations which are imposed upon titles. *Ibid.*

25. *Same—Controversy Without Action.*—The courts will hear and determine a controversy submitted without action in suits brought by and against the parties in interest, wherein the vendee has refused to accept the title on the ground of its being doubtful, either in its equitable jurisdiction as treating the controversy as a bill for specific performance or under the provisions of the Revisal, sec. 1589, for the purpose of removing clouds upon obscure titles. *Ibid.*

26. *Estates—Descriptive Words—Legal Phrases—Construction.*—When the language employed in a conveyance of land as to the estate passed thereby has a clearly defined legal signification, there is no room for construction to ascertain the intent; and when the intent of the grantor appears from the use of customary language to be that given by law to the legal phrases also used in connection with the subject matter, the latter will be construed as showing that the grantor desired to remove any doubt as to the interest conveyed. *Ibid.*

27. *Same—Living Issue—Succession of Survivorship—Purchasers—Estates.* An estate in trust to the use of grantor's two daughters, providing in the deed that if said daughters "shall die leaving living issue, then to the use of such surviving issue, who shall take the same *per stirpes*, and not *per capita*," creates a succession of survivorships in the living children and grandchildren of the daughters, who may take as purchasers upon the happening of the event, and the daughters named can not convey to a purchaser a good and indefeasible title. *Ibid.*

28. *Succession of Survivorship—Children and Grandchildren—Purchaser.* When a deed in trust creates a succession of survivorships, in the use of lands, to the children and grandchildren of B. and C., a deed from a child of C. to the *locus in quo* in the lifetime of B. and C. vests in him his interest only; so that, if the child should die, leaving issue, before the death of his parent, such issue would take as a purchaser under the limitations declared. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

29. *Fraud—Undue Influence—Mental Capacity—Preponderance of Evidence.* Mental incapacity of a grantor, and fraud and undue influence on the part of the grantee in procuring his deed, is only necessary to be shown by the greater weight of the evidence, and a charge of the judge imposing a greater burden is erroneous. (*Harding v. Long*, 103 N. C., 1; *Chaffin v. Manufacturing Co.*, 135 N. C., 95, cited and approved, and the terms, "to the satisfaction of the jury by the greater weight of the evidence," reconciled and explained by HOKE, J.) *Fraley v. Fraley*, 501.

30. *Interpretation—Words and Phrases—"Surviving Heirs"—Surplusage.* The word "surviving," in a conveyance of land "to P. for life, and at his death to his surviving heirs," is surplusage, and can not affect the legal interpretation of the words employed. *Price v. Griffin*, 523.

31. *Same—Rule in Shelley's Case.*—A conveyance of an estate "to P. for life, and at his death to his surviving heirs," conveys the fee simple to the grantee, under the rule in *Shelley's case.* (*May v. Lewis*, 132 N. C., 115, cited, approved and distinguished.) *Ibid.*

32. *Interpretation — Context — Estates — "Living Heirs"—Surplusage.*—In construing the meaning of words contained in a deed the court may examine the context of the deed; and for the purpose of shedding light upon the value or extent of the estate described in the conveyance clause—in this case, "to P. for life and at his death to the surviving heirs"—the warranty and covenant clause may be resorted to, when the language is applicable, as some evidence that the word "living," thus used, should be treated as surplusage. *Ibid.*

33. *Contracts to Convey—Grantee in Possession—Evidence of Payment—Burden of Proof—Cancellation of Note—Payee's Possession.*—While the burden of proof to show payment is upon the grantee in possession of lands under a contract to make title, when both the grantor and grantee are dead, and the grantee, and those claiming under him, have been in continuous possession for a long lapse of time (in this case twenty-eight years), evidence of payment is sufficient to go to the jury which tends to show that the bond for title, and a note of less amount wrapped in it, with the payer's signature to the note cut out, were found among the papers of deceased payer, written upon the same kind of paper, witnessed by the same person, and no note corresponding with that mentioned in the bond was suggested or produced. *Pool v. Anderson*, 624.

34. *Commissioner's Deed—Decree—Specific Description.*—A commissioner to sell land in partition proceedings may not extend or change the boundaries from those given in the decree, but he may make the description of the land sold by him more specific and certain. *Bailliere v. Shingle Co.*, 627.

35. *Escrow—Contracts, Breach of—Damages—Evidence—Burden of Proof.* In an action for damages for breach of contract for the sale of land, evidence showing that the deed was signed by defendant and placed in escrow, upon condition that the other parties in interest should first sign before delivery; that the other parties refused to sign, the plaintiff refused to take only the interest of the defendant, and the deed was never delivered, is insufficient upon the issue as to whether

DEEDS AND CONVEYANCES—*Continued.*

the defendant violated his contract, the burden of proof being on plaintiff, and a motion to nonsuit upon the evidence should have been sustained. *Mitchem v. Wallace*, 640.

DEFECTIVE MACHINERY. See Negligence; Evidence.

DEFENSE. See Penalty Statutes; Contributory Negligence; Nonsuit.

DELIVERY, CONDITIONAL. See Insurance.

DELIVERY, DELAY IN. See Interstate Commerce.

DEMURRER. See Pleadings; Parties; Procedure.

DEPOSITORY. See Evidence; Deeds and Conveyances.

DESCRIPTION. See State's Lands; Evidence; Deeds and Conveyances; Injunction; Indictment.

DETERMINABLE FEE. See Estates.

DEVISAVIT VEL NON. See Evidence.

DEVISES. See Estates; Wills.

DEVISES, CONDITIONAL. See Wills.

DISBARMENT. See Attorneys.

DISCRIMINATION. See Carriers of Freight.

DISORDERLY HOUSES. See Cities and Towns.

DRAINAGE. See Nuisance; Railroads.

DUE PROCESS. See Constitutional Law.

DURING WIDOWHOOD. See Estates.

DYING DECLARATIONS. See Evidence.

DYNAMITE. See Negligence.

EJECTMENT.

1. *Trespass—Evidence—Summons—Acts of Ownership.*—When plaintiff sues in ejectment and has shown title to the *locus in quo* in himself, it is competent for him to show acts of forcible trespass thereon of defendant, which occurred after the issuance of the summons, of such character as to indicate a claim of the right of possession. *Land Co. v. Lange*, 26.

2. *Same—Judgments—Nonsuit.*—A judgment as of nonsuit upon the evidence will not be granted in an action involving title to land, when the plaintiff has shown a forcible trespass upon the *locus in quo* by the defendant after summons was issued, and that defendant immediately entered, assumed dominion and exercised acts of ownership. *Ibid.*

ELECTRIC COMPANIES. See Corporations.

EMBEZZLEMENT.

Other Articles—Intent—Evidence.—In a trial upon an indictment for embezzlement, evidence that defendant had pawned and disposed of other articles of the same character identified as belonging to his employers about the same period of time is competent upon the question of guilty intent. *S. v. Hight*, 817.

ENDORSEMENTS. See Process; Notes.

ENLARGEMENT OF ACTION. See Arbitration.

ENTERER. See State's Lands.

ENTRY. See Lessor and Lessee.

ESCROW. See Deeds and Conveyances.

ESTATES. See Wills; Husband and Wife.

ESTOPPEL.

Deeds and Conveyances—Timber—Title, Source of—Description—Breach of Contract.—Defendant, claiming title to timber by *mesne* conveyances from plaintiff, is estopped to deny plaintiff's title to the lands in an action to recover damages for cutting timber of other kinds and dimensions than the conveyances specify. *Smith v. Lumber Co.*, 40.

EVIDENCE. See Boundaries.

1. *Res Gestæ—Narrative—Hearsay.*—When a conversation between witness and deceased as to the manner in which he was injured is not a part of the *res gestæ* it is hearsay and incompetent evidence, though a very brief interval of time had elapsed. *Hill v. Insurance Co.*, 1.

2. *Map—Hearsay.*—A map offered in evidence for the purpose of showing a negligent killing by defendant railroad company's train of plaintiff's intestate while on defendant's railroad bridge is inadmissible when it was made some eighteen months after the occurrence, upon the statements of one not produced as a witness. *Strickland v. R. R.*, 4.

3. *State's Lands—Enterer—Prior Grant—Vacant and Unappropriated.*—When plaintiff, enterer, introduces a valid grant, issued prior to his, under which the defendant claims, it shows that the lands had been previously granted and were not vacant and unappropriated at the time of the issuance of his grant, and it is unnecessary for the defendant, claimant, to show a connected title therewith. *Babb v. Manufacturing Co.*, 139.

4. *Outstanding Title—Proof—Superior Title.*—When it appeared that defendant had purchased the standing timber on a tract of land of given dimensions, and taken a deed therefor in recognition of the grantor's claim of title, and on the trial between them, this being the plaintiff's only evidence of title, defendant offered evidence tending to show that there was an outstanding title superior to that of plaintiff's, and that defendant had acquired it, such evidence should have been received, and its rejection constitutes reversible error. *Sample v. Lumber Co.*, 161.

EVIDENCE—*Continued.*

5. *Nonsuit—Parties in Interest.*—When it is shown that a plaintiff is not a real party in interest, his action to recover, brought in his own right, will be dismissed on a motion as of nonsuit upon the evidence. *Chapman v. McLawhorn*, 166.

6. *Statements—Silence—Admissions.*—Statements made in the presence of one (who did not reply), to become his implied admissions, must have been made on an occasion when a reply would properly be expected; and testimony as to statements made in a plea for mercy to the court by an attorney, in the hearing of his client and not denied by him, as to his mental incapacity, is inadmissible upon an issue of *devisavit vel non* attacking the probate of his will on that ground. *In re Thorp*, 487.

7. *Rejected—Subsequent Offer to Admit—Harmless Error.*—When the trial judge has excluded certain evidence, which he thereafter, at the close of all the evidence, offered to admit, and there is no suggestion that the witnesses had been discharged, the error, if any, was cured. *Nail v. Brown*, 533.

8. *Estates—Waste—Permanent Injury.*—In an action of waste for damages and forfeiture of the premises by the life tenant of lands, evidence that the life tenant was cutting and using valuable standing timber thereon, beyond the quantity necessary to properly keep up the estate or for his reasonable enjoyment as such tenant, and selling it or using it in a manner not to benefit the estate or in repairing houses thereon which he had permitted to fall into disrepair, is properly submitted to the jury upon the question as to whether the inheritance had been permanently injured, or whether, under the facts and circumstances of the particular case, the life tenant acted with the same care as a prudent owner of the fee in possession would have used. *Norris v. Laws*, 599.

9. *Construed—Nonsuit.*—The plaintiff's evidence must be accepted as true and construed in a light most favorable to him, upon an appeal from a motion as of nonsuit upon the evidence. *Settle v. R. R.*, 643.

10. *Police Justice—Jurisdiction—City Limits—Judgment—Motion in Arrest.*—When a police justice has jurisdiction of offenses only when committed within the corporate limits of a city, a motion in arrest of judgment will be denied when it does not appear that the offense was committed in the limits prescribed. *S. v. Brown*, 867.

EXCUSABLE NEGLECT. See Principal and Agent.

EXCEPTIONS. See Objections and Exceptions; Clerk of Courts; Appeal and Error; Reference.

EXCESSIVE FORCE. See Questions for Jury.

EXECUTORS AND ADMINISTRATORS.

EX MALIFICIO. See Contracts.

EXPRESSED TRUST. See Trusts and Trustees; Guardian and Ward.

FALSE PRETENSES.

1. *Indictment — Proof — Variance — Instructions.* — When the indictment charged that defendant induced an exchange of horses with another

FALSE PRETENSES—*Continued.*

by means of false and fraudulent representations, the jury should be instructed, when the evidence is directed to a different defense and there is no evidence of such representations, that there was fatal variance between the allegation and proof. *S. v. Davis*, 851.

2. *"Calculated to Deceive"—Evidence—Instructions.*—When the evidence, considered in the light most favorable to the State, on a trial for obtaining goods by false pretenses, tends only to show that the prosecutor has once been deceived by defendant in a horse trade, returned the horse and refused to take others because defendant refused to warrant any of his horses, and, finally, without examining him, ordered a certain other horse to be sent to his stable upon the guarantee of defendant that the horse was sound and all right, and as soon as the horse was examined by the prosecutor the defect complained of was so patent as to be noticed at once, it is not sufficient as showing a false representation, "calculated to deceive," and it was error in the trial judge to refuse defendant's requested instructions, that if the jury believed the evidence they should render a verdict of not guilty. *Ibid.*

FELLOW-SERVANTS. See Master and Servant.

FINAL JUDGMENT. See Judgments.

FINDINGS. See Contempt; Injunctions; Courts.

FLYING SWITCHES. See Nonsuit.

FORECLOSURE. See Taxation; Contracts.

FORMER JEOPARDY. See Procedure.

FORNICATION AND ADULTERY.

Indictment, Bill of—Sufficiency.—A bill of indictment for fornication and adultery sufficiently alleges the offense, under the statute (Revisal, sec. 3350), when it charges that a certain man and woman, by name, "did unlawfully bed and cohabit together." (Revisal, sec. 3254.) *S. v. Britt*, 811.

FOUR-MONTHS TERM OF SCHOOL. See Taxation.

FRAGMENTARY APPEAL. See Appeal and Error.

FRANCHISES. See Cities and Towns.

FRAUD. See Procedure.

Arrest and Bail—Alienating Wife's Affections—Insolvent Debtors—Inventory of Property—Statements—Surplusage—Issue.—One who has another arrested and held to bail for alienating the affections of his wife does not raise an issue or suggestion of fraud (Revisal, sec. 1934) by answering the petition for discharge and denying a statement therein made by petitioner that he is advised by counsel that, owing to the condition of the title to certain lands scheduled, an execution could not issue against it, as such statement is surplusage. (*Adams v. Alexander*, 23 N. C., 501, cited and distinguished. The procedure

FRAUD—*Continued.*

upon the question of fraud, when the husband has scheduled lands in which he claims his wife has no interest, and he has paid the purchase price, discussed by CONNOR, J.) *Edwards v. Sorrell*, 713.

FRAUD OR MISTAKE. See Fraud.

FREEHOLDER. See Bond Issues.

FUNDS, APPLICATION OF. See Cities and Towns.

GAS PLANTS. See Cities and Towns.

GRANDCHILDREN. See Estates.

GRANTS. See State's Lands.

GUARDIAN AND WARD.

1. *Incompetency—Appointment of Guardian.*—A finding of the jury that a person, the subject of an inquisition of lunacy, is incompetent from want of understanding to manage his own affairs is such as to require the clerk to appoint a guardian for him, under the Revisal, sec. 1890, whatever the cause may be. *In re Denny*, 423.

2. *Express Trust—Termination of Trust—Death of Ward—Administration —Accounting.*—The express trust existing between guardian and ward terminates at the death of the latter, and then the ward's distributees may have letters of administration taken out and call for an accounting. *Lowder v. Hathcock*, 438.

3. *Death of Ward—Administration—Limitation of Actions.*—An action brought by the administrator of a deceased lunatic against the guardian, whose last annual account, made in the ward's lifetime, showed unaccounted for guardian funds in his hands, is barred when brought more than ten years after the death of the ward. *Ibid.*

4. *Death of Ward—Limitation of Action—Time Extended—Interpretation of Statutes—Requisites—Proof.*—The one year given in which to bring an action after the death of the one entitled thereto, provided the statute had not run at the time of the death and the cause of action survives (Revisal, sec. 367), embraces any remaining and unexpired time within the statutory limitation at the time of his death; and when this action is relied on, in an action by the administrator of a deceased lunatic against the guardian, to prevent the running of the statute of limitations, it is necessary that the action should have been commenced within one year from the issuance of the letters of administration. *Ibid.*

GUARDIAN, APPOINTMENT OF. See Guardian and Ward.

HARMLESS ERROR.

1. *Evidence—Damages—Exceptions.*—Defendant's exception that under a certain issue permanent damages were awarded plaintiff, when from the character of the injury, or otherwise, the plaintiff was entitled to recover damages, can not be to defendant's prejudice, and it is not reversible error on his appeal. *Spence v. Canal Co.*, 160.

2. *Option—Lease—Evidence—Principal and Agent.*—When it is shown that a lessee, holding a lease with an option of purchase, has notified

HARMLESS ERROR—*Continued.*

the agent of the lessor, the latter residing abroad with her husband, of his acceptance of the option according to its terms, who communicated the fact to the husband, and she made no reply, it is harmless error to admit in evidence, under her objection, a letter from the husband stating that the terms of the option had not been complied with upon a different ground than that contended for in the action, whether the husband was or was not the agent of the wife. *Pearson v. Millard*, 303.

3. *Contracts, Entire—Interpretation—Questions of Law—Jury.*—The interpretation of an entire written agreement is a question of law; and while it is error to submit it to the jury, it is cured by the jury answering it correctly. *Hardy v. Ward*, 385.

4. *Evidence—Wills—Devisavit Vel Non—Mental Capacity—Book of Settlements.*—Upon an issue of *devisavit vel non* the testimony of both sides showed that the testator had been confined in and discharged from a State's hospital about twelve years previous to his death; and the conflicting evidence upon his mental capacity to make a will was directed almost exclusively to his mental condition during the last few years of his life: *Held*, (1) in the absence of any evidence to the contrary, the law will presume the discharge was based upon the restoration of the testator's mind; (2) that the erroneous admission in evidence of the book of settlements in the office of the Superior Court clerk was harmless error. *In re Thorp*, 488.

5. *Jurors, Incompetent—Employee—Challenge—Peremptory.*—While an employee is an incompetent juror for the trial of a cause involving the rights or interest of the employer, it is not reversible error when a party follows his objection to such juror by a peremptory challenge and it does not appear that his rights were in any way prejudiced by the ruling of the court. (*State v. Gooch*, 94 N. C., 987, cited and approved.) *Blevins v. Cotton Mills*, 493.

6. *Evidence Rejected—Subsequent Offer to Admit.*—When the trial judge has excluded certain evidence, which he thereafter, at the close of all the evidence, offered to admit, and there is no suggestion that the witnesses had been discharged, the error, if any, was cured. *Nail v. Brown*, 533.

7. *Evidence—Murder—Manslaughter—Instructions.*—When it appears that the jury has discarded the plea of self-defense, contended for by defendant on trial for murder, and it is clear, from the evidence and admissions, that defendant was guilty of murder in the second degree at least, the defendant can not be prejudiced by a charge to the jury by the trial judge under which he was convicted of a lesser degree of homicide. *S. v. Quick*, 820.

8. *Instructions—Extracts from Opinions.*—While the wisdom of reading lengthy extracts from the opinions of the Supreme Court to the jury is doubted, as their reasoning is generally based upon the facts of each case, and the facts may differ, in this case there could be no error to defendant's prejudice, as the extracts were of a general character and the law charged with such clearness as not to be misunderstood. *Ibid.*

HEADLIGHT. See Negligence; Contributory Negligence.

HEALTH. See Cities and Towns.

HEIRS. See Limitation of Actions; Slaves.

HUSBAND AND WIFE.

1. *Married Women—Damages to Land—Joinder of Husband—Parties.*—A married woman may maintain an action without joining her husband to recover damages to her land caused by the improper construction of a roadbed and road on a railroad company's right of way thereon. *Willis v. White*, 199.

2. *Deeds and Conveyances—Coverture—Judgments—Liens.*—When title to a tract of land was in the husband, and one had a judgment for $200 against the husband for the purchase money, duly docketed, and, the wife having instituted an action against the husband and the holder of the judgment to establish for herself and children an interest in the land, by reason of the fact that she had aided in the purchase of the same, a decree by consent was entered declaring the judgment to be in full force and effect to the amount of $100, and adjudging that the husband convey to the wife a certain interest in the property, this conveyance was subject to the judgment lien for the purchase money to the extent of $100, and on sale of the land to enforce collection of the judgment the purchaser acquired the title. *Windley v. Swain*, 356.

3. *Deeds and Conveyances—Judgment—Jurisdiction—Coverture.*—A judgment of a court having jurisdiction of the cause and the parties against a married woman on her contract, made during coverture, will be set aside, on direct application, when it appears by the pleadings that she was under coverture at the time the contract was made, though the defense of coverture was not formally pleaded, but it is binding upon her while it stands as the formal and final deliverance of the court. *Ibid.*

4. *Deeds and Conveyances—Lands—Title—Purchase Price—Coverture—Judgment in Personam.*—Under the facts and circumstances of this case, the consent judgment recognizing the validity of a former judgment rendered against the husband for balance due upon purchase price for land to which the title was in him, and adjudging an interest in the land in the wife on account of payment made by her with her own funds, and decreeing a balance due thereon a lien upon the land, whether the second judgment was *in personam* against her, *Quære. Ibid.*

5. *Judgments, Entire — Rights Under — Estoppel — Coverture.*—A *feme covert*, claiming an interest in lands under a decree of court, can not assert her claim thereto under one clause of an entire judgment and repudiate a lien upon it declared and established by another clause thereof. *Ibid.*

6. *Pleadings—Action for Possession of Lands—Married Women—Equities.* When the complaint in an action to recover lands contains the ordinary allegations, and the answer a general denial, the pleadings are not sufficient to sustain an equity set up in favor of a *feme* defendant, arising by reason of coverture, in transactions concerning lands. *Ibid.*

7. *Marriage—Adoption of Constitution—Vested Rights—Wife's Separate Property—Disposition by Will—Husband's Curtesy.*—By marriage, be-

HUSBAND AND WIFE—*Continued.*

fore the adoption of the Constitution of 1868, the husband acquired no vested rights in the lands of his wife before a child was born capable of inheriting; and when the first child born of the marriage was after the adoption of the Constitution, which gives a married woman the power, among other things, of disposing, by will, of her property acquired before marriage (Article X, sec. 6), she may accordingly dispose of it by will and deprive him of his interest therein as tenant by the curtesy. *Richardson v. Richardson*, 549.

8. *Wife's Separate Property—Marital Interests—Vested Rights—Common Law—Statutory Change—Wills.*—The common-law doctrine that the husband, upon the marriage, was seized in right of his wife of a freehold interest in her lands during their joint lives, and that as tenant by marital right he was entitled to the rents and profits of her estate, etc., was changed by the act of 1848 (now Revisal, sec. 2097); and thereafter no vested right of his therein could be impaired by giving effect to the provisions of the Constitution of 1868, Art. X, sec. 6, allowing her to absolutely dispose of her separate real property by will, free from any claim therein of her husband, as such. *Ibid.*

9. *Wife's Separate Property—Lease—Privy Examination—Void Lease.*—A written lease of land for a term of five years, made subsequent to the passage of the act of 1848 (now Revisal, sec. 2097), without the privy examination of the wife, is void as to the wife and passes no interest to the husband in the rents and profits thereof. *Ibid.*

10. *Wills, Interpretation of—Devises—Restraint on Alienation—Void—Public Policy.*—When an item of a will gives a married woman a fee in testator's land, and it is followed by an item that the "above-devised lands shall not be disposed of, but shall descend to the children of my above-mentioned daughter," the words employed in the subsequent item are an attempted restraint upon alienation, contrary to public policy, and void. *Foster v. Lee*, 688.

11. *Lands—Estates—Jus Accresendi—Judgment—Against One—Lien.*—A judgment against the husband does not constitute a lien on lands conveyed to him and his wife in fee, so that execution and sale thereunder of his interest can be had to satisfy the judgment debt against him, for they take by entireties, with the right of survivorship, and the interest of neither, during their joint lives, becomes subject to the lien of a docketed judgment against them or either of them. *Hood v. Mercer*, 699.

12. *Wife's Separate Personalty—Wife's Note—Consent of Husband—Charge Specific by Intendment.*—A note signed by a *feme covert* alone, but with the written consent of her husband, will not bind her separate personal property to its payment when it does not expressly or by clear intendment and application create a specific charge against her property, sought to be bound for its payment. *Bank v. Benbow*, 781.

13. *Wife's Separate Realty—Wife's Note—Consent of Husband—Charge Specific—Equity—Privy Examination.*—For a *feme covert* to bind her real property to the payment of a note given by her, she must execute a formal conveyance or some paper-writing which in equity may be a charge upon her separate estate, accompanied by the written assent of her husband and her privy examination. *Ibid.*

HUSBAND AND WIFE—*Continued.*

14. *Indictment—Witness—Tender by State—Refusal—Evidence Against Each Other—Improper Comments of Counsel—Appeal and Error.*—The State having the wife of the accused under subpœna, tendered her, and the solicitor commented on the refusal of the defendant to use her in corroboration of his own evidence. Upon objection by the defendant, it became the duty of the trial judge to caution the jury that this refusal of the accused should not be considered by them, and the judge's failure to so caution the jury was reversible error; and his telling them that the State could not use the wife as a witness, but the accused could, was an unintentional accentuation of the error. *S. v. Cox*, 846.

IMPROPER COMMENT. See Appeal and Error.

INDEMNITY. See Contracts; Insurance.

INDEPENDENT CONTRACTOR. See Negligence; Contracts.

INDICTMENT.

1. *Form of—Substance—Allegations.*—While it is not now necessary, under our statute, to allege mere matters of form in a bill of indictment, the bill itself must sufficiently allege matters of substance, so that the court may see that an indictable offense is charged and the accused may be informed of the accusation. *S. v. Cline*, 854.

2. *Allegations—Material Matters—Motion to Quash.*—A bill of indictment for perjury, alleging that the defendant falsely and feloniously asserted on oath certain statements in a certain action, without any averment showing that such were in relation to a matter material to the issue therein, is defective, and a motion to quash should be granted. *Ibid.*

3. *Form of—Defect—Bill of Particulars.*—A defect of averment in an indictment can not be cured by matters contained in a bill of particulars. *Ibid.*

4. *Unlawful Burning, etc.—Allegation of Ownership—Identification—Description.*—On a trial under an indictment containing two counts for unlawfully, etc., setting fire, etc., and also attempting to burn, etc., a certain stable and granary, the property of and in possession of W. (Revisal, secs. 3338, 3336), the evidence was that the stable and granary was owned by a different person than the one named, who had rented it to W., and he had stored corn in the granary end of the building: *Held*, the allegation of ownership was for identification of the property, and it was sufficiently proved by thus showing occupancy. *S. v. Sprouse*, 860.

5. *Same—Instructions.*—When an indictment charges the unlawful, etc., setting fire to a granary, the property of W., and an unlawful attempt to burn the barn, etc., of W., and the evidence tends to show that S. was the owner, but had rented it to W., who had stored corn therein, it is not error for the trial judge to charge, in effect, that if the jury so find the facts beyond a reasonable doubt, and likewise find beyond a reasonable doubt that defendant willfully set fire to and burned said house, with the corn of the prosecutor in it, it was their duty to return a verdict of guilty. *Ibid.*

INDICTMENT—*Continued.*

6. *Two Counts—General Verdict—Defective Count—Judgment Arrested.* When there are two counts in a bill of indictment charging an unlawful, etc., burning of the house of another, and the jury have returned a general verdict of guilty, judgment may not be arrested upon the ground that one of the counts is defective. *Ibid.*

7. *Sufficient—Setting Fire to Property.*—A count in a bill of indictment charging that defendant "did unlawfully, wantonly, willfully, and feloniously set fire to a stable and granary, then and there the property and in possession of W.," etc., is good, under the Revisal, sec. 3338. *Ibid.*

8. *Intoxicating Liquors—Insufficient—Certainty of Charge—Rights of Accused—Judgment.*—While the statutes are sufficiently full to cure mere formal defects in the procedure incident to criminal prosecution, the procedure, whether by indictment or warrant, either alone or in connection with the accompanying affidavit, must inform the accused of the charge against him with sufficient certainty to enable the court to know what offense has been committed and the punishment which may be imposed in case of conviction. *S. v. Lunsford*, 862.

9. *Same—License.*—In order to sustain a conviction for an unlawful sale of spirituous liquors in a town before prohibition went into effect there, whether in violation of a State law or municipal ordinance, and when to constitute the offense it was necessary that such sale be made without license, the procedure must allege a sale without a license; otherwise it would be fatally defective. *Ibid.*

10. *Intoxicating Liquors—Sale—Ordinance—Certainty of Charge.*—When a warrant and accompanying affidavit charge an unlawful sale of spirituous liquor in violation of some city ordinance, without setting forth or describing the ordinance or referring to it in a way sufficient to identify it, a conviction thereunder can not be sustained. *Ibid.*

11. *Same — State Law — Judgment.* — A conviction of selling spirituous liquor contrary to law can not be sustained under a warrant not specifying whether the charge was under a State law or municipal ordinance, when both are in force at the time; for the court could not determine for which offense to impose punishment, and no valid judgment could be pronounced. *Ibid.*

INDICTMENT OF. See Landlord and Tenant; Fornication and Adultery; Husband and Wife.

INFANTS. See Negligence.

INHERITANCE. See Slaves; Estates.

INJUNCTIONS.

1. *Principal and Agent—Prima Facie Right.*—When the plaintiff claims under a contract to convey lands, valid upon its face and signed by the agent of the owner or principal thereto lawfully authorized, he has a *prima facie* right to the issuance of a restraining order against defendants committing trespass upon the lands, claiming under a like contract from the owner or principal, registered at a time subsequent to that of registration of plaintiff's contract. *Combes v. Adams*, 64.

INJUNCTIONS—*Continued.*

2. *Contempt—Evidence—Findings Sufficient.*—A finding by the judge below that, after the issuance and service of an order restraining defendant, its agents and employees from cutting and carrying away timber trees from the *locus in quo*, it and its superintendent, under advice of counsel, have arbitrarily undertaken to locate disputed boundaries to suit their own purposes, and have willfully and intentionally continued to cut and carry away timber trees upon the lands in dispute and embraced in the restraining order, is sufficient to sustain a judgment for contempt of court. *Davis v. Fiber Co.*, 84.

3. *Description—Sufficiently Definite—Contempt.*—A preliminary order restraining defendant from cutting and carrying away timber trees beyond a disputed line claimed by plaintiff is sufficiently definite to authorize a judgment for contempt, when the description of the land set forth in the complaint, the wrong complained of, and the evidence, taken in connection with the order, tended strongly to establish that defendant and its agent were fully aware of the location of the land in dispute, and fully informed of the placing of the line contended for by plaintiff. *Ibid.*

4. *Description—Definiteness.*—There is no particular form required for a restraining order, and it is sufficiently definite if it informs the party of the matters or things he is therein restrained from doing. *Ibid.*

5. *Findings—Evidence—Bona Fide Controversy.*—In this case there was sufficient evidence to justify the finding of the lower court that there was a *bona fide* controversy concerning the ownership of timber, and the restraining order was continued to the hearing. *Davis v. Fiber Co.*, 88.

6. *Deeds and Conveyances—Interpretation—Words Employed—Construed as a Whole—Intent—Time to Cut and Remove.*—A deed conveying timber of a certain dimension on a described tract of land for a fixed price, granting four years in which to cut, haul and remove the same, and granting an extension of two years, at the grantee's option, upon payment of interest on the purchase price, should be construed as a whole and the intention of the parties gathered from the language used; and when, by placing the words in their proper relation to each other and the subject-matter of the contract, it appears that the right to cut, as well as to remove, was included in the extension of time, and the grantors were duly notified beforehand of the purpose to exercise the option, the time of commencing to cut is not limited to the first period. The injunction should have been continued to the hearing. *Lumber Co. v. Smith*, 253.

7. *Before Whom Returnable—Jurisdiction.*—Section 814, Revisal, confers upon a judge holding a special term jurisdiction to grant a restraining order, returnable before himself, only in cases "which he may have jurisdiction to hear and determine under the commission issued to him": *Held*, that he has no jurisdiction to make a restraining order returnable before himself in a case wherein the summons is returnable to a regular term, beginning after the termination of the special term which he is commissioned to hold. He has no jurisdiction to "hear and determine" such case. *Royal v. Thornton*, 293.

INJUNCTIONS—*Continued.*

8. *Same—Procedure.*—A restraining order, improperly made by a judge holding a special term of court, returnable before himself, and by him continued to the hearing, will be reversed, without prejudice to the plaintiff's rights to apply to a judge having jurisdiction, upon the affidavits filed, or new ones, if so advised. *Ibid.*

9. *Railroads—Cities and Towns—Use of Streets—Ministerial Duties—Power of Courts.*—The action of the board of aldermen in authorizing a railroad company to use a certain street for legitimate railroad purposes, the laying and use of tracks, etc., when the statutory power is given, is not reviewable by the courts at the instance of an owner of land on the street, claiming that some other street should have been so used. *Griffin v. R. R.*, 312.

10. *Railroads—Cities and Towns—Use of Street—Tracks—Additional Servitude—Remedy—Damages.*—The remedy of an owner of land on a street which has been used for railroad purposes, the maintenance of track, etc., against a railroad company using additional tracks necessary to maintain a union depot, is by an action for damages for a superimposed burden upon the street, and not by injunction. *Ibid.*

11. *Railroads—Cities and Towns—Use of Streets—Tracks—Assent of City—Corporation Commission—Public Good.*—The progress of work, apparently for the public good, such as the laying of a track on a city street by railroad companies to maintain a union station authorized by the city and ordered by the Corporation Commission, will not be interfered with by injunction. *Ibid.*

12. *Roads and Highways—Motion to Dissolve—Supreme Court.*—A motion to dissolve an order restraining the working of a public road, ordered by the county commissioners, under the provisions of chapter 407, Laws 1907, will be allowed in the Supreme Court, when it appears that the appeal from the order of the county commissioners was neither properly taken nor perfected. *Sutphin v. Sparger*, 517.

13. *Municipal Corporations—Cities and Towns—Necessary Buildings—City Hall—Discretion.*—The fact that a city contemplates having a city hall on one of the floors of a municipal building, to be built under authority conferred by statute to erect a necessary municipal building, does not invalidate a bond issue likewise authorized for the purpose, or furnish reason for enjoining their issuance. *Hightower v. Raleigh*, 569.

14. *Cities and Towns—Municipal Powers—Contract for Watershed—Application to Rescind Contract—Pleadings—Demurrer.*—In an action for injunction against the board of commissioners of a city acquiring certain property for a watershed to supply the town with water, which is alleged in the complaint to be a nuisance, threatening the lives of the citizens if so used, a demurrer on the ground that it does not appear that plaintiffs, citizens and property owners, had applied to the municipal authorities to rescind the contract of purchase, is bad. *Jones v. North Wilkesboro*, 646.

15. *Cities and Towns—Municipal Powers—Corruption—Water Supply—Health of Citizens—Demurrer—Answer.*—It is not necessary for the complaint to allege corruption or moral turpitude on the part of a board of town commissioners in purchasing property for a watershed

INJUNCTIONS—*Continued.*

and waterworks to supply the citizens with water; and a demurrer to a complaint, in a suit brought by citizens and property owners to restrain such action, alleging that it would be a public nuisance and endanger the health and lives of the people, admits the truth of such matters and should be overruled. In this case the defendant was required to answer, and, upon notice, the motion for injunction to be heard before the judge having jurisdiction was granted. *Ibid.*

16. *Corporations—Voting Trust—Shares of Stock—Rights of Purchaser.*—A purchaser of shares of corporation stock held by an illegal voting trust may enjoin the voting thereof by the trust or its carrying out a contemplated plan of reorganization, and may vote the same in all stockholders' meetings. *Sheppard v. Power Co.*, 776.

INSOLVENT DEBTORS. See Arrest and Bail.

INSTRUCTIONS.

1. *No substantial Error.*—In this case the assignments of error were to the judge's charge, in which no substantial error was found on appeal. *Smithwick v. R. R.*, 39.

2. *Negligence—Causal Connection.*—A prayer for instruction, based upon plaintiff's negligent act, which did not cause the injury complained of, is properly refused. *Ives v. Gring*, 137.

3. *Negligence—Light—Marine Railway—Proximate Cause—Contributory Negligence.*—In an action for damages to plaintiff's marine railway, caused by defendant's tugboat running into it at night, a charge was correct, when there was evidence to support it, that if plaintiff did not have a light on its marine railway, and such failure was the proximate cause of the injury, to find the plaintiff guilty of contributory negligence. *Ibid.*

4. *Burden of Proof—Contributory Negligence—Proximate Cause—Questions for Jury.*—The burden of proof is on defendant to show contributory negligence, and when there is evidence tending to show that negligence on defendant's part caused the injury the court can not fix, as a matter of law, contributory negligence or proximate cause upon plaintiff. *Ibid.*

5. *Damages—Value—Opinion of Witnesses.*—When there is conflicting evidence as to the amount of damages caused to land by defendant's negligence, in an action involving that question, there is no error in an instruction that the jury should not be controlled in their verdict by the opinion of the witnesses, but that they should apply their own knowledge and common sense in the light of their experience, consider the evidence fully and determine the amount of the damages. *Hamilton v. R. R.*, 193.

6. *General—Sufficiency.*—Instructions of law which are correct in their general application to the evidence are sufficient, in the absence of requests for specific instructions. *Willis v. Telegraph Co.*, 318.

7. *Master and Servant—Employer and Employee—Fellow-servants—Evidence.*—When there is evidence tending to show that an injury was sustained by plaintiff in the course of his employment, while acting under the direction of another employee having authority to direct

INSTRUCTIONS—*Continued.*

the place and manner of his work, an instruction that they were fellow-servants is properly refused. *Midgette v. Manufacturing Co.*, 333.

8. *Master and Servant—Employer and Employee—Duty of Employer—Contributory Negligence—Rule of the Prudent Man.*—While working among dangerous machinery in defendant's mill or plant, it is the duty of the employee to use the same degree of care required of a man of ordinary prudence under the circumstances. Upon the question of contributory negligence it is proper for the judge to charge the jury, in effect, that defendant's liability for a personal injury caused the employee in the course of his employment would depend upon whether the employee acted as a reasonably prudent man would have done to foresee the consequences of his act and avoid the injury. *Ibid.*

9. *Negligence—Sidewalks—Reasonable Time—Questions for Jury—Burden of Proof.*—The question of notice of dangerous places in the sidewalks, implied from a failure of the city to inspect its streets with reasonable frequency, is one for the jury, on the evidence; and a charge, in an action to recover damages for personal injury, that the burden was on the plaintiff to satisfy the jury by the greater weight of the evidence that the city, through its proper officers, knew or should have known of their existence within a reasonable time to make them safe and avoid the injury, is correct. *Revis v. Raleigh*, 348.

10. *Request—Charge.*—When the trial judge substantially gives, by a change of language, proper instructions requested, without weakening their force, there is no error. *Graves v. Jackson*, 383.

11. *Contracts—Warranty—False Representations—Test.*—In an action upon a warranty for deceit or misrepresentation it is correct for the judge to charge the jury that one of the decisive tests whether the language used was a mere expression of opinion or a warranty is whether it purported to state a fact upon which it may fairly be presumed the seller expected the buyer to rely, and upon which the buyer would, ordinarily, and did, rely. *Smith v. Alphin*, 425.

12. *Same—Competent for Some Purposes—Declarations Restricted—Procedure.*—Under Rule 27 (140 N. C., 662), when evidence competent for some purposes, but not for all, is admitted generally, unless appellant asks at the time of the admission that its purpose be restricted, or requests special instructions to that effect, the failure of the judge to so restrict it is not assignable for error. *Hill v. Bean*, 436.

13. *Adverse Possession—Adverse Acts—Procedure.*—When the trial judge has correctly charged the law on the question of adverse possession, arising in an action to recover land, it is not to defendant's prejudice for him to further charge, there being evidence tending to support it, that cutting timber on the *locus in quo* by a third person, in behalf of plaintiff, without the knowledge or acquiescence of defendant, would not affect defendant's claim or impair his right. It would be otherwise if such third person was recognized by defendant as acting for and in behalf of plaintiff. *Ibid.*

14. *Evidence—Wills—Mental Capacity—Burden of Proof.*—After placing the burden of proof on the caveator to establish the insanity of the

INSTRUCTIONS—*Continued.*

testator at the time of making the will, by the preponderance of the evidence, it is correct for the judge to charge, in effect, that if the jury find from the evidence that the testator signed the writing offered in evidence as and for his last will; that at the time he had mental capacity to know and understand what he was doing, to know his property and its disposition, his relationship to his property and the persons benefited, the nature and effect of his act, he had mental capacity sufficient to make a will. *In re Thorp*, 487.

15. *Master and Servant—Safe Appliances—Negligence—Defective Machinery.*—When the complaint alleged, and there was evidence tending to show, that plaintiff received personal injury by reason of a defective fastening of a door in a carding machine, where he was at work, and attributed to defendant's negligence, and there was also evidence, admitted without objection, that there was at the time no "stripping stick" on the machine: *Held*, no reversible error that the charge confined the inquiry to the condition of the door and its fastening, omitting all reference to the "stripping stick," when it appeared that this "stripping stick" was not intended or relied upon as a safety appliance or that it could be considered in any way as the proximate cause of the injury. *Blevins v. Cotton Mills*, 493.

16. *Special—Offered Too Late—Appeal and Error.*—It is necessary to offer a prayer for special instruction in apt time, and the refusal of the trial judge to give a correct instruction, when tendered too late, is not reviewable on appeal. *Nail v. Brown*, 533.

17. *Telegraphs — Messages—Negligence—Failure to Deliver—No Train—Evidence—Questions for Jury.*—When it appears that the delivery of a telegram announcing an extreme illness had been negligently delayed by the defendant telegraph company from 8 A. M. Sunday morning until between 9 and 10 A. M. Monday morning, that no train ran from that place on Sunday which plaintiff could have taken, and the defense was that defendant's negligence was not the proximate cause of the injury, for that the plaintiff could not have reached his destination before the funeral had the message been promptly delivered, testimony of plaintiff tending to show he could have driven a great distance through the country and have taken a train at another station in time was sufficient evidence to be submitted to the jury, under an instruction that such fact must be shown by the plaintiff to the satisfaction of the jury. *Pierson v. Telegraph Co.*, 559.

18. *Estates—Waste—Timber Lands—Comparative Value—Facts Assumed*—In an action for waste, for the alleged cutting of timber by the life tenant, to the permanent injury of the inheritance, there was evidence upon the one hand tending to show that the land had improved in value by the cutting, and upon the other that the price of timber was getting higher and that the land was of greater value if not cleared: *Held*, it was error for the trial judge to charge the jury that they could consider the increased value of timber lands as compared with cleared lands in concluding whether clearing any part of the land was necessary, as such an instruction assumed as a fact that clearing the land had diminished its value. which was a question for the jury, under the conflicting evidence. *Norris v. Laws*, 599.

INSTRUCTIONS—*Continued.*

19. *Estates—Waste—Timber Lands—Life Estate—Right of Life Tenant.*—The life tenant of lands has the right to make additional clearings thereof, if in the exercise of prudence and judgment it was required for his support and reasonable enjoyment of his estate; and an instruction is erroneous which makes this right to depend solely upon the value of timbered land as compared with the value of cleared land. *Ibid.*

20. *Deeds and Conveyances—Fraud—Grantor and Grantee—Consideration of Marriage—Proper Relationship—Evidence.*—When the evidence to set aside a certain deed for fraud and undue influence tends only to show that the grantor, a colored man of about seventy years of age, left the home of his son-in-law, where his grandchildren were, of whom he was fond, and for whose benefit the suit was brought after his death, to board with a colored woman of the same humble station of life, whom he desired to marry, to be taken care of, and in a relationship proper and lawful and to whom he made the deed, the subject of the controversy, it was not error in the trial judge to charge the jury that there was no evidence that the grantor was not of a sound and disposing mind or that he did not know what he was doing when he executed the deed. *Whitlock v. Dixon*, 616.

21. *Master and Servant—Rule of Employer—Negligence.*—In an action for damages arising from the killing of plaintiff's intestate, alleged to have been caused by a defect in the pilot to a moving switching engine, upon which intestate jumped while engaged in his duty of coupling cars, there was evidence that a rule of the company, made to protect the employees by prohibiting them from thus jumping on the pilot of a moving engine, had become in abeyance from habitual and continued violation; and uncontradicted evidence that plaintiff's intestate had been positively and frequently and, up to the time of the injury, forbidden to do such act: *Held*, the judge should have charged, as requested, that if the injury was caused by plaintiff's intestate thus jumping upon the moving engine, in violation of the personal orders given him, and they so found the facts to be, it was not through defendant's negligence he was injured, and this without reference to whether the rules of the company were in abeyance at the time. *Crawford v. R. R.*, 619.

22. *School District—County Board of Education—Special Tax—Proceedings—Regularity Presumed—Burden of Proof.*—In an action to impeach the validity of a local election for the levy of a special tax the presumption of law is in favor of the regularity of the conduct of the authorities, with the burden on the objecting party to show the contrary; and when the regular filing of the petition and the order for the election by the county commissioners, and their confirmation of the election, are shown, no irregularity appearing, it is not error for the judge to charge the jury that, if they believed the evidence, the plaintiffs had not made out a case. *Thrash v. Commissioners*, 693.

23. *Appeal and Error — Issues — Findings — Procedure.* — When the judge charges the jury, upon a certain issue, to find for defendant, if they believe the evidence, the better practice is for the plaintiff to except to the charge and appeal, than to do so upon exceptions to the evidence and the refusal of a motion for judgment upon the whole evidence. *Supply Co. v. Machin*, 738.

INSTRUCTIONS—*Continued.*

24. *Murder—Evidence—Manslaughter.*—When there is no evidence of manslaughter it is correct for the judge to charge the jury, upon competent evidence, to return a verdict of murder in the first or second degree, or not guilty, against the defendant, tried for the unlawful killing of deceased. *S. v. McKay*, 813.

25. *Evidence—Murder—Manslaughter—Harmless Error.*—When it appears that the jury has discarded the plea of self-defense, contended for by defendant on trial for murder, and it is clear, from the evidence and admissions, that defendant was guilty of murder in the second degree at least, the defendant can not be prejudiced by a charge to the jury by the trial judge, under which he was convicted of a lesser degree of homicide. *S. v. Quick*, 820.

26. *Extracts from Opinions—Harmless Error.*—While the wisdom of reading lengthy extracts from the opinions of the Supreme Court to the jury is doubted, as their reasoning is generally based upon the facts of each case, and the facts may differ, in this case there could be no error to defendant's prejudice, as the extracts were of a general character and the law charged with such clearness as not to be misunderstood. *Ibid.*

27. *Same—Evidence.*—When there is evidence tending to show that prisoner and deceased were knocking, that prisoner knocked deceased down and struck him several times after he got up, and that immediately thereafter deceased was discovered to have been cut in his right breast, a wound which caused his death, and there were declarations, competent as a part of the *res gestæ*, tending to show that deceased was then cut, it is sufficient to sustain a verdict of murder in the second degree and a charge of the court respecting it. *S. v. Hinson*, 827.

28. *Same.*—When the evidence is sufficient, it is not error, to defendant's prejudice, in the trial court to charge the jury that if they were satisfied beyond a reasonable doubt that the prisoner and his deceased brother were engaged in a mutual fight, on equal terms, without use of deadly weapons; that the father interfered, endeavored to separate them, and prisoner pressed the fight and cut his unarmed retreating brother, who had quit the combat at the entreaty of his father, with a knife, which resulted in death, the prisoner would be guilty of murder in the second degree. *Ibid.*

29. *False Pretense—Indictment—Proof—Variance.*—When the indictment charged that defendant induced an exchange of horses with another by means of false and fraudulent representations, the jury should be instructed, when the evidence is directed to a different defense and there is no evidence of such representations, that there was fatal variance between the allegation and proof. *S. v. Davis*, 851.

30. *False Pretense—"Calculated to Deceive"—Evidence.*—When the evidence, considered in the light most favorable to the State, on a trial for obtaining goods by false pretenses, tends only to show that the prosecutor has once been deceived by defendant in a horse trade, returned the horse and refused to take others because defendant refused to warrant any of his horses, and, finally, without examining him, ordered a certain other horse to be sent to his stable upon the guaran-

INSTRUCTIONS—*Continued.*

tee of defendant that the horse was sound and all right, and as soon as the horse was examined by the prosecutor the defect complained of was so patent as to be noticed at once, it is not sufficient as showing a false representation, "calculated to deceive," and it was error in the trial judge to refuse defendant's requested instructions, that if the jury believed the evidence they should render a verdict of not guilty. *Ibid.*

31. *Indictment — Unlawful Burning — Ownership.* — When an indictment charges the unlawful, etc., setting fire to a granary, the property of W., and an unlawful attempt to burn the barn, etc., of W., and the evidence tends to show that S. was the owner, but had rented it to W., who had stored corn therein, it is not error for the trial judge to charge, in effect, that if the jury so find the facts beyond a reasonable doubt, and likewise find beyond a reasonable doubt that defendant willfully set fire to and burned said house, with the corn of the prosecutor in it, it was their duty to return a verdict of guilty. *S. v. Sprouse*, 860.

INSURANCE.

1. *Evidence—Res Gestæ—Narrative—Declarations—Admissions.*—When a personal representative has no personal knowledge of the cause of the death of his intestate, in an action for wrongful death, his declarations concerning it, or failure to deny a statement relative thereto, are not competent as evidence or as an admission. *Hill v. Insurance Co.*, 1.

2. *Evidence—Proof of Death—Affidavits—Prima Facie Case—Hearsay—Burden of Proof.*—In an action to recover upon an accident policy of insurance which, by its terms, exempts the company from liability if the assured was killed while "entering or trying to enter or leave a moving" train, it being admitted that insured was killed from injuries received from being run over by a train, the proofs of death, in evidence, are *prima facie* true against the personal representative of the relevant matters stated in his own and the affidavits of others concerning the manner of the killing, whether he had seen the other affidavits or not, if they were authorized by him; and to impeach such matters as hearsay he must show error in the facts as stated, and not merely that they contained his own conclusion from hearsay evidence. *Ibid.*

3. *Policy—Conditional Delivery—Payment of Premiums.*—A contract of life insurance delivered upon condition that it would be effective only if the advance premium should have been paid in the lifetime and good health of the insured is not binding when these conditions have not been complied with by him. *Perry v. Insurance Co.*, 143.

4. *Same—Prima Facie Case—Rebuttal.*—While the production of a policy of life insurance on the trial is *prima facie* evidence of its validity as a binding contract, the presumption may be rebutted by proof that it was delivered upon condition that the advance premium must be paid in the lifetime and good health of the insured, which was not done. *Ibid.*

5. *Same.*—When the insured has received possession of a life insurance policy under agreement that it was to be effective, at his option, only

INSURANCE—*Continued.*

upon payment of the advance premium in his lifetime and good health, his administrator may not recover thereon when he did not notify the company of his election to take the policy and failed to perform the condition upon which the contract was to be binding. *Ibid.*

6. *Indemnity—Receipt—Future Indemnity.*—When insured, in a policy securing a fixed amount of indemnity on account of sickness, files proof of claim, as provided by the terms of the policy, to a fixed date and executes a receipt for such amount, the language will be restricted to the amount due, and not extended to cover a claim for indemnity for future sickness. The Court concurs with the construction put upon the receipt by the trial judge. *Moore v. Casualty Co.*, 153.

7. *Mutual or Insurance Orders—Beneficiary Changed.*—When not restricted by some provision of law, general or special, or by some rule of the company affecting the contract, a member of a mutual benefit society or fraternal order with an insurance feature as an incident of membership may designate the beneficiary and change him at will. The reference to fraternal orders in the Revisal, sec. 4794, does not amount to such restriction. *Pollock v. Household of Ruth*, 211.

8. *Beneficiary—Insurable Interest—Insured—Payment of Premiums.*—When the insured takes out a policy of insurance on his own life for another's benefit, pays or arranges for the payment of the premiums himself and on his own account and not as a mere "cloak or cover for a wagering transaction," it is not void by reason of the principle which obtains, that there must be an insurable interest. *Ibid.*

9. *Premiums Paid by Beneficiary—Beneficiary Changed—No Agreement—Proceeds of Policy.*—When the insured has lawfully exercised his right to change the beneficiary under his policy of insurance, the original beneficiary is not entitled to its proceeds at maturity by reason of having paid the premiums thereon for a period of time, unless the payments were made under an agreement or contract to that effect or under circumstances where a change of the beneficiary would constitute fraud. *Ibid.*

10. *Premiums—Agreement of Parties—Final Judgment.*—An agreement entered into between the parties to the suit, looking to an accounting between them in view of further adjustment required, should the plaintiff recover of defendant life insurance company certain premiums paid by him to it, can not have the force and effect of changing the character of the action, after final judgment for defendant, and open up questions which involve an inquiry into the scheme and plan of defendant's organization and an investigation as to the regulation and management of the internal affairs of the company. *Jones v. Life Association*, 377.

11. *Back Dues—Partial Payment—Terms of Reinstatement—Waiver.*—Evidence that an insurance company received a partial payment for insurance of back dues on a lapsed policy is no evidence in itself of waiver, when, under the terms of the policy, the payment of "all back dues" was necessary to reinstate the policy. *Melvin v. Insurance Co.*, 398.

12. *Same—Waiver.*—When, under the terms of a contract of insurance, a lapsed policy would only be reinstated sixty days from the payment of all back dues, and then on condition that the insured should be in

INSURANCE—*Continued.*

good health when the dues were paid and for five weeks thereafter, the fact that the company received a part payment of back dues raised no question of waiver for the jury, when it was shown that the insured died two days after making the partial payment. *Ibid.*

13. *Life Insurance—Applications—Untrue Statements—False Representations.*—Statements made in an application for life insurance, upon which the policy was issued, that the applicant had never had any disease of the kidneys or been under the care of a physician within two years preceding the date of the application, are material as an inducement for the insurance company to issue the policy, and when untrue will invalidate it. *Alexander v. Insurance Co.*, 536.

14. *Same—Judgment Upon Verdict.*—It was established by the verdict, in a suit upon a life-insurance policy, matured by the death of the insured, that certain material statements in the application upon which the policy was issued were untrue, though no false representations had been therein made by the applicant: *Held*, it appearing that the company had been imposed upon, from the very nature of the representations, it was immaterial whether the representations were fraudulent or not, and the defendant's motion for judgment upon the issues should have been granted. *Ibid.*

15. *Contracts—Policies—Sick Benefit—Notice to Company.*—Accepting a sick-benefit policy of insurance, with a provision that written notice shall be given the company by the insured, or his attending physician, of such disease as is therein insured against, within ten days after its contraction, binds the insured by the contract, the stipulation being to prevent imposition, and in the absence of such notice he can not recover thereon. *Williams v. Casualty Co.*, 597.

INTENT. See Uses and Trusts; Deeds and Conveyances; Embezzlement; Evidence.

INTERPLEADER.

Procedure—Final Judgment.—After the courts have passed upon the merits of a controversy, and an appeal had and determined by the Supreme Court, an interpleader by new parties should not be allowed, as an independent action should have been brought; but while this is an irregularity, the court below may proceed, under this decision, as the case is now constituted. *Harrell v. Hagan*, 242.

INTEREST. See Champerty; Jurisdiction.

INTERSTATE COMMERCE. See Constitutional Law.

1. *Carriers of Freight—Consignment Missent—Rebilled—Intrastate Shipment—Penalty.*—An interstate shipment of goods which was missent, bill of lading lost, and rebilled from one point in the State to another therein, is an intrastate shipment, and upon the carrier's violating the provisions of the Revisal, sec. 2633, the penalty therein accrues. *Hockfield v. R. R.*, 419.

2. *Carriers of Freight—Delay in Delivery—Burden.*—The penalty for failure of a common carrier to deliver freight, as prescribed by the Revisal, sec. 2633, shipped from beyond the State, after it has been unloaded from its cars and while in its depot, is constitutional and not a burden upon interstate commerce. *Ibid.*

INTOXICATING LIQUORS.

1. *Sale Prohibited—Town Ordinance—Nonintoxicants—Charter Powers.*—A town ordinance prohibiting the sale of a drink for which a license is required by the United States statutes is invalid when the power to enact such an ordinance is not conferred by its charter. *S. v. Dannenberg*, 799.

2. *Same.*—A town ordinance is void which prohibits the sale of nonintoxicating drinks when there is no power to pass such an ordinance given in its charter. *Ibid.*

3. *Sale Prohibited—Town Ordinance—General Statutes—Variances.*—Where the sale of intoxicating drinks is prohibited by legislative enactment, which makes it an indictable offense, a town ordinance covering the same subject-matter is void. *Ibid.*

4. *Town Ordinances—Sale Prohibited—General Law—License.*—Except in specially prohibited territory, the sale of spirituous, vinous or malt liquors was licensed in this State up to 1909 and the character of license required in incorporated towns specified, with penalties for violation: *Hence*, a town ordinance then prohibiting the sale of such drink, made without any charter provision authorizing it, is void. *Ibid.*

5. *Indictment, Insufficient—Certainty of Charge—Rights of Accused—Judgment.*—While the statutes are sufficiently full to cure mere formal defects in the procedure incident to criminal prosecution, the procedure, whether by indictment or warrant, either alone or in connection with the accompanying affidavit, must inform the accused of the charge against him with sufficient certainty to enable the court to know what offense has been committed and the punishment which may be imposed in case of conviction. *S. v. Lunsford*, 862.

6. *Same—License.*—In order to sustain a conviction for an unlawful sale of spirituous liquors in a town before prohibition went into effect there, whether in violation of a State law or municipal ordinance, and when to constitute the offense it was necessary that such sale be made without license, the procedure must allege a sale without a license; otherwise it would be fatally defective. *Ibid.*

7. *Sale—Indictment—Ordinance—Certainty of Charge.*—When a warrant and accompanying affidavit charge an unlawful sale of spirituous liquor in violation of some city ordinance, without setting forth or describing the ordinance or referring to it in a way sufficient to identify it, a conviction thereunder can not be sustained. *Ibid.*

8. *Same—State Law—Judgment.*—A conviction of selling spirituous liquor contrary to law can not be sustained under a warrant not specifying whether the charge was under a State law or municipal ordinance, when both are in force at the time; for the court could not determine for which offense to impose punishment, and no valid judgment could be pronounced. *Ibid.*

INTRASTATE SHIPMENTS. See Interstate Commerce.

IRREPARABLE INJURY. See Nuisance.

ISSUES. See Damages, 26.

1. *Sufficiency.*—The issues were sufficient to present all matters relevant and necessary to the determination of the rights of the parties, and

ISSUES—*Continued.*

it was not error in the trial judge to submit those tendered in this case. *Lance v. Rumbough*, 19.

2. *Evidence — Withdrawal—Effect—Nonsuit—Damages.*—Upon the withdrawal of an issue from the jury by the trial judge upon the question of whether the defendant was answerable in damages for refusing to permit the plaintiff to cut certain timber, on the ground that such were not recoverable under the contract sued on, the effect is that of an order of nonsuit upon the evidence, and it is erroneous when such damages may be recoverable and there is any competent evidence making for plaintiff's claim. *Gooding v. Moore*, 195.

3. *Tender—Evidence Excluded—Appeal and Error.*—It is not necessary on appeal for a party to have tendered an issue when all evidence relevant to it has been excluded by the trial judge. *Winslow v. Staton*, 265.

4. *Objections Cured by Verdict.*—An instruction, if erroneous, that certain matters arising under a certain issue submitted were the crucial ones, becomes immaterial when the jury has answered that issue in favor of the party objecting. *Smith v. Alphin*, 425.

5. *Power of Court—Discretion—Questions of Law—New Trial—Appeal and Error.*—Unless some question of law or legal inference is involved, the granting or refusing a new trial upon all or any one of the issues rests in the discretion of the lower court, and in the exercise of this discretion his action is not subject to review on appeal. (*Jarrett v. Trunk Co.*, 144 N. C., 302, cited, distinguished and approved.) *Billings v. Observer*, 540.

6. *Same—Punitive Damages.*—Where, on facts in evidence, the question of punitive damages is properly presented, the award of such damages and the amount thereof, under a proper charge, is for the jury, and can never be directed by the court as a matter of law; but the court has the same right in its discretion to set aside a verdict on an issue involving an award of punitive damages as on any other issue. *Ibid.*

7. *Power of Court—Discretion—New Trial—Damages—Appeal Premature.* When, in the proper exercise of his discretion, the trial judge has set aside an issue and verdict thereon as to the amount of damages the plaintiff has sustained in an action involving them, an appeal therefrom is premature and will be dismissed. *Ibid.*

8. *Same—Exceptions—Procedure.*—When the trial judge sets aside an issue and finding of the jury upon the question of damages alone, awards a new trial thereon, and leaves the other issues and answers fixing the defendant's liability, the proper procedure is by exception taken, and an appeal is premature until the case has been tried thereon in the lower court. *Ibid.*

9. *Form—Facts Assumed—Negligence.*—An issue which assumes the negligence of the defendant, one of the questions involved by the pleadings, is not in a good or usual form. *Crawford v. R. R.*, 619.

10. *Insufficient—Judgment—New Trial.*—In an action to recover damages for a "mixed nuisance," where the defendant answered, denying the existence of the alleged nuisance, and also denying that the plaintiff was the owner or lawful occupant of property adjacent thereto or

ISSUES—*Continued.*

within its influence, and two issues were submitted—(1) as to the existence of the nuisance, and (2) as to the existence of special damages—and the verdict on the first issue established the existence of the nuisance, and on the second issue negatived the existence of special damage, the plaintiff was not entitled to judgment on such a verdict, because no damage to him of any kind was shown to exist, and, so far as appears, he may not own any property adjacent to the nuisance or injuriously affected by it; nor should the defendant have judgment, for the reason that, in order to sustain his action for the alleged injury, plaintiff is not required to show special damage—that is, damage differing in kind and degree from others injuriously affected by the nuisance—but only that the nuisance exists and that he has suffered damage thereby. The two questions submitted, therefore, did not determine all the essential and issuable facts involved in the action, and the cause should be referred to another jury on issues adequate and fully determinative of the controversy. *McManus v. R. R.*, 655.

11. *Perjury—Matter at Issue—Burden of Proof.*—A charge which puts the burden on a defendant under indictment for perjury to show the truth of the matter at issue is error. *S. v. Cline*, 854.

JOINDER OF ACTION. See Procedure.

JOINDER OF HUSBAND. See Parties.

JOINDER OF PARTIES. See Jurisdiction.

JUDGMENTS. See Liens, 2, 3; Issues, 10.

1. *Nonsuit.*—A judgment as of nonsuit upon the evidence will not be granted in an action involving title to land, when the plaintiff has shown a forcible trespass upon the *locus in quo* by defendant after summons was issued, and that defendant immediately entered, assumed dominion and exercised acts of ownership. *Land Co. v. Lange*, 26.

2. *Tenants in Common—Tax Sales—Trusts and Trustees—Reference.*—When a tenant in common has wrongfully permitted the lands of the cotenancy to be sold for taxes to a stranger, and acquires his deed from him, it is proper for the court to order, at the suit of his cotenants, that his cotenants be let into possession, and a reference to state an account as to waste and betterments, disbursements for taxes and receipts of rents and profits within three years next before the commencement of the action. *Smith v. Smith*, 81.

3. *Estoppel—Vessels—Repairing—Negligence.*—When it has been adjudicated in a former action that the defendant in this action had performed his contract to repair the vessel of the present plaintiff, the plaintiff is estopped to claim damages arising from defective work alleged to have been done thereon. *Bell v. Machine Co.*, 111.

4. *Rights Reserved—Estoppel.*—When a judgment expressly reserves the rights of one of the parties litigant, without prejudice, it does not estop him from further asserting such rights. *Green v. Rodman*, 176.

5. *Deeds and Conveyances—Coverture—Liens.*—When title to a tract of land was in the husband, and one had a judgment for $200 against the husband for the purchase money, duly docketed, and, the wife

JUDGMENTS—*Continued.*

having instituted an action against the husband and the holder of the judgment to establish for herself and children an interest in the land, by reason of the fact that she had aided in the purchase of the same, a decree by consent was entered declaring the judgment to be in full force and effect to the amount of $100, and adjudging that the husband convey to the wife a certain interest in the property, this conveyance was subject to the judgment lien for the purchase money to the extent of $100, and on sale of the land to enforce collection of the judgment the purchaser acquired the title. *Windley v. Swain*, 356.

6. *Deeds and Conveyances—Jurisdiction—Coverture.*—A judgment of a court having jurisdiction of the cause and the parties against a married woman on her contract, made during coverture, will be set aside, on direct application, when it appears by the pleadings that she was under coverture at the time the contract was made, though the defense of coverture was not formally pleaded, but it is binding upon her while it stands as the formal and final deliverance of the court. *Ibid.*

7. *Deeds and Conveyances—Lands—Title—Purchase Price—Coverture—Judgment in Personam.*—Under the facts and circumstances of this case, the consent judgment recognizing the validity of a former judgment rendered against the husband for balance due upon purchase price for land to which the title was in him, and adjudging an interest in the land in the wife on account of payment made by her with her own funds, and decreeing a balance due thereon a lien upon the land, whether the second judgment was *in personam* against her, *Quære. Ibid.*

8. *Entire—Rights Under—Estoppel—Coverture.*—A *feme covert*, claiming an interest in lands under a decree of court, can not assert her claim thereto under one clause of an entire judgment and repudiate a lien upon it declared and established by another clause thereof. *Ibid.*

9. *Parties—Strangers.*—The owner of a mule is not bound by a judgment rendered in an action between a third person and one attempting to mortgage the mule to him, when he was not a party thereto. *Graves v. Jackson*, 383.

10. *Assignment — Summons—Service—Invalid Judgment—Notice—Limitations of Actions.*—When an assignee of a judgment has knowledge that service of summons had not been made on the judgment debtor, and that the judgment was invalid as to him, the statute of limitations begins to run in favor of the assignor of the judgment; and when suit is brought by the assignee, upon the implied warranty of the assignor, more than three years after he had such knowledge, the action will be barred. *Manufacturing Co. v. Fertilizer Co.*, 417.

11. *Railroads—Master and Servant—Torts—Scope of Employment—Verdict.*—In an action for damages from an injury to plaintiff, caused by being shot by the servant or employee of defendant railroad company, the jury found, upon issues submitted without objection, that defendant's servant shot and injured the plaintiff in a reckless and wanton manner; that he was not acting within the scope of his em-

JUDGMENTS—*Continued.*

ployment at the time, and that plaintiff was entitled to recover in a certain sum: *Held*, defendant was entitled to have his motion for judgment upon the verdict allowed. *Jones v. R. R.*, 473.

12. *Writs—Recordari—Purposes—New Trial—Erroneous Judgments.*—A writ of *recordari* may issue from the Superior Court to a justice's court for the purpose of obtaining a new trial of the case on its merits or reversing an erroneous or false judgment. *Marler Co. v. Clothing Co.*, 519.

13. *Attorney and Client—Excusable Neglect—Duty of Client.*—A person having a suit in court should at least give it such attention as a man of ordinary prudence would usually give to his important business; and when he and a firm of lawyers who represent him have been notified that his case will be called on a certain day of a term of court, and he did not attend and no one attended to represent him, and it does not appear that he had consulted with his lawyers or taken any other steps to protect his interests, excusable neglect to set aside a judgment rendered therein is not shown at a subsequent term by the fact that the member of the law firm having this matter especially in charge was too ill at the time to attend court. *White v. Rees*, 678.

14. *Collusion, What is Not—Validity of Trial—Pleas—Former Conviction.* A conviction before a justice of the peace is not objectionable upon the ground that it is collusive and not adversary, when it appears that the defendant informed the magistrate that he had had a fight and would have to suffer for it; that he requested him to set a time for trial convenient to his work; that affidavit was made, at the justice's instance, by a third party, several eye-witnesses were summoned and examined at the trial, and the assaulted party and his brothers, who were eye-witnesses, were notified of the time and did not appear, though waited for; and the validity of this trial will be upheld and the plea of former conviction of the same offense sustained. (*S. v. Moore*, 136 N. C., 581, cited and distinguished.) *S. v. Cale*, 805.

JURISDICTION. See Courts; Power of Courts; Equity; Attorneys.

1. *Consent of Parties—Judgment—Validity.*—A decree of confirmation of receiver's report of sale of an insolvent corporation's property may, by consent, be made out of term and in another county than the one in which the cause is pending. *Clark v. Machine Co.*, 372.

2. *Parties—Judgment—Defects—Confirmation.*—The legal effect of confirming a decree in term, when the court has jurisdiction over the parties and subject-matter, which was made out of term and in a different county from the one in which the cause is pending, is the same as if the decree had been again written and entered at the term. *Ibid.*

3. *Same.*—When, at a term of court having jurisdiction of the parties and subject-matter, a decree written and spread upon the minutes at a former term, and defective, is referred to and confirmed, it is given validity thereby. *Ibid.*

4. *Justices of the Peace—Nonresidents—Joinder of Parties—Summons—Service—Appeal and Error.*—When a plaintiff has sued a resident

JURISDICTION—*Continued.*

and a nonresident of a county in a justice's court, issued the summonses under the provisions of the Revisal, sec. 1447, and obtained judgment thereon, and the Superior Court has denied a petition of the nonresident defendant for a writ of *recordari*, based upon the jurisdictional ground of improperly joining the resident defendant, the judgment of the Superior Court will be upheld when it appears that the resident defendant was joined in good faith and not for the purpose of conferring jurisdiction. *Marler Co. v. Clothing Co.*, 519.

5. *Process, Defective—Warrant—Arrest—Special Officer, Appointment of —Waiver—Judgment Valid.*—Defective process, by reason of a warrant of arrest not being signed or the deputation of a special officer not being in writing (Revisal, secs. 3158, 935), may be waived by the appearance of the prisoner before a court having jurisdiction which decides the case; and whatever may be the rights of the defendant against the officers making the arrest, the validity of the judgment is not thereby affected. *S. v. Cale*, 805.

6. *Police Justice—City Limits—Evidence—Judgment—Motion in Arrest.*—When a police justice has jurisdiction of offenses only when committed within the corporate limits of a city, a motion in arrest of judgment will be denied when it does not appear that the offense was committed in the limits prescribed. *S. v. Brown*, 867.

JURORS.

1. *Incompetent — Employee—Challenge—Peremptory—Harmless Error.*—While an employee is an incompetent juror for the trial of a cause involving the rights or interest of the employer, it is not reversible error when a party follows his objection to such juror by a peremptory challenge and it does not appear that his rights were in any way prejudiced by the ruling of the court. (*S. v. Gooch*, 94 N. C., 897, cited and approved.) *Blevins v. Cotton Mills*, 493.

2. *Party in Interest—Challenge for Cause—Admission—Reversible Error.* In an action against a corporation one of its stockholders is incompetent as a juror, as he has a direct pecuniary interest in the result of the trial. When the objecting party has exhausted his peremptory challenges, the ruling of the trial court retaining such juror is reversible error. *Bank v. Oil Mills*, 683.

3. *Challenge for Cause—Party in Interest—Statutory Cause—Cumulative.* The causes of challenge specified in the Revisal are cumulative to that of the incompetency of a person sitting as a juror in a cause in the result of which he is pecuniarily interested. *Ibid.*

JURY.

Railroads—Condemnation Proceedings—Exceptions—Clerk—Appeal and Error—Trial.—In condemnation proceedings, questions of fact and law are first determined by the clerk, to whose rulings exceptions may be noted. No appeal lies until after the final report of the commissioners to appraise the value of the land has been made. Upon appeal the entire record is taken up and all of the exceptions are passed upon by the Superior Court. *Abernathy v. R. R.*, 97.

JUS ACCRESENDI. See Husband and Wife.

JUSTICE OF THE PEACE.

1. *Contract—Jurisdictional Amount—Interest on Excessive Principal.*—The Constitution (Article IV, section 27) and the Revisal (section 1419, subsection 1) limit the jurisdiction of justices of the peace in actions upon contract, to where the sum demanded does not exceed two hundred dollars, exclusive of interest; and a justice of the peace has no jurisdiction in an action to recover the balance of the principal due upon a note when it and the interest on the original amount thereof exceeded the sum named. *Riddle v. Milling Co.*, 689.

2. *Jurisdictional Amount—Application of Payment—Interest.*—A payment made upon a note with interest then due must be applied first to the extinguishment of the interest and the remainder only upon the principal; and the holder may not apply such payments to the reduction of the principal in order to reduce the amount to that cognizable by a justice of the peace, and maintain an action in his court for the principal, as thus reduced, and the accumulated interest in an amount exceeding two hundred dollars. *Ibid.*

3. *Jurisdictional Amount — Summons — Demand — Remitter—Action Dismissed.*—The jurisdiction of a justice of the peace in actions upon contract is determined by the amount of the recovery demanded in the summons; and when this amount exceeds the jurisdictional amount and there is no remitter for the excess, the action will be dismissed on appeal. *Ibid.*

"KICKING" CARS. See Master and Servant; Evidence.

"KITING" CHECKS. See Principal and Agent.

LANDLORD AND TENANT.

1. *Abandonment of Crop—Imprisonment—Constitutional Law—Indictment Quashed.*—The provisions of the Revisal, sec. 3366, making it a misdemeanor in certain counties, and punishable by imprisonment, for a tenant or cropper to procure advancements from his landlord for the purpose of making a crop on his land and then willfully abandoning the crop without good cause and before paying for the advances, contravene Article I, section 16, of our State Constitution, prohibiting imprisonment for debt, except in cases of fraud; and an indictment thereunder, without averment of fraud, will be quashed. *S. v. Williams*, 802.

2. *Indictment Insufficient—Abandonment of Crop—Indictment Quashed.*—An indictment under the provisions of the Revisal, sec. 3366, which does not charge that the abandonment of the crop by the tenant or cropper was "without cause" and "before paying for such advances," should be quashed as insufficient. *Ibid.*

LANDLORD'S LIEN. See Liens.

LARCENY.

1. *Conviction—Evidence Insufficient.*—Indictment for larceny of fish from a "fish slide." The evidence for the State tended to prove that the owner of a fish slide gave permission to defendant to fish the slide until repaired, and that such permission had not been revoked: *Held*, error to refuse an instruction that there was no evidence of felonious intent and that the jury should acquit. *S. v. Hathaway*, 798.

LARCENY—*Continued.*

2. *From Person — Punishment — Jurisdiction—Superior Court.*—Larceny from the person, regardless of the value of the property, is within the exclusive jurisdiction of the Superior Court. (Revisal, sec. 3506.) *S. v. Brown*, 867.

LAWS, PUBLIC.

1883, chapter 156. Books of settlements in the clerk's office are not evidence of contents of papers recorded upon issue *devisavit vel non*. *In re Thorp*, 487.

1907, chapter 74. The right of electric companies to eminent domain. *Power Co. v. Whitney Co.*, 31.

1907, chapter 407. Exceptions to report of road commissioners should be made at time of confirmation by county commissioners. *Sutphin v. Sparger*, 517.

1907, chapter 862. Seven years will bar the right of the heir or next of kin to require the probate of a will in solemn form which has been probated in common form. *In re Hedgepeth*, 245.

1907, chapter 941. The courts have no power to disbar an attorney solely because he has been "convicted" in another State or the United States. *In re Ebbs*, 44.

LEGISLATIVE JOURNALS. See Bond Issues.

LEGISLATIVE POWERS. See Constitutional Law; Statutes.

LESSOR AND LESSEE. See Husband and Wife.

1. *Assignee of Mortgage Note—Notice.*—One who has not been in possession of mortgaged premises and has advanced money to a lessee in possession, with an option of purchase, with which the lessee acquired the note secured by the prior outstanding mortgage by accepting the mortgage note as collateral for the loan at a time when nothing was due under the lease, does not become a mortgagee in possession and is not chargeable with notice of any claim against the lessee made by the mortgagor for rents and profits, and he is entitled to have the mortgage foreclosed and the proceeds applied thereunder to the satisfaction of his debt, without an accounting. *Green v. Rodman*, 176.

2. *Covenant Implied—Entry—Rights and Remedies.*—By entering into a contract of lease, to commence at a fixed future time, the lessor impliedly covenants with the lessee that the latter shall then have the premises open to his entry. *Sloan v. Hart*, 269.

LIENS.

1. *Contracts—Mortgages—Damages—Substitution.*—Plaintiff, under agreement with defendant, giving a lien for advancements, and to enable him to fulfill his contract to cut and deliver certain lumber, took up a mortgage on defendant's mules, etc. Plaintiff claimed that defendant had not fulfilled his contract, and seized the mules, etc., under the mortgage and the agreement. The jury found that defendant had broken his contract, to plaintiff's damage in a certain sum: *Held*, the amount awarded by the verdict was a lien on the mules, etc. *Walker v. Cooper*, 128.

LIENS—*Continued.*

2. *Executors and Administrators—Judgment—Statute of Limitations.*—There is no statutory provision which prevents the expiration of a judgment lien in case of death and administration similar to that of Revisal, sec. 367. *Matthews v. Peterson*, 134.

3. *Same—Deeds and Conveyances—Intestate's Deed—Fraud—Procedure.* When intestate has made a *bona fide* conveyance of land, subject to lien by judgment, his administrator can not sell it to make assets to pay the judgment after the expiration of the judgment lien. Questions of fraud in intestate's deed left undetermined in this case can be passed upon on a new trial awarded. Revisal, sec. 87 (5), applies to funds in the administrator's hands. *Ibid.*

4. *Contracts—Material Men—Suit by Contractor—Trusts and Trustees—Parties—Judgment.*—A contractor to build a house can not maintain an action against the owner to the use of those who furnished material for its construction without alleging and proving an express trust. *Perry v. Swanner*, 141.

5. *Contracts—Material Men—Suit by Contractor—Authority to Collect—Parties.*—The authority given a contractor to collect debts due the material men does not constitute him a trustee of an express trust, within the meaning of the statute, so as to authorize him to maintain a suit in his own name in their behalf as *cestuis que trust. Ibid.*

6. *Mortgagor and Mortgagee—Chattel Mortgage—Notice—Registration—Priorities.*—A recital in a registered chattel mortgage of a piano that there was no encumbrance except a certain amount now due "a piano company": *Held*, (1) is not sufficient notice to the mortgagee in the recorded mortgage; (2) if it were otherwise full and sufficient, it could not supply the absence of registration; (3) the words employed were to protect the mortgagor from any charge of improperly conveying mortgaged property and from liability incurred to the mortgagee on that account. *Piano Co. v. Spruill*, 168.

7. *Same.*—A holder of a registered mortgage has a prior lien to that of a holder whose mortgage was first made, but not recorded, notwithstanding a recital in the recorded mortgage that there was no encumbrance except "$115 now due a piano company," which subsequently proved to be due the holder of the unregistered mortgage. (The question of notice and liens by mortgage discussed by CLARK, C. J.) *Ibid.*

8. *Additional Mortgage Lien.*—Money subsequently paid by a mortgagee to acquire a tax title on the mortgaged lands becomes a lien on the land. (Revisal, sec. 2858.) *Cauley v. Sutton*, 327.

9. *Deeds and Conveyances—Coverture—Judgments.*—When title to a tract of land was in the husband, and one had a judgment for $200 against the husband for the purchase money, duly docketed, and, the wife having instituted an action against the husband and the holder of the judgment to establish for herself and children an interest in the land, by reason of the fact that she had aided in the purchase of the same, a decree by consent was entered declaring the judgment to be in full force and effect to the amount of $100, and adjudging that the husband convey to the wife a certain interest in the property, this conveyance was subject to the judgment lien for the purchase money

LIENS—*Continued.*

to the extent of $100, and on sale of the land to enforce collection of the judgment the purchaser acquired the title. *Windley v. Swain*, 356.

10. *Lessor and Lessee—Contracts to Convey—Sale of Land—Installments—Landlord's Lien—Foreclosure.*—When, under an agreement of lease of lands, containing also a contract to convey the same upon payment of a stipulated rental for a specified period, in full, the lessor treats the lease as continuing after default, he is entitled as lessor to the landlord's lien for rent; but when he puts an end to it by seeking to resume possession, the lessee can assert his equity under the contract to convey, and cause the land to be sold, to be applied to the balance due for the purchase money. *Hicks v. King*, 370.

11. *Public Schools—Property in Trustees—Statutory Lien—Materials Furnished—Absence of Legislative Intent.*—A public-school building vested in trustees for public-school purposes is not subject to a statutory lien for materials furnished for its construction, in the absence of a statute indicating a legislative purpose to the contrary. *Hardware Co. v. Graded School*, 680.

LIMITATION OF ACTIONS.

1. *Shortened by Statute—Reasonable Time.*—When a limitation of time for bringing an action is shortened by statute, there must be a reasonable time given, notwithstanding the statute, within which to bring the action. *Matthews v. Peterson*, 132.

2. *Same—Executors and Administrators.*—An administrator who seeks to subject land to the payment of a debt barred by the statute of limitations does not move for that purpose within a reasonable time after the statute has been passed (Revisal, sec. 367) shortening the limitation when he has waited for more than a year after the passage of the statute and for more than eight months after the prospective date fixed therein for it to become operative. (The provisions of Revisal, sec. 367, that letters of administration be granted within ten years after death of deceased, commended, discussed and applied to the facts of this case by CLARK, C. J.) *Ibid.*

3. *Executors and Administrators—Revisal, sec. 367, When Operative.*—An action which was not barred in the debtor's lifetime can be maintained against his personal representative to recover a debt, when the cause of action survives him, after the statute has run, if brought within one year after the issuance of the letters of administration; and when the letters of administration have been issued before the operative effect of Revisal, sec. 367, the provision that such should have been issued within ten years from the death of the intestate is inapplicable. *Matthews v. Peterson*, 134.

4. *Executors and Administrators—By Whom Pleaded—Heirs at Law—Lands.*—The heirs at law can successfully plead the statute of limitations (Revisal, sec. 367) against the administrator seeking to subject their lands to the payment of deceased's debts as fully as he can against a creditor. *Ibid.*

5. *Trespass—Cause of Action Accrued—"Continuing Trespass."*—"Continuing trespass," within the statute of limitations, requiring action

LIMITATION OF ACTIONS—*Continued.*

therefor to be brought within a specified period from the original trespass, refers to trespass by structures of a permanent nature, and not to separate and distinct acts of wrongfully cutting timber. *Sample v. Lumber Co.*, 161.

6. *Judgments, Assignment of—Summons—Service—Invalid Judgment—Notice.*—When an assignee of a judgment has knowledge that service of summons had not been made on the judgment debtor, and that the judgment was invalid as to him, the statute of limitations begins to run in favor of the assignor of the judgment; and when suit is brought by the assignee, upon the implied warranty of the assignor, more than three years after he had such knowledge, the action will be barred. *Manufacturing Co. v. Fertilizer Co.*, 417.

7. *Guardian and Ward—Death of Ward—Administration.*—An action brought by the administrator of a deceased lunatic against the guardian, whose last annual account, made in the ward's lifetime, showed unaccounted-for guardian funds in his hands, is barred when brought more than ten years after the death of the ward. *Lowder v. Hathcock*, 438.

8. *Guardian and Ward—Death of Ward—Time Extended—Interpretation of Statutes—Requisites—Proof.*—The one year given in which to bring an action after the death of the one entitled thereto, provided the statute had not run at the time of the death and the cause of action survives (Revisal, sec. 367), embraces any remaining and unexpired time within the statutory limitation at the time of his death; and when this section is relied on, in an action by the administrator of a deceased lunatic against the guardian, to prevent the running of the statute of limitations, it is necessary that the action should have been commenced within one year from the issuance of the letters of administration. *Ibid.*

9. *State's Land—Enterer—Time of Protest—Condition Annexed.*—The provision that protest must be filed to an entry of the State's vacant and unappropriated land within ten days, etc., is a condition annexed to the right of protest, and not a statute of limitation. *Garrison v. Williams*, 674.

LUNATICS. See Guardian and Ward.

MAINTENANCE. See Champerty.

MAJORITY VOTE. See Bond Issues.

MANDAMUS.

1. *Public Officer—Discretionary Powers.*—A writ of *mandamus* will not be granted to compel the performance of an act by a public officer involving the exercise of his judgment and discretion, to whom its performance is thus committed by our Constitution and statutes. *Board of Education v. Commissioners*, 116.

2. *Taxation—Public Schools—Board of Education—County Commissioners—Action Dismissed.*—The courts will not grant a *mandamus* to compel the county commissioners to accept and adopt as final the estimate of the amount required to maintain a four-months term of a public

MANDAMUS—*Continued.*

school made by the county board of education (Revisal, sec. 4112), and an action brought by the latter board for that purpose will be dismissed. *Ibid.*

MANSLAUGHTER. See Evidence.

MAP. See Evidence.

MARRIAGE. See Slaves; Husband and Wife.

MARRIED WOMEN. See Husband and Wife.

MEETINGS. See Corporations.

MENTAL ANGUISH. See Telegraph Companies.

MENTAL CAPACITY. See Wills; Deeds and Conveyances.

MORTGAGOR AND MORTGAGEE. See Chattel Mortgages; Corporations.

1. *Vendee in Possession—Sale to Third Person—Damages.*—When a vendee remains in possession of lands under a written contract of sale, and the vendor enters into an agreement to accept interest on the purchase price, the relation of mortgagor and mortgagee is established, and the latter may not sell the *locus in quo* in a summary manner to an innocent third person without incurring liability for damages, although he may have disabled himself from specifically performing his contract. *Freeman v. Bell*, 146.

2. *Corporations—Mortgage to Officers—Preëxisting Debt.*—A mortgage on all its property, made by a corporation to its president and two directors under authority of a resolution of the board of directors, without any vote of the stockholders, to secure them in their prior endorsements of the company's notes negotiated at a bank for the benefit of the corporation, is void; otherwise, had the mortgage been authorized at the time of the endorsements and receipt of the money to aid the corporation's business. *Edwards v. Supply Co.*, 171.

3. *Corporations — Seal—Officers—Evidence—Rebuttal.*—The presumption that a mortgage, with its seal affixed, was authorized by a corporation (Revisal, sec. 1130) is rebutted when it was executed to the company's officers to secure a preëxisting debt. *Ibid.*

4. *Corporations—Mortgage to Officers—Void as to Creditors.*—When a mortgage has been made on all its property by a corporation to its officers to secure a preëxisting debt, the company continuing in possession, it is evidence sufficient to sustain a judgment that it was void as to other creditors. *Ibid.*

5. *Mortgagee in Possession—Tenant—Accountability—Rents.*—By entry upon the mortgaged premises the mortgagee makes himself tenant of the land and becomes responsible to the mortgagor for the "highest fair rent" and for all such acts of omission for which an ordinary tenant would be liable. *Green v. Rodman*, 176.

6. *After-acquired Property—Terms Sufficient—Property Embraced.*—Subsequently acquired property will be construed as subject to the lien given by mortgage, when the mortgage so states in express terms, or it clearly appears from the language used that such was the manifest

MORTGAGOR AND MORTGAGEE—*Continued.*

intention of the parties; and the expression, "all the property, real, personal or mixed, wheresoever the same is situated, now owned (by the grantor) or shall be owned during the continuance of the liability hereinafter mentioned," is sufficient, when identified, to bring after-acquired property within the terms of the instrument. *Lumber Co. v. Lumber Co.*, 282.

7. *After-acquired Property—Equity—Validity of Mortgage.*—A mortgage of after-acquired property, whether real or personal, will be enforced by a court of equity, without reference to whether the mortgage is by a railroad corporation. *Ibid.*

8. *Equal Equities—Common Law.*—The after-acquired property clause of a mortgage will not be enforced against subsequent purchasers for value and without notice. *Ibid.*

9. *After-acquired Property — Registration — Notice — Equities.*—One who loans money to the mortgagor for the subsequent purchase of property falling within the terms and description of a prior registered mortgage of after-acquired property takes with notice of the mortgagee's equities therein, and no equity is raised to defeat the rights under the prior registered mortgage. *Ibid.*

10. *Same—Purchase—Money Loaned—Equities.*—When one purchases land with money advanced by another, without giving at the time a sufficient conveyance to create a lien thereon, and the lands so purchased come within the terms and description of his prior registered mortgage on after-acquired property, the lien of the mortgage attaches and is prior to that of a registered mortgage on the land subsequently given by the mortgagor to the one advancing the money. *Ibid.*

11. *Trusts and Trustees—Tax Deeds.*—A mortgagee holds the legal title to the mortgaged lands in trust for the mortgagor and himself, and by subsequently acquiring a tax deed to the mortgaged premises he cannot deprive the mortgagor of his equity of redemption. *Cauley v. Sutton*, 327.

12. *Mortgage Deed—One Action—Procedure.*—In an action brought for the cancellation of a mortgage and for general relief it is the better procedure to ascertain, when appropriate, the amount due upon the mortgage debt, so that redemption or foreclosure can be had and all controversy between the parties settled in the same action. The judgment in this action will be considered interlocutory, or final, according as the parties may determine to proceed. *Ibid.*

13. *Cancellation—Possession—Mortgage to Third Person.*—When the mortgagor of a mule for the purchase price fails to pay the mortgage debt, he and the mortgagee can make a valid agreement to cancel the mortgage upon the condition that the mule be surrendered; and after such has been done and the absolute and unconditional title restored to the mortgagee, who hires the mule to the former mortgagor, a mortgage of the mule then made by the latter to a third person will not be valid, and upon conflicting evidence an issue of fact is raised for the jury. *Graves v. Jackson*, 383.

MOTION. See Courts.

MOTION TO SET ASIDE JUDGMENT. See Power of Court.

MOTION TO STRIKE OUT ANSWER. See Pleadings.

MURDER.

1. *Evidence, Circumstantial—Sufficiency.*—When circumstantial evidence points clearly to the guilt of the one accused of murder, and is sufficiently strong to convince the jury, a conviction of murder will be sustained. *S. v. McKay*, 813.

2. *Same.*—Defendant's repeated threats to kill deceased, his following deceased, armed with brickbats, and when deceased was last seen, 8 or 9 o'clock at night, defendant was thus following him on a certain street, saying he would get him if he could come up with him, taken in connection with the testimony that the next day a brickbat with hair and blood stains on it was found on that street, and some five weeks thereafter deceased's body was found hidden in a hole, is sufficient evidence of the actual killing by premeditation to sustain a verdict of murder in the first degree. *Ibid.*

3. *Same—Bad Feeling—Malice Presumed—Deadly Weapon.*—Evidence that defendant had repeatedly threatened to kill deceased, and when last seen was following him with brickbats and threatening him, and that deceased was killed with some blunt instrument, a deadly weapon, is sufficient upon the questions of bad feeling and malice to sustain a verdict of murder in the first degree. *Ibid.*

4. *Evidence—Manslaughter—Instructions.*—When there is no evidence of manslaughter it is correct for the judge to charge the jury, upon competent evidence, to return a verdict of murder in the first or second degree, or not guilty, against the defendant, tried for the unlawful killing of deceased. *Ibid.*

5. *Verdict—Polling Jurors—Power of Court—Retirement—Proper Verdict.* Upon the returning of a verdict of guilty of murder in the first degree, "with mercy," it is not error for the judge in open court, upon polling the jurors and finding that only one recommended mercy, to direct the jury to retire and bring in a proper verdict. *Ibid.*

6. *Verdict—Guilty, with Recommendation for Mercy—Surplusage.*—The words used by the jury in their verdict to recommend mercy are merely surplusage and do not vitiate or affect the verdict. *Ibid.*

7. *Evidence—Manslaughter—Instructions—Harmless Error.*—When it appears that the jury has discarded the plea of self-defense, contended for by defendant on trial for murder, and it is clear, from the evidence and admissions, that defendant was guilty of murder in the second degree at least, the defendant can not be prejudiced by a charge to the jury by the trial judge, under which he was convicted of a lesser degree of homicide. *S. v. Quick*, 820.

8. *Self-defense—Excessive Force—Questions for Jury.*—Evidence that defendant was assaulted by deceased with a pistol, and, acting in the heat of blood, but not exclusively in his own defense, shot a greater number of times than was necessary for self-defense, and killed him, is sufficient to sustain a verdict of manslaughter, and the question of excessive force is one for the jury. *Ibid.*

9. *Declarations—Res Gestæ.*—When there is testimony tending to show that prisoner, on trial for murder, made violent and determined assault on deceased, his brother, who was backing from him, knocked

MURDER—*Continued.*

him down and struck him three or four times after he got up, his declarations, "I am cut," and those of the father endeavoring to separate them, "I told you to quit; you are going to get cut," are competent evidence, as a part of the *res gestæ*, that a cut with a knife which caused the death soon thereafter was inflicted by the defendant. *S. v. Hinson*, 827.

10. *Same—Evidence—Instructions.*—When there is evidence tending to show that prisoner and deceased were knocking, that prisoner knocked deceased down and struck him several times after he got up, and that immediately thereafter deceased was discovered to have been cut in his right breast, a wound which caused his death, and there were declarations, competent as a part of the *res gestæ*, tending to show that deceased was then cut, it is sufficient to sustain a verdict of murder in the second degree and a charge of the court respecting it. *Ibid.*

11. *Same.*—When the evidence is sufficient, it is not error, to defendant's prejudice, in the trial court to charge the jury that if they were satisfied beyond a reasonable doubt that the prisoner and his deceased brother were engaged in a mutual fight, on equal terms, without use of deadly weapons; that the father interfered, endeavored to separate them, and prisoner pressed the fight and cut his unarmed retreating brother, who had quit the combat at the entreaty of his father, with a knife, which resulted in death, the prisoner would be guilty of murder in the second degree. *Ibid.*

12. *Deadly Weapon — Malice — Presumption — Premeditation — Burden of Proof.*—While the law presumes malice from an admission of the killing of a human being with a deadly weapon, a pistol, the burden is on the State to fully satisfy the jury that it was deliberately and premeditatedly done to justify a conviction of murder in the first degree. *S. v. Roberson*, 837.

13. *Deliberation and Premeditation—Evidence Sufficient.*—Evidence of threats made by the prisoner, who was angry with deceased, that he would give deceased trouble unless he paid him certain wages due; that he went to deceased's place of business with a concealed weapon and shot three times with a pistol from the outside of the structure in which deceased was standing, killed him when unarmed, and ran away, is sufficient to sustain a verdict of murder in the first degree, upon the question of deliberation and premeditation. *Ibid.*

14. *Same—Intent.*—The evidence tended to show that deceased had employed the prisoner and another and refused to pay them; that prisoner was angry with deceased and used threats, and had a concealed weapon, a pistol, on his person, and went to deceased's place of business and shot him down, firing three times while he was standing on the outside and deceased, unarmed, on the inside of the structure. The prisoner's own evidence made out a clear case of self-defense, but the State's evidence tended to show deliberation and premeditation to kill in the event the money claimed was not paid: *Held*, evidence that the prisoner went on this occasion, in consequence of being told by the other person with whom prisoner had worked that he had received his money, threw no light upon the intent of the prisoner to kill in the event he should not be paid, and was properly excluded. *Ibid.*

MURDER—*Continued.*

15. *Deliberation and Premeditation—Time—Evidence.*—In order to convict of murder in the first degree, there must be evidence that the fact of the killing was weighed and considered, resulting in the fixed purpose to kill; but the length of time between forming the purpose and the act is not material. *Ibid.*

16. *Deliberation and Premeditation—Circumstantial Evidence.*—Upon the question of murder in the first degree, premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining as to whether there were such the jury may consider evidence of absence of provocation, absence of quarrel at the time of the killing, and threats, if there were such evidence. *Ibid.*

17. *Deadly Weapon—Malice Presumed—Instructions—Premeditation and Deliberation.*—Malice is a necessary element of murder in the first and second degrees, means killing without legal excuse, and is presumed from the killing with a deadly weapon; and an instruction to the jury accordingly does not intimate a presumption of murder in the first degree, when the charge further states that the defendant must have weighed and determined the matter and formed a fixed purpose to kill, and must have killed as a consequence of this fixed purpose. *Ibid.*

NECESSARY BUILDINGS. See Cities and Towns.

NECESSARY EXPENSE. See Bond Issues; Constitutional Law.

NEGLIGENCE. See Contributory Negligence.

1. *Railroads—Evidence—Headlight—Causal Connection—Proximate Cause.* In order to recover damages against a railroad company for the killing of plaintiff's intestate by a train negligently running at night without a headlight, there must be some evidence that the negligent act of defendant was the proximate cause of the death. *Strickland v. R. R.*, 4.

2. *Vessels—Repairing—Measure of Damages.*—The measure of damages for work defectively done on a vessel in caulking and otherwise repairing it is the necessary cost of having the defects repaired and interest on the value of the vessel, hire of employees, and the like, during the additional delay caused by the defective work. *Bell v. Machine Co.*, 111.

3. *Vessels—Repairing—Counterclaim.*—A counterclaim for damages on account of defective work in caulking and otherwise repairing a vessel may be set up in an action to recover for the work. *Ibid.*

4. *Vessels—Repairing—Damages Remote.*—A recovery of damages for destruction by fire of plaintiff's vessel, caused by a leak alleged to have been the result of defendant's defective work in caulking and repairing it, by admitting the water to four barrels of lime stored in it, is too remote, in the absence of notice that the vessel was to be used for carrying lime. *Ibid.*

5. *Evidence—Nonsuit—Marine Railway—Vessels.*—In an action for damages to plaintiff's marine railway, lawfully placed, by defendant's tugboat running into it at night, an instruction that plaintiff could not recover is properly refused when the evidence tended to show that the

NEGLIGENCE—*Continued.*

captain of the tugboat was fully aware of the location of the railway, could have seen it by the moonlight and lights in the harbor, and had deviated from a channel known to him and which would have afforded ample room for his boat to pass without injury. *Ives v. Gring*, 137.

6. *Causal Connection—Instructions.*—A prayer for instruction, based upon plaintiff's negligent act, which did not cause the injury complained of, is properly refused. *Ibid.*

7. *Light—Marine Railway—Proximate Cause—Contributory Negligence—Instructions—Vessels.*—In an action for damages to plaintiff's marine railway, caused by defendant's tugboat running into it at night, a charge was correct, when there was evidence to support it, that if plaintiff did not have a light on its marine railway, and such failure was the proximate cause of the injury, to find the plaintiff guilty of contributory negligence. *Ibid.*

8. *Marine Railway—Construction—Proximate Cause—Harbor Line—Questions for Jury—Vessels.*—In an action for damages to plaintiff's marine railway, caused by defendant's tugboat running into it at night, the question of proximate cause arising from the extension of the railway beyond the harbor line was one for the jury. *Ibid.*

9. *Master and Servant—Rule of the Prudent Man—Burden of Proof.*—In an action to recover damages for personal injury the burden of proof is on the plaintiff to show that the defendant failed to exercise the reasonable care that a prudent man would have used, under the circumstances, in the discharge of a duty owed to plaintiff, and that such failure was the proximate cause of the injury complained of. *Midgette v. Manufacturing Co.*, 333.

10. *Evidence—Defective Machinery—Subsequent Condition.*—In an action to recover damages alleged to have been received as the result of a defective machine, evidence is competent which tends to show the condition of the machine twenty-two months after the occurrence, and that there was no change therein in the meantime. (*Myers v. Lumber Co.*, 129 N. C., 252, relative to voluntary changes made by an employer after the injury, cited and distinguished.) *Blevins v. Cotton Mills*, 493.

11. *Master and Servant—Safe Appliances—Duty of Employer—Instructions.* It is the duty of employers to provide a reasonably safe place for their employees to do the work they are employed to do, and to supply them with machinery, implements and appliances which are suitable, and such as are approved for the purpose, in general use, etc.; and under conflicting evidence a charge to the jury is correct that if the injury complained of was by reason of a breach of such duty, to answer the issue as to defendant's negligence in the affirmative. *Ibid.*

12. *Safe Appliance—Selection—Rule of the "Prudent Man."*—It is culpable negligence, and not a mere error in judgment, which renders an employer liable to the employee injured by reason of the use of an appliance furnished with which to work; and when the employer has selected one of several methods which are approved and in general use, with that degree of care that a person of ordinary prudence would have used, no liability will attach by reason of such selection. *Nail v. Brown*, 533.

NEGLIGENCE—*Continued.*

13. *Proximate Cause—Burden of Proof.*—In order to recover upon an issue involving defendant's negligence, the plaintiff must show that the damages claimed arose as the proximate cause of the negligence as well as the negligence alleged. *Hauser v. Telegraph Co.*, 557.

14. *Same.*—When it is shown that, notwithstanding the negligent delay in the delivery of a telegram sued on, there were two routes the plaintiff could have taken and avoided the injury alleged, upon which an issue was made, whether by the exercise of ordinary diligence the plaintiff could have avoided the injury, the burden of proof is on plaintiff on the issue, he being required to show that defendant's negligence was the proximate cause of the alleged injury. *Ibid.*

15. *Master and Servant—Rule of Employer—Abeyance—Instructions.*—In an action for damages arising from the killing of plaintiff's intestate, alleged to have been caused by a defect in the pilot to a moving switching engine, upon which intestate jumped while engaged in his duty of coupling cars, there was evidence that a rule of the company, made to protect the employees by prohibiting them from thus jumping on the pilot of a moving engine, had become in abeyance from habitual and continued violation; and uncontradicted evidence that plaintiff's intestate had been positively and frequently and, up to the time of the injury, forbidden to do such act: *Held*, the judge should have charged, as requested, that if the injury was caused by plaintiff's intestate thus jumping upon the moving engine, in violation of the personal orders given him, and they so found the facts to be, it was not through defendant's negligence he was injured, and this without reference to whether the rules of the company were in abeyance at the time. *Crawford v. R. R.*, 619.

16. *Master and Servant—Disobedience of Servant—Proximate Cause.*—When an injury to the servant is occasioned by his disobedience to the orders of the master, such disobedience is the proximate cause of the injury and bars recovery. *Ibid.*

17. *Issues, Form of—Facts Assumed.*—An issue which assumes the negligence of the defendant, one of the questions involved by the pleadings, is not in a good or usual form. *Ibid.*

18. *Evidence — Blasting — Dynamite — Nonsuit—Questions for Jury.*—Evidence of negligence, in an action for damages caused by blasting, is sufficient to be submitted to the jury, and to refuse a motion as of nonsuit upon the evidence, which tends to show that plaintiff's house was injured by concussions and vibrations resulting from defendant's blasting, causing 200-pound rocks to be hurled a great distance across a river, and no attempt was made to confine or smother the blasts, in which over two hundred pounds of powder and twenty sticks of dynamite were used at a time. *Settle v. R. R.*, 643.

19. *Carriers of Passengers—Platform—Seeing Passengers Off—Custom—Invitation Implied—Ordinary Care—Trespass.*—When a wife who has accompanied her husband to the train (the latter a passenger, about to depart thereon) is injured while upon the platform of a stationary coach which her husband was to take, by being suddenly thrown to the ground by the negligent and violent contact of another car run into it, the railroad company is liable in damages; the custom in

NEGLIGENCE—*Continued.*

such instances being an implied invitation to the wife, imposing upon the company the duty to exercise ordinary care for her safety, and not merely that of not willfully injuring her, as in a case of trespass. *Fortune v. R. R.*, 695.

20. *Carriers of Passengers—Contributory Negligence—Seeing Passengers Off—Attaching Coach—Custom.*—When there was evidence that a railroad company customarily left an empty coach at a station and opened it for passengers ten minutes before the departure of the train to which it was to be attached, for the use of passengers to further points on the same road, and that the plaintiff and her husband (the latter having taken passage on this coach and the former seeing him off) attempted to enter the coach a few moments before train time, but found it locked, and while there, thus engaged, another car was suddenly run into this coach with great violence, throwing *feme* plaintiff to the ground and violently injuring her: *Held*, under the evidence of this case, not to constitute contributory negligence. *Ibid.*

21. *Carrier of Passengers—Contracts—Charterer of Trains—Verdict—Exemplary Damages—Immaterial as to Issue.*—In an action for exemplary damages for the alleged wanton and willful failure of defendant carrier to comply with its contract to furnish and run for plaintiff an excursion train, the verdict of the jury, under competent evidence and a properly framed issue, finding that the defendant was not guilty of any breach of duty thereunder, puts an end to the action and renders unnecessary the form of the issue submitted upon the question of defendant's wanton and willful acts. *McColman v. R. R.*, 707.

NEGOTIABLE INSTRUMENTS. See Tender; Notes.

NEWLY DISCOVERED EVIDENCE. See Judgments; Power of Court; Courts.

NONRESIDENTS. See Jurisdiction.

NOTES. See Tender; Mortgagor and Mortgagee.

1. *Guarantor—Surety—Liability Enlarged—Construction.*—The liability of a grantor or surety can not be enlarged by construction. *Shoe Co. v. Peacock*, 545.

2. *Same.*—P. and F. gave a note to R., reading, "We promise to pay to R. the sum of $1,000, to be applied to the payment of all claims for collection R. had against P., and to all such others as he may receive for that purpose, until the full amount is paid." It was stipulated therein that its purpose was to secure and guarantee said claims to the extent and in the sum specified. R., having claims to the amount of $1,800, received from P. the sum of $647, with instructions from him to prorate that sum on the amount of claims held: *Held*, under the terms of the guarantee, such would enlarge the liability of the guarantor, and the sum so received should have been applied to the reduction of the guaranty. *Ibid.*

3. *Joint Principals—Fraud as to One, Valid as to the Other.*—In an action upon a note, when it appears from its face that it was signed by two persons as joint principals, and the jury have found it was obtained by fraud as to one, but was valid as to the other, as to whom

NOTES—*Continued.*

there was no evidence that fraud had been used, a judgment upon the note in plaintiff's favor and against such other principal was properly rendered. *Booker v. Eller*, 555.

4. *Negotiable Instruments—Restrictive Endorsements—"For Deposit or Collection" — Intermediate Agents — Notice — Payment Arrested.*—A draft or bill transferred to a bank by restrictive endorsement, as "for deposit" or "for collection," is taken and held by the bank as agent for the endorser; and for the purpose indicated, and subject to the right of the endorser to arrest payment or divert the proceeds in the hands of any intermediate or subagent who has taken the paper for like purpose and affected by the restriction. *Bank v. Oil Mills*, 718.

5. *Negotiable Instruments—Restrictive Agreement—Dehors—Notice—Payment Arrested.*—A drawer of a draft, ordinarily standing towards subsequent parties as a general endorser, may, by appropriate words appearing on the paper, or by agreement *dehors* the instrument as to persons affected with notice, retain the right to arrest payment. *Ibid.*

6. *Negotiable Instruments—Restrictive Agreement—Principal and Agent—Holder in Due Course—Drawee and Endorsee—Liability.*—When an agent, for collection or deposit of a negotiable instrument (a draft in this case), has acted within the apparent scope of his authority and exceeds his power, so that a holder in due course acquires the paper for value and without notice of a restrictive agreement between the original parties, the drawer may be held responsible to such holder. *Ibid.*

7. *Negotiable Instrument—Holder in Due Course—Purchase—Consideration.*—A bank which acquires a draft by purchase from another bank for an existing indebtedness is a holder for value, such indebtedness constituting value by express provision of the statute (Revisal, sec. 2173). *Ibid.*

8. *Negotiable Instruments—Restrictive Agreement—Notice—Evidence—Questions for Jury.*—When a bank to which a draft, appearing on its face to be negotiable, is forwarded by another bank, purchases it for value, without notice of an agreement restricting its negotiation, the drawer may not stop payment of the draft as against the rights of the bank so holding the paper; and when there is conflicting evidence as to whether the purchasing bank acquired without notice, the question is properly submitted to the jury. *Ibid.*

NOTICE OF ARRIVAL. See Carriers of Freight; Principal and Agent.

NUISANCE. See Issues, 10.

1. *Negligence—Marine Railways.*—The captain of a tugboat is not authorized to run into a marine railway unnecessarily and negligently, though the railway was illegally placed and constructed and was a public nuisance. *Ives v. Gring*, 137.

2. *Public—Private Rights—Special Damages.*—The doctrine that a private citizen can only recover damages by reason of a public nuisance, by showing some injury peculiar to himself and differing in kind and degree from that suffered by the public generally, applies only to that class of nuisances which are, in strictness, public nuisances, without more—*i. e.*, an unlawful interference with a public right—a right

NUISANCES—*Continued.*

enjoyed by the general public, as in case of user of a public highway; but the doctrine does not obtain where the nuisance, though public from its extent and placing, by its very existence involves the invasion of the personal and private rights of individuals. *McManus v. R. R.*, 655.

3. *Same—Evidence.*—In nuisances of this second class, sometimes termed "mixed nuisances," an actionable wrong arises in favor of all persons who come within its effect and influence, and whose rights of person or property are injuriously affected; and it is not required to sustain such an action that the person injured should establish damage different in kind and degree from others in like circumstances, however numerous they may be. The right of action in such case is sustained by showing the existence of appreciable damage to the plaintiff, whether such damage be special or otherwise. *Ibid.*

4. *Same—Irreparable Injury.*—To sustain an action for a nuisance, public or private, which does not involve the physical invasion of the property of another, it is always required to be shown that some appreciable damage has been suffered or that some serious or irreparable injury is threatened; and unless this is made to appear, a right to nominal damages does not arise. *Ibid.*

5. *Ponds—Public Health—Arbitration—Consent Order—Pleadings—Agreement—Scope of Action Enlarged.*—In an action for injury from the maintenance of a pond, and to enjoin the rebuilding of a dam, the parties may, by a consent order of arbitration, voluntarily enlarge the scope of the controversy to include in the award a scheme of drainage proper to safeguard the public health; and when there is no evidence impeaching the award, a judgment rendered in accordance therewith is valid and binding. *Snell v. Chatham*, 729.

6. *Ponds — Public Health — Arbitration — Consent Order — Agreement — Drainage—Scope of Action Enlarged—Consideration.*—When, by consent of the parties to an action for damages and to enjoin the rebuilding of a dam alleged to be against the interest of the public health, an order of arbitration is made by the court, under which the complaining party agreed to execute such plan or scheme as the majority of the arbitrators should award as "proper to safeguard the public health in the premises," an exception to the power of the court to enforce an award requiring the drainage of an area of land which was in its natural condition can not be sustained, the agreement of arbitration being a sufficient consideration. *Ibid.*

OFFICE HOURS. See Telegraph Companies.

OFFICERS. See Mortgagor and Mortgagee; Corporations.

Mandamus—Public Officer—Discretionary Powers.—A writ of *mandamus* will not be granted to compel the performance of an act by a public officer involving the exercise of his judgment and discretion, to whom its performance is thus committed by our Constitution and statutes. *Board of Education v. Commissioners*, 116.

OPINION EVIDENCE. See Evidence.

OPTIONS. See Contracts.

ORDINANCES. See Cities and Towns; Intoxicating Liquors.

OWNERSHIP. See Damages; Indictment.

PAROL CONTRACTS. See Contracts.

PAROL EVIDENCE. See Contracts; Evidence.

PARTIES.

1. *Contracts—Material Men—Suit by Contractor—Authority to Collect.*—The authority given a contractor to collect debts due the material men does not constitute him a trustee of an express trust, within the meaning of the statute, so as to authorize him to maintain a suit in his own name in their behalf as *cestuis que trust*. *Perry v. Swanner*, 141.

2. *Contracts—Material Men—Contractor—Notice to Owner—Procedure.*—When the contractor furnishes the owner with statements of the amounts due the material men, according to Revisal, secs. 2021, 2022, 2023, a direct obligation of the owner to the material men may be created, upon which the latter may sue in their own names. *Ibid.*

3. *Principal and Agent—Guaranty of Payment—Party in Interest—Trusts and Trustees.*—An agent to sell goods on a *del credere* commission—that is, who guarantees payment on all sales and turns over to the principal, when called for, all notes, accounts, etc.—is not a real party in interest, and can not maintain, in his own right or by construction, as trustee of an express trust, an action to recover for the goods sold. *Chapman v. McLawhorn*, 166.

4. *Same—Evidence—Nonsuit.*—When it is shown that a plaintiff is not a real party in interest, his action to recover, brought in his own right, will be dismissed on a motion as of nonsuit upon the evidence. *Ibid.*

5. *Defect—Procedure—Demurrer.*—Objection for defect of parties must be made by demurrer or answer; otherwise it is waived. *Bridgers v. Staton*, 216.

6. *Judgments—Proceedings Void.*—When in special proceeding, under which certain timber interests were sold by a commissioner, it does appear upon the face of the record that certain persons of age were not made parties, or that they have not appeared as such in person or by attorney, or have waived their rights, they are not bound by a judgment rendered therein, and as to them the entire proceeding is void upon its face. *Moore v. Lumber Co.*, 261.

7. *Jurisdiction—Judgment—Defects—Confirmation.*—The legal effect of confirming a decree in term, when the court has jurisdiction over the parties and subject-matter, which was made out of term and in a different county from the one in which the cause is pending, is the same as if the decree had been again written and entered at the term. *Clark v. Machine Co.*, 372.

8. *Same.*—When, at a term of court having jurisdiction of the parties and subject-matter, a decree written and spread upon the minutes at a former term, and defective, is referred to and confirmed, it is given validity thereby. *Ibid.*

9. *Deeds and Conveyances—Cities and Towns—Streets—Title Acquired—Equitable Rights—Parties in Interest—Conveyance—Estoppel.*—When

PARTIES—*Continued.*

some of the plaintiffs claim as heirs at law of one who was an officer of defendant's grantor corporation, and, as such, a party to his conveyance, and the other plaintiffs are two corporations, the majority stock of which was held by one also an officer of defendant's grantor, no equitable rights can be asserted by them. *State Co. v. Finley*, 727.

PARTITION.

Report of Commissioners—Exceptions, When Taken—Amended Exceptions—Waiver of Time—Appeal and Error—Cause Remanded—Procedure. One of the parties to a partition proceeding appealed within the twenty days fixed by the statute, and had the clerk enter upon record his objection and exception to the report of the commissioners. After twenty days had expired, said party and his attorney appealed and filed amended exceptions, which were received and filed by the clerk. Some months later the motion to confirm was heard by the clerk, who declined to consider the exceptions: *Held*, to be error, as exception was duly entered within twenty days, and the clerk had power to allow amended exceptions after the expiration of twenty days, and the action of the clerk was in effect allowing such amendments. Cause remanded. *McDevitt v. McDevitt*, 644.

"PARTY AGGRIEVED." See Penalty Statutes.

PARTY IN INTEREST. See Jurors; Parties.

PASSENGERS. See Railroads.

PAYMENT. See Insurance; State's Lands.

PENALTY STATUTES.

1. *"Party Aggrieved"—Interest in Goods—Agent or Attorney.*—The penalty prescribed by the Revisal, sec. 2631, is for the person who is interested in having the goods shipped, and whose legal right in respect thereto is denied; and a person may not maintain an action for the penalty, as the party aggrieved, who has no right or interest in the goods tendered by him for shipment, except as agent or attorney for an attaching creditor and surety on his attachment bond, after the debt has been paid and the goods released. *McRackan v. R. R.*, 331.

2. *Carriers of Freight—Consignment Missent—Rebilled—Intrastate Shipment—Interstate Commerce.*—An interstate shipment of goods which was missent, bill of lading lost, and rebilled from one point in the State to another therein, is an intrastate shipment, and upon the carrier's violating the provisions of the Revisal, sec. 2633, the penalty therein accrues. *Hockfield v. R. R.*, 419.

3. *Carriers of Freight—Refusal to Accept Freight—Tender—Accumulated Penalties.*—When the common carrier permits a shipper to load a car with his goods and refuses to receive it for shipment or to issue a bill of lading, it is a refusal to receive the goods for shipment, under the Revisal, sec. 2631; and when the shipper leaves the goods in the car, with request for shipment, and by his conduct, understood by the railroad, makes his tender continuous, each day's delay is a separate refusal, within the meaning of the statute, to which the penalty will apply. *Garrison v. R. R.*, 575.

PENALTY STATUTES—*Continued.*

4. *Carriers of Freight—Refusal to Accept Freight—Defenses at Common Law—Insufficient Defense—Evidence Rejected.*—A railroad company may show, in defense to an action for refusal to receive goods for shipment when tendered (Revisal, sec. 2631), such matters as would excuse its failure to do so at common law, unavoidable conditions then existing, over which it had no control; when a carrier has refused a shipment of the nature and kind it was its business to receive, and which it could have received at the point tendered without working a hardship or oppression, it is no defense for it to show that, for the reason of the consignee's blocking the freight yards at destination, an embargo had been placed by the railroad for shipments tendered to be forwarded to him there. *Ibid.*

5. *Carriers of Goods—Refusal to Accept Freight—Constitutional Law—Interstate Commerce.*—A statute imposing a penalty on a common carrier for refusing to accept freight when tendered (Revisal, sec. 2631), and which gives it every available defense in court, is within the police powers of the State in enforcing the duties and liabilities of the carrier to its patrons, and is not void as an interference with interstate commerce, in the absence of inhibitive congressional legislation or orders of the Interstate Commerce Commission made in pursuance thereof. *Ibid.*

6. *Carriers of Goods—Refusal to Accept Freight—Due Process—Defense—Reasonable Penalty—Constitutional Law—Interstate Commerce.*—When, in an action for the recovery of the penalty prescribed by the Revisal, sec. 2631, for the failure of shipment when tendered, every legal right of the carrier is safeguarded, as trial by jury, regular procedure, defense and appeal, and the penalty is not unreasonable or oppressive, the act does not contravene the provisions of the Federal Constitution in relation to interstate commerce or the Fourteenth Amendment. *Ibid.*

7. *Railroads—Tender of Freight—Placing it on Platform—Evidence—Questions for Jury.*—The mere placing of freight on the freight platform of a railroad company and asking the agent when he could ship it does not amount to a tender of shipment, the refusal of which will make the company liable for the penalty prescribed by the statute (Revisal, sec. 2631); and when from the evidence it appears that the language used and the conduct of the parties left it in doubt as to whether a tender or daily tenders had been made and refused, it is for the jury to find whether any or how many of such tenders had been made. *Cotton Mills v. R. R.*, 608.

8. *Carriers of Freight—Refusal to Receive—Strikes—Unavoidable Conditions—Defense.*—In an action to recover the penalty for the failure of the carrier to accept a drove of cattle for shipment (Revisal, sec. 2631) it is a valid defense for the carrier to show that the shipments were refused by reason of strikes and other conditions over which it had no control, rendering it impossible for it to make the shipments, if accepted. *Hardware Co. v. R. R.*, 703.

9. *Same—Stock.*—The penalty against a carrier for refusing to receive (Revisal, sec. 2631) and that for failure to transport within a reasonable time (Revisal, sec. 2632) must be construed together to ascertain

PENALTY STATUTES—*Continued.*

the entire burden placed on the carrier; and it is a valid defense, in an action for the penalty for refusing to receive shipments of cattle, for the carrier to show that, owing to strikes and other conditions over which it had no control, it could not have transported them, if received; and the carrier, under such conditions, is not compelled to keep and feed a shipment of cattle for an indefinite time. *Ibid.*

10. *Carriers of Freight—Legal Excuse—Defense.*—A carrier may show, in defense to an action brought for the penalty under the Revisal, sec. 2631, for refusing to accept a shipment tendered, any legal defense or excuse it may have against the shipper for failure to discharge its common-law duty. *Ibid.*

11. *Railroads—Carriers of Goods—Refusal to Accept Freight—Constitutional Law.*—Section 2631 of the Revisal of 1905, imposing a penalty on a railroad for refusing to accept freight tendered for shipment, is a valid regulation in direct and reasonable enforcement of the duties incumbent on defendant company as a common carrier, and is not in conflict with the Fourteenth Amendment of the Constitution of the United States. *Reid v. R. R.*, 753.

12. *Same—Interstate Commerce.*—Nor is said section repugnant to or in contravention of Article I, section 8, of the Constitution of the United States conferring upon Congress the power to regulate commerce between the States. The penalty is in direct enforcement of the duties incumbent on defendant company as a common carrier, is imposed for a local default, is not a burden on interstate commerce, but in aid thereof, and, in the absence of inhibitive congressional legislation or of interfering action by the Interstate Commerce Commission, the matter is a rightful subject of State legislation. *Ibid.*

PETITION TO REHEAR. See Courts.

PHRASES. See Estates.

PLATFORMS. See Penalty Statutes; Negligence.

PLATS. See Evidence.

PLEADINGS.

1. *Evidence—Ejectment.*—When the defendant, in an action involving the title to land, denied a wrongful and unlawful withholding of the possession of the *locus in quo*, and the testimony shows that plaintiff has title, and that defendant, after the summons was issued, stopped the work of plaintiff's employees by the use of a gun, claimed the land and hauled dirt thereon to cover piers which the plaintiff was having constructed, there is evidence sufficient to take the question of title to the jury. *Land Co. v. Lange*, 26.

2. *Ejectment—Title—No Adverse Claim—Allegation of Possession.*—Since the statute of 1893 (Revisal, sec. 1889) it is not necessary to allege that defendant was in possession, in an action involving title to land. *Ibid.*

3. *Demurrer—Allegations Taken as True.*—When an action is dismissed upon demurrer to a complaint the statements made therein will be accepted as true and interpreted in the light most favorable to the plaintiff. *Smith v. Hartsell*, 71.

PLEADINGS—*Continued.*

4. *Demurrer—Fraud—Questions for Jury.*—Upon reversing on appeal the judgment of the trial judge sustaining a demurrer to a complaint, questions of fraud and undue influence alleged in the answer are for the consideration of the jury. *Ibid.*

5. *Lessor and Lessee—Breach of Covenant—Proof.*—In order to recover special damages arising out of a breach of contract, they must be both pleaded and proved. *Sloan v. Hart*, 269.

6. *Telegraph—Allegation of Ownership.*—An allegation in the complaint that a telegram was delivered to defendant telegraph company at B. for transmission to R., which defendant undertook and agreed to transmit accordingly, is a distinct averment that defendant owned and operated the line from B. to N., an intermediate station, through which it was forwarded to its destination. *Willis v. Telegraph Co.*, 318.

7. *Telegraph—Evidence—Averments—No Denial—Amendments—Questions for Jury.*—A complaint and answer is some evidence that a telegraph company owned a telegraph line over which a message was forwarded by it, when the former contains a distinct allegation of ownership, which the latter does not deny; and the fact that subsequently an amendment to the answer was allowed and made does not render the evidence incompetent, but affects only its weight or sufficiency to prove the fact. *Ibid.*

8. *Admissions—Evidence.*—When paragraphs of the answer, put in evidence by plaintiff are complete in themselves, it is not error to exclude other paragraphs thereof, offered in evidence by defendant, containing distinct averments in its own interest. *Hockfield v. R. R.*, 419.

9. *Amendments—Conditions—Discretion of Court—Appeal and Error.*—The trial judge may allow a plaintiff to amend his complaint and the defendant to amend its answer, restricting the latter from pleading the statute of limitations. His action is discretionary and not reviewable. *Ibid.*

10. *Power of Court—Amendments—Discretionary Power—Findings—Record.*—When it appears that a cause was entered as continued by consent for the term by the judge at a former term, in the absence of counsel in the case, by mistake of the judge, the court thereafter, at the same term, had the power and discretion to allow defendant to amend his answer and set up a further defense arising under the contract sued on. The discretionary power of the court to allow amendments to pleadings in term, when matters are *in fieri*, discussed by WALKER, J. *Cook v. Telegraph Co.*, 428.

11. *Demurrer, Frivolous—Discretionary Powers—Answer.*—It is in the discretion of the trial judge to permit defendant to answer after overruling a demurrer to the complaint, though the demurrer were frivolous. *Parker v. R. R.*, 433.

12. *Answer—Demurrer.*—When a complaint does not state a cause of action, the defect is not waived by answering, and defendant may demur *ore tenus*, and the Supreme Court may take notice of the insufficiency, *ex mero motu*. *Garrison v. Williams*, 674.

PLEADINGS—*Continued.*

13. *State's Land — Enterer — Protest — Irregularities—Answer—Waiver—Demurrer.*—When it is alleged by an enterer of the State's vacant and unappropriated lands, in his complaint, that defendant protested his entries before the time limited for him to take out his grant, and thus prevented him from doing so, pending the proceedings to determine the validity of the protest, the failure to allege that the notice of entry was seasonably given would be but a defective statement of his cause of action, which an answer would waive, and as against which a subsequent demurrer would be bad, it being equivalent to a motion to dismiss after answer. *Ibid.*

14. *Corporations—Shares of Stock—Demand—Voting Trust—Lawful Intent—Answer Insufficient.*—An answer of an illegal pool for the voting of corporation stock to a demand for possession of his stock by a purchaser of the stock so held, that it would not vote such stock illegally, etc., is insufficient. *Sheppard v. Power Co.*, 776.

POLLING JURORS. See Jurors.

POSSESSION. See Deeds and Conveyances; Damages; Contracts; Ejectment; Tenants in Common; Pleadings; Estates; Mortgagor and Mortgagee.

PRESUMPTION. See Cities and Towns; Process; Murder; Procedure; Evidence.

PRIMA FACIE CASE. See Evidence; Insurance.

PRINCIPAL AND AGENT.

1. *Corporations—Superintendent.*—An agent authorized to collect for his principal has no implied authority, in his endeavor to collect, to arrest the debtor upon warrant, or put such restraint upon his wife as will amount to an arrest in law; and the principal is not responsible for such unauthorized or unratified acts. This principle applies to a corporation, as principal, acting through its superintendents as agents. *Powell v. Fiber Co.*, 12.

2. *General Agent—Secret Limitation—Apparent Authority.*—One dealing with an agent within the apparent scope of his authority to bind his principal is not bound by any secret limitation on the agent's authority not made known to him; and a contract for the cutting of timber, made by a general agent with authority to buy timber interests with plants for the purpose of cutting it, and who had general management of his principal's business at the location in question at the time, is made within the apparent scope of the agent's authority. *Gooding v. Moore*, 195.

3. *Undisclosed Principal—Contracts—Evidence.*—In defense to an action brought by the principal to recover an amount credited to an agent's individual debt out of the proceeds of sale of his principal's goods, evidence is competent tending to show, with burden of proof on defendant alleging it, that at the time of the transaction the defendant understood that the one acting as agent was selling his own goods and in his own right, and that he had a place of business, with his own sign out, and that the fact of agency was unknown to him. (*Hoff-*

PRINCIPAL AND AGENT—*Continued.*

man v. Kramer, 123 N. C., 570, and that line of cases upon the principles of law applicable to brokerage, cited, discussed and distinguished by BROWN, J.) *Winslow v. Staton*, 264.

4. *Same.*—When a principal sues upon the contract for the price of goods sold by his agent to a third party the principal's rights are subject to the equities of the third party, when he had no knowledge at the time that he was dealing with an agent or one in a fiduciary capacity, or of such facts and circumstances as would put him on inquiry. *Ibid.*

5. *Principal and Agent—Declarations—Evidence of Agency.*—A witness may testify that, as agent for another, he had charge of lands, paid the taxes thereon and collected the rents therefor, as such is direct testimony tending to establish the agency. *Hill v. Bean*, 436.

PRINCIPAL AND SURETY. See Notes.

PRINCIPAL, JOINT. See Notes.

PRIORITY. See Liens.

PRIVY EXAMINATION. See Husband and Wife.

PROBATE. See Deeds and Conveyances, 22; Wills, 3, 4, 5, 6, 7, 8, 9.

PROCEDURE. See Process; Appeal and Error, 22.

1. *Process, Defective—Warrant—Arrest—Special Officer, Appointment of—Waiver—Jurisdiction—Judgment Valid.*—Defective process, by reason of a warrant of arrest not being signed or the deputation of a special officer not being in writing (Revisal, secs. 3158, 935), may be waived by the appearance of the prisoner before a court having jurisdiction which decides the case; and whatever may be the rights of the defendant against the officers making the arrest, the validity of the judgment is not thereby affected. *S. v. Cale*, 805.

2. *Criminal—Demurrer to Evidence.*—Demurring to the evidence is now regulated by statute, is peculiar to civil actions, has no place in criminal proceedings, and tends only to delay. *S. v. Moody*, 847.

3. *Criminal—Demurrer to Evidence—"Demurrer" Defined—State's Appeal.* In determining the right of the State to appeal in a criminal action upon demurrer, the word "demurrer" must be taken in its usual and ordinary significance as relating to a pleading and as understood and defined in criminal proceedings. The State may not appeal when the trial judge sustains defendant's demurrer to the State's evidence. *Ibid.*

4. *Same—Questions for Jury—Verdict Directing.*—The jury must pass upon the weight of the State's evidence in criminal cases. Instead of demurring to the evidence, the proper practice is for the defendant to move the court to direct the jury that the evidence is insufficient to convict, and to enter a verdict of not guilty. If the trial judge so directs the verdict, the State can not appeal. *Ibid.*

PROCEDURE—*Continued.*

5. *Criminal—Demurrer to Evidence Sustained—Mistrial.*—In this criminal action the trial judge sustained the prisoner's demurrer to the State's evidence, the State appealed, and no verdict was rendered: *Held*, the case is still pending, and the solicitor should proceed to try the defendant again under the indictment, as upon a mistrial. *Ibid.*

6. *Cities and Towns—Police Courts—Excessive Sentence—Appeal and Error—New Trial—Remand—Resentence.*—A defendant is not entitled to a new trial upon appeal by reason of a sentence of punishment imposed by a police justice of a city greater than that authorized for the offense committed. The procedure would be to remand the case for resentence in conformity with law. *S. v. Black*, 866.

PROCEEDINGS, CONDEMNATION. See Railroads, 4, 5, 6, 7, 8.

PROCESS. See Procedure. Constitutional Law, 10.

1. *Notice, Service of—Superior Court—Constable.*—The service of a notice in an action in the Superior Court by a town constable is insufficient. *Brown v. Myers*, 441.

2. *Justices of the Peace—Jurisdiction—Nonresidents—Joinder of Parties—Summons—Service—Appeal and Error.*—When a plaintiff has sued a resident and a nonresident of a county in a justice's court, issued the summonses under the provisions of the Revisal, sec. 1447, and obtained judgment thereon, and the Superior Court has denied a petition of the nonresident defendant for a writ of *recordari*, based upon the jurisdictional ground of improperly joining the resident defendant, the judgment of the Superior Court will be upheld when it appears that the resident defendant was joined in good faith and not for the purpose of conferring jurisdiction. *Marler Co. v. Clothing Co.*, 519.

3. *Summons—Endorsements—Presumptions.*—The return upon a summons by the proper officer that he had served it is *prima facie* sufficient, as it implies that it has been served as the statute directs; and the service will be upheld as valid, in the absence of evidence to the contrary. *Ibid.*

4. *Justices of the Peace—Jurisdictional Amount—Summons—Demand—Remitter—Action Dismissed.*—The jurisdiction of a justice of the peace in actions upon contract is determined by the amount of the recovery demanded in the summons; and when this amount exceeds the jurisdictional amount and there is no remitter for the excess, the action will be dismissed on appeal. *Riddle v. Milling Co.*, 689.

5. *Defect—Warrant—Arrest—Special Officer, Appointment of—Waiver—Jurisdiction—Judgment Valid.*—Defective process, by reason of a warrant of arrest not being signed or the deputation of a special officer not being in writing (Revisal, secs. 3158, 935), may be waived by the appearance of the prisoner before a court having jurisdiction which decides the case; and whatever may be the rights of the defendant against the officers making the arrest, the validity of the judgment is not thereby affected. *S. v. Calc*, 805.

PUBLIC OFFICERS. See Officers; Mandamus.

PUBLIC POLICY. See Statutes; Champerty; Wills; Corporations.

PUBLIC SCHOOLS. See Taxation.

Property in Trustees—Statutory Lien—Materials Furnished—Absence of Legislative Intent.—A public-school building vested in trustees for public-school purposes is not subject to a statutory lien for materials furnished for its construction, in the absence of a statute indicating a legislative purpose to the contrary. *Hardware Co. v. Graded Schools*, 680.

PUBLIC UTILITIES. See Statutes.

QUORUM. See Corporations, 12, 15.

RAILROADS. See Carriers of Freight; Master and Servant; Evidence.

1. *Condemnation, Right of—Trespass.*—A railroad company having the right of eminent domain, entering upon and occupying lands for building its track, is not a trespasser. *Abernathy v. R. R.*, 97.

2. *Condemnation Proceedings—Procedure—Power of Courts.*—The courts have authority under the statute to make rules of procedure in condemnation proceedings, when not expressly provided, "so that the practice shall in such cases conform as near as may be to the ordinary practice in the court." (Revisal, sec. 2593.) *Ibid.*

3. *Condemnation Proceedings—Exceptions—Clerk—Appeal and Error—Trial by Jury.*—In condemnation proceedings, questions of fact and law are first determined by the clerk, to whose rulings exceptions may be noted. No appeal lies until after the final report of the commissioners to appraise the value of the land has been made. Upon appeal the entire record is taken up and all of the exceptions are passed upon by the Superior Court. *Ibid.*

4. *Condemnation Proceedings—Compensation—Title.*—A plaintiff, asking compensation from a railroad company for possessing and occupying his land for railroad purposes without first having exercised its right thereto in condemnation proceedings, must show title in himself; he may not force the corporation to take and pay for a doubtful title. *Ibid.*

5. *Same—Evidence.*—In the trial of a special proceeding by the owner for compensation for land taken by the company it is competent for it to introduce evidence tending to show title in a stranger to the suit, without connecting itself therewith. *Ibid.*

6. *Condemnation Proceedings—Title in Stranger—Evidence.*—It is competent, in the trial of a suit brought for compensation by one claiming title to land used by a railroad company for railroad purposes, for the company to introduce evidence tending to show a prior unregistered deed from plaintiff's grantor to a third person; the loss and manner of loss of the deed; facts showing that, at the time he acquired the quitclaim deed under which he claimed, plaintiff knew that his grantor had no title and bought at a grossly inadequate price. *Ibid.*

7. *Condemnation Proceedings — Compensation — Damages — Misjoinder — Procedure.*—Proceedings for compensation for the use and occupation

RAILROADS—*Continued.*

of plaintiff's land by defendant railroad company as a right of way for railroad purposes, and a cause of action for damages arising in trespass, are a misjoinder. The petition will not be dismissed, but the cause of action for damages will be stricken out. *Ibid.*

8. *Condemnation Proceedings—Compensation—Measure of Damages—Evidence.*—In proceedings for compensation for the use and occupation of a right of way over his lands by defendant railroad company for railroad purposes, the measure of the recovery is the difference between the fair market value of the land before the right of way was taken and its impaired value thereby. The evidence should be restricted to that question. *Ibid.*

9. *Right of Way—Covenant—Fee.*—A covenant to grant a right of way does not entitle the covenantee to demand a conveyance of the land. There is nothing in the contract in this case showing any intention to convey the land over which the right of way was located. *Mills v. Lumber Co.*, 114.

10. *Construction—Improper Drainage—Independent Contractor—Negligence.* When one who has contracted to construct a roadbed and track for a railroad company according to plans furnished by the civil engineer of the company enters upon the lands of the owner for that purpose, both he and the railroad company are responsible in damages for his negligent failure to use reasonable efforts to protect the land and crops growing thereon from injury caused by the construction. *Willis v. White*, 199.

11. *Construction—Improper Drainage—Negligence—Independent Contractor—Completion of Work—Liability.*—An independent contractor who has constructed a roadbed and track for a railroad company on its right of way in accordance with the plans and specifications of the civil engineer of the company is not liable to the owner of the land for damages from improper drainage, caused by an error of the engineer in fixing the size of the drainpipe, which accrued after the completion of the work and delivery to the railroad company. *Ibid.*

12. *Same—Permanent Damages.*—Permanent damages to land can not be recovered of an independent contractor who has constructed a roadbed and road for a railroad company on its easement over the lands of another according to the plans and specifications of the company's civil engineer, his authority ceasing thereon when the work is turned over to and accepted by the company. *Ibid.*

13. *Married Women—Damages to Land—Joinder of Husband—Parties.*—A married woman may maintain an action without joining her husband to recover damages to her land caused by the improper construction of a roadbed and road on a railroad company's right of way thereon. *Ibid.*

14. *Master and Servant—Warnings—Negligence—Proximate Cause.*—A railroad company is responsible in damages for the failure of its engineer to give forewarning of a sudden, unexpected and unusual movement of its train, consisting of an engine and flat cars equipped for ditching, when the proximate cause of an injury to an employee thereon while engaged in the course of his duties. *Redman v. R. R.*, 400.

RAILROADS—*Continued.*

15. *Master and Servant—Signals—Warnings—Negligence.*—When an employee on a ditching train is injured while sitting on a flat car, where he should have been, in the discharge of his duties, and it is shown that, while actually engaged, his position should be standing, but, at the time, from the nature of his employment, it was not then required, the mere fact of his sitting at the time of the injury, when he was in position to promptly discharge his duty when called upon, as required, does not relieve the defendant of the duty to signal or give warning of an unusual and unexpected jolting of the train, caused by the sudden moving of the engine. *Ibid.*

16. *Pleadings—Allegations of Lease—Demurrer.*—When it is substantially alleged in the complaint, in a suit for damages against a railroad company, that plaintiff's intestate was killed while in the course of his employment by defendant's lessee company operating the railroad of the defendant as its lessee, the complaint is not demurrable on the ground that it did not sufficiently appear that the lease was in force at the time of the injury. *Parker v. R. R.*, 433.

17. *Negligent Killing—Lessor—Damages.*—Defendant lessor railroad company is liable for the negligent killing of plaintiff's intestate by its lessee railroad company (*Logan v. R. R.*, 116 N. C., 940, and *Brown v. R. R.*, 131 N. C., 455, cited and approved.) *Ibid.*

18. *Master and Servant—Torts—Liability of Master—Scope of Employment.* For the torts of the servant the liability of a railroad company is limited to those committed within the scope of the employment in furtherance of its business. *Jones v. R. R.*, 473.

19. *Unloading Cars—Master and Servant—Accident—Damages.*—When it appears that plaintiff was injured while unloading rails from a flat car, caused by a rail bounding back in an unusual and unexplained way and striking him; that the method employed for unloading was considered the safest way; that the car had been properly loaded with the rails, sufficient help furnished in unloading them, the injury was an accident, and the plaintiff can not recover for consequent damages. *Lassiter v. R. R.*, 483.

20. *Master and Servant—Yards—Employees—Negligence—Rules of Employer—Enforcement.*—The failure to enforce a reasonable rule made for the protection of employees of a railroad company engaged in repairing cars upon an extensive repair and switching yard is evidence of a waiver or abrogation of the rule. *Bordeaux v. R. R.*, 529.

21. *Master and Servant—Rules of Employer—Habitual Violation—Knowledge—Waiver.*—A printed and bulletined rule made for the safety of employees engaged in repairing cars on an extensive repairing and switching yard of a railroad company, requiring that flags of warning should be placed in a certain manner at such times, will not relieve the company of liability for its negligence, when the employees fail to observe the rule while engaged in "short jobs," when it was actually or constructively known to the company that the rule was habitually and continually disregarded in such instances to such an extent as to amount to an abrogation. *Ibid.*

22. *Master and Servant—"Kicking" Cars—Railroad Yards—Rules of Safety—Enforcement—Employer.*—While the rules of liability of railroads

RAILROADS—*Continued.*

in regard to "kicking" cars or making "flying" switches at a public crossing do not apply to the constant changing or switching of cars on extensive repairing and switching yards, it is still the duty of the company to establish and enforce proper rules for the protection of the employees in such yards from injuries otherwise likely to occur to them when engaged in repairing cars therein. *Ibid.*

23. *Master and Servant—Rules of Employer—Waiver—Contributory Negligence—Evidence—Questions for Jury.*—When there is evidence of a waiver by a railroad company of its rule that employees at work on cars on its extensive repairing and switching yard must put out blue flags as warnings, and that plaintiff and two other employees agreed that the job would be a short one—from a half minute to two minutes—discussed the matter and decided not to put out the flags, but have one of their number keep a lookout, and while thus engaged the plaintiff's intestate was killed by a shifting engine "kicking," at fast speed, cars onto the one where he was working, the question of contributory negligence is one for the jury. *Ibid.*

24. *Infants—Negligence—Evidence—Nonsuit.*—When it is shown by the evidence that plaintiff's intestate, a boy nearly fifteen years of age, was riding, by permission, on defendant railway company's flat car, and, of his own volition, unexpectedly jumped from the car when the train was moving at the speed of thirty miles an hour, and was killed, his act of thus jumping amounted to such negligence on his part as will bar recovery in a suit for damages against the company by his administrator, and a motion for judgment as of nonsuit upon the evidence should be granted. *Baker v. R. R.*, 562.

25. *Infants—Negligence—Questions for Court—Evidence—Nonsuit.*—The age at which an infant's responsibility for his own negligence will be presumed is a question of law; and when, at the age of fifteen, it is shown that an infant was killed as the result of his own negligent act in jumping from a car of a train moving at a speed of thirty miles an hour, a motion for judgment as of nonsuit upon the evidence should be allowed. *Ibid.*

26. *Passengers—Caboose Cars—Care Required—Negligence.*—A railway company owes it as a duty to its passengers on a freight train, whether on a passenger coach or caboose, or a car temporarily fitted for the purpose, to exercise the highest degree of care and diligence of which such trains are susceptible; and while the difference in character and purposes of the trains may and should be given due consideration, there is no relaxation as to the degree of care required from the company, and it is responsible for an injury caused to a passenger on a caboose car, occasioned by a breach of its duty to exercise the care indicated. *Suttle v. R. R.*, 668.

27. *Same—Evidence—Contributory Negligence.*—In an action for damages occasioned to a passenger on defendant railroad company's caboose car, caused by coupling other cars onto it in an unusually violent and unexpected manner, it is not necessary for the passenger to anticipate extraordinary and unusual dangers incident to the company's negligence, producing the injury complained of; and when from his testimony it appears that he had been injured by getting up

RAILROADS—*Continued.*

from his seat to go for a drink of water in the usual and natural manner, his testimony, given in the course of a long cross-examination, that he was paying no attention when the coupling was made, should be understood as meaning that he was not noticing the coupling at the time and was not expecting to be injured by such a severe and unusual shock. *Ibid.*

28. *Negligence — Burning Lands—Damages—Ownership—Possession—Evidence—Paper Title.*—To recover for the negligent burning of woods, timber, etc., in a suit against a railroad company, evidence of ownership is sufficient which shows actual and long-continued possession of plaintiff, for more than the statutory period, claiming the land as his own; and defective links in his paper title would not necessarily bar a recovery. *Thornton v. R. R.*, 691.

29. *Negligence—Burning Lands—Ownership—Continued Possession.*—Evidence of possession of lands, in a suit against a railroad company for their negligent burning, etc., is sufficient to sustain a recovery of damages, which tends to show that plaintiff's husband had been in possession for fifty years to the time of his death, and the plaintiff since then, through tenants, who cultivate all the lands that are fit for the purpose. *Ibid.*

30. *"Kicking" Cars—"Flying" Switches—Streets of Towns—Evidence—Negligence per se—Nonsuit.*—It is negligence *per se* for those in charge of a railroad engine and train to "kick" cars or make "flying" switches along the streets of populous towns; and when there is evidence that plaintiff's intestate, with other employees of a factory, was leaving his work at a factory in a populous town, and the intestate was in this manner killed by the defendant, in front of the factory, a motion as of nonsuit upon the evidence should be denied. (*Baker v. R. R., ante*, 562, cited and approved, upon the doctrine of contributory negligence of a thirteen-year-old child.) *Vaden v. R. R.*, 700.

31. *Carriers of Goods—Schedules—Congress—Statutory Requirements—Presumptions—Interstate Commerce.*—The law presumes that a railroad company has complied with the requirements of an act of Congress, and the orders of the Interstate Commerce Commission made thereunder, in publishing its rates to and from stations on its road. *Ibid.*

32. *Schedules—Publication—Congress—Statutory Requirements—Purpose—Penalty Statutes.*—The purpose for which railroad companies are required to publish their schedule of rates by the act of Congress and the orders of the Interstate Commerce Commission, made in pursuance thereof, is entirely different from and inapplicable to that involved in an action for the penalty accruing from the refusal of the company to accept freight when tendered, under the Revisal, sec. 2631. *Ibid.*

33. *Penalty Statutes—Carriers of Goods—Refusal to Accept Freight—Due Process—Constitutional Law.*—The defendant having been afforded full opportunity to make defense, and the evidence failing to disclose any substantial excuse or explanation for its default, on the facts appearing in this case, a recovery of the penalty imposed by the statute is not an interference with or a burden on interstate com-

RAILROADS—*Continued.*

merce, prohibited by the United States Constitution or statutes or by regulations of the Interstate Commerce Commission, made in pursuance thereof. *Ibid.*

RATES. See Evidence.

RECORDARI. See Courts.

RE-ENACTING STATUTES. See Statutes, 2.

REFERENCE.

Exceptions to Report—Right of Jury Trial—Exceptions Withdrawn.—A plaintiff, in an action referred under the statute, who has filed exceptions, but made no demand for a jury trial, can not, by virtue of the consent of the defendant that a jury trial be had under the exceptions, prevent such other party withdrawing his own exceptions, upon which he had made demand, and force him to a jury trial. *Greenlee v. Greenlee*, 638.

REFUSAL TO RECEIVE. See Penalty Statutes.

REGISTRATION. See Chattel Mortgages, 2, 3; Mortgagor and Mortgagee, 7, 14, 15; Contracts, 6.

RESTRAINT ON ALIENATION. See Wills.

RESTRICTIVE ENDORSEMENTS. See Notes.

REVIEW. See Appeal and Error.

REVISAL.

Reference should be made to the various subject-matters for accuracy.

SEC.

87. Applies to funds in administrator's hands, and not to sale of lands after expiration of judgment lien to pay judgment debt. *Matthews v. Peterson*, 134.

173. The time limit for entry under section 2766 applies to a time prior to the adoption of this section. *Garrison v. Lumber Co.*, 674.

367. Heirs at law can plead statute of limitation against administrator seeking to subject lands to payment of debt. *Matthews v. Peterson*, 134.

367. Administrator seeking to subject land to payment of debt must move within reasonable time, etc. *Matthews v. Peterson*, 132.

385. (4). Statute does not run against mortgagor in possession, because the title is in the mortgagee not in possession. *Cauley v. Sutton*, 327.

735. This section should be construed in connection with sections 737 and 1920 *et seq.*, in relation to discharge of prisoner in certain instances. *Edwards v. Sorrell*, 712.

737. This section should be construed in connection with sections 735 and 1920 *et seq.*, in relation to discharge of prisoners in certain instances. *Edwards v. Sorrell*, 712.

REVISAL—*Continued.*

SEC.

472. The Supreme Court will not direct a judgment by default and inquiry for the reason of a frivolous answer, when judgment is not prayed or exception taken to order allowing answer in the Superior Court. *Parker v. R. R.*, 433.

656. The Supreme Court will not direct a judgment by default and inquiry for the reason of a frivolous answer, when judgment is not prayed or exception taken to order allowing answer in the Superior Court. *Parker v. R. R.*, 433.

935. Appearance of prisoner waives process defective for lack of service by proper officers. *S. v. Cale*, 805.

980. Contracts to convey lands require registration. *Combes v. Adams*, 65.

1130. The seal affixed to a corporation mortgage will not be presumed authorized when the mortgage is given to officer to secure a pre-existing debt. *Edwards v. Supply Co.*, 171.

1181. The transfer books control in discrepancy between it and stock book as to stockholders voting. *Bridgers v. Staton*, 216.

1182. An election of officers of a corporation can not be had after an adjournment has been improperly carried. *Bridgers v. Staton*, 216.

1184. An agreement for a term of exceeding three years to pool stock can not be considered as a proxy. *Sheppard v. Power Co.*, 776.

1184. Written assignment of stock with power to vote is inoperative as to the power after three years. *Bridgers v. Staton*, 216.

1185. Written assignment of stock with power to vote amounts to a proxy. *Bridgers v. Staton*, 216.

1188. *Mandamus* can not issue to compel reconvening of stockholders after time thereof set before adjournment. *Bridgers v. Staton*, 216.

1189. *Mandamus* can not issue to compel reconvening of stockholders after time thereof set before adjournment. *Bridgers v. Staton*, 216.

1190. The judge ordering reconvening of stockholders must give the notice required by this section. *Bridgers v. Staton*, 216.

1207. Taxing costs against mortgage creditors of a corporation winding up its affairs, when they establish their right of payment, is error. *Lumber Co. v. Lumber Co.*, 281.

1226. Taxing costs against mortgage creditors of a corporation winding up its affairs, when they establish their right of payment, is error. *Lumber Co. v. Lumber Co.*, 281.

1318 (30). Townships are not corporate bodies and have no corporate powers not specially conferred. *Wittkowsky v. Commissioners*, 90.

1419 (1). When the balance on the principal and interest on the original amount of a note exceeds the statutory amount a justice of the peace has no jurisdiction of the action. *Riddle v. Milling Co.*, 689.

1447. Judgment obtained before a justice of the peace upon summons issued to a nonresident defendant will not be disturbed when it appears to have been issued in good faith, etc. *Marler Co. v. Clothing Co.*, 519.

REVISAL—*Continued.*

SEC.

1542. The Supreme Court may dissolve a restraining order, long since issued, when required by public interest. *Griffin v. R. R.*, 312.

1556. Colored children claiming to inherit from slave parents, under this section, must show cohabitation of parents at birth, paternity, exclusive cohabitation, and by evidence of reputation, etc., as in establishing the fact of marriage in other cases. *Spaugh v. Hartman*, 454.

1589. Enlarges the jurisdiction of courts in actions to quiet title. *Campbell v. Cronly*, 457.

1631. Incompetent for parties in interest by parol to engraft a resulting trust upon lands under the facts presented here. *Harrell v. Hagan*, 242.

1722. Prior to adoption of this section, an entry too vague in description is not sufficient notice to second enterer. *Loving v. Carver*, 710.

1889. In an action involving title to land allegation of defendant's possession unnecessary. *Land Co. v. Lange*, 26.

1890. Clerk may appoint a guardian for one found mentally incompetent in an inquisition of lunacy. *In re Denny*, 423.

1920 *et seq.* Should be construed in connection with sections 735 and 737, in relation to the discharge of prisoners in certain instances, and the remedies are cumulative. *Edwards v. Sorrell*, 712.

1930. Defendant arrested under section 7271 for alienating affections of wife is entitled to the relief afforded by this section. *Edwards v. Sorrell*, 712.

1934. No issue or suggestion of fraud is raised by defendant charged with alienating the affection of the wife of another by the denial of his statement made as to his not having title to certain property scheduled. *Edwards v. Sorrell*, 713.

1996. Townships have no right to issue bonds in construction of railroads upon which work has not been commenced. *Wittkowsky v. Commissioners*, 90.

2021-2-3. A statement by contractor to owner of amounts due material men creates a direct obligation of owner to material men. *Perry v. Swanner*, 141.

2097. The husband's marital rights to rents and profits of his wife's lands was changed by the act of 1848, now section 2097 of the Revisal, and now a written lease for a term of five years requires privy examination of the wife. *Richardson v. Richardson*, 549.

2567 (5). A railroad company has the right to the use of street with assent of town having statutory power. *Griffin v. R. R.*, 312.

2593. The court can make rules in condemnation proceedings when not expressly provided by statute. *Abernathy v. R. R.*, 97.

2631. The penalty on carriers for failure to accept freight is constitutional. *Reid v. R. R.*, 753.

REVISAL—*Continued.*

SEC.

2631. Delay of carrier to ship goods left with it, with an implied continuous tender for shipment, imposes the penalty for each day's delay. The carriers has all defenses at common law. The penalty is constitutional. *Garrison v. R. R.*, 575.

2631. When shipments are intrastate the penalty imposed here is not a burden on interstate commerce. The receiving carrier is not relieved by embargo laid by connecting line from transporting and tendering shipment to the other line. *Cotton Mills v. R. R.*, 612.

2631. The "party aggrieved" is the one whose right is denied by the railroad and has an interest in the shipment. *McRackan v. R. R.*, 331.

2633. Missent interstate shipments, afterwards rebilled from and to a point within the State, is intrastate, and penalty of this section accrues upon its violation. *Hockfield v. R. R.*, 419.

2690. It is necessary to give an appeal bond to perfect an appeal from county commissioners' confirmation of report of road commissioners. *Sutphin v. Sparger*, 517.

2765. The requirement of notice of entry on State's lands is mandatory, and the posting should be done by an officer. *Garrison v. Williams*, 674.

2766. The time limit for entry on State's lands applies to entries made before the adoption of section 173. *Garrison v. Williams*, 674.

2858. Money paid by mortgagee to acquire tax title becomes a lien on the land. *Cauley v. Sutton*, 327.

2916 (6). The grant of franchises to public-utility corporations, etc., did not exist previous to the enactment of this section. *Elizabeth City v. Banks*, 407.

2945. When a judgment appealed from establishes the fact of publication of polling places it will not be disturbed for alleged insufficiency on that account. *Hendersonville v. Jordan*, 35.

2958. Relating to an election for bond issue under charter of Hendersonville in the charge and supervision of a register and two judges. *Hendersonville v. Jordan*, 35.

2860. When requirement that tenant in common pay his share of taxes does not apply. *Smith v. Smith*, 81.

3113. The probate of a will in common form may be done by the clear and satisfactory testimony of one witness. *In re Hedgepeth*, 245.

3135. Interested person may require a will probated in common form to be probated in solemn form, when the right is not lost by delay. *In re Hedgepeth*, 245.

3158. Appearance of prisoner waives process defective for lack of service oy proper officer. *S. v. Cale*, 805.

3252. Indictment charging that a man and woman "did unlawfully bed and cohabit together" is sufficient. *S. v. Britt*, 811.

3336. Indictment for setting fire to the property of W. is good, and conviction will be sustained if title to building is shown in another and the loss of the destroyed property to be that of W. *S. v. Sprouse*, 860.

REVISAL—*Continued.*

SEC.

3338. Indictment charging that defendant set fire to a certain stable, the property and in possession of W., with the other material allegations, is good, and conviction will be sustained if it is shown that W. had possession and his goods were destroyed, though the title to the building prove to be that of another. *S. v. Sprouse*, 860.

3350. Indictment charging that a man and woman "did unlawfully bed and cohabit together" is sufficient. *S. v. Britt*, 811.

3366. Imprisonment of tenant or cropper for abandoning crop without fraud is unconstitutional; and an indictment not charging abandonment without cause, or before paying for advances, should be quashed. *S. v. Williams*, 802.

3506. Larceny from the person is in the exclusive jurisdiction of the Superior Court. *S. v. Brown*, 867.

3590. County commissioners are subject to indictment for failure to provide the term of school required by Article IX, section 3, State Constitution. *Board of Education v. Commissioners*, 116.

3592. County Commissioners are subject to indictment for failure to provide the term of school required by Article IX, section 3, State Constitution. *Board of Education v. Commissioners*, 116.

3749. A common carrier is indictable for laying an embargo amounting to an unjust discrimination. *Garrison v. R. R.*, 575.

3972. Sulphur as an ingredient in preservative powder does not necessarily imply a want of consideration of purchase. *Smith v. Alphin*, 425.

4112. The action of county board of education in submitting estimate of amount required to maintain a four-months period of school is recommendatory. *Board of Education v. Commissioners*, 116.

4794. Does not restrict a member of fraternal order from changing beneficiary of policy. *Pollock v. Household of Ruth*, 211.

7271 (2). Defendant arrested for alienating wife's affections is entitled to relief under section 1930. *Edwards v. Sorrell*, 712.

REVOCATION. See Wills.

RIGHT OF WAY. See Railroads.

ROADS AND HIGHWAYS.

County Commissioners—Appeal, When Taken.—Exceptions to a report of road commissioners, in proceedings to change the grade of and straighten a public road, under chapter 407, Laws 1907, should be made at the confirmation of the report by the county commissioners, and appeal should then be taken, to be effective. *Sutphin v. Sparger*, 517.

RULE IN SHELLEY'S CASE. See Deeds and Conveyances.

RULE OF THE PRUDENT MAN. See Master and Servant; Negligence.

SAFE APPLIANCES. See Master and Servant; Negligence.

SAFE PLACE TO WORK. See Master and Servant, 3, 9.

SALES. See Taxation, 1, 2, 3, 4; Mortgagor and Mortgagee, 1; Contracts, 44, 45, 46; Intoxicating Liquors, 1, 2, 3, 4.

1. *Estoppel in Pais—General Manager—Declarations.*—A general manager of a corporation will not be presumed in law to have authority to estop by his acts and declarations the corporation from asserting its title to property sold by another at public sale. *Supply Co. v. Machin*, 738.

2. *Purchaser—Interest Acquired.*—A purchaser at a bankrupt sale, or sale under execution, acquires only such title or interest in the property sold as the bankrupt or debtor may have had therein. *Ibid.*

3. *Estoppel in Pais—Questions for Jury—Evidence Insufficient—Scintilla.* When the trial judge has taken an erroneous view of the authority of an attorney at law or a general manager of a corporation to estop the corporation, by matters *in pais*, from asserting title to its property sold by another at public sale, and held the corporation estopped as a matter of law, such questions being exclusively for the jury, and it appears that all the evidence upon the issue should have been excluded as insufficient, a new trial will not be granted on appeal. *Ibid.*

SEALS. See Corporations.

SELF-DEFENSE. See Evidence.

SHIPMENTS, INTRASTATE. See Interstate Commerce.

SIDEWALKS. See Bond Issues; Cities and Towns.

SIGNALS. See Railroads.

SLAVES.

1. *Inheritance—Legitimatizing Children—Heirs at Law.*—The efficacy of the act of 1879 (Revisal, sec. 1556), legitimatizing the children of colored parents, under certain conditions, living together as husband and wife, and thus giving them the rights of inheritance, depends upon two essential facts—a cohabitation subsisting at the birth of the child and the paternity of the person from whom the property claimed is derived. *Spaugh v. Hartman*, 454.

2. *Same—Cohabitation.*—In order to come within the provision of the act of 1879 (Revisal, sec. 1556), legitimatizing the children of colored parents living together as man and wife, etc., and thus giving them the rights of inheritance, an exclusive cohabitation must be shown, as signified by the expression, "living together as man and wife," and not casual sexual intercourse. *Ibid.*

3. *Marriage—Legitimatizing Children—Evidence—Acts and Declarations.* The *quasi* marriage relation necessary to legitimatize the children of colored parents, under the provisions of the act of 1879 (Revisal, sec. 1556), may be shown in evidence by reputation, cohabitation, declarations and conduct, under the same general rule of evidence applicable to establish the fact of marriage. (*Nelson v. Hunter*, 140 N. C., 599, cited and approved.) *Ibid.*

STATE LAWS. See Intoxicating Liquors.

STATE'S APPEAL. See Appeal and Error.

STATE'S LANDS.

1. *Grants—Deeds and Conveyances—Descriptions—Fixed Corners—Subsequent Surveys.*—An instruction is erroneous when its effect is to ignore the calls of a grant under which a party claims, and adopts a line from a fixed corner subsequently made by the surveyor by construction and not by the actual survey upon which the patent was issued. *Land Co. v. Erwin*, 41.

2. *Grants—Boundaries—Calls.*—In this case the call in grant No. 893, "beginning at the S. W. corner of entry No. 3058, and running with the line of the entry," refers to the line of entry No. 3058, upon which grant No. 895 was based. (See chapter 173, Laws 1893.) *Ibid.*

3. *Enterer—Prior Grant—Evidence—Vacant and Unappropriated.*—When plaintiff, enterer, introduces a valid grant, issued prior to his, under which the defendant claims, it shows that the lands had been previously granted and were not vacant and unappropriated at the time of the issuance of his grant, and it is unnecessary for the defendant, claimant, to show a connected title therewith. *Babb v. Manufacturing Co.*, 139.

4. *Grants—Description Sufficient.*—When a grant of land gives the corners and courses and distances of the land; and the first corner can thereby be located with reference to the second, and parol evidence is competent to locate the two, it is not void upon its face for uncertainty of description. *Ibid.*

5. *Enterer—Time for Payment—The Code—Revisal.*—The Code, sec. 2766, providing the time limit in which the enterer of the State's vacant and unappropriated lands should pay for them, applies to such entries made before the adoption of the Revisal, sec. 173, making certain changes in that respect. *Garrison v. Williams*, 674.

6. *Enterer—Notice of Entry, by Whom Made.*—The legislative intent is that the posting of the notice of an entry of the State's vacant and unappropriated lands should be made by its officer and not by the enterer; and the requirement that the protest should be filed within the ten days during which the notice of entry is posted (The Code, sec. 2764) is mandatory. *Ibid.*

7. *Enterer—Time of Protest—Condition Annexed—Limitation of Actions.* The provision that protest must be filed to an entry of the State's vacant and unappropriated land within ten days, etc., is a condition annexed to the right of protest, and not a statute of limitation. *Ibid.*

8. *Entry—Vague Descriptions—Second Enterer—Trusts and Trustees—Notice.*—Prior to the Laws of 1905 (Revisal, sec. 1722) an entry of the State's vacant and unappropriated lands too vague to give notice of the boundaries of the land intended to be entered is not sufficient notice to a second enterer who has perfected his grant in ignorance of the first; and the mere running of the lines of the lands by survey or the making of a map by the first enterer which he could keep in his possession, or the warrant to the county surveyor, necessarily no more definite than the original entry, can not remedy the defective description of the entry. *Lovin v. Carver*, 710.

9. *Enterer—The Code, sec. 2766—Time for Payment.*—The end of the year in which an entry of the State's vacant and unappropriated lands

STATE'S LANDS—*Continued.*

is made, and not the day of the year, is the date from which the enterer may compute the time in which he must pay for the lands entered, under The Code, sec. 2766, requiring that the land "shall in every event be paid for on or before the 31st day of December which shall happen in the second year thereafter," or the entry shall be null and void. Hence lands entered thereunder on 16 November, 1904, and paid for 31 December, 1906, meets the requirement of the statute. *Barker v. Denton*, 723.

STATUTORY REQUIREMENTS. See Bond Issues, 2, 5; Cities and Towns.

STENOGRAPHER'S NOTES. See Appeal and Error.

STIPULATIONS, REASONABLE. See Telegraph Companies.

STORAGE. See Carriers of Freight.

STREETS, USE OF. See Cities and Towns.

SUPERINTENDENT. See Principal and Agent; Arrest.

SUPREME COURT. See Courts; Power of Courts; Injunction.

SURPLUSAGE. See Arrest and Bail; Verdict.

"SURVIVING HEIRS." See Deeds and Conveyances.

SURVIVORSHIP. See Estates.

TAXATION.

1. *County Commissioners—Deeds and Conveyances—Tax Sale—Certificate—Foreclosure.*—A deed to land made by the county commissioners for land sold for taxes and bought in by them (in 1899) without foreclosure of the certificate is void. *Ibid.*

2. *County Commissioners—Public Schools—Duties—Four-months Period—Constitutional Law.*—The requirement of Article IX, section 3, of the Constitution, that the county commissioners provide by taxation for maintaining the public schools for the minimum period of four months in each year, is not restricted by Articles V and VII, limiting the power of taxation, and the commissioners are subject to indictment upon failure to provide the term of school required by said section 3, Article IX. (Revisal, secs. 3590, 3592.) *Board of Education v. Commissioners*, 116.

3. *County Commissioners—Public Schools—Four-months Term.*—Our Constitution and statutes have committed to the judgment and discretion of the county commissioners the manner and method of levying taxes to maintain a four-months minimum period of the public schools, and in the exercise thereof the courts will not interfere by civil process, *mandamus* or otherwise, unless their action is so unreasonable as to amount to a manifest abuse of power. *Ibid.*

4. *Same—Board of Education—Estimate—Advisory and Recommendatory.* The action of the board of education of a county in making and submitting to the county commissioners an estimate of the amount required to maintain a four-months term of a public school (Revisal, sec. 4112) is recommendatory and in aid of the judgment and discre-

TAXATION—*Continued.*

tion given by our Constitution and statutes to the county commissioners in such matters. *Ibid.*

5. *Same—Action Dismissed.*—The courts will not grant a *mandamus* to compel the county commissioners to accept and adopt as final the estimate of the amount required to maintain a four-months term of a public school made by the county board of education (Revisal, sec. 4112), and an action brought by the latter board for that purpose will be dismissed. *Ibid.*

6. *Mortgagor and Mortgagee—Trusts and Trustees—Tax Deeds.*—A mortgagee holds the legal title to the mortgaged lands in trust for the mortgagor and himself, and by subsequently acquiring a tax deed to the mortgaged premises he can not deprive the mortgagor of his equity of redemption. *Cauley v. Sutton*, 327.

7. *Same—Additional Mortgage Lien.*—Money subsequently paid by a mortgagee to acquire a tax title on the mortgaged lands becomes a lien on the land. (Revisal, sec. 2858.) *Ibid.*

8. *School District—County Board of Education—Special Tax—Proceedings—Regularity Presumed—Burden of Proof—Instructions.*—In an action to impeach the validity of a local election for the levy of a special tax the presumption of law is in favor of the regularity of the conduct of the authorities, with the burden on the objecting party to show the contrary; and when the regular filing of the petition and the order for the election by the county commissioners, and their confirmation of the election, are shown, no irregularity appearing, it is not error for the judge to charge the jury that, if they believed the evidence, the plaintiffs had not made out a case. *Thrash v. Commissioners*, 693.

TAX DEEDS. See Taxation.

TAX LISTS. See Evidence.

TELEGRAPH COMPANIES.

1. *Telegraphs — Delivery of Message — Negligence — Evidence.*—Evidence that the husband of *feme* plaintiff told the messenger who, about four hours afterwards, delivered the message, that he was expecting a message, and to bring it out to his wife, is competent, upon the question of negligent delay in delivery, when the addressee lived but a short distance from defendant's office and delivery was delayed several hours. *Bailey v. Telegraph Co.*, 316.

2. *Telegraphs—Death Message—Evidence—Mental Anguish.*—When there is evidence tending to show negligence on the part of defendant telegraph company in delivering a message announcing the death of a sister, evidence of mental anguish suffered by plaintiff is competent. *Ibid.*

3. *Telegraphs—Delivery of Message—Negligence—Damages—Avoidance—Evidence.*—When negligent delay is shown in the delivery of a message, and the uncontradicted evidence in defense is that by driving a distance through the country, trains could have been caught which would have enabled plaintiff to have reached destination before the

TELEGRAPH COMPANIES—*Continued.*

funeral, the court can not say, as a matter of law, that it was plaintiff's duty to thus avoid the injury, but the question is one for the jury, under all the facts and circumstances of the case. *Ibid.*

4. *Telegraphs—Negligence—Delivery—Evidence—Questions for Jury.*—A telegram was incorrectly addressed to 23 East Marshall Street, in Richmond, Va. It was received in Richmond at 3:30 P. M., the 27th, and the messenger attempted to deliver it at 23 East Marshall Street and at 23 West Marshall Street, and unsuccessfully inquired where the addressee could be found. He did not inquire at the post office. He delivered nine other messages on that trip, and reported at defendant's office at 6 o'clock P. M. Unavailing inquiries were made of several persons there, and the city directory was consulted. A service message, asking for a better address, was sent to the initial point, which was delayed until the next morning, owing to the observance of office hours. The message was delivered at 10 A. M., the 28th, at the address as corrected: *Held*, evidence of negligence in the delivery sufficient to go to the jury. *Willis v. Telegraph Co.*, 318.

5. *Telegraphs — Negligence—Message—Reasonable Stipulations—Demand in Sixty Days.*—A stipulation written on the back of a telegraph message, requiring, in effect, that a claim for damages should be presented within sixty days or recovery thereon would be barred, will be upheld as a reasonable regulation when it appears that the party claiming damages knew of the company's default more than sixty days before the action was brought, and made no claim therefor in that time. *Sykes v. Telegraph Co.*, 431.

6. *Negligence—Office Hours—Efforts to Deliver—Defense.*—The observance of reasonable office hours is not a valid defense to the delayed delivery of a message by a telegraph company, when it is shown that it was received on Saturday night as a night message, delivered on Monday morning between 9 and 10 o'clock, and under the rules of the company it appeared that it should have been delivered on Sunday morning to the addressee, who resided within a short distance of the telegraph office, and no effort was made to do so. *Pierson v. Telegraph Co.*, 559.

7. *Messages—Negligence—Failure to Deliver—No Train—Evidence—Questions for Jury—Instructions.*—When it appears that the delivery of a telegram announcing an extreme illness had been negligently delayed by the defendant telegraph company from 8 A. M. Sunday morning until between 9 and 10 A. M. Monday morning, that no train ran from that place on Sunday which plaintiff could have taken, and the defense was that defendant's negligence was not the proximate cause of the injury, for that the plaintiff could not have reached his destination before the funeral had the message been promptly delivered, testimony of plaintiff tending to show he could have driven a great distance through the country and have taken a train at another station in time was sufficient evidence to be submitted to the jury, under an instruction that such fact must be shown by the plaintiff to the satisfaction of the jury. *Ibid.*

8. *Messages—Notice of Importance—Relationship—Mental Anguish—Evidence Sufficient.*—A telegram announcing the dying condition of a child, with request to "come," puts the company upon notice of its

VERDICT—*Continued.*

importance to the sendee and that it was sent for his benefit; and when the testimony shows that the child was a niece, to whom sendee was much attached, and had lived with her in his brother's house, it is sufficient evidence for the jury to consider in awarding damages for mental anguish. *Ibid.*

TENANTS IN COMMON.

1. *Possession by One—Tax Sales—Deeds and Conveyances—Trusts and Trustees.*—A tenant in common in sole possession assumes an implied obligation to sustain the common interest. When he permits the land to be sold for taxes, without notifying his cotenants, and conveyed by a sheriff's deed to a stranger, and takes a deed from him, he holds as trustee for the cotenancy. *Smith v. Smith*, 81.
2. *Possession by One—Deeds and Conveyances—Tax Sales—Revisal, sec. 2860.*—Revisal, sec. 2860, authorizing one tenant in common to pay his share of the taxes or to redeem his share of the land after sale for taxes, applies to instances in which all the tenants stand on the same footing in regard to possession, and does not apply when one tenant is in possession for all. *Ibid.*

TENDER. See Penalty Statutes; Contracts; Witnesses.

Notes—Uncertain Amount Due—Suit.—When the correct amount due by plaintiff on his notes, secured by mortgage, was neither admitted nor shown, and could not be ascertained until certain questions were determined in his suit involving the quantity of lands for the purchase price of which the notes were given, a tender of payment was unnecessary. *Lance v. Rumbough*, 19.

TIMBER. See Contracts; Damages; Deeds and Conveyances.

TIME OF THE ESSENCE. See Contracts.

TITLE, SOURCE OF. See Deeds and Conveyances.

TOWNSHIPS.

1. *Corporate Powers—Legislative Powers—Constitutional Law.*—Under Revisal, sec. 1318, subdiv. 30, enacted in pursuance of the constitutional amendment of 1875, townships are not corporate bodies and have no corporate powers when not specially conferred by statute. *Wittkowsky v. Commissioners*, 90.
2. *Same—Bond Issues.*—Townships may issue bonds to aid in the construction of railroads only under authority given by statute passed in accordance with the requirements of Article II, section 14, of the Constitution, respecting its several readings, the roll call, the "aye and no" vote, etc. *Ibid.*
3. *Same—Interpretation of Constitution—Implication—County Divisions.* The restrictions imposed by Article II, section 14, of the Constitution on counties, cities and towns in pledging their credit or contracting a debt are by necessary implication applicable to townships, as they are but constituent parts of the county organization. *Ibid.*
4. *Interpretation of Statutes—Bond Issue—Railroads, Aid to Finish.*—Section 1996, The Code of 1883, does not confer on a township the right to issue bonds to aid in the construction of a railroad upon which work has not been commenced. *Ibid.*

TRANSFER BOOKS. See Corporations.

TRESPASS. See Cities and Towns, 41; Carriers of Passengers, 1.

1. *Ejectment—Evidence—Summons—Acts of Ownership.*—When plaintiff sues in ejectment and has shown title to the *locus in quo* in himself, it is competent for him to show acts of forcible trespass thereon of defendant, which occurred after the issuance of the summons, of such character as to indicate a claim of the right of possession. *Land Co. v. Lange*, 26.

2. *Same—Judgments—Nonsuit.*—A judgment as of nonsuit upon the evidence will not be granted in an action involving title to land, when the plaintiff has shown a forcible trespass upon the *locus in quo* by the defendant after summons was issued, and that defendant immediately entered, assumed dominion and exercised acts of ownership. *Ibid.*

TRUSTS AND TRUSTEES. See Uses and Trusts.

Resulting Trusts—Conversation With Deceased Person—Evidence.—In an action to engraft a resulting trust on lands alleged to have been bought by O. at a public sale in behalf of H., both deceased, testimony of witnesses who are parties and interested in the result of the action as to a conversation between O. and H. tending to establish the trust is incompetent. (Revisal, sec. 1631.) *Harrell v. Hagan*, 242.

UNDISCLOSED PRINCIPAL. See Principal and Agent.

UNDUE INFLUENCE. See Deeds and Conveyances.

UNILATERAL CONTRACTS. See Contracts.

USES AND TRUSTS. See Trusts and Trustees; Estates.

1. *Deeds and Conveyances—Delivery—Intent—Parol Evidence—Parties.*—When a deed reciting a valuable consideration paid, contained a *habendum*, "to have and to hold" the land conveyed, "free and clear of all privileges," etc., "to the grantee and his heirs in fee simple," and has full covenants of seizin and warranty, and in other respects gives clear indication that an absolute estate was intended to pass, evidence tending to show a failure of consideration is incompetent, in an action to establish a resulting trust between the original parties in favor of the grantor, for such can never obtain when there is a contrary intent clearly expressed in the deed. *Gaylord v. Gaylord*, 222.

2. *Same—English Statute of Frauds.*—The seventh section of the English Statute of Frauds, which forbids the creation of parol trusts or confidences of land, etc., unless manifested and proved by some writing, not having been enacted here, and there being no statute with us of equivalent import, such trusts have a recognized place in our jurisprudence, but they can not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title to lands and giving clear indication on the face of the instrument that such a title was intended to pass. *Ibid.*

3. *Deeds and Conveyances—Written Instrument—Parol Evidence—Incompetency.*—The doctrine of engrafting by parol a trust upon lands conveyed by deed is subordinated to a well-recognized principle of law,

USES AND TRUSTS—*Continued.*

that such a trust can not be established between the parties in favor of a grantor in a deed, when the effect will be to contradict or change by contemporaneous stipulations and agreements, resting in parol, the written contract, clearly and fully expressed. *Ibid.*

VARIANCE. See Evidence.

VENDEE IN POSSESSION. See Mortgagor and Mortgagee.

VENDOR AND VENDEE. See Contracts.

VERDICT. See Railroads; Issues.

1. *Set Aside—Trial Court—Discretion—Preponderance of Evidence—Exception to Verdict—Appeal and Error.*—It is within the discretion of the trial judge to set a verdict aside as being against the preponderance of the evidence, and this question will not be considered on appeal upon exception to a verdict and judgment thereon, at least in the absence of gross abuse in the exercise of the discretion. *Bank v. Insurance Co.*, 770.

2. *Murder—Guilty, with Recommendation for Mercy—Surplusage.*—The words used by the jury in their verdict to recommend mercy are merely surplusage and do not vitiate or affect the verdict. *Ibid.*

3. *Procedure, Criminal—Demurrer—Questions for Jury—Directing.*—The jury must pass upon the weight of the State's evidence in criminal cases. Instead of demurring to the evidence, the proper practice is for the defendant to move the court to direct the jury that the evidence is insufficient to convict, and to enter a verdict of not guilty. If the trial judge so directs the verdict, the State can not appeal. *S. v. Moody*, 848.

VESSELS. See Negligence; Contributory Negligence; Measure of Damages.

VESTED RIGHTS. See Constitutional Law.

VOTE OF THE PEOPLE. See Constitutional Law.

VOTING TRUST. See Corporations.

WATER AND WATER COURSES.

1. *Corporations—Electric Companies—Water Powers—Public Policy—Charters—Reënacting Statutes.*—Plaintiff, an electric company, obtained a charter by chapter 236, Private Laws 1897, whereby it was given the right of eminent domain to acquire water powers against the will of the owner. The corporation was not organized within five years, as required by its charter. Chapter 74, Laws 1907, declares that electric companies can not use such right; and thereafter, at the same session, by private act, the Legislature granted plaintiff three years in which to organize, and provided that, as amended, chapter 236, Private Laws 1897, "is hereby reënacted": *Held*, (1) that the public policy, as declared in the general law, was not repealed in its application to the plaintiff's charter by the private law subsequently passed at the same session; (2) the private act of 1907 must be taken as reënacting the plaintiff's charter in the same plight, status and condition as it stood at the time the reënacting statute was passed. *Power Co. v. Whitney Co.*, 31.

WATER AND WATER COURSES—*Continued.*

2. *Mainland—Water Ways—Islands—Statutes, Interpretation of.*—The word "mainland," used in the statute prohibiting a float house to be anchored more than a certain distance therefrom, should be given the definite and precise meaning the word has, "the principal land opposed to island," and indicates there were other lands within the prescribed territory at the time of the passage of the act that did not come within the meaning of the term. *S. v. Barco*, 792.

3. *Same.*—When, at the time of the passage of the statute making it unlawful for one to anchor a float house more than three hundred yards from the mainland, a point of land projecting into the waters of a sound had been cut off by the action of the wind tide, so as to cause a channel forty and more feet wide, sufficient for the passage through it of small boats, and through which the tide flowed, the land thus cut off is an island, and not "mainland," within the meaning of the statute. *Ibid.*

WATER POWER. See Water and Water Courses.

WATER SUPPLY. See Cities and Towns.

WATERSHED. See Injunction; Cities and Towns.

WIFE'S SEPARATE PROPERTY. See Husband and Wife.

WILLS. See Estates; Husband and Wife, 7.

1. *Deeds and Conveyances—Interpretation.*—When the language of a paper-writing is that of a deed, described the lands and contains the usual *habendum* clause, recites a valuable consideration and is therein expressly spoken of by the maker as a deed, the writing can not be interpreted as a will and is not revocable by the maker as such. *Dick v. Miller*, 63.

2. *Deeds and Conveyances—Interpretation—Estates in Futuro—Title—Possession.*—An estate of freehold may commence *in futuro* in this State; and when a deed expresses "the purpose and intent" to convey the lands described, and contains the words "title is vested" in the grantor "during his natural life, then passes to" M., the reservation of the "title" during the grantor's life is construed as the reservation of the possession. *Ibid.*

3. *Lost or Destroyed—Probate, Common Form—Jurisdiction.*—The clerk of the Superior Court has jurisdiction to take probate of a lost will, or of one which was not destroyed by the testator, or was destroyed by him when not having the *animo revocandi*, and an action in the nature of a bill in equity to set up the will is unnecessary. *In re Hedgepeth*, 245.

4. *Same—Contents—Evidence—One Witness.*—It is necessary to the probate of a will before the clerk in common form to show its execution was in the manner prescribed by statute (Revisal, sec. 3113), but its contents may be proven by the clear and satisfactory testimony of one witness. *Ibid.*

5. *Lost or Destroyed—Probate—Evidence, Sufficient.*—It is sufficient for the probate of a will in common form before the clerk when it is

WILLS—*Continued.*

shown by affidavits that it was properly executed and attested, the death of the testator, the contents, and that a person other than the testator, with whom it was last seen, had destroyed it. *Ibid.*

6. *Probate—Common Form—Caveat—Right of Party in Interest—Laches.* A person interested is entitled to file a *caveat* to a will probated in common form and require the propounder to prove the will in solemn form, if the right has not been lost by acquiescence or unreasonable delay. (Revisal, sec. 3135.) As to whether laches can be imputed without notice of probate in common form, *Quære.* *Ibid.*

7. *Same—Reasonable Delay.*—A reasonable time which will bar the next of kin or heir at law to file a *caveat* to a will probated in common form has not been settled by the Court; but that of seven years, fixed by the Acts of 1907, ch. 862, passed subsequently to the probate in this case, is applicable. *Ibid.*

8. *Lost or Destroyed—Probate—Solemn Form—Proof Required—Propounder—Burden of Proof.*—Upon the filing of a *caveat* to a will probated in common form the propounder must prove the will *per testes* in solemn form, and the burden is upon him to show (1) the formal execution as prescribed by statute; (2) the contents, if the original was not produced; (3) the loss of the original will or that it had not been destroyed by the testator or with his consent or procurement. *Ibid.*

9. *Same—Presumption of Revocation—Evidence.*—When the propounder, to establish a will in common form, does not produce the original, or when it is not to be found, there is a presumption of fact that it was destroyed by the testator *animo revocandi*, which will have to be overcome by competent evidence; and affidavits admitted before the clerk when the will was admitted to probate in common form are incompetent. *Ibid.*

10. *Pleadings—Evidence—Testator—Identification.*—The propounders of a will are not required to prove the identity of the one who signed the will as the testatrix, when the allegations are that the signature of the testatrix was obtained by duress, undue influence, etc., and that she did not have sufficient mental capacity, and there is no allegation that she did not sign the will. *Harris v. Martin*, 367.

11. *Evidence—Testator—Identification.*—Testimony of an attorney and witness to a will that they were sent for and introduced to a person, whom they had not met before, and who answered to the name of the testatrix, and that the will was drafted and executed by such person as the testatrix named in the will, is *prima facie* evidence that the person signing was the testatrix named, and sufficient to take the case to the jury. *Ibid.*

12. *Devises—Estates for Life—"During Widowhood."*—A devise by one of lands to his wife "during her widowhood" is an estate for life, subject to be divested if she should remarry, and subjects her to an action for damages for waste and an injunction against its further commission. *Sink v. Sink*, 444.

13. *Same—Residuary Legatee.*—A direction in a will that certain real and personal property be sold to pay the testator's debts and certain

WILLS—*Continued.*

legacies which were provided for, and if any surplus remained it should go to the widow, does not constitute her the general residuary legatee, so as to vest the remainder of the estate in her in fee, when she takes by devise whatever may remain during the term of her widowhood. *Ibid.*

14. *Evidence—Devisavit Vel Non—Records—Books of Settlements—Originals—Copies.*—Upon an issue of *devisavit vel non* upon the question of the mental capacity of the testator to make a will, the book of settlements, kept in the clerk's office in accordance with the provisions of section 21, chapter 156, Laws 1883, recording copies of original papers, is not competent evidence of the contents of such papers. The original papers or the records of the executive committee of the State Hospital are competent. *Quœre. In re Thorp*, 488.

15. *Evidence—Devisavit Vel Non—Mental Capacity—Book of Settlements—Harmless Error.*—Upon an issue of *devisavit vel non* the testimony of both sides showed that the testator had been confined in and discharged from a State's hospital about twelve years previous to his death; and the conflicting evidence upon his mental capacity to make a will was directed almost exclusively to his mental condition during the last few years of his life: *Held,* (1) in the absence of any evidence to the contrary, the law will presume the discharge was based upon the restoration of the testator's mind; (2) that the erroneous admission in evidence of the book of settlements in the office of the Superior Court clerk was harmless error. *Ibid.*

16. *Evidence—Mental Capacity—Burden of Proof—Instructions.*—After placing the burden of proof on the caveator to establish insanity of the testator at the time of making the will, by the preponderance of the evidence, it is correct for the judge to charge, in effect, that if the jury find from the evidence that the testator signed the writing offered in evidence as and for his last will; that at the time he had mental capacity to know and understand what he was doing, to know his property and its disposition, his relationship to his property and the persons benefited, the nature and effect of his act, he had mental capacity sufficient to make a will. *Ibid.*

17. *Witnesses—Signed in Testator's Presence—Transaction With Deceased—Independent Facts.*—Upon the trial of a *caveat* to a will, evidence pertinent to the inquiry is competent which tends to show the relative positions of the deceased and the witnesses to the will at the time of their signing in attestation, etc., that the testator rode with the witness to town to have the will attested, etc., as such, are independent matters and do not involve transactions or communications with the deceased prohibited by the statute. *In re Bowling*, 507.

18. *Same—Evidence.*—Evidence tending to show that the testator produced the paper-writing purporting to be his last will and testament, and had it signed, at a desk near by and in his plain view, by the subscribing witnesses, is sufficient to be submitted to the jury upon the question of whether the will was signed by the witness in his presence; and it is not necessary to prove that the testator actually saw the witnesses sign, if he was in position to do so without moving from where he was, the object of the law being to prevent the fraudulent substitution of another writing for that containing the will. *Ibid.*

WILLS—*Continued.*

19. *Fraud—Evidence—Questions for Court.*—When it is shown that testator had children living by a first and second marriage, had made provision for those of the first marriage by deed a few days before making the paper-writing purporting to be the will, and therein stated he had given them all he had intended; that he was eighty-four years old at the time, and died about four years thereafter, and there is nothing further to show undue influence, there is no evidence sufficient to be submitted to the jury on that question. *Ibid.*

20. *Construction—Devises Upon Condition—Unforeseen Circumstances.*—A will must be so construed as to effectuate the evident intent of the parties; and a devise by a testatrix of all of her property to her child by adoption and the object of her affection and solicitude, "provided she lives with her said uncle until she becomes free by age or marriage," will not be construed to divert the estate of the niece, who lived with her uncle after testatrix's death, because she was forced to leave him for her safety, owing to his subsequent unsoundness of mind and insanity, a condition not to have been anticipated by the testatrix before her death. *Lynch v. Melton*, 595.

21. *Interpretation—Devises—Husband and Wife—Restraint on Alienation—Void—Public Policy.*—When an item of a will gives a married woman a fee in testator's land, and it is followed by an item that the "above-devised lands shall not be disposed of, but shall descend to the children of my above-mentioned daughter," the words employed in the subsequent item are an attempted restraint upon alienation, contrary to public policy, and void. *Foster v. Lee*, 688.

WITNESSES. See Wills.

1. *Public Policy—Contract—Agreement to Testify—Consideration.*—An agreement by a party to give all true evidence when called on in any suit it may be deemed necessary to bring to recover an estate in which he has an interest, is not void as against public policy, when there is no indication that he was to receive payment therefor beyond that which the law allows to a witness and to which he would be legally entitled. *Smith v. Hartsell*, 71.

2. *Irrelevant Answer—Motion to Strike Out Answer—Objections and Exceptions.*—When a question calls for the statement of a fact, but the witness expresses an opinion, the party objecting should move the court to strike out the answer. For refusal to do so, an exception may be lodged. *Midgette v. Manufacturing Co.*, 333.

3. *Evidence—Impeaching—Character.*—It is harmless error, if erroneous at all, to ask witness, who testified to the good character of defendant, on trial for murder, whether he would consider one who had acted as defendant had admittedly done, as a man of good character, it being a test of witness' conception of what constituted good character. *S. v. Quick*, 820.

4. *Husband and Wife—Indictment—Tender by State—Refusal—Evidence Against Each Other—Improper Comments of Counsel—Appeal and Error.*—The State having the wife of the accused under subpœna, tendered her, and the solicitor commented on the refusal of the defendant to use her in corroboration of his own evidence. Upon objec-

WITNESSES—*Continued.*

tion by the defendant, it became the duty of the trial judge to caution the jury that this refusal of the accused should not be considered by them, and the judge's failure to so caution the jury was reversible error; and his telling them that the State could not use the wife as a witness, but the accused could, was an unintentional accentuation of the error. *S. v. Cox*, 846.