ANNOTATIONS INCLUDE 174 N. C.

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IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1909

BY

ROBERT C. STRONG

STATE REPORTER.

ANNOTATED BY

WALTER CLARK

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FALL TERM, 1909

STATE, EX REL. W. O. BARNETT v. S. E. MIDGETT.

(Filed 8 September, 1909.)

1. **Clerks of Court—Election—Board of County Canvassers—Decisions—Collateral Attack.**

   The decisions of judgments of the county board of canvassers are not of such conclusiveness or finality as to exclude collateral attack, and the use of the word "judicially" in Revisal, sec. 4350, does not enlarge the meaning of sec. 2694, Code, in respect thereto.

2. **Same—Rights and Remedies—Quo Warranto.**

   The correctness of the result of the election of a clerk of the Superior Court, determined and declared by the county board of canvassers, can be investigated, passed upon and determined in a civil action in the nature of a *quo warranto*, and such is the proper remedy.

QUO WARRANTO, brought in the name of the State, upon leave granted by the Attorney-General, upon relation of W. O. Barnett, against S. E. Midgett, to recover possession of and try the title to the office of the clerk of the Superior Court of DARE, tried before *Peebles, J.*, and a jury, at May Term, 1909, of said county.

The relator alleged that he was duly elected clerk of the Superior Court of DARE at the election held on Tuesday, 3 November, 1908, having received a plurality of the votes cast at said election, there having been at said election three candidates voted for in said county for said office; that at said election in Mashoes Precinct in said county the relator received five votes and the defendant only two votes, but that the board of county canvassers determined that the defendant received at said precinct five votes, thus making a tie vote between (2)

the relator and the defendant, which tie vote was broken by the election of the defendant by the board of elections of the county, and the defendant was declared duly elected and certificate of election issued to him, and on 7 December, 1908, he was duly inducted into said office, and the defendant has since then been in possession of the office and in receipt of its emoluments.

The record discloses the following as the only exception presented: "During the course of the trial the court stated, in response to the contention of the defendant, that it would hold that the return of the board of canvassers, together with the action of the county board of elections, was a judicial determination of the questions involved in the controversy, if the facts pleaded in the answer as to the meeting of the board and canvassing the returns were as pleaded, and could not therefore be collaterally assailed. The relator admitted that the board of county canvassers met at their regular meeting for the purpose and canvassed and determined the returns of the election, as alleged, and declared the result of the said election to have been a tie between the relator and the defendant. Said county canvassers reported said result to the county board of elections. Each board, acting separately, elected defendant clerk of said court. Thereupon the court repeated the opinion above expressed, in deference to which the relator suffered a nonsuit and appealed." In the judgment signed by his Honor it is recited that, "and the court having intimated an opinion that upon admission made by plaintiff as to action of board of county canvassers the plaintiff could not recover, the plaintiff in deference to said intimation submitted to a judgment of nonsuit and appealed to the Supreme Court."

B. G. Crisp, D. M. Stringfield and Ward & Grimes for plaintiff.
W. M. Bond and Aydlett & Ehringhaus for defendant.

MANNING, J., after stating the facts: It was contended before us that the Legislature, by section 4250, Revisal, created the board of canvassers an inferior court, whose decisions are judgments, having all the conclusiveness and finality of judgments, and protected from attack or review, except possibly by some kind of appeal, *certiorari* or some other writ, and that an action in the nature of *quo warranto,* such as this is, to try the title to the office of the clerk of the Superior Court, would not lie, because it would be a collateral attack upon the final judgment of the board of canvassers of the county. This argument was rested upon the word "judicially," used in the statute.

That this word cannot be given such meaning in this statute has been decided by this Court in *Gatling v. Boone,* 98 N. C., 573, and *Roberts v. Calvert,* 98 N. C., 583. The meaning and (3)

effect of the same word, used in the amendments to section 2694, Code 1883, subsequently adopted and embraced in section 4350, Revisal, cannot be enlarged to support the contention of the defendant or his Honor's ruling. The only amendment to section 2694, Code, is the following, viz: "The said board shall have power and authority to judicially pass upon all facts relative to the election, and judicially determinate and declare the result of the same, and they shall have power and authority to send for papers and persons and examine the same." "It is a mistaken notion that such limited exercise of judicial power is conclusive." "No such jurisdiction is conferred, and the board of canvassers is not adapted to such purpose." *Gatling v. Boone, supra.*

The extent and the effect of the determination of the board of canvassers or other election officers have been declared in that case the other cases determined by this Court. *Roberts v. Calvert,* 98 N. C., 583; *S. v. Cooper,* 101 N. C., 684; *Gatling v. Boone,* 101 N. C., 64; *Boyer v. Teague,* 106 N. C., 576; *Cozart v. Fleming,* 123 N. C., 547.

That *quo warranto* is the appropriate remedy, and that the correctness of the result of the election declared by the board of canvassers can be investigated in such action, has also frequently been decided by this Court. *Lyon v. Commissioners,* 120 N. C., 237; *Cozart v. Fleming, supra,* and cases cited above.

Therefore the ruling of his Honor is erroneous, the judgment is reversed and the plaintiff is entitled to a new trial.

Reversed.

RALEIGH SAVINGS BANK v. B. R. LACY, STATE TREASURER.

(Filed 8 September, 1909.)

1. Bond Issues—Suit Against the State—State Agency.

A suit brought by a bidder on State's bonds against the State Treasurer to recover a cash deposit made with defendant Lacy as security, that the plaintiff would take and pay for a certain issue thereof in case they were adjudged to be valid by the courts, is not a suit against the State, and may be maintained against the treasurer as an agent appointed by the State to make the sale.

2. Bond Issues—Legislative Acts—Aye and No Vote—Separate Days—Constitutional Law.

Bonds issued by the State in aid of its institutions are not unconstitutional because an amendment directing that some of the fund be applied to the settlement of a deficit in the account of one of the institutions has not passed its readings upon aye and no vote, upon different days, as required by the State Constitution, when otherwise the constitutional requirements have been met.

(4) ACTION heard upon demurrer to the complaint by his Honor, *W. R. Allen, Judge,* at July Term, 1909, of WAKE.

His Honor susained the demurrer, and from the judgment rendered plaintiffs appealed.

Womack & Pace for plaintiff.
Attorney-General Bickett for defendant.

BROWN, J. The facts admitted by the demurrer are as follows: The General Assembly of 1909 authorized an issue of $500,000 of State bonds (chap. 510, p. 872, Laws 1909) for purposes connected with the maintenance, enlargement and improvement of the State hospitals. The bonds were bid off by plaintiff, who deposited $125,000 with the defendant Lacy as security that plaintiff would take and pay for the bonds in case they were adjudged to be valid by this Court. Under such circumstances we do not conceive this to be in any sense a suit against the State, but a proceeding instituted solely to test the validity of the bond issue between Lacy, the agent appointed by the State to make the sale, and the purchaser. The defect in the bonds consists in the allegation that the ayes and noes were not recorded on two readings in the House of Representatives, as required by the Constitution, Art. II, sec. 14. The journal of the House of Representatives shows that the bill was read on the day of introduction and referred to a committee, and that on 25 February, 1909, the bill passed its second reading, the "aye and no" vote being taken and recorded in the journal. On a subsequent date, namely, 26 February, 1909, the bill was taken up as a special order, when and where, before its third reading, the following amendment was introduced: "House Bill 1367. Amend section 1 by adding to the end thereof the following: 'Provided, that out of the proceeds of said bonds shall be paid the sum of $20,000, deficit existing in the accounts of the State Hospital at Morganton, and also the sum of $11,000, deficit in the account of the Eastern Hospital at Goldsboro.'" At this point the House journal reads as follows: "The amend-

(5) ment of Mr. Graham is adopted. The question recurs upon the passage of the bill, as amended, on its third reading. Passes its third reading by the following vote." The "aye and no" vote was taken and recorded in the House journal and the bill was duly passed and sent to the Senate. That it passed the Senate in strict accord with constitutional requirements is not questioned.

We are of opinion that the bill has become a valid law of the State, and that the forms of procedure required by the Constitution have been observed.

It is true the bill was amended on the third reading in the House,

but the amendment created no additional debt and placed no additional burden on the State, nor does it change the rate of interest or time of payment. It simply directed the application of a very small portion of the proceeds of the bonds to the payment of a deficit in the accounts of the Morganton Hospital. This is one of the State's institutions, for the relief of which the bond issue was authorized. We think the case is fully covered by previous rulings of this Court, in *Glenn v. Ray,* 126 N. C., 730; *Brown v. Stewart,* 134 N. C., 357; *Commissioners v. Stafford,* 138 N. C., 453.

Affirmed.

Cited: Pritchard v. Comrs., 159 N. C., 637; *Gregg v. Comrs.,* 162 N. C., 484.

NORWOOD L. SIMMONS, ADMR., v. HATTIE RESPASS ET AL.

(Filed 15 September, 1909.)

1. **Homestead—Rights of Widow—Children—Constitution—Interpretation.**

The widow by a second marriage of one who died seized and possessed of land leaving no children by her, is not entitled to the benefit of a homestead therein, when he has left children by his first marriage, though they are adult. The meaning of the language of the Constitution is too plain for construction, that in speaking of children the instrument refers to children of the deceased owner. Constitution, Art. X, secs. 2, 3, 5.

2. **Executors and Administrators—Debts—Sales—Assets—Dower.**

When the widow's claim of homestead is rightfully denied in proceedings by the administrator on partition to sell lands to make assets to pay her deceased husband's debts, an order directing that her dower be assigned, and, subject thereto, the land be sold for assets, is the proper one.

APPEAL from *Peebles, J.,* at February Term, 1909, of BEAUFORT.

Petition to sell land for assets, heard on appeal from the clerk of the Superior Court and on case agreed. The facts agreed upon were as follows: (6)

1. That on or about the ____ day of July, 1908, Fred. Respass died intestate in the county of Beaufort and seized of the lands described in the petition in this cause.

2. That the said Fred. Respass left debts aggregating $350, and it is necessary to have a sale of his real estate to make assets with which to pay those debts.

3. That N. L. Simmons is the duly appointed and qualified administrator of the said Fred. Respass.

4. That said Fred. Respass was married twice, and by his first marriage he had two children, to wit, John B. Respass and Esther Respass, who are over twenty-one years of age.

5. That their mother, the first wife of Fred. Respass, pre-deceased him, having died ____ years ago.

6. That about February, 1908, said Fred. Respass intermarried with Hattie Respass, one of the defendants, and was living with her in the relation of husband and wife at the time of his death.

7. That he has no children as the issue of the marriage with the said Hattie Respass.

8. That Hattie Respass is not the owner of a homestead in her own right.

9. That the said Fred. Respass was entitled to homestead exemption, but no homestead was allotted to him during his lifetime.

Upon the foregoing statement of facts the said Hattie Respass contends that she is entitled to a homestead out of the lands of the said Fred. Respass. The administrator contends that she is not entitled to a homestead.

On these facts the clerk adjudged that the widow was not entitled to a homestead in the lands of her deceased husband, and directed that her dower be assigned, and subject thereto that the land be sold for assets. This judgment was affirmed by the court, and the widow, Hattie Respass, excepted and appealed.

Ward & Grimes for defendant.
No counsel contra.

HOKE, J., after stating the facts: It was contended for the claimant, Hattie Respass, that when the Constitution conferred upon the widow the right to a homestead, in case there were "no children," these words should be construed to mean no children of the deceased and the widow making the claim; but, in our opinion, both the language of the Constitution and authoritative interpretations of it are against defendant's position.

(7) The sections of our Constitution controlling the question (Article X, sections 2, 3, 5) provide as follows:

"Sec. 2. Every homestead and the dwellings and buildings used therewith, not exceeding in value $1,000, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwellings and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of $1,000, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale

for taxes or for payment of obligations contracted for the purchase of said premises.

"Sec. 3. The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children or any one of them.

"Sec. 5. If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right."

A perusal of these sections makes it clear, and the meaning is too plain for construction, that in speaking of children the instrument refers to children of the deceased owner, and that no special reference is made to them as children of his widow or any former wife. Thus, in section 3, "If the owner die, the homestead shall be exempt, etc., during the minority of his children or any one of them"; section 5, "If the owner die, leaving a widow and no children," etc.

It is urged for the defendant that the reason of the thing tends to sustain her position, as a widow should not be required to depend for support on the kindness and good will of adult children by a former wife. To this it may be answered that in case the owner die, leaving a widow and also children, minors or adults, that dower is the estate especially favored and designed by the law for the protection and support of the widow. In *Watts v. Leggett,* 66 N. C., 197, it has been held that the widow's dower is the superior right when both claims attach to the same property. The true answer, however, is that the Constitution, in language too plain for construction, only confers the right of homestead on a widow in case the owner dies, leaving no children by the widow or any other lawful wife.

There are decisions of this Court which bear upon this question and tend strongly to support this view of the case. Thus, in *Wharton v. Leggett,* 80 N. C., 169, approved in *Taylor v. Powell,* 90 N. C., 202, it was contended that by fair and reasonable interpretation the Constitution should be construed to confer upon the widow the right of homestead when the husband had died, leaving only adult children, and that the term "no children," in section 5, Article X, should (8) be construed to mean "no minor children." But this view was rejected by the Court, and *Ashe, J.,* delivering the opinion, said: "The plain and literal construction of these sections is that they were meant, first, to secure a homestead to every resident of the State who owned land and was in debt by exempting his land, not exceeding in value $1,000, from sale for his debts; second, if he die in debt and in possession of a homestead, it should descend to his minor children until the youngest attain the age of twenty-one years; and, third, if he die in debt

and in possession of a homestead, leaving a widow and no *children,* it would go to her." And, again, on page 171, "But it is also insisted on the part of the widow defendant that the words in section 5, Article X, 'but no children,' should be construed to mean minor children, but we do not concur in this construction. It cannot be made without discarding the plain and unequivocal language of the Constitution—leaving a 'widow, but no children.'" And so we hold here. The Constitution is speaking of the homestead throughout in special reference to the owner; and when it says if the owner of the homestead die, leaving a widow, but no children, the instrument means what it plainly says, and no other interpretation is permissible.

There is no error, and the judgment below is affirmed. See, also, *Wharton v. Taylor,* 88 N. C., 230, as to the correctness of the order entered.

Affirmed.

M. S. BARDEN v. L. P. HORNTHAL AND L. H. HORNTHAL.

(Filed 15 September, 1909.)

1. **Notes—Original Parties—Restrictive Endorsements—Delivery—Presumptions.**

The time of the operative effect of Revisal, sec. 2345, relating to negotiable instruments, was 8 March, 1899; and prior thereto, as between the original parties, one who wrote his name across the back of the instrument, could show the exact nature of the obligation assumed, whether as joint promissor, guarantor or first or second endorser, the presumption of the law, in the absence of such qualifying testimony, being that he signed as comaker, or at least as surety.

2. **Same—Instructions—Questions for Jury.**

In an action on a promissory note made in February, 1899, when it appears from the instrument itself and admissions in the pleadings, in evidence, that the defendant wrote his name across the back of the note, before delivery to payee, to enable the maker to obtain a loan from the payee, without further evidence tending to restrict or qualify the nature of his obligation, and the amount claimed to be due is not disputed, the defense that the defendant was discharged by the laches of the payee in the collection of the note from the maker and by failure to give notice of default, is invalid, and a charge is correct that if the jury believe the evidence they should render a verdict for plaintiff.

3. **Notes—Liability of Endorsers—Original Parties—Restrictive Endorsements—Undated Endorsements—Burden of Proof.**

The question as to whether an undated endorsement on a note is presumed to bear the same date of the instrument only in favor of third persons, and has no application between the original parties, is not involved,

when it appears from the admissions that the defendant, in a suit upon a note, wrote his name across its back before delivery to enable the maker to obtain money from the plaintiff, and there is no evidence restrictive of the defendant's obligation, which it is upon him to show.

4. Notes—Endorser—Liability.

Whether sec. 50, Code, 1883, by which all endorsers are declared to be *prima facie* sureties, applies to a transaction of this character or is confined to endorsements in the strict sense of mercantile law by which the title to a note is passed and same put in circulation as a negotiable instrument. *Quaere.*

APPEAL from *Peebles, J.,* at January Term, 1909, of WASHINGTON. (9)

L. P. Hornthal, on petition duly filed, having received his discharge in bankruptcy, the action is further prosecuted against L. H. Hornthal, the other defendant. The note in question was given to plaintiff for $1,500, bearing date 27 February, 1899, payable on demand, signed by L. P. Hornthal as maker, and on the back thereof appears the name of defendant, L. H. Hornthal.

In the pleading L. H. Hornthal admitted that the note was for money lent by plaintiff to L. P. Hornthal, the maker, and that before delivery of same, and as an inducement to the loan, he had written his name on the back of the note; but alleged that he so wrote his name as endorser and not as surety, and contended that as such endorser he was discharged by the laches of plaintiff in the collection of the note from L. P. Hornthal, the maker, and by failure to give said L. H. Hornthal proper notice of the maker's default. Other defenses were also alleged in the answer. On the trial the plaintiff presented the notes on which certain partial payments had been entered as credits, proved the signature of defendant L. H. Hornthal on back of note, introduced the complaint and answer showing defendant's admissions, and rested. Defendant moved for judgment of nonsuit, which was overruled, and defendant excepted.

The court charged the jury, if they believed the evidence they would render a verdict for balance due on note, and defendant excepted. Verdict for plaintiff; judgment, and defendant excepted and appealed.

Gaylord & Gaylord for plaintiff. (10)
Shepherd & Shepherd and Ward & Grimes for defendant.

HOKE, J., after stating the facts: Our statutes on negotiable instruments (Revisal 1905, sec. 2345) enact that the provisions of the law shall not apply to such instruments made and delivered prior to 8 March, 1899; and the note sued on having been executed on 27 February, 1899, the rights of the parties to this controversy are unaffected by the statute,

and must be so considered and determined. Viewed in that aspect, our decisions are to the effect that when a third person writes his name on the back of a negotiable instrument before delivery to the payee, and with a view to give additional credit to the maker, it is open to the original parties, and as between themselves, to show the intent and exact nature of the obligation assumed, whether as joint promissor and guarantor or as first and second endorser, etc.; and in the absence of such qualifying testimony the law will presume that such person signed his name as co-maker, and in any event as surety, that being the relationship of the defendant alleged in the complaint. *Lilly v. Baker,* 88 N. C., 151; *Treadwell v. Blount,* 86 N. C., 33; *Hoffman v. Moore,* 82 N. C., 313; *Baker v. Robinson,* 63 N. C., 191; *Good v. Martin,* 95 U. S., 90.

In *Lilly v. Baker, supra, Ashe, J.,* speaking to these questions, said: "Whether a party who endorses a note in blank is to be held to be an original promissor, endorser or guarantor will depend upon the time of the endorsement and the character of the instrument endorsed; as, for instance, if a note, whether negotiable or not, is endorsed at the same time the note itself is made, the endorser ought to be held as original promissor or maker of the note. But where the note is endorsed after its delivery to the payee, whether the endorser is to be held as an endorser or guarantor, will depend upon the character of the note. If it is a note not negotiable, he is held to be a guarantor; but if it is a negotiable note and is endorsed in blank by a third person, not being the payee, or a prior endorsee through them, in the absence of any controlling proof it is presumed that such person means to bind himself in the character of an endorser, and not otherwise, and precisely in the order and manner in which he stands on the note. Story, *supra,* pp. 473-480."

And in *Good v. Martin,* 95 U. S., *supra,* the Court held as follows:

"1. In a suit upon a promissory note the court below charged
(11) the jury that if the defendant, without making any statement of his intention in so doing, wrote his name on the back of the note before its delivery to the payee, he is presumed to have done so as the surety of the maker, for his accommodation, and to give him credit with the payee; and that, if such presumption is not rebutted by the evidence, he is liable on the note as maker. Held, that the charge was not erroneous."

A correct application of these principles to the facts presented fully sustains the decision of his Honor below in refusing to nonsuit the plaintiff, and the charge as given to the jury. On the trial the note was presented, showing the amount originally due, and a number of partial payments entered thereon as credits. The fact was proved that

the defendant L. H. Hornthal wrote his name on the back of the note; and the pleadings which were introduced in evidence contain by fair intendment an admission by defendant that he so wrote his name before delivery to the payee, and to enable his codefendant, L. P. Hornthal, to obtain the money that plaintiff then loaned him. On these facts, and in the absence of any testimony tending to restrict or qualify the nature of defendant's obligation, the court, under the authorities cited, was fully justified in charging the jury, if they believed the testimony, they would render a verdict for plaintiff, there being no dispute as to the amount due on the note in case defendant was liable.

It is earnestly contended for defendant that the presumption which usually obtains, to the effect that an undated endorsement, when there is no evidence to the contrary, will be presumed to have been the same date as the note, does not apply as between the original parties to the instrument, but only arises in favor of third persons; and when a negotiable instrument has been put in circulation by regular and proper endorsement, and that, in the present case, in the absence of direct evidence as to the time of the endorsement, the form of the instrument should control. But, in our opinion, the case does not call for or permit the determination of this interesting question, for the reason that the pleadings contain by fair intendment a clear admission on the part of the defendant that he wrote his name on the back of the paper before delivery to the payee, and to assist his codefendant in obtaining the loan; and where this appears, then all evidence restrictive of the signer's obligation must come from him.

As said by *Chief Justice Smith,* in *Hoffman v. Moore, supra,* "The legal effect of such a signing ought to be, and, we think, is, fixed and definite, when the security is assigned, and for like reasons should be, when, as in the present case, it is delivered unexplained to the payee, and the legal liability of the endorsers not left contingent upon an unexpressed and unknown understanding among themselves. (12) But however this may be, it is clear the evidence restrictive of the implied obligation must come from the parties who are charged. Not only was no such testimony produced, but the evidence tended to show that the plaintiff accepted the note under the belief that the signers were all sureties for the debt. The charge of the court was almost in the very words upon which, in *Baker v. Robinson, supra,* the decision was made, holding the endorsers responsible as sureties for the maker."

Decided intimation is given in this last case (*Hoffman v. Moore*) that the provision of the Code of 1883, being chapter 6, section 50, making all endorsers liable as sureties unless otherwise plainly expressed in the endorsement, "does not apply to the facts presented here, but only to endorsements in the strict sense of commercial law, and by means of

which a negotiable instrument is put in circulation." This, too, is an interesting question, the decision of which is not required for the determination of the present appeal, and the section of the Code mentioned and the decisions predicated thereon cited by plaintiff are not therefore referred to or dwelt upon.

No error.

Cited: *Bank v. Wilson,* 168 N. C., 559.

GEORGE W. BAKER v. WALTER R. BROWN.

(Filed 15 September, 1909.)

1. **Appeal and Error—Estoppel—Res Judicata—Evidence.**

When the contents of records in a former suit, upon which a plea in *estoppel* or *res judicata* is based, do not appear on appeal, the Supreme Court will not pass upon the question as there is no evidence to support the plea.

2. **Evidence—Nonsuit—Limitations of Action.**

Without deciding whether a motion to nonsuit upon the evidence is the proper method of raising the question of the bar of the statute of limitations, the motion will be denied when there is conflicting evidence upon the issue.

3. **Partnership—Trusts and Trustees.**

Partners stand in a fiduciary relationship to each other, and ordinarily the rules and tests applicable to trustees are applicable to their conduct towards each other.

4. **Same—Limitations of Actions.**

When one partner receives the assets of the firm for the purpose of paying its debts and settling its affairs he acts as a trustee or agent for his copartner, and when such relationship is shown to exist without evidence that it had been terminated, it is not error to refuse a motion to nonsuit under the plea of the statute of limitations.

5. **Instructions—Evidence—Questions for Jury.**

An instruction, "If you find by the greater weight of the testimony that the plaintiff's evidence on the fourth issue is not positive and supported, then you will answer that issue, Yes," is properly refused as invading the province of the jury to pass upon the weight and sufficiency of the evidence.

6. **Partnership—Evidence—Transactions.**

In an action to dissolve a partnership it was not error in the trial court to refuse to dismiss the action as to a certain line of business, when there was evidence that it was embraced in the partnership dealings and which was germane to the issue.

7. Jurors—Improper Conduct—Court's Discretion.

While it is not proper conduct for a party litigant to talk to a juror sitting in his cause, it is within the discretion of the trial judge to set the verdict aside, and his decision is not reviewable, when he had not said anything relating to the cause then being tried, and when it was found by the judge and appears to be harmless in its effect.

8. Motions—Set Aside Verdict—Additional Evidence—Court's Discretion.

When the trial judge has heard the evidence adduced upon a motion to set aside a verdict because of the improper conduct of a party in talking to a juror in his cause, it is within his discretion to refuse additional evidence, and his decision is not reviewable.

APPEAL from *Peebles, J.*, at May Term, 1909, of BEAUFORT. (13)

B. B. Winborne and J. B. Martin for plaintiff.
Winston & Matthews for defendant.

WALKER, J. This action was brought by the plaintiff to dissolve a partnership existing between him and the defendant, and for an account and settlement of the business and affairs of the partnership. There was evidence tending to show that the parties were engaged, as partners, in conducting "a general mercantile, sawmill and lumber business." The defendant averred in his answer and introduced evidence to show that the firm was engaged only in a mercantile business and that the "sawmill and lumber dealings" were not a part of the transactions of the firm. He also alleged that the partnership was dissolved in 1899, more than three years before this action was commenced, and pleaded the statute of limitations in bar of the action. The plaintiff alleged that the firm was not dissolved in 1899 and never had (14) been dissolved, but that the business was discontinued and he took possession of its assets for the purpose of paying its outstanding debts and liabilities. The defendant also averred that the plaintiff had agreed with him to take the assets of the partnership and assume and pay its debts. There was a controversy between the parties as to whether the "hotel and lot at Kelford" were purchased with funds belonging to the firm, but this matter was settled, as will appear by the judgment, and is eliminated from the case. The plaintiff set up the records in former suits as an estoppel or *res judicata,* but these records are not before us and their contents do not in any way appear. This defense, therefore, fails because there is no evidence to sustain it.

The defendant moved to nonsuit the plaintiff, which motion was overruled.

The defendant then requested the court to charge the jury as follows: "The defendant contends that the plaintiff's evidence is uncertain, not

strong, not positive, and that it is not supported by other witnesses. He also contends that his evidence is clear and positive, and that it is supported by disinterested witnesses. That is for you (the jury) to determine. The law has a rule for weighing all testimony. If witnesses are in all respects of equal character and credit, the law attaches greater weight to the evidence of the witness who is positive and supported than it does to the evidence of one who is doubtful or undecided and unsupported. With the rules of law as your guide, you are to ascertain the quality and character of the evidence in this case."

This the court gave, but refused to give the rest of the instruction as requested and which is as follows: "If you find by the greater weight of the testimony that plaintiff's testimony on the fourth issue is not positive and is unsupported, and that the defendant's evidence is positive and supported, then you will answer that issue 'Yes.'"

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

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

2. Was the lumber plant and its business, including the purchase and manufacture of timber and lumber, embraced in the partnership of Baker & Brown? Answer: Yes.

3. Were the hotel and lot at Kelford purchased with any of the funds of the partnership of Baker & Brown, in whole or in part? Answer: Yes; in part.

4. Was there a dissolution and settlement of the partnership,
(15) and did Baker, the plaintiff, agree to assume the debts of the partnership, take the property of the firm and other property, and release Brown, defendant, from all liability on account of said partnership? Answer: No.

5. Did the plaintiff, Baker, receive from his partner, Brown, sufficient assets of the firm of Baker & Brown to pay the debts of said firm? Answer: No.

Upon motion of the plaintiff, the answer to the third issue was set aside, and the plaintiff consented that said issue should be answered No, which was done.

There was evidence supporting the respective contentions of the parties in respect to the issues submitted by the court. The defendant moved for a new trial; the motion was overruled and judgment entered upon the verdict for the plaintiff. The defendant, in apt time, excepted to the several rulings of the court, which were adverse to him, and appealed from the judgment.

The defendant's motion to nonsuit the plaintiff, because the action is barred by the statute of limitations, was properly overruled. If

this be the proper method of raising that question, as to which we express no opinion, there was abundant evidence to show that the action was not barred. Indeed, there was scarcely any evidence to the contrary. If there was such evidence, it was the province of the jury to pass upon the conflicting proof and determine, under instructions of the court, as to the law, whether the action was barred.

It is well settled by the authorities that partners stand in a fiduciary relation toward each other. The same rule and tests are applied to the conduct of partners as are ordinarily applicable to that of trustees. In law the functions, rights and duties of partners, in a great measure, comprehend those both of trustees and agents. We so held in *Patterson v. Lilly,* 90 N. C., 82. Referring to that case, when discussing a question similar to the one now before us, *Justice Burwell,* in *Faison v. Stewart,* 112 N. C., 332-344, said: "When within the scope of the business of the firm, a partner does any act in the name of the partnership, he binds all his associates, for he is in all such matters their agent, as they are his. And where a partner takes into his possession or borrows from the firm or appropriates to his own use any of the assets of the copartnership, he assumes towards the other partners the position of a trustee, and is bound to account with them for the assets so taken or appropriated or borrowed, whenever the other partners make demand upon him so to do." There must be some action taken by the one partner against the other, such, for example, as a demand for an account and settlement, in order to terminate this fiduciary relation before the statute of limitations will begin to run (*Rencher v. Anderson* (16) 95 N. C., 208; *Rhyne v. Love,* 98 N. C., 486); and in this connection it may be well to quote what is said by *Justice Ashe* in *Patterson v. Lilly,* 90 N. C., 87, as to the nature of this trust relation subsisting between partners, and as to how it may be ended: "Where the trust is direct, it is a well-established rule, belonging exclusively to the jurisdiction of courts of equity, that, so long as the trust subsists, the right of the *cestui que trust* cannot be barred or excluded by the trustee by virtue of the length of time during which the latter has held possession. Yet it is a rule quite as well settled that where the fiduciary character of the trustee has ceased or been put an end to by his repudiating the rights of the *cestui que trust,* as by assuming absolute ownership over the property or by refusing to account for the same, then the statute does apply, and the *cestui que trust* must bring his action within the time prescribed or be barred," citing Angell on Limitations, secs. 468 and 174. If one of the partners receives the assets of the firm for the purpose of paying its debts and settling its affairs, he acts as a trustee or agent for his copartner, and the statute does not begin to run until in some way the fiduciary relation ceases to exist. It is further said in *Patterson v.*

Lilly, 90 N. C., at p. 88: "The statute of limitations does not commence to run in favor of one partner against another, even after a dissolution of the partnership, as long as there are debts due from the partnership to be paid, or debts due to be collected. *Hammond v. Hammond,* 20 Ga., 556; Wood on Lim., sec. 210." There is no evidence in this case to show that the statute bars the plaintiff, but the trend of all the evidence is the other way. The cases of *Patterson v. Lilly* and *MacNair v. Ragland,* 7 N. C., 139, seem to be directly in point, and the principles therein stated are decisively against the defendant's contention. The facts of the latter case are substantially identical with those presented by the record before us. We have considered this question somewhat at length, as it appears to be the defendant's principal reliance for a reversal of the judgment. We have not cited the numerous authorities to be found in the brief of the plaintiff's attorneys, as we deemed those to which we have referred sufficient to show that this objection of the defendant is untenable. There was, therefore, no error in the ruling and charge of the court as to the statute of limitations.

The court properly rejected the latter portion of the instruction which the defendant requested to be given to the jury in regard to the nature of the evidence adduced by the parties and the weight to which it was entitled. It was for the jury to pass upon the weight of the testimony and its sufficiency to establish any particular fact, and not for the
(17) Court. Indeed, the instruction given by the court in response to the prayer was quite as favorable to the defendant as the law permitted it to be, and he has no reason to complain that a part of the instruction was omitted.

The refusal of the court to dismiss the action "as to the dealings in lumber and timber" was not erroneous, as there was some evidence that they were transactions of the partnership.

The defendant moved to set aside the verdict because the plaintiff had talked to one of the jurors. This was not proper conduct on the part of the plaintiff, when unexplained, but the evidence shows that it was inadvertent and that what he said did not even remotely relate to the case tried by the jury of which he was a member, and was utterly harmless. It had no influence whatever upon the jury or the juror with whom the plaintiff talked, and the court so finds the facts to be. As was said by *Judge Pearson,* in *S. v. Tilghman,* 33 N. C., at p. 552, "Perhaps it would have been well had his Honor, in his discretion, set aside the verdict and given a new trial as a rebuke to the jury and an assertion of the principle that trials must not only be *fair, but above suspicion.* This, however, was a matter of discretion, which we have no right to reverse. Our inquiry is, was the misconduct and irregularity such as to vitiate the verdict, to make it in law null and void and *no verdict?*"

That case is an authority for the position that, under the facts of this case, the motion for a new trial was addressed to the sound discretion of the court. "When the circumstances are such as merely to put suspicion on the verdict by showing, not that there *was,* but that there might have been undue influence brought to bear upon the jury, because there was opportunity and a chance for it, it is a matter within the discretion of the presiding judge; but if the fact be that undue influence was brought to bear upon the jury, as if they were fed at the charge of the prosecutor or prisoner, then it would be otherwise." *S. v. Brittain,* 89 N. C., 483. See also, *S. v. Harper,* 101 N. C., 761; *S. v. Morris,* 84 N. C., 757; *S. v. Tilghman, supra; S. v. Gould,* 90 N. C., 658; *S. v. Barber,* 89 N. C., 523. In *Moore v. Edmiston,* 70 N. C., at p. 481, *Justice Bynum,* for the Court, thus formulates the rule: "The line of distinction is that to vitiate and avoid a verdict it must appear upon the record that undue influence was brought to bear on the jury. All other circumstances of suspicion address themselves exclusively to the discretion of the presiding judge in granting or refusing a new trial. He is clothed with this power because of his learning and integrity and of the superior knowledge which his presence at and partici- (18) pation 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." It does not appear in this case that the jury were influenced in the slightest degree, in deciding upon their verdict, by what the plaintiff said to one of the jurors. On the contrary, it appears that they were not and could not have been so influenced.

The request of the plaintiff that he be allowed to offer additional testimony after the motion to set aside the verdict had been heard upon evidence already introduced, and had been finally submitted to the judge for his consideration and decision, was clearly a matter within his discretion, and its refusal is not subject to review in this Court.

Upon a review of the whole case, we find no error in the rulings and judgment of the court.

No error.

Cited: Lewis v. Fountain, 168 N. C., 279; *S. v. Trull,* 169 N. C., 369.

C. H. GASKINS v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 15 September, 1909.)

Carriers of Freight—Consignor and Consignee—Title—Evidence—Nonsuit.

The title to goods shipped under an open bill of lading *prima facie* vests in the consignee; and when the consignor, in his action for damages to the goods against the carrier, fails to offer evidence upon his allegation that he had retained the title which is denied, defendant's motion to nonsuit should be granted.

APPEAL from *Peebles, J.*, at May Term, 1909, of BEAUFORT.

This action was brought against the defendants, the Atlantic Coast Line Railroad Company and the Southern Railway Company, to recover damages for injury to a soda fountain, which was delivered by the plaintiff to the first-named company at Grifton, N. C., to be shipped *via* Selma, N. C., to J. C. Reitzel, at Liberty, N. C., a station on the Southern Railway. When it was delivered for shipment the soda fountain was in good condition. The plaintiff alleges in his complaint "That the soda fountain and fixtures were his property, and by agreement with J. C. Reitzel, the consignee, they were to remain his property until (19) accepted and paid for by Reitzel." This allegation was denied in the answer of the defendant, and there was no evidence to sustain it, it appearing only that the fountain and its fixtures were shipped under an open bill of lading, which was issued by the Atlantic Coast Line Railroad Company to the plaintiff.

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

1. In what sum, if any, is the defendant Atlantic Coast Line Railroad Company indebted to the plaintiff? Answer: Twenty dollars.

2. In what sum, if any, is the defendant Southern Railway Company indebted to the plaintiff? Answer: Two hundred and fifty dollars.

It appeared that the ice shaver was damaged while the fountain was in the possession of the Atlantic Coast Line Railroad Company, and the defendant did not appeal from the judgment for the amount assessed by the jury against it for said damage. The evidence tended to show the following facts:

The Atlantic Coast Line Railroad Company has a "line of track" from Grifton to a point beyond Selma, and the Southern Railway Company has a "line of track" which crosses the line of its co-defendant at Selma and extends beyond that place. The two companies receive and deliver freight at Selma from and to each other. This statement is taken from the answer of the Southern Railway Company, which was in evidence. The bill of lading issued to the plaintiff by the Atlantic Coast Line

Railroad Company was also in evidence. C. H. Gaskins testified in behalf of the plaintiff as follows: "I helped to crate the property; it was in perfect condition and worth $285. It was delivered to the Atlantic Coast Line Railroad Company at Grifton for transportation to Liberty, N. C. I last saw the property in the warehouse of the Atlantic Coast Line at Grifton, about sixty days after it had been shipped. I only saw the top and end of the fountain on its return. The agent objected to my examination. The marble was broken all to pieces; the ice shaver was missing. The ice shaver was worth $22.50. I know as a fact that the fountain started to Liberty. I do not know whether it ever got there." At the close of this testimony the defendant Southern Railway Company moved to nonsuit the plaintiff. The motion was overruled and an exception entered.

J. A. Spiers, a witness for the Atlantic Coast Line Railroad Company, testified as follows: "This shipment was received at Selma, 12 March, 1908. I delivered it to the Southern Railway Company. The wheel to the ice shaver was in bad condition."

At the close of all the testimony the defendant Southern Railway Company renewed its motion to nonsuit, which being over- (20) ruled, it excepted.

The court charged the jury as follows: "The agent at Selma shows delivery of the fountain to the Southern Railway Company on 12 March, in good condition, with the exception of damage to the ice shaver. (If you believe that the Atlantic Coast Line Railroad Company delivered the property to the Southern Railway Company at Selma in good condition, that would put the burden on the Southern Railway Company to show delivery in good condition at the point of destination. If you believe the testimony, you will assess the damage to the ice shaver against the Atlantic Coast Line Railroad Company and the balance of the damage against the Southern Railway Company.) You cannot give against the Southern Railway Company more than $262.50 damages. You are not bound to give plaintiff the amount of damages demanded by him."

The Southern Railway Company excepted to that part of the charge in parentheses. There was a motion for a new trial, which was denied. Judgment was entered upon the verdict, and the Southern Railway Company excepted and appealed, assigning errors as follows:

1. That the court erred in refusing the motion to nonsuit.

2. That there was error in the part of the charge to which exception was taken.

W. C. Rodman for plaintiff.

W. B. Rodman, R. G. Lucas and J. H. Pou for defendant.

WALKER, J. It appears in this case that the fountain was delivered to the carrier by the plaintiff, who had sold it to Reitzel, and who received from the carrier an open bill of lading, by which the latter agreed to transport and deliver the fountain to the consignee, Reitzel, at Liberty, N. C., the shipment to be made over the lines of the two defendants. The case, therefore, is governed by the principle settled by this Court in *Stone v. R. R.*, 144 N. C., 228, and *Mfg. Co. v. R. R.*, 149 N. C., 261. In the former of these cases we held it to be "undoubtedly true that in the absence of any suggestion that the goods were not shipped 'open,' the delivery to the carrier taking a bill of lading to the consignee vests in the consignee the title to the goods, making the carrier liable to him for failure to transport and deliver. '*Prima facie* the consignee is the owner of the goods in transit, the property therein vesting in the consignee upon delivery to the carrier, and he only can sue the carrier for nondelivery, though a receipt was given to the consignor.

(21) The carrier is entitled to consider and bound to treat the consignee as such owner, unless it is advised that a different relation exists, or unless notice of such fact is to be implied from the manner of shipment, as when goods are sent C. O. D.' Moore on Carriers, 188; Tiffany on Sales, 195; *Crook v. Cowan*, 64 N. C., 743; *S. v. Patterson*, 134 N. C., 612; *Ober v. Smith*, 78 N. C., 316."

In the latter case the doctrine was thus stated: "It is common learning that when the vendor delivers an article to the common carrier to be transported by the usual route to the vendee, taking an open bill of lading, the title to the article passes to the vendee or consignee. This is true, although by the terms of the sale the vendee is to pay cash. For an injury to an article while in transit, or delay in transportation or delivery, the carrier is liable to the consignee. *Stone v. R. R.*, 144 N. C., 220."

Stone v. R. R., was approved in *Cardwell v. R. R.*, 146 N. C., 218, in the following language: "When goods are delivered to a common carrier for transportation, and a bill of lading issued, the title, in the absence of any direction or agreement to the contrary, vests in the consignee, who is alone entitled to sue, as the 'party aggrieved,' for the penalty given by section 1467, Revisal. This is undoubtedly a correct decision, applying, as stated, where it appears that goods are shipped and the bill of lading taken to a consignee, without more."

If the plaintiff had shipped the fountain and taken a bill of lading requiring it to be delivered "to his order," or had retained the title and control of the fountain in any other way, he would be entitled to recover for any damage to the property or for any delay or other default of the carrier. He alleges, it is true, in his complaint, that he retained the title, but this allegation is denied by the defendant, and there was no

proof to sustain it, and we must conclude, therefore, that there was no agreement with the carrier or the consignee to prevent the application of the ordinary rule which we have stated. If the plaintiff can show in another action that he retained the title to the fountain, he will be in a position to sue for any breach of contract by the defendant and recover the damages to which he may be entitled. We do not consider the other questions debated before us, for the reason that upon the record and the case, as they now appear, the court erred in refusing to sustain the motion for a nonsuit and dismissing the action.

Action dismissed.

Cited: *Buggy Corporation v. R. R.*, 152 N. C., 121; *Elliot v. R. R.*, 155 N. C., 236; *S. v. Fisher*, 162 N. C., 568; *Grocery Co. v. R. R.*, 170 N. C., 246; *Tilley v. R. R.*, 172 N. C., 365.

H. W. PHELPS v. S. B. DAVENPORT.

Vendor and Vendee—Option of Purchase—Acceptance—Purchase Price—Deed—Tender.

It was the duty of the vendor, in an option given for the purchase of land, to prepare and tender a deed upon being notified by the vendee, within the time specified, that he elected to take the land in accordance with the terms of the option and was ready to pay the sum agreed; and a tender of payment by the vendee was not required until the deed was so tendered, if, in fact, he was ready to make the payment; nor was it incumbent on him to do a vain thing by offering the money after the vendor had refused to make the deed.

APPEAL from *Peebles, J.*, at January Term, 1909, of WASHINGTON. (22)

Action for the possession of land, the right of which was denied by defendant, who alleged that the plaintiff gave him an option of purchase and wrongfully refused to comply with its terms.

Pruden & Pruden and Shepherd & Shepherd for plaintiff.
Gaylord & Gaylord for defendant.

CLARK, C. J. The defendant held an option for the purchase of the land in question. Within the time specified the defendant wrote the plaintiff a note that he elected to take the land at the price stipulated; that he was ready to pay the sum agreed on, and requested that plaintiff make a deed at once. The plaintiff told the bearer of the note that he

would not sell the land and the law would not compel him to do so. There was no money shown or counted out. The defendant testified that he was ready that day to pay the money and had kept ever since the full amount in bank and had been at all times ready and able to pay the purchase money.

His Honor, being of opinion that there had not been a sufficient tender, instructed the jury to answer the issues, as in the record, in favor of the plaintiff. This was error. When the defendant notified the plaintiff he had made his election, was prepared to pay for the land and demanded a deed, it was incumbent on the plaintiff to prepare, and tender the deed. It was not necessary that the plaintiff should then and there offer the money, as it was not payable except in exchange for the deed. If, as is not contradicted, the defendant was in fact able to make the payment at that time, and in good faith demanded the deed, it was not incumbent on him then to show or count out the money, nor was it incumbent on him to do a vain thing by offering the money after the plaintiff refused to make the deed. *Hughes v. Knott,* 138 N. C., 105.

New trial.

Cited: Gallimore v. Grubbs, 156 N. C., 577.

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(23)

STORY LUMBER COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 15 September, 1909.)

1. Carriers of Freight—Unreasonable Delay—Damages—Evidence—Nonsuit.

An unreasonable delay in transporting and delivering a shipment of goods renders the carrier liable to at least nominal damages, and when there is evidence thereof a motion to nonsuit should not be granted.

2. Carriers of Freight—Unreasonable Delay—Special Damages—Notice.

A verdict of special damages awarded against a common carrier, arising from its unreasonable delay in transporting and delivering goods to the consignee, will be sustained upon the question of knowledge, when from the evidence it appears that the shipment was a sawmill edger, weighing about one thousand pounds, shipped "open," to a consignee whose business was known to the carrier to be that of running sawmills, the character and manner of the shipment being such that the jury could fairly presume that the carrier knew it was for a special purpose or present use.

WALKER and BROWN, JJ., dissenting.

APPEAL from *Peebles, J.*, at Spring Term, 1909, of GATES.

Action for damages alleged to have been caused by diminishing the output of plaintiff's sawmill, etc., by reason of defendant's unreasonable delay in transporting and delivering a sawmill edger.

The plaintiff purchased in Norfolk, Va., and delivered to the defendant for transportation to the plaintiff at Eure, N. C., on 16 March, 1907, a sawmill edger. This machine weighed about 1,000 pounds and was delivered to and carried "open" by the defendant. The distance from Norfolk, Va., to Eure, N. C., is forty-seven miles—nineteen miles to Suffolk, and from Suffolk to Eure, *via* Atlantic Coast Line Railroad Company, twenty-eight miles. There was no continuous line of road operated by the defendant from Norfolk to Eure. The sawmill was delivered by the defendant (twenty-nine days after delivery for shipment) to the Atlantic Coast Line Railroad Company at Suffolk on 15 April, 1907, and was delivered the same day at Eure, N. C., to plaintiff. The record contains the following additional statement: "There was no evidence that the Southern Railway Company had any information whatever about the nature of the machinery, the purposes for which it was intended, and any inconvenience or loss that would be sustained by the delay, other than what was disclosed by the character of the machinery itself." The defendant, at the conclusion of the evidence, moved to nonsuit the plaintiff. Motion denied. Defendant excepted. (24)

The defendant requested the court to charge the jury as follows: "That there is no evidence of such notice or that it could be reasonably presumed by the defendant that such consequences would follow." This request was refused, and defendant excepted. The court charged the jury that it was for them to determine whether the fact that the machinery was shipped open by the plaintiff over defendant's line and that defendant could inspect the same and know for what it was intended, was sufficient to put the defendant on notice that the alleged damage to the plaintiff's business would occur, or to make them reasonably presume that it would. The defendant excepted to this charge. There was evidence as to the amount of damage sustained by the plaintiff, but no exception by the defendant to the charge of his Honor laying down the rule by which the jury should ascertain the plaintiff's damage, if the plaintiff was entitled to special damages. The only issue submitted to the jury was: "What amount of damage is plaintiff entitled to recover, if any, of the defendant, the Southern Railway Company?" The answer of the jury was: "Two hundred and ten dollars." From a judgment upon the verdict the defendant appealed.

A. P. Godwin and Ward & Grimes for plaintiff.

W. B. Rodman and R. G. Lucas for defendant.

MANNING, J. The defendant did not, as appears from the record of the trial, contest that it had carelessly permitted an unreasonable delay in the transportation of the edger, nor did it contest the rule laid down by his Honor for the admeasurement of the plaintiff's damages, if it was entitled to more than nominal damages. His Honor could not have granted the defendant's motion to nonsuit the plaintiff, because the unreasonable delay, the breach of the contract of shipment, being uncontested by the defendant, the plaintiff was, in any view, entitled to recover nominal damages. But the defendant's exceptions do present as the only material point in the appeal the question whether there was any evidence proper to be submitted to the jury and from which they could reasonably find that plaintiff had sustained more than nominal damages. The facts relied upon by the plaintiff to sustain its contention are: (1) its name, indicating the character of business engaged in by it; (2) the nature of the article shipped, to wit, an edger, a machine used by sawmills, weighing about 1,000 pounds, indicating an article not of general use, but for particular purpose; (3) that the machine was shipped unboxed, uncovered and open, and thus observable (25) by the defendant; (4) being a single machine, indicating that it was intended to be used in conjunction with other machinery; (5) the destination, being a section in which lumber was manufactured. All of which were under defendant's observation or knowledge at the time the contract of carriage was made. The admissions at the trial remove any suggestion that there was any express notice to the defendant, at the time of making the contract of carriage, that this machine was "ordered for a special purpose or for present use in a given way."

With the above facts open to the defendant, did they import or could the jury reasonably infer, that a breach of the contract of shipment would occasion an injury to the plaintiff greater than nominal damages?

The question was very recently presented to this Court in *Furniture Co. v. Express Co.*, 148 N. C., 87, and is there fully considered in an able opinion by *Mr. Justice Hoke*. By that decision and the decision of this Court in other cases it is settled that a plaintiff can recover more than nominal damages for breach of contract by unreasonable delay in performance: (1) when the special purpose or present use in a given way is expressly made a part of the contract or enters into the negotiations of the parties, (2) or when the article shipped is of such character that the parties may be fairly supposed to have had in contemplation, at the time of making the contract, the special purpose or present use in a given way. *Lewark v. R. R.*, 137 N. C., 383; *Sharp v. R. R.*, 130 N. C., 613; *Neal v. Hardware Co.*, 122 N. C., 104; *Rocky Mount Mills v. R. R.*, 119 N. C., 693; *Foard v. R. R.*, 53 N. C., 235.

Guided by these cases, we are of the opinion that the evidence offered

in this case was sufficient to carry the case to the jury, and was of such character that the jury could fairly presume knowledge by the defendant that there was a special purpose or a present use for the machine, and that a failure by the defendant to perform its contract would result in more than nominal damages to the plaintiff. This is our conclusion, after a careful consideration of the authorities, including those cited by the attorneys for the defendant in their well-prepared brief. We are therefore of the opinion that the exceptions taken by the defendant at the trial below cannot be sustained.

No error.

Cited: *Olive v. R. R.*, 152 N. C., 280; *Peanut Co. v. R. R.*, 155 N. C., 151, 161; *Rawls v. R. R.*, 173 N. C., 8.

(26)

O. F. WHITE v. LOUIS LIPSITZ.

(Filed 15 September, 1909.)

In this appeal there is no error, the trial judge having proceeded along the settled principles as laid down in *Avery v. Stewart*, 136 N. C., 426.

APPEAL from *Guion, J.*, at Spring Term, 1909, of BERTIE.

Action to convert defendant into a trustee for the plaintiff as to a tract of land.

These issues were submitted:

1. Did the defendant Lipsitz buy said land in controversy for the plaintiff White and take deed to himself in trust to convey it to plaintiff White upon payment of the purchase money? Answer: Yes.

2. If the plaintiff White had such an equity as he alleges, has he by his conduct abandoned and given up the same? Answer: No.

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

4. What amount is due by plaintiff upon said purchase price, if anything? Answer: Fifteen hundred and twenty-seven dollars.

From the judgment rendered the defendant appealed.

Shepherd & Shepherd and Pruden & Pruden for plaintiff.
Winston & Matthews for defendant.

PER CURIAM: The Court has examined the several exceptions arising upon the evidence and to the charge of the court assigned as error.

We are of opinion that his Honor committed no error which would warrant us in directing another trial of the issues.

The court seems to have proceeded along well-settled principles, as laid down in *Avery v. Stewart,* 136 N. C., 426, where all the authorities bearing upon questions of the character in this State are collected.

The findings of the jury are supported by the evidence and entitle plaintiff to judgment.

No error.

(27)

LAMBERT HOISTING ENGINE COMPANY v. J. R. PASCHAL AND WISE GRANITE COMPANY.

(Filed 15 September, 1909.)

1. **Principal and Agent—Evidence of Agency—Harmless Error.**

   In an action to recover purchase price of goods sold and delivered, exclusion of defendant's evidence that plaintiff's agent was told by the agent of defendant that the goods were bought by him for his principal, is harmless, when plaintiff has brought his action and recovered against the principal in recognition of this fact.

2. **Principal and Agent—Agent's Counterclaim.**

   An agent cannot successfully interpose as a setoff, in an action brought by another against his principal, expenses incurred by him individually and for which his principal cannot be held responsible.

3. **Contracts, Written—Language, Plain—Interpretation.**

   The courts may not disregard the plainly expressed meaning of a lawful contract, and by construction or otherwise substitute a new contract for the one made by the parties.

4. **Private Corporations—Contracts—Restricting Liability—Valid Stipulations.**

   A clause in a written contract of purchase between two private corporations, not affected with a public use, clearly expressing that the vendor assumed no liability for damages on account of delay in delivery will be upheld in the absence of allegations of fraud and bad faith, and the vendee cannot recover damages caused by a delay of sixty-three days beyond the time fixed for delivery.

HOKE and MANNING, JJ., concur in result.

APPEAL from *Guion, J.,* at June Term, 1909, of WARREN.

The action was brought to recover the purchase price of certain machinery sold by the plaintiff company to the defendant, the Wise Granite Company.

The defendant sets up a counterclaim for damages in a breach of the

contract as a setoff against the purchase money. These issues were submitted:

1. Is the defendant indebted to the plaintiff, Lambert Hoisting Engine Company? If so, in what amount—(1) for the purchase price of the cable way and outfit? Answer: Three thousand eight hundred and thirty-eight dollars and eighty-three cents, with interest on $3,500 from date. (2) For erecting the cable way and outfit? Answer: Two hundred and seventy-five dollars, with interest from 1 August, 1907.

2. Did the plaintiff wrongfully and unlawfully seize and remove certain parts of the cable way? Answer: Yes.

3. What damages are the defendants entitled to recover by rea- (28) son of said unlawful seizure and removal—(1) for repairs made? Answer: Two hundred and eighty-two dollars and sixty-two cents, with interest from 24 August, 1907. (2) For profits the defendants could have made during the twenty-four days the machinery is alleged to have been idle? Answer: Six hundred and seventy dollars and eighty-five cents, with interest from 24 August, 1907.

The court, after giving defendant credit for the damages assessed upon the counterclaim, gave judgment in favor of plaintiff for the residue of the purchase price. The defendants, having excepted to the rulings of the court, appealed.

T. W. Bickett for plaintiff.

Tasker Polk, W. E. Daniel, T. T. Hicks and B. G. Green for defendants.

BROWN, J. The correctness of his Honor's ruling in allowing evidence of prospective profits under the second subdivision of the third issue is not before us for review, as the plaintiff did not appeal.

The defendant assigns error because of the exclusion of evidence that plaintiff's agent, Delaney, was told by J. R. Paschal that the cable way was bought for the Wise Granite Company. This ruling is harmless and the evidence immaterial, as the plaintiff has recognized the granite company as a purchaser of the machinery through its agent, Paschal, by suing and recovering judgment against the company for the purchase price.

Defendant also assigns error because of the exclusion of the testimony of J. R. Paschal as to the expense incurred by him individually in an action brought against him and the Wise Granite Company on account of the inability of the Wise Granite Company to fulfill its contract in Norfolk. We are not favored with any authority sustaining this contention of defendant, but it would seem to be unquestioned law that,

as Paschal admits that the purchase was made, not for himself, but exclusively by the granite company, he cannot successfully interpose a setoff peculiar to himself.

Besides, there is no such item of damage referred to or set out in the counterclaim pleaded in the answer.

The only remaining assignment of error (besides the formal exceptions to the refusal to grant a new trial and to the judgment) relates to the exclusion of evidence as to the damage the Wise Granite Company sustained by reason of delay in the delivery of the cable way.

(29) The written contract for the purchase of the machinery was approved by plaintiff on 2 March, 1907, and calls for a delivery of the machinery within three weeks. The machinery was delivered to the railroad company at Newark, consigned to defendant on 27 May, 1907, some sixty-three days after the expiration of the time fixed for delivery.

The plaintiff would be liable undoubtedly for all such damages caused by the delay as were reasonably within the contemplation of the parties except for the unusual provisions of the contract. First, there is a sweeping limitation of liability in these words, "We assume no liability for damages on account of delay." Again, "It is agreed that no liability shall attach to us on account of damages or delays caused by such defective material." And the instrument closes with a provision by which the performance of the contract by the engine company may be avoided entirely, for "this contract is contingent upon strikes, accidents or other delays unavoidable or beyond our reasonable control."

Thus we have before us a contract which exempts the seller from any liability on account of any delay in executing it; also for defective material, and then provides that he may avoid the contract entirely on account of strikes, fires, etc.

The instrument would appear to be one made almost entirely for the seller's protection, with but little regard for the buyer's interests. Yet we are constrained to hold that it is a valid contract and that the only question is one of construction.

We have not been cited to any precedent or other authority, and our own investigations have failed to discover a case in point; so we have to go upon the "reason of the thing" and the plain letter of the written instrument. It is common learning that any contract entered into voluntarily between competent parties is valid and generally will be enforced, unless it contravenes some settled principle of public policy or is based upon an immoral consideration or entered into to accomplish an unlawful or immoral purpose.

The contract under consideration is tainted with nothing of that sort, and the parties are undoubtedly competent to make it. The plaintiff

seller is a private corporation, and so is the defendant purchaser. Neither is affected with a public use and thereby prohibited from entering into a contract, which exempts it from liability arising from the negligence of its servants.

As the contract is lawful and expressed with definiteness and certainty, the court is not at liberty to alter it by construction or make a new agreement for the parties. Chitty on Cont. (11 Am. Ed.), 92.

If a contract is expressed in plain and unambiguous language (30) neither courts nor juries may disregard and by construction or otherwise substitute a new contract in the place of that deliberately made by the parties. 7 Am. & Eng., 118, and cases cited; *Dwight v. Ins. Co.*, 103 N. Y., 347.

The language used in the contract exempting the seller from liability for damage caused by any delay is broad and comprehensive and the meaning unmistakable. The purpose of inserting such a provision was very likely to exempt the seller from the very kind of damage in which the buyer is seeking to mulct the seller in this case. The defendant seeks to hold plaintiff liable for the loss of prospective profits on certain contracts for the delivery of granite which it avers it was unable to perform by reason of the failure to deliver the machinery on time.

The experience of the plaintiff may have taught it that ordinary prudence required that it should guard itself against any such indefinite and uncertain liability, which it could not estimate, by inserting in the contract the comprehensive clause, "We assume no liability for damages on account of delay."

That the plaintiff had a right to exclude this particular kind of damage when making the contract is not to be questioned, for it is a well-settled principle of law of contracts that where the parties to a contract themselves stipulate what damages shall or shall not be recoverable, then the agreement of the parties becomes the law of the case. 8 Am. & Eng. Ency., 636; *Bush v. Chapman*, 2 Green (Ia.), 661. In the case last named the Court says: "If a plaintiff sue on a written or special contract, so as to make it the basis of his action, it must regulate his right to recover, as well as the amount."

The language used plainly indicates that, while damages for delay in delivery beyond the three weeks were contemplated and considered by the parties when the contract was made, they were excluded by its express terms. In another part of the contract it says: "This contract is contingent upon strikes, fires, accidents or other delays unavoidable or beyond our reasonable control." This does not refer to damages, but to the whole contract. All that is said about damages is said in the first clause, which, clearly, without equivocation or qualification, declares that there is no liability for damages on account of delay. In view of

this plain provision, and in the absence of any allegation in the answer of fraud or bad faith, we are not prepared to hold that a delay of sixty-three days does not come within the protecting terms of the contract of sale, although it may be that the delay may be so protracted and attended with such circumstances as would make the seller liable even under such a contract as this.

The judgment is Affirmed.

Cited: *Conservatory v. Dickenson,* 158 N. C., 209; *Ollis v. Furniture Co.,* 173 N. C., 546; *Hardware Co. v. Machine Co.,* 174 N. C., 482.

(31)

M. G. MORRISETT v. ELIZABETH CITY COTTON MILLS.

(Filed 15 September, 1909.)

1. **Issues, Sufficient—Contributory Negligence.**

When the negligence of a fellow-servant is set up in bar of recovery and the judge below clearly gives the defendant the benefit of it by proper instructions under the issue of negligence, the refusal of the trial judge to submit a separate issue thereon is not error.

2. **Issues—Evidence.**

The refusal of the trial judge to submit an issue upon which no evidence whatever is offered is not erroneous.

3. **Master and Servant—Fellow-servant.**

One who is "second boss" in a cotton mill, under whose direction the plaintiff was employed to work, and was working at the time of receiving the injury complained of, is not his fellow-servant.

4. **Negligence—Master and Servant—Res Ipsa Loquitur—Evidence—Nonsuit.**

When the evidence tended to show that plaintiff, an employee, was injured while at work, in the course of his employment, on a certain machine while not running, and that it suddenly started, without explanation, inflicting the injury complained of, the motive power being under the management of other agents or employees of defendant, a motion to nonsuit upon the evidence was properly refused.

5. **Contributory Negligence—Master and Servant—Officious Acts—Evidence.**

The plaintiff was not guilty of contributory negligence in thrusting his hand into the machine to adjust it while it was not running, and he was not guilty of an officious act because he was directed to do so by the master representative.

APPEAL from *Peebles, J.,* at January Term, 1909, of PASQUOTANK.

These issues were submitted:

1. Was the plaintiff injured by the negligence of defendant, as alleged? Answer: Yes.

2. Did the plaintiff contribute to his own injury, as alleged? Answer: No.

3. Did the plaintiff assume the risk of the injury suffered by him, as alleged? Answer: No.

4. What damage, if any, has plaintiff sustained? Answer: Twenty-two hundred and fifty dollars.

From the judgment rendered defendant appealed.

Aydlett & Ehringhaus for plaintiff.

H. S. Ward and C. E. Thompson for defendant.

BROWN, J. The evidence tends to prove that plaintiff, a boy of (32) sixteen years of age, was employed in defendant's mill as "head doffer," whose duty it was to superintend the boys in the spinning department, who were engaged in taking off full bobbins and putting on empty ones. One Trueblood was "second boss" in that department, and plaintiff was under him, as well as McAbee, the general manager. It was not plaintiff's duty to change the gearing and he had never done so before he was injured.

On 13 January, 1902, Trueblood ordered plaintiff to go with him and change the gear. Plaintiff had no previous experience, but undertook to change the gear under Trueblood's direction, while the machine was stopped. While changing the gear Trueblood told plaintiff to loosen the nut, and while so engaged the machinery suddenly started up and the plaintiff was seriously injured.

1. Defendant tendered certain issues which the court refused to submit, to which ruling defendant excepted.

The issues submitted by his Honor are substantially the same as those tendered by defendant, with the exception of an issue relating to the negligence of a fellow-servant. It was not necessary that a separate and distinct issue should have been submitted in order to give defendant the benefit of that defense. Evidence tending to prove that the injury was caused, not by the negligence of the defendant, but by the negligence of a fellow-servant, could have been presented under the first issue, and by proper instructions the jury could have been directed that if they found that the injury was caused by a fellow-servant, then they would answer that issue in the negative, for such negligence would not be the negligence of the defendant.

We think, therefore, that the exception cannot be sustained, as the issue tendered, while raised by the pleadings, is clearly embraced under the first issue, and when that is the case it is not error to refuse the

isuse tendered. *Kirk v. R. R.*, 97 N. C., 82; *McAdoo v. R. R.*, 105 N. C., 140; *Paper Co. v. Chronicle Co.*, 115 N. C., 147.

Again, we find no evidence tendered or received which tends to prove that plaintiff was injured by the negligence of a fellow-servant of the plaintiff, and it is decided that a refusal to submit an issue on which there is no proof is not erroneous. *Porter v. White*, 128 N. C., 42.

Trueblood was not in any sense a fellow-servant of the plaintiff, but according to all the evidence, he succeeded Anderson as second boss in the spinning department, and was the immediate superior of plaintiff, who worked under him.

(33) 2. On direct examination plaintiff's witness, Anderson, was asked, "State whether or not it is dangerous to change the gearing with the belt on the loose pulley." The court admitted the question and answer over defendant's objection.

It is contended that the evidence offered was opinion evidence, and that it was not a matter about which an expert opinion could have been given. We think the learned counsel for defendant misconceives the character of the evidence. Anderson was a skilled operative and fully acquainted with the character of the machinery. When he stated that it was not safe to change the nut without taking the belt off the top pulley, he was conveying to the minds of the jury a fact gathered from his experience which was material and which could not have been put before them in any other way.

To cause the witness to give all the detailed knowledge and experience he had concerning the character of the machinery would have been useless, more so than to go into the details as to the value of a tract of land, concerning which opinions are always allowed. The distinctions between those cases in which opinions may be expressed by experts only and those in which any person having means and opportunity to form an opinion may express it is well stated in *Clary v. Clary*, 24 N. C., 78. See also, *Wade v. Telephone Co.*, 147 N. C., 223, and cases cited; McKelvey, p. 230; *Davenport v. R. R.*, 148 N. C., 294.

The other exceptions to the evidence we deem it unnecessary to discuss. We have examined them and found them without merit.

3. We come next to consider the refusal to nonsuit, and that presents the question as to whether there is any evidence of negligence sufficient to take the case to the jury. The evidence affords no satisfactory explanation as to why the machinery started up just at the moment when plaintiff was adjusting the nut; and unless the rule of *res ipsa loquitur* applies, the motion to nonsuit must be sustained. But we think this belongs to the class of cases wherein that doctrine holds good. The rule has been applied in a class of cases similar to this in great Britain for many years, *Scott v. Dock Co.*, 3 H. & C. (Exch.) 596,

and is recognized in most of the States in the Union. Mr. Wigmore states that, in order that the rule should apply, the apparatus must be such that ordinarily no injurious effect is to be expected, unless from careless construction of operating, and that the injurious result must have taken place independent of any voluntary action of the person injured. Wig., sec. 2509.

The defendant has failed to explain why the machinery was started up just at the time when plaintiff was fixing a part of it. (34) Machinery in proper condition, operated by a motive power controlled by human agencies, does not start a-going of its own accord. It must either be started or else it may start because something is out of order.

All of this is supposed to be within the knowledge of defendant's agents and therefore the defendant should explain it, if possible. Nevertheless, the rule does not at all change the burden of the proofs or of the issue. It still remains with the plaintiff to establish negligence by a preponderance of evidence. But he may offer the "fact of the accident," in cases like this, to the jury as some evidence of negligence. There is no presumption raised which must be rebutted. No artificial force is given to the rule, but the jury may give it such weight as they see proper as a fact in evidence, and, if nothing else is offered, find for or against the plaintiff, as they see fit. *Womble v. Grocery Co.*, 135 N. C., 474; *Stewart v. Carpet Co.*, 138 N. C., 60; *Ross v. Cotton Mills*, 140 N. C., 115.

The case last cited is very much like the present case, and, we think, is an apt authority, justifying his Honor in submitting the issue of negligence to the jury, and that negligence, as alleged in the pleadings, consisted in carelessly and negligently starting up the machinery while plaintiff was engaged in adjusting the nut.

4. We deem it unnecessary to consider *seriatim* the exceptions bearing upon the issue of contributory negligence, for in our opinion there is nothing whatever to support such defense.

In an able argument Mr. Thompson, for the defendant, contends that the plaintiff was engaged voluntarily, out of the line of his duty, in a dangerous work. We do not think the evidence sustains the learned counsel in his contention. It is true that plaintiff was doing something he had not done before, but he was ordered to do it by his immediate superior. He was under Trueblood's control, and it was as natural that this boy of sixteen should obey him as that a pupil should obey his master. The plaintiff was not acting officiously, but in obedience to orders. Nor did he knowingly and carelessly place his hand in an obviously dangerous place. The machine was harmless when idle, and in that condition plaintiff ran no risk in adjusting the nut. He had a

right to believe that it would remain motionless until he completed the work. It was the starting-up of the motive power at the critical moment that caused the injury and was its proximate cause, and his Honor might well have so instructed the jury.

Upon a review of the record we find

No error.

Cited: Cotton Mills v. Assurance Corporation, 161 N. C., 564; *Ridge v. R. R.,* 167 N. C., 518; *Shaw v. Public Service Corporation,* 168 N. C., 616; *R. R. v. Mfg. Co.,* 169 N. C., 166; *Dunn v. Lumber Co.,* 172 N. C., 134; *Hux v. Reflector Co.,* 723 N. C., 98; *Nixon v. Oil Mill,* 174 N. C., 732.

(35)

J. A. MODLIN v. ATLANTIC FIRE INSURANCE COMPANY.

(Filed 22 September, 1909.)

1. **Appeal and Error—Forma Pauperis—Trial Judge—Discretion.**

An appeal will not lie from the decision of the trial court in refusing a motion to disallow the continued prosecution of a suit in *forma pauperis,* it being within his discretion.

2. **Insurance—Pleadings—Evidence—Admissions.**

When, in an action against a fire insurance company, the complaint alleged a total loss and that the full amount of insurance became due, a part of the corresponding allegation in the answer is admissible in evidence, when put in by plaintiff, admitting the loss, without introducing a part thereof denying liability therefor.

3. **Insurance—Title—Deeds—Trusts and Trustees—Beneficial Owner—Evidence.**

A deed from the insured to the property embraced in a policy of fire insurance, the subject of the suit, having been put in evidence by the defendant insurance company as a matter of defense to show that the insured had concealed a material matter concerning his title to the subject of the insurance, it was competent for the insured to show that the grantee agreed to take title and hold it solely in trust for the benefit of the insured, and thus explain the quantity and quality of his title and estate in the property.

4. **Parol Trusts—Sole Beneficial Interests—Equitable Owner.**

One who is entitled, under a parol trust, to the entire beneficial interest, is the sole equitable owner of the property affected by the trust.

5. **Insurance—Title—Equity—Proof.**

As between the insured and an insurance company, in an action to recover upon a fire insurance policy, it is not necessary for the former to

show by clear, strong and convincing proof, that he was the sole equitable owner of the property covered by the policy, this rule of proof not applying in such case.

6. Insurance—Title—Essential Matters—Time of Inquiry.

If it is essential for an underwriter to know by what title the insurer holds the property, the inquiry should be made at the time of issuing the policy, and not deferred until after the loss has occurred.

7. Insurance—Mortgages—Title—Policy—Benefits Avoided—Waiver—Estoppel.

Execution of a mortgage on the insured property so affects title, as will avoid an insurance policy then existing thereon and forfeit its benefit, if made without the knowledge or consent of the insurance company, and not attested as prescribed by the policy contract, unless the company thereafter, by its acts, conduct and statements has waived the effect of the mortgage and is estopped to assert its forfeiture.

8. Same—Evidence.

In an action to recover upon a fire insurance policy, in defense to which a mortgage of the property insured was put in evidence as tending to show a misrepresentation by plaintiff of his title thereto, it is competent for the plaintiff to show, upon the question of defendant's waiver and estoppel, that the adjuster found the property was mortgaged contrary to the insurance contract, but assured plaintiff that defendant company would nevertheless pay the loss; that the defendant, thereafter, notified plaintiff it was sending draft for payment to its local agent, also notifying mortgagee thereof, and that subsequently defendant withdrew payment of draft upon objection of mortgagee to payment of premiums due to local agents of defendant, assented to by plaintiff.

9. Insurance—Policies—Conditions—Waiver.

It is not necessary that the consent of an insurance company to a waiver of the conditions of a policy contract be in writing and attached to the policy, as therein required, when such consent was given by the company itself. *Black v. Ins. Co.*, 148 N. C., 169, cited and distinguished.

10. Same—Arbitration—Nonwaiver—Agreement—Estoppel.

A "nonwaiver agreement" looking to the ascertainment of loss by fire under a fire insurance contract, affords no defense to the insurance company for its own acts, conduct and statements, constituting a waiver or estoppel done and made afterwards with full knowledge of all its rights and defenses and a knowledge of the causes of avoidance.

11. Insurance—Standard Policies—Limitations of Actions—Interpretation of Statutes.

The provision of a standard fire insurance policy, Revisal, sec. 4760, stating that no suit thereon shall be sustained, etc., "unless commenced within twelve months next after the fire," etc., must be construed in connection with Revisal, sec. 2809, to wit: that the policy shall not "limit the time within which such suit or action shall be commenced to less than one year after the cause of action accrued," and it is not barred if brought accordingly.

12. Insurance—Pleadings—Waiver—Estoppel—Allegations Sufficient.

In an action to recover upon a fire insurance policy, the plaintiff alleged sole beneficial ownership of property insured, the issuance of policy and subsequent loss by fire when policy was in force; the adjustment of loss which defendant promised to pay and issued check therefor, but recalled it. The parties appeared to be satisfied to present their contentions arising under the pleadings under an issue of indebtedness, and another as to the bar of the statute of limitations: *Held*, matters constituting waiver and estoppel were sufficiently pleaded in this case.

(36) APPEAL from *Guion, J.*, at Spring term, 1909, of BERTIE.

From a judgment for plaintiff defendant appealed.

The plaintiff alleged that he was the sole beneficial owner of the property insured; that defendant, on 5 July, 1906, issued its (37) policy of insurance for $500; that the property was destroyed by fire 24 May, 1907, the policy being in force; that proof of loss was made, the loss adjusted and defendant promised to pay full amount of policy and issued its check therefor, but the same was recalled before delivery to plaintiff; that the policy had not been assigned, but was held simply as collateral security. The defendant denied plaintiff's ownership of the property insured; alleged that the title was in one Wilmer Modlin; admitted it issued the policy of insurance, using the standard form prescribed in section 4760, Revisal; admitted destruction of property, but denied liability; alleged the execution of the following nonwaiver agreement by plaintiff and defendant:

NONWAIVER AGREEMENT.

29 May, 1907.

It is hereby mutually stipulated and agreed by and between J. A. Modlin, party of the first part, and the insurance company or companies whose name or names are signed hereto, each acting for itself, party of the second part, that an action taken, request made or information received by said party of the second part in or while investigating or ascertaining the cause of fire, the amount of loss or damage, or other matter relative to the claims of said party of the first part for property alleged to have been lost or damaged by fire on 24 May, 1907, shall not in any respect or particular change, determine, waive, invalidate or forfeit any of the terms, conditions or requirements of the policy of insurance of the second part held by the party of the first part or any of the rights whatever of any party hereto.

The intent of this agreement is to save and preserve all the rights of all the parties hereto and permit an investigation of the claim and the determination of the amount of the loss or damage, in order that the party of the first part may not be unnecessarily delayed in his

business, and that the amount of his claim may be ascertained and determined without regard to the liability of the party of the second part, and without prejudice to any rights or defenses which said party of the second part may have. ATLANTIC FIRE INSURANCE CO.,
J. A. MODLIN. By W. B. SWINDELL.

Alleged that the policy was avoided (1) because the assured swore falsely, in that he swore in the proof of loss that the property described in the policy belonged at the time of the fire to insured, and no other person or persons had any interest therein, thereby violating an express provision of the policy; (2) that the plaintiff was not the sole and unconditional owner of the property insured; (3) that the plaintiff violated the following stipulation in the policy: (38) "If any change, other than by the death of the insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of insured, or otherwise," the policy shall be void, in that two mortgages were placed on the property, one before and the other after the policy was issued, and both without the knowledge of the defendant; (4) that this action was not brought within the time specified in the policy contract, to wit, one year.

The evidence established the following facts: (1) That the plaintiff was the sole beneficial owner of the property, the naked legal title being in Wilmer Modlin. (2) That two mortgages were placed on the property, one before and the other after the policy was issued. (3) That the defendant had no knowledge of either until after the fire, the existence of the mortgage being discovered by defendant's adjuster during the investigation of the causes of the fire and the adjustment of the loss. (4) That the mortgages were unpaid at the time of the fire. (5) That proof of loss was filed on 5 June, 1907, and that on 6 June defendant sent draft to its agents at Tarboro, who placed the insurance for the amount of adjustment and so notified plaintiff and the holder of the first mortgage and the assignee of the policy of insurance; that the draft was recalled before delivery, and the plaintiff and his assignee so notified, and the plaintiff informed that the matter of payment of loss was postponed until a meeting of directors of defendant, on 15 July, 1907. No further correspondence passed between plaintiff and defendant after 25 June, 1907. (6) Summons was issued 22 June, 1908.

His Honor submitted the following issues, which, under his direction, were answered in favor of the plaintiff, to wit:

1. Is the defendant indebted to plaintiff, as alleged in the complaint?

2. Is the action of plaintiff barred?

The defendant in apt time moved both to dismiss the action and for judgment of nonsuit; also requested his Honor, by specific prayers, to instruct the jury that the plaintiff could not recover, and to answer each issue in its favor. It was agreed that if plaintiff was entitled to recover, the amount was $495, less $45.40, premiums unpaid on the policy. At the end of the case on appeal his Honor makes this statement: "The case was tried by the court upon the theory that after the loss by fire and after the adjustment of such loss the agent and
(39) adjuster, with admitted knowledge of the mortgages upon the property, thereafter sent check in payment."

Pruden & Pruden, Shepherd & Shepherd, T. H. Calvert and Gilliam & Davenport for plaintiff.

Winston & Matthews, Murray Allen and Womack & Pace for defendant.

MANNING, J. The defendant, during the trial, took several exceptions, which we will dispose of before considering the principal questions presented by the record. The defendant moved to strike out the order allowing the plaintiff to sue *in forma pauperis* and to require a prosecution bond on deposit. The motion was heard by his Honor upon affidavits, and he disallowed it. This exception cannot be sustained under the decision of this court in *Christian v. R. R.*, 136 N. C., 321. The defendant's second exception was to the ruling of his Honor in permitting plaintiff to offer in evidence a part of paragraph 4 of the answer and the corresponding paragraph of the complaint. The part of paragraph 4 of the answer offered by plaintiff was as follows: "As to the allegations contained in article 4, defendant admits the loss of the said property by fire." The excluded portion was: "but denies liability therefor." Article 4 of the complaint alleged a total loss by fire and that the full amount of insurance became due. The third exception is of the same character. These exceptions cannot be sustained. *Lewis v. R. R.*, 132 N. C., 382; *Hedrick v. R. R.*, 136 N. C., 510; *Stewart v. R. R.*, 136 N. C., 385; *Thaxton v. Ins. Co.*, 143 N. C., 33; *Hochfield v. R. R.*, 150 N. C., 419.

Defendant's fifth exception is thus stated in the record: "The following question is asked J. A. Modlin, plaintiff: 'You have heard the deed read from Manufacturing Company to Wilmer Modlin. For whose benefit was that deed made?' To this defendant objects. The purpose of this question is to establish a trust in the hands of Wilmer Modlin for the use of the plaintiff, for the purpose of showing a beneficial interest in plaintiff at the time of the contract of insurance and

for the purpose of showing that he had the sole beneficial interest, and to show that Wilmer Modlin agreed to take the legal title to himself and to hold it solely in trust for the benefit of J. A. Modlin and to convey it to such person as he might direct at any time. Defendant objected; overruled, and witness answered as above. Defendant excepted."

The defendant had, prior to this question and answer, offered in evidence a deed from the Manufacturing Company to Wilmer Modlin covering the property insured, for the purpose of proving a (40) breach of the conditions of the policy in that plaintiff was not the sole and unconditional owner of the property insured, in that the plaintiff had concealed a material fact concerning the subject of insurance; in that the interest of the insured in the property was not truly stated in the policy, and in that plaintiff falsely swore, after the loss, touching his title to the property. In this situation it was competent for the plaintiff to show the quantity and quality of his title and estate. There was no application filed for this policy. The plaintiff testified there was nothing said or inquiry made about the character of his title to the property. "An equitable owner is an entire and sole owner." 13 Am. & Eng. Enc., n. 6, p. 231, and cases cited; Ostrander on Fire Ins., sec. 63 p. 217; *Wainer v. Ins. Co.*, 153 Mass., 335; *Ins. Co. v. Crockett*, 7 Lea (Tenn.), 725. In *Ins. Co. v. Erb*, 112 Pa. St., 149, the facts were these: "The property insured was a tannery, situated at Port Matilda, in Center County. The title, it is conceded, had been in one Dr. Myer, from whom, on 25 April, 1882, it was sold by the sheriff and purchased by John G. Love. Before the sheriff's return of the sale Love agreed to sell the property to John Erb, the plaintiff below, but by some blunder the sheriff returned the property as sold to Elizabeth J. Erb instead of John Erb, and made the deed to her." There was evidence supporting this statement, and the Court held: "If the facts alleged are assumed, John Erb was, in equity, the absolute and sole owner of the property. He held in trust for no one, but in his own right, and was entitled at any time to a conveyance. The title of his mother was the bare legal title, and was to her utterly and absolutely worthless. It was not essential that John Erb should have been invested with the legal title if he was the sole beneficial owner of the property." It cannot be questioned in this State that one who is entitled, under a parol trust, to the entire beneficial interest is the sole and absolute owner of the property affected by the trust. That the evidence required to establish this beneficial ownership does not, in an action between the party asserting such ownership and an insurance company, fall within the rule requiring clear, strong and convincing proof, is held, in *Ins. Co. v. Jackson*, 105 Ill.

App., 287; that the holder of such beneficial interest has an insurable interest is likewise well settled. *Gerringer v. Ins. Co.,* 133 N. C., 407; *Clapp v. Ins. Co.,* 126 N. C., 388; *Grabbs v. Ins. Co.,* 125 N. C., 389. If it is essential for an underwriter to know by what title the insurer holds the property insured, that inquiry should be made at the time of issuing the policy, and not deferred until after the loss has occurred. Beach on Law of Insurance, vol. 1, sec. 406.

(41) The defendant next contends that the giving of the mortgages was such a change of title and interest of the assured as avoided the policy, unless assented to by it in the manner prescribed by the policy.

It is well settled by the decisions of this Court—differing from the courts of some of the States—that the giving of a mortgage effects such a change of title and interest of the assured as avoids the policy when not assented to by the insured in the manner prescribed by the policy. *Sossamon v. Ins. Co.,* 78 N. C., 145; *Biggs v. Ins. Co.,* 88 N. C., 141; *Gerringer v. Ins. Co.,* 133 N. C., 407; *Hayes v. Ins Co.,* 132 N. C., 702; *Weddington v. Ins. Co.,* 141 N. C., 234. "In some of the States a mortgage is held by statutory regulation or judicial construction to be simply a lien, leaving the legal estate in the mortgagor. In North Carolina and many other States, the common law prevails, and the mortgage deed passes the legal title at once, defeasible by the subsequent performance of its conditions." *Hinson v. Smith,* 118 N. C., 503; *Moore v. Hurtt,* 124 N. C., 27; *Carter v. Slocumb,* 122 N. C., 475; *Collins v. Davis,* 132 N. C., 106; *James v. R. R.,* 121 N. C., 523; *Parker v. Beasley,* 116 N. C., 1; *Hemphill v. Ross,* 66 N. C., 477; *Williams v. Teachey,* 85 N. C., 402; Mordecai's Law Lectures, pp. 534-539.

In *Weddington v. Ins. Co., supra,* this Court said: "The validity of a provision in a policy of insurance against the creating of encumbrances without the consent of the insurer can hardly be contested at this late day. It has now become the settled doctrine of the courts that the facts in regard to title, ownership, encumbrances and possession of the insured property are all important to be known by the insurer, as the character of the hazard is often affected by these circumstances." The execution of the mortgages upon the insured property without the consent or knowledge of the insurer, attested in the way prescribed by the policy, clearly, therefore, avoids the policy, and was undoubtedly a cause of forfeiture of its benefits, unless the defendant, by its acts, conduct and statements, waived the effect of the mortgages, and is estopped to assert its forfeiture. We will here briefly state the facts presented and relied upon by the plaintiff to constitute the waiver and estoppel: Swindell, the adjuster of defendant, said to plaintiff, while the loss was being adjusted: "We found some mortgages on the property

which would bar from collecting it. Our company is willing, though, to pay the claim, and I will take it up with them and make it all right." This conversation occurred on 29 May. On 5 June plaintiff made out his proof of loss and mailed it to the defendant at his head office in Raleigh, N. C. The value of the property destroyed was fixed at $1,517; the insurance was $500. On 6 June the (42) defendant wrote plaintiff: "We are in receipt of proof of loss, properly signed, and we are sending today to our agents at Tarboro draft for $495, and presume they will communicate with you in regard to the matter." On the same day the defendant wrote a similar letter to the bank at Windsor, the holder of the first mortgage on the insured property and also the holder of the policy of insurance as security for the debt secured by the mortgage. The defendant, in its answer, admits that it did prepare a draft for the amount of the appraised value of said property, viz., $495, and sent it to its local agents at Tarboro, to be delivered to the plaintiff, upon certain conditions to be performed by the plaintiff; that said conditions were not performed by the plaintiff, and defendant withdrew the draft. It developed in the evidence that the conditions referred to were these: The Orren-Williams-Weddell Company, defendant's agents at Tarboro, had accounted to defendant for the premium on the policy, but had not collected the premium from the plaintiff, and it was still due the agents. At the time of the adjustment of the loss Williams, of the Tarboro agents, was present, and the plaintiff directed the amount due these agents to be deducted from the appraised loss and that the check be sent these agents for this purpose. The Windsor Bank objected to the payment of the Tarboro agents, as the policy was held by it as collateral to secure the mortgage debt, and the entire amount was needed to pay its debt. As a result of this contention the defendant withdrew the check and this litigation resulted.

The defendant objected to the introduction of its correspondence showing the above facts. We think the evidence competent. It gives the acts, conduct and statements of the defendant relied upon to prove waiver of the forfeiture. The defendant contends, however, that the evidence relied upon to prove waiver is insufficient, for three reasons, to wit: (1) For that the acts, conduct and statements, of themselves, are insufficient; (2) for that the provisions of the policy prevent this result, because the defendant's consent was not attached, in writing, to the policy; (3) for that during the adjustment a nonwaiver agreement, which is copied in the preceding statement of the case, was signed, and this prevents the waiver. In passing upon these defenses it is essential to keep in mind that the acts, conduct and statements relied upon to prove the waiver are the acts, conduct and statements of

the *defendant* itself— not of its adjuster, special agent, local agent or officer. In the paragraph herein quoted the defendant answers that it did the acts. The sending of the draft was *its* act; the notification to plaintiff of the check was *its* act; the condition imposed upon
(43) plaintiff to pay his debt to *its* agent, as he had promised was *its* act. In *Black v. Ins. Co.*, 148 N. C., 169, the act relied upon to constitute waiver was the act of a local agent. The consent of the company was not written upon or attached to the policy, and this Court said: "They (the words 'written upon or attached hereto') are not intended to restrict the powers, express or implied, of *general or local agents,* but to prescribe an invariable rule of evidence by which this conduct must be proven to bind the company." (Italics ours.) In *Hayes v. Ins. Co.*, 132 N. C., 702, the act relied upon was the act of a local agent.

The principle applicable to the facts of this case has been very clearly and accurately stated in *Titus v. Ins. Co.*, 81 N. Y., 410, at 4 p. 419, as follows: "When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention may be inferred or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture. But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as a matter of law waived." *Ins. Co. v. Norton,* 96 U. S., 234; *Horton v. Ins. Co.*, 122 N. C., 498; *Collins v. Ins. Co.*, 79 N. C., 279.

Can there be any stronger facts of the recognition of the continued validity of a policy than for the insurer, after adjustment and appraisal of loss and the receipt of proof of loss, to send its draft or check to its local agent, to the amount of the appraised loss, notify the assured and the holder of the first mortgage, after knowledge of the encumbrance, with the condition not communicated to the assured, but to its local agents, that the local agents must reserve the amount of premium due them by the assured and which the assured had previously notified the local agent they could deduct? Why did the defendant send its check, unless it recognized the continued validity of the policy? Was not this act based thereon? And in all this not a word of forfeiture

or that the policy was void! We are therefore of the opinion that the evidence was clearly sufficient to prove a waiver by an estoppel upon the defendant, and that there is nothing in the provisions (44) of the policy which prevents the defendant itself from failing to take advantage of forfeitures in its favor. Does the nonwaiver agreement relieve the defendant from acts and statements binding upon it? It is doubtful if this nonwaiver agreement added to the protection of the defendant, as provided in the policy. The provisions of the policy, it would seem, have sufficiently protected the defendant from all acts of its agents, whether deliberately or inadvertently done. It provides: "This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal or any examination herein provided for." The "examination herein provided for" embraces proof of loss, exhibiting by the assured all that remains from the fire, submitting by the assured to examination, under oath, by any person designated by the company, and the producing of all books, accounts, etc., and the submission to appraisers of the amount of loss in case of disagreement." It seems to comprehend every matter occurring in the ascertainment of the loss. But, giving to the nonwaiver agreement the fullest scope of protecting the defendant against a waiver by anything said or done by its agent at the time of or during "the investigation of the claim and determination of the amount of the loss or damage," and that whatever was done to effectuate this purpose was done "without prejudice to any rights or defenses which said party of the second part (the company) may have," we do not see how this can protect the defendant from the effects of its own act, conduct and statements, done and made afterwards, with full knowledge of all that the investigation of the claim and determination of the loss disclosed, with a full knowledge of all its rights and defenses and a knowledge of the causes of avoidance.

A nonwaiver agreement very similar to this one was presented to the Court of Appeals of Missouri in *Rudd v. Ins. Co.*, 120 Mo. App., 1, and in discussing its effect the Court said: "The document provided merely that any action taken by the insurance company in investigating and ascertaining the cause of the fire and the amount of damage done should not create a waiver or invalidate any of the conditions of the policy. It is not clear that an investigation of those matters would waive forfeiture had no nonwaiver writing been taken." In *Hayes v. Ins. Co.*, 132 N. C., 702, this Court, in speaking of the effect of a nonwaiver agreement, quite as comprehensive as the one now being considered, said: "The plaintiff, however, relies upon the fact that the agent of the company went out to investigate the loss and determined

the amount of damages from fire to be $679. But whatever in
(45) ference of waiver might otherwise be drawn from such circumstance is negatived, not only by a stipulation in the policy that such an investigation, in case of loss, should not be deemed a waiver of any objection to the liability of the company under the policy, but before making this investigation the insured and the agent of the company entered into a written agreement that such investigation and ascertainment 'should not waive or invalidate any of the conditions of the policy or any rights whatever of either of the parties, but was merely to avoid unnecessary delay to the plaintiff, and should not be taken in anywise as an acknowledgment of liability on the part of the company."

The ultimate effect, then, of the nonwaiver agreement was to leave the company free and unrestrained to determine its course in regard to the settlement of the damages, possessed of all the facts acquired by its agents in the investigation of the plaintiff's claim and the amount of the loss by fire. Its nonaction or silence thereafter could not have been construed against it as a waiver or estoppel. But, possessed of abundant information to determine its course, it became active—sent its draft in full payment and notified plaintiff and the first mortgagee, as narrated herein. It seems to us that it should be bound by this course, by every principle of good faith.

The last contention of the defendant is that the plaintiff delayed longer than is permitted by the policy contract in bringing this action. We do not think this contention can be sustained. The fire occurred 24 May, 1907; the proofs of loss were filed and accepted 6 June; the amount of damages sustained ascertained 29 May; summons issued 22 June, 1908. The provisions of the policy, to wit, "and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of loss herein required have been received by this company," and "no suit or action on this policy for the recovery of any claim shall be sustainable in any court, law or equity, until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire," will be construed with this limitation in section 4809, Revisal, to wit, "nor shall it limit the time within which such suit or action shall be commenced to less than one year after the cause of action accrued."

These provisions of the policy and of this section of the Revisal have been construed and the conclusion reached contrary to this contention of the defendant in the following cases: *Muse v. Assurance Co.*, 108 N. C., 240; *Lowe v. Acc. Assn.*, 115 N. C., 18; *Dibbrell v. Ins. Co.*, 110 N. C., 193; *Gerringer v. Ins. Co.*, 133 N. C., 407

The matters constituting waiver or estoppel are sufficiently set out

in the complaint, especially in view of the fact that the defendant did not move for greater particularity; and, without objection, the parties seemed to be satisfied to present all of their contentions arising upon the pleadings under two issues—the first, an issue of indebtedness; the second, as to the bar of the action by delay in its commencement; and it is apparent that a judgment could be rendered upon the verdict determinative of the rights of the parties to this litigation. After a careful examination of the exceptions presented, aided by the able briefs and arguments of counsel, we are of the opinion that there was no reversible error committed in the trial below, and the judgment is

Affirmed.

Cited: Heilig v. Ins. Co., 152 N. C., 360; *Lumber Co. v. Hudson,* 153 N. C., 99; *Lancaster v. Ins. Co., ibid,* 290; *Watson v. Ins. Co.,* 159 N. C., 640; *Millinery Co. v. Ins. Co.,* 160 N. C., 137; *Roper v. Ins. Co.,* 161 N. C., 155; *Holly v. Assurance Co.,* 170 N. C., 5; *Faulk v. Mystic Circle,* 171 N. C., 302.

(46)

BESSIE W. RICKS v. JULIA H. WILSON ET AL.

(Filed 22 September, 1909.)

1. **Parties—Joinder of Husband—Demurrer.**

A demurrer will not be sustained for nonjoinder of the husband in an action brought by the wife to declare certain trusts in her favor in a deed made by her deceased father.

2. **Parties—Order to Make Parties—Objections and Exceptions—Demurrer—Appeal and Error.**

When no exception is taken in the court below to an order making a defendant a party in his additional capacity as administrator, a demurrer that he was not made a party as administrator will not be considered on appeal.

3. **Suits—Causes of Action—One Cause.**

Plaintiff alleging that defendants destroyed a certain paper-writing in which her deceased father appointed to her certain of his real and personal property under a parol trust in a deed he had theretofore made, sets out one cause of action.

4. **Superior Courts—Jurisdiction—Parol Trusts—Equity.**

When it is alleged that plaintiff's deceased father had created a parol trust under a deed in her favor in certain of his real and personal property, and that he had subsequently executed a paper-writing declaring the trusts, which defendant had destroyed, the action is properly cogniz-

able in the Superior Court, to enforce the trusts declared, whether the writing be a deed or a will, and it can give relief in its equity jurisdiction; and leave given the plaintiff to probate the paper as a deed, or will, under penalty of dismissal, is erroneous.

5. Parties—Severable Actions—Action Divided—Procedure.

When several causes of action are improperly joined, on a demurrer therefor, the judge should order the pending action divided accordingly, and not grant leave to plaintiff to bring separate actions under penalty of dismissal.

(47) APPEAL from *Cooke, J.*, at April Term, 1909, of PITT.

From the judgment of the court sustaining demurrer to complaint plaintiff appealed.

Skinner & Whedbee and J. L. Fleming for plaintiff.
Moore & Long and Jarvis & Blow for defendants.

CLARK, C. J. The plaintiff is the daughter of R. J. Wilson, deceased, and the defendants are her mother and brother. The complaint alleges that R. J. Wilson purchased divers tracts of land, describing them, taking deed to himself, that he had purchased others also describing them, to which he caused the title to be made to his wife in trust for himself; that another tract of land, duly described, he conveyed direct to his wife, but though in form a deed, it was in fact a mortgage to secure the sum of $600, which R. J. Wilson afterwards paid off (the dates of above conveyances are each given); that on 23 January, 1899, R. J. Wilson and wife, by deed, conveyed all the lands above described to the defendant Jesse P. Wilson in consideration of the nominal sum of $10, reserving a life interest to themselves; but the complaint avers that in truth the conveyance was to Jesse P. Wilson, in parol trust, to hold such lands, to be used and disposed of as the trustor, R. J. Wilson, might subsequently direct and appoint, and that Jesse P. Wilson accepted the conveyance upon such express trust to hold for future appointment by the trustor, R. J. Wilson; R. J. Wilson in the meantime remaining in sole control of all of said property and in sole receipt of all the rents and profits thereof; Julia H. Wilson and Jesse P. Wilson "acknowledging on all occasions that R. J. Wilson was the owner of the same and all the rents and profits thereof."

The complaint further alleges that subsequently R. J. Wilson executed a paper writing—whether a deed or will the plaintiff is not advised—whereby he executed the power of appointment under the trusts in the deed of 23 January, 1899, whereby he assigned and appointed for the plaintiff the McDuell land, and directed enough cash to be given her to make her share equal to the home place which, by the same instru-

ment, was assigned to her brother, and at the same time an equal division was directed to be made of all the stock, crop and provisions, money and notes on land at his death between her brother and (48) herself.

The complaint further avers that the two defendants, with the aid of an aunt, conspired to destroy and did destroy said paper writing or power of appointment, executory of the trusts under the deed of 23 January, 1899; that the defendants took possession of $10,000 in money (of which R. J. Wilson died in possession, and out of which he had directed enough be paid her to equalize her land with her brother) and all the lands, crops thereon and all the personal property left by her father, and refuse to assign to plaintiff her share, as directed by the paper writing, aforesaid; that the defendant Julia H., who is administratrix of R. J. Wilson, has refused to inventory much of the personalty as assets, the defendants claiming to hold them individually. The complaint asks that the trusts under the deed of 23 January, 1909, be executed in accordance with the paper writing, aforesaid, and that the defendants pay her so much of the $10,000 to make equality and half of the other personalty, as therein provided.

The defendants demurred—

1. Because the plaintiff's husband was not made a party.

The court properly did not sustain that ground of demurrer. Revisal, sec. 407 (1); *Hart v. Cannon,* 133 N. C., 10.

2. Because Julia H. Wilson was not a party in her capacity as administratrix. As the judge ordered her made a party, and there is no exception, that point is not before us. But as no relief is sought against the estate, it is not clear that the administratrix is a necessary party. It was held not necessary in a very similar case. *Daniels v. Fowler,* 120 N. C., 16.

3. For misjoinder.

His Honor sustained this ground and erroneously ordered (*a*) that the plaintiff replead or amend, to confine her action to the realty; (*b*) that she have leave to bring a new action as to the personalty; (*c*) that she have leave to bring a new proceeding to probate the will; (*d*) that if she fail to avail herself of the leave to bring the two aforesaid new actions, this action shall be dismissed.

It is clear that the plaintiff sets out only one cause of action, to wit, the enforcement of the alleged paper writing, which she alleges the defendants conspired to destroy and have destroyed, by the terms of which she alleges she was to have half of the personalty and the "McDuell" place and enough of the alleged $10,000 to make her share equal to the "home place." There is no reason for dividing the action into two—one for the personalty, with part of the $10,000, and another for the

realty. Her right to both would be proven by the same witnesses
(49) and the same writing, if at all, and the whole matter should be settled in one suit.

As to the second of the actions which she has leave to bring under penalty of dismissal, the plaintiff is not seeking to prove a will; she does not seem to know yet whether the alleged paper writing was a will or a deed. In this action she is not claiming under such paper writing *qua* deed or *qua* will, but she is seeking to prove that the deed of 23 January, 1899, was in trust for the purposes thereafter to be appointed, and that by a subsequent paper writing her father made such appointment directing the conveyance to her of a certain part of the realty with a part of a $10,000 fund and one-half of any other personalty he should leave. These matters she can prove only by this action in the Superior Court, with the aid of a jury to find the facts. "If a deed or will is destroyed or suppressed, a court of equity can give relief." 1 Perry Trusts (5 Ed.), sec. 183, and cases cited.

There is no need to order an independent action to probate the deed or will. Indeed, there was such instrument executed and willfully destroyed.

Indeed, if three actions were proper, the order should be to divide the pending action into three, and not to give leave to bring two new actions under penalty of dismissal of all action if the two new suits are not brought. Revisal, sec. 476. This is not a case of misjoinder of parties, for both defendants are necessary.

There is, as already said, only one cause of action. The grounds of complaint "arise out of the same series of transactions, all tending to one end, and one connected story can be told of the whole." *Ruffin, C. J.*, in *Bedsole v. Munroe,* 40 N. C., 313; cited and approved, *Young v. Young,* 81 N. C., 91; *King v. Farmer,* 88 N. C., 22; *Heggie v. Hill,* 95 N. C., 303.

In *Daniels v. Fowler,* 120 N. C., 17, it is said: "This is an action for the conversion of the entire estate of the ancestor of the infant plaintiff and to set aside sundry transactions, conveyances and judgments, by means of which the wrong has been done, in none of which frauds the ancestor participated. The demurrer was therefore properly overruled. Had it been sustained, the action would not have been dismissed, but divided into several, in the trial of each of which substantially the same evidence would have been admitted and the same propositions of law discussed, with great increase of costs and loss of time, with benefit to no one." To same effect, *Benton v. Collins,* 118 N. C., 196; *Cook v. Smith,*
119 N. C., 350; *Fisher v. Trust Co.,* 138 N. C., 224; *Williams v.*
(50) *R. R.,* 144 N. C., 502; *Hawk v. Lumber Co.,* 145 N. C., 48.

Whether or not there are other legal exceptions to the complaint

which could have been presented by demurrer we have not considered. The sole point presented by this appeal is as to the alleged misjoinder and the correctness of the judgment giving leave to bring two new actions under compulsion of dismissal.

Reversed.

Cited: *S. c.*, 154 N. C., 284; *Sherrod v. Dawson, ibid.*, 527; *Lee v. Thornton,* 171 N. C., 214.

JAMES K. CREDLE v. NORFOLK & SOUTHERN RAILROAD COMPANY.

(Filed 22 September, 1909.)

1. Carriers of Goods—Rights of Way—Invitation Implied—Trespass.

A railroad company by customarily allowing passengers to get off and on a train stopping at a coal chute, collecting their fares therefrom, etc., impliedly invites them to do so, and one acting accordingly is not a trespasser on the lands of the defendant there.

2. Same—Negligence—Questions for Jury.

Evidence on the question of actionable negligence is sufficient upon which to submit the case to the jury, tending to show that defendant railroad company knowingly permitted passengers to get off and on its trains stopping at a coal chute in a town, some distance from the station, collected fare there, etc., and that plaintiff, a passenger, got off the defendant's train at that place on a dark night, and fell into defendant's unlighted coal chute nearby, sustaining the injury complained of, which could have been prevented by a guard rail.

APPEAL from *Cooke, J.*, at April Term, 1909, of CRAVEN.

Action for damages for personal injury. Judgment for plaintiff Defendant appealed.

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

CLARK, C. J. The train stopped at the coal chute, a short distance before getting to New Bern, as was its custom. The plaintiff got off there, as his house was close by. He testified that he had been in the habit of doing so, without objection by the railroad authorities, ever since he had been living there, some three years. The chute was in town limits, about three blocks from the station. It was not a station, but the uncontradicted evidence was that for years people in that part of the

town had been getting on and off at that point, without objection
(51) or hindrance from the railroad officials, and that while no tickets were sold there the conductors would collect the fare. Several well-beaten paths or streets lead to the railroad at the chute. When the train stopped there, on this occasion, the plaintiff got off on the side next to his home. There was a string of cars on the other side; it was very dark, and at that time the defendant had no lights there. The chute was close beside the track—the defendant's witness says 7 feet 4 inches from the chute to the center of the track. The chute was 17½ feet wide, 31 feet long and 75 feet high. The defendant's witness says it was "perfectly practical to have put a rail there," which would have "kept the plaintiff from falling in." The plaintiff testified that he was proceeding cautiously, but had not taken more than two or three steps after he got off the train before he fell in the chute, and was injured by falling some fifteen feet down the chute.

There are several exceptions, but in effect there is but one, which is that there was no evidence of negligence to submit the case to the jury. We think his Honor properly held that there was.

It is not altogether unusual in the suburbs of a town for the engine to stop at a coal chute or water tank and for people in that part of the town to get on and off at such place for their own convenience. Johnson Street in Raleigh is a well-known instance. When the railroad for a long series of years has permitted such practice as has been here testified, it was negligence not to put a railing across the mouth of the chute alongside the track, as defendant's conductor testified was "perfectly practical" to keep persons from falling into the chute, especially when, as here, the night was dark and the defendant had no light there. The conductor testified that passengers were in the habit of getting on and off at that point, and that he took the money of those getting on. Such conduct amounted to an invitation to get off there, especially as the conductor did not warn the plaintiff. *Johnson v. R. R.*, 130 N. C., 488.

The court correctly charged, among other things: "If it had been the custom for a considerable time for persons in the neighborhood of the coal chute, wishing to become passengers on the outgoing trains of the defendant, to enter upon the same, when they stopped at the coal chute, without tickets, and to pay the fares in money, which were accepted by a conductor, without objection, and that it had also been the custom for them to leave the trains on their return, when the trains stopped at the said coal chute, and of which the agent of the defendant operating the said trains had notice, then the said passengers alighting from said train would have the license to be upon the lands of the
(52) defendant; and if they and others had habitually used ways and paths across the lands of the defendant for the purpose of com-

ing to or going from such trains, then there would be a license for them to do so; but if these facts did not exist, then one getting off the trains at that point and going on the lands of the defendant would be a trespasser." *Troy v. R. R.*, 99 N. C., 306; *Bradley v. R. R.*, 126 N. C., 735; *Bennett v. R. R.*, 102 N. C., 235. Another case in point is *Ray v. R. R.*, 141 N. C., 84, which holds that such usage would make the plaintiff a license, and the defendant would be liable for its negligence. A case exactly in point is *Hulbert v. R. R.*, 40 N. Y., 146, which is so fully stated that we need only to refer to it. It is there held that "Wherever passengers are accustomed to be received on a train, whether at the station house, at the water tank or elsewhere, railroad companies are bound to keep in a safe condition for transit the ordinary space in which passengers go to and from the train; and the latter have the right to assume that the ground adjacent to the cars, within the limits in which persons necessarily and naturally go to and from them, admits of their getting safely out and in, even on a dark night."

The jury found that the defendant was guilty of negligence, and that the plaintiff was not guilty of contributory negligence. There was evidence justifying the submission of these issues, and we find they were submitted under proper instructions from the court.

No error.

JESSE P. GODETTE v. S. B. GASKILL.

(Filed 22 September, 1909.)

Witnesses—False Testimony—Damages.

A witness is not liable for damages for alleged willful and false testimony given by him in a former case, upon the ground that by reason thereof the plaintiff had lost his suit in the former action. Such action would not lie at common law, and there is no statute authorizing it.

APPEAL by plaintiff from *O. H. Allen, J.*, at November Term, 1908, of CRAVEN.

W. D. McIver and R. A. Nunn for appellant.
No counsel contra.

CLARK, C. J. This is an action for damages against the defend- (53) ant for willful and false testimony as witness in an action formerly tried, which had been brought by the plaintiff against one Bowen, alleg-

ing that by reason of such false testimony of the defendant the plaintiff had lost his suit against Bowen.

There is no precedent in this State, but an action on this ground has been brought in other jurisdictions, which have uniformly held that such actions cannot be maintained. It was so held as far back as *Damport v. Sympson,* Cro., Eliz., 220, and *Eyres v. Sedgewick,* Cro., Jac., 160. Subsequently a statute was enacted authorizing such action in certain cases, but even that statute, it seems, is now deemed obsolete in England.

It was held that such action does not lie. *Dunlap v. Glidden,* 31 Me., 439; *Phelps v. Stearns,* 70 Mass., 106; *Cunningham v. Brown,* 18 Vt., 126; *Bostwick v. Lewis,* 2 Day (Conn.), 456; *Smith v. Lewis,* 3 Johns. (N. Y.), 165, 169; *Grove v. Brandenburg,* 7 Blackf. (Ind.), 235. And this is true of subornation of perjury. *Taylor v. Bidwell,* 65 Cal., 490; 1 Cyc., 687; 22 A. & E., 698. *Rice v. Coolidge,* 121 Mass., 393; holds that one not a party to the action in which the perjury was committed may maintain an action for tort against one who suborned witnesses to swear falsely in that action, whereby plaintiff's character was defamed.

The authorities above cited rest upon two grounds: (1) There was no precedent for such action, and, indeed, the precedents were against it. (2) It "would overhale," as *Chancellor Kent* says, in 3 Johns., 166, the decision of the former case, to which the plaintiff in the new action had been a party. We think there is a third reason, in that it would multiply and extend litigation if the matter could be reëxamined by a new action between a party to the action and a witness therein; and, more than that, witnesses would be intimidated if their testimony is given under liability of themselves being subjected to the expense and annoyance of being sued by any party to the action to whom their testimony might not be agreeable. It would give a great leverage to litigants to intimidate witnesses.

Witnesses who swear falsely are liable to indictment. It is not to be contemplated that grand juries shall willfully and oppressively find indictments; but if a civil action lay in such cases, a litigant smarting under the loss of his suit could subject witnesses to the annoyance and expense of litigation at will. Such action did not lie at common law, and we have no statute authorizing it.

The judgment of nonsuit is

Affirmed.

ROSCOE JONES v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 22 September, 1909.)

1. **Insurance—Fraud and Deceit—Instructions Unresponsive—Questions for Jury.**

In an action of fraud and deceit against a life insurance company, in which it was alleged that defendant obtained the policy from plaintiff by falsely and fraudulently representing that he would receive back his premiums paid, and interest thereon, at the expiration of ten years, there was evidence that plaintiff was told by one P., after he had received and paid premiums on his policy, that the policy was worthless in that respect; that this was repeated to defendant's agent who then said that the policy was "as good as gold": *Held*, error for the judge to instruct the jury to find the issue on the question of fraud and deceit in the affirmative if they found that the agent had said that the policy was "as good as gold," as such was not responsive to the issue. It likewise prevented the jury from finding the truth or falsity of the statement of P.

2. **Instruction on Different Issues—Error Not Cured as to One.**

An erroneous instruction upon one issue cannot be cured by an instruction upon a different issue, when it does not purport to do so, and when it does not appear which instruction influenced the verdict of the jury on the first issue.

3. **Insurance—Fraud and Deceit—Evidence Sufficient.**

The evidence in this case upon the question of whether the insured was induced by the defendant insurance company to take the policy by fraud and deceit: *Held*, sufficient to go to the jury.

APPEAL by defendant from *Cooke, J.*, at February Term, 1909, (54) of CRAVEN.

The facts necessary to the appeal are stated in the opinion of the Court.

D. E. Henderson and Simmons, Ward & Allen for plaintiff.
W. W. Clark for defendant.

WALKER, J. This action was brought to recover damages for fraud and deceit practiced upon the plaintiff, with reference to certain policies of insurance upon his life and the lives of his children, which the defendant issued to the plaintiff and induced him to take by reason of false and fraudulent representations. The court submitted issues to the jury, which, with the answers thereto, are as follows:

1. Did the defendant falsely represent to the plaintiff that, under the policies in controversy, the plaintiff would be repaid the amount of premiums paid by him, with about four per cent interest (55) thereon, at the expiration of ten years? Answer: Yes.

2. If so, did the plaintiff rely on said representations and was he induced thereby to accept said policies? Answer: Yes.

3. Has the plaintiff waived the right to rely upon the failure to deliver to the plaintiff policies that provided for the return of premiums paid and about four per cent interest, at the expiration of ten years? Answer: No.

There was an issue as to the damages, which was answered by consent of the parties. The fraud alleged was that the defendant, by its agent, represented that at the expiration of ten years the plaintiff, or, as the complaint alleges, plaintiff or the beneficiaries, would receive the amount which had been paid in the way of premiums, with interest on the same. It was stipulated that if the insured died at any time while the policies were in force the plaintiff or the beneficiaries would receive their face value.

There are some discrepancies to be found in the allegations of the complaint, the issues and the evidence, but we need not notice them now, as the defendant is entitled to another trial, because of an error in one of the instructions of the court to the jury, which was as follows:

"If the plaintiff, after his interview with Mr. Pelletier, as testified to by him, reported to the agent of the defendant what Pelletier had said, and the agent told him the policies were as good as gold, you will answer the first issue, Yes."

This instruction was erroneous, for the reason that it was not pertinent to the first issue as framed by the court, as that issue related to representations made when the policies were issued, and required the jury to find, not whether the policies were "as good as gold," but whether the defendant had falsely represented to the plaintiff that, at the expiration of ten years, he would receive the total amount of premiums paid by him with interest. What the agent said with reference to the statement of Pelletier, when fairly interpreted, may have been true. If it had referred to the time when the policies were issued, and meant that the plaintiff would be paid the amount of the premiums and interest, the instruction would still be faulty, as the court does not thereby require the jury to pass upon the truth or falsity of the statement. It is true that the court afterwards gave the following instruction:

"If the agent told him the policies were as good as gold and he would get what was promised him, you will answer the first issue Yes; and
(56) if the effect of what the agent at that time told him was to assure him and lull his fears and apprehensions, then you will answer the third issue No."

But that did not cure the error, for the reason given, as to the other instructions. It does not direct the jury to consider or pass upon the falsity of the statement made by the agent. The instructions of the

court did not fit the issue, and were, at least, misleading. If the last instruction had been correct, it does not purport to correct the error apparent in the first one, and in that case we could not say which instruction controlled the jury. *Edwards v. Railroad,* 132 N. C., 99; *Williams v. Haid,* 118 N. C., 481; *Tillett v. Railroad,* 115 N. C., 662.

The evidence in this case to establish the plaintiff's allegation of fraud is very meager; but upon a careful analysis of it, we cannot say that there is *no* evidence. Whether it is sufficient to satisfy the jury that a false and fraudulent representation was made, which entitles the plaintiff to recover damages for deceit, which he seeks to do, is a question for the consideration of the jury, upon proper instructions from the court. Several cases of a similar nature have been before this Court. *Caldwell v. Ins. Co.,* 140 N. C., 100; *Sykes v. Ins. Co.,* 148 N. C., 13; *Stroud v. Ins. Co.,* 148 N. C., 54; *Whitehurst v. Ins. Co.,* 149 N. C., 273. We specially direct attention to these cases, as they state what facts should be found to entitle the plaintiff to a verdict and indicate the form of the issues. They also state the general principles applicable to cases of this kind.

There must be a new trial, because of the error in the charge of the court.

New trial.

Cited: Spruill v. Columbia, 153 N. C., 48; *Jones v. Ins. Co., ibid.,* 391; *Clements v. Ins. Co.,* 155 N. C., 63; *Briggs v. Ins. Co., ibid.,* 75; *McWhirter v. McWhirter, ibid.,* 147; *Hughes v. Ins. Co.,* 156 N. C., 593; *Champion v. Daniel,* 170 N. C., 333.

W. V. BRETT ET AL. v. J. W. DAVENPORT, TRUSTEE, AND CITIZENS BANK OF WINDSOR.

(Filed 22 September, 1909.)

1. Mortgagor and Mortgagee—Sale, Defect in—Resale—Breach of Trust—Damages.

Ordinarily a junior mortgagee with power of sale can only sell and convey the property subject to prior existing liens, and a plaintiff mortgagor, claiming a homestead, and certain judgment creditors with junior liens on the land, cannot recover damages of the trustee and *cestui que trust* holding a lien by their deed subsequent to that of a prior mortgage, for an alleged breach of trust in failing to collect, or making any endeavor to collect, bids obtained at a sale thereunder, and afterwards reselling at a less price, when at the first sale the trustee, in effect, offered an

unencumbered title and there was a prior registered mortgage on the property, the holder of which had not been notified or given his consent to such a sale.

2. Same.

When the trustee, at a sale under deed of trust, announced that all prior liens on the mortgaged premises would be paid out of the proceeds of the sale of the land, such liens consisting of those of a prior mortgage and judgments, and subsequently resells at a lower price without attempting to collect the bids made at the first sale, the mortgagor, by claiming a homestead, and the judgment creditors, by asserting a demand for the entire proceeds of sale, make it impossible for the trustee to comply with his proposition thereat and render the obligation of the bidders unenforceable.

3. Mortgagor and Mortgagee—Advertisement—Notice—Validity.

Unless the stipulation in a mortgage in regard to advertising or notice of sale thereunder are complied with by the mortgagee, it renders the sale invalid; and a deed made in pursuance thereof passes the legal title subject to certain equitable rights in the purchaser as of subrogation, etc., when the purchase money is paid in good faith.

4. Mortgagor and Mortgagee—Sale Defective—Resale—Duty of Mortgagee.

When the mortgagee discovers a defect in a sale under the mortgage before the purchase price has been paid, it is his right and, ordinarily, his duty, unless the defect is waived or cured by the parties whose interests are affected, to readvertise and foreclose the property in accordance with law and the stipulations of the instrument under which he is acting.

(57) APPEAL from *Guion, J.*, at Spring Term, 1909, of BERTIE.

Action, tried upon admissions in pleadings and facts agreed.

Among other facts, it appeared that on 1 February, 1908, plaintiff Brett executed a mortgage or deed of trust with power of sale, conveying certain lands in Bertie County to defendant J. W. Davenport, trustee, to secure defendant bank in the sum of $460; that at the time this deed was executed there was a prior mortgage upon said land for an existing indebtedness to some third party, which remains unpaid; that in June, 1908, the trustee offered the land for sale, when same was bid in by certain purchasers for $1,850; that, the purchasers having refused to comply with their bids, the trustee, at the instance of the bank, the beneficiary, again advertised the property, as required by the deed, and sold same, subject to prior liens, and made title to the purchaser, the purchase price being much less than that bid at the former sale. Thereupon the plaintiff, the mortgagor, claiming a homestead interest, and certain junior judgment creditors of said mortgagor instituted this present action against the trustee and the bank, contending there had been a breach of trust on the part of defendants, and that

the trustee and the bank should be made to account to them, ac- (58) cording to their respective interests, for the sum of $1,281, the difference between the amount bid at the first sale and the debt secured in the deed, and interest and costs. The facts found by the court as more directly relevant to the inquiry are as follows:

"The following facts, together with such facts as are established in the pleadings, are agreed to as the facts in this case:

"J. W. Davenport, purporting to act under a deed of trust to him, sold the lands described, at the courthouse door in Windsor, N. C., when W. C. Askew, who is solvent, bid in one tract for $1,650, and G. T. Brett, who is solvent, the other, at $150.

"At the sale, Davenport, through his attorney, announced that all prior liens would be paid out of the sales of the land. Davenport had not advertised the lands according to law or as required by the terms of the deed of trust under which he sold.

"After the sale both bidders refused to comply with their bids—Brett, because the lands were not worth as much as he gave; Askew, because, as he alleged, he had been advised by counsel that the trustee, Davenport, could not make to him a good title.

"After this, without tendering a deed or bringing action to enforce the bid, Davenport again advertised this property, as required in the deed of trust, and sold the same, subject to the prior liens, amounting to $_____, when Moses B. Gilliam bought the same, at the price of $_____, and deed was executed to him."

Upon the facts found and admitted in the pleadings, the court gave judgment that defendants go without day, and plaintiffs excepted and appealed.

Winston & Matthews for plaintiff.

Pruden & Pruden, Shepherd & Shepherd and Gilliam & Davenport for defendant.

HOKE, J., after stating the case: As we understand it, the demand of plaintiffs proceeds upon the theory that the defendant trustee, and the bank, as his aider and abettor, should be held responsible in damages for a breach of trust, in failing to collect or making any endeavor to collect the bids obtained at the first sale; but we are aware of no principle that would justify or sustain such a recovery. The trustee, in effect, offered for sale an unencumbered title, and the instrument under which he was acting, in itself, conferred upon him no such power.

Authority (certainly the decided weight of authority) is to the effect that, except with the consent of the senior mortgagee (59) and of the mortgagor, and perhaps subsequent encumbrancers, or

by their ratification, a trustee in a deed of this character, a second mortgage with power of sale, can only sell the interest conveyed to him and which he is authorized to sell by the terms of the instrument under which he is acting. *Dearnelly v. Chase,* 136 Mass., 288; *Donohue v. Clare,* 130 Mass., 137; Jones on Mortgages (6 Ed.), sec. 1853. And even if the offer could be made good as to the prior encumbrancer by paying him off, the mortgagor and subsequent judgment creditors having interfered to prevent this by demanding the entire proceeds of the first sale over and above the amount required to pay the defendant's debt, the trustee, on such objection, was not in a position to comply with the terms of his own proposition, and the bid made was no longer a binding and enforceable obligation. Jones on Mortgages, sec. 1903; *Mayer v. Adrian,* 77 N. C., 83.

Again, it appears that at the time of the first sale, or attempted sale, the property had not been advertised "according to law or as required by the terms of the deed of trust under which he had sold"; and on such facts it is very generally held, uniformly, so far as we have examined, that a sale would have been invalid. In an instrument of this kind the law is that a statutory requirement or contract stipulation in regard to notice is of the substance and unless complied with a sale is ineffective as a foreclosure, and even when consummated by deed the conveyance only operates to pass the legal title, subject to certain equitable rights in the purchaser, as of subrogation, etc., in case he has paid the purchase money in good faith. *Atkins v. Crumpler,* 118 N. C., 532; *Lunsford v. Speaks,* 112 N. C., 608; *Lamer v. McIntosh,* 117 Mo., 508; Jones Mortgages, sec. 1822. And where the defect is discovered, as in this case, before any money is paid or conveyance executed, it is the right, and ordinarily would be the duty of the trustee, unless the defect is waived or cured by the parties whose interests are affected, to readvertise the property and proceed to foreclose in accordance with law and the stipulations of the instrument under which he was acting. *Botineau v. Ins. Co.,* 31 Minn., 125 Jones on Mortgages, sec. 1851; 21 Cyc., p. 1511. This is all that was done in the present case, and we are of opinion that on the facts presented the defendants, in making the second sale, were in the proper performance of their duty and acting strictly within their rights, and that the judgment of the court below in their favor should be

Affirmed.

Cited: Eubanks v. Becton, 158 N. C., 234; *Hinton v. Hall,* 166 N. C., 480; *Ferebee v. Sawyer,* 167 N. C., 201; *Banking Co. v. Leach,* 169 N. C., 716.

(60)

G. T. RICHARDSON v. SOUTHERN EXPRESS COMPANY.

(Filed 29 September, 1909.)

Appeal and Error—Fragmentary Appeal—Appeal Dismissed.

An appeal from a judgment on an agreement that if negligence on certain issues be found for plaintiff a referee shall be appointed to assess the damages, is premature and will be dismissed, when the issues are thus found but the amount of damages has not been ascertained or adjudged; and this rule is adhered to in this case, though both parties request a decision.

APPEAL from *Cooke, J.*, at May Term, 1909, of CRAVEN.

The plaintiff sued the defendant in the Superior Court to recover $120 damages to forty-three crates of strawberries, and alleged:

4. That the defendant company negligently failed to have a messenger or other agent at said point (Clark's Station, on the Atlantic and North Carolina Railroad, where a branch road runs to Richlands) to receive said berries, and negligently and wrongfully, in breach of said contract, aforesaid, failed to receive said berries for shipment, and a part of said berries were badly damaged and became a total loss, etc.

The defendant denied its liability to the plaintiff, and alleged that the Superior Court had no original jurisdiction. Without objection, and as determinative of the matters involved, the following issues were submitted, with the following stipulation, signed by counsel for plaintiff and defendant:

It is hereby stipulated and agreed that the following issues may be first tried and determined, to wit:

1. Did plaintiff and defendant contract as alleged? Answer.
2. Did plaintiff perform the contract on his part? Answer.
3. Did defendant wrongfully and negligently break said contract, as alleged? Answer.

If these three issues shall be answered in favor of the plaintiff, then the question of damages may be referred to some person agreed upon by the parties or their counsel, if they can agree; if not, then to some person to be appointed by the court.

The following judgment was signed upon the verdict:

"This cause coming on to be heard before his Honor, C. M. Cooke, Judge, and a jury, and it appearing to the court that the parties hereby stipulated and agreed that the jury might answer the following issues to wit:

1. Did plaintiff and defendant contract as alleged?
2. Did plaintiff perform the contract as alleged?

3. Did defendant wrongfully and negligently break said contract, as alleged?

"And if the jury should answer these issues in favor of the
(61) plaintiff, the question of damages should be referred to some person agreed upon by the parties, if they could agree; if not, then to some person to be appointed by the court.

"And the jury having answered the first issue Yes, the second issue Yes, and the third issue Yes, and the parties having agreed upon . . . referee to ascertain the damage:

"It is now considered and adjudged that plaintiff is entitled to recover damages from defendant, and that Thomas D. Warren is appointed referee to hear the evidence as to damage and report his findings of fact and conclusions of law thereon to the court.

"It is further adjudged that plaintiff recover his costs. And this cause is retained."

The defendant excepted and appealed.

D. L. Ward and E. M. Green for plaintiff.
W. D. McIver for defendant.

MANNING, J., after stating the case: Under the decision of this Court in *Moore v. Lumber Co.*, 150 N. C., 261, this appeal must be dismissed, for an appeal will not lie from an interlocutory or a partial judgment of this character. The damages should have been assessed either by the jury or by the referee appointed by the court. If by the referee, he should have reported to the court, when a final judgment should have been rendered, and from which the defendant, having entered and reserved his exceptions taken during the trial, could have prosecuted its appeal. This Court has uniformly enforced this rule of practice. *Rogerson v. Lumber Co.*, 136 N. C., 266. While the counsel of both parties expressed their desire that this Court should pass upon the other questions presented by this appeal, we prefer to adhere to the rule enunciated in *Hinton v. Ins. Co.*, 116 N. C., 22, and *Milling Co. v. Finlay*, 110 N. C., 411, to pass only upon the questions decisive of the appeal. In this case especially do we perceive no urgent reason for departing from this rule, as none of the evidence and no part of the judge's charge is sent up, and we cannot see how fully the facts upon which the other question presented to us depends were developed. Upon the authority cited, the appeal is dismissed as premature.

Appeal dismissed.

(62)

J. M. COX v. NEW BERN LIGHTING AND FUEL COMPANY.

(Filed 29 September, 1909.)

1. Mortgagor and Mortgagee—Realty, Chattels Annexed—Liens—Priorities.

The mortgagee of the realty has no superior lien on chattels subsequently annexed thereto, subject, at the time, to a mortgage lien for the purchase price of the chattels, as the senior mortgagee could acquire no title superior to that of the mortgagor, whether claimed by him under the terms of the mortgage or by reason of its annexation to the realty.

2. Same—Notice.

The question of notice to a mortgagee of the realty of the subsequent annexation thereto of chattels under an existing mortgage or conditional sale, is not determinative of his superior right, or important in fixing the rights of the respective mortgagees.

3. Mortgagor and Mortgagee—Realty, Chattels Annexed—Liens—Priorities—Intent—Evidence.

By adding to or substituting new or additional machinery in a manufacturing plant, mortgaged at the time to secure the purchase price, and annexing it to the realty, the intent of the purchaser is evidenced thereby that such machinery is to retain its character as personalty, regardless of the manner in which it may have been annexed to the freehold.

4. Same.

A mortgagor of the realty cannot annex thereto personal property, so as to become a part thereof, and thereafter change its character as such, by his convention with a stranger, so as to conclude the rights of a prior mortgagee.

5. Mortgagor and Mortgagee—Realty, Chattels Annexed—Liens—Priorities—Equity—Relief.

When it appears that the rights of a mortgagee of the realty will be impaired by the preservation of the rights of the mortgagee of personal property subsequently affixed and made a part of the freehold, the chattel mortgage being for the balance of the purchase price, the impairment being by reason of substitution of additional machinery in a manufacturing plant, the old machinery having been dissipated or being in such condition that its restoration would cause the expenditure of a material sum of money, the rights of the respective mortgagees should be adjusted upon sound and just equitable principles.

6. Same—Evidence Required.

In the adjustment of the rights and equities between a mortgagee of a manufacturing plant and a subsequent mortgagee of chattels having his lien at the time of annexation, the machinery annexed to the freehold replacing that embraced in the prior mortgage, the finding of the referee as to the value of the plant and of the substituted machinery are not sufficient upon which to render judgment, as it was necessary to find the value of the plant at the time of the annexation and whether or not it was increased or diminished by the changes made.

7. Mortgagor and Mortgagee—Subsequent Mortgage—Delay in Registration —Rights Unaffected.

The delay in registering a mortgage of machinery annexed to the freehold, upon which there was a senior mortgage, does not affect the priority of the liens as between the mortgagees, when it does not appear that the rights of the senior mortgagees were in any way prejudiced.

(63) APPEAL from *O. H. Allen, J.*, at November Term, 1908, of CRAVEN.

The plaintiff, being a stockholder of the New Bern Lighting and Fuel Company, hereinafter called the gas company, a corporation, instituted this action in behalf of himself and all creditors of the corporation, alleging the insolvency of the defendant corporation. Upon the demand of the plaintiff, a receiver was appointed to wind up its affairs. The court directed the receiver to advertise for claims against the defendant, and authorized and directed said receiver to determine the priority of all claims which were contended to be encumbrances on the property of defendant. Whereupon S. W. Smallwood filed claim for $60,000, evidenced by coupon bonds of the defendant and secured by a deed of trust or mortgage, duly authorized and duly executed on 30 June, 1906, and recorded 9 July, 1906, in the office of the Register of Deeds of Craven County, conveying two lots, therein described, all gas works, pipes, etc., all property of every kind, and "also the rights, easements and additions to said plant, and equipment and rights that shall be made prior to the time the said bonds are paid off or discharged." The bonds were thirty-year bonds, bearing five per cent. interest per annum, payable 1 July and 1 January of each year. The defendant defaulted in the payment of taxes, in the interest on the bonds due 1 July, 1908, and in other covenants specified in its deed.

On 23 March, 1907, after the registration of the mortgage to secure its bonds, the defendant entered into a written agreement with the Empire Gas, Improvement and Construction Company, which we will designate as the Empire Company, by which the Empire Company agreed to furnish certain specifically described apparatus used for the manufacture of gas, and to erect the same in defendant's plant, for the sum of $3,500, $1,750 of which to be paid when materials were delivered and the remainder to be paid within six months after completion of the work; the note evidencing the deferred payment was executed 1 September, 1907, at six months. It was stipulated in said contract as follows: "It is further understood and agreed by the parties hereto, anything to the contrary notwithstanding, that the apparatus men-

(64) tioned in the annexed specifications is to remain the property of the party of the first part until all the amounts specified herein to be paid by the party of the second part are paid to the party of

the first part. If such payment or payments are not made, as herein provided, by the party of the second part, the party of the first part shall have the right to enter the premises and plant of the party of the second part and remove the apparatus," etc. This conditional sale agreement was registered on 9 January, 1908, in the office of the register of deeds of Craven County. The apparatus so purchased was installed between 23 March and September and was used thereafter by the gas company as a part of its plant. The receiver, under the order of the court, allowed the claim of Smallwood, holder of the bonds and interest thereon, and held that it was a first lien, subject only to unpaid taxes, upon all the property of the defendant, including the apparatus furnished by the Empire Company and included in its conditional sale agreement, finding in reference thereto the following facts:

Special lien claimed against the defendant corporation. Empire Gas, Improvement and Construction Company, of New York, claims title to the machinery sold by it to the defendant corporation until all payments due upon said machinery under a contract of sale shall have been fully paid. Your receiver has carefully examined this claim, and finds that the contract of sale was executed 23 March, 1907, and that the machinery was immediately shipped, delivered and installed in the defendant corporation's plant at New Bern, North Carolina, and that the last payment on it had fallen due and the defendant corporation had failed to meet the payments. The said contract of sale under which claimant claims title to the machinery was not recorded in the office of the register of deeds of Craven until about 6 or 8 January, 1908, The parties to this contract sale acted without notice to the trustees of the deed of trust securing the bond, and without the consent of the said trustee, and the said deed of trust was recorded in the office of the register of deeds of Craven on 30 June, 1906, and had been on record for several months before the contract of sale referred to was made. The said deed of trust securing the bonds constitute the first lien on all the property conveyed to the defendant company, and also a first lien on the rights, easements and additions to the said plant, and equipments and rights that shall be made prior to the time the said bonds are paid off and discharged. The two gasmaking machines existed at the New Bern Gas Works at the time of the above conveyance, and they existed also at the time of the execution and recording of the deed of trust, and at the time the said contract of sale (65) was executed by claimant company and the New Bern Lighting and Fuel Company. As a result of the purchase of the machinery above claimed, one of the two gas machines that were originally in the plant was taken out and dismantled, and its parts have been scattered about in various places; some of the parts have been sold, and it would

now be impossible to again install them, except at a very large expense, while the other apparatus has been greatly damaged. The building in which the new machinery furnished under the said contract of sale has been installed has been so changed as to render it unfit for the purpose for which it was formerly used, and could not be again used for such purpose, except by the expenditure of a large sum of money. For these reasons your receiver is of the opinion that it would not be just or legal to allow the claim of the Empire Gas, Improvement and Construction Company, so as to retain title to the said machinery referred to in said contract, so as to defeat the lien of said bonds; and therefore disallows the claim as to title, but recommends that it be allowed as a debt against the insolvent corporation.

The Empire Company excepted to this finding. His Honor heard the matter at November Term, 1908, and filed his judgment 11 January, 1909. It was agreed at the said term that his Honor could take all the time he desired, and that all motions and exceptions should be made and the judgment should be entered as of November Term. His Honor, in his judgment, finds the facts affecting the claim of the Empire Company substantially as the receiver, and further finds the following sums due the Empire Company under its contract: $1,750, with interest from 1 September, 1907, and $154.47, with interest from 1 October, 1907, and "that the gas manufacturing machine, the property furnished under said contract by the Empire Gas Company to the defendant is worth $3,000 and the entire plant is worth $26,688." The Empire Company excepted to the findings of fact and the judgment of his Honor, assigning as one of its grounds therefor "that there is no finding as to the amount of injury or damage, if any, caused the property of the defendant by the installation of the property furnished by the Empire Gas Company under the terms of its contract." The judgment adjudged the priority of the lien of Smallwood as holder of the bonds to the amount of $60,000 over the claim of the Empire Company, and further adjudged costs against the Empire Company incurred in trying the exception filed by it. The Empire Company appealed to this Court.

(66) *Simmons, Ward & Allen for Smallwood.*
W. W. Clark for defendant.

MANNING, J., after stating the facts: In our opinion, the judgment of his Honor cannot be sustained upon facts found by him. After a careful consideration of the authorities cited by the learned counsel appearing before us, and the consideration of other authorities our own researches have found, we think a very clear statement of the principle controlling one feature of this case is found in Jones on Chattel Mort-

gages (5 Ed.), sec. 133a, as follows: "One holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore the title of a conditional vendor of such chattels, or of a mortgage of them, before or at the time they were attached to the realty, is just as good against the mortgagee of the realty as it is against the mortgagor." 19 Cyc., 105; *Campbell v. Roddy,* 44 N. J. Eq., 244; *Waller v. Bowling,* 108 N. C., 289; *Belvin v. Paper Co.,* 123 N. C., 138; *Binkley v. Forkner,* 117 Ind., 176; *Bank v. Elmore,* 52 Iowa, 541; *Lumber Co. v. Rank,* 57 *Neb.,* 323; *Anderson v. Creamery Co.,* 8 Idaho, 200; *Potter v. Cromwell,* 40 N. Y., 287; *Eaves v. Estes,* 10 Kan., 314; *Teaff v. Hewitt,* 1 Ohio State, 511.

The martgagee (Smallwood), however, resists the contention of the Empire Company, the vendor, by conditional sale contract, upon the grounds (1) that the chattels, as annexed, are by the express terms of his mortgage embraced in it, under the words, "additions to said plant"; (2) that he had no notice of the claim of the Empire Company or that its chattels were being annexed to the plant; (3) that the Empire Company knew that the purpose of the gas company was to annex said chattels as permanent additions to said plant, and that the annexation could be done only by dismantling a part of the plant in its then condition; (4) that the Empire Company had notice of the Smallwood mortgage by reason of its registration; (5) that the Empire Company was guilty of laches in the registration of its conditional sale contract.

Conceding the correctness of his position on his first point of contention, it is not, under the authorities, conclusive of his superior right to claim the annexed chattels. Although embraced within the terms of the mortgage to secure Smallwood, the chattels were also probably so annexed as to become part of the freehold, though there is no definite finding by his Honor as to the manner of the annexation. If the apparatus sold by the Empire Company were neither additions to the plant nor annexed thereto as fixtures, Smallwood could not, in any view, have a lien upon them. It is only because of the express (67) terms used in the mortgage, or because the chattels have been attached as fixtures, that Smallwood can assert any claim to them. In Jones on Mortgages (4 Ed.), sec. 158, this author says: "The mortgage (speaking of an existent mortgage) attaches to the property in the condition in which it comes into the mortgagor's hands. If it be at that time already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. *United States v. R. R.,* 12 Wall., 362. In *Tift v. Horton,* 53 N. Y., 377, the Court said: "Another consideration makes it clear, I think, that in this case the absence of a concurrent intention on the part of the prior

mortgagees is of no weight. . . . Hence I conclude that the agreement of the owner of the land with the plaintiff, as it did fully express their distinct purpose that the annexation of boiler and engines should not make them a part of the real estate, was sufficient to that effect without any concurring intention of the defendants as prior mortgagees."

In *Lumber Co. v. Lumber Co.,* 150 N. C., 282, Pou was the holder of the first mortgage, containing an after-acquired property clause, executed by the Gay Lumber Company. His mortgage was recorded. Subsequently thereto the lumber company acquired lands and thereafter executed a mortgage to the Hickson Lumber Company, which company denied the priority of Pou's mortgage on these after-acquired lands. On this point *Mr. Justice Brown,* in his able opinion, said: "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." In no one of the many cases examined by us has notice to the prior mortgagee of the realty of the annexation of chattels covered by a chattel mortgage or conditional sale been considered as determinative of his superior right or as important in fixing the rights of the respective mortgagees. Upon the third point of the contention of Smallwood, to wit, the knowledge of the Empire Company that its apparatus was to be annexed to the gas company's plant or to become additions thereto or as a substitution for other apparatus then in use. In *Binkley v. Forkner,* 117 Ind., 176, the Court, in a well-considered opinion, upon this point said: "Accordingly, the proposition is well sustained that one who purchases machinery with a view that it shall be annexed to or placed in a building, of which he is the owner, and
(68) who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold. *Eaves v. Estes,* 10 Kan., 314; *Ford v. Cobb,* 20 N. Y., 344; *Sisson v. Hubbard,* 75 N. Y., 542; *Tift v. Horton,* 53 N. Y., 377; *Campbell v. Roddy,* 44 N. J. Eq., 244." But it will not be understood that parties may, by their convention and at their will, convert chattels real into chattels personal. If at the time of the agreement the chattels personal have been annexed to and become affixed to the realty, their character as a part of the real estate cannot be subsequently changed by a convention of the owner of the real estate with a stranger, so as to conclude the rights of prior mortgagees or creditors or

subsequent purchasers for value. The fourth point of contention has been considered in what has already been said.

The contention of Smallwood that his security will be diminished by permitting the Empire Company to remove its chattels so as to enforce its lien remains to be considered. The proper adjustment of the rights of the respective mortgagees can be secured by the application of sound and just equitable principles. "Whether the chattel mortgage shall be postponed, notwithstanding the agreement between the owner of the land and the mortgagee, must depend upon the inquiry whether or not the preservation of the rights of the holder of the chattel mortgage will impair or diminish the security of the real estate mortgage as it was when he took it. If it will not, then it would be inequitable that the latter should defeat or destroy the security of the former. If it will, then it was the folly or misfortune of the holder of the chattel mortgage that he permitted the property to be annexed to a freehold from which it cannot be removed without diminishing or impairing an existing mortgage thereon." *Binkley v. Forkner, supra; Campbell v. Roddy, supra.*

The facts found by his Honor are not sufficient to enable us to adjust the interests of Smallwood and the Empire Company in accordance with the equitable principles announced. While his Honor finds the value of the plant, at the date of the receiver's report, to be $26,688, including the value of the apparatus and chattels sold by the Empire Company, which he appraises at $3,000, there is no ascertainment of the value of the plant at the time the annexation of the chattels of the Empire Company took place and the apparatus then used removed. Although his Honor finds that some of the apparatus of the gas company was dismantled, scattered and its value perhaps totally destroyed by the installation of the apparatus acquired from the Empire Company, yet it would not necessarily follow that the value of the gas (69) company's plant as an entirety was diminished or the security of Smallwood lessened. It may be that this substituted apparatus was more economically operated and more efficient in production.

Lastly, Smallwood complains that the Empire Company delayed the registration of its conditional sale contract until 9 January, 1908. Up to that time, and even for some time afterwards, Smallwood seems to have had no cause for complaint. There was, up to them, no default by the mortgagor, the gas company, of which he complains. He parted with nothing of value to the gas company upon the faith of this security during this delay, and we do not see how he was prejudiced by it. He lost none of his rights by it, nor was he delayed in the enforcement of any of his rights under his mortgage deed, and no other parties are complaining of the delay.

In *United States v. R. R.*, 12 Wall., 362, the Court said: "A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors." This, it seems to us, accords with our own decisions and rests upon the soundest principles of right and equity.

We therefore conclude there was error in his Honor's judgment, and the same is reversed and this cause is remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

Cited: Lancaster v. Ins. Co., 153 N. C., 291; *Bank v. Cox*, 171 N. C., 80; *Dry Kiln Co. v. Ellington*, 172 N. C., 484.

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(70)

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

(Filed 29 September, 1909.)

1. **Taxation—Notice—Hearing—Procedure.**

The plaintiff having been afforded an opportunity to be heard before the assessment of its property for taxation should become fixed, as directed in a former appeal (s. c., 146 N. C., 199), the question of proper notice is not material on this appeal.

2. **Taxation—Domestic Industrial Corporations—Corporation Commission—Notes—Solvent Credits.**

When a domestic industrial corporation has paid its taxes on its capital stock for the year 1902-03, assessed in accordance with the report of the treasurer and auditor of the State transmitted to the board of commissioners of the county, pursuant to law as it then existed, the said commissioners cannot lawfully assess for taxation a note held by the corporation, upon the ground that it was a solvent credit, as such was included and considered by the treasurer and auditor in the values determining the

full value of the capital stock; and subject to a stated right of exception and appeal to the courts, their estimate forms the only basis of assessment for taxation, and any other or further imposition of taxes on this portion of their assets is forbidden. The Revisal substantially confers the former powers and duties of the State Auditor and Treasurer on the Corporation Commission. (The Revisal upon this subject and Revenue Act of 1909 discussed and interpreted by HOKE, J.)

3. Taxation—Legislative Powers—Acts Directory—Positive Requirements.

Subject to well recognized constitutional restrictions, the Legislature has plenary power, in matters of public taxation, to designate the property, fix the rate and establish the methods of collection; and while many of the regulations affecting these methods are regarded as directory, this does not permit or sanction a procedure in direct contravention of a positive and essential legislative requirement respecting them.

4. Taxation—Legislative Powers—Domestic Industrial Corporations—Solvent Credits—Corporation Commission—Class Legislation—Constitutional Law.

The provisions of the Revisal and Revenue Act of 1909, for the assessment of the capital stock of domestic industrial corporations by the Corporation Commission, formerly incumbent on the State Auditor and Treasurer, are not in violation of the Constitution, as the Commission is directed to include in its estimate of the value placed upon the capital stock, every asset, solvent credit or investment, embracing the surplus, undivided profits, etc., and such method is not therefore prohibited as class legislation.

APPEAL from *Murphy, J.*, at November Term, 1908, of CALDWELL. Action to restrain the collection of a tax alleged to be illegal, a jury trial having been formally waived by the parties. (71)

On the hearing it appeared that plaintiff was a domestic industrial corporation, having its principal place of business in Lenoir, Caldwell County, N. C., and the defendants were the sheriff and board of commissioners of said county; that, under the Machinery Act of 1907, the commissioners of Caldwell County, acting under the impression that plaintiff, during the years 1902 and 1903, held a solvent credit, subject to taxation at and in said county, same being a note of $417,750, and that same had not been listed nor any tax paid thereon, entered the note, to the amount indicated, on the tax list, and assessed the plaintiff for taxation thereon for the said years, in the sum of $7,655.16; and the defendant, John M. Smith, sheriff and tax collector of said county, in enforcement of this claim, had levied on plaintiff's property and was proceeding to sell the same when stayed by order of court issued in this cause. This alleged solvent credit was a note, to the amount stated, given to plaintiff by George O. Shakespeare, as part of the purchase money for certain lands in Caldwell County, which had been conveyed to said Shakespeare by plaintiff company, and was secured by a mort-

gage to the company on the lands so conveyed; that the plaintiff company had paid tax on its capital stock for the year 1902, assessed in accordance with the report of the Treasurer and Auditor of the State, transmitted to the board of commissioners by said officers, pursuant to the law as it had then existed, but had paid no such tax in the county for the year 1903, and in neither year had this note and mortgage been listed as a separate item of taxation, nor any tax paid thereon as such.

There was evidence on part of plaintiff tending to show that the note of $417,750 was not a solvent credit to anything like the amount of its face value, and that the company was indebted in a considerable sum, which is claimed should be deducted in case the note could be lawfully listed against it; and, further, that the tax on the land embraced in the mortgage had been paid for both years.

The court, being of opinion that the commissioners of the county had no power to list the note for taxation, and that the tax assessed against plaintiff by reason of same was illegal, gave judgment perpetually restraining the county officials from collecting the tax, and defendant excepted and appealed.

Jones & Whisnant and W. C. Newland for plaintiff.

Mark Squires, M. N. Harshaw and Lawrence Wakefield for defendant.

(72) HOKE, J., after stating the case: On a former appeal in this cause (*Lumber Co. v. Smith,* 146 N. C., 199) it was held that, on an assessment of the kind indicated here, the party affected was entitled to notice, and, in the absence of such notice, should be afforded opportunity to be heard before the assessment should become a fixed and final charge upon his property. This opportunity having been allowed on the trial below, the question of proper notice is no longer material. *Kinston v. Wooten,* 150 N. C., 295, citing *Davidson v. New Orleans,* 96 U. S., 104. And on the merits of the controversy we fully concur in the decision of the judge below, to the effect that a domestic industrial corporation is not now required to list its mortgages, bonds or other securities as separate items of taxation, but values arising from these sources are all to be included and considered in the assessment of its capital stock, referred by the statute, as it then stood, to the State Auditor and Treasurer, changed to the Corporation Commission by the Revenue Acts of 1909, and that the assessment imposed upon the plaintiff in this instance, by reason of the note of $517,750, was without warrant of law, and its collection was therefore properly enjoined.

Subject to certain well-recognized constitutional restrictions, the Legislature undoubtedly has plenary power in this matter of public

taxation, both in designating the property, fixing the rate and establishing the methods of collection. *Comrs. v. Tobacco Co.,* 116 N. C., 441. And, while regulations affecting these methods are many of them regarded as directory, such a position does not permit or sanction a procedure in direct contravention of a positive and essential legislative requirement. And we are of opinion that a perusal of the statutes in the Revisal of 1905 concerning the revenue, this being in all respects substantially similar to the law as it prevailed at the time, notably sections 5108, 5270, 5274, leads clearly to the conclusion that all the intangible property and assets of these industrial corporations should be included and considered in estimating for taxation the value of their "capital stock"; that this duty has been referred by the law exclusively to the Corporation Commission (at that time to the State Auditor and Treasurer), subject to a stated right of exception and appeal to the courts, and their estimate forms the only basis of assessment of taxation, and any other or further imposition of taxes on this portion of their assets is forbidden.

As heretofore stated, the powers and duties relevant to the inquiry, which were conferred and imposed by the Revisal on the State Auditor and Treasurer, have, by a subsequent statute (Revenue Acts of 1909), been transferred to the Corporation Commission, and this body will be hereafter named in reference to them. Under section 5270, "Every domestic industrial corporation of the State is required (73) annually to make a report to the Corporation Commission, giving the data from which a correct estimate of the capital stock may be made; and the president, treasurer or other accredited officer of the corporation must himself, under oath, make an estimate and appraisement of the 'capital stock of the company' at its actual value in cash on the first day of June, 1909, after deducting therefrom the assessed value of all the real and personal estate upon which the corporation pays tax," and forward same to the commission. On the coming in of this report, if the commission, or either of them, is not satisfied with the appraisement and valuation, they are authorized and directed, on the facts contained in the report, "or upon any information in their possession," to make their own appraisement, subject to the right of the corporation to except and appeal to the court as stated. If any corporation fails or refuses to make the report indicated, provision is further made in this section for the commission, of their own motion, to make the appraisement required.

Under the powers conferred by this statute, and others in the Revisal, of cognate nature, notably sections 1119 *et seq.,* constituting the Corporation Commission "State Tax Commissioners," that body has prepared and supplied a form adequate and comprehensive and specifying with

great minuteness every kind and description of property which belongs to the corporation or which constitutes an asset which reasonably tends to enhance its value. Among many other things, this report is to include a statement as to the par value of the stock, the amount paid in on each share, the market value of same, the price obtained on any sales of stock which may have been made within the past year, any dividends paid during that period, and the amount of same; also the surplus and undivided profits, together with the assessed value of real and personal property of the corporation listed with local assessors. And the commission, after giving full and fair consideration to all the evidence contained in the report or otherwise possessed by them, and tending to aid them to a just conclusion, shall determine the proper valuation of the corporate property and assets, termed for the purpose of these statutes the "capital stock," and then, as required by the law, deducting the tangible real and personal property of the company which, as noted, is to be listed in the proper county, the remainder constitutes the appraisement upon which further taxation is to be assessed, either for State or local purpose. Having ascertained and decided on the appraisement which includes all the corporate assets, except the tangible real and personal property, and assessed the tax thereon due the
(74) State, the commission must notify the corporation of the amount due for State purposes, and, under section 5108, this amount must be remitted direct to the State Treasurer; and, under section 5274, the commission is further required to certify the amount of the appraisement to the register of deeds of the county in which the corporation has its principal office or place of business, "and the corporation, joint stock association, etc., shall pay the county, township, town or city taxes upon the valuation so certified." A similar provision will be found in the Machinery Act of 1909, sec. 37. This amount having been ascertained and determined, under the methods indicated, section 5108 provides that no individual stockholder in a corporation, joint stock association, etc., thus paying tax on his capital stock shall be required to pay any tax on said stock or list the same; and both sections 5108 and 5270 contain the provision that "all corporations, joint stock associations, etc., thus paying tax on capital stock shall not be required to make any report or pay any further tax on mortgages, bonds or other securities or credits held by them in their own right." And as tending to further confirm the interpretation placed upon the statute, section 5108 provides, further, "but such corporation, etc., holding such mortgages, credits, etc., as executors, trustees or guardian shall return and pay tax on these securities as in the case of individuals," giving clear indication that when not held as trustees, etc., these intangible assets shall only be taxed as a component part of the capital stock, and not otherwise. Substantially the

same method of taxation is applied to most of the public service corporations doing business in this State, as telegraph companies, under section 5276, subsection 5; telephone companies, section 5277, subsection 5; express companies, section 5278; sleeping car companies, section 5379, subsection 5; street railway companies, sections 5281-5284.

In assessing railroad property, local officers only list and assess such property as is off the right of way. All other property, real and personal, is assessed by the Corporation Commission. Sections 5290, 5291, 5292, 5293; *R. R. v. New Bern,* 147 N. C., 165.

There is some slight change in the case of banking corporations, Revisal, sec. 5267; Laws 1909, sec. 33. In the case of banks, their realty is listed in the county, and, on report made as required by this section, the value of the shares is appraised and determined by the commission, and this, with the sworn list of shareholders, is certified by the commissioners to the county authorities, to the end that the proper amount of tax may be assessed against the individual holders of same. This is done in order to conform the taxation of all banks to the method permissible in the case of national banks, and in (75) order to make the taxation equal and uniform throughout the State on all institutions of that class. There is much to be said in support of the scheme of taxation contained in these statutes, tending as it does to uniformity and consistency of rulings on the various and important questions presented; and under an intelligent and conservative administration the law is proving itself to be a satisfactory and workable system. These are matters, however, more properly for legislative consideration, and are therefore not dwelt upon, the only question for us being as to the power of the Legislature to enact the law and its correct interpretation.

It is objected that, under the construction adopted, the statute violates the provision of the Constitution requiring that all solvent credits shall be taxed; but, as we have endeavored to show, every asset, solvent credit, investment, etc., is included in the estimate of value placed upon the capital stock. As heretofore stated, the entire corporate property and assets are included, embracing the surplus, undivided profits, etc.

The note in controversy here is, or should have been, included in the valuation of the capital stock of the company; and one of the advantages incident to the method adopted is that in this way double taxation is avoided. The facts are therefore against the defendants on this position.

It is further urged that the statute, so construed, violates the principle of uniformity required by the Constitution in the imposition of public taxes, but the authorities do not sustain this position. The power of the Legislature in this matter of classification is very broad and com-

prehensive, subject only to the limitation that it must appear to have been made upon some "reasonable ground—something that bears a just and proper relation to the attempted classification, and not a mere arbitrary selection." And under numerous and well-considered and authoritative decisions the classification made in this instance must be upheld and approved. *Lacy v. Packing Co.,* 134 N. C., 567; *S. v. Stevenson,* 109 N. C., 730; *S. v. Powell,* 100 N. C., 525; *Gatlin v. Tarboro,* 78 N. C., 119; *State R. R. Tax Cases,* 92 U. S., 575.

If the plaintiff corporation has escaped taxation for the year 1903, and the right of collection is not barred by lapse of time, the collection of the proper tax may no doubt be enforced, but the claim must be established in a proper way, by an appraisement and assessment of the capital stock of the company; and there is no authority or sanction for listing the note in controversy as a separate item for taxation.

We are of opinion, and so hold, that the listing and assess-
(76) ment of the note in question and the imposition of the tax thereon were without warrant of law, and the collection of the same has been properly restrained.

Affirmed.

Cited: Pullen v. Corporation Commission, 152 N. C., 555; *Dalton v. Brown,* 159 N. C., 180.

B. E. NOBLE v. JOHN L. ROPER LUMBER COMPANY.

(Filed 29 September, 1909.)

1. Master and Servant—Negligence—Instruction of Foreman—Proximate Cause.

The defendant is liable to the plaintiff, its employee, for an injury received while removing a shiver from a sawmill in the course of his employment, when it appears that it was necessary for him to remove it, and that he was required by his foreman to do so when the saw was running, the only safe method being to stop the saw before doing so; and such negligent act of the foreman was the proximate cause of the injury.

2. Negligence—Safe Appliances—Evidence.

There is no evidence of the failure of the employer to furnish the employee with proper appliance to remove shivers at a sawmill, when it does not appear that there is any special appliance in general use for the purpose.

3. Issues—Burden of Proof—Harmless Error.

When the burden is upon plaintiff on two issues of negligence, and the verdict on one of them is sufficient to sustain the judgment, it is harmless

error for the judge to have submitted the other on which there was no evidence, and in the disjunctive erroneously instruct the jury thereon.

4. **Negligence—Instructions of Foreman—Rule of the Prudent Man.**

Under the evidence in this case the removal of a shiver by the plaintiff from the planing machine, while it was running, was not obviously so dangerous as to make it plaintiff's duty to refuse to obey the instructions of the foreman to do so.

APPEAL from *Cooke, J.*, at April Term, 1909, of CRAVEN.

Action to recover damages for personal injury received by plaintiff while working in defendant's mill.

The usual issues of negligence, contributory negligence and damage were submitted. From a verdict and judgment for plaintiff the defendant appealed.

D. L. Ward and W. D. McIver for plaintiff.
Moore & Dunn for defendant.

BROWN, J. The uncontradicted evidence in this case tends to (77) prove these facts. Plaintiff was injured in November, 1906, while feeding the planing mill. He was working under one Chapman, who was the foreman of the machine. A shiver of wood became fastened under the guide. It was necessary to remove this. The grader, who was present, called plaintiff's attention to the fact that there was a streak on the board, caused by the shiver. Plaintiff shut the feed off and went to remove the shiver. The company did not furnish any appliance of any kind for removing such shivers of wood. It was customary to pick up a stick from the floor to remove them. The foreman had often done this in the presence of the plaintiff. Chapman, the foreman, had often told the plaintiff not to remove his belt and stop the machine when a shiver of wood got under the guide. At other times, when plaintiff would offer to stop the machine to remove the shivers and Chapman was not near enough to speak to him, on account of the noise made by the various machines, he would wave his hand to the plaintiff not to stop.

There are two allegations of negligence set out in the complaint, viz:

1. Refusing to permit plaintiff to shift the belt and stop his machine long enough to remove the shiver, and directing him to remove it while running.

2. A failure to furnish a proper appliance with which to remove shivers.

There were the usual motions to nonsuit, which were overruled.

We find many exceptions in the record which, in the view we take of the case, it is unnecessary to discuss.

The principal exception is to the following charge: "The court instructs the jury that, in order to find the first issue in the affirmative, they must be satisfied by the greater weight of the testimony (1) that the foreman under whom he was placed to work directed him to remove the shiver without stopping the machine; (2) that the defendant failed to exercise reasonable care in furnishing to the plaintiff a reasonably safe appliance for removing the shiver while the machine was running."

We agree with the learned counsel for the defendant that there is nothing to support the second alleged ground of negligence, for the reason that there is no evidence that there is any kind of appliance in general use adapted for the safe removal of shivers when they obstruct the guide. The only appliance, so far as the evidence discloses, for the purpose, is an ordinary stick, which was used by the foreman as well as by plaintiff.

(78) And if the charge quoted had been in the disjunctive, we should be compelled to direct another trial, because we would be unable to determine upon which ground of negligence the jury acted. But his Honor put the burden on the plaintiff to prove both grounds of negligence in order to entitle him to a verdict, and therefore if there is evidence to support either it is sufficient to sustain the verdict.

It is elementary learning that it is the duty of the master to furnish his servant a reasonably safe method, as far as practicable, for doing his work. The only safe manner of removing the shiver was to disconnect the belt and momentarily stop the particular machine plaintiff was operating. When left to himself plaintiff did this, and, of course, escaped injury. To save time, the foreman forbade him to stop the machine and directed him to remove the shiver while running. The plaintiff did as he was ordered and was injured.

We think it was a false economy of time to forbid the plaintiff to do what ordinary care and prudence prompted him to do, and that the defendant is responsible for Chapman's negligence. *Tanner v. Lumber Co.*, 140 N. C., 475, and cases cited; *Shaw v. Mfg. Co.*, 146 N. C., 236; *Avery v. Lumber Co.*, 146 N. C., 592.

Chapman represented the defendant and had the right to give orders to plaintiff, and therefore if he failed in his duty the defendant is liable for his acts. *Tanner v. Lumber Co., supra.*

If Chapman had ordered plaintiff to do something obviously dangerous and which a reasonably prudent man, under similar conditions, would not do, then it would have been plaintiff's plain duty to refuse. But it was not so obviously dangerous to undertake to remove the shiver with a stick. The plaintiff had seen the foreman do it, and was following his

instructions when the foreman refused to allow him to shift the belt off the pulley and stop the machine.

The refusal was the direct cause of plaintiff's injury.

We have examined the exceptions discussed in the defendant's brief, and find no reversible error. The judgment is

Affirmed.

Cited: *Holton v. Lumber Co.*, 152 N. C., 69; *Walters v. Sash Co.*, 154 N. C., 325; *Hamilton v. Lumber Co.*, 156 N. C., 523; *Briley v. R. R.*, 160 N. C., 92; *Pigford v. R. R., ibid.*, 100; *Odum v. Lumber Co.*, 173 N. C., 136.

JAMES A. SIMMS v. SAM H. VICK.

(Filed 29 September, 1909.)

Notes—Overpayment—Mistake of Fact—Recovery.

When plaintiff has overpaid his note owing to his having forgotten a previous payment, it is a mistake of fact, and not of law, against which he may be relieved and the mere fact that he had means of knowing does not necessarily preclude him from recovering in his action therefor.

APPEAL from *O. H. Allen, J.*, at February Term, 1909, of WIL- (79) SON.

The plaintiff sued the defendant, before a justice of the peace, upon two causes of action, to wit: (1) for $40 due by notes; (2) for $67.50, an overpayment on a note of $175. The justice gave judgment in favor of plaintiff on the note of $40, from which judgment plaintiff appealed. At the trial in the Superior Court defendant tendered judgment for the $40 interest and costs, and his Honor submitted the following issue to the jury: "Is the defendant, S. H. Vick, indebted to the plaintiff; and, if so, in what amount?" to which the jury responded, "Yes, for $67.50 and interest." The record then proceeds: "Thereupon, on motion, the verdict was set aside upon the grounds that the mistake in overpayment claimed by the plaintiff was not such a mistake as the law would relieve against. Plaintiff excepts. And it was ordered that plaintiff do not recover the amount claimed to have been overpaid upon the note of $175." Judgment was thereupon entered in favor of plaintiff for $40 interest and costs, and further that plaintiff was not entitled to recover the overpayment of $67.50, upon the grounds stated above. To this part of the judgment plaintiff excepted and appealed to this Court.

J. D. Bardin for plaintiff.
Connor & Connor for defendant.

MANNING, J., after stating the case: Upon the trial plaintiff produced receipts of the defendant for $67.50 more than the principal and interest of his note. The note was dated 3 March, 1906, and was due 1 November, 1906. The receipts were dated from 6 March, 1906, to 12 November, 1906. Upon the payment made on the last-named day the note was surrendered to plaintiff, endorsed: "Paid in full." The plaintiff testified that he could not read, and on the day of the last payment had forgotten the first payment and his receipt therefor. The defendant testified that he had no personal knowledge of the receipts to plaintiff, as they were signed by his clerks and bookkeeper, and that plaintiff did not mention to him the overpayment for twelve months afterwards. The jury found the issue in favor of plaintiff.

The question presented is whether his Honor erred in holding that, upon the verdict the mistake was a mistake of law and could not be relieved against. We think his Honor committed error. A voluntary payment, with a knowledge of all the facts, cannot be recovered
(80) back, although there was no debt. But a payment under a mistake of fact may be. *Adams v. Reeves,* 68 N. C., 134; *Pool v. Allen,* 20 N. C., 120; *Newell v. March,* 30 N. C., 441; *Lyle v. Silver,* 103 N. C., 261; *Worth v. Stewart,* 122 N. C., 258; *Comrs. v. Comrs.,* 75 N. C., 240; *Pearsall v. Mayers,* 64 N. C., 549. In *Pool v. Allen, supra, Ruffin, C. J.,* states the reason for this principle with his usual force: "There was no intention here to make a gift of the money, so as in that sense to constitute it a case of a voluntary payment. On the contrary, it was clear that the money was paid out and received in discharge of a debt then believed to subsist. In that there was a total mistake on the part of the person making the payment, and probably on that of the receiver also; and it is plain that money thus got under a mistake, and for no consideration, cannot be kept *ex equo et bono.*" In 30 Cyc., 1318, it is said: "And money paid under a *bona fide* forgetfulness of facts, which disentitled the party to receive it, is paid under a mistake of fact and may be recovered." And again: "The knowledge of the facts which disentitles the party from recovering means a knowledge existing in the mind at the time of payment." *Kelly v. Solari,* 9 M. & W., 54; *Guild v. Balridge,* 2 Swan (Tenn.), 295; *Lewellen v. Garrett,* 58 Ind., 442; 26 Am. Rep., 74. Nor is it sufficient to preclude a party from recovering money paid by him under a mistake of fact, that he had the means of knowledge of the fact, unless he paid it intentionally, not choosing to investigate the fact. *Kelly v. Solari,* 9 M. & W., 54.

His Honor should have entered judgment upon verdict for the plain-

tiff, and in his failure to do so for the reasons assigned by him there is error. The action is remanded, that judgment may be entered upon the verdict for the plaintiff.

Error. Remanded.

Cited: *Sanders v. Ragan,* 172 N. C., 616.

H. A. GRAY v. J. R. JENKINS, J. I. JAMES AND WIFE ET AL.

(Filed 29 September, 1909.)

1. Deeds and Conveyances—Reformation—Evidence Sufficient—Questions for Jury.

The evidence to reform a written deed must be clear, strong and convincing, but when the testimony is sufficient to carry the case to the jury, as on an ordinary issue, the judge can only lay this down as a proper rule to guide the jury in their deliberations and it is for them to determine whether in a given case the testimony meets the requirements of this rule as to the degree of proof.

2. Same—Positive Fraud.

A grantor who can read and write, by merely signing a deed, is not necessarily concluded from showing that, as between the original parties, it was induced by a positive act of fraud on the part of the grantee, and that he was deceived and thrown off his guard by the grantee's false statements and assurances designedly made at the time, and reasonably relied on by him.

3. Same.

Evidence is sufficient to go to the jury, in an action to reform a deed alleged to have been procured by fraud, tending to show that grantee and others went, about dark, to the house where grantor was and requested him to sign it, which he did without reading upon their representation that the description only covered a certain part of his lands, that it was a plain deed and such as they had previously agreed upon; that they urged his signature at once, stating they were in a hurry to leave; that he then signed it upon the assurance of one of them, in whom he had confidence, that the deed was as represented; and that in fact the deed conveyed more land than agreed upon.

APPEAL from *Cooke, J.,* at April Term, 1909, of PITT. (81)

This action was originally tried before *Lyon, J.,* at November Term, 1907.

The action was instituted by plaintiff, a subsequent purchaser of the land now in controversy, against J. R. Jenkins, mortgagee of this and other lands, and J. I. James, mortgagor and owner, and his wife, Lucy,

et al., to enforce a sale of the mortgaged land in a certain order, as required by the rights and equities of plaintiff as subsequent purchaser.

The mortgagee answered, setting up his indebtedness and the mortgage given to secure the same on all the land in controversy and other lands not embraced in plaintiff's deed. The mortgagor answered, and, among other things, alleged that the plaintiff's deed included more land than the agreement and contract between them authorized and that the excess, to wit, all that portion lying outside of the town of Oakley, was inserted in the instrument by reason of deceit and fraudulent representations on the part of plaintiff.

On issues submitted, the jury rendered the following verdict:

1. Did defendants agree to sell and convey to plaintiff only that portion of their land which is located within the boundary lines of the town of Oakley? Answer: Yes.

2. Were defendants induced to execute the deed of 16 November, 1905, containing that portion of their land lying outside the boundary lines of the town of Oakley, by the deceit and false and fraudulent misrepresentations of the plaintiff? Answer: Yes.

3. Is the plaintiff the owner and entitled to the possession of
(82) the land described in the complaint? Answer: All that part in the town of Oakley.

4. Does the defendant J. I. James unlawfully withhold the possession of said land from the plaintiff? Answer: Yes.

5. What is the annual rental value of said land? Answer: Thirty-six dollars.

On such verdict judgment was rendered reforming plaintiff's deed according to the facts established, and directing a sale in a given order, and from that judgment plaintiff appealed. The appeal was dismissed as having been prematurely taken, on the ground that in a sale had pursuant to the decree it might turn out that the question at issue between plaintiff and the mortgagor would be immaterial and irrelevant. 149 N. C., 139. This opinion having been certified down, further proceedings were had, in which it was disclosed that all claims of the senior mortgagee were fully satisfied out of that portion of the lands not contained in plaintiff's deed, and thereupon it became necessary to determine the questions involved between plaintiff and defendant, the mortgagor, and presented in the pleadings, issues and verdict had in the original trial. This result having been ascertained by formal judgment, the plaintiff again appealed.

Jarvis & Blow and Moore & Long for plaintiff.
Moore & Dunn and Skinner & Whedbee for defendant.

HOKE, J., after stating the case: The objection chiefly urged for error is the refusal of the court below to charge the jury "That the evidence in the case does not tend to prove facts sufficient to constitute fraud and deceit, and the jury is instructed, upon the whole evidence, if they believe it, to find the first and second issues No," but the objection, in our opinion, cannot be sustained. While it is well established that in an action to reform a written deed the proof must be clear, strong and convincing, our decisions are to the effect that when the testimony is sufficient to carry the case to the jury, as on an ordinary issue, the judge can only lay this down as a proper rule to guide the jury in their deliberations, and it is for them to determine whether in a given case the testimony meets the requirements of this rule as to the degree of proof. *Lehew v. Hewett,* 138 N. C., 6; *Cuthberson v. Morgan,* 149 N. C., 72. This being the established principle, we think it clear that the prayer of plaintiff, above noted, was properly refused by the judge below.

It is true that in an action of this character the false statements must be such that they are reasonably relied upon by the complaining party. It is also true that when an adult of sound mind and memory, and who can read and write, signs or accepts a formal (83) written contract, he is ordinarily bound by its terms. *Floars v. Ins. Co.,* 144 N. C., 232. In such case it is very generally held that a man should not be allowed to close his mind to facts readily observable and invoke the aid of courts to upset solemn instruments and disturb and disarrange adjustments so evidenced, when the injury complained of is largely attributable to his own negligent inattention.

Older cases have gone very far in upholding defenses resting upon this general principle, and, as pointed out in *May v. Loomis,* 140 N. C., 357-358, some of them have been since disapproved and are no longer regarded as authoritative; and the more recent decisions, on the facts presented here, are to the effect that the mere signing or acceptance of a deed by one who can read and write shall not necessarily conclude as to its execution or its contents, when there is evidence tending to show positive fraud, and that the injured party was deceived and thrown off his guard by false statements designedly made at the time and reasonably relied upon by him. Some of these decisions, here and elsewhere, directly hold that false assurances and statements of the other party may of themselves be sufficient to carry the issue to the jury when there has been nothing to arrest attention or arouse suspicion concerning them. *Walsh v. Hall,* 66 N. C., 233; *Hill v. Brower,* 76 N. C., 124; *May v. Loomis,* 140 N. C., 350; *Griffin v. Lumber Co.,* 140 N. C., 514.

In *Walsh v. Hall,* one of the cases just cited, *Dick, J.,* delivering the opinion of the Court, said: "If the purchaser has received no covenants, and there is no fraud vitiating the transaction, he has no relief for de-

fects or encumbrances against his vendor, for it was his own folly to accept such a deed, when he had it in his power to protect himself by proper covenants. But in cases of positive fraud a different rule applies. The law presumes that men will act honestly in their business transactions, and the maxim of *Vigilantibus non dormientibus jura subveniunt* only requires persons to use reasonable diligence to guard against fraud —such diligence as prudent men usually exercise under similar circumstances. In contracts for the sale of land purchasers usually guard themselves against defects of title, quantity, encumbrances and disturbance of possession by proper covenants; and if they do not use these reasonable precautions the law will not afford them a remedy for damages sustained, which were the consequences of their own negligence and indiscretion. But the law does not require a prudent man to deal with every one as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts
(84) which constitute material inducements to a contract. There must be a reasonable reliance upon the integrity of men, or the transactions of business, trade and commerce could not be conducted with that facility and confidence which are essential to successful enterprise and the advancement of individual and national wealth and prosperity. The rules of law are founded on natural reason and justice, and are shaped by the wisdom of human experience, and upon subjects like the one which we are considering they are well defined and settled."

In *Griffin v. Lumber Co., supra,* the Court held as follows: "3. Before signing a deed, the grantor should read it, or, if unable to do so, should require it to be read to him, and his failure to do so, in the absence of any fraud or false representation as to its contents, is negligence, for the result of which the law affords no redress; but when fraud or any device is resorted to by the grantee which prevents the reading or having read the deed, the rule is different." And like decision was made in *May v. Loomis, supra.*

Under these authorities, the judge below correctly ruled that the questions at issue should be submitted to the jury, the evidence bringing the case clearly within the principle stated. Among other things, the defendant (the plaintiff in the issue) testified that he had bargained with the plaintiff Gray concerning the land, and had agreed to sell and convey to him all that portion of the tract of land which lay within the boundaries of the town of Oakley for $600 and a store account amounting to about $20; that some time after that, when the defendant and his wife were at the house of one Williams, some time between sundown and dark, plaintiff came to them with a deed already prepared, and a justice of the peace with him, and in conversation defendant told him he was only selling the land in town, and plaintiff replied the deed only

covered the land in town; "said it was only a plain deed, like we had agreed upon. There was no reading done. Gray (the plaintiff) handed me the deed; I read the deed to where it mentioned E. R. Mizell's corner, and I said to Gray, 'You have his initials wrong,' and he said, 'It makes no difference; it is nothing but a plain deed; I am in a hurry to get back to the store; there is no one there but Mr. Rogers.' I handed the deed to Mr. Whichard. I had confidence in him. I thought he would tell me the truth, or I would not have signed it. Whichard was looking over the deed, and the plaintiff said the same thing to him—that he was in a hurry." No one read the deed to witness. He further testified that he did not know the deed embraced any land outside of the town, or he would not have signed the deed.

Mrs. James, wife of defendant, gave similar testimony as to what took place about reading the deed at the house, of the exe- (85) cution, and further that she had agreed to sign a deed for the land within the town, and said so at the time, and she would not have agreed to the execution otherwise.

Mrs. Williams, sister of the defendant, testified that plaintiff Gray said it was not worth while to read the deed; that it was just a plain deed, containing what he bought.

Plaintiff further testified that, some time after executing the deed, he discovered that it was not restricted to the land within the town, but conveyed the entire tract to plaintiff, and same was worth $1,000 to $1,200. There was testimony on the part of plaintiff in denial of defendant's claim; but, for the purpose of the exception, the evidence of defendant must be taken as true, and, as stated, presents a case for the consideration of the jury.

The exceptions to the ruling of the court in questions of evidence are without merit, and the judgment for defendant is affirmed.

No error.

Cited: *McCall v. Tanning Co.*, 152 N. C., 650; *Hendren v. Hendren*, 153 N. C., 506; *Highsmith v. Page*, 158 N. C., 230; *Elks v. Hemby*, 160 N. C., 23; *Pate v. Blades*, 163 N. C., 271; *Glenn v. Glenn*, 169 N. C., 731; *Ray v. Patterson*, 170 N. C., 227; *Grimes v. Andrews*, *ibid.*, 523; *Johnson v. Johnson*, 172 N. C., 532; *Potato Co. v. Jeanette*, 174 N. C., 244.

A. L. BELL AND WIFE v. M. McJONES AND WIFE.

(Filed 29 September, 1909.)

1. Issues, Sufficient.

An issue is not open to objection which clearly arises from the pleadings and under which any phase of the evidence and of the controversy may be presented.

2. Deeds and Conveyances—Married Women—Principal and Agent—Fraud—Reformation of Deed.

In an action to reform a deed of a married woman, evidence is sufficient which tends to show that defendant, acting through her husband as her agent, bargained to sell the whole of her certain lot, which was not measured at the time but afterwards ascertained to have a frontage of sixty-five feet, and that her husband, thereafter, induced, by fraudulent act and representations, the plaintiff to accept a deed conveying only a frontage of fifty feet, leaving out a large portion of a house which was to have been included in the conveyance, and that she received the purchase price for the sixty-five foot lot; and an instruction is correct, that the jury should find for plaintiff if defendant knew the whole lot was not conveyed and that plaintiff was deceived thereby and induced to accept the deed thinking it conveyed the whole lot bargained for.

3. Same—Equitable Relief.

When a *feme covert* admits a contract for the sale of a certain lot of her land by an agent, and has received the purchase money, she cannot profit by his fraud in inducing her grantor to accept a deed for a smaller lot, and thus profit by his fraud; but she will be held as trustee of the unconveyed property to the end that the agreement may be executed; and equity will decree correction of the deed, and if such is not done, the registration of the decree as a conveyance. Revisal, 567.

(86) APPEAL by defendant from *Peebles, J.*, at May Term, 1909, of BEAUFORT.

The facts are sufficiently stated in the opinion.

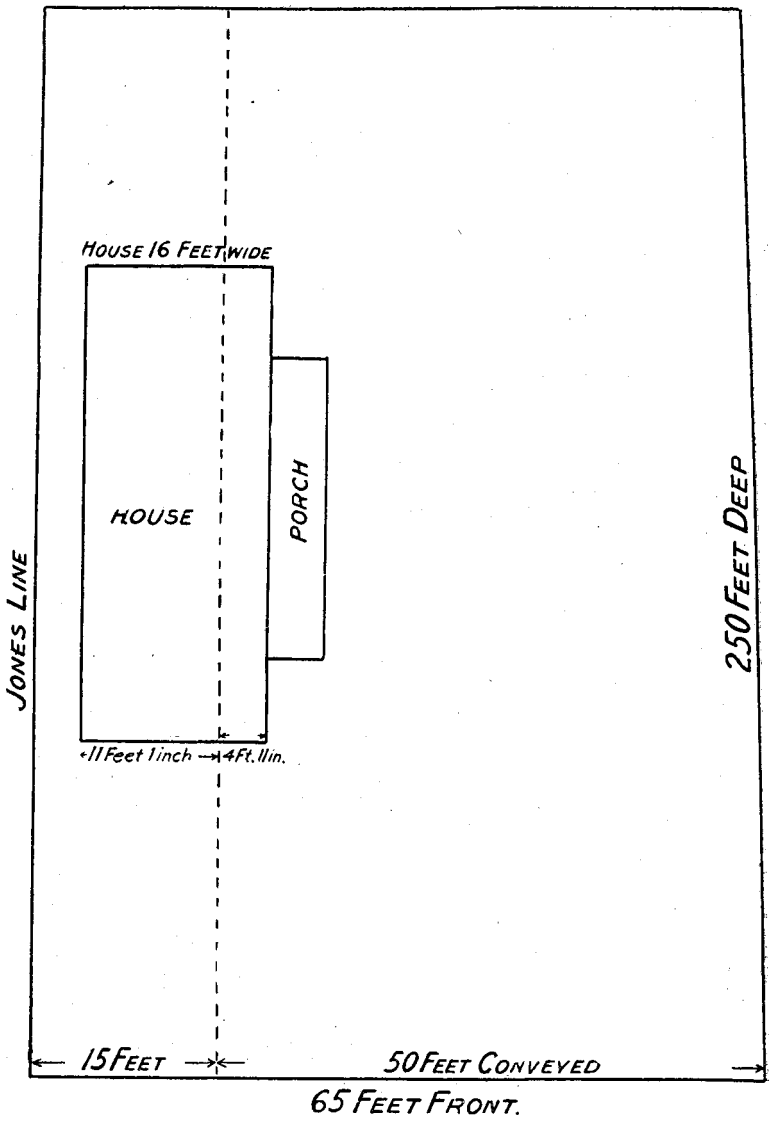
Nicholson & Daniel and Ward & Grimes for plaintiffs.
Small, MacLean & McMullan for defendants.

CLARK, C. J., The *feme* defendant, Lydia McJones, wife of M. M. McJones, owned a lot in Belhaven, which fronted on Water Street of that town. The plaintiffs introduced a deed to her for this lot, which showed that it was 65 feet wide and 250 feet deep. The plaintiffs alleged and offered evidence tending to show that M. M. McJones proposed to sell them this lot, which was called by them the "Sam Wilkinson lot," and in consequence of this offer and subsequent negotiations the plaintiffs agreed to buy the same and pay therefor the sum of $1,000; that defendant, M. M. McJones, thereafter produced a deed for it, in which the lot was described

as being only 50 feet in width or frontage upon Water Street, and fraudulently represented to the plaintiffs that it conveyed the "Wilkinson lot." Plaintiffs contended that they accepted the deed, understanding that it conveyed the whole of the lot of 65 feet frontage, but they afterwards found out that it only conveyed them a lot 50 feet by 250 instead of a lot 65 feet by 250. The evidence of the defendants tended to show that only 50 feet frontage was to be conveyed. The defendants lived next to the lot conveyed. The *feme* defendant joins in the answer, admits the receipt of the $1,000 and that she and her husband did agree to sell the plaintiff a lot on Water Street for $1,000, and that such lot would include the dwelling house on said property. It appears in the evidence that with only 50 feet frontage the deed conveys only 4 feet 11 inches of the house (and the porch), leaving over 11 feet of the house on the 15-foot strip retained by the defendant.

It was in evidence that when the deed was delivered the male defendant, who had conducted all the negotiations, brought it and said, "Here is the deed for the S. E. Wilkinson lot"; that he was going off next morning and must have his money that night. The plaintiff and his wife read the deed only as far as the consideration; finding that stated to be $1,050, a dispute arose, which was finally settled by the plaintiff paying $1,000, which the male defendant accepted, and (88) departed. The deed was not read further. Later, on reading the deed, it was found that only 50 feet was conveyed. A reform of the conveyance, so as to include the other 15 feet, was demanded and refused, though the *feme* defendant offered to let the plaintiff move the house upon the 50 feet.

It appears that the *feme* defendant, through her husband, as agent, agreed to sell the "Wilkinson lot," fronting on Water Street, to the plaintiff; that it was understood by both parties that the land conveyed would embrace the house. There were no measurements made. The court stated to the jury the contentions of the parties and told them that this was an action to reform a deed, and that in actions of this kind the rule of evidence was different from what it is in ordinary cases; that in this case the burden is upon the plaintiffs to satisfy the jury by clear, strong and convincing proof that the bargain made by the parties was as is claimed by plaintiffs—that if the plaintiffs did not know the width of the lot, and that the male defendant at the time he delivered the deed said, "Here is your deed for the Wilkinson lot," and that defendants knew that it did convey the Wilkinson lot, but only a part of it, and plaintiffs were deceived thereby and induced to accept the deed, thinking it conveyed the whole of the Wilkinson lot, then you will answer the first issue Yes; otherwise you will answer it No. To this charge the defendants excepted.


HOUSE 16 FEET WIDE
HOUSE
PORCH
JONES LINE
250 FEET DEEP
11 Feet 1 inch
4 Ft. 11 in.
15 FEET
50 FEET CONVEYED
65 FEET FRONT.

The issues submitted was, "Was the deed from defendants to the plaintiff executed by fraud, as alleged?" The defendants excepted, but this issue clearly arises upon the pleadings, and upon it any phase of the evidence and of the controversy could be presented.

Coverture was not pleaded. It appears in the evidence that M. M. McJones, in the whole negotiation, was acting as agent for his wife. She admits as much in her answer, which says that the land sold was to embrace the house, and that she received the money. If, as the jury find, the understanding was that the deed was to cover the whole lot, but M. M. McJones, by saying "Here is your deed," misled the defendants and procured payment of the $1,000, the wife cannot profit by the fraud. She made her husband her agent, and if he represented that the deed was to embrace the whole lot and received the money from the plaintiffs, who accepted the deed on M. M. McJones' statement, "Here is the deed for the Wilkinson lot," thinking it conveyed the whole lot, the *feme* defendant is bound by the conduct of her agent.

This is not the case of one signing a deed without reading it (89) though if that were the case it might well come under the principle so well laid down by *Mr. Justice Hoke* in *Gray v. James,* at this term. But here the deed was signed by the other party, and the plaintiffs accepted the deed, relying upon the statement, "Here is the deed for the Wilkinson lot," defendant saying at the same time he must go, and asking for the money. The case falls, therefore, under *Gwaltney v. Ins. Co.,* 130 N. C., 629; *ibid.,* 132 N. C., 928.

Nor does the question of the power of a married woman to contract arise. She contracted through her husband, as her agent, and, therefore, with his assent, to sell the "Wilkinson lot." She admits this in her answer, and that the lot conveyed should embrace the house. The deed delivered covers only 4 feet 11 inches of the house. The jury find that the agreement between the parties was for the whole lot, 65 feet, and that the delivery, instead, of a deed for 50 feet, was a fraud. It is clear that as to one *sui juris* the judgment should direct correction of the deed to conform to the contract. As the *feme* defendant was acting through her agent, it is incumbent upon her to correct any error committed through her agent's fraud. She received, by the jury's finding, payment for a 65-foot lot, upon an understanding that the deed should convey 65 feet, and the decree properly adjudges the correction of the deed and, if not done, the registration of the decree as a conveyance under Revisal, sec. 567.

The law applicable is thus stated, 1 Perry on Trusts (5 Ed.), sec. 170: "In equity, if a married woman has obtained property by fraud, the court disregards the technical rules of common law in regard to married women and converts her, by construction, into a trustee and compels her

to do justice by executing the trust. . . . This is on the ground that infants and married women shall not take advantage of the rules made for their protection to perpetrate frauds upon innocent persons, but they shall be bound by their own fraudulent representations or by equitable estopples, like other persons." Here, as the jury find, the *feme* defendant, through her husband, as her agent, agreed to convey the whole lot, of 65 feet. She received the agreed purchase money therefor, but fraudulently her agent delivered a deed for only 50 feet. The court, on these facts found, properly decreed her a trustee of the 15 feet and directed a conveyance thereof to the plaintiff and the registration of its decree as a conveyance. This subject is fully discussed by *Mr. Justice Walker* in *Warehouse Co. v. Ozment,* 132 N. C., 839.

(90) All our authorities hold that where a married woman obtains anything of value she will not be allowed to retain it and not pay the price. *Bridgers v. Bridgers,* 101 N. C., 71. She must give up one or the other. *Burns v. McGregor,* 90 N. C., 223, and cases citing it, in annotated edition. Where she has received the price and refuses to make the conveyance, the fund can be followed, where she has invested it and subjected. *Hodges v. Powell,* 96 N. C., 69, citing *Scott v. Battle,* 85 N. C., 184. Where the party who made the contract was not her agent, she can disavow the contract upon return of the money received. *Boyd v. Turpin,* 94 N. C., 137. But when, as here, she admits the contract was made by her agent and has received the purchase money, she cannot profit by his fraud but will be held trustee of the unconveyed property, to the end that the agreement may be executed.

No error.

Cited: Council v. Pridgen, 153 N. C., 455; *Michael v. Moore,* 157 N. C., 466.

A. N. WATERS AND McCOY G. WATERS v. B. L. SUSMAN AND B. E. TUNNELL.

(Filed 29 September, 1909.)

Contracts, Written—Contemporaneous Agreement—Breach—Issues.

In an action for breach of a written contract of sales rights for certain machines, wherein plaintiff claimed damages arising from the alleged fraudulent negotiation of certain notes he had given therefor in violation of the terms of a contemporaneous oral agreement that they were not to be binding until defendant's fulfillment of certain conditions, issues were submitted, without objection, determinative only of the ques-

tion of the violation of the oral agreement, and not of the fraudulent negotiation of the notes: *Held*, that upon the issues as submitted and in the absence of evidence of substantial damage, the plaintiff was entitled to nominal damage only.

APPEAL from *Peebles, J.*, at February Term, 1909, of BEAUFORT.

These issues were submitted without objection:

1. Did defendants agree that the notes mentioned in the complaint should not be binding and of any force until a collateral agreement made by the defendants to the effect that they would instruct plaintiff M. G. Waters in the use of the washing machine until five family rights were sold and until said M. G. Waters should sign a blank agreement, set out in the contract, that he was satisfied with said instruction? Answer: Yes.

2. If so, did defendants fail and refuse to perform said collateral agreement? Answer: Yes.

3. What damages, if any, are plaintiffs entitled to recover? (91) Answer: Five cents.

To the ruling of the court, that the plaintiffs are entitled to nominal damages only, the plaintiffs excepted, and appealed from the judgment rendered.

Nicholson & Daniel for plaintiffs.
Bragaw & Harding and Ward & Grimes for defendants.

BROWN, J. The plaintiffs allege that the defendant Tunnell and one Booker Lawson, acting as agent for defendant Susman, sold to plaintiffs a Swift 1904 clothes washer, together with the right to sell said machines; that two notes were executed for $250 as the purchase price. There was a contemporaneous verbal contract that defendants should fully instruct plaintiff M. G. Waters in the use of the machine, and that the transaction should stand as open and unfinished until that was done and until M. G. Waters should express himself, in writing, as satisfied with such instruction. It is admitted that one of the notes has been surrendered to plaintiffs and canceled. The complaint avers that the transaction was a fraud for the purpose of tricking the plaintiffs.

These allegations of the complaint are denied, and the defendant Susman denied specifically that section which alleges the wrongful assignment of one of the notes to Dr. Hardy.

The findings of the jury establish these facts, viz.: That the defendants agreed that the notes mentioned should not be binding until the collateral agreement in respect to teaching M. G. Waters the use of the machine was performed to his satisfaction, and that the defendants failed to perform such collateral agreement.

It is to be noted that no issue was asked for by the plaintiff for the purpose of establishing the allegation that the note was wrongfully and fraudulently assigned before due for the purpose of cheating and defrauding the plaintiff.

Instead of submitting to the jury an issue involving the aforesaid tort charged against the defendants, the plaintiffs seem to have preferred to try the cause solely as for a breach of contract as to the collateral agreement only. So we have a finding that the defendants failed to perform their collateral agreement to teach Waters the use of the machine, but no finding that the outstanding note has even been wrongfully and fraudulently assigned for the purpose of defrauding plaintiffs.

In fact, while there is evidence, there is no finding that the note has been assigned at all, although that issue is raised by the answer of Susman.

(92) Taking the case, therefore, as presented by the pleadings and the issues submitted by consent, we are of opinion that his Honor did not err in confining the recovery to nominal damages.

The second issue relates solely to the failure to perform the collateral agreement, and therefore the measure of damage under the third issue must be confined to such damages as are shown to have been sustained by defendant's failure to perform the collateral agreement, and which were reasonably within the contemplation of the parties. The collateral agreement, as stated in the first issue, was that "they (the defendants) would instruct M. G. Waters in the use of the machine until five family rights were sold and until said M. G. Waters should sign a blank agreement that he was satisfied with said instructions." This collateral agreement, as its name imports, was not a part of the written contract of sale, but a contemporaneous verbal agreement entered into at the same time. The record does not disclose a scintilla of evidence that the plaintiffs sustained any substantial damage because the defendants failed to keep the collateral agreement and instruct M. G. Waters in the use of the machine until five family rights were sold.

There is no evidence that plaintiffs sustained loss by lack of such instruction. For aught that appears, they may have acquired the necessary knowledge as to the use of the machine and may have sold the five family rights without the assistance of the defendants.

It is contended by counsel for the plaintiffs that, upon the evidence of plaintiffs the $250 note has been assigned to Dr. Hardy, and that, although the plaintiffs admittedly have paid nothing on the note and are utterly insolvent, the measure of damage is the amount of the note, or at least what it would cost plaintiffs to have it canceled. For this position he relies upon *Lyle v. McCormick,* 51 L. R. A., 908, and cases

there cited. This view was presented in an able and interesting argument by Mr. Daniel for the plaintiffs. Had there been an issue and finding that the note had been wrongfully assigned by defendants for the purpose of defrauding the plaintiffs, then we think the point would have been before us for determination.

As the case stands upon the pleadings, the issues as agreed upon and the evidence, we think his Honor did not err upon the issue of damage.

No error.

(93)

L. P. SWAIN v. C. S. JOHNSON, J. F. NOBLE AND W. A. WEST.

(Filed 29 September, 1909.)

Deeds and Conveyances—Breach of Contract—Action in Tort—Pleadings—Proof.

An action cannot in general be maintained for inducing a third person to break his contract with the plaintiff, the consequence being only a broken contract, for which the party to the contract may have his remedy by suing upon it. To this rule there are two generally recognized exceptions discussed by BROWN, J.

APPEAL from *Cooke, J.*, at Spring Term, 1909 of CARTERET.

From a judgment of nonsuit the plaintiff appealed. The facts are sufficiently stated in the opinion of the Court.

Moore & Dunn and Abernethy & Davis for plaintiff.
Thomas D. Warren for defendant Noble.
Simmons, Ward & Allen for defendant Johnson.

BROWN, J. We deem it unnecessary to discuss the seventy exceptions set out in the record, as in our opinion the whole case may be reviewed in passing upon the correctness of his Honor's ruling in granting the motion to nonsuit.

The plaintiff contends that he contracted with defendant Noble to purchase all the pine and juniper timber on certain lands belonging to the Cox heirs, said Noble being their attorney in fact, with power to sell the land; that the defendants West and Johnson conspired together and induced Noble to violate his contract with plaintiff by purchasing the lands from Noble for a corporation, the West Lumber Company, in which West and Johnson are interested. Wherefore, for such alleged tort, the plaintiff claims substantial damage.

The principle of law upon which plaintiff founds his right of action is thus stated in Comyn's Digest, Action on Case A: "In all cases where

a man has temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong."

This principle has been applied in some jurisdictions to the violation of contracts for personal service, and was so applied in this State in *Haskins v. Royster,* 70 N. C., 601, although by a divided court. It has been applied to the malicious enticing away of workmen; to the loss of a contract of marriage by means of a false and malicious letter; to maliciously enticing and inducing a wife to remain away from her
(94) husband, and to maliciously inducing an opera singer to abandon her contract; but we find no case in any court where it has ever been applied to breaches of contracts to convey title to property. It is true that in *Jones v. Stanly,* 76 N. C., 356, it was applied where the president of a railroad company maliciously prevented his company from performing a contract of carriage of freight, and in that case *Judge Rodman* says "the same reasons cover every case where one person maliciously persuades another to break any contract with a third person." This is but a *dictum,* and in commenting on it the Supreme Court of Kentucky, in a well considered opinion in *Chambers v. Baldwin,* 11 L. R. A., 547, says: "We have seen no other case where the doctrine is stated so broadly." This Kentucky authority, with the voluminous notes of the annotator and the numerous cases cited, support fully the text of *Judge Cooley,* that "an action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequences, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." Cooley on Torts, 497. To this rule there are but two generally recognized exceptions—one where servants and apprentices are induced from malicious motives to leave their master before the term of service expires, and the other arises where a person has been procured, *against his will* or contrary to his purpose, by coercion or deception of another, to break his contract. *Green v. Button,* 2 Cromp. M. & R., 707; *Ashley v. Dixon,* 48 N. Y., 430. This is based upon the idea that a person has no right to be protected against competition, but he has a right to be free from malicious and wanton interference in his private affairs.

If disturbance or loss comes as the result of competition or the exercise of like rights by others, it is *damnum absque injuria. Walker v. Cronin,* 107 Mass., 564.

It is only where the contract would have been fulfilled but for the false and fraudulent representations of a third person that an action will lie against such third person. *Benton v. Pratt,* 2 Wend., 385, citing *Pasley v. Freeman,* 3 T. R., 51.

Ashley v. Dixon, supra, is in every respect similar to the one under consideration. In that case the New York court holds: "If A has agreed to sell property to B, C may at any time before the title has passed induce A to sell it to him instead; and if not guilty of fraud or misrepresentation, he does not incur liability, and this is so, although C may have contracted to purchase the property of B. B cannot maintain an action upon the latter contract, as he cannot perform and can only look to A for a breach of the former." This doctrine is (95) supported by abundant authority. Cooley on Torts, *supra; Otis v. Raymond,* 3 Conn., 413; *Young v. Scovell,* 8 J. R., 25 N. Y.; *Johnson v. Hitchcock,* 15 J. R., 185; *Gallager v. Brunell,* 6 Cow., 347; *Hutchins v. Hutchins,* 7 Hill, 104.

Tested by these generally accepted principles, the plaintiff has entirely failed, for he does not allege, and there is not a shred of evidence to prove, that Noble was ready and willing to perform his alleged contract with plaintiff, but that he was prevented, against his will, from so doing by the false and fraudulent representations of West and Johnson, or either of them.

In fact, it is hard to discover in the record any evidence that at the time West is alleged to have purchased the timber the plaintiff had any subsisting contract with Noble. The latter had given plaintiff an option, but it had expired. Then Noble placed the deed with his attorney, Wooten, to be delivered in case plaintiff paid the purchase money in three days, as agreed, which the plaintiff failed to do.

Tested by the *dictum* of *Judge Rodman,* in *Jones v. Stanly, supra,* the plaintiff also fails, for under that authority, if followed, plaintiff must both allege and prove malice upon the part of West and Johnson, and he fails as to both.

The evidence does not disclose any illegal act committed by either West or Johnson, much less an evil one. The latter agreed to buy the timber from plaintiff, who then held an option on it, provided his attorney, Judge Shepherd, pronounced the title good. He examined it and pronounced it bad, and Johnson declined to purchase. After plaintiff had failed to take up the deed from Wooten and pay the price agreed upon between him and Noble, West purchased the timber from Noble and deposited the money to await the perfecting of the title.

It is very hard to discover in the evidence any moral, much less legal, wrong done the plaintiff by these defendants, or either of them. He lost the purchase of the timber, not by any fraudulent practices of West or Johnson, whereby Noble was prevented from selling to the plaintiff, but because he failed to pay Wooten the money for Noble and take the deed at the time agreed upon.

Affirmed.

(96)

T. T. MARROW AND WIFE v. J. J. WHITE AND WIFE.

(Filed 6 October, 1909.)

Contracts—Debt of Another—Consideration—Independent Agreement.

A promise to the landlord made by one advancing supplies to the tenant, under a mortgage, that if the landlord would wait until the tenant finished selling the crop the promisor would give him his note for the tenant's rent payable the next fall, is an independent contract between the landlord and one furnishing the supplies, and not barred by the statute of frauds. The question whether the landlord in this case has lost his lien by not following the remedy provided under the Virginia statute, does not arise.

APPEAL by defendant from *O. H. Allen, J.,* at May Term, 1909, of VANCE.

The facts are sufficiently stated in the opinion.

J. H. Bridgers for plaintiffs.
T. T. Hicks for defendants.

CLARK, C. J. The plaintiffs own a tract of land in Virginia. Their tenant sold some of the crop, and instead of paying the proceeds on the rent paid it to the defendant, a merchant, on his store account for supplies, for which he held a mortgage.

The plaintiff testified that the defendant told him, "If you will wait till Hilliard (the tenant) finishes selling, I will give you my note for the $75, payable next fall." The Code of Virginia, sec. 2496, gives the landlord a lien "prior to all other liens" and a remedy by distress. We need not consider the question debated before us, whether the landlord's lien in that State is lost by not taking out proceedings in distress, for, according to plaintiff's evidence, the defendant promised to pay the $75 if the plaintiff would let the tenant alone till he had gathered and sold the rest of his crop. This is not a promise barred by the statute of frauds, but an independent contract upon a consideration. *Whitehurst v. Hyman,* 90 N. C., 490; *Voorhees v. Porter,* 134 N. C., 604; *Deaver v. Deaver,* 137 N. C., 244; *Satterfield v. Kindley,* 144 N. C., 461, in which last case the point is fully and clearly presented by *Mr. Justice Brown.*

The nonsuit must be

Reversed.

Cited: Rogers v. Lumber Co., 154 N. C., 111.

(97)

ROLAND THIGPEN AND ALBERT THIGPEN v. KINSTON COTTON MILLS AND THE EMPLOYERS LIABILITY ASSURANCE CORPORATION.

(Filed 6 October, 1909.)

Actions, Misjoinder of—Negligence—Personal Injury—Loss of Son's Services —Parties—Demurrer.

The joinder of a cause of action brought by a son, an employee, to recover of defendant cotton mill, his employer, damages for a personal injury alleged to have been caused by the latter's negligence, with that of the father to recover for the loss of the son's services alleged to have been caused by the same negligent act, is demurrable on the ground of misjoinder of parties and causes of action. Revisal, sec. 469.

APPEAL from *W. R. Allen, J.*, at March Term, 1909, of LENOIR.

Action to recover damages for personal injury, heard upon demurrer by *W. R. Allen, J.*, at LENOIR.

The plaintiffs appealed from a judgment sustaining the demurrer.

G. V. Cowper and Y. T. Ormond for plaintiffs.
Davis & Davis for Employers' Liability Assurance Corporation.
Rouse & Land for Cotton Mills.

BROWN, J. This is a suit brought by Roland Thigpen, an infant, and by Albert Thigpen, individually, against the Kinston Cotton Mills and the Employers' Liability Assurance Corporation (Limited), of London, England, for injuries received by the plaintiff, Roland Thigpen, while at work in the cotton mills of the Kinston Cotton Mills.

1. The son sues to recover damages for a personal injury received while working in the cotton mills, alleged to be due to negligence of the employer. The father is joined in same action and sues to recover of the employer for the loss of his son's services.

One of the grounds of demurrer is the misjoinder of parties and causes of action.

We think the demurrer was properly sustained and the action dismissed. The son has no interest in the cause of action of the father, and the father has no interest in the cause of action of the son. It is a manifest misjoinder, both of parties and causes of action, and therefore the action cannot be divided. Revisal, sec. 469. *Cromartie v. Parker,* 121 N. C., 198; *Morton v. Telegraph Co.,* 130 N. C., (98) 302; *Edgerton v. Powell,* 72 N. C., 64.

2. Another ground of demurrer is that the plaintiffs have no cause of action against the Employers' Liability Assurance Corporation.

The question raised by the demurrer has never been decided by this Court, and as the action is dismissed it is unnecessary to decide it now. The judgment of the Superior Court is

Affirmed.

Cited: Cooper v. Express Co., 165 N. C., 539; *Campbell v. Power Co.*, 166 N. C., 489.

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(99)

J. W. SMATHERS v. BANKERS LIFE INSURANCE COMPANY.

(Filed 6 October, 1909.)

1. **Insurance, Life—Collateral Agreement—Policyholders—Preferred Class—Revisal, 4775.**

When a policyholder surrendered his policy of life insurance for cancellation and received the surrender value, he cannot maintain an action against the insurance company upon an agreement made collaterally to the policy contract, and which is in direct contravention to the Revisal, sec. 4775, prohibiting discrimination among insurants of the same class and equal expectation of life, etc.

2. **Same.**

An agreement collateral to a policy contract of life insurance which selects a body of its policyholders not exceeding three hundred, and confers upon them such a property right in the funds of the company as to make the policies in this class self-sustaining in five or six years, is a distinction or discrimination between insurants of the same class and equal expectation of life, and prohibited by the statute. Revisal, sec. 4775.

3. **Insurance, Life—Collateral Agreement—Policyholders—Special Inducements—Statutory Requirements.**

When a collateral agreement delivered to insured with his policy of life insurance provided for the reduction of his premiums to be paid thereon, and is claimed to be the sole inducement moving him to take the policy, it is necessary for these inducements so claimed to be specified in the policy contract. Otherwise the collateral agreement is prohibited by the statute and not enforceable. Revisal, sec. 4775.

4. **Same—In Pari Delicto.**

A policyholder cannot enforce against the insurance company a severable collateral agreement to his policy contract of life insurance which is prohibited by statute, Revisal, sec. 4775, upon the principle that the law was not passed for the benefit of the company resisting recovery, but for the protection of the policyholders when it appears that the agreement is executory in character and gives him a preference over the general body of policyholders for whose benefit the statute was passed. In such cases the parties are *in pari delicto.*

APPEAL from *Ferguson, J.*, at February Term, 1909, of BUNCOMBE.

Civil action heard on demurrer to complaint.

The complaint, in substance, alleged that plaintiff had heretofore had a policy of life insurance in defendant company to the amount of $5,000, and had paid the annual premium thereon for four years, from 1903 to 1906, inclusive, at the sum of $131.50 per year; that the insurance policy was taken by reason of a contract entered into between plaintiff and defendant, separately drawn and evidenced, constituting plaintiff a member of the "board of advisory agents" of defendant company for the State of North Carolina, not to exceed three hundred in number and under the terms of which plaintiff, as such member, was to have a continuing share of the "renewal commissions upon all the business done by the company in said State, which share would increase from year to year, until at the end of five or six years the plaintiff's profits under said contract would fully pay the annual premiums upon said policy of insurance; so, that, by reason of the benefits to accrue to the plaintiff under said renewal commission contract, the plaintiff's said policy of insurance would, after the expiration of said five or six years, become self-sustaining"; that a scheme or plan was contained in the contract by which the interest of plaintiff in this renewal commission fund was to be declared and evidenced; and from time to time, in accordance with such plan, certain certificates were issued to plaintiff in evidence of his interest in said commission fund under the contract. These certificates were similar in form, one of them being, in words and figures, as follows:

BANKERS LIFE INSURANCE COMPANY
OF THE CITY OF NEW YORK.

This is to certify that John W. Smathers, a member of the company's advisory agents of the State of North Carolina, having caused the company to receive regular premiums on an additional amount of insurance in accordance with the provisions of this contract, shall be, at each distribution, entitled to six additional units of representation, provided that the conditions upon which said additional units were credited and the conditions of his said contract remain fulfilled.

New York, N. Y., 17 October, 1904.

FRANK G. COMBES, *Secretary.*

Form 736, 1—Pa., S. & N. C., 1—01—04.

This contract is set out in full as a part of the complaint, and a (100) portion of the same as indicative of its general plan and purpose is as follows:

"Whereas the Bankers Life Insurance Company of the City of New York has the good will and favorable influence of the leading bankers and

business men in and around said city; and whereas, to extend the benefits and advantages of the company and to further increase it business, it agrees to appoint throughout the State of North Carolina a board of advisory agents, to be composed of well-known citizens, agents of the company, whose good will and favorable influence shall be a considerable factor in sustaining the present high standing of the company.

"Now, therefore, in consideration of the foregoing and of the continued favorable influence, good will and assistance in building up the company of the holder of this certificate, the company agrees to the following articles:

"Article 1. To compensate the person herein named for his services, the company agrees to create from its expense appropriation a special renewal commission fund each year during a succeeding thirty years, based on the number of thousands of dollars of insurance which the company shall have in force in said State on December of each year, and which was issued during the ten years between 15 November, 1908, and 14 November, 1908, both inclusive, and upon which premiums payments have not ceased.

"Article II. The company agrees to appoint not to exceed three hundred members of said board; and in event of any such member forfeiting his membership therein, his place will not be filled, but the number of persons who shall thereafter be considered as members of said board shall thereby and to that extent be forever decreased.

"Article III. On 31 December, 1899, and annually thereafter during the period of thirty years mentioned above, the company shall determine the number of thousands of dollars of such insurance then in force, as provided in Article I; also the number of members then remaining in said board; and each member shall at all times be entitled to representation on said board in each distribution of funds in the proportion of twenty units to each ten thousand dollars of insurance (and proportionately for other amounts) upon which he has caused the company to receive the regular premiums and for which he holds a certificate."

As to obligations imposed upon plaintiff, the contract provides:

"Article V. This agents' renewal commission contract is issued and will remain in force upon the two following conditions, which are hereby agreed to by the holder hereof:

(101) "1. That the person herein named shall annually furnish to the company, upon its request, the names of ten people, residents of his county, whom he deems insurable.

"2. That it shall cause the company to receive annually the regular premiums on an amount of insurance aggregating at least five thousand dollars."

The complaint then alleged performance on part of plaintiff of all

obligations imposed upon him by the contract until prevented by breach thereof on part of defendant in 190__, when defendant company withdrew from the State and ceased to write insurance therein, and failed and refused to create from its expense appropriation the special renewal commission fund, as provided by Article I; and, further—

"8. That except for the representations and inducements held out to the plaintiff, as alleged in the third paragraph hereof, the plaintiff would not have taken out said insurance with the defendant; and the breach of said contract by the defendant, as hereinbefore alleged, made it necessary for the plaintiff to surrender and cancel said policy of insurance after he had paid four annual premiums upon said policy. The plaintiff's premium payments upon said policy were as follows: 20 June 1903, $131.50; 21 June, 1904, $131.50; 20 June, 1905, $131.50; 20 June, 1906, $131.50; and the plaintiff received from the defendant upon the surrender and cancellation of said policy the sum of one hundred and eight dollars ($108), or thereabouts.

"9. That by reason of the matters and things hereinbefore alleged, the plaintiff has been greatly endamaged, both generally and specifically, to wit, in the sum of two thousand dollars ($2,000), as nearly as plaintiff can ascertain the same.

"Wherefore, the plaintiff prays judgment against the defendant (1) for damages in the sum of two thousand dollars; (2) for costs, and (3) for such other, further and general relief as the plaintiff may be entitled to, upon the facts alleged."

Defendant demurred to the complaint on the ground that the alleged contract and agreement declared on were unlawful and void and contrary to the statutes of the State applicable to and controlling same. There was judgment overruling the demurrer, and defendant excepted and appealed.

Frank Carter and H. C. Chedester for plaintiff.
J. C. Martin and J. G. Merrimon for defendant.

HOKE J., after stating the case: The statute applicable to the question presented (Revisal, sec. 4775) provides as follows:

"4775. Discrimination between insurants forbidden. No life (102) insurance company doing business in this State shall make any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the contract it makes; nor shall any such company or any agent thereof make any contract of insurance or agree-

ment as to such contract other than as plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow as inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

In *Annuity Co. v. Costner,* 149 N. C., 293, the Court held that when a policy had been issued in connection with a contract of this character and retained by the beneficiary for a year, an action by the company on the notes executed for the annual premiums could be sustained, and this on the ground that, on the facts there appearing, the policy and the contract, which it was claimed conferred illegal benefits, were severable, and that defendant, having received the benefits of the policy as an executed consideration, could be made to pay the stipulated price.

In this case the policy has been surrendered and canceled and the surrender value received by the plaintiff, and the action is brought on the collateral agreement itself, seeking to recover damages for its breach, as of an executory contract; and we are clearly of opinion that, considered in reference to this claimant and persons in like relation and circumstance, the agreement in question is in direct contravention of the statute, and that no recovery upon it can be had. The express provision and obvious purpose and policy of the statute are to prevent discrimination among policyholders of like class and expectancy, and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurant and the company in reference thereto shall be plainly expressed in the policy; and, in our view, the contract in question here is violative of both these requirements. It creates a select body of its policy holders, not to exceed three hundred in number, and agrees to confer upon them a property right in a fund of the company, by means of which practically the annual premiums are to be reduced, and to such an extent that in five or six years, as the complaint states, the policy would be fully self-sustaining, thereby withdrawing a portion of
(103) the company's assets for the benefit of this favored few, and tending to render it less able to furnish the general body of its policy holders with this desirable form of protection at the lowest cost consistent with good business prudence. It is an undoubted and distinct "special favor" and advantage to arise in behalf of this preferred class who are policy holders in the company for a given amount. For the other stipulation that the member shall send to the company annually, at its request, the names of ten people, residents of his county, whom he deems insurable, is so clearly colorable that it does not require serious consideration. Again, the agreement declared on is one that,

in this instance, was made in reference to plaintiff's contract of insurance. The plaintiff alleges that it was the sole inducement for taking out the policy, and, this being true, the law requires that it should appear in the policy itself and not otherwise. On both grounds, therefore, the contract or agreement declared on is forbidden by the statute, and recovery on it should not be allowed. *Edwards v. Goldsboro,* 141 N. C., 60; *Warden v. Plummer,* 49 N. C., 524; *Sharp v. Farmer,* 20 N. C., 122; 9 Cyc., 480, 481.

The same view as to similar statutes has prevailed in other jurisdictions. *Ins. Co. v. Comrs.,* 125 Mich., 85; *State Life v. Strong,* 127 Mich., 346; *Cole v. State* (Miss.), 45 Southern, p. 11. And the Attorneys-General of several States have officially advised against their validity.

We were referred by counsel to *Urwan v. Ins. Co.,* 125 Wis., 349, in support of plaintiff's right to recover, but the authority does not sustain the position. In that case the plaintiff applied for a policy of insurance for five thousand dollars on the twenty-year payment plan and was to become a member of a board of special agents of the company, and paid $159.55 as a tentative premium on the policy for which he had applied. In an action brought to recover this premium plaintiff introduced evidence tending to show that the contract and policy sent plaintiff were entirely different from the agreement he had made, and that the agent of defendant had been guilty of false and fraudulent representations in inducing plaintiff to apply for the policy and pay the money; that plaintiff, on discovering the discrepancy, immediately offered to return both the contract and policy, etc. Recovery was sustained, and, in part, on the ground that, though the contract may have been forbidden by the statute, plaintiff, having repudiated same while the illegal portion was entirely executory, could recover the amount he had advanced.

To the extent stated, the position is recognized in *Edwards v.* (104) *Goldsboro, supra,* and not only finds support in the Wisconsin case cited, but in other decisions of authority (*Spring Co. v. Knowlton,* 103 U. S., 49; *Stacy v. Foss,* 19 Me., 335), and may be taken as established, at least where the parties are not *in pari delicto* or public policy does not forbid that recovery should be enforced. *Webb v. Fulchire,* 25 N. C., 485; Clark on Contracts, p. 338; 15 A. & E. (2 Ed.), 1007. But in our case there has been no repudiation of the agreement nor any money withheld by defendant by reason of it, the premiums paid having been accounted for to plaintiff in the surrender value of the policy; and the action is in direct recognition of an illegal executory contract, and demands damages for its nonperformance.

Again, it is urged that the statute, as expressed, only forbids the

company and its agents from making the contract in question, and, having been passed for the protection of policy holders, an insurant seeking to recover on such a contract is not considered as *in pari delicto*, and for that reason should be allowed to recover. There are various recognized exceptions to the principle which finds expression in the maxim, *in pari delicto*, etc. They will be found very well digested in Clark on Contracts, p. 336 *et seq.*, and well-considered decisions support and apply the principle and its modifications as there stated. *Tate v. Building Assn.*, 97 Va., 74; *Lawn v. Ins. Co.*, 131 Wis., 555. One of the exceptions referred to is to the effect that "parties are not to be regarded as being *in pari delicto* where the agreement is merely *malum prohibitum*, and the law which makes it illegal was intended for the protection of the party asking relief; and an instance not infrequent occurs in legislation on insurance where a statute forbids the issuance of a policy without a license, or establishes some other formal requirement, and the prohibitive features are addressed to the company or its agents, and the penalty, if any, only imposed upon them. In such case, if a company, without having taken out license, issues a policy, receives the premium, and a loss occurs, the statute will not prevent a recovery.

In the case suggested there is an executed consideration, and, the law having been passed for the general protection of policy holders, the exception is allowed to prevail. But no such position can obtain when the action is to enforce a contract entirely executory, and the same is directly forbidden by law, and a recovery would be subversive of the very public policy which the statute was designed and intended to uphold. True, the statute, in terms, is only addressed to the companies and their agents, and is enacted for the protection of policy holders;

but this is for the general body of policy holders who would
(105) suffer by the enforcement of such agreements, and not for those

who have entered into the forbidden agreement and are seeking to profit by its terms. In such case the litigants are *in pari delicto*, and any and all recovery is denied. *Edwards v. Goldsboro, supra; York v. Merritt*, 77 N. C., 214; *King v. Winants*, 71 N. C., 469; *Pres. Ministers' Fund v. Thomas*, 126 Wis., 281.

The contract declared on comes directly under condemnation of the principles expressed and sustained in these decisions, and the judgment overruling defendant's demurrer must be reversed.

Reversed.

Cited: Lloyd v. R. R., post, 540, 541; *Sykes v. Thompson*, 160 N. C., 351; *Slehli v. Express Co., ibid.*, 506; *Parrott v. R. R.*, 165 N. C., 309.

N. B. FINCH v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 6 October, 1909.)

1. **Railroads—Shipper—Cotton—Licensee.**

One who is preparing bales of cotton for shipment in a customary manner on the platform provided by a railroad company for the purpose is not a bare licensee.

2. **Railroads—Cotton Platform—Repairs—Duty to Shippers—Negligence—Questions for Jury.**

A railroad company owes a duty to its patrons shipping bales of cotton over its lines to keep in repair its platform used and furnished by it for that purpose, and when there is evidence tending to show that one thus shipping cotton, while complying with the instructions of defendant's agent in heading up the bales so that their marking could readily be seen, was injured by his foot catching in a hole in the platform left by a rotting plank, which was concealed by the bale he was then handling, it is sufficient to take the case to the jury upon the issue of defendant's negligence. In this case the question of contributory negligence was not presented.

APPEAL from *O. H. Allen, J.,* at March Term, 1909, of NASH.

Action, to recover damages for an injury sustained by plaintiff from falling in a hole in defendant's cotton platform at Springhope.

These issues were submitted to the jury:

1. Was plaintiff injured by the negligence of defendant? Answer: Yes.

2. What damage is plaintiff entitled to recover? Answer: Two thousand five hundred dollars.

From the judgment rendered the defendant appealed.

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

Jacob Battle for plaintiff. (106)
Bunn & Spruill for defendant.

BROWN, J. The only controversy in this appeal arises upon the refutal of his Honor to allow the motion to nonsuit, and in so ruling we are of opinion he did not err. The evidence tends to prove that the plaintiff was a merchant and cotton buyer of Springhope, in which town the defendant had, on its right of way, near its station house, a large platform, upon which it was required that cotton bales should be placed before bills of lading would be issued for the same. It was also required or requested by the defendant that the bales should be "headed up," put in an upright position, with the marked ends up. This platform was kept up by the defendant to receive cotton intended for ship-

ment over its road, and, as its agent testified, it was required that cotton be placed on the platform before bills of lading would be issued for it, and headed up so the marks could be seen and taken down by the agent. On the occasion in question the plaintiff purchased in the streets a bale of cotton from a farmer, and he threw it out of his cart on said platform, according to the usual custom. The bale was lying down flat and covered a hole in the platform seven or eight inches wide and two or three feet long, a decayed piece of plank having broken out there. The plaintiff, with the assistance of the farmer, was engaged in putting the bale in an upright position, in order to meet the requirement of the defendant, and intended to have it shipped by the defendant, when his left leg went down in the hole and the bale fell on his right leg and he was seriously injured. The defense of contributory negligence is not set up in the answer.

Upon these facts we think the defendant is plainly liable, upon well-settled principles. *Dowd v. R. R.*, 20 L. R. A., 531, and cases cited; 16 Am. & Eng. (1 Ed.), 413, 415; 21 Am. & Eng. (2 Ed.), 417, note 2; 2 Jaggard on Torts, 895, 896. At the time plaintiff was injured he was not a bare licensee, as in *Quantz v. R. R.*, 137 N. C., 136, or *Peterson v. R. R.*, 143 N. C., 260; but the inducement to deposit his cotton on the platform was equivalent to an invitation to do so. *Briscoe v. Light Co.*, 148 N. C., 405. At the time he was injured plaintiff was engaged in obeying the instructions of defendant's agent to head up the bale so the mark could be taken down by him and bill of lading issued. Plaintiff was really transacting business with the company, as he was delivering the bale on the platform kept by defendant for the purpose of receiving it for shipment.

The defendant owed a duty to its patrons so engaged to keep the platform in repair. *Phillips v. R. R.*, 124 N. C., 126; 1 Fetter on Carriers, sec. 228.

Affirmed.

Cited: Monroe v. R. R., post, 377; *Patrick v. Springs,* 154 N. C., 272; *Autry v. R. R.*, 156 N. C., 295; *Silvey v. R. R.*, 172 N. C., 112, 114.

(107)

G. F. WILLIAMS v. CHARLES F. DUNN ET AL.
(Filed 6 October, 1909.)

1. Deeds and Conveyances—Mortgages—Pleadings—Cancellation—Evidence.

In an action for the cancellation of a bond and mortgage on plaintiff's land, plaintiff alleged that they were given defendants upon consideration that the latter would pay a certain prior mortgage indebtedness of plaintiff, which, owing to the defendant's delay, plaintiff had to pay when he was in imminent danger of losing the land under foreclosure. The answer raised no material issue: *Held*, upon the pleadings, it appeared there was a failure of consideration and the bond and mortgage should be canceled.

2. Appeal and Error—Admissions of Counsel—Deeds and Conveyances—Cancellation—Conditions Precedent.

When it is adjudged from the pleadings that plaintiff is entitled to the relief demanded, that his certain bond and mortgage held by the defendants be canceled, and it appears, from facts admitted by counsel on appeal that defendants should first be repaid a certain sum of money they had paid to plaintiff in consideration of the transaction relieved against, the cancellation of the bond and mortgage will be decreed upon the condition of defendants' being repaid.

3. Appeal and Error—Reversed on Merits—Judgment Modified—Costs.

On this appeal, the plaintiff (appellant) having succeeded upon the substantial merits of the case, and the judgment below being modified upon admission of plaintiff's counsel, the defendants, not appealing as to that matter, are taxed with the costs of appeal.

APPEAL by defendants from *W. R. Allen, J.*, at June Term, 1909, of LENOIR.

The facts are sufficiently stated in the opinion.

Y. T. Ormond for plaintiff.
C. F. Dunn for defendant.

WALKER, J. This is a civil action, brought by the plaintiff, for the cancellation of a bond and mortgage given by him to the defendant. It is alleged in the complaint that, in consideration of the execution of the bond and mortgage, the defendant agreed to pay certain indebtedness, in the amount of $565, of the plaintiff to the Kinston Insurance and Realty Company, and of $300 to L. Harvey & Son, and to satisfy a judgment of $50 against the plaintiff. The plaintiff's counsel admitted here that the defendants had paid the plaintiff the sum of $10 at the time the papers were executed. It was so alleged in section 4 of the complaint and denied in the answer, but we will act upon the admission of counsel in the disposition of the case upon its merits. (108)

The defendant filed an answer, but no material issue was raised by its denials or by any affirmative averments therein. The court adjudged, upon the pleadings, that the bond and mortgage be canceled, and the defendant, having duly excepted, appealed to this Court.

Having carefully examined the pleadings in the case, we have been unable to discover that they raise any issue of law or of fact fit to be considered by the court or jury. The defendants obtained the bond and mortgage upon a promise to the plaintiff, with which they have failed to comply, and, upon their own showing, they have no defense to the cause of action set out in the complaint. Indeed, they seem to have played "fast and loose" with the plaintiff, and to have had little or no regard for their duty as fiduciaries toward him. They permitted his land to be advertised for sale by his creditor, and he was in imminent danger of losing it, when he paid off the incumbrance. The day after this was done, the defendant, it seems, tendered the amount due upon the debt, to pay which the land had been advertised for sale, but he was too late. The debt was due, and he should have been more diligent, and, furthermore, by the terms of his contract, he was required to be so. The plaintiff, having been compelled to pay the money in order to save his land, is entitled to be reimbursed by the defendants.

The defendants are entitled to have the $10 which was paid by them returned by the plaintiff, and the bond and mortgage will not be canceled until this is done. The judgment, as thus modified, is affirmed, but the defendants must pay the costs of this Court, as they did not specially appeal, because the plaintiff had been allowed to retain the amount so paid, and the plaintiff has succeeded in this Court upon the substantial merits of the case.

Judgment modified.

JOHNSTON COUNTY SAVINGS BANK v. C. C. CHASE.

(Filed 6 October, 1909.)

1. Evidence—Competent in Part—Objections and Exceptions.

When a part of the testimony of a witness is competent and relevant, an objection to his entire testimony will not be sustained.

2. Negotiable Instruments—Fraud—Purchaser With Notice—Agent's Declarations—Evidence.

On the defense of an action brought upon an acceptance given by defendant and assigned by the drawer to the plaintiff, when it is alleged in the answer that they were given for certain jewelry bought by defendant of the drawer upon the false and fraudulent representations of the agent of the latter and assigned to plaintiff with notice of the fraud, it is

not reversible error to show the alleged fraudulent statements of the agent at the time of the negotiations. The evidence would be harmless if it is found that the plaintiff was a purchaser without notice, and, if otherwise, the agent's statements would bind the plaintiff.

3. Same—Principal and Agent—President.

Upon the question of whether a bank purchased an accepted draft with notice of fraud on the part of the drawer in obtaining it, it is competent to show by the bank president, who was active in the transaction, that the bank purchased with notice of the fraud, leaving the question an open one for the jury, when the evidence is conflicting, under proper instructions from the court.

4. Instruction Entire—Verdict Directing—Evidence Conflicting.

A requested instruction directing the jury to answer each of several issues in a certain manner, if they believed the evidence, is not correct when there is conflicting evidence as to one or more of them. The instruction being asked in its entirety every substantial and integral part must be correct in law.

APPEAL by plaintiff from *O. H. Allen, J.*, at March Term, 1909, (109) of MARTIN, in an action originating in a court of a justice of the peace.

Martin & Critcher for plaintiff.
H. W. Stubbs for defendant.

WALKER, J. This action was brought for the recovery of $125, alleged to be due on two drafts which were drawn by the Puritan Manufacturing Company upon C. C. Chase, trading as the "Chase Drug Store," accepted by the latter and endorsed to the plaintiff. The court, without objection by the parties, submitted issues to the jury, which, with the answers thereto, are as follows:

1. Did the Puritan Manufacturing Company represent and guarantee to defendant that the goods were of such quality and kind as described in the pleadings? Answer: Yes.

2. Were the representations and warranties false and fraudulent, as set forth in the pleadings? Answer: Yes.

3. Did the plaintiff purchase the said paper writing before maturity, in good faith, for value and without notice of said alleged fraud? Answer: No.

The defendant, as will appear from the pleadings and issues, averred that the drafts were given by him in the purchase of certain articles of jewelry from the Puritan Manufacturing Company, which he bought to resell, and that the said manufacturing company, by (110) its agent who sold the jewelry, made false and fraudulent representations as to the quality and value of the same, and also stated that

the defendant could safely sell the jewelry with a guaranty as to its good quality. The defendant further alleged that the jewelry "began to tarnish" and "the plating dropped off," so that he was unable to sell the same. Several contracts of sales were made, but the goods were returned as being valueless. It was still further alleged that the jewelry became useless to him.

The defendant proved by one Leslie Fowden the conversation between C. C. Chase and the salesman of the defendant at the time the jewelry was bought. This evidence was objected to by the plaintiff, but admitted by the court. The objection was addressed to the entire testimony of the witness Fowden, some of which was clearly competent and relevant to the issues, and for this reason was properly overruled, even if the other portion of the testimony was incompetent. *S. v. Ledford,* 133 N. C., 714, and cases cited.

But we think all of the material testimony of the witness was competent. How could the false and fraudulent representations of the Puritan Manufacturing Company be otherwise established than by the statements of its agent to the defendant at the time he was negotiating with him for a sale of the goods? It was the primary and best evidence that could be offered for that purpose, and certainly was competent, even against the plaintiff, to prove what was the contract of sale. If the plaintiff purchased the drafts in due course without notice of the fraud, it acquired a good title to it, notwithstanding the fraud, and the testimony of Fowden would in that event be harmless. If it received the drafts as endorsee, with notice of the fraud, the result would be otherwise.

The defendant introduced in evidence the deposition of W. H. Fry to prove that the plaintiff did not pay value for the drafts and took them with notice of the fraud, but we do not think any one of the objections are tenable, and, besides, the testimony of the witness would seem to be practically harmless. It is not necessary to consider the objections *seriatim.* It may be said, generally, that it was competent to prove by W. H. Fry the nature of the transactions between the plaintiff bank, he being its president, and the Puritan Manufacturing Company, relating to the purchase of the drafts. Fry had knowledge of their dealings and, indeed, represented the bank actively in the same. Whether upon the whole evidence, the bank paid value for the drafts
(111) or had notice of the fraud was an open question for the jury to decide, under proper instructions of the court.

The plaintiff, in apt time, requested the court to charge the jury that, if they believed all the evidence in the case, they should answer the first issue No, the second issue No, and the third issue Yes. The court refused to give the charge, and the plaintiff excepted. The in-

struction was properly refused. It was asked to be given in its entirety, and every substantial and integral part of it must be correct in law. *Bost v. Bost,* 87 N. C., 477; *Ins. Co. v. Sea,* 21 Wallace, 158; *S. v. Ledford, supra.* There was evidence for the jury to consider as to the false and fraudulent representations, and, therefore, it would have been error to instruct the jury to answer the first and second issues No. The court could not direct such a finding in the very teeth of evidence strongly tending to establish the fraud. The instruction not being correct as a whole, the judge committed no error in declining to submit it to the jury, even if it was correct as to the third issue.

We have examined the record carefully and have been unable to discover any reason for setting aside the judgment of the court and ordering a new trial.

No error.

Cited: Unitype Co. v. Ashcraft, 155 N. C., 68; *Machine Co. v. McKay,* 161 N. C., 587; *R. R. v. Mfg. Co.,* 169 N. C., 169.

V. H. FREEMAN v. JOSIAH BROWN, ADMR.

(Filed 6 October, 1909.)

1. Issues—Evidence Immaterial—Harmless Error.

The admission or exclusion of evidence not pertinent to the inquiry or material to the issue does not constitute reversible error.

2. Same.

Upon an issue involving the determination of the question of an express contract, as to whether plaintiff's deceased father had agreed to compensate him for services rendered for a term of years by giving him at his death the farm on which he lived, worked, etc., evidence tending to show services performed by plaintiff for his father from which the jury could imply a contract and fix their value as upon a *quantum meruit* was immaterial, and was harmless error.

3. Evidence—Depositions—Motion to Suppress, When Made.

An objection and motion made on the trial of the cause to suppress a deposition taken therein for that the deposition was taken before the filing of the answer or issue joined, is made too late. The motion, at least, should have been made before the trial was entered upon.

4. Evidence—Depositions, When Used—Answer.

A plaintiff is not required to delay taking the deposition of a witness in a cause until after answer is filed. Revisal, sec. 1647.

5. Contracts to Convey—Consideration of Services—Deceased Persons—Evidence Sufficient—Nonsuit.

Evidence is sufficient to take the case to the jury upon an issue as to whether plaintiff's deceased father had agreed, in consideration of services to be rendered, to give him, at his death, the farm he resided on, which tends to show, by several witnesses, that intestate had told them that he had agreed to give or leave by will, etc., the farm upon such conditions; and upon a motion as of nonsuit upon the evidence such testimony must be construed in the view most favorable to plaintiff's contentions, and each ingredient making for plaintiff's claim taken as established.

6. Contracts to Convey—Consideration of Services—Deceased Persons—Failure to Perform—Limitation of Actions.

To an action to enforce an express contract made by deceased to convey or leave by will certain lands to plaintiff at his death, in consideration of continued services rendered thereon by plaintiff to him, the statute of limitations only begins to run from the death of the deceased or from the time he was to have performed his part of the contract, or from the time it has been ascertained that he has failed therein.

(112) APPEAL from *Guion, J.*, at May Term, 1909, of BERTIE.

The plaintiff, after averring the death of Josiah Freeman, intestate, and the qualification of defendant Brown as his administrator, alleges that the plaintiff is a son of the intestate, who, for many years prior to his death, was in feeble health and unable to care for himself; that he (the plaintiff) lived with his father, at his request, from the time he became of age, in 1887, to 1907; that his father promised him that if he would live with him and care for him and look after his farm he would compensate him (the plaintiff) by giving him his farm, of about 69 acres, at his death. The plaintiff alleged that he lived with his father to his death; that he cultivated the farm, looked after and attended to all of his father's business, and cared for and looked after the wants of his father and mother during their lives; that the intestate survived his wife many years and was very feeble and unable to care for himself. The other heirs at law were made parties on their petition, and a joint answer was filed by them and the administrator, in which they denied all the material allegations of the complaint; pleaded the statute of limitations; that plaintiff, as a member of the family, received all the rents and profits, converted to his own use all the personal property of his father, and has never accounted therefor; that plaintiff is indebted to the estate in a large sum, and prayed that an account be taken by a referee. The following issues were submitted by his Honor:

(113) 1. Did Josiah Freeman, at the time the plaintiff, V. H. Freeman, arrived at the age of twenty-one years, request the plaintiff, V. H. Freeman, to remain with him at his home and care for him and look

out for his business, and that if he (the said V. H. Freeman) would do so, he would, at his death, compensate plaintiff for his services and attention by giving plaintiff his farm on which he lived?

2. If so, is plaintiff's action barred by the statute of limitations?

3. Is defendant's action upon his counterclaim barred by the statute of limitations?

The jury made these responses: Yes, to the first issue; No, to the second issue, and No, as to the three years next preceding the commencement of this action; Yes, prior thereto. Upon the verdict his Honor signed judgment adjudging the taking of an account necessary, ordering a compulsory reference and appointing a referee to state the account between the parties in accordance with the verdict, requiring a report from referee and retaining the cause for further orders. The defendant appealed.

Winborne & Winborne for plaintiff.
Winston & Matthews and W. R. Johnson for defendant.

MANNING, J., after stating the case: The form of the issues submitted by his Honor, to which no exception was taken by the appellants, or other issues tendered by them, renders it unnecessary to consider several exceptions appearing in the record and pressed upon our attention. The first issue was to determine the existence of an express contract, as set forth in that issue. The evidence of the plaintiff himself, tending to show services performed by him for his father, from which the jury could imply a contract and fix their value as upon *quantum meruit,* was immaterial, and we cannot see—certainly, as no part of his Honor's charge is sent up in the record—that the defendants were prejudiced by the admission of it. If this evidence were material or pertinent to any issue, its competency would present a difficult question for solution, under the decisions of this Court. *Dunn v. Currie,* 141 N. C., 123; *Stocks v. Cannon,* 139 N. C., 60; *Davidson v. Bardin,* 139 N. C., 1, and cases cited. It has been held in numerous cases decided by this Court and other appellate courts that neither the admission or exclusion of immaterial evidence—immaterial in the determination of any issue to be found by the jury (and it cannot be seen by the appellate Court that the appellant was prejudiced thereby)—will constitute reversible error. *In re Thorp,* 150 N. C., 487; *Davis v. Thornburg,* 149 N. C., 233; *Griffin v. R. R.,* 123 N. C., 55; *Jennings v. Hinton,* 128 N. C., 214; *Collins v. Collins,* 125 N. C., 98. (114) This disposes of the first six exceptions of the appellants, all of which were taken to the evidence of the plaintiff of the purport above stated.

The seventh exception is thus stated in the record: "Here the plaintiff

offers in evidence the deposition of Hattie Freeman. The defendant objects and moves to suppress the deposition, for that the same was taken before there was issue joined in the cause, in that the answer had not been filed at the date of taking the deposition. Motion denied and objection overruled. Defendant excepts." This exception cannot be sustained. The motion to suppress the deposition ought to have been made, at latest, before the trial was entered upon. Section 1647, Revisal; *Ivey v. Cotton Mills,* 143 N. C., 189. It is not required by section 1652, Revisal, that the plaintiff shall delay the taking of evidence by deposition until after answer is filed. On the contrary, it has been held that it is competent, under the limitation prescribed in the cases cited, to use a deposition taken in one case in a subsequent case. *Bryan v. Malloy,* 90 N. C., 508; *Stewart v. Register,* 108 N. C., 588; *Mabe v. Mabe,* 122 N. C., 552.

The eighth, ninth and tenth exceptions present the question, by motion to nonsuit and by refusal of his Honor to direct the jury to answer the first issue No, whether there was sufficient evidence to take the case to the jury. Several witnesses for plaintiff testified as to statements made to them at various times and places by the intestate, from which the jury could fairly and reasonably find that the express contract, stated in the issue, existed between plaintiff and his father. While no one of the witnesses testified in the exact language of the issue, we do not understand that to be necessary. Where a motion to dismiss an action is made, under the statute, the evidence must be construed in the view most favorable to the plaintiff, and every fact which it tends to prove, and which is an essential ingredient of the cause of action, must be taken as established, as the jury, if the case had been submitted to them, might have found those facts from the testimony. *Cotton v. R. R.,* 149 N. C., 227; *Brittain v. Westhall,* 135 N. C., 492. One witness, Edgar Askew, testified that the intestate told him that he had told plaintiff, after his son, Walter, one of the defendants, left him, about twenty years before, that if he would stay with him and help him out of debt he would will him what he had when he died; another, that plaintiff lived with his father, looked after him and the farm and property, and that intestate told plaintiff he must live with him and take care of him; another, that he heard the intestate say the plaintiff had
(115) worked there (on the farm), had redeemed the farm, and he had given it to him—that plaintiff did everything around the farm; another, that he had seen plaintiff plow, hoe, ditch and repair buildings, and heard the intestate say that he had given everything he had to the plaintiff. In our opinion, from this evidence of the conduct, declarations and attending circumstances, the jury could fairly infer a contract or mutual understanding, as stated in the issue.

The eleventh exception is to the refusal of his Honor to give the following charge, at the request of the defendants: "That the plaintiff's action is barred by the statute of limitations, except for services rendered, if any, for the three years next preceding the death of the defendant's intestate." In the statement of the case on appeal we find this statement: "It was agreed, by consent, that if the jury answered the first issue Yes the court should answer the other issues for the jury as found in the record." In view of this statement, we doubt if this exception is presented for consideration; but, passing this, we do not think his Honor should have given the instruction prayed. The finding of the jury to the first issue brings this case clearly within the principle, declared in *Miller v. Lash,* 85 N. C., 51: "Where services are performed by one person for another, during life, under a contract or mutual understanding, fairly to be inferred by their conduct and declarations and the attending circumstances that compensation therefor is to be provided in the will of the party receiving the benefit of them, and the latter dies intestate or fails to make such provision, the subsisting contract is then broken, and not only will the action then lie for the recovery of this reasonable value, freed from the operation of the statute, but it could not be maintained before."

No issue as to the value of plaintiff's services was submitted; but, in view of the counterclaim set up by the defendants, both parties seemed to conclude that the value of plaintiff's services and his liability upon the matters set up in the counterclaim could be more justly and accurately determined by a referee and the stating of an account by him. Having found no reversible error in the trial below, the judgment is

Affirmed.

Cited: Morton v. Lumber Co., 152 N. C., 55; *Deppe v. R. R., ibid.,* 80; *Heilig v. R. R., ibid.,* 471; *Edge v. R. R.,* 153 N. C., 220; *Mfg. Co. v. Townsend, ibid.,* 245; *Lowrie v. Oxendine, ibid.,* 269; *Moore v. Horne, ibid.,* 416; *West v. Tanning,* 154 N. C., 46; *Kornegay v. R. R., ibid.,* 392; *Beck v. Bank,* 161 N. C., 205; *Nance v. Rourk, ibid.,* 649; *Ball-Thrash v. McCormick,* 162 N. C., 473; *Lloyd v. R. R.,* 166 N. C., 29; *Helsabeck v. Doub,* 167 N. C., 206; *Shaw v. Public Service Corporation,* 168 N. C., 615; *Horton v. R. R.,* 169 N. C., 116.

(116)

R. F. YARBOROUGH ET AL. v. W. A. MOORE ET AL.

(Filed 6 October, 1909.)

1. **Executors and Administrators—Fiduciary Capacity—Sale to Make Assets —Suit of Creditors—Jurisdiction.**

It is a fiduciary duty of the personal representative of deceased to sell land to make assets to pay his debts, when the personal property is insufficient, and upon his failure to do so an action will lie in the Superior Court by a single creditor to subject the land to the payment of his claim, though the action may be converted afterwards into a creditors' suit.

2. **Executors and Administrators—Debts—Judicial Sales—Judgment, Motion to Set Aside—Findings—Appeal and Error.**

The facts found by the judge of the Superior Court, having evidence to support them, are conclusive on appeal from his denial of a motion to set aside a judgment directing that decedent's lands be sold by his personal representative to pay his debts. Clark's Code, sec. 417.

3. **Executors and Administrators—Debts—Sale of Lands—Innocent Purchaser—Infants—Parties—Representation—Process.**

An innocent purchaser for value without notice of land sold under judgment of the Superior Court by the personal representative of deceased to make assets to pay his debts, takes free from the claim of children, not *in esse*, at the time of sale, to whom the lands descend subject to the life estate of their father, when the father, as life tenant, had been served with process and was bound by the order of sale, affirming *Carraway v. Lassiter*, 139 N. C., 145.

4. **Judicial Sales—Motion to Set Aside—Innocent Purchaser—Infants—Parties—Process—Service—Proof—Record Evidence.**

A purchaser at a judicial sale is only required to see that the court has jurisdiction of the parties and the cause of action. And when it appears that certain parties defendant were minors and interested in the lands sold, that guardians *ad litem* had been appointed for them and that the sheriff had served the summons on them by reading it, and it nowhere appears in the record that they were under the age of fourteen so as to require service by copy, etc., as provided by the statute, the service on them is apparently sufficient and the rights of an innocent purchaser at the sale will not be disturbed.

5. **Same—Equitable Considerations—Lapse of Time.**

Upon a motion to set aside a judicial sale of lands in which the rights of an innocent purchaser for value have intervened as against the claims of infants, setting forth irregular service, the courts should give much weight to such facts as show a representation of the infants by a guardian acting in good faith; that the payment of a debt for which the lands were sold was justly due and established by judgment which the lands should have been sold to pay and that the land brought a fair price as indicated

by the sale being confirmed by the court upon due consideration; and under such facts in this case, the defendants were not entitled to a favorable consideration of the court, they having waited many years after reaching their maturity before moving to vacate the judgment.

APPEAL by defendants W. A. Strickland and J. M. Stallings (117) from *O. H. Allen, J.,* at April Term, 1909 of FRANKLIN.

Motion to set aside the judgment of the Superior Court in the above-entitled action, which was brought for the purpose of selling land to pay the debts of the testatrix, Martha Moore. She died, leaving a will, in which she appointed the defendants W. A. and J. C. Moore executors. The motion to set aside the judgment was made by Mabel, Annie and Joshua Moore, children of J. W. Moore and Frances Strickland; Mary Stallings and Sidney Harris, children of Sarah E. Harris. By her will the testatrix devised certain lands to her son, J. W. Moore, for his natural life, and then to his bodily heirs, share and share alike, and an undivided one-third interest in other land she devised to her daughter, Sarah E. Harris, wife of S. A. Harris, in fee. There is a provision for equality in the division of her estate, real and personal, among her children, but it is not necessary, for the purpose of deciding the case, to set it out. The testatrix died in 1874, and in 1879 R. F. and W. H. Yarborough,the plaintiffs in this action, recovered judgment against her executors for the sum of $871.52, with interests and costs, which judgment was later assigned to the Wachovia National Bank. This action was. commenced in October, 1883, against the executors and devisees, under the will, to sell the lands of the testatrix for the payment of her debts and liabilities, the personal estate having been exhausted. The court ordered a sale of the land at the Fall Term, 1884; the sale was made 2 March, 1885; the commissioner made his report to the court, and at November Term, 1885, the sale was in all respects confirmed and title ordered to be made to the purchasers, upon payment of the purchase money, except as to certain tracts allotted to Sarah Harris and others, which were ordered to be resold. The commissioner, in obedience to this order, sold said lands and reported the sale to May Term, 1886, of the Superior Court, and at January Term, 1888, his report was confirmed as of May Term, 1886, with directions to make title to the purchasers, the purchase money having been paid. Final judgment was entered in 1891.

Judge Allen found the facts from the evidence before him, and it appears from his findings that the only controversy relates to the land devised to J. W. Moore and Sarah E. Harris. It appears therefrom that there was no service of the summons upon J. W. Moore, who had not married and did not marry until ten years after the final judgment in this action. At his own request, he was permitted by (118)

the court to come in and make himself a party to the action, bought a part of the land at the sale under the order of the court, was served with sundry notices in the cause, as purchaser, and accepted a deed from the commissioner for the land bought by him. The said John W. Moore had three children by his marriage, namely, Mabel Moore, Annie Moore and Joshua Moore, who were, of course, not parties to this action, and who now move to set aside the judgment.

As to the interest of Sarah E. Harris, it appears from the findings of fact that she was living at the time of her mother's death, but died before this suit was commenced, and her interest descended to her children, Frances Strickland, Mary Stallings and Sidney Harris, subject to the estate by the curtesy of A. S. Harris, husband of Sarah Harris, who survived her. Frances Strickland was of full age when this suit was commenced. Mary Stallings is now about forty-one years old, and Sidney Harris was under fourteen years of age at the time the suit was commenced. The motion to set aside the judgment was made by the heirs of J. W. Moore and the heirs of Sarah Harris. It appears that guardians *ad litem* were appointed by the court for all the infants, and filed answers to the petition for the sale of the land. It does not appear that any copy of the summons was delivered to the infant under fourteen years of age, or "to his father, mother or guardian, or to any person having the care and control of him, or with whom he resided, or in whose service he was employed." Revisal, sec. 440, subsec. 2.

The court further finds that the proceeding throughout was fairly and honestly conducted; that the persons now moving to set aside the judgment were not prejudiced thereby, as they had no real or meritorious defense thereto; that the persons who have bought the land are innocent purchasers, having purchased for full value and without notice of any defects or irregularities, and that the motion to vacate the judgment was not made within a reasonable time, it having been made about eighteen years after the final judgment in the cause.

The court thereupon denied the motion and entered judgment for costs against those by whom it was made. They excepted and appealed.

Bickett & White, F. S. Spruill and William H. Ruffin for plaintiffs.
W. M. Person and T. T. Hicks for defendants.

(119) WALKER, J., after stating the case: It is well settled that the Superior Court had jurisdiction of the proceeding to sell the land for the purpose of paying the debts of the testatrix. Laws 1876-77, ch. 241; Revisal, sec. 129; *Haywood v. Haywood,* 79 N. C., 42; *Clement v. Cozart,* 107 N. C., 695; *Fisher v. Trust Co.,* 138 N. C., 90. A single creditor may proceed by action in that court to subject the land of his

deceased debtor to the payment of his claim. *Pegram v. Arrington,* 82 N. C., 326; *Shober v. Wheeler,* 144 N. C., 409. Especially may he sue to compel the personal representative to perform his fiduciary duty and sell the land for the payment of debts. *Pelletier v. Saunders,* 67 N. C., 261. The statute makes it the duty of the personal representative to sell the land when the personal property is insufficient to pay the debts, and there is no good reason why the creditor should not be permitted to compel a performance of this duty by suit when the representative refuses to take any action in the premises. We hold, therefore, against the contention of those who now move to set aside its judgment, that the court had jurisdiction of the cause.

We are concluded by the findings of the judge as to the facts, when there is any evidence to support them; and, without discussing the question more fully with special reference to the testimony, we will consider the case upon the facts as found by him. Clark's Code, sec. 417, and cases cited in the notes. There is evidence in the record which tends to establish the facts as found.

We will first refer to the legal merits of the motion, so far as the children of J. W. Moore are concerned; and for the purpose of disposing of this branch of the case we will assume that he acquired only a life estate by the will of his mother, Martha Moore. He was a party to the action, and was, of course, bound by the judgment. The question presented is: Are his children also bound under the doctrine of representation? They were not *in esse* when the judgment was rendered, and were not born for some years afterwards. The law is careful to preserve and safeguard the integrity of judicial sales. Public policy requires that such should be the case, in order to inspire confidence in the regularity and validity of judicial proceedings in which such sales are ordered, and to induce persons to become purchasers. The language of *Ruffin, J.,* in *Sutton v. Schonwald,* 86 N. C., 198, expresses clearly the rule of the law in this respect: "In such cases the law proceeds upon the ground as well of public policy as upon principles of equity. Purchasers should be able to rely upon the judgments and decrees of the courts of the country; and, although they may know of their liability to be reversed, yet they have a right, so long as they stand, to presume that they have been rightly and regularly rendered, and they are not (120) expected to take notice of the errors of the court or the laches of parties. The contrary doctrine would be fatal to judicial sales and values of titles derived under them, as no one would buy at prices at all approximating the true value of property if he supposed that at some distant day his title might be declared void because of some irregularity in the proceeding, altogether unsuspected by him and of which he had no opportunity to inform himself." We said, in *Millsaps v. Estes,* 137

N. C., 544: "It is freely admitted to be the general rule, as argued by the defendants' counsel, that innocent purchasers, or those who have purchased at a judicial sale, without notice of any irregularity in the proceedings and judgment under which the sale was made, will be protected when it appears that the court had jurisdiction of the parties and of the subject-matter of the proceedings, and that the judgment on its face authorized the sale. This is but another way of stating the general principle that the judgment or decree of a court having general jurisdiction over the subject-matter, subsisting unreversed, must be respected, and sustains all things done under it, notwithstanding any irregularity in the course of the proceedings or error in the decision. *Williams v. Harrington, supra.* Such a judgment will therefore sustain the title of a purchaser at a sale made under it, if he had no notice of the alleged defect in the proceedings. *Sutton v. Schonwald,* 86 N. C., 198; *England v. Garner,* 90 N. C., 197." What we have quoted is applicable generally to this case.

As to the interest of the children of J. W. Moore, we have held in a similar case that they were sufficiently represented by him, although he was but a life tenant of the property. *Carraway v. Lassiter,* 139 N. C., 145. In that case (at pages 151-152) the Court said: "It appears that since the filing of this petition Mrs. Carraway has died. The petitioners are not parties to the original proceeding; they claim title to the land as remaindermen after the termination of the life estate of Mrs. Carraway, under the will of Mrs. Whitehead. . . . If the proceeding had been one in which the life tenant had, for any proper reason, invoked the aid of the court to sell the land as for partition, only those who were parties, either personally or by representation, would be bound by the decree. The proceeding is based upon the theory that the executor is, by order of the court, selling the lands of his testatrix, which are subject to the payment of her debts, and the devisees or heirs at law are brought in that they may show cause why he may not have license to do so. If the petitioners had been *in esse* at the time the proceeding was instituted, it would have been necessary, to divest their inter-
(121) est, to make them parties. It cannot be that a person indebted may, by devising his lands, upon contingent limitation to parties not *in esse,* prevent their sale for payment of his debts until all who may by possibility take are born, or every possible contingency is at an end. Mrs. Carraway, for the purpose of enabling the court to proceed in the cause, represented the entire title, and children thereafter born to her are bound by the judgment." This citation is sufficient to sustain the ruling of the Court that the children of J. W. Moore are not entitled to vacate the sale.

Let us now consider the case so far as it relates to the interest of the

children of Sarah Harris. An examination of the record nowhere shows that any of her children were under the age of fourteen years, which would require the service of the summons by copy and compliance with the other provisions of the statute. It is true that a guardian *ad litem* was appointed for them, and also for other infants, but this would only imply that they were minors and not indicate at all their respective ages. The fact that the sheriff served the summons by reading it to those infants would indicate, if anything, that they were over the age of fourteen years. So that, looking at the record, there was nothing to put any person, who intended to buy, upon his guard. Service of the summons by reading it to a minor is good, unless he is under the age of fourteen years, and, as to a purchaser, it so appears on the face of the record or he has actual knowledge of the fact. A purchaser at a judicial sale is only required to see that the court has jurisdiction of the parties and the cause of action. *Williams v. Johnson,* 112 N. C., 424. In *Syme v. Trice,* 96 N. C., 243, one of the parties was an infant, but the record did not disclose the fact. The court failed to appoint a guardian *ad litem* for him. His motion, after he arrived at full age, was denied, upon the ground that the proceeding was merely irregular and he could not have relief as against an innocent purchaser of the land which was sold under an order of the court. The proceedings were apparently regular and the purchaser was protected. So, in *Matthews v. Joyce,* 85 N. C., 264, viewing the question from a different standpoint, the Court said: "To declare a legal proceeding void for the want of such service upon a few of the class of whom the larger number, with identical interests in the result, have been regularly brought into court, would be to establish a rule subversive of much judicial action, unsettling titles dependent thereon and introducing distrust and confusion in regard to the tenure of estates, the injurious consequences of which can hardly be foreseen or estimated; and we do not feel at liberty, after so long a delay, to disturb the decree on this ground." It was also held in *Harrison v. Hargrove,* 120 N. C., 96, that where the (122) record shows service of process apparently sufficient, the rights of an innocent purchaser will not be disturbed. So, in *England v. Garner,* 90 N. C., 197, one of the parties to the proceeding, which was *ex parte,* was an infant, who had no knowledge of it, though there was nothing in the record to suggest his infancy. With reference to these facts, the Court said: "If he were an infant, this did not render the judgment as to him absolutely void; it was irregular and might, upon proper application, have been set aside—not, however, to the prejudice of *bona fide* purchasers without notice."

It must be remembered that the court finds, in this case, that the parties who now seek to set aside the judgment had no defense to the

proceeding and were not in the least prejudiced by what was done in it. The infants were all represented by guardians *ad litem,* who, in good faith, so far as appears, represented them and their interests, and filed answers. The debt was justly due, as had been established in a prior action by judgment, and the land should have been sold to pay it. The sale by the commissioner was reported to the court, and, upon due consideration, it was confirmed. The land presumably brought a fair price. If it had not, the court would hardly have confirmed the sale. Facts such as these have much weight with the court in passing upon questions of this kind. *Williamson v. Hartman,* 92 N. C., 236. Furthermore, it appears that the parties have waited for many years, after reaching their majority, before moving in this case to vacate the judgment; and, in view of the facts as found by the court, and this long delay, we do not see that they have made any showing which entitles them to the favorable consideration of the Court, under the principles of the law applicable to this class of cases. *Williamson v. Hartman,* 92 N. C., 236; *Williams v. Williams,* 94 N. C., 732; *Edwards v. Moore,* 99 N. C., 1; *Weaver v. Jones,* 82 N. C., 440; *Harrison v. Hargrove,* 109 N. C., 346; *Matthews v. Joyce, supra; White v. Morris,* 107 N. C., 92.

The motion to set aside the judgment cannot be considered by us as a meritorious one, in any aspect of the case. The respondents have purchased the land in good faith and for a valuable consideration and without notice of any fatal irregularity apparent upon the face of the record. Indeed, an examination of the record would seem to indicate that the proceeding was conducted with due regard to the prescribed forms of law, and there is nothing in it to notify a prudent and careful man that any of the parties had not been duly summoned to appear in the cause or that his or her interest had not been properly represented.

(123) There was no finding by the court that the purchasers had actual notice of any irregularity which would invalidate the judgment.

Affirmed.

Cited: Hobbs v. Cashwell, 152 N. C., 187; *Bailey v. Hopkins, ibid.,* 752; *McDonald v. Hoffman,* 153 N. C., 256; *Harris v. Bennett,* 160 N. C., 344; *Cooke v. Cooke,* 164 N. C., 287; *Pinnell v. Burroughs,* 168 N. C., 320.

LAM LAWRENCE v. JOHN HARDY ET AL.

(Filed 13 October, 1909.)

1. Partition—Summons—Publication—Proceedings in Rem—Sale—Title—Purchaser for Value.

When the service of summons, as provided by Revisal, sec. 2490, has been made by publication on parties unknown, etc., in proceedings in partition for the sale of lands for division by the heirs at law, the proceedings being regular upon their face, and the court having jurisdiction of the subject matter, a purchaser for full value without notice acquires title, free from claim or demand of such heir upon whom summons has been thus served.

2. Summons—Publication—"Due Process"—Proceedings in Rem—Constitutional Law.

Our courts have general power, in following the provisions of Revisal, sec. 2490, relating to the service of process by publication to acquire jurisdiction and make decrees affecting the condition and ownership of real property situate within the State, *i. e.*, in proceedings *quasi in rem;* and this section is not subversive of the "due process" clause of the Constitution.

3. Partition—Summons—Publication—Funds—Investment—Title—Purchaser.

A purchaser for full value, without notice, of lands at a sale for partition thereof by the heirs at law, acquires a title which is not affected by the failure of the court to retain and invest funds sufficient to protect the rights of such unknown persons, served with summons by publication, who may afterwards appear and establish an interest in the lands, Revisal, sec. 2516, as the proceeds necessarily arise after the sale, and the purchaser has no interest in or control over them or the orders or decrees concerning them.

4. Partition—Summons—Publication—Representation—Discretionary Powers—Appeal and Error.

It is discretionary, by the express terms of the statute, with the trial judge as to whether he will appoint some disinterested person to represent the interests of unknown persons, etc., served with summons by publication, in proceedings to sell land for partition, Revisal, sec. 2490, and this discretion is not reviewable.

5. Summons—Publication—Persons Unknown—Defense After Judgment—Title—Purchaser.

Revisal, sec. 449, allowing persons served with summons by publication to defend after judgment, etc., by its express terms does not affect the title to land acquired by a *bona fide* purchaser of land at a sale therein decreed.

APPEAL from *O. H. Allen, J.*, at March Term, 1909, of EDGE- (124) COMBE.

On the hearing it appeared that in February, 1907, Lam Lawrence, an heir at law of James Lawrence, deceased, filed a petition against numerous other persons, cousins in different degrees, heirs at law of said James Lawrence, for sale of the lands of said James Lawrence situate in said county, and that all the heirs at law of James Lawrence who were known were made parties defendant by service and acceptance of process. In connection with the petition it was made to appear that, as plaintiff was informed and believed, there were other unknown heirs at law of James Lawrence interested in the subject of the action who should be made parties, and that neither the names nor residences of such interested parties could, after diligence, be ascertained. On order, properly entered, publication was duly made for five successive weeks in the *Tarboro Southerner,* stating the style and purpose of the action, etc., notifying "all the unknown heirs of James Lawrence, deceased, whatever may be their names and whatever may be their residence," to appear, etc. After the time of such publication had expired, decree was entered, sale had, and report made. The bid having been raised on 4 May, 1907, a resale was ordered, and this having taken place and report duly made, the sale was confirmed, deed made to the purchaser, and, no unknown parties having appeared, nor their existence or placing disclosed, in July, 1907, distribution was ordered among the parties in interest who had appeared, and according to an amended petition filed, claiming for these parties the entire fund. The costs having been paid and the fund distributed, Elsie Lawrence, resident of Haywood County, Tenn., claiming to be an heir at law and third cousin of James Lawrence, deceased, and that she had never known of the proceedings nor been served with process therein, applied to the court, on motion and later by formal petition, to have her portion of the property allotted to her, and to enforce her claim thereto on the land, etc. She was allowed to proceed in the cause *in forma pauperis,* and all the parties, including the purchaser, having been duly notified, the matter was heard, and the clerk found the facts directly relevant to the application of Elsie Lawrence and entered judgment as follows:

This cause coming on for hearing before the clerk, and being heard upon the pleadings, as amended, and proof, the following conclusions of fact are found from records in case and proof:

1. That Elsie Lawrence, at the time the original proceeding was instituted, was a nonresident of the State of North Carolina and had no actual notice of said proceeding until 7 September, 1907.

(125) 2. That at the time the original proceeding was instituted the said Elsie Lawrence was interested in the premises; that at that time her name was unknown to and could not, after due diligence, have been ascertained by the original petitioners.

3. The facts recited in the second finding of fact were made to appear to the court by affidavit, and that thereupon the court duly ordered notice to be given to all such persons, whose names were then unknown, by publication in the newspaper published in the town of Tarboro, North Carolina.

4. That the notice, a copy of which is attached to the answer, marked "A," was duly published in the *Tarboro Southerner,* a weekly newspaper published in the town of Tarboro, once a week for five successive weeks immediately preceding the sale of the property for partition.

5. That Elsie Lawrence was, at the time said original petition was filed, the owner of an undivided one-sixteenth interest in the property.

6. That the property was duly sold at public auction; that said sale was a fair sale, for full value, and that at said sale T. M. Staton was the purchaser, and that he was a purchaser in good faith and for the full value of the property.

7. That the court, in its discretion, did not deem it necessary to appoint any person to represent the unknown owners who had been served with notice of said original proceeding by publication.

8. That Elsie Lawrence has not received any part of the purchase money, but that the whole thereof was paid to the known owners of the property sold in said proceeding, the names of the unknown owners not being known and their interest in said property at that time being also unknown to the court.

9. That the petitioner, Elsie Lawrence, is satisfied with said sale, and seeks simply to recover her proportion of the purchase money.

From the foregoing conclusions of fact the court finds the following conclusions of law:

1. That the petitioner, Elsie Lawrence, was duly and regularly served with notice of the original proceeding by publication.

2. That the title to said property has passed to T. M. Staton under the orders and decrees in said original proceeding; that said T. M. Staton was a purchaser in good faith, and that said sale cannot be set aside so as to affect the title of the said T. M. Staton.

3. That it was not necessary for the court to appoint any person to represent the unknown owners in said original proceeding, unless the court, in its discretion, deemed such appointment necessary, (126) and that as the court did not in its discretion deem such appointment necessary, the validity of said proceeding is not affected by the failure to make such appointment.

4. That the petition of Elsie Lawrence sets up no defense to the decree for a sale for partition, made in the original proceeding, and no defense to the confirmation of said sale.

5. That the petitioner, Elsie Lawrence, is entitled to receive from John Hardy, Jr., and Mary Eliza Harrell and James Hardy $29.20 each, being her share of the purchase money, less the expenses of sale.

6. That the order for a sale for partition and the order confirming said sale should not be set aside upon the petition of the said Elsie Lawrence.

A. T. WALSTON, *C. S. C.*

11 November, 1908, as of 23 July, 1908.

The petitioner excepts to the above judgment and appeals to the Superior Court. Notice waived.

A. T. WALSTON, *C. S. C.*

The facts and the decree of sale further show that the publication was prior to said "decree." This judgment, as stated, was affirmed on appeal by *O. H. Allen, J.*, and the petitioner, Elsie Lawrence, excepted and appealed to this Court.

H. H. Phillips for petitioner.
Gilliam & Clark for respondents.

HOKE, J., after stating the case: It may be well to note that the petitioner, Elsie Lawrence, has recovered judgment against the other heirs at law of James Lawrence, deceased, for the ratable portion of her interest paid to each of the other heirs, and her appeal is from the refusal to make this recovery efficient by declaring same a lien on the property and ordering a resale of same, should this be necessary to accomplish the desired purpose. This being true, and the formal requirements of the law as to publication of notice for unknown parties having been properly complied with, we are of opinion that the petitioner has been regularly made a party to the proceedings, and that, so far as the purchaser is concerned, her claim to any interest in the property itself is barred by the decree in the cause and the sale and deed had and made pursuant to same.

Our statute on the subject (Revisal 1905, sec. 2490) clearly contemplates and provides that in proceedings for partition by sale, or otherwise, publication may be made "for persons interested in the premises whose names are unknown to and cannot, after due diligence, be
(127) ascertained by the petitioner." And, while the hardship of some particular case has not infrequently provoked judges of ability and repute to strong expressions of condemnation, the decisions as to such legislation, and in proceedings of this character, *i. e., in rem* or *quasi in rem,* have generally upheld it, and always when the necessity for it was

made to appear, and the notice provided was such as to render it reasonably probable that the parties concerned would be apprised of the proceeding and afforded an opportunity to appear and protect their interest. *Shepherd v. Ware,* 46 Minn., 174; *Pile v. Bratney,* 15 Ill., 314; *Nash v. Church,* 10 Wis., 303; *Foster v. Paschal,* 8 Mass., 596; *Cook v. Allen,* 2 Mass., 462; *Foxcroft v. Barnes,* 29 Me., 128.

In *Shepherd v. Ware, supra,* it was held: "The Legislature may by statute authorize proceedings by action against unknown claimants, and bind them by constructive or substituted service or notice, in actions to determine adverse claims to real property. Such action is in the nature of a proceeding *in rem;* its object is an adjudication of the state of the title, and the judgment can go no further. The Legislature may by statute provide for constructive or substituted service of process, in actions to determine adverse claims to land, as against unknown claimants, or in cases of necessity or where personal service is impracticable, in action where the controversy relates to property within the jurisdiction of the court, and with a reasonable exercise of legislative discretion in such matters the courts will not interfere. Such statutes must be strictly construed and followed to preserve the distinction between known and unknown claimants." And, delivering the opinion, the Court further said: "It is a case, then, where constructive or substituted service of notice upon adverse claimants may be made. Under the Constitution, legal proceedings in the courts are under the direction of the Legislature, subject, of course, to the fundamental provisions of the bill of rights. But the guaranty of 'due process of law' does not necessarily require personal service of notice upon parties resident or nonresident. The Legislature may in its discretion provide for substituted service in case of necessity or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court; and with a reasonable exercise of such legislative discretion the courts will not assume to interfere."

The writer does not recall a case in this jurisdiction where the validity of a decree has been questioned by reason of constructive service of process "on persons unknown." But the general power of our courts, following the provisions of the statute, to acquire jurisdiction and make decrees affecting the status and condition and ownership (128) of real property situate within the State has been frequently recognized and declared (*Vick v. Flournoy,* 147 N. C., 209; *Bernhardt v. Brown,* 118 N. C., 701); and, under the statute applicable, we are of opinion, as stated, that jurisdiction has been properly acquired over the petitioner, so far as her interest in the land is concerned, and she is conclusively bound by the decree and the deed conveying the title to the purchaser.

A court dealing with the matter should always be properly careful of the rights and interests of the parties who are only so by reason of constructive service. If such rights are questioned or assailed, the statute provides that some disinterested person may be appointed to represent them and look after their interests, and this should in most instances be done. If these interests are known to exist, or there is good reason to believe that they do, a sufficient amount of the fund should be retained to satisfy such claims and be invested or settled so that it may be forthcoming when called for. This the statute expressly requires (Revisal, sec. 2516), and, if there is promise of success, further effort can and should be made to ascertain and notify the rightful owner; but the policy of the law is, and has always been, that our lands shall pass into the possession of home owners, and with assured and unencumbered title, and this wise and beneficial purpose should not be prevented or seriously hindered because in rare and exceptional instances a wrong may be possible.

In the case before us the deceased seems to have had no lineal descendants or near kinsmen, and his lands descended to numerous relatives, distant in degree, whose names and placing are not all known. So far as appears, if this claim is allowed, there is no assurance that the end is reached; and the facts present a case where a general notice by publication is the only feasible method by which the property can be sold for anything like its value and a true title assured. In his carefully prepared and learned argument the counsel for the petitioner further insisted that no one was appointed by the court to represent these unknown parties and no part of the fund has been retained or invested, as required by the law, and that, owing to these defects, the proceedings are void, at least to the extent necessary to secure the petitioner her interest in the property; but we do not think this position can be maintained. The statute (section 2490) expressly refers this matter of appointing some disinterested person to look after the absent owner's interest to the discretion of the court; and, conceding that we have the power to review the discretion of the lower court in this respect, we are not prepared to say that it should be done in this instance, and (129) certainly not to the prejudice of an innocent purchaser. Our law is properly solicitous of the rights of such a purchaser; and, while they are affected by the existence of certain defects apparent in the record, numerous and well-considered decisions with us sustain the position that only those defects which are jurisdictional in their nature are available as against his title. *Yarborough v. Moore,* at this term; *Harrison v. Hargrove,* 120 N. C., 97; *Herbin v. Waggoner,* 118 N. C., 657; *England v. Garner,* 90 N. C., 197; *Sutton v. Schonwald,* 86 N. C., 198. Nor is the second defect one which should be allowed in any way

to affect the purchaser, that no part of the fund has been retained and invested for the rightful owner as the statute directs. This refers to the action of the court concerning the proceeds and to arise necessarily after this sale. It does not in any way relate or profess to relate to the jurisdiction of the court over the cause or the parties, and is a matter that the purchaser could in no way influence or control.

Under Revisal 449, a defendant, known or unknown, when there has been constructive service of process, is allowed, upon good cause shown, to defend after judgment rendered at any time within one year after notice and within five years from its rendition, and on such terms as may be just; and if the defense be successful and the judgment, or any part thereof, shall have been collected or otherwise enforced, such restitution may thereupon be compelled as the court may direct. The section, however, contains this additional provision: "But title to property sold under this judgment to a purchaser in good faith shall not be thereby affected." Under the liberal provisions of the former portion of this section, the petitioner has been allowed to appear and to recover judgment against each of the heirs the amount of her interest which has been paid them, and, under the last clause of the section, the title to the purchaser has been properly assured and confirmed.

There is no error in the judgment entered, and the same is

Affirmed.

Cited: Hughes v. Pritchard, 153 N. C., 145; *Johnson v. Whilden,* 166 N. C., 109.

(130)

PITTSBURG LUMBER COMPANY v. Z. P. ROWE.

(Filed 13 October, 1909.)

1. **Appeal and Error—Agreement of Time to Serve Case—How Computed—Sunday.**

In computing the time wherein a case on appeal may be served under an agreement, when, by excluding the first, the last day falls on Sunday, service on the next succeeding day is sufficient. Clark's Code, sec. 596.

2. **Issues—Misapplication of Funds—Consent—Instructions.**

Upon an issue as to whether the defendant fraudulently applied the plaintiff's money to his own use, the defense being that the money was used with the plaintiff's consent, the question presented was whether the defendant had reasonable grounds to believe from his intercourse with plaintiff that it had been so agreed; and it was not error for the trial judge to omit to charge as to whether the plaintiff assented to this use of the money by defendant, either expressly or impliedly, as such would tend to confuse the true meaning of the issue.

APPEAL from *Neal, J.*, at May Term, 1908, of NEW HANOVER.

Action to recover money alleged to have been advanced to defendant for services, expenses, etc., as agent, in buying logs for plaintiff, a part of which defendant wrongfully converted to his own use in building a house for himself. The defendant contended that the plaintiff consented to his thus using the money, and, further, denied that he owed plaintiff anything. From the judgment rendered the defendant appealed.

Meares & Ruark for plaintiff.
Stevens, Beasley & Weeks for defendant.

BROWN, J. 1. The contention that the case on appeal was not served in time, and therefore the court can consider only errors apparent on the face of the record proper, cannot be sustained. The court adjourned for the term 5 June, 1908. Under the consent order, plaintiff was required to serve his case within thirty days. Excluding the 5th, plaintiff was required to serve his case on 5 July. That day being Sunday, service on the 6th is legal. Clark's Code, sec. 596, and cases cited; *Guano Co. v. Hicks,* 120 N. C., 29; *Turrentine v. R. R.,* 92 N. C., 642.

2. This cause was tried at the April Term, 1907, of the Superior Court of New Hanover County, upon issues which the jury answered as follows:

1. Is the defendant indebted to the plaintiff, as alleged in the complaint? If so, in what amount? Answer: $623.62.

2. If so, did defendant fraudulently misapply the money so advanced to his own use? Answer: No.

(131) 3. Is the plaintiff indebted to defendant upon his counterclaim; and if so, in what amount? Answer: Nothing.

Long, J., set aside the verdict as to issue No. 2, entered judgment in favor of the plaintiff for $623.62 and directed a new trial as to the second issue. An appeal by defendant, not being perfected, was dismissed by the Supreme Court. The case was again heard at the May Term, 1908, before *Neal, J.,* upon the second issue only, to wit, "Did the defendant fraudulently misapply the money, $623.62, to his, the defendant's, use?" The jury answered the issue Yes.

The assignments of error all relate to the charge of the court, and we find no merit in them. We think his Honor did the defendant full justice and stated succinctly the whole controversy when he charged: "That if the jury shall find from the evidence that the defendant Rowe had reasonable ground to believe that the plaintiff company, through its vice-president and general manager, assented to the use of money for building the house (either expressly or impliedly), then the jury should

answer the _____ issue No." The omission by his Honor of the words in parentheses was not erroneous; in fact, it would have somewhat obscured the true meaning of the issue to have included them. The question presented was not what the plaintiff had expressly or impliedly agreed to, but what the defendant had reasonable grounds to believe, from his intercourse with its vice-president and general manager, it had agreed to.

We fail to see anything in the contention that there is no finding to support the judgment of Judge Neal. The issue and finding relating to this question of fraud is copied in the record and embodied in the judgment, and fully warrants it.

No error.

ABRAM UZZLE ET AL. v. H. WEIL & BROTHERS ET AL.

(Filed 13 October, 1909.)

1. **Sales, Judicial—Advance Bids—Trial Judge—Discretion.**

The refusal of the judge to set aside a judicial sale of land on an advance bid, not made in apt time, is discretionary, and not reviewable.

2. **Same—Laches.**

An advance bid over that obtained at a judicial sale of lands should be made in apt time, which is held to be at the term next ensuing the sale; and in this case the refusal of the trial judge to reopen the sale upon an advance bid of forty per cent, made before the confirmation, but fourteen years after the sale, is not reviewable on appeal.

APPEAL by defendants from *Neal, J.*, at May Term, 1908, of (132) NEW HANOVER.

The facts are sufficiently stated in the opinion.

Aycock & Winston and F. A. Daniels for plaintiffs.
W. C. Munroe for defendants.

CLARK, C. J. The land was ordered sold under decree of court, October, 1893; land was sold for $250 by W. T. Faircloth, commissioner, 22 January, 1895; motion had previously been made, 5 January, 1895, to set aside sale, but no action was taken; neither was sale confirmed. At November Term, 1908, the defendants, Weil & Bros., objected to confirmation of sale and offered to raise the bid $100. At April Term, 1909, the court overruled the exceptions and confirmed the sale.

The brief of counsel for appellant is based on the ground that the court had the power to set aside the sale, and should have done so, upon the advance bid of 40 per cent. But, conceding that, notwithstanding the increase in the value of land since 1895, it would have been just to the purchaser to now reopen the sale, the action of the court in refusing

to do so is not reviewable. *Trull v. Rice,* 92 N. C., 572; *Vaughan v. Gooch, ibid.,* 530; *Harrell v. Blythe,* 140 N. C., 415. In *Attorney-General v. Navigation Co.,* 86 N. C., 408, *Judge Ashe* uses this language: "The practice, here, established by long usage in our courts of equity, has been to reopen biddings and order a resale whenever an advance bid has been offered of 10 per cent upon the amount bid at the sale, provided it is made before the confirmation of the sale and in apt time, which is at the term ensuing the sale." Certainly it cannot be said that the application of H. & S. Weil to raise the bid has been made "in apt time," and much less that it has been made at the "term ensuing the sale," for probably over sixty terms intervened between the report of the sale and the offer to raise the bid.

Affirmed.

Cited: Copping v. Mfg. Co., 153 N. C., 331; *Thompson v. Rospigliosi,* 162 N. C., 156; *Upchurch v. Upchurch,* 173 N. C., 91; *Sutton v. Craddock,* 174 N. C., 276.

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CHARLES F. DUNN v. KNIGHTS OF GIDEON MUTUAL AID SOCIETY.

(Filed 13 October, 1909.)

1. **Process—Service—Misnomer of Defendant—Procedure—Plea in Abatement.**

A mere misnomer of the defendant in failing to serve summons on it as the "Supreme Lodge," etc., when, in fact, the summons was served on the proper officer, is not a ground for dismissal; the proper procedure is a plea in abatement wherein the correct name could be supplied and the pleadings amended to conform.

2. **Process—Service—Misnomer of Defendant—Misjoinder of Causes—Procedure.**

In this case there was no misjoinder of causes of action; but, if otherwise, the remedy was by motion to divide the action, Revisal, 476, the defendant being already in court and having received notice by the summons and complaint.

3. **Pleadings—Benevolent Societies—Rejection of Member—Cause of Action.**

The complaint alleging that plaintiff had been elected a member of defendant society by ballot, but that, subsequently, misled by false statements to his prejudice, made by one of its directors, it rescinded its action to his humiliation and damage, states no cause of action, it appearing that the director acted in the line of his duty.

4. **Benevolent Societies—Rejection of Member—Certificate—Contracts.**

A complaint alleging that defendant society elected him a member and then rescinded its action before issuing him a certificate of membership, fails to set out a contract for the breach of which damages may be recovered.

DUNN *v.* AID SOCIETY.

APPEAL by plaintiff from *W. R. Allen, J.*, at March Term, 1909, of LENOIR.

The facts are sufficiently stated in the opinion.

C. F. Dunn for plaintiff.
No counsel for defendant.

CLARK, C. J. This is an action against the defendant, a fraternal insurance company, for damages, alleging that on plaintiff's application he was elected a member by ballot, but that subsequently, misled by false statements, to his prejudice, made by one of the directors, the defendant association rescinded its action, refused to issue him a certificate of membership and returned him the initiation fee, greatly to his humiliation; wherefore he asks damages for breach of contract.

Counsel entered a special appearance and moved to dismiss the action because the defendant was styled, in the summons which (134) was served, "The Knights of Gideon Mutual Aid Society," whereas the true name is "The Supreme Lodge, Knights of Gideon Mutual Society." The service was upon the president of the latter corporation.

His Honor allowed the motion and dismissed the action on that account, and also because there was a misjoinder of causes of action and because no cause of action was stated.

The misnomer was not ground for dismissal, but for plea in abatement, when, the correct name being given, the summons and pleadings would be amended to conform. 14 Cyc., 438; 14 A. & E. Pl. & Pr., 295; 7 A. & E., 688. The defect here would not even vitiate a conveyance. *Asheville Div. v. Aston,* 92 N. C., 584, and cases cited.

Nor was there a misjoinder of causes of action. Had there been, the remedy was not to dismiss, but to divide the action (Revisal, sec. 476), because the party is already in court, having received notice by the summons and complaint. The division is merely to prevent, in proper cases, confusion and complexity in the trial. *R. R. v. Hardware Co.,* 135 N. C., 73; *Weeks v. McPhail,* 128 N. C., 134; *Gattis v. Kilgo,* 125 N. C., 133.

But the action was properly dismissed because no cause of action was stated. The conduct of the director, even if it were ground of action against him, was in the line of his duty and not ground of action against the company. Nor did the action of the company in rescinding its resolution before a certificate of membership was issued entitle the plaintiff to sue for breach of contract.

Affirmed.

Cited: Drainage District v. Comrs., 174 N. C. 739.

JERE HOBBS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 13 October, 1909.)

Witnesses—Fees—Costs.

Witness fees may not be taxed in the cost against an unsuccessful litigant, though the witnesses were subpœnaed, when they were not examined, or tendered, or, if the witnesses did not attend the trial, having a legally sufficient excuse, it is not shown that their evidence was material. Nor can fees be taxed when it only appears that the failure of the witness to attend was inexcusable.

APPEAL by defendant from *Guion, J.*, 5 May, 1909, from ONSLOW.

The facts are sufficiently stated in the opinion.

No counsel for plaintiff.

Davis & Davis and Frank Thompson for defendant.

(135) WALKER, J. This is a motion by the defendant in the above-entitled cause to retax costs. The clerk of the court, before whom the motion was made, found and stated the facts, from which it appears that the case was tried at April Term, 1909, and that D. L. Hobbs and S. T. Brittan, who were subpœnaed as witnesses by the plaintiff, had attended as such at a term of the court prior to the April Term, 1909, but were not present at the trial term, S. T. Brittain having died since the last preceding term; that D. V. Justice had attended, under subpœna, as a witness for the plaintiff at several terms, including the trial term, and was sworn, but not examined nor tendered to the defendant when the case was tried. J. W. Spicer, a witness for the defendant, was duly subpœnaed to attend at the trial term, but failed to do so, or, rather, left the courthouse before the trial of the case and without giving the defendant an apportunity to examine him. The clerk ruled that the fees of certain other witnesses, who had not been sworn and examined or tendered to the defendant, should not be taxed against the defendant, but held that D. V. Justice was not entitled to prove his attendance at the trial term and to have his fees for that term taxed against the defendant, but was entitled to have his fees for attendance at prior terms so taxed. He also held that the fees of the witnesses, Hobbs and Brittan, should be taxed in the bill of costs against the defendant. Judgment was entered accordingly. In his judgment he does not distinctly rule as to the fees of the defendant's witness, J. W. Spicer, but merely states that he had not "proved his attendance at the trial term." The defendant excepted to the clerk's rulings and judgment, and appealed to the Superior Court, and his judgment was affirmed. It thereafter excepted and appealed to this Court, assigning errors as follows:

1. That the court erred in taxing the witness tickets of D. L. Hobbs and S. T. Brittan against the defendant.

2. That the court erred in taxing the witness tickets of D. V. Justice for the term of court prior to April Term, 1909, against the defendant.

3. That the court erred in taxing the witness tickets of Jere W. Spicer against the defendant.

4. That the court erred in affirming the judgment of the clerk of the Superior Court of Onslow County in said cause.

The general rule which is applicable to the facts under consideration is, that when a cause has been tried, only those witnesses of the successful party who have been sworn and either examined or tendered to the opposite party can be taxed against the latter. *Venable v. Wheeler,* 4 N. C., 128; *Costin v. Baxter,* 29 N. C., 111; *Wooley v. Robinson,* 52 N. C., 30; *Loftis v. Baxter,* 66 N. C., 340; *Cureton v. Garrison,* 111 N. C., 271; *Moore v. Guano Co.,* 136 N. C., 248; *Herring v. R. R.,* 144 N. C., 208. The reason for the rule is, that if the witness is examined, the nature of his testimony will appear and the court can then judge as to its materiality, or, if he is tendered, the party to whom the tender is made has the opportunity, not only of using him as a witness, but of ascertaining whether or not his testimony is relevant to the controversy, and consequently whether he should be made to pay for his attendance if he should be cast in the suit. There is still another branch of the rule which has not been stated, and it is this: "When a material witness is not present at the trial, but has theretofore been in attendance, and when the question is made in apt time, a party is only entitled to have such witness' fees taxed against his adversary upon satisfactory proof of the materiality of his evidence, and that his absence was on account of sickness or other sufficient cause; for if the witness failed to attend without sufficient excuse he is not entitled to have his attendance taxed against either party, but is liable to a penalty of forty dollars and to such damages as the party may have sustained by reason of his willful default." *Boyden, J.,* in *Loftis v. Baxter, supra.* See, also, *Venable v. Martin, supra.*

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In this case the plaintiff was the prevailing party and entitled to recover costs of the losing party, the defendant, which are allowed by the statute, as construed by this Court.

It appears that the two witnesses, Hobbs and Brittan, had attended, under subpœna, as witnesses for the plaintiff, but not at the trial, and that Justice attended at April Term and also at previous terms, but it does not appear that they were "examined or tendered," or that their testimony was material. It is true Brittan died before the case was tried, but that can make no difference, for the plaintiff could still have proven the materiality of his testimony. Indeed, that fact was peculiarly within the knowledge of the plaintiff. The names of those witnesses should have

been stricken from the bill of costs. The plaintiff must pay them, if they see fit to compel him to do so.

As to the witness J. W. Spicer, if he absented himself and thereby failed to obey the subpœna issued for him, he is not entitled to any fees. The exceptions of the defendant should have been sustained by the court and the bill of costs reformed accordingly, and in failing to do so there was error.

Reversed.

Cited: Cotton Mills v. Hosiery Mills, 154 N. C., 467; *Chadwick v. Ins. Co.,* 158 N. C., 382.

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(137)

THE AUSTIN-STEPHENSON COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 13 October, 1909.)

1. **Railroads—Live Stock—Bills of Lading—Notice—Condition Precedent—Reasonable Stipulations.**

A stipulation in a bill of lading given by the carrier for a shipment of live stock, requiring that written notice of claim for damages be given the delivering carrier before the live stock is removed or intermingled with other live stock, as a condition precedent to recovery, being merely a provision to protect the carrier against a false or unjust claim by affording it an opportunity for examination, is reasonable and will be upheld.

2. **Same.**

A consignee cannot recover of a carrier damages alleged to have been negligently caused by it on a shipment of live stock, when it appears, by its own evidence, that he did not give the delivering carrier notice of his claim, as required by the bill of lading, before taking the live stock from the depot, and carrying them away and commingling them with other live stock.

3. **Same—Consideration.**

A reduced rate of carrier of live stock is a sufficient consideration to support a stipulation in a bill of lading therefor, that notice in writing must be given the delivering carrier of any claim for damages as a condition precedent to recovery, before the removal from the depot of the live stock or commingling them with others.

APPEAL by defendant from *Lyon, J.,* at March Term of JOHNSTON.

The facts are sufficiently stated in the opinion.

Pou & Brooks for plaintiff.
E. S. Abell and W. B. Rodman for defendant.

WALKER, J. This action was brought to recover damages for alleged injury to certain live stock (a carload of mules and horses) shipped from Morristown, Tenn., to Selma, N. C. A bill of lading was given by the defendant for the shipment, one of the stipulations of which is as follows: "That as a condition precedent to any right to recover any damage for loss or injury to said live stock, notice in writing of the claim therefor shall be given to the agent of the carrier actually delivering said live stock, wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock."

The evidence of the plaintiff tended to show that the mules were in good condition when they left Morristown and were damaged when he received them at Selma, but his agent drove them away (138) from the defendant's premises without giving the notice required by the bill of lading. His witness, W. R. Long, who was his agent in the purchase of the mules and horses and in receiving them at Selma, testified: "I did not give the agent of the defendant, or any one else, any notice of claim for damages or injury to this car of stock. The first notice I gave any one of any claim for damage or injury to the stock was through my attorneys, some time after I received the stock and had sold part of same. I brought the stock through the country from Selma to Smithfield, a distance of four miles. I do not know, of my knowledge, when any notice of claim was filed with the defendant." The plaintiff put the bill of lading in evidence.

There was a verdict in favor of the plaintiff for $150, and judgment was given thereon. The defendant, having duly excepted, appealed to this Court.

The exception of the defendant raises the two questions, whether the stipulation in the bill of lading requiring notice to be given to the defendant before removal from its premises of the goods transported is valid, and whether a failure to give it will defeat the plaintiff's recovery. These questions we consider as having been decided by this Court adversely to the plaintiff's contention. In *Selby v. R. R.*, 113 N. C., at pages 594-595, *Justice Burwell,* for the Court, in the course of a very able discussion of the very question herein presented, says: "It seems to us that this condition, imposed upon the plaintiff by a contract of his own making, founded upon a valuable consideration moving to him, contravenes no sound legal policy and is not unreasonable. It is not in any sense a stipulation that the defendant carrier shall be exempted from the effects of its negligence or the negligence of its servants in the performance of

those duties towards the plaintiff assumed in the contract, nor is it a requirement that any injury that has been done to plaintiff's stock while in defendant's care, under the terms of the bill of lading, shall be adjusted in the presence of an officer of the defendant company before the property is removed from the station, and hence the case of *Capehart v. R. R.*, 81 N. C., 438, has no application here. We have no stipulation as to the fixing of the amount of damage done to plaintiff's property, but simply an agreement that he will, when about to take his animals from the cars or yard of the defendant, notify the company in writing, if, upon a reasonable examination, he is able to detect any damage done them. Owing to the nature of the property entrusted to the carrier, the difficulty of identifying each animal and the terms of the contract as regards such damage as might be inflicted by the
(139) animals on one another or might come to them without any fault on the part of the defendant, it seems to us, indeed, very reasonable that the defendant's agents should have an opportunity then and there to examine the stock and ascertain, if they can, the cause and the extent of the damage. We have been cited to no authority which, upon examination, seems to hold that such requirement, under the circumstances, is unreasonable. *Rice v. R. R.*, 63 Mo., 314; *Goggin v. R. R.*, 12 Kan., 416, and other cases, seem fully to sustain the view we take of the matter, and to show that there was error in the charge that the stipulation was not reasonable and was void." That case was approved and the principle it lays down reaffirmed in the more recent case of *Wood v. R. R.*, 118 N. C., 1063. Common carriers may by special contract require any claim for damages to be presented within a given time, provided the time allowed be reasonable. *Express Co. v. Caldwell*, 21 Wallace, 264; *Lewis v. R. R.*, 5 Hurl. & N., 867; *Express Co. v. Harris*, 51 Indiana, 127; *Express Co. v. Glenn*, 16 Lea, 472. We have adopted this principle as a fair and reasonable one, and held that it is not a condition by which the liability of the company is restricted, nor is it a limitation of the time within which an action may be brought to recover damages for negligence or for any breach of the contract between the parties, but merely intended as a provision to protect the party who is sued against a false or unjust claim. *Sherrill v. Telegraph Co.*, 109 N. C., 527. The stipulation must, of course, be reasonable in itself and fairly construed, so as not to exempt the carrier from the performance of any part of its contractual or legal duty to the shipper. Such a stipulation as that we are now considering has been generally held to be perfectly reasonable and valid, to enable the defendant, while the matter is still fresh, to institute proper inquiries and furnish itself with evidence or information on the subject of its liability and the extent thereof. The carrier does a large business, covering a vast extent of territory, and to allow

suits to be brought against it without such notice, at any length of time, when the evidence of the true nature of the transaction has been lost or obliterated, and there is no sufficient opportunity afforded of ascertaining the truth of the matter, would be to surrender the carrier, bound hand and foot and in a helpless condition, to the tender mercy of the shipper, and subject it to the payment of almost any kind of claim which his caprice or avarice might tempt him to assert. In Hale on Bailments and Carriers, pp. 429, 430, it is said, substantially, that the law will not tolerate such an imposition which might follow the denial of the validity of this clause in the contract. The particular language used at page 430 by the author of that valuable treatise—and it exactly (140) fits our case—is this: "A stipulation requiring a consignee of cattle to present any claim for damages, at the time the cattle were received and before they were unloaded and mingled with other cattle, has been held to be reasonable and valid."

This rule could not avail the defendant in *Jones v. R. R.*, 148 N. C., 580, owing to the peculiar facts of that case, which do not fully appear in the report of the case. In that case the stock arrived at the point of destination in good condition and remained in the defendant's possession at a livery stable, where the injury is supposed to have occurred, and under the supervision of the defendant's agent for several days, awaiting the arrival of the owner. The agent had full notice of the injury to the mule before there was any delivery of the remainder of the stock. In this respect that case differs from the one now under consideration.

The court erred in holding that the failure to give notice did not defeat the plaintiff's recovery, because the clause inserted in the bill of lading requiring notice to be given was invalid, or, if valid, did not apply to the facts of this case. If it does not apply to this case, it could not apply to any case, as it was not denied that the stock was taken away from the defendant's yard without giving the notice, and that was the point upon which the case was made to turn in the court below, the judge holding that it was immaterial whether the notice was given or not.

The consideration for this stipulation in the contract, assuming that a special consideration is required to support it, was the reduced rate of charge which was allowed for the carriage.

The motion to nonsuit should have been sustained.

Action dismissed.

Cited: Kime v. R. R., 156 N. C., 453; *Southerland v. R. R.*, 158 N. C., 329; *Duvall v. R. R.*, 167 N. C., 25; *Culbreth v. R. R.*, 169 N. C., 725; *Baldwin v. R. R.*, 170 N. C., 13; *Mewborn v. R. R., ibid.*, 510; *Horse Exchange v. R. R.*, 171 N. C., 73; *Schloss v. R. R., ibid.*, 352.

B. F. POWELL v. FLOWERS & McPHAIL.

(Filed 13 October, 1909.)

1. Partnerships—Contracts—Scope of Authority—Warranty.

During the continuance of a partnership for building purposes, a warranty of material and construction given by one partner for the purpose of obtaining a payment from the owner after the completion of a house contracted for by the partnership, is within the scope of the power of the partnership relations; and in the absence of bad faith by the partner giving it, or notice thereof by the owner, it is binding upon the other partner.

2. Same—Innocent Third Persons.

A misnamed "guaranty contract" given by one partner in the scope of his partnership authority, without the knowledge of the other, being in effect but a continuance of a warranty of material and construction after the completion of a house contracted to be built by the partnership, is binding upon such other partner as against the rights of the owner, though it may have been improvidently made and entailed a loss on the partnership.

(141) APPEAL from *W. R. Allen, J.*, June Term, 1909, of SAMPSON.

His Honor submitted the following issues to the jury, who responded to them as set out:

1. Has there been a breach of the guaranty described in the complaint? Answer: Yes.

2. If so, what damage is the plaintiff entitled to recover on account thereof? Answer: $235.

3. Is the plaintiff indebted to defendants on account of the contract price for erecting his building, and in what amount? Answer: $135.

4. Did the defendant McPhail have any knowledge of the guaranty contract made by the defendant Flowers? Answer: No.

The question presented by this appeal is thus stated in the record:

The only matter in controversy is whether, on the pleadings, evidence and verdict, the plaintiff is entitled to have judgment against both the defendants or whether he was entitled to judgment against the defendant Flowers alone. The facts bearing upon this question are as follows:

The defendants, Flowers & McPhail, were partners, engaged in contracting for and building houses, under the firm name of Flowers & McPhail. Flowers did most of the actual work and collected most of the money, but McPhail did some of the work, made some of the contracts and collected some of the money. They had no written contract of partnership, and the partnership agreement was oral and general in its terms.

On 7 October, 1902, while said partnership was in force, Flowers contracted, in writing, in behalf of said firm, with the plaintiff to erect for

him a storehouse in Clinton, N. C., for the price of $1,750, to be paid in installments at certain stages of the work. This contract was signed "Flowers & McPhail." The first payment of $500 was made to McPhail before the completion of the building, and other payments, to the amount of $1,015, were made to Flowers before and at the time of the completion of the building. After the building was completed there was still unpaid on the contract price $235. Almost three months after the completion of the building, Flowers demanded the balance of the contract price. After some controversy the plaintiff paid Flowers (142) $100 and Flowers gave to plaintiff a paper-writing, in words and figures as follows:

GUARANTEE OF CONSTRUCTION.

We agree that we will be responsible for any damage to B. F. Powell that he may sustain, that shall be the direct result of improper or poor construction of the store building erected by us. This guarantee to cover a period of five years from 1 January, 1903.

(Signed) FLOWERS & MCPHAIL.

This guarantee was executed about three months after the completion of the building and about six months before the partnership of Flowers & McPhail was dissolved.

The jury found that there had been a breach of this guarantee; that the plaintiff had been damaged thereby $235; that the plaintiff was still due on the contract price $135, and that McPhail had no knowledge of the execution of the guarantee or of its existence until a short time before the commencement of this action.

This action was commenced 8 October, 1907. Upon the rendition of the verdict the plaintiff tendered judgment in his favor against both the defendants for $100, with interest from 21 June, 1909, and costs. The defendant McPhail contended that plaintiff was entitled to judgment against the defendant Flowers alone. His Honor refused to sign judgment in accordance with plaintiff's contentions, and the plaintiff excepted and appealed to this Court.

The contract attached to the complaint contained this stipulation: "Said Flowers & McPhail guarantee said roof not to leak . . . and should any leak be found in said roof within one year after its completion, they agree to repair the same and effectually stop all leaks," etc. And it was also stipulated that all work was to be done in "first class workmanship manner," and all materials furnished by defendants.

F. R. Cooper for plaintiff.

H. A. Grady for defendant.

MANNING, J., after stating the facts: The defendant McPhail rests his defense against liability for the damages assessed by the jury for the improper and poor construction of the store building upon two grounds, viz.: (1) that the contract of warranty was executed without his knowledge or consent, and (2) that it was not within the scope of the partnership agreement and not necessary in the ordinary and usual manner of conducting the business of the partnership. We do not think either ground of defense can avail the defendant. The partnership between the defendants was formed for the purpose of contracting for and building houses, was general in its terms, and both partners actively participated in the partnership undertakings. Each partner, by virtue of the partnership relation, was a general agent for the other as to all matters within the scope of the partnership dealings, and had communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership. George on Partnership, p. 212; Story on Partnership, sec. 101; 1 Bates on Partnership, sec. 315; 1 Lindley on Partnership, p. 124; *Winship v. Bank,* 5 Pet., 529; *Wilkins v. Pearce,* 5 Denio (N. Y.), 541; *Cotton v. Evans,* 21 N. C., 284; *Abpt v. Miller,* 50 N. C., 32; *Carter v. Beaman,* 51 N. C., 44; *Long v. Carter,* 25 N. C., 238.

(143)

It is decided by the cases above cited, and must necessarily follow from the principle announced, that the invalidity of an act of one partner does not arise from a want of power nor from the absence of actual knowledge or assent of the other members of the partnership, but from the bad faith of such partner by the perversion of his power for his "several advantage" and from the knowledge of him with whom he deals of such bad faith. There is an entire absence of evidence in this case that the giving of the warranty by the partner, Flowers, was for "his several advantage," or that it was given by perversion, in bad faith, of his authority. That it was given without the knowledge of the defendant McPhail is certainly no proof of bad faith in Flowers. The contract simply warranted, for a specified time, the durability of the materials and workmanship used by the partnership in constructing the building; was executed in the name of the partnership and concerning a matter of joint enterprise. It follows, therefore, that the defendant McPhail must be conclusively fixed, as against the plaintiff, with a knowledge of the terms of that contract. "Thus both partners are authorized to treat for each other in everything that concerns or properly belongs to the joint trade." *Carter v. Long, supra.* Can it be said that it is beyond the scope of the implied power of one member of a partnership, formed for the purpose of constructing stores and other buildings, to warrant the quality of its workmanship and the durability of its materials used in

a building constructed by it? The contract, in this case, contained both, and the defendant McPhail collected a part of the price. The misnamed "guaranty contract" simply extended the duration of the warranty. The partners engaged to erect the building for plaintiff, of proper materials and in workmanlike manner. Whatever pertained to the (144) carrying out of this contract concerned a joint enterprise and the power, implied in each partner, was coextensive with any act of either partner in its furtherance. That after events demonstrated that the particular contract was unwise and entailed a loss upon the partnership is wholly insufficient to vitiate the act as to strangers. "In such a case there is a loss to fall on one of two innocent persons, and the question is, which of them ought to bear it? Manifestly, he who entrusted the power. It was susceptible of abuse, and that he knew when he conferred it. It is not, in point of form, exceeded; and if it has been employed for a different purpose than that for which it was created, that is a risk that must have been seen and undertaken from the beginning." *Cotton v. Evans, supra.* The plaintiff was therefore entitled to judgment upon the verdict against both defendants, and this result is not changed by any fact found by his Honor. In declining to render judgment against the defendant McPhail there was

Error.

Cited: *Campbell v. Huffins, post,* 264; *Sladen v. Lance, post,* 494.

R. B. WOODSON v. J. W. BECK.

(Filed 13 October, 1909.)

Insurance—Contracts, Written—Parol Evidence—Contradictory.

In defense to an action upon a due bill specifying that $92.92 was due on a policy of life insurance, to be paid on the delivery of the policy by the agent of the company issuing it, it is incompetent to set up by parol that the contract was the surrender of a $1,000 policy for one for $2,000, the latter of which was to be for life, and the annual payment of a premium of $9; and that the due bill was signed under an impression that it was an order to deliver the old policy under this contract. This would be a contradiction by parol of the terms of a written instrument and not admissible in the absence of fraud or mistake.

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

APPEAL from *O. H. Allen, J.,* May Term, 1909, of VANCE.

The plaintiff sued the defendant before a justice of the peace on the following due bill:

HENDERSON, N. C., 4 December, 1908.

Due R. B. Woodson $92.92 (ninety-two dollars 92-100) on a policy of life insurance applied for this day in the Equitable Life, said $92.92 to be paid when policy is delivered.

J. W. BECK.

(145) The defendant admitted the execution of the due bill and a tender of the policy for $2,000, an ordinary life policy, but alleged that the contract between him and plaintiff was that the defendant could purchase the new policy and pay premiums on the same by the surrender of a $1,000 policy in the same company that would mature in April, 1909, and the payment of $9 per year, and that plaintiff refused to perform said contract, and defendant therefore denied all liability on the due bill. There was no allegation of fraud or mistake. The justice of the peace rendered judgment against defendant, from which he appealed to the Superior Court. At the trial in the Superior Court his Honor submitted the following issue:

"Is the defendant indebted to plaintiff, and, if so, in what amount?"

The jury, under instructions from his Honor, responded: "Yes, $92.92 and interest from 30 December, 1908." The defendant appealed.

Henry T. Powell for plaintiff.
T. T. Hicks for defendant.

MANNING, J. The only question presented by this appeal is the correctness of his Honor's ruling, excluding the following testimony of the defendant: "Plaintiff offered to insure my life. I told him I wanted no insurance. He said, 'You have an Equitable policy that I can trade you for to your advantage.' Asked to see it. I showed it. He saw it was payable to my wife. He said he'd write the company, and later said he had done so. My policy for $1,000 was a twenty-payment policy, on which I had paid nineteen payments. He proposed to get me a new policy for $2,000, and that my old policy would be accepted in payment of all premiums to be due on it, except $9 per year. In other words, the old $1,000 policy was to be exchanged for a new $2,000 policy and I was to pay $9 a year additional. I agreed to this, and was examined, signed the application and the due bill, which I understood was an order binding me to surrender the old policy. Nothing was ever said about my paying $92.92 per year for a new $2,000 policy. I never agreed to do so. Three weeks later, when he brought the policy for $2,000, which calls for $92.92 per year from me for life, he refused to accept the old policy, but said I must arrange the surrender of it to the company, and he demanded of me $92.92 and that I take the new policy. This I refused.

The policy he offered me is the same as now shown me, and the application I signed is, to the best of my knowledge, copied correctly in it." (146)

This testimony was excluded by his Honor, there being no allegation of fraud or mistake, because it contravenes the well-settled and elementary rule of evidence that it is not permissible to add to, vary or contradict the terms of a written agreement by a contemporaneous parol agreement, even where no statutory enactment requires the agreement to be in writing. The more recent cases in which this rule is discussd are *Walker v. Cooper,* 150 N. C., 129; *Basnight v. Jobbing Co.,* 148 N. C., 350; *Walker v. Venters,* 148 N. C., 388; *Medicine Co. v. Mizell,* 148 N. C., 384; *Cobb v. Clegg,* 137 N. C., 153; *Evans v. Freeman,* 142 N. C., 61. In these cases will be found cited the earlier cases. It is contended, however, by the defendant, that the evidence does not contravene this rule, but was admissible under the rulings of this Court in *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, and *Evans v. Freeman,* 142 N. C., 61, and the cases therein cited. The principle, reaffirmed in these cases, is that "where the contract does not fall within the statute of frauds the parties may put their agreement in writing or contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract." Clark on Contracts (2 Ed.), p. 85.

The limitations, however, upon the application of this principle, recognized in all the cases in which this principle has been applied, is that the oral collateral agreement, or that part of the agreement not reduced to writing, cannot be permitted to vary, add to or contradict the written agreement, "but, leaving it in full force, as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing." *Evans v. Freeman, supra.*

The manifest purpose and effect of the evidence offered by the defendant is to show, by parol, a contract entirely variant from and inconsistent with the written agreement. The defendant denies that what the writing contains was, in fact, any part of his agreement with plaintiff, though admitting, by his admission of signature to it, its obligatory force in law. He says the sum of $92.92 was not mentioned at all; that he thought the due bill was an order for the surrender of the old policy; that the only agreement he made was to buy an ordinary life policy for $2,000, as was tendered him, and to pay for the entire contract, to run for his life, by surrendering his twenty-payment policy of $1,000

(147) and by the payment of $9 per year. There is no part of the written contract that is not varied and contradicted by this parol agreement. For the contract contained in the writing the defendant proposed to substitute, by parol, an entirely different contract. In our opinion, the proposed testimony was not competent or admissible under the decision of this Court in any case. In *Typewriter Co. v. Hardware Co., supra,* the defendant proposed to prove as its defense to an action upon its written promise to pay for a typewriter that at the time the agent of defendant agreed to allow it a credit of $40 as commissions on four machines sold by him. The Court held the evidence admissible, because it did not conflict with the written part of the agreement.

In *Evans v. Freeman, supra,* the defendant offered to prove by parol, as his defense to his note sued upon, that it was agreed that it should be paid out of the proceeds of the sale of the patent right for which it was given. This Court held the evidence competent, as not in conflict with the written part of the agreement, holding "that it is competent to show by parol evidence a collateral agreement as to how an instrument for the payment of money should in fact be paid, though the instrument is necessarily in writing and the promise it contains is to pay so many dollars."

In *Braswell v. Pope,* 82 N. C., 57, the plaintiff was allowed to show, as a defense to the action upon his notes, that it was agreed by parol that the defendant was to accept, as payment of his notes, an assignment of a judgment secured by a mortgage on another. In *Kerchner v. McRae,* 80 N. C., 219, the parol agreement, held admissible, showed that plaintiff was to credit on defendant's note the value, $3,000, of certain cotton belonging to defendant in the hands of plaintiff for sale. Other cases will be found decided by this Court "in which the application of the same principle has been made to various combinations of facts, all tending, though, to the same general conclusion that such evidence is competent where it does not conflict with the written part of the agreement and tends to supply its complement or to prove some collateral agreement made at the same time." In all these cases, in which the application of this principle has been made, the parol agreement was limited in its effect to the particular obligation sued upon; but, in this, this is neither the effect nor the purport of the proposed evidence, nor would the defendant be content with such a limitation. He proposes to discharge, not only the due bill to the plaintiff, but to discharge the contract with the assurance society issuing the policy, by writing into that contract the parol agreement made with the plaintiff. The parol evidence not

(148) only does not tend to supply the complement of the written agreement or tend to prove some collateral agreement made at the same time as a part of the written agreement and not inconsistent with

it, but to prove a contract entirely variant from and inconsistent with it. Writing the parol agreement into the written, no part of the written agreement would be left. We do not think this principle has ever been extended so far, and, mindful of the warning of this Court in *Moffitt v. Maness,* 102 N. C., 457, repeated in *Cobb v. Clegg,* 137 N. C., 153, we are unwilling further to relax the well-settled rules of evidence against the admissibility of parol testimony to contradict, vary or add to the terms of a written agreement. We do not intend by what we have said in this decision to preclude the defendant, if he shall be so advised, from bringing his action against the assurance society for a reformation of his contract of insurance upon proper allegation and proof of mistake. After a careful review of the decided cases, we are of the opinion that the evidence was inadmissible and his Honor committed no error in excluding it. The judgment is therefore

Affirmed.

HOKE, J., dissenting: I am unable to concur in the disposition made of this case, being of opinion that the evidence offered by the defendant, in effect, only tended to show a different method of payment than that mentioned in the contract. It is well established with us that, as between the original parties, when a note is given, payable in so many dollars, without further written specification, parol evidence may be received tending to establish an agreement that a different method of payment should be accepted.

This was the question directly presented in *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, where it was held by a unanimous Court: "1. It is competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should in fact be paid, though the instrument is in writing and the promise it contains is to pay in so many dollars."

And this position has uniformly prevailed with us, and has been sustained in numerous and well-considered decisions, notably *Evans v. Freeman,* 142 N. C., 61; *Walters v. Walters,* 34 N. C., 28.

In *Evans v. Freeman* the Court held: "(1) The rule that when parties reduce their agreement in writing, parol evidence is not admissible to contradict, add to or explain it, applies only when the entire contract has been reduced to writing; and where a part has been written and the other part left in parol, it is competent to establish the latter by oral evidence, provided it does not conflict with what (149) has been written. (2) In an action on a note, by which the maker promised to pay the sum of $50, being the purchase money for the right to sell a stock feeder, it was competent to show that it was a

part of the agreement at the time the note was given that it should be paid out of the proceeds of the sales of the stock feeder."

In Brown on Parol Evidence, sec. 117, the position referred to is stated as accepted doctrine, and our decision in *Walters v. Walters, supra*, and well considered decisions in other States, are referred to as authority for the statement. And other prior and cotemporaneous parol agreements affecting the obligation given to pay in so many dollars have also been frequently received and acted on. *Kelly v. Oliver,* 113 N. C., 442; *Penniman v. Alexander,* 111 N. C., 427.

In *Penniman v. Alexander* defendant had accepted a draft without further specification, and in action brought proposed to show that his acceptance was on a condition that had not been complied with, the evidence offered being as follows: "Defendant offered himself as a witness, and proposed to show that his acceptance of paper was on condition that the drawer, Mooney, was building some houses for defendant, where brick was used, was building same by contract, payable in installments as work progressed; that said Mooney abandoned work and gave up contract before payments were due, and he never became indebted to said Mooney, and that he was only to pay bill on said acceptance in case he became indebted to Mooney for said amounts."

This evidence was ruled incompetent by the trial judge, and in granting a new trial for error *Burwell, J.,* said: "It cannot be contended that the rights of the plaintiffs against the defendant are stronger than if he had given them his promissory note for the sum named in the writing on which this action is brought, instead of accepting the order, as he did. If he had done so—that is, had given to plaintiffs his promissory note for the amount of the order—it would have been competent for him, if sued on the note by the payee, to prove that there was a collateral agreement between him and them to the effect that he should not be required to pay except upon the happening of certain events or that the note was without consideration."

Placing the interpretation on the evidence adopted by the court, there is perhaps no serious impairment of an accepted principle, either wrought or threatened, but I think, by correct interpretation, that the evidence rejected amounts to no more than a cotemporaneous parol agreement affecting the method of payment—that is, that the value of an
(150) existing policy should be allowed defendant, and a certain portion of it received year by year in reducing the regular annual premiums, and that, under a proper application of the authorities cited, the evidence should have been received.

Walker v. Venters, 148 N. C., 388, to my mind, in no way militates against this position. In that case there was a special method of payment stipulated and provided for in the written contract—that is, in

twenty bales of merchantable lint cotton, each weighing 500 pounds, and the proposition was to prove a parol agreement that plaintiff could at his option satisfy the demand by paying $4,000 in money. This involved a substantial alteration of the written terms of the contract, and the Chief Justice, in disallowing the evidence, said: "Such evidence is never admitted if the wording of the written contract is clear or if the evidence offered is in direct contradiction of the intrinsic meaning of the language of the contract."

But the general written promise, "to pay in dollars," is not allowed to have this restrictive effect, and, as heretofore stated, in such instruments cotemporaneous parol agreements are always received, tending to show a different method of payment.

For the reasons indicated, I think the evidence competent and that a new trial should be awarded.

CLARK, C. J., concurs in dissent.

Cited: Machine Co. v. McClamrock, 152 N. C., 407; *Hilliard v. Newberry,* 153 N. C., 109; *Kernodle v. Williams, ibid.,* 479; *Pierce v. Cobb,* 161 N. C., 304; *Mfg. Co. v. Mfg. Co., ibid.,* 434; *Piano Co. v. Strickland,* 163 N. C., 253; *Wilson v. Scarboro, ibid.,* 385; *Richards v. Hodges,* 164 N. C., 188; *Sykes v. Everett,* 167 N. C., 605; *Guano Co. v. Livestock Co.,* 168 N. C., 447; *Farquhar Co. v. Hardware Co.,* 174 N. C., 373.

M. HANSTEIN v. T. M. FERRELL.

(Filed 13 October, 1909.)

In this case the controversy being over an issue of fact, no error appearing, the judgment of the lower court was affirmed.

APPEAL from *W. R. Allen, J.,* at April Term, 1909, of SAMPSON.

These issues were submitted, by consent:

1. Where is the dividing line between plaintiff and defendant? Answer: The true line between plaintiff and defendant is twelve inches on the side next to defendant from the southeast wall of plaintiff, above the ground, along the whole course of the wall.

2. Is the plaintiff the owner of the lands in controversy? Answer: Yes.

3. If so, are defendants in wrongful possession thereof? An- (151) swer: Yes.

4. What damage, if any, is plaintiff entitled to recover? Answer: No.

From the judgment rendered the defendant appealed.

F. R. Cooper and Faison & Wright for plaintiff.
George E. Butler and J. D. Kerr for defendant.

PER CURIAM: This cause was before this Court at a former term and a new trial was directed. Upon this second trial we are of opinion, upon examination of the record, that no error has been committed. Under the form of the first issue the controversy is one of fact, and has been determined by the jury in favor of the plaintiff. We find no reversible error, and the judgment is

Affirmed.

KINGHAM & COMPANY ET AL. v. J. H. WEDDELL, ADMR., ET AL.

(Filed 22 September, 1909.)

In this case there was no error.

APPEAL from *Cooke, J.*, at February Term, 1909, of CRAVEN.

Action, in the nature of a creditors' bill, against J. H. Weddell, administrator of F. Ulrich and the surety on his administration bond.

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

W. D. McIver and R. A. Nunn for plaintiff.
W. W. Clark for defendants.

PER CURIAM: The Court has carefully considered the record and the exceptions noted, and is of opinion that the results of the trial should not be disturbed.

There were various breaches of duty alleged against the defendant administrator, but on issues submitted each and every one of these alleged defaults have been decided by the jury in defendant's favor, and, as stated, we find no reversible error in the trial or the disposition made of the case.

The judgment for the defendant is therefore

Affirmed.

(152)

J. T. BEDSOLE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 October, 1909.)

1. Evidence—Demurrer—Ruling Reserved—Sustained—Instructions—Harmless Error.

It is not improper for the trial judge to reserve his ruling on the evidence upon matters set out in a certain section of the complaint and to sustain the demurrer when the evidence is all in if it appears that he should have done so. His instructions to the jury to exclude such evidence from their consideration would cure the error, if any, committed therein.

2. Carriers of Passengers—Protection—Assault—Evidence—Res Gestæ.

In an action to recover damages of a railroad company for injuries plaintiff received while a passenger on defendant's excursion train by reason of defendant's failure when notified to properly protect him from the assault of a fellow passenger, a man of dangerous character, pertinent evidence of what was said at the time of assault, by the one assaulting, to plaintiff and another passenger, is competent as a part of the *res gestæ*.

3. Carriers of Passengers—Protection—Assault—Avoidance—Evidence, Corroborative.

In an action to recover damages of defendant railroad company for injuries received in an assault by another passenger, arising from defendant's alleged negligence in failing or refusing to afford plaintiff proper protection, it appeared that there was evidence that plaintiff went into a "reserved seat" car to avoid the difficulty, and the conductor was informed of the fact and refused the protection therein requested: *Held*, it was competent for plaintiff to testify his reason for going into this car in corroboration of the witness who testified that he notified the conductor of the fact.

4. Carriers of Passengers—Measure of Damages—Instructions Distinctive.

A charge to the jury, upon the measure of damages, that the plaintiff is entitled to recover on account of injuries received in an assault made on him by another passenger, alleged to have arisen from defendant's failure or refusal to afford him proper protection, on its passenger train, that the jury could include such physical pain and mental suffering as was the proximate, immediate and necessary consequence of the assault, is not prejudicial on the question of mental suffering claimed on account of plaintiff's having been compelled to kill his assailant, when evidence on that point had been excluded and the jury instructed not to consider that phase of the case.

5. Pleadings—Variance—Amendments.

There is no error in the trial judge allowing amendments to the pleadings so as to make them conform to the proof. Revisal, 507.

(153) APPEAL from *W. J. Adams, J.*, April Term, 1909, of CUMBERLAND.

The facts are stated in the opinion of the Court.

H. McD. Robinson and Terry Lyon for plaintiff.
Rose & Rose for defendant.

CLARK, C. J. In 1906 the plaintiff and one Alexson were among the passengers on an excursion train, run over the defendant's road from Stedman, in Cumberland County, to Wilmington, N. C. On the return trip the plaintiff, on account of Alexson's threats to do him violence, secured a seat in the "reserved car" as a means of protecting himself against any assault Alexson might make upon him. The conductor of the excursion train was told of Alexson's conduct and threats against the plaintiff; that the plaintiff had gone into the reserved car for protection, and that Alexson was a dangerous man, who bore a bad reputation in his community. Notwithstanding the warning given to the conductor, Alexson was allowed to enter the reserved car, where plaintiff had sought refuge, and, carrying out his threats, with pistol in hand, violently assaulted plaintiff, striking, kicking and abusing him.

This action was instituted to recover damages for the failure of the defendant to protect plaintiff from the assault made upon him by a fellow-passenger. The liability of the railroad in such cases is fully discussed, with citation of authorities, in *Brown v. R. R.*, 2 L. R. A. (N. S.), 105, and notes.

The plaintiff killed Alexson. The complaint contained section 14, for mental suffering from the necessity imposed on plaintiff of slaying his assailant.

The first exception was for refusal of the court to sustain a demurrer *ore tenus* to said section 14. At that time the evidence had not been developed, and his Honor properly reserved the point. Later on in the trial the judge sustained the demurrer, excluded all evidence on that point, told the jury not to consider it, and again so instructed them in his charge. If there was error against the defendant, it was cured. *Medlin v. Simpson*, 144 N. C., 399. To same effect, *Wilson v. Mfg. Co.*, 120 N. C., 95; *S. v. Ellsworth*, 130 N. C., 690; *Moore v. Palmer*, 132 N. C., 976; *S. v. Holder*, 133 N. C., 712; *Briscoe v. Parker*, 145 N. C., 14; *Matthews v. Ins. Co.*, 147 N. C., 339; *S. v. Peterson*, 149 N. C., 533.

In *Briscoe v. Parker, supra*, the court below told the jury not to consider the excluded evidence, and we held that the jury must have understood so plain an instruction, and said: "If a jury is not possessed
(154) of this much intelligence, it is not a proper part of a trial court." Whether the court did not err in sustaining the demurrer and in

excluding the evidence is a matter not before us, as the plaintiff did not appeal.

Exception 2 is for permitting plaintiff to testify why he went into the reserved car, and exceptions 3 and 4 are to proof of what Alexson said to plaintiff and to a bystander when he made the assault. The latter was part of the *res gestæ* and the former was in corroboration of the testimony of another witness, who had notified the conductor of Alexson's threats and that plaintiff had taken refuge in the reserved car and asked the conductor to keep the door closed and guarded, which he refused to do. Exception 6 is abandoned.

Exceptions 5 and 7 are substantially to the same point. The court told the jury: "If the plaintiff is entitled to recover any damages, he is entitled to recover compensation for such injury, past, present and prospective, suffered by the plaintiff in consequence of and by reason of the assault, including such physical pain and suffering and such mental suffering as was the proximate, immediate and necessary consequence of the assault." We do not think this is obnoxious to the defendant's claim that it allowed damages for mental suffering from killing Alexson. Besides, his Honor expressly told the jury not to allow any damages "for any mental suffering the plaintiff may have undergone by reason of or in consequence of his killing Alexson."

The amendments allowed to the complaint to make it conform to the proof was in the discretion of the court. Revisal, sec. 507. The court read a part of the complaint to the jury, explaining to them that he did so as stating the plaintiff's contention. He also stated the defendant's contention and charged correctly as to the burden of proof. We find

No error.

Cited: Harrington v. Wadesboro, 152 N. C., 441.

THE BRYANT TIMBER COMPANY v. JOHN E. WILSON ET AL.

(Filed 20 October, 1909.)

1. Standing Timber—Option—Consideration—Nudum Pactum.

An option or offer to sell standing timber on lands, for which no consideration has been paid, may at any time be withdrawn before its acceptance, for the agreement is *nudum pactum.*

2. Standing Timber—Option—Acceptance—Lawful Consideration.

But after an unconditional acceptance, in accordance with the terms of the option, the voluntary proposal becomes a binding obligation on both parties, and specific performance will be decreed in equity at the suit of the vendee, when there is no equitable element to prevent it.

3. Standing Timber—Contract to Convey—Lis Pendens—Purchasers—Notice.

A suit for the specific performance of a contract to convey standing timber, against the owners of the land, setting forth with particularity the nature and extent of the contract, describing the land, etc., and reciting the registered option under which the performance is sought, is full notice, as *lis pendens*, to subsequent purchasers.

4. Standing Timber—Contract to Convey—Realty—Lands—Equity.

Standing timber is regarded as a part of realty, and specific performance of a contract to convey it will be governed by the same equitable principles that are applicable to lands.

5. Standing Timber—Contract to Convey—Specific Performance—Title Defective—Damages—Rights of Purchaser.

A purchaser, under a binding option on standing timber, may elect to take such title as the vendor may have, and recover damages to the extent that the vendor may be unable to make good title contracted for.

6. Standing Timber—Contracts to Convey—Specific Performance.

A contract to convey standing timber, definite and clear as to its subject matter, time for cutting, parties, etc., having a lawful consideration to support it, may be enforced in equity.

7. Same—Damages—Election.

When a cause of action for specific performance is shown, the plaintiff is not held to an election for damages merely by reason of his having claimed them in his suit, especially when it appears that he has subsequently waived all demand therefor.

(155) APPEAL by plaintiff from *W. R. Allen, J.*, at June Term, 1909, of SAMPSON.

These issues were submitted, without objection:

1. Did the plaintiff, within thirty days from the 12th day of April, 1907, notify the defendant John E. Wilson of its intention to purchase the timber referred to in the complaint? Answer: Yes.

2. If so, was the intention to purchase said timber coupled with the condition that the title was good? Answer: No.

3. Has the plaintiff been at all times ready, able and willing to perform its contract on its part? Answer: Yes.

4. Has the defendant John E. Wilson refused to perform his contract on his part? Answer: Yes.

5. What damage, if any, is the plaintiff entitled to recover? Answer: $100.

(156) Upon the rendition of the verdict the plaintiff tendered the judgment set out in the record, decreeing a specific performance of the contract, which the court declined to sign, and plaintiff excepted.

The court rendered judgment for damages only. Plaintiff excepted and appealed.

The further facts are stated in the opinion.

F. R. Cooper, Fowler & Crumpler and C. M. Faircloth for plaintiff.
Faison & Wright and George E. Butler for defendants.

BROWN, J. On 12 April, 1907, the defendants executed for a nominal consideration a contract, in writing, commonly called an option, whereby the defendants bound themselves to sell for a fixed price and for a definite period the timber growing and to be grown on certain lands described therein. Within the time required by the option the plaintiff gave due notice to defendant of its intention to purchase the timber and of its readiness to comply in all respects with the terms of purchase, thereby converting the written offer of the plaintiffs to sell into a valid and binding contract by an unconditional acceptance of and compliance with its terms.

It was the plaintiff's privilege to accept unconditionally and comply with the terms of the paper-writing by paying the cash upon tender of the deed, and thus secure to itself the right to compel defendants to perform their contract. *Weaver v. Burr,* 3 W. Va., 736; *Hardy v. Ward,* 150 N. C., 391.

Upon the findings of the jury, is plaintiff entitled to have a decree compelling a specific performance of the contract, or is plaintiff remitted to an action for damages for its breach?

If the defendants had withdrawn this option or offer to sell before its unconditional acceptance, there being no valuable consideration for it, they would have exercised an unquestioned right; for without a valuable consideration to support it the agreement would be a mere *nudum pactum,* and might have been withdrawn *at any* time.

Until the proposal is accepted, there can be no contract, as there is nothing by which the proposer can be bound; and unless both are bound, so that an action can be maintained against the other for a breach, neither will be bound. But after unconditional acceptance there is a valuable consideration to support the contract; it then becomes mutual, and the voluntary proposal of one becomes the binding obligation of both. 1 Sugden Vend., 8 Am. Ed., 195, 196; Bishop on Cont., secs. 77-79, 325; Story on Cont., 495; Benj. on Sales, sec. 41.

Contracts of this character, in respect to land, when uncondi- (157)
tionally accepted, have been very generally enforced by courts of equity, and specific performance decreed, as will be seen by adverting to the numerous cases cited in the learned opinion of *Mr. Justice Woods* in *Weaver v. Burr, supra.*

The defendant does not claim that there was any fraud, undue influence, oppression or other wrongful act on the part of the plaintiff in obtaining said contract; neither does he allege any mistake in reference to same.

But it is insisted that the defendants cannot specifically perform the contract, because they have conveyed the timber to the Tilghman Lumber Company. That would undoubtedly bar a decree for specific performance, although subjecting the defendants to damages, but for the fact that, according to the record, said company purchased, if at all, after the complaint was filed in this action, and, although it is not a party to the action, it is bound to the same extent as if it were. *Collingwood v. Brown,* 106 N. C., 365; *Spencer v. Credle,* 102 N. C., 78; *Todd v. Outlaw,* 79 N. C., 235; *Badger v. Daniel,* 77 N. C., 251.

Not only has a formal *lis pendens* been filed in this case, but the complaint contains a complete description of the property which is situated in the county where the action was commenced and is pending. This pleading refers to the registered option, as well as contains a full statement of the facts. It is itself notice to the world of the plaintiff's claim. The Tilghman company purchased after the filing of the complaint, and takes subject to any decree that may be made in this case. *Morgan v. Bostic,* 132 N. C., 751; *Baird v. Baird,* 62 N. C., 317; *Dancy v. Duncan,* 96 N. C., 111.

It is further contended that the defendants cannot make a good title to the timber, independent of the conveyance to the Tilghman company, and for that reason cannot be made to perform the contract.

This might avail the plaintiff if it was resisting the performance on its part, but it cannot avail these defendants, for it is well settled that, though the vendor is unable to convey the title called for by the contract, the purchaser may elect to take what the vendor can give him and hold the vendor answerable in damages as to the rest. *Kores v. Covell,* 180 Mass., 206; *Corbett v. Shulte,* 119 Mich., 249; 29 A. & E., 621, and cases cited. In this case the plaintiff has elected not only to take such title as the defendants can convey by their deed, but also to waive and discharge all claim for damages arising from a partial performance of the

(158) contract only.

The next objection urged is that the subject-matter is but growing timber and not the body of the land, and that equity will not require specific performance of that kind of contract, but will award damages in lieu thereof.

Some color is given to that position by the cases of *Paddock v. Davenport,* 107 N. C., 711, and *Bomer v. Canady,* 79 Miss., 223. But we find, upon a critical examination of the cases, that neither of them sustains the contention. The contract in the first-cited case provided for the sale

of merchantable ash, poplar and cherry trees, at the price of fifty cents and one dollar per tree, to be immediately removed. The refusal to decree specific performance is based upon the temporary character of the contract and because the breach is easily compensable in damages.

In the other case the contract required the defendant to saw up the timber into lumber and ship it to complainants. The court held that it would not specifically enforce a contract to cut trees from land and saw them into lumber, "if the contract be indefinite and uncertain as to the trees to be cut."

The contract we are asked to specifically enforce differs materially from those we have mentioned. The instrument defines with accuracy the land upon which the timber is growing—describes it as standing timber, ten inches in diameter, and such as may attain that size when cut, and gives ten years within which to cut and remove it. The price to be paid, as well as time of payment, is clearly stated.

The contract is definite and certain as to its subject-matter, its stipulations, its purposes, its parties and the circumstances under which it was made. Its meaning is plain and its various provisions carefully and clearly stated.

There is a valuable consideration; the agreement is mutual. Specific performance is not only entirely practicable, but is necessary, in order to give the plaintiff the full benefit of the contract, and there is nothing inequitable in its enforcement.

In short, the contract has every requisite which is usually regarded as necessary to authorize a court of equity to compel specific performance. Pomeroy Eq., secs. 1400 to 1505.

Then, again, the contract does not deal with personal property. It plainly savors of the realty.

Growing trees are often, especially in the older cases, regarded as a part of the land, and the sale thereof as a sale of an interest in land. 28 A. & E., 537, and cases cited.

In this State growing trees have ever been regarded as part of the realty, and deeds and contracts concerning them are governed by the laws applicable to land. *Bunch v. Lumber Co.,* 134 N. C., 116; *Hawkins v. Lumber Co.,* 139 N. C., 162; *Mizell v. Burnett,* 49 N. C., 249.

It is finally contended that the plaintiff, by his action, has (159) elected to proceed for damages in lieu of specific performance.

The position is hardly tenable. The complaint sets forth a cause of action and asks for specific performance.

The plaintiff had a right to ask for damages, and they could have been awarded in this action in case the court refused to grant the principal relief.

As the plaintiff waives all damages, even for delay in performing the

contract, the exceptions to the ruling of the court upon that issue need not be considered.

Upon a review of the record, we are of opinion that, upon the pleadings, proofs and responses to the issues, the plaintiff is entitled to the judgment tendered by its counsel.

The cause is remanded, with direction to enter judgment accordingly.

Reversed.

Cited: Woodbury v. King, 152 N. C., 680; *Ward v. Albertson,* 165 N. C., 221; *Flowe v. Hartwick,* 167 N. C., 452; *Williams v. Lumber Co.,* 172 N. C., 302.

BRYANT TIMBER COMPANY v. J. E. WILSON ET AL.

(Filed 20 October, 1909.)

For digest, see same case next above.

APPEAL by plaintiff from *W. R. Allen, J.,* at June Term, 1909, of SAMPSON.

F. R. Cooper, Fowler & Crumpler and C. M. Faircloth for plaintiff.
Faison & Wright and George E. Butler for defendants.

BROWN, J. This appeal presents identically the same questions discussed in the opinion in the case between same plaintiff and defendants at this term. For the reasons there given, the cause is remanded, with direction to enter judgment as tendered by plaintiff.

Reversed.

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(160)

JAMES MARSH v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 October, 1909.)

1. **Judgments of Other States—Estoppel.**

By virtue of the Constitution of the United States and Acts of Congress in pursuance thereof, the judgments of the courts of other States are put upon the same footing as domestic judgments. Therefore, a judgment of such other courts, standing unreversed, in the absence of fraud or lack of jurisdiction, bars a recovery of the same cause of action subsequently brought in the courts of this State.

2. Judgments of Other States—Pleadings—Demurrer—Merits—Estoppel.

A general demurrer to the merits of the cause of action alleged in the complaint is an admission of all matters of fact well pleaded, and a judgment of a court of competent jurisdiction of another State sustaining such a demurrer, in the absence of fraud, will bar recovery for the same cause of action brought in the courts of this State.

3. Same—Additional Allegations.

When a former judgment of a court, standing unimpeached, sustaining a demurrer to a complaint, is pleaded in bar of recovery, and it appears that every phase and essential feature of the controversy has been set out, that the cause and the parties are the same, a position that certain material facts stated in the pending action were not set out in the former one, cannot be sustained.

APPEAL from *W. J. Adams, J.,* at February Term, 1909, of CUMBERLAND.

It appeared in evidence that, on or about 28 May, 1904, the plaintiff, with other hands, was engaged in constructing a depot for defendant company at Nocatee, in De Soto County, Florida, either directly or under a contractor employed for the purpose; that the old depot building, situate near the new one, was a structure placed on pillars several feet above the ground, and the workmen employed and engaged as aforesaid kept their tools under the old building, and were accustomed at the noon interval to go under the old building to eat their midday meal; that the space under the old building was the only place near available for the purpose for which it was used by the workmen, and same was so used with the knowledge and consent of the defendant company; that on the occasion in question there was a box car standing on the railroad side track, and a gangplank left by defendant's agent and employee, extending from this car to the platform, and while plaintiff and the other hands were under the old building at the noon hour, and there with the consent and knowledge of defendant company, that said defendant, through its agents and employees, negligently backed (161) a train against the box car on the siding and continued to move the car backwards, and the gangplank which was resting upon it, until said gangplank became in some way wedged or jammed between the car and the platform, chiefly by reason of the position of a signal post standing in the space, and in this way the old depot building was pushed from the pillars and caused to fall on plaintiff, doing him serious and permanent injury; that soon thereafter, to wit, in December, 1904, plaintiff instituted an action against the defendant company in the Circuit Court of the Sixth Judicial Circuit, De Soto County, Florida, a court having jurisdiction of the parties and the cause, and filed his complaint therein, stating the facts of the occurrence and demanding

damages in the sum of $20,000 for injuries caused by "the gross negligence and carelessness on the part of defendant's agents, servants and employees." To the complaint filed, the defendant company interposed a demurrer, and, the demurrer having been sustained, the plaintiff, by leave of court, filed an amended complaint, and a demurrer to the amended complaint was sustained, with further leave to amend, and like action was taken on a second and third amendment; the demurrers to the first, second and third amended complaints being expressly to the merits of plaintiff's cause of action; the judgment of the Circuit Court of Florida, sustaining the demurrer to the third amended complaint, being as follows:

"The above matter coming on to be heard upon the demurrer to the third amended declaration, the same having been set for argument by the plaintiff, and the court being of the opinion that the said demurrer should be sustained and that judgment thereon be rendered for the defendant, it is thereupon, upon consideration thereof, ordered and adjudged that the said demurrer be sustained and that the defendant do go hence without day, and that the defendant do have and recover from the plaintiff its cost in its behalf expended."

So far as appears, there was no exception noted nor appeal taken from this judgment; and afterwards, to wit, in May, 1906, plaintiff instituted the present action for the alleged injury in Superior Court of Cumberland County, and, having filed his complaint, the defendant interposed a demurrer, and, this having been overruled, the defendant answered, denying the allegations of negligence, and in apt terms pleading the judgment rendered and in force in the Florida Circuit Court in bar of further proceedings against it. On issues submitted, addressed to the question, the court held that the proceedings and judgment in the

(162) Florida court, if established as alleged, would operate as a bar to any further prosecution of plaintiff's demand, and charged the jury, if they believed the evidence, they would answer the issue in favor of the defendant.

Verdict for defendant; judgment on verdict, and plaintiff excepted and appealed.

H. McD. Robinson, Sinclair & Dye, Terry Lyon and Neill C. Marsh for plaintiff.

Rose & Rose for defendant.

HOKE, J., after stating the case: There is no error in the disposition made of this case in the court below. As applied to domestic judgments, it is a principle universally recognized that when a court has jurisdiction of a cause and the parties, and on complaint filed, a judgment has

been entered sustaining a general demurrer to the merits, such judgment, while it stands unreversed and unassailed, is conclusive upon the parties and will bar any other or further action for the same cause. *Willoughby v. Stevens,* 132 N. C., 254; *Johnston v. Pate,* 90 N. C., 334; *Alley v. Nott,* 111 U. S., 472; *Gould v. R. R.,* 91 U. S., 526. And in Miller *v. Leach,* 95 N. C., 229, and in other decisions we have held—and this ruling, too, is in accordance with accepted doctrine—"that, by virtue of the Constitution of the United States, and acts of Congress in pursuance thereof, the judgments of other States are put upon the same footing as domestic judgments. They are conclusive of all questions involved in them, except fraud in their procurement, and whether the parties were properly brought before the court."

As far as appears, the judgment of the Florida court relied on by defendant stands unreversed; there is no suggestion either of fraud or lack of jurisdiction, and, under the authorities cited, the plaintiff is barred of recovery on the cause of action set forth in his complaint, if it be conceded that a good cause of action is stated.

It is contended on the part of the appellants that the law favors trials on the merits, and "that a former judgment will not operate as a bar to a subsequent suit upon the same cause of action unless the proceedings and judgment in the first case involved an investigation (or afforded full legal opportunity for an investigation) and determination of the merits of the suit. Or, as otherwise expressed, the judgment must be upon the merits in a competent action, the plaintiff having sued in his proper character and the pleadings having been correct." This may be taken as a very correct statement of a general principle, but, on the facts presented, its application is against appellant. The very question decided in the cases referred to is that a hearing on (163) a general demurrer to the merits "affords this legal opportunity for investigation." And a judgment sustaining such demurrer, while it stands unreversed and unquestioned, is as final and conclusive on the facts thereby admitted as if such facts had been considered by a jury and established by its verdict.

Thus, in *Johnston v. Pate, supra,* it was held: "That a judgment rendered upon a demurrer is as conclusive by way of estoppel as a verdict finding the facts confessed would have been," and *Chief Justice Smith,* delivering the opinion, said:

"1. The rule is well settled that demurrer to the merits of a complaint or other pleading overruled and followed by a final judgment is decisive of all the material facts charged and of the rights dependent upon them.

"'A judgment upon demurrer,' says Mr. Freeman, in his work on Judgments, sec. 267, 'may be a judgment upon the merits. If so, its effect is as conclusive as though the facts set forth in the complaint were

admitted by the parties or established by evidence submitted to the jury. No subsequent action can be maintained by the plaintiff if the judgment be against him on the same facts stated in the former complaint.'

" 'A judgment rendered upon a demurrer,' in the language of the court, in *Mispel v. Laparte,* 74 Ill., 306, 'is equally conclusive (by way of estoppel) of the facts confessed by the demurrer as a verdict finding the same facts would have been, since they are established, as well in the former case as in the other; and facts thus established can never afterwards be contested between the same parties or those in privity with them.'

"A general demurrer confesses all matters of fact well pleaded. Mansel Demr., 94; 24 Law Lib., 63; Big. Est., 33; Gould on Plead., pp. 43, 44; *Wilson v. Perry,* 24 Ind., 156."

It is further urged that some material facts are stated in the complaint as filed in the suit in this State which did not appear in the Florida pleadings, but we do not think this position can be sustained. In the pleadings filed in the Circuit Court of Florida the plaintiff sets forth with great fullness of detail every phase and essential feature of the occurrence. The cause and the parties are the same. The Florida court had jurisdiction of both, and the ruling of his Honor below, holding the judgment of that court an estoppel in bar of plaintiff's demand, must be

Affirmed.

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CHARLES WALKER ET AL. v. JOSEPH F. WALKER ET AL.

(Filed 20 October, 1909.)

1. Partition—Heirs at Law—Marriage—Declarations—Evidence—Harmless Error.

When, in proceedings for partition of lands brought by petitioners alleging title in common with defendants, as heirs at law of A., children by his marriage with E., an issue is submitted as to whether the petitioners were the children of A. and E., testimony of a witness as to the declarations of E., the mother, that she was never married to A. is competent evidence upon the question of the married relationship, and tenancy in common (*Spaugh v. Hartman,* 150 N. C., 454, cited and approved); and in this case the admitted declarations of E. expressing a legal opinion of her rights and the rights of her children, were harmless error.

2. Issues—Determination of Controversy—Other Issues—Harmless Error.

An issue submitted that does not prejudice the rights of the complaining party, though unnecessary, the whole controversy being correctly determined upon another issue, is harmless error.

3. Slaves—Marriage—Instructions—Legitimate Children.

Upon the question of inheritance by the children of slaves, dependent upon what constituted the married relationship of slaves before their emancipation, it was not error of the trial judge to charge that the jury were to ascertain from the evidence whether the claimants were the children of A. and E., and not whether they were the legitimate children, especially when more definite instructions were not requested.

4. Instructions—Contentions.

It is the duty of the trial judge to call the contentions of the parties to the attention of the jury when supported by the evidence, and his properly doing so can afford no just ground of exception.

5. Instructions—Admonitions.

Impartial admonitions of the trial judge to the jury as to the importance of the case to the parties, is not just ground for exceptions.

APPEAL from *W. R. Allen, J.*, at May Term, 1909, of NEW HANOVER.

This is a proceeding for partition, instituted before the clerk of the Superior Court of New Hanover and, upon issues being raised on the pleadings, transferred by him to the Court at term.

The plaintiff alleged that Arnold Walker, a slave, died in 1864, seized and possessed of the land sought to be partitioned, leaving as his heirs at law the plaintiffs and defendants, whose several interests are set forth, and demanding a sale for partition. The defendants denied all the material allegations of the petition; pleaded sole seizin and (165) title by open and adverse possession for more than twenty years; denied that plaintiffs were either the heirs at law or children of Arnold Walker; denied that the relationship of husband and wife existed between said Arnold and Clara Hoskins, the ancestors of plaintiffs; and denied that Arnold, being a slave, was capable of owning land. His Honor submitted the following issues to the jury:

1. Were Charles, Emma and Sophie children of Arnold and Clara?
2. If so, were Arnold Walker and Clara living together as man and wife at the time of the birth of said children?
3. Have the defendants been in the adverse possession of the land in controversy for twenty years prior to the commencement of this action?

The jury answered the first issue No, and, under his Honor's instructions, did not answer the other issues. His Honor rendered judgment for defendants and against plaintiffs, adjudging they were not tenants in common with defendants, and for costs. The plaintiffs appealed.

John D. Bellamy and R. G. Grady for plaintiffs.
Ricaud & Empie for defendants.

MANNING, J. The plaintiffs, in deraigning the title of the alleged common ancestor, Arnold Walker, offered a deed from Alec MacRae to Peter M. Walker, dated 28 July, 1854, the *habendum* of which is as follows: "To have and to hold the above-bargained land and premises to him, the said Peter M. Walker, and his heirs, forever, in trust, to permit said Arnold Walker to have and occupy and enjoy said lots, and his children after him, or such of them as he shall designate, forever." The deed described the land involved in this controversy, and the Arnold mentioned was Arnold Walker, the alleged common ancestor. The defendant objected to the deed, upon the ground that, as Arnold Walker was a slave, he was incapable of holding either the legal or equitable estate in lands. His Honor admitted the deed. In the view we take of the other questions decisive of this appeal, we do not deem it necessary or advisable to pass upon this question, which was so ably argued before us by counsel for defendants. The defendants did not appeal. There was much testimony offered at the trial by plaintiffs tending to show that the Charles, Emma, and Sophie mentioned in the first issue were the children of Arnold Walker by Clara Hoskins, and that the said Arnold and

(166) Clara sustained the relation of man and wife and of a possession common to both plaintiffs and defendants. The defendants also offered much testimony controverting the truth of Arnold's paternity of Charles, Emma and Sophie, and of the relation of husband and wife between Arnold and Clara at the time of the birth of Charles, Emma and Sophie, and tending to show the adverse possession of the defendants and their ancestors under a claim of right for more than twenty years. During the trial the defendants offered Mrs. Carolina Bloom as a witness, who testified that she knew Clara Hoskins (the ancestress of plaintiffs) and had a conversation with her, and the following question was asked her, viz.: "State to his Honor and the jury what she told you about the property." She answered: "I could tell you nothing, except she said she had no right to property. Her children could not get anything from property; that she was never married to Arnold." The plaintiffs objected to both question and answer, and, being overruled, excepted. This constitutes the first exception. This testimony was offered by defendants, after much evidence from the plaintiffs had been received tending to establish the paternity of Clara's children, Charles, Emma and Sophie, and also to establish the living together of Arnold and Clara as man and wife. In *Spaugh v. Hartman,* 150 N. C., 454, this Court said: "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. Reddick,* 79 N. C., 291; *Weaver v. Cryer,* 12 N. C., 337." This case, it would seem, is decisive of the correctness of his Honor's ruling admitting the testimony of Mrs. Bloom, giving the declarations of Clara as to her relations to Arnold. That part of Clara's declarations in which she expresses an opinion of her legal rights and the legal rights of her children in the property was incompetent, but it is inconceivable how her opinion of her legal rights could have been of the slightest influence upon the jury, directed by an able judge, in determining any issue submitted to them, or how the plaintiffs were prejudiced thereby. Her declarations as to her relations with Arnold were competent, under the authority of the case above cited. Besides, the issue which this evidence tended to establish in favor of the defendants was not answered by the jury.

The plaintiffs' second assignment of error is the submission of the second issue. This issue was not answered by the jury, the case being determined by the answer to the first issue. This was the case in *Rudisil v. Whitener,* 149 N. C., 439, the first head note of that case being: "An issue submitted that does not prejudice the rights of the (167) complaining party, though unnecessary, the whole controversy being correctly determined upon another issue, is harmless error." *Hayes v. R. R.,* 141 N. C., 195; *Cumming v. Barber,* 99 N. C., 332.

The complaint, or petition, contained the averment that Clara Hoskins was the second wife of Arnold Walker. The answer denied this, and the determination of this was presented by the second issue complained of. However, the jury, by its answer to the first issue against the plaintiffs, determined the controversy; and while it would not have been error if his Honor had not submitted this issue, we cannot see that the plaintiffs were prejudiced thereby.

The third assignment of error is made to "the failure of his Honor to charge the jury as to what constituted relationship of man and wife among slaves prior to the emancipation of the colored race." His Honor instructed the jury that they were to ascertain from the evidence whether Charles, Emma and Sophie were the children of Arnold and Clara—not whether they were the legitimate children. We do not see how the question presented by the first issue could have been more pointedly and concisely stated. No amount of elaboration could have elucidated it. Besides, the plaintiffs submitted no prayer for more definite instructions, and, having failed to do so, it has been frequently held by this Court they cannot complain, unless the charge given is itself erroneous. *Craft v. Timber Co.,* 132 N. C., 151; *Kendrick v. Dellinger,* 117 N. C., 491; *Nelson v. Tobacco Co.,* 144 N. C., 418; and cases cited; Pell's Rev. 1908, sec. 538.

We do not think this assignment of error can be sustained. The fifth and eighth assignments of error are governed by the cases above cited, and must be disposed of in the same way. The fourth assignment of error was earnestly pressed before us, but a careful and critical examination of the able charge of his Honor satisfies us that the plaintiffs have mistaken the placing and setting of that part of the charge embraced in this assignment of error. His Honor was in this particular stating the contentions of the defendants, and there was evidence offered at the trial supporting this contention. It has been frequently decided by this Court that it is the duty of the trial judge to call the attention of the jury to those contentions of the parties supported by evidence. The cases will be found collected in 1 Pell Rev., 1908, sec. 353. His Honor's entire charge, with all the evidence offered at the trial, is set out in the record, and it seems to us, after a careful examination, that every contention that could reasonably have been made, upon the evidence by both
(168) the plaintiffs and defendants, is clearly and carefully stated by his Honor. We cannot, therefore, sustain the fourth assignment of error.

The sixth assignment of error relates exclusively to the third issue, and, as that was not answered by the jury, it has become unnecessary to pass upon that. It is not seen that by this any harm came to the appellants, and we overrule this assignment.

The seventh assignment of error is to an excerpt from that part of his Honor's charge impressing upon the jury the importance of the case to the parties, and admonitions to carefully and fully consider all the evidence and, after so doing, determine their verdict. His Honor forcefully but impartially directed the attention of the jury to the importance of the case to the plaintiffs and defendants, that it might receive from the jury in their deliberations the more careful consideration. We can see no error in the charge of his Honor to the jury in this particular. After a careful examination of the plaintiffs' exceptions, we find

No error.

Cited: *S. v. Grainger,* 157 N. C., 633; *Hall v. Fleming,* 174 N. C., 170.

R. L. LEWIS v. OLIVER E. GAY ET AL.

(Filed 20 October, 1909.)

1. **Lands—Contract to Convey—Insufficient Deed—Tender of Sufficient Deed, When in Time.**

In actions where the remedy by specific performance is indicated, if the vendor of lands can make a good and sufficient title at any time before final decree, it is sufficient; and when the vendee, having made a partial payment on the purchase price, finds that the vendor's wife is not of age, and refuses to accept deed on that account, and brings suit to recover the partial payment he had made, a tender by defendant and his wife, the latter then being of age, of a good and sufficient deed, during the course of the proceedings will be held a sufficient compliance with the contract.

2. **Same—Agreement to Rescind—Evidence—Questions for Jury.**

In an action to recover a partial payment made on an executory contract for the sale of lands, the deed being refused by the vendee on discovering that vendor's wife, signing the deed, was not of age, and thereafter pending the proceedings, vendee refused to accept a good and sufficient deed from the vendor and his wife, the latter then being of age, it is competent to show that by parol or by matter *in pais*, the parties had agreed to rescind the contract, and under conflicting evidence the question thus raised should have been submitted to the jury.

3. **Lands—Contract to Convey—Agreement to Rescind—Purchase Price—Agreement Implied.**

When parties to a contract to convey lands mutually agree to rescind the same, in the absence of any stipulation to the contrary the law implies a promise to repay such amounts as may have been paid by the vendee on the purchase money.

APPEAL from *O. H. Allen, J.*, at March Term, 1909, of EDGE- (169)
COMBE.

At the close of the plaintiff's evidence there was a motion to nonsuit made by defendant, and like motion was made at the close of the entire evidence. The last motion having been allowed, and judgment of nonsuit entered, plaintiff excepted and appealed.

The facts are stated in the opinion of the Court.

Austin & Grantham for plaintiff.
Bunn & Spruill and T. T. Thorne for defendant.

HOKE, J. There was evidence tending to show that in December, 1906, plaintiff bought of defendant O. E. Gay a house and lot in Rocky Mount, N. C., at the contract price of $5,500, and shortly thereafter, in January, 1907, paid defendant $1,000 on the purchase price. Thereupon defendant

signed a written receipt for the money, giving the substance of the trade and reciting that a deed for the property from O. E. Gay and wife, Jessie Gay, had been left with Frank P. Spruill, to be delivered to plaintiff in case the money was paid on or before 9 February, 1907. Some time after the payment of the $1,000, plaintiff discovered that defendant's wife, Jessie E. Gay, was under twenty-one years of age when she signed the deed. Plaintiff demanded that, on this account, some security or indemnity be given before the full payment of the purchase money, and this demand was refused.

The complaint further alleged, and there was evidence on the part of plaintiff tending to show, that some time after the time fixed for the payment of the money and delivery of the deed, and while the parties were still contending as to their respective rights under the contract, they had agreed to rescind the trade, and the deed was obtained from Spruill either by defendant or John Gay, who was acting for defendant throughout the transaction, and that plaintiff agreed to this rescission of the contract under an express contract that plaintiff was to be repaid the $1,000; and that, after this rescission, defendant O. E. Gay had mortgaged the property and same was now encumbered to the amount of $1,500. Defendant having refused to pay, the action was instituted, as stated, to recover the $1,000 paid on the purchase price.

(170) At the trial term Mrs. Jessie Gay, wife of O. E. Gay, on motion, was allowed to become party defendant, and the two defendants tendered and filed a deed to plaintiff for the house and lot, properly executed and bearing date 27 March, 1909. It was agreed that at this time said Jessie Gay, defendant, was more than twenty-one years of age, and the two defendants also filed an amended joint answer, authorizing the plaintiff, out of the purchase money remaining due, to pay off and discharge the liens placed on the property by O. E. Gay. Upon this statement plaintiff contended that he could rightfully abandon the contract and recover the amount paid on the purchase price:

1. Because, at the time specified, defendant was unable to make plaintiff a good deed, *inter partes,* by reason of the infancy of his wife.

2. Because of the express agreement between them to rescind the trade.

We are not called on to determine how far the infancy of the *feme* defendant might have affected plaintiff's obligation under the contract, if same had continued, or whether the case of *Farthing v. Rochelle,* 131 N. C., 563, cited by defendant, applies to the present case; for the reason that in actions where the remedy by specific performance is indicated, it is very generally held that if a vendor can make a good title at any time before final decree, it will be considered sufficient. *McNeil v. Fuller,* 121 N. C., 209; *Hobson v. Buchanan,* 96 N. C., 444. And, the *feme* defendant being now of age, and she and her husband having tendered

a good and sufficient deed, it would seem, on the facts as they are now presented, that the first position of plaintiff is not well taken. But, on the second ground, we are of opinion that the plaintiff was entitled to have the question submitted to a jury for decision, and that the order directing a nonsuit must be set aside.

As said by *Walker, J.*, delivering the opinion in *May v. Getty,* 140 N. C., at p. 316: "It is now well settled that parties to a written contract may by parol rescind, or by matter *in pais* abandon the same." Citing *Faw v. Whittington,* 72 N. C., 321; *Taylor v. Taylor,* 112 N. C., 27; *Holden v. Purefoy,* 108 N. C., 163; *Riley v. Jordan,* 75 N. C., 180; *Gorrell v. Alspaugh,* 120 N. C., 362."

And it is well established that when parties to an executory contract of this character mutually agree to rescind the same, in the absence of any stipulation to the contrary, the law implies a promise to repay such amount as may have been paid upon the purchase money. This is so by authority and under the general principles upon which the action of *indebitatus assumpsit* is properly made to rest. *Beaman v. Simmons,* 76 N. C., 42. At this stage of the action we do not deem it (171) desirable to set out or dwell upon the testimony tending to sustain the plaintiff in this aspect of his claim, but consider it best to say, in general terms, that we have carefully examined the evidence as it appears in the record, and that there is testimony on the part of the plaintiff tending to show that the parties mutually agreed to rescind the trade; and if this view should be accepted by the jury, the claim of the plaintiff would prevail.

For the reasons indicated, we are of opinion that the order of nonsuit should be set aside and a trial had of the matters at issue between the parties.

Reversed.

HENDERSON WATER COMPANY v. TRUSTEES OF HENDERSON GRADED SCHOOLS.

(Filed 20 October, 1909.)

1. Cities and Towns—Water Supply—Powers Implied—Expressed Powers.

The expense of supplying water by a city or town is a necessary one, and implied in its general grant of powers unless expressly forbidden; and when the charter prescribes the particular mode in which this power may be exercised, it must be followed exclusively.

2. Cities and Towns—Water Supply—Franchise—Contract—Executed—Free Supply—Public Schools.

A water company operating under a franchise-contract from a city or town, and receiving the benefits and advantage arising thereunder, may

not repudiate the duty of supplying water free to public schools, etc., which it had expressly contracted to do in accepting the franchise containing such provision, and collect for water it had furnished them upon a *quantum meruit* or otherwise. The effect of the Revisal, sec. 2916, upon the question of the life of the contract, does not arise in the determination of this case.

3. **Same—Special Trustees—Ultra Vires.**

When a town has been given the statutory power to provide for a water supply and by statute a special board of trustees for its public schools has been created, a water company, operating under an accepted franchise-contract providing, among other things, that it will supply water without charge to the public schools of the town, cannot enjoy the privileges arising to it under its contract and avail itself of the plea that the town was acting *ultra vires*, and repudiate its obligation to thus furnish the water by endeavoring to collect for the water theretofore furnished.

4. **Same.**

A city or town having the power to provide for its water supply, may provide with a water company for the free use of water for its public schools under the statutory control of a special board of school trustees, when by so doing it does not interfere with its own free supply of water or impair the ability of the water company to perform its public duties.

5. **Cities and Towns—Franchise—Contract—Contemplation of Parties.**

A water company in accepting a franchise-contract of forty years duration from a city, providing for the extension of the plant, under which the company was to furnish water free for the public schools, etc., has in its contemplation at the time it accepted the contract, the increase in the supply of free water to be furnished in accordance with the growth of the town, as well as the increase of value of the franchise.

6. **Cities and Towns—Franchise—Contracts—Free Water Supply—Public Schools—Town Limits—Outside Attendants.**

The obligation of a water company under its franchise-contract to furnish water without charge to the public schools of a town within its limits, is with regard to the public schools as units, and though some of those children residing beyond the town limits will attend them; and for such no charge for water may be made upon any method of calculation or by actual count.

(172) APPEAL by plaintiff from *O. H. Allen, J.*, at May Term, 1909, of VANCE.

PLAINTIFF'S APPEAL.

This was a controversy without action. The pertinent facts, out of which this controversy arose, are as follows: The town of Henderson, a municipal corporation, granted, in 1892, to the assignors of plaintiff a franchise for forty years to supply water for fire purposes and other public uses, and to its inhabitants, at a fixed maximum rate of charges, and prescribed the standard of efficiency, granting to said assignors of

plaintiff the right to lay their pipes and mains under the streets and other public ways in the town, reserving the right to compel the plaintiff to extend its mains and pipes as the public interest demanded, and fixed the rental to be paid by the town for the use of the water for fire purposes at so much per hydrant, and containing a provision for the town to purchase, at stated intervals and at a price to be determined in a prescribed way. The particular section of the franchise-contract giving occasion to this controversy provides as follows:

"Sec. 9. Water shall be furnished free of charge to five (5) drinking fountains, with openings for man and beast; . . . also for churches, public schools, town offices, market houses for city use and all other town offices now in use or to be erected." (173)

The General Assembly, by chapter 91, Private Laws 1901, established the Henderson Township Graded School District and incorporated the defendant, giving to it the entire charge of the public schools and public school property in said district. This act was ratified, as required by it, on 6 May, 1901. The territory within the jurisdiction and control of the defendant embraced the town of Henderson and that part of the township lying beyond its corporate limits. Two frame public school buildings were erected by the defendant, under that act, in the corporate limits of the town and furnished with water by the plaintiff free of charge. Under the provisions of chapter 56, Private Laws 1905, an election was held in said township to authorize the issue of school bonds to the amount of $20,000. With the proceeds of the bonds the defendant has erected two large brick buildings in the corporate limits of the town and six buildings outside the town limits, and discontinued the use of the two frame buildings. Under section 6, chapter 820, Laws 1907, the public schools in the town have been declared public high schools, and it is competent, under said section, for the defendant and the County Board of Education of Vance to enter into an agreement to permit children and teachers of public schools of the county to enter certain grades in said schools. It would seem that some such agreement has been made and some children from beyond the corporate limits do attend the schools in the town. The public school census shows 3,084 children within school age in the township of Henderson, of whom about two-thirds live in the town. There has been no census of school children in the town. There is not now, nor ever has been, any provision of law for any school under the jurisdiction of the board of commissioners of the town of Henderson. The plaintiff has been furnishing the public schools in the town with water (no demand being made to furnish the schools outside the town), the schools being provided with lavatories, closets and drinking fountains, and by its meters ascertained that the and prescribed the standard of efficiency, grantiny to said assiynors of

December, 1908, amounted, at its regular rate, to $693.40, and the water used at the public school for colored people from 1 September, 1908, to 31 December, 1908, amounted, at the same rate, to $49.37. The plaintiff presented bills to defendant for these amounts and demanded payment; the defendant refused to pay, and this action was begun.

His Honor rendered the following judgment: "Now, after consideration thereof, and of the argument of counsel, the court is of opinion that, under its contract with the town of Henderson, the plaintiff is (174) required to furnish water free for use of the public schools maintained in said town for pupils residing in the corporate limits of the town of Henderson, but not for use of pupils patronizing said school in the said town, but residing outside of the corporate limits of said town of Henderson; and it appearing from the case agreed that at this time about one-third of the pupils in the graded school district entitled to attend said schools reside outside of the town of Henderson, and that at this time about two-thirds of said pupils reside in the corporate limits of the town of Henderson, it is now by the court ordered and adjudged that the plaintiff recover of the defendant, the Board of Trustees of Henderson Graded School, and they are commanded to pay the same out of the revenues and income from taxation and other sources from which said schools are maintained, the sum of two hundred and forty-seven and 59-100 dollars ($247.59), with interest thereon from the first day of January, 1909, till paid, and the costs of this controversy, the same being amount in full due by defendant for use of water to 1 January, 1909. And it is further adjudged that the plaintiff recover of the defendant the further sum of one-third of the amount for water used by defendant in said schools, at the regular price or rate for which water is provided to others, from 1 January, 1909, to 1 June, 1909, and said defendant is commanded to pay the same out of the revenues and income from taxation and other sources from which said schools are maintained, as heretofore set out. And it is further ordered and adjudged that in the future use of said water, after the first of June, 1909, which plaintiff is required to furnish to defendant, shall pay therefor at the usual or such rates as may be agreed on for all pupils patronizing said schools who shall not be residents of the town of Henderson, in proportion as such number shall bear to the whole number of pupils attending such schools; such number to be ascertained by an actual count by defendant, but such count to be subject to revision by the judge of the Superior Court presiding at any term of the court held in Vance County, in case of disagreement with plaintiff."

From which judgment both plaintiff and defendant appealed.

J. H. Bridgers and T. T. Hicks for plaintiff.
A. C. Zollicoffer for defendant.

MANNING, J., after stating the facts: The plaintiff contended that it was not bound by the franchise-contract with the town of Henderson to furnish any water free of charge to the public schools under the control and management of the defendant, the Board of Trustees of the Henderson Graded Schools. It based its contention before us (175) upon the following grounds: (1) That the stipulation in the franchise-contract, to wit, "Water shall be furnished free of charge, etc.; also for churches, public schools," was invalid, because *ultra vires* of the town of Henderson. (2) That those words can embrace only public schools established and maintained by the corporation, the town of Henderson, and do not include public schools within the corporate limits not so established and maintained; and the schools controlled by the defendant, a separate and distinct corporate body, are not within this meaning. (3) That the territorial area for educational purposes under the control of the defendant is much larger than the corporate limits of the town of Henderson, and that, although it is sought to compel it to furnish water free only to the public schools within the corporate limits of the town of Henderson, yet persons other than those children living within said corporate limits have a legal right to attend these schools in the corporate limits of the town, and do attend them.

By section 24, chapter 241, Private Laws 1889, the Board of Commissioners of Henderson are authorized, among other powers specified, "to provide water and lights for said town, and to contract for the same." The plaintiff does not seek to annul the entire contract with the town, but questions the validity of the stipulation for free water to the public schools. The determination of this question necessarily involves the validity of the contract and the extent of its obligatory force; for if the town was without power to make the contract and it was void, the entire contract would be a nullity; and if the whole falls, each stipulation must likewise fall. Contrary to the decisions of this Court in the earlier cases in which this question was considered, it is now established by the later decisions that the supplying of water and lights by a city or town is a "necessary expense," and that this power, even in the absence of express grant, is a power necessarily and reasonably implied in its general grant of powers, and can be exercised by its governing authorities, unless expressly forbidden by the provisions of its charter. If the charter prescribes the particular mode in which the power can be exercised, that mode is exclusive and must be followed. *Fawcett v. Mt. Airy,* 134 N. C., 125, overruling *Mayo v. Comrs.,* 122 N. C., 5; *Davis v. Fremont,* 135 N. C., 538; *Robinson v. Goldsboro,* 135 N. C., 382; *Wadsworth v. Con-*

cord, 133 N. C., 587, overruling *Edgerton v. Water Co.,* 126 N. C., 93; *Smith v. Goldsboro,* 121 N. C., 350; *Gas Co. v. Raleigh,* 75 N. C., 274; *Greensboro v. Scott,* 138 N. C., 181; *Elizabeth City v. Banks,* 150 N. C., 407. But the power, it would seem, is denied to a city to grant a valid franchise to individuals or to a corporation to tear up its streets (176) and lay water and gas pipes thereunder for the *sole* purpose of supplying water or gas to its inhabitants. This is determined by this Court in *Elizabeth City v. Banks, supra.* In that case this Court, in construing the charter of Elizabeth City, said: "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 or lighting the street. 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. *Fawcett 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 the contract 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." The present case is distinguished from *Elizabeth City v. Banks, supra,* not only in the matter noted in the above quotation from that case, for in the present case the plaintiff obliges itself to furnish water for public purposes and uses, but by the further difference of more enlarged powers of the town of Henderson in its charter, and that in that case the contract had not been performed, while in the present case the contract has been executed; the plaintiff has enjoyed its benefits, but seeks to escape its burdens. Even if the franchise-contract was *ultra vires* of the town of Henderson, because its board of commissioners could not, under the power it possessed at the time of entering into it, make a contract for forty years, as suggested in the concurring opinion of *Clark, C. J.,* in *Wadsworth v. Concord, supra,* and as held in *Thrift v. Elizabeth City,* 122 N. C., 31, yet the plaintiff could not recover for the performance of its own obligation for the time the contract had been executed and for the time it had enjoyed the benefits and advantages accruing to it under the contract, contrary to its express stipulation. *Trustees v. Realty Co.,* 134 N. C., 41; *Wadsworth v. Concord, supra,* at p. 599; *Hill v. R. R.,* 143 N. C., 539, at p. 582. To what time the ratification of the contract by the town of Henderson, if the contract has been

ratified, since the enactment of subsection 6 of section 2916, Revisal 1905, has prolonged or will prolong the life of the contract, we will not attempt to determine in the present case, as it is not (177) necessary for the determination of the questions decisive of it.

The validity of the franchise-contract, as far as necessary to be determined in this case, being settled by the cases cited, is the plaintiff obliged by its express stipulation to supply water free of charge to the public schools, and, if so, what public schools? The fact that a compliance with the stipulation was burdensome to the plaintiff can be no reason for changing its relation to it after performance. The purpose of this stipulation was certainly not immoral; it was not *contra bonos mores.* This duty is a continuing duty, imposed, not on the town, but on the plaintiff, and no reason was suggested to us why the plaintiff was not competent to assume it by its own voluntary act. Nor can we see why it should be beyond the scope of the contractual powers of the town, after it had provided for all its own uses, as a public corporation and administering a public trust, to take within its benefits, without additional cost to it, another public corporation whose duties and responsibilities so vitally concern its own growth, good order and even existence. If the plaintiff consented and agreed to it for the consideration furnished at the time by the town, what could vitiate this benefit? Regardless of how this might be determined in an action between other parties, we do not think the plaintiff ought to be permitted to recover as upon a *quantum meruit* for water already furnished under its stipulation for free water. When the ordinance of the town was accepted by the plaintiff, the execution of the contract was complete; by it valuable rights were granted the plaintiff and important duties imposed. An acceptance of those rights is an assumption of those duties. As it is a contract which binds the town not to interfere with those rights, so likewise it is one which binds the plaintiff to the discharge of those duties. *R. R. v. R. R.,* 47 Fed., 21. The public schools and the churches of the town of Henderson are beneficiaries, by express words, under the contract, entitled to free water, and they have such interest in the contract as entitles them to maintain an action for a violation of it, injurious to them. *Jones v. Water Co.,* 135 N. C., 553, and cases cited.

But the plaintiff complains that the town of Henderson furnished the consideration which supports the contract, and that the town could not legally do this for the public schools and churches. How can the plaintiff complain of this? It was entirely competent for it to make this stipulation, unless by its performance it entirely disabled itself to perform its duties to the town. It is in receipt of the consideration from the town, in the enjoyment of the benefits of the contract supported by it. The plaintiff is not the proper party to complain, (178)

in the absence of proof that it has thereby disabled itself to perform its public duties. In *Waterworks v. School District,* 23 Mo. App., 227, and 48 Fed., 523, cited by the able counsel of the plaintiff, the State and Federal courts differed as to the interpretation of the words "public buildings," used in a contract between the plaintiff and the authorities of Kansas City, obliging the plaintiff to furnish, free of charge, water "for all public buildings and offices of the city," the Federal Court holding that these words embraced public school buildings in the city, and the State Court holding *contra.* In those cases the school buildings and the school system were under the control of a different corporation, and the school district was not coterminus with the city limits. In *Water Supply Co. v. Albuquerque,* 9 New Mexico, 441, the plaintiff agreed to furnish 12,000,000 gallons of water to the defendant for "city purposes," and it was held that the supply of water to the public schools of the city, being under the control and management of a distinct and different corporation, was not a "city purpose," within the meaning of the contract, and that action related to future, not past, performance. In the present case the words "public schools" do not admit of any misconception. The plaintiff further contends that the present public schools were not in contemplation of the parties at the time the contract was entered into, and invokes this principle of construction, thus formulated in *Smith v. Kerr,* 108 N. Y., 31; 2 Am. St., 362: "In construing contracts, the court should put itself, as near as may be, in the situation of the parties, and, from a consideration of the surrounding circumstances and the occasion and the apparent object of the parties, determine the meaning and intent of the language used by them in their agreement." At the time the contract was made, the public schools in the town of Henderson were not under the control of the town or maintained by it; they are not now so, and never have been. At that time they were, as now, under the control and management of a separate and distinct body. It does not appear that the town, by its corporate limits, was a distinct and separate public school district; that there were, as now, public schools in the corporate limits of the town. There were then, as now, churches in the town of Henderson, and these the town could not in any way control or manage. It is true the public school buildings were then constructed of wood; they are now structures of brick, larger and more commodious. The parties were entering into contract to continue forty years; and while its purposes were fixed, it was contemplated that conditions would
(179) change; that the town would increase in population, as it has done; that the number of consumers and the amount of water consumed would increase; that new streets would be opened and old streets extended; that, as the town grew, the number of children would increase, and that there would be greater demand for water for those purposes

for which plaintiff stipulated it would furnish free water. The larger the town became, the more valuable became the franchise granted to the plaintiff by the town. The contract provides not only that the town may demand of plaintiff an increase of its pipe lines, but that the plaintiff may voluntarily extend them. The growth of the town in the forty years of life of the contract, and the enlargement and extension of plaintiff's system, entered largely into the contemplation of the parties, and probably controlled and determined the action of each. Shall the plaintiff be permitted to avoid the duties of its contract because a measure of the contemplated growth has been attained? The fact that the defendant—a separate and distinct corporate body—controls the "public schools," and not the governing authorities of the town, is not decisive of the question; this was the fact at the date of the contract. That this fact was not intended by the parties to be decisive will further appear by reading the entire clause in the contract: "Also for churches, public schools, *town* offices, market houses for *city use,* and all other *town* offices, now in use or to be erected." It will be noted the word *town,* or *city,* is used to designate the other buildings coming in the free class, but it is not used for the churches or public schools.

In our opinion, the plaintiff was required by its contract to furnish free of charge, for the time sued for, to the public schools located within the corporate limits of the town of Henderson, and, having performed this obligation, it cannot recover the value of the water so furnished. The fact that other children than those that live in the city limits are permitted to attend these schools we do not think should relieve the plaintiff of its obligation. The power of the Legislature to permit this was known, or ought to have been known, to the plaintiff, and it could by proper words in the contract have restricted and limited its duty and obligation. The schools are public; they are within the corporate limits. The Legislature has seen proper to entrust their management to the defendant, a corporate body, separate and distinct from the town of Henderson, and extended the territorial area of its control. It has located six public schools in the area beyond the corporate limits, which do not demand free water and are not beneficiaries of the contract, and it has located two schools in the town limits; these schools are open to the children who live in the town and to some others living beyond (180) the town limits. A very large majority of the children attending these two schools live within the town limits. This stipulation, while imposing upon the plaintiff the duty to furnish water free of charge, for drinking purposes, for toilet and water-closets in the school buildings, does not, of course, require of the plaintiff to furnish water for sprinkling lawns, yards, play grounds or for bath rooms or bathing pools, but only for the necessary purposes stated above. We are therefore of the

opinion that the plaintiff has nothing to justly complain of in his Honor's judgment. In plaintiff's appeal we find

No error.

BETWEEN THE SAME PARTIES.

DEFENDANT'S APPEAL.

MANNING, J. The facts are set out in the plaintiff's appeal in this case. What we have said in disposing of that appeal indicates our opinion on the defendant's appeal. The defendant appealed because his Honor, upon the agreed facts, required it to pay one-third of the amount of plaintiff's bill for water furnished the two public schools conducted in the corporate limits of the town of Henderson, based upon the proportion of the number of school children living beyond the town limits, to the total number of children within the school territory under control of defendant. We do not think this fact sufficient to relieve the plaintiff; for if the contract be so construed and the words of the stipulation so interpreted, the effect would be to make these schools in the corporate limits, in this relation to the plaintiff, public schools as to all children in the town limits and private schools as to those attending it who live without the corporate limits. The "public schools are the units, and the obligation is to furnish these free water for the necessary purposes," as stated in plaintiff's appeal. This same section of the contract obliges plaintiff to furnish water free of charge for man and beast at the public fountains, but forbids the taking of water from these fountains for private use. Can it be said that plaintiff must furnish water free for man and beast who inhabit the town and can charge for the men and beasts who drink at these fountains, but who live outside of the town, and the amount of charge can be ascertained by numbering those who live beyond the limits and those who live within the limits? The mere suggestion of such a construction contains its answer. The considerations that determine one should determine the other. In the one case the stipulation is to furnish water free to the *public* fountains; in the other, to furnish water free to the *public* schools. In rendering judgment against the defendant there was

Error.

Cited: Hotel Co. v. Red Springs, 157 N. C., 139; *Robinson v. Goldsboro,* 161 N. C., 673; *Bain v. Goldsboro,* 164 N. C., 104.

(181)

COLLIE JOYNER v. EVERETT JOYNER.

(Filed 20 October, 1909.)

1. **Marriage and Divorce—A Mensa—Wife's Separate Property—Improvements by Husband—Equity.**

A husband, from whom a decree of divorce *a mensa et thoro* has been obtained by his wife, because of his misconduct, cannot assert any equitable right or claim for improvements made by him and with his money, on lands conveyed by her to a trustee in trust for her separate use and enjoyment, in contemplation of the marriage, without request or inducement on her part. The decree is the result of his own acts, the improvements were made without suggestion of fraud or inducement on the part of the wife, and forms no basis for any equitable relief in his favor.

2. **Marriage and Divorce—A Mensa—Wife's Separate Property—Trusts and Trustees—Contingent Interests.**

It appearing that a wife, in contemplation of marriage, executed a deed in trust for her use and benefit providing a certain contingent estate, between herself and husband, which may be defeated by the happening of an event upon which it was made to depend; and that a decree for divorce *a mensa et thoro*, was obtained by her on the ground of the misconduct of the husband, the courts will not pass upon the contingent interests as the question may never arise. The possibility of condonation and resumption of the marriage relation is recognized by statute. Revisal, 2111.

APPEAL from *Lyon, J.*, at May Special Term, 1909, of WAYNE.

The plaintiff brought this action for divorce *a mensa et thoro* from defendant, and alleged that prior to and in contemplation of marriage with the defendant, they, on 27 May, 1895, executed a deed to B. F. Aycock, conveying certain described land in the town of Goldsboro, of which plaintiff was seized in fee, and declared the following trusts: For the sole use and benefit of the plaintiff during the existence of the marriage, and, in the event she should survive the defendant, then to the plaintiff in fee simple, with a direction to the trustee to convey; but in the event the defendant shall survive plaintiff, then the trustee should hold the same, in equal proportions, for the use and benefit of such child or children of the plaintiff (whether born of a former marriage or born of the marriage with the defendant), and the issue of such as may then be dead, and the defendant, provided the defendant shall insure and keep insured his life in the sum of $1,000 for the benefit of the plaintiff. The plaintiff had three children by a former husband, living at the date of the second marriage. Upon the trial of the issues arising on the allegations in the complaint, upon which the divorce was sought, the jury answered them in favor of the plaintiff. A decree of divorce from bed and board was entered, and the question (182)

of alimony and the rights of defendant under the deed in trust, and also for improvements made by him on the property, were referred to M. T. Dickinson. The referee duly made his report to the court, finding that the rental value of the property had been increased from $12 per month at the time of the marriage to $44 per month at the date of the report, by reason of the improvements and repairs made thereon by defendant, out of his own means and the rents which were collected by him; that the improvements were worth $1,500; that defendant has no income and is not more than able to support himself; that defendant has kept in force the insurance on his life of $1,000 for the benefit of the plaintiff. The referee concluded: (1) That the plaintiff was not entitled to alimony; (2) that the defendant is not entitled to recover the value of the improvements put by him on the land; (3) that the contingent estate in plaintiff's land was settled upon defendant solely in consideration of the marriage; (4) that defendant has forfeited his right to the contingent interest in said land.

The defendant duly excepted to the second, third and fourth conclusions of the referee, and upon the hearing by his Honor he overruled the exceptions, confirmed the report and adjudged as follows: "That the defendant is not entitled to recover improvements; that the contingent interest of defendant in the land was based upon the sole consideration of marriage, and was defeated by the divorce granted plaintiff, and that the trustee, B. F. Aycock, hold said land in trust for the plaintiff and her children, and that the defendant be excluded from any interest therein."

To the above provisions in the judgment the defendant excepted and appealed to this Court.

F. A. Daniels and Aycock & Winston for plaintiff.
George E. Hood and W. C. Munroe for defendant.

MANNING, J., after stating the case: We think it clear that the defendant is not entitled, by the application of any equitable principle, to have the value of the improvements made by him upon the land held by the trustee, Aycock, assessed against the land, or any judgment therefor against the plaintiff. We are referred by his learned counsel to three cases (*Baker v. Carson,* 21 N. C., 381; *Albea v. Griffin,* 22 N. C., 9; *Pitt v. Moore,* 99 N. C., 85), that lay down certain equitable doctrines which, they submit, might fit the present case and give the defendant aid. An examination of these cases, as well as *Luton v. Badham,* 127 N. C., 96, in which case many of the previous decisions of this Court are reviewed, will disclose that the basis of the relief granted in each of these cases was a parol agreement to convey certain land, or

an interest therein, which induced an expenditure of money, in (183) good faith, in its improvements and the enrichment of the land, the repudiation of the agreement to convey, and the attempt thereby to perpetrate a fraud. Not one of the facts essential to the support of the equitable doctrine declared in those cases is present here. The plaintiff and defendant, before and in contemplation of marriage, join in the execution of a deed to B. F. Aycock, conveying plaintiff's property, to be held upon the trusts declared. Subsequent to the marriage, with the deed operative and without any request, promise or inducement, as appears, made to him, the defendant, from the rents and his other sources of income, pays the taxes, occupies the property and makes improvements on the land; later he offers his wife such indignities as render her condition intolerable and her life burdensome; she obtains a divorce *a mensa et thoro,* because of his misconduct; yet he would have the value of the improvement declared a charge upon the property. When did this equity of the defendant begin? When the attempt to perpetrate a fraud upon him? It would seem that the defendant, by his own misconduct and his own wrongdoing, has brought upon himself his present misfortune. It is the result of his own acts, that ought to have been known by him. Revisal, sec. 2111; *Taylor v. Taylor,* 112 N. C., 139; *Halyburton v. Slagle,* 132 N. C., 959. We can see no ground upon which relief can be extended to him by the equitable power of the court.

We do not think his Honor, however, should have attempted to pass upon the contingent interest of the defendant in the property conveyed to Aycock, trustee. The defendant's interest in that property may be defeated altogether by the happening of the event upon which it is made to depend, or he may lose it by failing to comply with the condition in the deed. We do not pass upon this question. The deed to Aycock is still operative and obligatory; it is necessary that the estate of the trustee be continued to preserve the contingent interests and carry out the terms of the trust; but the plaintiff is entitled, under the deed, to all the rents from the property during her life, and the defendant cannot interfere in any way now with the property or with the rents. Even the statute (section 2111, Revisal) recognizes the possibilities of condonation and the resumption of the marriage relation.

In attempting, therefore, to finally determine the contingent interest of the defendant, his Honor was in error, and his judgment will be so modified, and, as modified, is affirmed. The defendant, however, will pay the costs of this appeal.

Modified and affirmed.

(184)

PRISCILLA HUNTER, ADMR., ET AL. v. CHARLES S. NELSON.

(Filed 20 October, 1909.)

1. Bill of Review—Superior Court—Judgment—Supreme Court.

An action commenced in the Superior Court, in the nature of a bill of review in equity, will not lie to correct an alleged error apparent upon the face of a final judgment, where such judgment has been affirmed on appeal by the Supreme Court.

2. Same—Procedure.

In such case the remedy is by petition to rehear, prosecuted according to the rules of and addressed to the Supreme Court.

APPEAL by plaintiff from *Lyon, J.*, at April Term, 1909, of WAKE.

Action, heard upon demurrer to the complaint.

The court sustained the demurrer and dismissed the action. Plaintiffs appealed.

The facts are stated in the opinion.

Aycock & Winston and Peele & Maynard for plaintiffs.
Herbert E. Norris for defendant.

BROWN, J. This action is entitled a "bill of review" by the learned lawyer who instituted it, and is brought solely to correct an alleged error of law apparent upon the face of the judgment heretofore rendered by the Superior Court and finally affirmed by this Court. *Nelson v. Hunter,* 140 N. C., 598; 144 N. C., 763, and 145 N. C., 334.

1. The judgment sought to be set aside by this proceeding was entered in pursuance of the mandate of this Court on appeal in the original action. It therefore became the final decree and judgment of this Court. It would be most extraordinary, under our or any other system of practice, if the lower court, from whence the appeal came, had jurisdiction to entertain a subsequent action to review and correct the alleged errors in law committed by the higher court, even though charged to be apparent upon the face of its judgment. A bill to rehear and review, as known in those jurisdictions where the principles and practice of equity are administered by chancellors or their substitutes, is a bill filed to reverse or modify a decree that has been enrolled for errors apparent upon the face of such decree, or on account of new facts discovered since publication was passed in the original cause and which could not by the exercise of due diligence have been discovered before the decree was made. 2 Beach Mod. Eq. Practice, sec. 852.

But even in those courts a bill of review will not lie for errors (185) of law alleged to be apparent on the face of the decree after the

judgment of the appellate court. 2 Beach, sec. 855. Bills of review have been entertained by lower courts based upon allegations of newly discovered testimony, where the original decree was entered in obedience to the mandate of the appellate court, but that is not allowable in England or in the Federal courts of this country, unless the right is reserved in the decree of the appellate court or permission given on an application to that court directly for the purpose. *Southard v. Russell,* 57 U. S., 547; 1 Vernon, 416; 2 Paige, 45; 1 McCord Ch., 22-30; Story Eq. Pl., sec. 408.

In New Jersey, however, it was held by Chancellor Runyan that such permission of the higher court is not essential in bills of review on the ground of newly discovered evidence (*Putnam v. Clark,* 35 N. J., Eq., 195), and many other courts have held likewise; but all agree that a bill to review a final judgment will not lie at all for errors of law apparent on the face of the decree after judgment of the appellate court. These errors may be corrected by a direct application to that court, which would amend, as matter of course, any error of that kind which had been made in rendering or entering the decree. This is the view of the Supreme Court of the United States, as first expressed by *Mr. Justice Nelson* in the leading case of *Southard v. Russell,* 57 U. S., 570, reiterated in subsequent cases and approved by the text writers generally. *Kingsbury v. Buckner,* 134 U. S., 671; *Machine Co. v. Dunbar,* 32 W. Va., 335; *Hunt v. Long,* 16 S. W., 968; *Jewett v. Dringer,* 31 N. J. Eq., 586; *Kimberly v. Arms,* 40 Fed., 548; *Hall v. Huff,* 76 Ga., 337; 2 Beach, sec. 855; Adams Eq., (7 Am. Ed.), 417, and the notes citing the Supreme Court of the United States. The rule of law is thus tersely stated in 3 Enc. of Pl. & Pr., 574: "After a decision has been rendered by an appellate court and the cause remanded to the court below, the latter court has no authority to entertain a bill of review for error apparent; but where the ground of review is newly discovered evidence, the jurisdiction is generally conceded."

In support of the text a great array of cases is cited in the notes from the various courts of this country, including the case of *Farrar v. Staton,* 101 N. C., 81, relied upon by appellant. We fully concur in the construction placed upon that case by the text writer. While the syllabus is a little misleading, a careful reading of the opinion convinces us that the learned Chief Justice who wrote it never for a moment contemplated that a bill of review could be entertained by a lower court to correct *errors of law* committed by the highest. Such a proceeding would be an anomaly in law and would not have been allowed (186) under the old system of practice, with which *Judge Smith,* from long experience, was perfectly familiar.

2. If we were disposed to entertain this proceeding as a method of

correcting errors, in addition to petitions to rehear addressed directly to this Court, we could not allow it in this case, for a reason well stated in appellant's own brief. "A review cannot be had for mistake in a decree which might have been rectified by proper attention," citing *Sims v. Thompson,* 16 N. C., 197, and other cases.

The grievance of appellants consists in alleged error of law, committed by us in giving judgment for Charles Nelson, the only legitimate child of Jackie Nelson, for the entire personal as well as real estate of his mother, in the face of a statute which, it is claimed, places these plaintiffs, her illegitimate children, on an equality with him as distributees of her personal estate. Revisal, sec. 136. Whether this statute must be construed as contended by plaintiffs we will not now decide; but if we have failed to take note of it in our former opinion, it is because no such point was presented, either in the briefs or arguments; and we have repeatedly said that we do not feel bound to notice a phase of a case not relied on in the brief. They have had two hearings in this Court, when they could have cited the statute with effect and corrected the error, if any has been committed. That appellants failed to do so is their misfortune, but we do not think it is due to anybody's neglect. Lord Coke once said that he would be ashamed if he could not answer any question relating to the common law without recourse to his books, but that he would be equally ashamed to answer any question relating to the statutes unless they were before him.

Lawyers are supposed to have general knowledge of the elementary principles of law, and frequently recur to them with facility, but none of us are able to carry in our minds all of the many changes constantly taking place in the legislation of the State, and to refer at will to every obsolete and seldom cited statute.

For the reasons given the judgment is

Affirmed.

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(187)

CHARLES S. RILEY & COMPANY v. W. T. SEARS & COMPANY.

(Filed 20 October, 1909.)

1. Receivers—Reference.

An order issued in this case, being a creditors' bill, requiring the receiver of a corporation to pass upon the different claims of the plaintiffs, and upon certain priorities claimed by some of them, is in effect an order of reference.

2. Reference—Findings—Issues—Exceptions—Judgments—Appeal Premature.

An appeal is premature from an order of the judge to submit to the jury issues raised by exceptions to referee's report, when the order of reference appears to have been made without objection. The practice is to proceed with the inquiry, and appeal from the final judgment or a judgment in the nature of one.

APPEAL from *W. R. Allen, J.*, at May Term, 1909, of NEW HANOVER.

The court ordered that an issue be submitted to the jury to determine whether the claim of certain petitioning creditors arose by reason of work and labor done within sixty days next before proceedings of insolvency were instituted against defendant company. From this order plaintiffs excepted and appealed.

The facts are stated in the opinion.

Herbert McClammy for plaintiff.
Graham Kenan for defendant.

HOKE, J. Plaintiffs, Charles S. Riley & Co., instituted an action in the nature of a creditors' bill against W. T. Sears & Co., incorporated in this State, alleging the total insolvency of the company; that plaintiff was a creditor to a large amount, part of it secured by mortgage on the company's property or a large portion of it; that there were various other creditors, most of them in small amounts, and that the appointment of a receiver was required, etc. Thereupon, various creditors intervened by petition, some of them alleging the existence of debts for work and labor performed within sixty days before proceedings were instituted, and claiming a prior lien on defendant company's assets, under section 1206, Revisal 1905.

Plaintiffs denied the indebtedness of all or the greater part of the petitioning creditors, and denied, further, that such creditors had any prior lien, as claimed by them, and alleged the superior claim to be in plaintiff, under and by virtue of certain mortgages. A receiver was appointed, and at October Term, 1908, the judge presiding issued an order requiring the receiver to pass upon the different claims. As the record now appears, this seems to have been in effect an order (188) of reference, and we find no exception noted. The receiver made report, finding that numbers of the claims were valid and were for work and labor within the time alleged. Thereupon, the plaintiffs filed various exceptions to the report of the receiver, raising objections to many of the claims and to the lien claimed by the holders, and at May Term, 1909, the court made an order directing that the following issue be submitted to the jury: "Were the services rendered by the petitioners,

or any of them, and, if so, which ones, within sixty days next preceding the date when proceedings in insolvency were instituted against W. T. Sears & Co., incorporated?"

From this order, as stated, the plaintiff excepted and appealed.

Our decisions are to the effect that when a good plea in bar is set up in the pleadings, until such plea is in some way disposed of an order of reference, on objection, made in apt time, is erroneous, and an immediate appeal will lie. "If such plea in bar appears and is overruled or sustained as a matter of law by the judge, it is optional with the party to take an appeal at once or have an exception noted." *Jones v. Wooten,* 137 N. C., 421-425. When, however, the order of reference is made without objection properly noted, or the plea in bar is disposed of by adverse verdict of the jury, then the proper practice is to proceed with the inquiry, and an appeal only lies from a final judgment or one in the nature of a final judgment. *Jones v. Wooten, supra; Brown v. Nimocks,* 126 N. C., 808; *Hailey v. Gray,* 93 N. C., 195; *Driller Co. v. Worth,* 117 N. C., 515.

In the case at bar, so far as appears, the order of reference was made without objection. Furthermore, the appeal has been taken from the judgment of the court directing an issue and not refusing it. If plaintiffs have objections to the form of the issue, or because the same is inadequate and not fully determinative of the different questions presented, they may preserve their rights by exceptions properly noted; but as the record now appears, their appeal has been prematurely taken, and the same must be dismissed. As said by *Merrimon, J.,* in *Hailey v. Gray, supra*: "The judgment appealed from is not final, nor was it such as in any aspect of the case would deprive the appellant of a substantial right by delaying the appeal until the final judgment shall be granted."

Appeal dismissed.

Cited: Smith v. Miller, 155 N. C., 246.

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(189)

B. G. THOMPSON v. CITY OF GOLDSBORO.

(Filed 20 October, 1909.)

Water Rates—Minimum Charge—Charge for Each House—Tenement Houses—One Supply Pipe.

Under a minimum charge of 60 cents a month for water for each house furnished therewith by the City of Goldsboro, the owner of three tenement houses on the same property is chargeable with the minimum amount for each house at least; and the abrogation of an ordinance requiring a separate water pipe and meter to each house in this and similar instances,

so as to permit of only one pipe and one meter for the supply of water to the three houses, is for the convenience and advantage of the owner, and does not affect the clear import of the regulations as to the minimum amount chargeable for each house.

ACTION for injunction, heard on return to preliminary restraining order, before *W. R. Allen, J.*, at chambers.

The restraining order was continued to the hearing, and the defendant excepted and appealed.

The facts are stated in the opinion.

M. T. Dickinson for plaintiff.
J. Langhorne Barham for defendant.

HOKE, J. On the hearing it appeared that plaintiff was the owner of a lot in the city of Goldsboro and within the water limits, on which there were three tenement houses, occupied by three separate families, tenants of plaintiff; that water was supplied to these houses from the water system owned and controlled by defendant, by a single pipe, and to this pipe there was a meter attachment, giving indication of the amount of water supplied to the "several families"; that defendant had established water rates for consumers at so much per cubic foot, the rate being gradually less for larger quantities of water consumed, and with a minimum charge of sixty cents, and there was also a requirement that "each consumer" should be supplied with a separate pipe.

On the part of plaintiff it was shown that the entire amount of water supplied by this pipe for all three of these houses for the month of May, 1909, did not exceed 180 cubic feet, and which, at the rate per cubic foot, would indicate a correct charge against plaintiff for water supplied to three houses, of forty-five cents; and that plaintiff had tendered to defendant, in payment and satisfaction of this sum, sixty cents, the minimum charge per month; that defendant had declined to accept the amount in satisfaction of the claim, but had demanded of plaintiff for said month the sum of $1.80, being the correct amount as indicated by a minimum charge for each of the three (190) families occupying plaintiff's houses, and threatened to enforce collection of this amount by shutting off the supply of water, etc.

For defendant it was made to appear that plaintiff had bought the property in January, 1909, when there was only one house on same, supplied by the single pipe, and later plaintiff had improved the property by constructing the three tenement houses, and that in the month of May the three houses, as stated, were each occupied by a separate family; that the regulations required a separate pipe for each consumer, at a minimum rate per month of sixty cents, and "that it is and has been

a rule of the said board of public works since 1 June, 1907, to require each consumer of water to be supplied by a separate pipe. But, in numerous cases, to require consumers of water to lay separate pipes to each and every one of their several houses would cause considerable expense and outlay of money on their part, and in this instance the board of public works have allowed consumers of water to be supplied with water for each of their several houses through one pipe, the meter being so placed as to measure water passing through said pipe and used by the several houses; that the rate charged by the board of public works for the water so used is that above stated in this affidavit, with a minimum charge of sixty cents for each house furnished with water; that these are the rates charged plaintiff in this case and the rates charged every consumer of water furnished by said board of public works; that these rates and rules, as above stated, have for a long time been printed and distributed to the public, and that these rates and regulations were and have been well known to the plaintiff."

Upon these facts the Court is of opinion that a minimum charge of $1.80 per month is a correct charge, and the position of plaintiff cannot be sustained. The regulations, whatever may be their further extent, clearly contemplate that each householder using the water and occupying a separate house, either as tenant or owner, shall be considered a consumer and, as such, liable to the minimum charge of sixty cents. This is not only the primary meaning of the words used, but such meaning is further confirmed and emphasized by the requirement that each consumer must be supplied with a separate pipe; and this significance is not changed by the fact that the authorities have adopted a method, when feasible, of making a single pipe serve for several houses, and attaching a meter to indicate the amount of water consumed. This is done for the convenience of the owner and to save him unnecessary cost, and was not intended and should not be allowed
(191) to affect or change the clear import of the regulations.

While not entirely apposite, the case of *U. S. v. Water Works*, 32 Fed., 747, applies the principle which we hold to be controlling on the facts presented here. In that case the United States was owner of a reservation within the water limits of defendant company and on which there were numerous buildings, used for dwellings for officers, hospitals, etc., and the water was supplied at an established rate, decreasing "inversely to the amount of water taken." The United States instituted suit to restrain the company from enforcing the collection of the water rate by shutting off the supply, etc., claiming that the Government, as sole owner of the reservation, was entitled to pay for the water at the reduced rate, as a single consumer; but the court held that the charge should be estimated as for each separate building using

the water, and *Brewer, J.*, speaking to this question, said: "Suppose some one in the city, owning a block of ground, should put up twenty or thirty residences to rent; it would be a clear violation of the spirit of this ordinance to permit him to supply all these houses as though they constituted one property. Indeed, as nothing is said about contiguity, if ownership was the test, a man having buildings, residences, stores and factories scattered in different parts of the city might insist upon a supply to all at the lowest rate; or, as neither ownership or contiguity is spoken of, why might he not contract for all the water from defendant and subcontract it to various consumers in the city? I think there can be little doubt on this."

By correct interpretation, the householders occupying these separate houses are each to be considered a consumer; and, on the facts presented, the judgment of the lower court continuing the restraining order to the hearing must be

Reversed.

WILLIAM E. WORTH v. KNICKERBOCKER TRUST COMPANY ET AL.

(Filed 20 October, 1909.)

1. Attachment—Illegal Trust—Actionable Wrong—Procedure.

On motion to discharge an attachment where it appeared in the affidavits filed that by flattering and deceptive statements on the part of the principal defendants, the plaintiff had been induced to subscribe and partly pay for certain shares of corporate stock in a company formed to develop a certain water-power; that before said subscription was obtained, and without the knowledge of plaintiff, said defendants had formed a voting trust forbidden by the law with the intent to dominate and control the management and business affairs of the company, and having thereby succeeded in obtaining such management and control, the said principal defendants wrongfully formed a combination and conspiracy by means of said illegal trust to exploit the enterprise for their own personal advantage and profit and to plaintiff's injury; that pursuant to such unlawful scheme, and with a view of acquiring the company's assets, said defendants in the management of said company designedly and systematically entered on a course of conduct by means of which said company was rendered insolvent and the value of plaintiff's stock and holdings therein was destroyed: *Held*, that an actionable wrong was stated against defendants and of a kind to uphold the validity of the order of attachment.

2. Same.

In attachment proceedings it is not now necessary that the damages sought should only be for a wrongful conversion of personal property or liquidated damages arising under a contract or limited or defined by some standard or data contained in the contract itself, but by the amendments

of the Code of 1883, and subsequent statutes, as shown in Revisal, sec. 758, the remedy is also provided in actions for; subdiv. 3: "Any injury to real or personal property in consequence of negligence, fraud or other wrongful act"; subdiv. 4: "Any injury to the person by negligence or wrongful act."

3. Same—Interpretation of Statutes.

Revisal, sec. 2831, and subsec. 6, provides: That in the construction of all statutes, unless a contrary intent is manifest, the term "personal property" shall include moneys, goods, chattels, choses in action and evidence of debt, including all things capable of ownership not descendible to the heirs at law, and applying such construction, sec. 758, subsec. 3, Revisal, above stated, authorizes the process of attachment in an action for an unlawful combination and conspiracy to injure plaintiff, and by means of which plaintiff's subscriptions and holdings in the corporation above indicated were rendered valueless.

(192) APPEAL from *W. R. Allen, J.*, at May Term, 1909, of NEW HANOVER.

Motion to discharge attachment and dismiss an action. It appeared, among other things, that plaintiff, making claim for damages against the Knickerbocker Trust Company, a nonresident, and other principal defendants, resident and nonresident, on 14 January, 1909, instituted his action against them and caused an attachment to be issued in same, and levied on debts and obligations due to said company from certain others who joined in the appeal in the cause. Some time after said attachment was issued and levied, the defendant, the Knickerbocker Trust Company, claiming to act under a special appearance, moved to
(193) discharge the attachment, on the ground that no cause of action was stated against defendant company upon which an attachment could be issued. Afterwards publication in due form was made for nonresidents, and orders were made, on adjournment from time to time, allowing amendments of the affidavits, restricting the amount of property to be held under the writ and affecting the amount of bonds of plaintiff and defendant, etc.

At May Term of Superior Court of New Hanover the defendant, the Knickerbocker Trust Company, still claiming to act under a special appearance, renewed its motion to dismiss the warrant of attachment and garnishment in the cause, on the ground that the plaintiff, in his affidavits, as amended, does not state facts sufficient to constitute a cause of action against defendant, or one in which an attachment could be issued, etc.

The court, having considered the matter, entered an order releasing all property levied on, over and above the amount of $50,000, and denied the motion as to that amount of the property; whereupon the trust company and other defendants excepted and appealed.

E. K. Bryan and J. D. Bellamy for plaintiff.
Davis & Davis for defendant.

HOKE, J., after stating the facts: The objections chiefly urged against the validity of the order of attachment were: (1) That no actionable wrong was stated against the defendants, or either of them. (2) No such actionable wrong was stated that an attachment would lie. But the Court is of opinion that neither position can be sustained. While the demand of plaintiff is set forth perhaps with some elaborateness of statement, the affidavits, as we interpret them, contain averments to the effect that, by means of flattering and deceptive statements on the part of the principal defendants, or some of them, plaintiff was induced to subscribe to an undertaking to develop certain water-powers on the Yadkin River, in the counties of Anson and Richmond, and by means of a corporation to be formed, under the style and title of the Rockingham Power Company; that plaintiff, by said subscription, agreed to take over $50,000 of bonds of said company and $20,000 of preferred stock therein, for which he was to pay $45,000, and plaintiff had already paid $9,000 on said subscription; that before said subscription was obtained, and without plaintiff's knowledge or assent, three of the principal defendants had formed a voting trust, forbidden by the law (see *Shepherd v. Power Co.,* 150 N. C., 776), to dominate and control the management and business affairs of the company, and had succeeded in obtaining and exercising such influence and control over the company's affairs, and that these three principal defendants (194) wrongfully formed a combination and conspiracy by means of this unlawful voting trust and otherwise to exploit the enterprise for their own personal advantage and profit and to the injury of plaintiff as subscriber in said company; and that the fourth principal defendant, the Knickerbocker Trust Company, had been a member of this unlawful combination and conspiracy originally, or had entered upon it afterwards, and knowingly participated in its plans and purposes; and that, after said subscription was obtained and the company was formed and said defendants were in the control and management of the affairs of same, the said defendants, in pursuance of their unlawful scheme and with a view and purpose of wrecking the Rockingham Power Company and acquiring its assets for their own gain and profit, and to the destruction of plaintiff's interest therein, systematically caused said company to enter into a number of improvident contracts with other companies owned and controlled by said defendants, designed and intended by defendants to effect their wrongful purpose, and had thereby succeeded in rendering said company insolvent. In this connection, though it may not be required, we consider it well to note that the

Rockingham Power Company is also made a defendant; and in the complaint, which seems to have been considered at the hearing, and without objection, as an additional affidavit, there is an allegation to the effect that the officers and directors in control and management of the power company have all been selected and appointed by the voting trust referred to, and are only appointees and agents of the parties charged, dominated and controlled by them, and that an appeal to these officers and agents for relief by action on the part of the company would be without avail. There is no denial of these averments on the part of defendants, no opposing affidavits thus far having been filed by them; and, this being true, we are of opinion that an actionable wrong has been stated against the four principal defendants—an unlawful combination or conspiracy to injure plaintiff, and by means of which he has sustained legal damage. *Mott v. Danforth,* 6 Watts, 304; *Carew v. Rutherford,* 106 Mass., 1; *Cherry v. Powell,* 88 Ga., 629; *Webb v. Drake,* 52 L. A., 290. We are also of opinion that the action is one where an attachment lies.

Under the Code of 1868, as originally enacted, this provisional remedy was only allowed in actions on contract for recovery of money only, or in actions for wrongful conversion of personal property; and several decisions of the Court, construing the first clause of the statute, held that an attachment was only permissible for breaches of contract in-
(195) volving the recovery of liquidated damages, or damages which could be limited and defined by some standard or data contained in the contract itself. See *Price v. Cox,* 83 N. S., 261; *Wilson v. Mfg. Co.,* 88 N. C., 85. Shortly after these decisions were announced, the statute was amended so as to provide the remedy "for breach of contract (express or implied), wrongful conversion of personal property, any other injury to personal property in consequence of negligence, fraud or other wrongful act." Code 1883, sec. 347. The Legislature of 1893 (Chap. 77) added "injuries to real property" to the section, and in 1901 there was another amendment, adding "or any injury to the person, caused by negligence or other wrongful act," making the law on the subject, as it now appears in the Revisal of 1905 (section 758), and allowing the remedy in—

1. Breach of contract, express or implied.
2. Wrongful conversion of personal property.
3. Any other injury to real or personal property in consequence of negligence, fraud or other wrongful act.
4. Any injury to the person, caused by negligence or wrongful act.

Under this law, as amended, various decisions from time to time have sanctioned the use of the writ in actions to recover unliquidated damages, when the demand otherwise complied with the statutory require-

ments, and the present claim comes clearly within the terms of the third clause of section 758: "An injury to the personal property of another, in consequence of fraud or other wrongful act."

Some of the older cases are to the effect that this word, "property," both in public statutes and transactions and business affairs, *inter partes,* applies only to tangible property and would not include choses in actions or an interest or investment of the kind involved in this litigation, unless such signification was clearly required by the context or by the facts and circumstances of the special case. One of them (*Webb v. Bowler,* 50 N. C., 362) was an action where the validity of an attachment was in question, and it was held that the term "property" should be confined to tangible property, and that a false warranty or deceit in the sale of personal property was not an injury to the property of another, within the meaning of the statute.

Since these decisions were rendered, however, and probably in consequence of them, this restricted significance of the word "property," when used in statutes or the rule of interpretation on the question presented, has been altered by express enactment, and our chapter on the construction of statutes, as contained in the old Revised Code, ch. 108, sec. 2, subsec. 6, has been changed to read as follows:

"The word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly (196) shows to the contrary. The words 'real property' shall be coextensive with lands, tenements and hereditaments. The words 'personal property' shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendible to the heirs at law. The word 'property' shall include all property, both real and personal." A change which seems to have been made by the Code of 1883 and now appearing in Revisal 1905, sec. 2831, subsec. 6.

And in *Duckworth v. Mull,* 143 N. C., 461, a decision involving the meaning of this word, "property," as affecting the jurisdiction of justices of the peace in matters of tort, the Court, among other things, said: "In the business affairs and transactions of individuals and the construction of instruments which concern the devolution and transfer of property between them, this term, 'property,' has usually received a more restricted construction. It has been so in the decisions of our own Court; but in constitutions and public statutes, where the words permit and the spirit and intent of the law require, the word 'property' has frequently and more usually been accorded the broader significance which we have given it."

Construing the law, therefore, in the light of the present statute and the more recent and approved decisions, this action is clearly one in

which the writ of attachment is allowed, the wrong alleged being an injury by which the plaintiff's interest and investment in the power company has been wrongfully destroyed or very greatly impaired. This view of a similar law has prevailed in other jurisdictions (*Paper Co. v. Scaring,* 54 Supreme Court N. Y., 237; *Weiler v. Schreeber,* 63 How. Pr., 491), and is clearly the proper construction of our statute on the subject.

There is no such disproportion between the reasonable estimate of plaintiff's demand and the amount of property retained or bond required as to justify or permit that the action of the lower court in reference to these matters should be disturbed; nor is there such repugnancy in the claim, as stated by plaintiff, as to seriously affect the validity of the attachment; and we are of opinion, on the controlling questions presented, that the plaintiff has stated a cause of action against the four principal defendants in which the writ of attachment lies, and that the judgment of his Honor below, denying defendants' motion to vacate the writ, should be

Affirmed.

Cited: Warlick v. Reynolds, post, 613; *Worth v. Trust Co.,* 152 N. C., 243; *Dockery v. Fairbanks,* 172 N. C., 530.

ROSE CHAMPION, ADMRX., v. SEABOARD AIR LINE RAILWAY ET AL.

(Filed 27 October, 1909.)

1. **Railroads—Lights and Signals—Negligence.**

When it is alleged and proven to the jury under conflicting evidence, that plaintiff's intestate was run over and killed by defendant's work train, without lights or signals, when he was endeavoring to go over the railroad at a public crossing, the defendant is liable in damages for its negligent act, in the absence of evidence of contributory negligence of plaintiff.

2. **Same—Contributory Negligence—Nonsuit.**

In an action to recover damages from a railroad company for the alleged negligent killing of plaintiff's intestate by running a train, without lights or signals, over him at a public crossing at night, the contributory negligence of intestate will bar recovery when it appears that he both saw and heard the engine coming and attempted to run across the track in front of it, and thus received the fatal injury.

(197) APPEAL from *O. H. Allen, J.,* at March Term, 1909, of EDGECOMBE.

Action, to recover damages for the alleged negligent killing of Sandy Champion by defendant's train, after dark.

At the conclusion of the evidence a motion to nonsuit was sustained. From the ruling and judgment of the court the plaintiff appealed.

The facts are stated in the opinion of the Court.

G. M. T. Fountain and R. T. Fountain for plaintiff.
Murray Allen for defendant.

BROWN, J. The allegations of the complaint, as well as the theory of the evidence advanced by plaintiff, are that the intestate was run over and killed at a public crossing near the station of Wise, in Warren County, N. C., by a work train, while the intestate was endeavoring to cross the track at the crossing; that the work train was composed of several flat cars, pushed by the engine; that there was no light on the end of the front car or on the engine, and that no signals were given for the crossing.

If these facts are true, as contended, they constitute negligence; and if the intestate was killed by such a train, under such circumstances, without being guilty of contributory negligence himself, the defendant would be liable. *Gerringer v. R. R.*, 146 N. C., 32; *Purnell v. R. R.*, 122 N. C., 832.

The theory and contention of defendant is that, according to the testimony of Sam Baskerville, who testified he was with deceased at the time he was killed, Sandy Champion was killed by an engine pulling a train and not pushing it, and that they both saw and heard the engine coming and attempted to run across the track in front (198) of it, and that Sandy got caught by the engine and killed.

If these facts be true, they constitute such contributory negligence as will bar a recovery. *Royster v. R. R.*, 147 N. C., 347; *Cooper v. R. R.*, 140 N. C., 213; *Strickland v. R. R.*, 150 N. C., 4.

Upon a careful examination of the evidence, we think his Honor should have submitted the issue of negligence and contributory negligence to the jury, with proper instructions.

New trial.

Cited: *Mitchell v. R. R.*, 153 N. C., 117.

L. E. SUMNER ET AL. v. L. L. STATON, INDIVIDUALLY, AND AS EXECUTOR, ET AL.

(Filed 6 October, 1909.)

1. **Probate Court—Wills—Deeds—Fraud—Jurisdiction—Equity—Relief.**

A court of equity has jurisdiction of an action brought by the next of kin and heirs at law to set aside a will for undue influence, when it appears that to afford the relief demanded it is necessary to cancel previous deeds for alleged fraud appearing to convey the same property to the executor and devisee under the will; and the Superior Court, in which the suit was brought, may proceed to hear and determine the case and administer all the rights and equities between the parties, as no adequate or complete remedy at law is given in proceedings before the clerk or probate court.

2. **Same—Trustee Ex Maleficio.**

And if it should be established that the executor acquired the property by the deeds and under the will by fraud, the court, in administering the equities and doing substantial justice between the parties, will decree the executor a trustee *ex maleficio* for plaintiff's benefit and prohibit him and those claiming under him from setting up title; may require the executor to give bond *pendente lite*, and make such further interlocutory orders as may be expedient and right to preserve the rights of the parties.

3. **Same—Remedy at Law.**

When it appears that a suit has been properly brought against one of the defendants in the Superior Court to set aside a will, for the reason of certain equities arising in setting aside a deed upon the ground of fraud, and necessary to be administered in order to give adequate and complete relief, it should be dismissed as to another defendant when relief can be had as to her in proceedings to caveat the will before the clerk (probate court) and concerning whose rights it is not necessary for the courts of equity to interfere.

WALKER, J., concurring, *arguendo*.

(199) APPEAL by plaintiffs from the refusal of *O. H. Allen, J.*, to grant their motion for an injunction and receiver, in an action pending in EDGECOMBE and heard during March Term, 1909, of the court.

The court, being of opinion "that it had no jurisdiction of that part of said action, in which it is sought to set aside the will of Mrs. Charlotte A. Knight for alleged fraud," etc., denied the motion for injunction and receiver. The plaintiff excepted and appealed.

The facts are stated in the opinion of the Court.

F. S. Spruill for plaintiff.

Aycock & Winston and G. M. T. Fountain for defendants.

BROWN, J. On the argument, and in appellant's brief, exception is particularly taken to the opinion of his Honor that the fact that the defendant L. L. Staton being sole residuary legatee under the will of Charlotte A. Knight will in a measure affect the original equitable jurisdiction of the Superior Court to declare said Staton a trustee *ex maleficio* in respect to the property conveyed to him by certain deeds executed by Mrs. Knight, and deprives the court of jurisdiction to make such interlocutory orders as are necessary to preserve the property during the pendency of the action. This feature of the case is the only matter presented for our consideration.

It appears that Mrs. Knight was the absolute owner of a considerable estate, consisting of valuable real and personal property, which she conveyed to the defendant L. L. Staton by two deeds—one dated 2 May, 1900, and the other 4 May, 1906. On 16 March, 1904, Mrs. Knight executed a will, in which she made a few insignificant bequests of spoons and other articles of personalty of small value, and then devised the "Bennett Jenkins place" to Bettie L. Sumner, and all the residue of her estate (real and personal) to Dr. L. L. Staton and Henry Johnson as residuary legatees, and appointed Dr. Staton executor to her will. No specific bequest or devise is made to him or to Johnson. On 25 September, 1906, Mrs. Knight, by a codicil to her will, revoked the devise to Bettie S. Sumner and devised the "Bennett Jenkins place" to Sallie Baker Staton, daughter of Dr. Staton, and at the same time revoked the devise to Henry Johnson and made Dr. Staton her sole residuary legatee. It is contended that a court of equity cannot interfere with the property conveyed to Dr. Staton in the deeds until the devise (200) by will is set aside by a separate proceeding, commenced before the clerk (the probate court), wherein the issue of *devisavit vel non* may be raised by a *caveat* and transferred to the Superior Court for determination.

It is manifest that if the deeds are set aside Dr. Staton will take the property as residuary legatee, and if the devise only is set aside he will take it under the deeds. So both must be set aside to give the full relief asked. As the probate court has no equitable jurisdiction to set aside the deeds, the question arises, must the plaintiffs prosecute two independent proceedings commenced in different jurisdictions, which may terminate differently, or will a court of equity, if the facts be as alleged, convert said defendant into a trustee for plaintiff's benefit, notwithstanding the fact that one of the methods by which he can claim title to the same property conveyed in the deeds is by a residuary clause in a will?

The plaintiffs are the next of kin and heirs at law of Mrs. Knight. They allege that the defendant, Dr. Staton, was for many years before

her death the physician, confident and adviser of Mrs. Knight, who was an old, feeble, childless widow, greatly addicted to the use of drugs, of weak mind and easily influenced, and that she was dominated by the superior mind and will of her confidential physician, upon whom she was largely dependent. Plaintiffs aver that Dr. Staton, taking advantage of his relations to Mrs. Knight, formed the design to acquire title to practically all of her estate, and that in pursuance of his scheme he wrongfully and fraudulently caused Mrs. Knight to execute the deeds referred to, and, for further protection to his title, caused her to make him sole residuary legatee under her will. These grave charges are fully met and denied by Dr. Staton in his answer.

The complaint, it is true, unnecessarily and improperly divides what is really one cause of action into three, but we will consider the substance of the charges made, rather than the manner and form in which they are pleaded.

We concur generally in the position taken, that since *Allen v. McPherson* and *Kerrick v. Bransby* were decided by the House of Lords, it is well settled in Great Britain, where the question was debated *pro* and *con.* for many years, that a court of equity will not entertain a bill, the sole object of which is to set aside the probate of a will upon the ground of fraud. This ruling has been followed by the Supreme Court of the United States (*Broderick's will,* 88 U. S., 504) and by other courts in this country, very generally. It is to be borne in mind, however,

(201) that the principal reason assigned in support of the ruling is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief, and therefore equity will not interfere. *Vide* opinion of *Justice Bradley, In re Broderick's will,* 88 U. S., 510.

These plaintiffs are not seeking to set aside the probate of a will, but to convert the defendant, Dr. Staton, into a trustee *ex maleficio,* upon well-recognized grounds of legal fraud, as laid down by *Lord Hardwicke* in *Chesterfield v. Jansen,* 2 Ves., 125; 1 Leading Cases in Eq., 341, and by *Chief Justice Pearson* in *Lee v. Pearce,* 68 N. C., 80. That a court of equity may convert a party into a trustee upon the ground of fraud is undisputed. *Wood v. Cherry,* 73 N. C., 110. And it would seem logically to follow that, where the fraudulent grantee has so fortified himself by various muniments that a court of law cannot give complete and adequate relief, a court of equity will undertake it. If the defendant claimed title to the property solely by virtue of the residuary clause in Mrs. Knight's will, then it would be undeniable that a proceeding to *caveat* the will in the probate court would give adequate relief, and we should dismiss this action. But in a case like this, where the muniments of title to the same property, alleged to be fraudulently

appropriated, consists of two deeds and a residuary clause in a will, it is plainly manifest that the probate court cannot give an adequate remedy and can afford only partial, if any, relief. An adequate remedy is not a partial remedy. It is a full and complete remedy, and one that is accommodated to the wrong which is to be redressed by it. It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

In commenting upon this subject the Supreme Court of the United States says: "The jurisdiction in equity attaches, unless the legal remedy, both in respect to the final relief and the mode of obtaining it is as efficient as the remedy which equity would afford under the same circumstances." *Gormley v. Clark,* 134 U. S., 338; *Boyce v. Grundy,* 3 Peters (U. S.), 210; Bispham Eq. (6 Ed.), sec. 37.

There is another principle of equity jurisprudence equally well founded, and that is that equity will not suffer a right to be without a remedy. "And it may be further observed," says Mr. Bispham, "that equity will not only not support a right to be unaccompanied by a remedy, but it will make the remedy, when applied, a complete one." This learned and accurate writer states another rule of equity courts which fits exactly such a condition as this case presents: "When a court of chancery acquires jurisdiction for any purpose, it will, as a general rule, proceed to determine the whole cause, although in so doing it may decide questions which, standing alone, would furnish (202) no basis of equitable jurisdiction." 55 Bispham (6 Ed.), sec. 37. To the same effect are our own decisions. *Oliver v. Wiley,* 75 N. C., 320; *Devereux v. Devereux,* 81 N. C., 18.

While a court of equity will not generally interfere to set aside the judgment or probate of a will procured by fraud, yet it has assumed jurisdiction to decree a trust where there is a gift to an executor (as alleged in this case), under such circumstances that it ought to be a trust for the testator's relations. I Perry on Trusts, sec. 182.

In the *Broderick case, supra, Mr. Justice Bradley* notes that there are occasional exceptions to this rule of noninterference by courts of equity with will and devises, which, being placed on special grounds, tend rather to establish than to weaken its force. He cites a case, which upon examination tends strongly to support our view: One who was both executor and residuary legatee to a will (as Dr. Staton is in Mrs. Knight's will) procured probate of a forged will by fraudulently inducing the testator's son to execute a deed consenting to and confirming its probate. Lord Hardwicke entertained a bill to declare the deed void, and compelled the executor to consent to a revocation of the probate, placing his judgment upon the ground that the ecclesiastical court,

which had exclusive jurisdiction over the probate of wills, had no power to annul the deed in order to give full relief, which was essential. This great chancellor, having assumed jurisdiction for the purpose of annulling the deed, gave complete relief by forcing the executor to revoke the probate. *Barnesley v. Powell,* 1 Vesey Sen., 284.

In his opinion the Lord Chancellor recognized the general rule as laid down in *Bransby v. Kerridge,* 7 Bro. P. C., 347, and the similar case of *Archer v. Moss,* 2 Vesey, 8, that a court of equity will not entertain a bill solely to set aside a probate of a will upon the ground of fraud.

In *Allen v. McPherson,* 1 Phillips, 133, and 1 House of Lords Cases, 191, wherein this doctrine is elaborately discussed, *Lord Lyndhurst* recognizes the duty of the chancellor to take jurisdiction in such cases, where the court of probate cannot afford adequate relief; and so does *Justice Bradley,* in the *Broderick case,* when he says: "It (equity) will only act on cases where the latter court can furnish no adequate remedy."

Judge Story also recognizes the general rule that equity will exercise complete jurisdiction in cases of fraud, where the remedy is beyond the reach of the courts of law. I Story Eq., 199.

In a note to 2 Pomeroy's Eq., sec. 913, it appears from many
(203) cited cases that, while equity does not generally assume jurisdiction to set aside a probate of a will upon the ground of fraud in obtaining the will, there does not seem to be an insuperable objection, on principle, to the granting of appropriate relief against the probate itself on account of proceedings independently of the will.

The complaint in this case sets forth a connected history of a series of transactions between her confidential and trusted physician and the testator, a feeble and infirm old woman, which has resulted, as alleged, in the transferring of practically her entire estate to him, to the exclusion of her next of kin. These transactions comprise in part the execution of a will and codicil, in which the physician is made sole residuary legatee and executor, thus fortifying and strengthening his grip upon her estate.

It is impossible to sever this last-mentioned act from the others; and in order to give complete relief, if the allegations of the complaint are established, the court will not only set aside the deeds, but will prohibit Dr. Staton and those claiming under him from taking the property under the residuary clause of the will.

It is suggested that the better procedure is to *caveat* the will and, when that issue is transferred to the Superior Court for trial, consolidate it with this action to set aside the deeds. Consolidation of actions is generally a matter of discretion with the trial judge, and the result might be that practically the same issues and evidence might have to

be presented to two different juries, who might reach different conclusions.

Not only is the form of the issue of *devisavit vel non* so different from other issues that consolidation is rather impracticable, but there is no reason for such circumlocution to get the whole controversy properly before the judge and jury.

The court, having undoubted jurisdiction over the person and the subject-matter, will make such decree as is necessary to afford complete relief in case the issue be found against the defendant.

This issue, or some similar one, when determined by the jury, will enable the court to give full relief and to do substantial justice between the parties, viz.: Did the defendant, L. L. Staton, acquire title to the real and personal property described in the complaint and the exhibits attached thereto by fraud, as alleged in the complaint? If it is answered in the affirmative, the court will set aside the deeds and decree the said defendant a trustee for plaintiff's benefit and forever prohibit him and those who may claim under him from setting up title under the residuary clause in the will. It would then also be in order for the clerk upon application, to remove the executor and appoint an administrator, with whom said defendant would be required to account (204) for the personal property, to the end that it be administered as if Mrs. Knight had died intestate.

In the meantime, in order to protect the rents of the land and to preserve the personalty *pendente lite,* the judge of the Superior Court has jurisdiction to make such interlocutory orders in respect to requiring bond from the defendant, and the like, as may be deemed necessary and expedient to preserve the rights of all parties.

In regard to the status of the defendant Sallie Baker Staton, it necessarily follows from what we have said that this action must be dismissed, as to her, for want of jurisdiction. The devise to her is in no way connected with her father's claim of title, although his undue influence is alleged to have induced it. She sets up no title, except by devise, and it is therefore manifest that proceedings by *caveat,* commenced before the clerk, will give adequate relief as to her, and the interference of a court of equity is unnecessary. It is not essential in such proceedings that the entire will be contested and set aside. Under proper issues and instructions, the controversy may be directed to the validity of the devise to Sallie B. Staton.

It is well settled that when the probate of a will is contested on the ground of undue influence, one or more of the provisions may be sustained as valid, while others are set aside. The whole will is not necessarily void because of undue influence, but it will be left to the

jury to determine what gifts or devises were obtained by such fraudulent influences, and such gifts and devises only will be declared void.

Jarman on Wills (5 Am. Ed.), 70-71; *Eastis v. Montgomery,* 93 Ala., 299, and cases cited. Upon a review of the case, we are of opinion that his Honor erred in holding that the Superior Court did not have complete jurisdiction.

The cause is remanded, to be proceeded with along the lines laid down in this opinion.

Reversed.

WALKER, J., concurring: I cannot better express my concurrence in the opinion of the Court than by quoting at some length, though not literally, from the most excellent treatise of Pomeroy on Equity Jurisprudence. The doctrine is fully settled by an unbroken line of decisions, extending to the present day, that, with one remarkable exception, the jurisdiction of equity exists in and may be extended over *every* case of fraud whether the primary rights of the parties are legal or equit-
(205) able and whether the remedies sought are equitable or simple pecuniary recoveries, and even though courts of law have a concurrent jurisdiction of the case and can administer the same kind of relief. The English judges have virtually said that in every case of fraud the remedy at law, either from the nature of the legal relief itself or from the methods of legal procedure, is inadequate. The only question, therefore, presented to an English court is, not whether the equitable jurisdiction *exists,* but whether it should be exercised. 2 Pom. Eq. Jur. (3 Ed.), sec. 912. The marked exception to the jurisdiction referred to in the foregoing paragraph is that of canceling wills obtained by means of fraud. In a few very early decisions the court of chancery seems to have asserted such a jurisdiction. For more than a century, however, and through a long series of cases, the judges have either refused to exercise the jurisdiction or denied its existence; and it has finally been settled by the tribunal of last resort that, under their general jurisdiction, courts of equity have no power to entertain suits for the purpose of setting aside or canceling a will on the ground that it was procured by fraud. The same rule has been generally adopted in the United States. Under the common-law system, the validity of wills of real estate could only be tested in an action at law; that of wills of personal estate was established by the decree of the ecclesiastical court in proceedings for probate. Under the statutory system generally prevailing in this country, both wills of real estate and wills of personal estate are admitted to probate; in some of the States the decree of the probate court is conclusive with respect to both kinds; in other States it is conclusive only with respect to those of personal property. 2 Pom. Eq. Jur.

(3 Ed.), sec. 913. Although an entire will cannot be set aside on account of fraud yet a particular devise or bequest may be impressed with a trust in favor of a third person, for whom the testator's beneficial intentions have been fraudulently intercepted and prevented by the actual devisee or legatee; and in the same manner the land descending to the heir may be impressed with a trust, where he has prevented the testator from making an intended devise by fraudulently representing to the testator that his intention will be carried into effect towards the beneficiary as fully as though the devise were made. Where a *probate* is obtained by fraud, equity may declare the executor, or the other person deriving title under it, a trustee for the party defrauded. The jurisdiction in the case of intended testamentary gifts fraudulently prevented extends to other analogous cases. Where one person has been prevented by fraud from doing an intended act for the benefit of another, equity may relieve the disappointed party by establishing his right, as though the act had been done, and by confirming the title which (206) he would thereby have acquired. Conversely, when instruments have been fraudulently suppressed or destroyed for the purpose of hindering or defeating the rights of others, equity has jurisdiction to give appropriate relief by establishing the estate or rights of the defrauded party. 2 Pom. Eq. Jur. (3 Ed.), sec. 919. Mr. Pomeroy further says: There is still a third aspect of the remedial action of equity which should be accurately understood, since it lies at the foundation of much of the dealing of the court of chancery with the legal estate and rights, and especially those conferred by the positive provisions of statutes. I mean the most important principle, that equity acts upon the conscience of a party, imposing upon him a personal obligation of treating his property in a manner very different from that which accompanies and is permitted by his mere legal title. Whenever a legal estate is, by virtue of some positive rule of either the common or statute law, vested in A, but this legal estate in A is of itself a violation of some settled equitable doctrines and rules, so that B is equitably entitled to the property or to some interest in or claim upon it, equity grants its relief and secures to B his right, not by denying or disregarding or annulling or setting aside A's legal estate, but by admitting its existence, by recognizing it as wholly vested in A, and then by working upon A's conscience and imposing upon him the duty of holding and using his legal title for B's benefit; so that, in the ordinary language of the courts, he is treated as a trustee for B. One or two familiar examples will illustrate the working of this fundamental principle. A testator has given certain lands to A by a will, properly executed, but A procured the devise by wrongful representations made to the testator, and the lands should, by the doctrines of equity, belong to B. The statute of wills, however, is per-

emptory in its prescribed mode of executing a will; there can be no will without conforming to the statutory requirements. Equity does not attempt to overrule the statute; it admits the validity of the will and the legal title vested in A, but, on account of A's wrongful conduct in procuring the devise to himself, it says that he cannot conscientiously hold and enjoy that legal title for his own benefit, and imposes upon his conscience the obligation to hold the land for B's benefit as the equitable owner thereof; and then arises the further obligation upon his conscience to perfect and complete B's equitable ownership by a conveyance. 1 Pom. Eq. Jur., sec. 430. *Lord Westbury* said, in *McCormick v. Grogan,* L. R., 4 H. L., 82, 97, that "A court of equity has from a very early period decided that even an act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a
(207) fraud, an act of Parliament intervenes, the court of equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act, and imposes upon him a personal obligation, because he applies that act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of wills and the statute of frauds." Although *Lord Westbury* here speaks only of a case where the equitable rights of one person arise from the frauds of another who has thereby obtained the legal estate, yet the principle applies, whatever be the grounds and occasion of the equitable interest and claims which are asserted in opposition to the one having the legal title. 1 Pom. Eq. Jur., 431.

These authorities would seem to sustain the very proposition involved in this case, that while a court of equity has no jurisdiction to invalidate a will or to set aside a probate, except, perhaps, in the latter case, when fraud in the procurement of the probate appears, because of the exclusive jurisdiction of the ecclesiastical court and, under our system, the clerk of the Superior Court, in such matters, it will treat the will as valid and work out the equity of any party justly entitled as a beneficiary, being the real object of the testator's bounty, by decreeing the person who has acquired the legal estate by any fraudulent method or contrivance which defeated the testator's intention as a trustee for such beneficiary. It does not assume jurisdiction to pass upon the validity of the will, which belongs to another tribunal, but, giving full scope to the jurisdiction and recognizing its plenary power in such cases, proceeds to exercise its own jurisdiction in harmony therewith, and acts solely upon the conscience of the party who has committed the fraud, compelling him to surrender, under its process, his ill-gotten gains.

Cited: Wilder v. Greene, 172 N. C., 95.

W. E. KINDLEY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 27 October, 1909.)

1. **Carriers of Passengers—Baggage—Larceny—Liability—Insurers.**

When there is no partnership arrangements between connecting lines of railroads, and a passenger buys a through ticket from a carrier to his destination on a connecting line, checks his trunk through to his destination and voluntarily returns to the starting point without going upon the road of the connecting lines, the latter carrier is not liable as insurer of the contents of the trunk from larceny by reason of taking the trunk to its destination, storing it there in its baggage room until its return was requested and then forwarding it to the junctional point, without compensation.

2. **Same—Warehousemen—Consideration—Gratuitous Bailee—Gross Negligence—Evidence.**

Nor is the connecting line liable under such circumstances as a warehouseman by reason of having stored the trunk at the destination in its baggage room, but only as a gratuitous bailee, for gross negligence; and the burden being upon plaintiff to show negligence, he cannot recover the value of the stolen articles in his suit against the connecting carrier, there being no evidence that the carrier was negligent under the facts appearing.

3. **Same—Interpretation of Statutes.**

Carriers are made liable under the statute (Revisal, sec. 2624) for baggage of passengers "from whom they have received fare," etc., and they are also required under the statute (Revisal, sec. 2627) to redeem the unused part of the ticket in the manner therein prescribed; and a connecting line which receives the trunk of a passenger checked through under a ticket bought from the initial carrier, with which it has no partnership agreement, and carries it to its destination, places it in its baggage room, not knowing that the passenger voluntarily did not take its train, and returns it upon request of the passenger, is merely a gratuitous bailee, having performed the service without consideration.

APPEAL from *W. J. Adams, J.*, at April Term, 1909, of CUM- (208) BERLAND.

The facts are stated in the opinion of the Court.

Sinclair & Dye and Cook & Davis for plaintiff.
J. D. Shaw and Murray Allen for defendant.

WALKER, J. In this case the plaintiff sought to recover the value of a diamond, which she alleged had been cut from its setting in one of her rings. The general allegation was that on 18 December, 1905, she purchased a through ticket from Fayetteville to Charlotte, which was issued by the defendant, the Atlantic Coast Line Railroad Company, *via* Max-

ton, to the place of her destination, in Charlotte. The ring, we will assume, for the purpose of deciding the question presented, and as the evidence tends to show, was in her trunk at the time the latter was delivered to the drayman for the purpose of being carried to the depot of the Atlantic Coast Line Railroad Company for shipment to Charlotte. There was some evidence tending to show that for a large part of the time the trunk was being carried from Fayetteville to Maxton it was under the supervision of the employees of the latter company, whose duty it was to take care of it, and was in good condition, and evidence was offered tending to show that at Maxton it was placed upon a truck and
(209) left, unguarded, on the station yard of the Atlantic Coast Line Railroad Company for about two hours and until the arrival of the Seaboard Air Line train, which was behind its schedule time that night. The plaintiff left Fayetteville on the train of the Atlantic Coast Line Railroad Company at 5 o'clock p. m. and arrived at Maxton between 8 and 9 o'clock p. m. the same day. She found that the train of the Seaboard Air Line Railway, bound for Charlotte, was delayed by an accident, and therefore she could not reach Charlotte until several hours after the usual time of arrival. She then decided to return to Fayetteville by the next train, and looked for the agent of the Atlantic Coast Line Railway at Maxton for the purpose of having her trunk checked back to Fayetteville, but, failing to find him, she requested the conductor of the returning train of the Atlantic Coast Line Railroad Company to have the trunk checked to Fayetteville. He replied that he did not think she could get it, and advised her to see the agent at Fayetteville on her return and have it sent to her. She returned to Fayetteville by the next train, leaving her trunk in Maxton. The trunk remained on the truck until the arrival of the train of the Seaboard Air Line Railway Company, when it was first delivered to that company, placed in its baggage car and carried to Charlotte. The Seaboard Company had no notice that the plaintiff had returned to Fayetteville, and no knowledge that the owner of the trunk was not a passenger on its train. When the train of the Atlantic Coast Line Railway Company arrived at Fayetteville the agent of the latter company was requested by the *feme* plaintiff's husband, Mr. Kindley, to telegraph for the return of the trunk. On 24 December, 1905, the trunk was received at Fayetteville in apparently good condition, and was locked and strapped, having no external appearance of having been opened. When it was examined by the plaintiff the condition of its contents was such as to indicate that it had been opened and the diamond cut from the ring, and stolen; at least, it could not be found. There was no evidence of any negligence on the part of the Seaboard Air Line Railway Company in handling the trunk, unless an

inference of negligence is, in law, to be drawn from the fact that the trunk had been in its possession and under its control while in transit on one of its trains and in its baggage room at Charlotte. The latter company never received or demanded any compensation of the plaintiff for the service it rendered in carrying the trunk from Maxton to Charlotte. The court submitted to the jury certain issues, which, with the answers thereto, are as follows:

1. Was the property of the *feme* plaintiff lost through the negli- (210) gence of the defendant, Atlantic Coast Line Railroad Company, as alleged in the complaint? Answer: Yes.

2. Was the property of the *feme* plaintiff lost through the negligence of the defendant, Seaboard Air Line Railway, as alleged in the complaint? Answer: Yes.

3. What amount, if any, is the *feme* plaintiff entitled to recover? Answer: $170.

Among others, the defendant, Seaboard Air Line Railway Company, requested the court to give the following instructions to the jury:

1. That defendant would only be liable if the jury find from the evidence that the loss occurred while the trunk was at Charlotte on its way to Fayetteville, resulting from gross negligence on its part, and there is no evidence of gross negligence.

2. That defendant was only required to take such care of the trunk while in Charlotte, or on its way to Fayetteville, as a prudent man would of his own property, and there is no evidence tending to show that defendant failed to take such care.

The court refused to give those instructions, or either of them, and charged the jury that the defendant, the Seaboard Air Line Railway Company, could, in law, be held liable to the plaintiff for the value of the diamond, either as an insurer, a warehouseman or a gratuitous bailee, depending upon how the jury should find the facts to be, the court stating to the jury the general principles of law applicable to each of those relations towards the plaintiff, sustained by the said defendant, and the measure or scope of its liability. There were other instructions given as to both of the defendants, which it is not necessary to set out. The court, in the exercise of its discretion, set aside the verdict as to the Atlantic Coast Line Railway Company and ordered a new trial as to it. Judgment was entered upon the verdict as to the other defendant, who has brought the case here by appeal, upon exceptions and assignments of error, duly taken during the course of the trial.

We think the very learned judge erred in his instruction to the jury. How the defendant, who was cast in this suit, can be responsible to the plaintiff as an insurer, having received not the slightest compensation for

its services to the plaintiff, which service was in every conceivable view voluntary and rendered in ignorance of the real facts, we are unable to see. It would be, in our opinion, an unreasonable imposition upon the appealing defendant to lay down any such rule of law, and we should not do it. The Seaboard Company never received the trunk as a common carrier.

(211) There are three aspects of the case, the court told the jury, in which the appellant could, admitting *all* that the plaintiff charges, be held for the value of this diamond: (1) as an insurer; (2) as a warehouseman; (3) as a gratuitous bailee. We do not hesitate to say that this is a very important question, involving as it does the rights of travelers with reference to their baggage. No one will go farther than the writer of this opinion to hold these carriers to a strict responsibility, not only in the protection of the rights of the passenger as to the safe and convenient carriage of himself, but also as to the safe custody and protection of his baggage during its transit, from the time of delivery to it for carriage until it has reached its destination. It is a very questionable proposition, though, that when a trunk is delivered at Fayetteville for carriage to Charlotte, even upon a through ticket, it being admitted that there was no partnership arrangement between the Coast Line and the other company, upon which the Seaboard should be held liable, the plaintiff is entitled to recover from the Seaboard Company the value of the lost diamond, when the latter company had no knowledge whatever that it was not carrying the trunk of a passenger on its line, but was gratuitously performing a service for the plaintiff, which, in law, she had no right to request, and certainly not to demand as her legal right. But the authorities, even the decisions of this Court, are fully sufficient to acquit the defendant of any legal wrong to the plaintiff, as an insurer, upon the facts as they appear, and construing all of them "in the best light" for the plaintiff. While we have referred to the question, it is not very material to inquire whether the appellant was an insurer of the safe custody and protection of this trunk or not. There is *no* evidence in this case that it insured the trunk against invasion by a robber. All the evidence proves the contrary, if it is the very truth, and authorizes us to conclude that it is the same as the facts themselves. What principle, upon the admitted facts of this case, can possibly hold this appellant as an insurer? It received the trunk in total ignorance of the fact that the *feme* plaintiff had changed her mind and decided to return to Fayetteville. Was it the fault of the appellant that the plaintiff changed her mind? It is said that it was because the train was late in arriving at Maxton, which delay was caused by the *negligence* of the appellant, so far as appears. The evidence showed that the train of the Seaboard

Company had been delayed by an accident, not due, so far as appears, to any negligence on the part of that defendant. But suppose it was negligent in this respect; it did not authorize the *feme* plaintiff to return to Fayetteville and leave her trunk at Maxton, knowing that it would be carried to Charlotte, without notice to the appellant, generally (212) speaking, if she could have given it, that it was performing a gratuitous service in taking her baggage to Charlotte. Such a holding would be contrary, we think, to the well-settled principle of the law. The law, as declared by the decisions of this and other courts, and as recognized by the text writers, acquits the appellant of any liability in this case as an insurer, unless the facts are changed by new or additional testimony.

Our rule has always been that where a carrier of baggage or of goods has become a warehouseman or a gratuitous bailee it is incumbent upon the plaintiff to offer *some* proof of negligence. When his cause of action and his right to recover is based upon negligence by the alleged offending party, he must show it, subject, however, to certain exceptions, which do not apply to this case. The learned judge bottomed the case upon the wrong ground when he held the appellant might be liable as an insurer. The appellant was certainly nothing more than a gratuitous bailee, liable for gross negligence (*crassa negligentia*). Did the fact that the trunk was deposited by it in its baggage room at Charlotte increase its liability in any degree or make it a warehouseman? If the appellant had left it on its yard, without a caretaker, the jury might perhaps have found, upon proper instructions from the court, that there had been gross negligence. This being so, can the fact that having received the trunk as a gratuitous bailee, it converted itself into a warehouseman by taking better care of it? *Non sequitur.* It is only when the baggage is received by the carrier—quo carrier—and is afterwards placed in its baggage room, remaining there for a reasonable time to be claimed by its owner, that the *carrier* becomes a warehouseman. But when it received the trunk as a gratuitous bailee, this relation of it to the owner of the baggage continues, and must needs continue, so long as the bailee has possession of it. We therefore think the learned judge erred in determining the liability of the appellant upon the idea that it became a warehouseman.

This case must go back for a new trial. But it would be trifling with the law and cause unnecessary delay in the disposition of the case if we failed to pass upon the other questions presented, which will surely come before us if there is another trial. We therefore proceed to consider them. It cannot be questioned, as we have shown, that the appellant is not liable as an insurer; but it was seriously contended by Mr. Dye, in a very able

and learned argument and carefully prepared brief, that the appellant was at least liable, in any view of the facts, as a gratuitous bailee, after the trunk had reached Charlotte and had been deposited in its
(213) baggage room, and after, also, the plaintiff had been given a reasonable opportunity of claiming and removing the same. *Trouser Co. v. R. R.,* 139 N. C., 382. But there is not a particle of evidence that, after the defendant had received the trunk at Charlotte and housed it in its wareroom, or after it had been notified to return the trunk to Fayetteville by the agent of the Atlantic Coast Line Railroad Company, it was guilty of any kind of negligence—that is, that it failed to exercise ordinary or even the slightest degree of care, so as to make it liable as a bailee for hire or as a gratuitous bailee. There was absolutely no evidence that the appellant ever assumed the liability of a common carrier with reference to this trunk, nor is there any evidence, affirmative or positive, that it neglected or omitted to perform its duty as a gratuitous bailee. The burden of proof as to the negligence, upon the facts of this case, was, by *all* our authorities, upon the plaintiff when she sought to charge the defendant as a gratuitous bailee. *Kahn v. R. R.,* 115 N. C., 638; *Hilliard v. R. R.,* 51 N. C., 343; *Chalk v. R. R.,* 85 N. C., 423. In the case first cited *Judge Shepherd* tersely but with sufficient clearness, fullness and accuracy thus states the law: "There was also error in so much of the charge as states that the burden was on the defendant to show that the property had not been lost or destroyed by reason of the defendant's negligence. It very clearly appears that the defendant's liability as a common carrier had ceased when the property was destroyed by fire, and that it was liable only as a warehouseman for want of ordinary care. 'The rules of law require, in an action for damages resulting from the negligence of the defendant, or his agents or employees while engaged in his service, that the plaintiff shall prove the negligence as a part of his case (*Doggett v. R. R.,* 81 N. C., 461) and we see nothing in the record to show that the present case falls within any of the exceptions to this general principle." This case goes further than is required to sustain our decision.

In 4 Elliott on R. R., sec. 1652a, we find it stated that "If a passenger stops or lies over at an intermediate point on his journey, without the consent of the carrier, and permits his baggage to go on without him, the carrier is not liable as such, but is liable, it seems, only as a gratuitous bailee." In *Brick v. R. R.,* 145 N. C., 203, where this Court carefully considered the liability of a carrier for baggage, and delivered its opinion by the present Chief Justice, it was held that, where the owner does not accompany his baggage, but leaves it in the constructive possession of a third person, who travels on the same train with it, and even when that

person was the clerk of the owner, the latter cannot recover for any loss of the baggage or its contents, except by showing a case (214) of gross negligence or willful misconduct. The Chief Justice said: "The court erred in holding that in no event could the plaintiff recover; but as there was no evidence of gross negligence this was harmless error." And we now say in this case and *a fortiori,* as there was no showing at all by the plaintiff of even a lack of ordinary care, the defendant was not liable as warehouseman. Indeed, the evidence all tends to show that the defendant exercised ordinary care and due diligence in regard to the protection of the trunk while in its possession. We invite a careful perusal of the case of *Brick v. R. R., supra,* for it covers every essential question in this case and states the law in regard to the liability of the defendant in that case (under facts and circumstances not as strong in its favor as are those in this case for the defendant) with remarkable pithiness and accuracy. In Fetter on Carriers, vol. 2, sec. 625, we find it stated as an admitted principle that "A connecting carrier is not liable for a passenger's baggage beyond its own line, in the absence of any showing that the carriers concerned in the transaction are partners, either *inter se* or as to third persons." See, also, *R. R. v. Roach,* 35 Kan., 740; *R. R. v. Campbell,* 36 Ohio St., 647. The English rule, recognized by every court of Westminster Hall, was to regard the carrier who received the goods and booked them for a certain destination beyond its own line as a carrier throughout the entire route; and this rule has met with favor in the courts of this country. *Watson v. R. R.,* 3 Eng. L. & Eq., 497; *R. R. v. Copeland,* 24 Ill., 337. Our statute provides (Revisal, sec. 2624) that carriers shall be liable for baggage of persons (passengers) "from whom they have received fare or charged freight"; and it is further provided by section 2627 that "When any round-trip ticket is sold by a railroad or transportation company, it shall be the duty of such company to redeem the unused portion of said ticket by allowing to the holder thereof the difference between the cost thereof and the price of a one-way ticket between the station for which such round-trip ticket was sold. Whenever any one-way or regular ticket is sold by a railroad or transportation company, and not used by the purchaser it shall be the duty of the company selling the ticket to redeem it at the price paid for it." It appears therefore, very clearly, from the express provision of the statute, that the Seaboard Air Line Railway Company did not and could not receive any compensation for the transportation of the plaintiff or her baggage over its line, which connected with that of the other defendant. There was no partnership or association between the carriers in their traffic arrangements. The logical and inevitable conclusion is that it was merely a gratitous bailee, responsible (215)

for *"gross negligence"* (if, in fact, there be in legal phraseology such a term), bound to a slight degree of care, and consequently liable for gross negligence, if the diamond was abstracted from the trunk while in its possession or during the storage of the baggage in its warehouse or baggage room. When the bailor sues the bailee for a breach of the contract of bailment, it must appear, not only that there has been a loss, but that the bailee failed to perform his duty by negligence to use ordinary care, or that degree of care which the character of the bailment and the rules of responsibility in such cases required of him. We have examined most carefully the cases cited by the appellee's counsel, and find that they all differ in the facts from this case. It appeared in the leading authorities cited that the carrier received the baggage in his own wrong or knew at the time it had been "routed" by a different line. The cases, therefore, are easily distinguished.

While we cannot say too much in praise of the careful manner in which the trial of the case was conducted under the supervision of the just and able jurist who presided and who displayed great ability and learning in his charge, and while generally it is correct in the statement of legal principles, we must conclude that, in the respect indicated, he did not declare the law as the appellant was entitled to have it stated to the jury. There was error in the charge of the court as to the liability of appellant, upon the facts as they appeared in the case, and it must be submitted, with proper instructions, to another jury.

New trial.

Cited: Williams v. R. R., 155 N. C., 275; *Perry v. R. R.,* 171 N. C., 164.

PENN BRIDGE COMPANY v. COMMISSIONERS OF CHATHAM COUNTY ET AL.

(Filed 27 October, 1909.)

Counties—Dividing Streams—Bridges—Cost Apportioned.

Under the provisions of Revisal, 1318, subsec. 29, each county shall defray the charge of building bridges across a stream dividing them "in proportion to the number of taxable polls in each," and a statute providing that the divisional line shall run up the "middle of the stream" (river) in question and that said line shall be "surveyed and marked," does not vary the rule of apportioning the expenses of such bridges between the counties from that prescribed by said section. Under the facts of this case Revisal, 2696, is inapplicable.

APPEAL by defendant from *Biggs, J.*, at May Term, 1909, of (216) CHATHAM.

The facts are stated in the opinion of the Court.

H. A. London & Son for plaintiff.
Hayes & Bynum for Commissioners of Chatham County.
A. A. F. Seawell for Commissioners of Lee County.

CLARK, C. J. This is an action against the county commissioners of Chatham and Lee to recover the balance due for the construction of three steel bridges over Deep River, a non-navigable stream dividing Chatham and Lee counties. There is no question as to the amount due the plaintiff. The controversy is between the defendants as to the apportionment of the recovery. The commissioners of Chatham contend that each county should pay one-half the cost of erecting the bridges, whereas the commissioners of Lee contend that the charge should be divided between the counties in proportion to the number of taxable polls in each.

Revisal, sec. 1318, subsec. 29, provides: "When a bridge is necessary over a stream which divides one county from another, the board of commissioners of each county shall join in constructing or repairing such bridge, and the charge thereof shall be defrayed by the counties concerned in proportion to the number of taxable polls of each."

Revisal, sec. 2696, as to building or repairing bridges over a stream which "divides one county from another," where the cost does not exceed $500, provides for the same basis of apportioning the cost between the two counties, "unless otherwise agreed upon by and between the commissioners of the respective counties." In this case no such agreement is averred; besides, the cost of each bridge exceeds $500.

The commissioners of Chatham urge, however, that this is not a case where "a stream divides one county from another," because the act creating Lee County (Laws 1907, ch. 624) provides that the line between Lee and Chatham shall run up "the middle of Deep River," and that said line shall be "surveyed and marked." We cannot see that this makes any difference. An examination of the acts creating counties show that in some instances, when a stream lies between two counties, the stream lies wholly in one of them, the line of the other county being at low-water mark on the other bank. This is the case as to the counties bordering on the Roanoke River, for instance. In other cases, as in this the line is up the middle of the stream. In neither case is there any neutral territory, and either county has criminal jurisdiction of offenses committed on or in the river. Revisal, sec. 3234; *S. v.* (217) *Lewis*, 142 N. C., 626.

In one of the later cases, *McPeters v. Blankenship,* 123 N. C., 651, the act provides, "One-half the river lies in Mitchell County and one-half in Yancey County," and the Court recognized the above section (now Revisal, sec. 1318, subsec. 29) as applicable and quote it in full.

The judgment apportioning the charge of constructing these bridges in proportion to the number of taxable polls in each county conforms to the evident intent of the Legislature, which is founded upon the calculation that, as a general rule, the number of taxable polls in the respective counties will approximate the benefit to be derived by the people of the respective counties. This benefit can in nowise be affected by the fact whether the county line is in the middle of the stream or on the edge of it. It may be that a juster rule would be an apportionment "in proportion to the assessed value of taxable property in each county," for property as well as persons passing over the bridge, but that is a matter for the Legislature. The judgment is

Affirmed.

THE SNOW LUMBER COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 October, 1909.)

1. **Appeal and Error—Issues of Fact—Questions for Jury.**

In an action for damages to plaintiff's lumber from fire alleged to have been caused by a spark from defendant's engine, the question being whether the defendant's engine or a spark from plaintiff's mill caused the fire, the issue is one of fact for the jury to determine under conflicting evidence, with the burden upon plaintiff, when no competent evidence has been excluded and the judge has correctly charged the law.

2. **Appeal and Error—Expert Witness—Qualification—Record—Evidence Required.**

When evidence is offered and ruled out by the trial judge the burden is upon the appellant to show on appeal that prejudicial error was committed. And an exception to the exclusion of expert evidence is not tenable on appeal when it does not appear of record that his Honor failed, when requested by appellant, to find the preliminary question of the qualification of the witness as an expert, or that the evidence excluded was competent.

3. **"Opinion Evidence"—Qualifications—Competency.**

For "opinion evidence," as distinguished from expert evidence to be competent, there must be evidence tending to prove that the witness, by whom it is offered, has had personal observation and knowledge of the facts and conditions of the subject upon which it is offered, as well as that, from his practical training and experience, he can aid the jury in reaching a correct conclusion.

4. Same.

In this case defendant offered the "opinion" of its experienced engineer as to whether the burning of plaintiff's lumber near defendant railroad company's right of way was caused by a spark alleged to have come from a defective smokestack on defendant's engine, or from plaintiff's own mill. It did not appear that the witness had personal observation of all the pertinent and material facts and circumstances, and it is *held*: that his opinion relative to the cause of the fire was incompetent.

BROWN, J., did not sit upon the hearing of this case.

APPEAL from *W. R. Allen, J.*, May Term, 1909, of SAMPSON. (218)

The plaintiff sued to recover the value of a large amount of lumber which was alleged to have been destroyed by fire negligently communicated to it by an engine operated by the defendant on its branch line between Clinton and Warsaw, N. C. The defendant denied the negligent acts alleged against it. The particular negligence of the defendant alleged was the defective condition of the spark arrester on its engine. The following issues were submitted by his Honor and were answered as set out:

1. Did the defendant set fire to and burn the property of the plaintiff? Answer: Yes.

2. If so, was such burning caused by the negligence of the defendant? Answer: Yes.

3. If so, what damage is the plaintiff entitled to recover? Answer: $9,996.17.

Upon the verdict, judgment was rendered against the defendant, from which it appealed.

The facts are stated in the opinion of the Court.

H. A. Grady, Carter Dalton and King & Kimball for plaintiff.
Davis & Davis and F. R. Cooper for defendant.

MANNING, J. The amount of lumber destroyed by the fire was nearly 700,000 feet. The plaintiff had manufactured it for market and had sold it, and its value at the place and time of destruction was $14.40 per 1,000 feet. The only seriously controverted question at the trial was whether the defendant's engine was the cause of the fire. There was upon this question much evidence, both for and against, and it presented simply a question of fact for the jury. It has been found adversely to the defendant; its determination was doubtful; the jury were the sole judges of the credibility of the witnesses, the weight to be given to their testimony and the inferences of fact to be drawn therefrom. They were the triers of the fact, and their finding is necessarily conclusive upon us, unless it was induced by evidence improperly admitted (219) or improperly excluded. His Honor properly placed the burden

of proof of each issue upon the plaintiff, and charged the jury that, before finding each affirmatively, they must be satisfied of the fact presented by the greater weight of the evidence. The assignment of error, most earnestly and with great learning and ability, pressed upon our attention, is taken to the exclusion of the following evidence: J. E. Huey, the engineer in charge of the engine alleged to have caused the fire, was offered by the defendant as a witness, and he testified, among other matters, as follows: "Engine had spark arrester in good condition, as far as I know. Do not examine unless engine begins to throw sparks. Wood sparks will burn better than coal. Wood will ignite farther from smokestack. . . . Had short train and was running about ten miles per hour when we passed the mill. With a spark arrester on engine, sparks will escape. If meshes are so small that no sparks could go through, train could not run. Saw spark arrester in this engine that day or day before. With a light or heavy wind, sparks could not go in front of train, but to rear. In light wind from south, sparks would go to one side. I claim to be an expert in running coal-burning engines. Have been running coal-burning engines for seven years." Witness was then asked "if from his experience and knowledge of the facts, as they existed when the train passed the mill, he could form an opinion satisfactory to himself as to how far a coal cinder or spark would float in the air, or be carried by the wind, and retain the power to ignite trash, shavings or other combustible matter." Witness answered, he could. Witness was then asked how far, in his opinion, a spark or cinder from the engine, when it passed the mill, could be carried. The answer to this question was, upon objection, excluded, and defendant excepted.

There was evidence offered showing that sparks in considerable volume escaped from the smokestack of the engine in use on the evening the plaintiff's property was destroyed, and were thrown from thirty-five to forty feet high, and were of the size of the finger nail of a man; that this was observed as the engine passed a shanty near the burned lumber; that fire had been communicated by this engine, on the day before, to property along the track as far as from sixty to one hundred and twenty-five feet; that at least three fires had, on that day and the day before, originated from sparks from this engine, near plaintiff's mill; that the season was dry, and on the night in question a wind was blowing; that on the day of the fire plaintiff had shut down its plant—one boiler at 12:30 p. m., the other at 3 p. m.—and the fires had been raked into pits and water poured on them; that men had been at work around the
(220) plant during the afternoon until dark, and no fire had been seen in the boiler pits or in the lumber; that there was fire in what was called "slab pits," or trash piles, but there was some difference of opinion as to its condition, some of the witnesses stating that there were

only coals in them, others that the fire was blazing; that one of these pits was north and the other west of the place where the fire caught; that the wind was blowing from west of south to east of north; that the fire caught between two piles of lumber, at a distance from the railroad track estimated from 108 to 180 feet; that the fire was discovered between one-half hour and one hour after the train passed, at 7 p. m. The grounds upon which this evidence of the witness Huey was excluded are not stated. If he was offered as an expert, then, upon objection, the preliminary question of his qualification as an expert ought to have been found by his Honor, at defendant's request. No request for a finding by his Honor upon this question appears from the record to have been made. The burden being upon the appellant to show prejudicial error, we cannot assume that his Honor, in this view, found the witness to be an expert, and then excluded the question and answer. In order that the witness might testify as an expert when objection is made, there must be either a finding by the court or an admission or waiver by the adverse party that the witness was so qualified. Neither appears in this record. This being an appellate court, for the review of errors, the appellant must show, where evidence is excluded, not only that the witness was found qualified to testify as to the particular matter, where a special qualification is necessary, but that the evidence excluded is itself competent; and when the evidence admitted is excepted to, this Court must assume that the preliminary fact of qualification was found by the court or admitted or waived, and the appellant must show that the evidence itself is incompetent. *Britt v. R. R.,* 148 N. C., 37; Rogers on Expert Testimony, p. 8, sec. 3; *Summerlin v. R. R.,* 133 N. C., 550.

The appellant, however, contends that the witness was qualified and the evidence competent as "opinion evidence." The rules governing the admissibility of this class of evidence and prescribing the qualification of witness competent to give it in evidence have been recently and fully considered by this Court in the following cases: *Wilkinson v. Dunbar,* 149 N. C., 20; *Myatt v. Myatt,* 149 N. C., 137; *S. v. Peterson,* 149 N. C., 533; *S. v. Banner,* 149 N. C., 519; *Britt v. R. R.,* 148 N. C., 37; *Fire Setter Co. v. Whitehurst,* 148 N. C., 446; *Taylor v. Security Co.,* 145 N. C., 385; *Davenport v. R. R.,* 148 N. C., 287; *Wade v. Tel. Co.,* 147 N. C., 219; *Whitfield v. R. R.,* 157 N. C., 236; *Whitaker* (221) *v. Hamilton,* 126 N. C., 465.

The courts are disposed with greater liberality to admit "opinion evidence" "when the witnesses have had personal observations of the facts and conditions, and from their practical training and experience are in a condition to aid the jury to a correct conclusion." *Wilkinson v. Dunbar, supra.* The witness Johnson, whose opinion was rejected by his Honor, upon objection, did not bring himself within the rule, for the

reason that he admitted he had no practical knowledge of the subject; was not at the mill when the train passed; did not know the course and velocity of the wind or where the fire started. The witness Huey was more nearly qualified; he was the engineer in charge of the engine; he had had an experience of seven years in running coal-burning engines; was running the engine that passed plaintiff's mill the evening of the fire; noticed there was some wind blowing; did not know where the fire started: had not examined the spark arrester; admitted that if fires were communicated the day before by sparks from engine to fields from 80 to 125 feet from right of way, as testified to by witnesses, the spark arrester was in bad condition; that it was not his rule and he did not examine the spark arrester unless engine began to throw sparks; did not observe that when train passed shanty near to and occupied by employees of plaintiff, sparks were flying from engine to a height of thirty-five or forty feet, as testified to by one witness; that sparks as large as a man's finger nail escaped from engine. All facts that were within his personal knowledge or observation his Honor permitted this witness to narrate, but excluded his opinion.

It will appear from this summary that the witness did not have that personal observation and knowledge of those facts and conditions required by the rule established in the cases above cited to make his opinion competent. Without this knowledge and observation, his opinion could have been of no aid to the jury in determining the fact to be tried by them. His opinion would have been speculative. The jury were to determine not merely the probability that the fire communicated to plaintiff's property by sparks from defendant's engine, but to determine the fact that this was true by the preponderance of proof. An examination of the many cases cited to us in the able and exhaustive briefs of counsel of the defendant convinces us that the rule established by the decisions of this Court is in harmony with the rule established by the well-considered opinions of other courts. As in *Krippner v. Biebl,* 28 Minn., 139, approved in *Davidson v. R. R.,* 34 Minn., 51, it is held: "The fact
(222) being material as to how far a fire in stubble land would be liable to 'jump' a fire-break, under certain conditions of the wind and vegetation, it is competent for a witness, shown to have had *actual knowledge* of such conditions, and to *have had sufficient experience with such fires,* to give his judgment or opinion as to such fact." The principles governing the admissibility of such evidence are well stated in Rogers on Expert Testimony, pp. 7 and 8, as follows: "(*a*) It is competent for a witness to state his opinion in evidence when the primary facts on which it is founded are of such a nature that they cannot be adequately reproduced or described to the jury, so as to enable another than the actual observer to form an intelligent conclusion from them.

(*b*) And when the facts upon which the witness is to express his opinion are of such a nature that men in general are capable of comprehending and understanding them. If they are not of that nature, the opinion of ordinary witnesses cannot be received, but the opinions would have to come from men of science and skill." See, also, section 4, page 9. Many of the cases cited by appellant's counsel deal with evidence strictly expert and not "opinion evidence," and are not apposite to the present question. We cannot sustain the sixth and seventh exceptions, which were taken to the exclusion of the opinions of several witnesses, who were present during the fire, that it could not have been caused by sparks from the train engine. 1 Greenleaf Ev. (16 Ed.), sec. 441b; *Smaltz v. Boyce,* 109 Mich., 382; *Hayrie v. Baylor,* 18 Tex., 498; *R. R. v. Lawler,* 40 Neb., 356; 58 N. W., 968; *Frazier v. Tupper,* 29 Vt., 409; *Ferguson v. Habbell,* 97 N. Y., 507; *Summerlin v. R. R.,* 133 N. C., 550; *Marks v. Cotton Mills,* 135 N. C., 287.

We have carefully examined the other exceptions noted in the record and briefs, and we are unable to discover any error in his Honor's rulings prejudicial to the defendant. The charge of the learned judge was carefully prepared; the evidence, under proper instructions, was submitted to the jury to determine the facts; they have found them against the defendant, and no error in the trial is manifest to us.

No error.

BROWN, J., did not sit.

Cited: Harper v. Lenoir, 152 N. C., 730; *Moffitt v. Smith,* 153 N. C., 293; *Deppe v. R. R.,* 154 N. C., 525; *Boney v. R. R.,* 155 N. C., 105; *Caton v. Toler,* 160 N. C., 106, 107; *Mule Co. v. R. R., ibid.,* 255; *Boyd v. Leatherwood,* 165 N. C., 617; *Patton v. Lumber Co.,* 171 N. C., 839.

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(223)

JAMES N. WILLIAMSON v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 3 November, 1909.)

1. Telegraphs—Message—Cipher—Notice of Importance—Damages.

A telegram reading, "Sold Tootle Mottar ninety cases twenty-eight inch six and three-quarters," is not a cipher message, and the use of the capital letters to the words Tootle Mottar indicates the name of a firm to whom goods are sold, and the rest of the message the quantity, kind and price thereof; and, from the nature of the business, a telegraph company receiving the message for transmission has implied knowledge of the importance of accuracy in transmission and promptness in delivery.

2. Same—Measure of Damages—Proximate Cause.

A telegram indicating upon its face that a commodity had been sold gives notice to defendant telegraph company that damages would probably result from an error in transmitting it; and when a message addressed to a manufacturer of cloth, a user of defendant's telegraph service, by his commission man, was negligently transmitted so as to show a difference of eighty-one cases in the quantity of goods sold to a certain firm, which caused the manufacturer not to buy the cotton for the eighty-one cases, until several days later when the price of cotton was higher, he may recover of defendant his loss in having to protect himself by purchasing cotton for the eighty-one cases later at the advanced price, as such damages will be reasonably presumed to have been in the contemplation of the parties at the time the message was received by defendant for transmission, and the direct and proximate cause of its negligence.

3. Same—Additional Notice.

And when, after the manufacturer informed the defendant's agent that the message was important and involved a financial loss or profit, and requested an investigation, the agent tells him later in the same day that the message as delivered correctly stated the number of cases sold, relying upon which he does not protect himself, the company has received additional notice of the importance of the message, and also through its second error caused the injury.

4. Telegraph Companies—Messages—Contracts—Conflict of Laws—Public Policy—Comity.

A stipulation printed on a message form which limits the liability of a telegraph company for negligence in transmitting an unrepeated message is void in North Carolina, it being contrary to public policy; and if it is upheld by the laws of another State wherein the message had been received by the company and the contract for transmission had been made, the laws of such other State will not be recognized here through comity.

BROWN and WALKER, JJ., concurring in part.

APPEAL by defendant from *Lyon, J.*, at April Term, 1909, of WAKE. The facts are stated in the opinion of the Court.

Womack & Pace for plaintiffs.
Robert C. Strong for defendant.

CLARK, C. J. This action arose over a message sent from New York by R. Lindheim, reading as follows:

W. H. WILLIAMSON,
Pilot Cotton Mills, Raleigh, N. C.

Sold Tootle Mottar ninety cases twenty-eight inch six and three-quarters. R. LINDHEIM.

In the transmission of this message the word "ninety" was changed to the word "nine." When the message was receeived in (224) Raleigh on 1 December, by said Williamson, believing that there had been a mistake, he called up the office of the Postal Telegraph Company, in Raleigh, and asked if there was not a mistake in the message, in that the word "nine" was wrong. The office of the Postal Telegraph Company replied that they would look it up and let him know. At that time Williamson told them that it was a very important matter and that the Postal Telegraph Company had better look into it carefully, as it meant financial loss or profit to the plaintiff. On the same day on which this telephone conversation took place the Postal Telegraph Company called up the said Williamson and stated that the message was correct as delivered, and that "nine" cases was right.

Not until 4 December did Williamson receive by mail a copy of the correct message, thus ascertaining that the word "nine" should have been "ninety," according to the original message filed in New York.

Testimony was introduced to show that if it had been transmitted correctly at first, Williamson would have immediately gone into the market and bought cotton from which to manufacture the ninety cases of goods on 1 December. As it was, he was deterred from buying the cotton until 4 December, at which time cotton had advanced so that the said Williamson was forced to pay the sum of $283.50 in excess of the amount he would have had to have paid had he bought the cotton on 1 December. For this amount the jury rendered a verdict in favor of the plaintiff, having also responded to the first issue that the plaintiff had been injured by the negligent transmission of the telegram. In the message as filed "Tootle Mottar," indicating the vendees, were words beginning with capital letters, thus denoting proper names.

Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9 and 14 were to evidence tending to show that the sender of the message was the agent of the plaintiff in the absence of directions; that the agent and the plaintiff had (225) an understanding about the telegraphing of such message; what the plaintiff did when he ascertained that the message was transmitted incorrectly; why he bought the cotton at all, and other questions of similar character covered by the exceptions above enumerated. But this was proper testimony, as it went to show the *bona fides* and nature of the transaction, what damages would reasonably result from negligence by altering the message in transmission, and that the defendant must have known that damages would likely result from such negligent alteration.

The plaintiff appropriately cited *Garrett v. Telegraph Co.*, 83 Iowa, 263, where the following message was sent:

GREGORY, COOLEY & CO.,
U. S. Yards, Chicago, Ill.
Send me market Kansas City tomorrow and next day.
A. M. GARRETT.

The court admitted testimony to show that there existed an arrangement between Garrett and Gregory, Cooley & Co., as agents, by which no answer to such message meant that there was no change in the market. This message was undelivered, and Garrett, receiving no answer, inferred that there was no change in the market. Acting upon this, he bought cattle in Kansas City or St. Louis, and, there being a change in the market, he lost by his trade. The court admitted the testimony showing the arrangement, and held that it should have been left to the jury the question if, in such a case, the damages were such as were in the contemplation of the parties. In the case at bar the jury answered the issue of negligence and also the issue of damages in favor of the plaintiff. All the facts surrounding the sending and receiving the message, the damages, etc., were clearly brought out and assisted the jury in arriving at the true question of negligence, consequential damages, etc.

The following questions are presented by the exceptions taken on this appeal:

1. Was the message an obscure or cipher message?

2. Was the message such as would put the defendant on notice of damages resulting as the consequence of an erroneous transmission?

3. It was admitted that it was an unrepeated message, written on one of the usual blanks of the company. This being true, is such a stipulation as set out in the statement of facts against the public policy of the State of North Carolina?

4. The telegram having been filed in the State of New York, (226) admitting for the sake of argument that "the unrepeated stipulation" is valid in New York, will the courts of North Carolina recognize it as such and bar recovery?

1. The words "Tootle Mottar" in the message as filed by the sender began with capitals, indicating the name of the firm to whom the goods were sold. The rest of the message showed the quantity and kind of goods sold, and the price. The message was to a cotton mill and from a commission merchant, of the nature of whose business, they often using the wires, the defendant must have had knowledge. There was no cipher and nothing cryptic about the message. The defendant's agent must at once have known the nature of the telegram and that damage would likely result from any material alteration in transmission. Such business is necessarily largely transacted by telegraph, and the defendant

transmits such messages with knowledge of the importance of accuracy and promptness in delivery.

2. The nature of this message put the defendant on notice that damage would result from negligence by which it would be altered or delayed. It is not material that it did not have exact knowledge of the reason or extent of such damage. It is enough that it knew damage would probably result. In *Telegraph Co. v. Lathrop,* 131 Ill., 586, it is said: "We think the reasonable rule, and one well sustained by authority, is that where a message, as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance and discloses the transaction, so far as is necessary to accomplish the purpose for which it is sent, the company should be liable for all the direct damages resulting from a negligent failure to transmit it, as written, within a reasonable time, unless such negligence is in some way excused."

In *Telegraph Co. v. Griswold,* 37 Ohio St., 309, the message read as follows: "Will give one hundred and fifty for twenty-five hundred at London. Answer at once, as I have only tonight." As in the case at bar, the telegraph company contended that the message was indefinite and unintelligible, and that therefore a recovery was unauthorized. The court said: "It appears upon its face that it related to a business transaction, involving the purchasing and selling of property. The company, therefore, was apprised of the fact that pecuniary loss might result from an incorrect transmission of the message. Where this appears, there is no such obscurity that relieves the company from liability from negligently failing to transmit.

Again, in *Dixon v. Telegraph Co.,* 3 App. Div., N. Y., 60; 38 N. Y. Sup., 1056, the following message was held sufficient to (227) disclose to the company the fact that it related to an important business transaction, and the company, therefore, was held liable for damages for a negligent transmission of the message: "One dollar fifty freight thirteen cents. Answer quick." To same purport, *Telegraph Co. v. Milton,* 11 L. R. A., (new series), 560 (Fla.), and cases cited thereunder; also, *Garrett v. Telegraph Co., supra; Telegraph Co. v. Wenger,* 55 Pa., 262; *Maurie v. Telegraph Co.,* 58 N. Y. Sup. Court, 126. *Telegraph Co. v. Blanchard,* 68 Ga., 298, is very much in point. In that case the message read: "Corn two hundred September and one hundred August." The court held that such message on its face showed that it was a commercial message, of value, and that it was sufficient to render the company liable for negligent or improper transmission.

But the defendant insists that the damages suffered by the plaintiff in the case at bar could not have been in the contemplation of the parties at the time the message was sent. The authorities hold almost uni-

formly that it is sufficient to create a liability on the part of the company for all damages directly and approximately resulting from the negligent acts of its agents in failing to transmit a message in the form in which it is delivered, or in omitting to send it at all, that the rise of the market price of cotton resulted in loss to the plaintiff. Such a loss was the direct, immediate, proximate and natural result of the failure of the proper transmission of the telegram, and was in fact contemplated by the parties and was the natural result of the failure to deliver a commercial message. *Cannon v. Telegraph Co.*, 100 N. C., 300, cited by the counsel for defendant, does not apply, because the message over which the suit arose there was in cipher. In passing, however, we call attention to the fact that in that case it is stated that "If the message be in the form of a proposal to buy or sell on certain terms, its importance would appear on its face." . . . In the case at bar the message was written, not in cipher, but in plain English, and it was sufficient to show on its face a business transaction of importance.

Williams v. Telegraph Co., 136 N. C., 82, cited in the brief of appellant, does not apply, for the reason that in that case the plaintiff was suing for mental anguish, and there was nothing in the message in any respect to show the importance of the message or that mental anguish might have resulted from the failure to correctly or promptly transmit the message. On its face it did not show why it should be delivered or why it should have been sent, or that it in any way concerned a commercial transaction or even one of a social nature.

In the case at bar the telegram conveyed the information that
(228) parties in New York had sold to Tootle Mottar ninety cases of some commodity, and that they desired to have the plaintiffs notified in Raleigh. The defendant's contention that the purpose for which this notification was desired should have been communicated to the defendant company, and that before the plaintiff could claim damages for the negligent transmission of such message the sender of the message would have had to inform the operator of the reason for wiring such a message, would rob the commercial world of the benefit of the quick mode of communication; and to permit the barring of recovery for failure to understand every message which passes through his hands by the agent, and requiring the exact meaning of the message, the reason for sending it, and almost the exact results that would come about if the message is not delivered, would surround the sending of telegrams with such regulations as would deprive a business man of the very use for which the telegraph is used, namely, quickness and dispatch.

Besides, in this case, Williamson, after the receipt of the telegram, called up the office of the defendant and informed it that he believed that there was a mistake, to which the agent replied that he would look

into the matter and see if there was a mistake; that subsequently, on that same day, he called Williamson over the 'phone and informed him that "nine" was correct. The testimony shows that only after Williamson had been informed that there was no mistake in the message did he decide not to buy the cotton. Hence the company had additional notice of the importance of the message, and through its second mistake also caused the injury.

3. The defendant sets up the further defense that this message was written on one of the blanks of the company, and that as part of the contract of transmission there was a stipulation that it would not be responsible or liable for mistakes or delays in the transmission of a message unless the same was repeated at one-half the regular rate. The question, therefore, arises as to whether this stipulation bars the recovery of the plaintiff. It is contended by the defendant that this was a New York contract, and that such a stipulation is valid in the State of New York, barring recovery unless the message is repeated. Granted, for the sake of argument, that such is true; the plaintiff, on the other hand, contends that such a stipulation is void in North Carolina, having been expressly held to be against public policy. *Brown v. Telegraph Co.*, 111 N. C., 187 (overruling *Lassiter v. Telegraph Co.*, 89 N. C., 334). *Brown's case* was reaffirmed in *Sherrill v. Telegraph Co.*, 116 N. C., 658. Our courts will not give effect to any contract or stipulation in violation of our public policy. In both above cases (229) the message came from points in other States.

4. Such a stipulation having been declared void by our courts as against the public policy of this State, will our courts, through comity, recognize the validity of the contract in the case at bar simply because it was made in the State of New York? Ordinarily matters bearing upon the execution, interpretation and validity of a contract, we know, are determined by the law of the place where made. To this rule, however, there are well-known exceptions, as follows: First, when the contract is contrary to good morals; second, when the State of the forum, or its citizens, would be injured by the enforcement by its courts of contracts of the kind in question; third, when the contract violates the positive legislation of the State of the forum—that is, contrary to its Constitution or statute; and, fourth, when the contract violates the public policy of the State of the forum. *Canady v. R. R.*, 143 N. C., 443.

The contract in question comes under the second and fourth exceptions. Comity between States as to the recognition of the laws of one by another is the voluntary act of the State offering it, but it is inadmissible when contrary to its policy or prejudicial to its interests. *Gooch v. Faucett*, 122 N. C., 270; *Canady v. R. R., supra; Armstrong*

v. Best, 112 N. C., 60; *Pope v. Hank,* 155 Ill., 617; 28 L. R. A., 568; *Seaman v. Temple Co.,* 28 L. R. A., 430 (Mich.).

Our courts having held that such a stipulation is against the public policy of the State, and having also held that comity is inadmissible in the enforcement of a contract which is against the public policy of the State or prejudicial to its interests, the enforcement of the stipulation in the case at bar would be unwarranted, and the exclusion of the testimony as to the validity of such in the State of New York was proper.

A majority of the cases cited by the attorney for the appellant held that the stipulation would not free the company from liability in case of gross negligence or failure to transmit. We fail to see how the company could be relieved simply because of the grossness of the negligence. In other words, how can a company contract to relieve itself of one degree of negligence and at the same time be held accountable for another degree of negligence? Our Court has held not. See *Brown v. Telegraph Co., supra.*

Attention is called to the fact that some of the cases which hold that these stipulations are valid also hold that, even though such a stipulation may bind the sender, it would not bind the receiver. This (230) is intimated in *Primrose v. Telegraph Co.,* 154 U. S., at bottom of page 21. See, also, *Telegraph Co. v. Dryburg,* 35 Pa. St., 298; *Harris v. Telegraph Co.,* 9 Phil., 88; *De la Grange v. Telegraph Co.,* 25 La. Ann., 386.

These decisions place the invalidity of the stipulation, so far as binding the receiver of the message, on the ground that he had no notice of the printed condition until after the message was received, and could not therefore agree to it in advance.

In the present case the jury found as an actual fact that the plaintiff was injured by the negligent transmission of the message, as alleged in the complaint. The excellent brief of the plaintiff, which we have so largely used in preparing this opinion, thus justly sums up:

1. The message was a commercial message, and therefore showed upon its face the importance of prompt and correct transmission.

2. That it was sufficient to give notice to the defendant that damage might occur through its improper transmission.

3. That the damages which actually occurred, as found by the jury, were the natural, immediate and proximate consequence of the negligence of the defendant.

4. That the stipulation known as the "repeated stipulation" is void in this State on the ground of public policy, and that, although valid in New York, it will not be recognized by our courts, because it is against public policy.

No error.

BROWN, J. I concur in the judgment of this Court, upon the ground that, after the telegram was delivered to plaintiff at Raleigh, he notified defendant's office here that there was probable error in the transmission of the message; that the matter was one of financial importance to him, and requested the defendant to investigate at once. This occurred in ample time to save plaintiff from loss, and was complete notice to the defendant's agents here of the important character of the message, and that financial loss might result to plaintiff in case an error had been committed. When they had the message repeated for their own information, they informed the plaintiff that there was no error committed, and upon such reassurance the plaintiff had a right to rely. As is held in *Williams v. Telegraph Co.*, 136 N. C., 82, plaintiff was not bound to notify defendant of each particular item of damage that might result, but it is sufficient if defendant had notice that financial loss would result from error in transmitting the message.

This view of the case renders it unnecessary to discuss the (231) other points raised by the learned counsel for defendant.

MR. JUSTICE WALKER concurs in this opinion.

Cited: Mfg. Co. v. Telegraph Co., 152 N. C., 162; *Rhyne v. Telegraph Co.*, 164 N. C., 394; *Gardner v. Telegraph Co.*, 171 N. C., 407.

R. T. WEST v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 3 November, 1909.)

1. **Issues Unnecessary—Negligence—One Damage.**

When there is allegation and evidence that defendant negligently injured plaintiff by the derailment of its passenger train and the immediate running into it of another passenger train, the plaintiff can only recover one damage caused by the negligence of the defendant, and two issues as to damage are unnecessary.

2. **Contracts Voidable—Insanity—Notice—Advantage.**

When a party to a contract has not been judicially found to have been of unsound mind, but makes it a defense in an action involving the validity of his agreement, the contract is not void, but voidable, and will not be set aside where the other party had no notice of the infirmity and has derived no inequitable advantage.

3. **Same—Damages—Release.**

Where the plaintiff is found by the jury to have executed a release to defendant, when the former was *non compos mentis*, for damages arising

from an injury negligently inflicted by the latter, the courts will not set it aside in the absence of a finding that the defendant was aware of his incapacity at the time of the release, or that its execution was induced by its fraud or misrepresentations.

4. Same—Subsequent Sanity—Repudiation—Consideration—Restoration.

When plaintiff has executed a release to defendant for damages claimed in his action, and seeks to avoid it upon the ground of insanity, he is barred by his failure, within a reasonable time after being restored to his right mind, to repudiate the contract and restore the consideration he has received.

APPEAL from *Biggs, J.*, at February Term, 1909, of UNION.

The action was brought to recover damages for injuries alleged to have been sustained in a wreck on defendant's road. The defendant pleaded a release, and in reply the plaintiff, upon the facts stated in his replication, prayed relief that the release be declared void.

The wreck occurred 9 September, 1904. The release was exe-
(232) cuted 9 October, 1905, and this action was commenced 24 June, 1907. The court submitted, without exception, these issues:

1. Did the plaintiff, at the time of receiving the voucher for $1,511.61, execute the alleged release, dated 9 October, 1905, set up in the answer? Answer: Yes.

2. Did the plaintiff, at the time of executing the said release, have sufficient mental capacity to understand the nature and effect of said release? Answer: No.

3. Did the plaintiff, at the time of endorsing and collecting the said voucher for $1,511.61, have sufficient mental capacity to understand the nature and effect of said voucher transaction? Answer: No.

4. Was the plaintiff, R. T. West, injured by the negligence of the defendants, as alleged in that part of the complaint relating to the injuries alleged to have been caused by the derailment of the passenger train? Answer: Yes.

5. Was the plaintiff, R. T. West, injured by the negligence of the defendants, as alleged in that part of the complaint relating to the injuries alleged to have been caused by the second train? Answer: Yes.

6. What damage, if any, is plaintiff, R. T. West, entitled to recover for injuries caused by the derailment of the passenger train, as alleged in the complaint? What damage, if any, is the plaintiff, R. T. West, entitled to recover for injuries caused by the second train, as alleged in the complaint? Answer: $7,000.

From the judgment rendered the defendant appealed.

Williams & Lemmond and A. M. Stack for plaintiff.

Burwell & Cansler, J. D. Shaw and Adams, Jerome & Armfield for defendant.

BROWN, J. The plaintiff, conductor on defendant's train, was injured in a wreck which occurred at Whisnant's trestle, on the night of 9 September, 1904. The wreck was caused by the train being derailed at the trestle, and in about three minutes another passenger train ran into it. As we understand the record, the defendant does not contest its original liability to plaintiff for whatever injuries he sustained by reason of the wreck, but alleges that it has settled with the plaintiff therefor, and pleads a release in full. The defendant replies to this answer, and avers that he executed the paper-writing set up in the answer, but that it was not intended to release plaintiff from the injuries sustained at Whisnant's trestle; secondly, that said release was obtained by fraud upon the part of defendant; and, thirdly, that at the time he executed it he was *non compos mentis* and did not have sufficient mental (233) capacity.

Upon the rendition of the verdict the judge set aside the fifth and sixth issues as unnecessary, and rendered judgment in favor of plaintiff upon the findings upon the other issues.

We agree with his Honor in setting those two issues aside as unnecessary.

If the plaintiff is entitled to recover at all, he is entitled to recover one damage for whatever injuries he sustained in that wreck caused by the derailment of his own train and by the immediate running into it of another train.

We also agree with his Honor that there is no evidence whatever in this case which will justify a court or jury in setting aside the release on the ground of mistake, fraud or misrepresentation.

The undisputed evidence, consisting of the admitted letters of the plaintiff (many of them introduced by him), shows that the release was executed after a voluminous correspondence on the subject of the compromise on account of plaintiff's injuries, extending over a period of twelve months, between plaintiff and defendant's claim adjuster, Stanley.

In one of these letters, introduced by him, the plaintiff says: "Referring to your letter of 8 December, 1904, relative to the injuries sustained by me in the accident at Whisnant's trestle, I beg to say that I have carefully considered your proposition of adjustment as stated therein. Without discussing the matter of the company's legal liability, I beg to say that I am willing to accept the proposition as submitted by you." The release was executed at Portsmouth and the sum of $1,500 paid the plaintiff, and he seems to have rested contented therewith for nearly two years before the institution of this action. The plaintiff's own account of what took place between him and Stanley at Portsmouth does not disclose any attempt to constrain him by duress or to overreach him by fraud and misrepresentation.

The compromise seems to have been arrived at after an elaborate correspondence, which disploses to any unbiased mind that at the time he wrote the letters plaintiff had an intelligent comprehension of his rights.

There are a class of cases where releases of this character have been set aside and the plaintiff permitted to recover, notwithstanding them. *Hayes v. R. R.,* 143 N. C., 125, and *Bean v. R. R.,* 107 N. C., 731, and others we might name. But those decisions are all based upon the ground of fraud, undue advantage, misrepresentation, in some instances combined with weakness of mind and body. As said in *Bean's*
(234) *case* by *Merrimon, C. J.,* "The court of equity will grant relief where only the party complaining makes mistake, when the facts and circumstances give rise to the presumption that there has been undue influence, imposition, mental imbecility, surprise, or confidence abused. Mere ignorance, mere inadequacy of consideration, mere weakness of mind, mere mistake on the part of one party, will not entitle that party to relief. But it is otherwise when there is a combination of such things to prejudice the party." *Buffalow v. Buffalow,* 22 N. C., 241; Story's Eq., secs. 119, 120, 134, 251; *Sprinkle v. Wellborn,* 140 N. C., 163.

In *Hayes' case* the release was set aside for fraud in the *factum,* the paper-writing having been falsely read to plaintiff, an illiterate person at the time of its execution. There is no suggestion of anything of that sort in this case.

So, upon the record before us, in the absence of any finding of fraud, the plaintiff's case appears to us to rest solely upon the finding of the jury that at the time he signed the release plaintiff did not have mental capacity sufficient to execute it.

This finding, in connection with those upon the remaining issues, we do not think, according to well-settled principles, warrants the judgment rendered.

Eliminating all fraud, this is a case where the plaintiff asks a court of equity to relieve him from the consequence of a contract he made with the other party to it, upon the sole ground that at the time he executed it he did not have sufficient mental capacity and was a person of insane mind.

The well-established rule is that the mere fact that one of the parties to the contract is of unsound mind (he not having been found to be a lunatic by judicial proceedings) does not render the contract void, but, at most, only voidable, and is no ground for setting it aside, where the other party had no notice of the insanity and derived no inequitable advantage from it. *Carr v. Holliday,* 21 N. C., 344; *Rhoades v. Fuller,* 139 Mo., 179; *Jamison v. Culligan,* 151 Mo., 510; *Schaps v. Lehner,* 54 Minn., 208; *Brown v. Cory,* 9 Kan. App., 702; *Coburn v. Raymond,* 76 Conn., 484; *Riggan v. Green,* 80 N. C., 236; 1 Chitt. on Cont., 191;

Story Eq., secs. 227, 228. This learned jurist says: "The ground upon which courts of equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics and otherwise *non compos mentis,* is fraud. Such persons being incapable in point of capacity to enter into any valid contract or to do any valid act, every person dealing with them, *knowing their incapacity,* is deemed to perpetrate a meditated fraud upon them and their rights."

To the same effect is Adams Eq., 183, and cases there cited.

In a full and valuable discussion of this subject in the leading (235) case of *Odom v. Riddick,* 104 N. C., 521, the present Chief Justice says: "The great teachers of English law say that persons of non-sane memory are not totally disabled to convey or purchase, but only *sub modo.* Their conveyances are voidable, but not void. 2 Black, 291; 2 Kent Com., 451. The deed of a person of unsound mind, not under guardianship, conveys the seizin. *White v. Maxwell,* 5 Peck, 217; *Crouse v. Holman,* 31 N. C., 30, and cases cited."

In the same opinion, commenting upon the above quotation from Story, *Judge Clark* says: "This places the doctrine upon an intelligible basis and delivers the courts from the evident injustice and insurmountable inconvenience of declaring that all contracts made with one *apparently sane,* but who proves to have been insane, void *ab initio* for want of a consenting mind."

After reviewing many decided cases, he further says (p. 523): "It is clear from these authorities that the conveyances of an insane person, not previously declared insane, are voidable merely, and not void; that the right to set them aside is based upon the ground of fraud, and that the Court will not usually interfere unless there has been fraud *or a knowledge of the insanity* by the other party, and then will place the parties *in statu quo.*" There being no finding by the jury that at the time of the execution of the release defendant's agent had any knowledge of plaintiff's alleged insanity, is there anything in this record upon which the Court can declare the defendant to be fixed with such knowledge as matter of law?

All the correspondence between plaintiff and Stanley, which culminated in the settlement and release, has been put in evidence by one side or the other. In it there are some thirty-odd letters written by plaintiff to Stanley, the defendant's adjuster of claims, beginning 23 November, 1904, in a written demand by plaintiff for a settlement "on account of his injuries," and ending with a letter of 7 October, 1905. In none of them is there anything to excite even a suspicion of plaintiff's sanity. The last letter plaintiff wrote before going to Portsmouth to get the controversy settled speaks for itself:

MONROE, N. C., 7 October, 1905.

MR. W. L. STANLEY, *Claim Attorney,*
Portsmouth, Va.

DEAR SIR:—Referring to your letter dated 22 June, 1905, file 4619, relative to the manner in which you were desirous to settle with me on account of personal injuries sustained in above wreck, beg to advise that I am now and have been able since 1 October, 1905, to resume my duties as passenger conductor.

Dr. Ashcraft also advises that I am now able to go on any wit-
(236) ness stand when and wherever you need me. Please arrange an early date for me to go to Portsmouth and get this matter straightened up, as I am desirous of resuming my duties at once. Thanking you for your prompt attention, I am,

Yours truly, R. T. WEST, *Conductor.*

Could Stanley or any one else possibly divine from this letter that the writer, who traveled to Portsmouth and settled for his injuries and signed the release and received $1,500 two days later, was a person of unsound mind, without mental capacity to make a contract?

The entire correspondence is conducted by plaintiff with such intelligence on its face as to forbid rather than to warrant any such deduction.

There is not only no finding that the defendant or its agent had knowledge of plaintiff's alleged mental incapacity, but nothing whatever in the record to support such an allegation, and, as we have shown, the plaintiff must show this, as well as his mental incapacity, in order to avoid his contract. There being no contention that the release was executed by the mutual mistake of both parties, and no finding that its execution was brought about by the fraud and misrepresentation of the defendant's agent, it was essential to have a finding that at the time of its execution defendant's agent had knowledge of plaintiff's alleged insanity.

In the absence of such finding, the judgment cannot be sustained.

The defendant requested his Honor to rule that plaintiff could not recover, because, after being restored to sanity, he failed to repudiate the contract and to return to defendant the $1,500 he had received.

As this case is to be tried again, it is well to pass on this. This rule does not apply where a release is set aside upon the ground of fraud, although the party injured is made to account for what has been paid him. *Hayes case* and *Bean case, supra.*

But in the case at bar, where there is no element of fraud, this rule does apply, as is held by all the authorities. In an elaborate opinion the Supreme Court of Minnesota, discussing the subject, says: "But, conceding plaintiff's mental incapacity on that day, there is an insuper-

able obstacle to his recovery in the fact that he has never rescinded nor offered to rescind the settlement, but still retains the consideration and has never offered to return it. . . . Upon recovering his usual mental condition, it was his duty to elect promptly—that is, within a reasonable time—whether he would affirm or disaffirm, and if he (237) elected to do the latter it was his duty to restore or offer to restore what he had received, so as to place the parties *in statu quo*. He cannot affirm in part and reject in part. He cannot escape the burdens of the contract and retain its benefits. Of course, we have no reference to cases where the other party has been guilty of fraud or bad faith in procuring the contract and the insane person has lost or squandered the consideration before he regained his mental capacity." See, also, Clark on Cont., p. 185; *Och v. R. R.*, 130 Mo., 27; and cases cited; *Strodder v. Granite Co.*, 99 Ga., 595; *Harley v. Riverside Mills*, 129 Ga., 214; *Drohan v. R. R.*, 162 Mass., 435; *Kelly v. R. R.*, 154 Ala., 573.

For the reasons given, we are of opinion that his Honor erred in refusing defendant's motion for a new trial.

Reversed.

Cited: S. c., 154 N. C., 24; *Ipock v. R. R.*, 158 N. C., 448; *Hodges v. Wilson*, 165 N. C., 333.

MOTTU v. DAVIS.

(Filed 3 November, 1909.)

1. **Pleadings—Distinct Defenses—Demurrer as to One—Procedure.**

Under Revisal, sec. 4853, when a pleading contains averments of separate and distinct offenses, an adverse litigant may demur to one of such defenses and reply to another.

2. **Judgment of Other States—Jurisdiction—Parties—Subject Matter.**

In an action on a judgment recovered in a sister State, it is open to defendant to allege and show a want of jurisdiction in the court rendering the judgment, either of the subject matter or the parties litigant, and this is allowable though the judgment sued on may recite jurisdictional facts.

3. **Judgments of Another State—Nonresidence—Summons—Service—Proof.**

A lack of jurisdiction of the person is not established by showing, without more, that process was personally served on a nonresident defendant while he was temporarily and of his own volition within the jurisdiction of the court rendering the judgment.

4. Judgments of Other States—Fraud—Proof.

In an action in the courts of this State on a judgment rendered in a sister State it is open to defendant to allege and prove fraud in the procurement of the judgment, and the term fraud in this connection includes all such circumstances of fraud or imposition in procuring the judgment as would induce and authorize the courts of the original forum to interfere to prevent the enforcement of an unconscionable recovery.

5. Same—Pleadings.

This defense of fraud involves an issue of fact, and in order to be available it is not sufficient to aver in general terms that a judgment was procured by fraud, but the alleged facts must be set forth with sufficient fullness and accuracy to indicate the fraud charged and to apprise the offending party of what he will be called on to answer.

6. Judgments—Contracts, Impairment of—Legislation—Constitutional Law.

While judgments are sometimes spoken of as contracts of record, they are not in reality contracts, and are never so considered in reference to the clause in the Federal Constitution which forbids that contracts should be impaired by State legislation.

7. Gaming Contracts—Legislation—Judgments of Other States—Conflict of Laws—Res Judicata—Constitutional Law—"Full Faith and Credit."

Where, in an action pending in the courts of this State to recover on a judgment in a sister State, the Legislature amended our statute on gaming by adding thereto: "Nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract," there can be no valid objection to such legislation on the ground that same impairs the obligation of contracts, and it would seem that no such objection can be made under Art. IV, secs. 1 and 2 of the Federal Constitution, "the full faith and credit clause," etc., if it is admitted or clearly appears that the judgment sued on was rendered on a transaction expressly forbidden by our statutes on gaming, and that the question was not raised, investigated or determined in the courts of the State in which the judgment was originally rendered.

8. Same.

On the facts indicated, if it appeared that the court of the sister State rendering the judgment had jurisdiction of the cause and the parties, and that the question whether the transaction sued on was a gaming transaction had been expressly raised and determined adversely in that court, in such case under Art. IV, sec. 1 the judgment of the sister State would conclude the parties, the terms and very purpose of the article being to prevent all question in the courts of one State of the Union as to the validity of a cause of action which had been presented and decided in the courts of another.

9. Same—Issues—Fraud—Jurisdiction.

In the present case, being an action to recover on a judgment rendered in favor of plaintiff and against defendant in the State of Virginia, it appearing that personal service of process on defendant was had in the State of Virginia, and that said defendant appeared and by proper pleas

raised the question whether the claim declared on arose on a gaming transaction and on inquiry duly had the question resolved against defendant, the parties are thereby concluded as to such question; and it appearing, further, that the plea of fraud is not sufficiently averred, the only remaining issue arising on the pleadings is on the jurisdiction of the court, and the cause is sent back for the proper decision of such issue.

APPEAL from *O. H. Allen, J.*, at June Term, 1909, of EDGECOMBE. (239)

Action, heard as on demurrer to the answer. The plaintiff instituted the action to recover on a judgment of the Corporation or Hustings Court of the city of Manchester and State of Virginia, in the sum of $1,848.25, with interest and cost, and filed his complaint, alleging the rendition of the judgment in a court of general jurisdiction, and annexing a transcript of same, properly certified, and showing that the plaintiff had instituted said action in the court in Virginia against the present defendant; that personal service was obtained on defendant in said city of Manchester, and defendant appeared in said court and answered or entered pleas in bar of plaintiff's demand, among other pleas, that such demand was on a wagering contract or by reason of a deal in cotton futures between them, and same was prohibited by law and no recovery could be had thereon; that on issues framed there was verdict and judgment for plaintiff for the amount indicated.

In the present action the defendant appeared and answered, denying that the Corporation Court of the city of Manchester was a court of general jurisdiction, or that it ever had acquired any jurisdiction over the defendant or the subject-matter of the demand. In this connection the answer further averred, in effect, that defendant was and since always had been a citizen and resident of Edgecombe County, N. C., and plaintiff was and always had been a citizen and resident of Norfolk County, Va.; that service was obtained on defendant while he was temporarily in the city of Manchester attending a reunion of Confederate veterans, and that said Corporation Court, in which the judgment was obtained, had never had or acquired any jurisdiction either over defendant's person or the subject-matter of the litigation, and that said judgment was void for lack of such jurisdiction.

In addition, the defendant made answer, styled by said defendant a further answer, averring that said judgment was obtained on a gambling debt, arising by reason of a deal in cotton futures, and that said demand was illegal and any and all recovery thereon was forbidden by public policy and by express provision of our statute laws; and, further, that said judgment had been obtained by means of fraudulent, false and material and pertinent testimony, etc.

At March Term, 1908, the plaintiff replied to the further answer of defendant, and alleged that all of the matters and things contained in said further answer were concluded by the judgment of the Virginia court, and pleaded same as an estoppel of record; and at April
(240) Term, 1909, the plaintiff demurred to said further answer, and, the cause coming on for hearing at the June Term of the court, his Honor gave judgment sustaining the demurrer, in form as follows:

This cause coming on to be heard, and being heard by the court, and the same being heard and considered by the court, upon the pleadings filed in said cause, the complaint, answer and demurrer to the answer, and the court being of opinion that the demurrer is well taken, and the same is hereby sustained: Now, on motion of counsel for plaintiff, it is ordered and adjudged that the plaintiff do recover of the defendant the sum of $1,898.99 and interest, as alleged in the complaint, and cost of this action, to be taxed by the clerk."

From said judgment defendant excepted and appealed.

J. R. Gaskill, J. K. Rawley and F. S. Spruill for plaintiff.
G. M. T. Fountain for defendant.

HOKE, J., after stating the case: The pleading on the part of plaintiff, styled a reply, and the demurrer, are both addressed, in terms, to the defendant's "further answer." Ordinarily this is irregular and not permissible. 6 Enc. Pl. & Pr., 382. As this further answer, however, is designed and intended to set up two defenses—one, that the judgment was rendered on a demand growing out of a gambling transaction, and that same was procured by fraud—the course pursued in this instance seems to be sanctioned by the Code, sec. 485, and, in any event, as this reply only amounted, in effect, to a demurrer, the court below very properly treated the demurrer as the only additional pleading on the part of plaintiff; and, being of opinion that the position presented was well taken and that the same went to the entire merits of the defense as contained in the answer, his Honor entered judgment sustaining the demurrer and awarding plaintiff recovery for the amount demanded. Assuming that the Corporation Court of Manchester, Va., had jurisdiction of the cause and of the parties, we concur in the ruling of the court below that the matter contained in the former answer does not set forth any valid defense to plaintiff's claim.

As we have said, this further answer alleges that the original demand was on a gambling contract; that a recovery thereon is forbidden, both by our public policy and our statute law, and contends that this defense is now open to the defendant, notwithstanding the rendition of the Virginia judgment, but the question presented has been recently decided

against the defendant's position by the Supreme Court of the United States, the final arbiter in such matters, in *Fauntleroy v. Lum*, 210 U. S., 230. (241)

In that case the pertinent facts are thus summarized in the opinion of the Court, delivered by *Associate Justice Holmes:* "This is an action upon a Missouri judgment, brought in a court of Mississippi. The declaration set forth the record of the judgment. The defendant pleaded that the original cause of action arose in Mississippi out of a gambling transaction in cotton futures; that he declined to pay the loss; that the controversy was submitted to arbitration, the question as to the illegality of the transaction, however, not being included in the submission; that an award was rendered against the defendant; that thereafter, finding the defendant temporarily in Missouri, the plaintiff brought suit there upon the award; that the trial court refused to allow the defendant to show the nature of the transaction, and that by the laws of Mississippi the same was illegal and void, but directed a verdict, if the jury should find that the submission and award were made and remained unpaid; and that a verdict was rendered and the judgment in suit entered upon the same. The plea was demurred to on constitutional grounds, and the demurrer was overruled, subject to exception. Thereupon replications were filed, again setting up the Constitution of the United States (Article IV, p. 1), and were demurred to. The Supreme Court of Mississippi held the plea good and the replications bad, and judgment was rendered for the defendant. Thereupon the case was brought here." And on these facts it was held that—

1. A judgment is conclusive as to all the *media concludendi,* and it cannot be impeached, either in or out of the State, by showing that it was based on a mistake of law.

2. A judgment of a court of a State in which the cause of action did not arise, but based on an award of arbitration had in the State in which the cause did arise, is conclusive, and, under the full faith and credit clause of the Federal Constitution, must be given effect in the latter State, notwithstanding the award was for a claim which could not, under the laws of that State, have been enforced in any of its courts.

It was contended before us that the decision referred to is not conclusive in this case, because it proceeds on the assumption that the defense there insisted on could not be made available in the State of Missouri, where the judgment was rendered, and if it had been otherwise the case would have been differently decided; the argument being that the clause in the National Constitution controlling the matter (Article IV, sec. 1) only requires that the judgments of a sister State shall be given that faith and credit which they are allowed in the State where (242) rendered; that, in Virginia, courts of equity will relieve against

a judgment had on a gaming transaction, and, this being true, the defense should be made available in the courts of North Carolina. The defendant here takes a correct position as to the meaning and proper application of this clause of the Federal Constitution. As shown in the case we are now discussing (*Fauntleroy v. Lum, supra*), many authoritative decisions so hold (*Christmas v. Russell,* 72 U. S., 290; *Hampton v. McConnel,* 16 U. S., 234), and it has been embodied in the public statutes as the correct legislative interpretation of the constitutional provision, as follows: "And said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." 1 U. S. Comp. Stat., sec. 905.

But the argument is at fault in the premise that the courts of equity in Virginia would interfere for defendant's protection on the facts presented in the case before us. True, in the case to which we were referred by counsel (*White v. Washington,* 46 Va., 645) it was held, in accordance with doctrine very generally accepted, that, in the absence of any fault or negligence on the part of defendant, a court of equity would relieve against a judgment obtained under such circumstances of surprise and fraud, that it would be clearly unjust and unconscientious to insist on its enforcement. 23 Cyc., pp. 989, 990, and authorities cited. And it was held, further, that in the case of a gambling transaction, and by correct interpretation of the Virginia statutes on the subject, equity would relieve where a judgment was rendered by default or under other circumstances showing that no inquiry was had on the subject; and this, though opportunity to defend had been afforded; but this very decision referred to and relied on also holds that if a defendant appeared and raised the question by proper pleas, and judgment was rendered after investigation had, in such case the judgment would conclude while it stood unreversed and unassailed in the court where same was rendered.

Speaking to this question, *Baldwin, J.,* delivering the opinion of the Court, among other things, said: "It must be admitted, however, that in an action founded upon a gaming promise or security, if the defendant elects to make his defense at law, and upon a full and fair trial of the question in that forum a verdict is rendered against him, he cannot be permitted to renew the controversy, upon adverse testimony, in a court of equity; for if this were allowed, it would, in effect, be an ap-
(243) peal from the verdict of a jury. And yet, notwithstanding such election, if the defendant has been surprised at law, by reason of some fraud, misfortune or accident, which has prevented him from having a full and fair trial before the jury, he may still resort for re-

dress to a court of equity. Nor will he be precluded from doing so by its appearing that he had an adequate opportunity of obtaining a new trial by application to the court of law. The case of a gaming promise or security is an exception to the general rule on the subject, that rule being derived from the obligation of the party, in most cases, to avail himself of his opportunity to defend himself at law; whereas, in the case of a gaming promise or security, he is under no such obligation."

In this case, as stated, the defendant was served with process within the State of Virginia; he appeared, and by full and proper pleas raised the issue that the plaintiff's demand arose out of a gaming transaction, and on investigation and trial had the question was resolved against him and verdict and judgment entered for plaintiff.

Under *White v. Washington, supra,* and other decisions of like effect, unless more was shown, this concludes the parties in the State of Virginia, and, under the Federal Constitution, the same effect must be allowed the proceedings when offered here.

And this, too, is the answer to another position urged by defendant, that the Legislature of North Carolina, pending the present action, and before judgment rendered in this State, has amended our statute on gaming (Revisal 1905, sec. 1689) by adding thereto: "Nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based on any such contract." Laws 1909, ch. 853. While judgments are sometimes said to be contracts of record, and are regarded as possessing some of the incidental features of contracts, particularly in reference to joinder of causes of action and other regulations affecting the jurisdiction of courts concerning them, they are not in reality contracts, lacking as they do the great essential of all contracts, mutuality of consent; and it is well established that they are not considered contracts in reference to the clause in the Federal Constitution which forbids that contracts should be impaired by State legislation, and there are notable decisions upholding legislation affecting pending litigation, both before and after judgment rendered. *Evans v. McFadden,* 105 Fed., 293, affirmed on appeal to Supreme Court of the United States, 185 U. S., 505; *Sprott v. Reid,* 39 Greene (Iowa), 549; Freeman on Judgments, sec. 4; Black on Judgments, secs. 7-11.

No valid objection, therefore, can be made to this legislation be- (244) cause it was enacted pending litigation.

Again, in *Provision Co. v. Davis,* 191 U. S., 373, the Supreme Court of the United States has held that in the case of a foreign corporation, complainant, a State was not required, under Article IV, sec. 1, the full faith and credit clause, to provide a court having jurisdiction to entertain an action on a judgment rendered in its favor in another State. Whether by reason of section 2, Article IV, that "the citizens of each

state shall be entitled to all the privileges and immunities of citizens of the several States," a like ruling would have obtained if the complainant had been an individual citizen, was not determined. It will be noted that the North Carolina legislation in the present case, withdrawing causes of this character from the jurisdiction of her courts, applies to all persons, both resident and nonresident, and to all judgments, both domestic and foreign; and under the various authoritative decisions construing these terms, "privileges and immunities," in our National Constitution, notably *Blake v. McClung*, 172 U. S., 239; *Butchers Union Co. v. Crescent City. Co.*, 111 U. S., 746; *Conner v. Elliott*, 59 U. S., 593, there would seem to be no reason for making a distinction between actions on judgments in favor of foreign corporations and individual citizens, and no recognized principle that would prevent a State Legislature from withdrawing the jurisdiction of its courts from an action to enforce judgments, when it was admitted or clearly appeared that recovery had been awarded on a transaction forbidden by its public policy or statute law, and that the matter had not been raised, considered or determined in the courts of the original forum.

The question is expressly reserved in *Provision Co. v. Davis, supra,* and is not necessarily determined in *Fauntleroy v. Lum, supra,* as that decision is chiefly made to rest on the fact that the legislation there presented was addressed to the rights of the parties and the *duty* of the domestic courts concerning them, and not to their jurisdiction and power, though the opinion *arguendo* gives decided intimation against the validity of such legislation, except to the extent that like defense and inquiry would be open to defendant in the courts of the sister state where the judgment was obtained. But, however this may be, we are clearly of opinion that the legislation relied upon by defendant for his protection is not available for that purpose on the facts presented here, and for the reason indicated, that on pleas properly entered in the Virginia court the very question was raised whether the plaintiff's demand arose out of a gaming transaction, and on investigation had was
(245) determined against the defendant; and when this occurs, as indicated in *Fauntleroy v. Lum, supra,* an erroneous ruling of the trial court would be an error of law, to be corrected only by some procedure in the court rendering the judgment; and while the judgment stands unreversed and unassailed, it comes directly within the protection of Article IV, sec. 1, its recognized and established purpose being to prevent any question in the domestic court as to the validity of a claim which had been considered and adjudged in the courts of another state.

Defendant further insists that the demurrer to his further answer should be overruled because the same contains a valid and sufficient plea of fraud, as follows: "That plaintiff obtained said judgment upon

fraudulent, false, material and pertinent testimony offered by him." Some of the appellate courts of our sister states whose decisions are always received with the greatest respect and consideration have held that the plea of fraud is never available as a defense to a judgment rendered by the courts of another state, when such courts had jurisdiction of the cause and the parties, basing such ruling upon decisions of the Supreme Court of the United States construing Article IV, sec. 1, of the Federal Constitution. As in *Mooney v. Hinds,* 160 Mass., 469, citing and relying on *Christmas v. Russell,* 72 U. S., 290; *Maxwell v. Stewart,* 89 U. S., 77; *Hanley v. Donaghue,* 116 U. S., 1-4; *Simmons v. Saul,* 138 U. S., 439-459.

Undoubtedly, if the cases referred to correctly interpret the decisions of the Supreme Court of the United States, they must be followed here and elsewhere, for such decisions are final and controlling on the question presented; but, while there are many expressions in the opinions of our highest court which seem to sanction the position contended for, we are of opinion that no authoritative decision of that tribunal directly so holds, and that the great weight of well-considered authority is to the effect that in states such as ours, where all distinctions between actions at law and suits in equity have been abolished and relief is administered in one form of action, fraud in the procurement of a judgment, when properly pleaded, is available as a defense to an action on a judgment recovered in a sister state, though such state may have had jurisdiction of the cause and the parties; and that this term, "fraud in the procurement of a judgment," should and does include all such facts and circumstances as would induce and enable the courts of equity or courts having jurisdiction of the matter in the state where the judgment was rendered to interfere to prevent the enforcement of an unconscionable recovery.

We have recently considered this question, and so held in *Lewis v. Gladstein,* 142 N. C., 482, and the decision in that case is well (246) sustained by authority in this and other jurisdictions. *Miller v. Leach,* 95 N. C., 229; *Gray v. Richmond Bic. Co.,* 167 N. Y., 348; *Davis v. Headley,* 22 N. J. Eq., 115; *Paine v. Oshea,* 84 Mo., 129; *Eaton v. Hartz,* 6 Neb., 419; Black on Judgments, secs. 917, 918; Freeman on Judgments, sec. 576.

There are decisions to the effect that when a judgment has been procured by means of an ordinary perjury on the part of a witness, without more, this does not present a case for the interference of a court in the exercise of its equitable powers, and it is very generally held that this plea of fraud, considered as available, does not apply to fraud anterior to the judgment, or rather the inquiry, and which by proper effort could have been asserted by way of original defense; but wherever, as

stated, without fault or neglect on part of defendant, there has been fraud successfully practiced in procuring a judgment, and under circumstances that would authorize the courts of the state where same was rendered to interfere by action to stay the enforcement of an unconscionable recovery, the same defense can in some way be made available when the judgment is made the basis of an action in another state.

Referring to the decisions of the Supreme Court of the United States cited and usually relied upon to support a contrary position: In *Christmas v. Russell, supra,* the judge delivering the opinion evidently had in mind the plea of fraud when attempted to be set up in an action at law, and when by the form of procedure it could not be regarded as a direct proceeding to impeach the judgment; and, as pointed out in *Levin v. Gladstein, Associate Justice Clifford,* for the court, said: "Domestic judgments, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be done directly by writ of error, by petition for a new trial or by *bill of chancery.*"

And the same may be said in the case of *Maxwell v. Stewart, supra,* where the decision of *Christmas v. Russell* is referred to as authority and without further comment or inquiry; and, as further pointed out in *Levin v. Gladstein,* the question was really not presented or involved in the case of *Hanley v. Donaghue, supra,* and in the case of *Simmons v. Paul, supra,* some of the objections to the judgment were on matters of form, where only a motion in the cause could be considered as a direct proceeding to impeach it, and on the further and substantial objection the decision was properly made to rest on the fact that the judg-
(247) ment in question was an adjudication of probate and the granting of letters of administration, citing and relying on the case of *Broderick's will,* 88 U. S., 503-512, in which is was held that, owing to the peculiar and exclusive jurisdiction of courts of probate, courts of equity in the exercise of their ordinary jurisdiction had no power as a general rule to entertain suits to set aside or modify the decrees of these courts in such matters, and it may be that the Massachusetts decision, to which we were referred, might be upheld on like ground. In North Carolina, however, as heretofore indicated, where only one form of action is now recognized, and in cases like the one here presented, whenever a final judgment is sued on, and the answer properly sets up facts impeaching the judgment, this, as shown in *Houser v. Bonsal,* 149 N. C., 51, is to be considered a direct and proper proceeding to impeach the judgment; and if on the hearing it is shown that the judgment, though rendered in another state, was procured by fraud and under circumstances which would impel the courts of such state by independent action to arrest its enforcement, this defense will be sustained here and

the defendant afforded proper relief. The defense of fraud in procuring the judgment was therefore open to defendant, but is not available for his protection on these pleadings, because not sufficiently and properly alleged.

This question of fraud involves an issue of fact, and it is no sufficient averment to allege in general terms that a judgment was procured by fraud, but the facts constituting the alleged fraud must be set out with sufficient certainty and fullness to indicate the defense and apprise the opposing party of what he is called on to answer. This is not done in the further answer of defendant, and the general allegation designed and intended to raise the issue of fraud must be held sufficient and was properly disregarded in the court below. *Ritchie v. McMullen,* 159 U. S., 235; 9 Enc. Pl. & Pr., 687.

While we agree with the judge below that the plaintiff's demurrer should be sustained, we do not concur in the ruling of his Honor to the effect that the demurrer went to the merits of the entire answer, and that in sustaining it the plaintiff was entitled to recover the sum demanded. From a perusal of this answer, it appears that in the first or first portion of it is contained a denial of jurisdiction on the part of the Corporation and Hustings Court in which the judgment was obtained. While there is some difference in the decisions as to the power of a domestic court to entertain the plea of fraud to a judgment rendered in a sister state, there is no such diversity as to a plea averring lack of jurisdiction. This is always open to defendant, and both as to the parties and subject-matter, and even when the jurisdictional facts are recited (248) in the judgment. *Thompson v. Whitman,* 85 U. S., 457; *Miller v. Leach, supra; Gilman v. Gilman,* 126 Mass., 26. There is no merit in the alegation in this first answer, to the effect that personal service was obtained when defendant was temporarily and of his own volition in the city of Manchester (*Harris v. Balk,* 198 U. S., 213), but the first answer contains a denial that the Corporation and Hustings Court of Manchester had jurisdiction either of defendant's person or the subject-matter of the action; and in this connection avers, further, that plaintiff is a citizen and resident of Norfolk, Va., and that defendant is now and always has been a citizen and resident of North Carolina. True, there is an averment in plaintiff's complaint that the Corporation Court is one of general jurisdiction, but this, too, is denied in the answer; and, while we are told by *Baron Comyns* that the Court of Hustings is the most ancient and eminent court of the city of London, such courts do not seem to have had like dignity in the provinces, nor even to have been so termed, and all of these Corporation Courts were regarded as courts of inferior and limited jurisdiction (3 Lewis' Blackstone Book, 80-81), and

this assuredly is *prima facie* the modern view as to their jurisdiction. Abbott Munic. Corporations, sec. 585, and authorities cited.

It may be that the Constitution and laws of the State of Virginia have conferred on these courts general jurisdiction to hear and determine claims of this nature, as the complaint alleges, but at present we are not so advised, and, denial having been made, the issue must be submitted and determined as a question of fact. *Hilliard v. Outlaw,* 92 N. C., 266; *Hooper v. Moore,* 50 N. C., 130.

On the whole matter, we are of opinion, and so hold, that as to matters set out in the further answer the demurrer of plaintiff was properly sustained, and as to any defense therein the defendant is concluded, but that an issue is raised by the pleadings, in this State an issue of fact, as to whether, under the Constitution and laws of Virginia, and on the facts appearing in that trial, the Corporation Court of Manchester had jurisdiction to hear and determine the matters in litigation and render the judgment on which the present suit is brought.

The opinion will be certified down, that a trial of the issue indicated may be had.

Error.

Cited: Billings v. Joines, post, 365; *Worth v. Trust Co.,* 152 N. C., 246; *Machine Co. v. Feezer, ibid.,* 518; *Roberts v. Pratt, ibid.,* 734; *Mottu v. Davis,* 153 N. C., 161; *Best v. Best,* 161 N. C., 516; *Mutual Asso. v. Edwards,* 168 N. C., 380; *Williamson v. Jerome,* 169 N. C., 218; *Randolph v. Heath,* 171 N. C., 386, 388; *Chemical Co. v. O'Brien,* 173 N. C., 620.

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MRS. M. J. PRITCHARD, IN HER OWN RIGHT AS ADMINISTRATRIX, ET AL. v. THE PANACEA SPRING COMPANY ET AL.

(Filed 3 November, 1909.)

Appeal and Error—Order of Reference—Appeal Premature—Final Judgment.

An appeal is premature from the judgment of the lower court modifying the report of a referee, declaring the indebtedness and priorities among defendant's creditors, and ordering a reference as to one of them, and it will be dismissed without prejudice; for when a reference has been entered upon, it must proceed to its proper conclusion, and an appeal will only lie from a final judgment, or one in its nature final.

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

APPEAL from *O. H. Guion, J.*, at June Term, 1909, of WARREN.

Action, heard on exception to referee's report. From a judgment modifying the report, some of the unsecured creditors, having excepted, appealed.

The facts are stated in the opinion of the Court.

Gay & Midyette and Walter Clark, Jr., for creditors.

S. G. Daniel, T. M. Pittman, Tasker Polk and Green & Boyd for defendant.

HOKE, J. This was an action to wind up an insolvent corporation, or one threatened with insolvency, and make distribution of the assets. A receiver was duly appointed to preserve the property pending litigation, and the cause was referred to ascertain and declare the indebtedness and determine the amount and priority of certain liens, etc. The referee having made report, exceptions were filed, and on the hearing the court overruled some of the exceptions, sustained others, in whole or in part, and entered judgment modifying the report accordingly and making distribution of a large part of the assets, according to the rights of the parties as established by the judgment. The judgment then concludes as follows: "Upon motion of Gay & Midyette, attorneys for excepting creditors, it is ordered that, as to the claim of Royall & Borden, the cause is recommitted to T. T. Hicks, Esq., referee, to hear such further evidence as the parties may offer thereon, and to make his further findings of facts and conclusions of law thereon in respect of said claims to the next term of this court."

In this condition of the record, and on the facts indicated, the Court is of opinion that the appeal has been prematurely taken and that the same must be dismissed without prejudice. It has been the uniform ruling of this Court that when a reference has been entered (250) upon, it must proceed to its proper conclusion, and that an appeal will only lie from a final judgment or one in its nature final. *Brown v. Nimocks,* 126 N. C., p. 808; *Driller Co. v. Worth,* 117 N. C., 515; and *Haley v. Gray,* 93 N. C., 195.

If a departure from this procedure is allowed in one case, it could be insisted upon in another, and each claimant, conceiving himself aggrieved, could bring the cause here for consideration, and litigation of this character would be indefinitely prolonged, costs unduly enhanced and the seemly and proper disposition of causes prevented. Under the authorities cited

Appeal dismissed.

CLARK, C. J., did not sit.

Cited: Smith v. Miller, 155 N. C., 246; *Beck v. Bank,* 157 N. C., 106; *Bradshaw v. Bank,* 172 N. C., 633.

WINSLOW BROS. & CO. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 November, 1909.)

An agreement in a bill of lading for shipment of live stock limiting the value thereof not to exceed $100 a head, upon the consideration of a less freight rate, is valid, and in such cases recovery against the carrier cannot exceed the amount named.

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

APPEAL by plaintiffs from *O. H. Allen, J.,* at May Term, 1909, of SAMPSON.

This action is to recover the sum of $201, the alleged value of a mule, killed while being transported from Kansas City by defendant. From the judgment rendered the plaintiff appealed.

The facts are stated in the opinion of the Court.

Fowler & Crumpler and C. M. Faircloth for plaintiffs.
Davis & Davis and F. R. Cooper for defendant.

BROWN, J. The only assignment of error is to the ruling of his Honor holding the plaintiffs to the value of $100 agreed upon in the bill of lading under which the live stock were shipped.

The bill of lading set out in the record is identical in all respects with the one printed in full in Jones against this same carrier
(251) (148 N. C., 583), and the point was fully discussed and decided against the plaintiffs in that case.

The case at bar falls squarely within the principles laid down in the opinion of the Court in that case, as well as within the concurring opinion written by *Mr. Justice Hoke* and concurred in by *Chief Justice Clark.* In that concurring opinion it is well and wisely said: "This rule is particularly applicable to shipments of stock in quantities, and eminently just to both parties to such contracts, affording to the shipper a fair and reasonable shipping rate and protecting the carrier from exorbitant and unconscionable recoveries by reason of excessive valuations which it had no opportunity to ascertain or to resist successfully, and for which it has received no adequate compensation." We find nothing whatever in the record which takes the case out of that rule or distinguishes it from the *Jones case,* where the subject is fully discussed and many authorities cited.

It would be a work of supererogation to repeat here the reasons that led us to our conclusion.

In addition to the authorities cited in the opinion of the Court the following additional cases will be found to fully sustain our former judgment: *Winslow v. R. R.*, 79 S. C., 344; *Express Co. v. Caldwell*, 21 Wall., 264; *Hart v R. R.*, 112 U. S., 331; *R. R. v. Henlin*, 52 Ala., 606; *R. R. v. Henlin*, 56 Ala., 368; *R. R. v. Harwell*, 91 Ala., 340; *R. R. v. Lesser*, 46 Ark., 236; *R. R. v. Weakly*, 7 Am. St., 104; *R. R. v. Harmon*, 17 Ill. App., 640; *R. R. v. Sowell*, 90 Tenn., 17; *R. R. v. Davis* (Texas), 2 Willson Civ. Cases, Court of Appeals, 191; *R. R. v. Caldwell* (Texas), 3 Willson, 439; *Zouch v. R. R.*, 36 W. Va., 524; 17 L. R. A., 116, where many other supporting authorities are cited.

In *Johnstone v. R. R.*, 39 S. C., 61, a case on all fours with this, the late *Chief Justice McIver*, a very able judge and a just man, delivering the opinion of the court, says: "But when, as in this case, the shipper has obtained an advantage, in consideration of which he has fixed the value of the property shipped, the case becomes still stronger. The shipper, having reaped the advantage obtained by the special contract, must, as a matter of common justice, bear the burden which such contract imposed."

The judgment of the Superior Court is

Affirmed.

CLARK, C. J., dissenting: No case of more vital importance than this to the business interests of the State, especially to all who ship freight by common carriers, is likely to arise. Great corpora- (252) tions, with immense aggregations of capital, do the bulk of the carrying business of today. The shipper does not and cannot deal on an equal footing with them. He is helpless and is as the mere dust in the balance if the law is not strong enough to enforce just dealings with him. *Bradley, J., Lockwood v. R. R.*, 84 U. S., at p. 379.

Legislation to this end has been recently found necessary in the enactment of statutes giving penalties where these carriers refuse to receive goods upon tender or to carry and deliver within a reasonable time. But, long ago, when carriers were less great and powerful, it was found necessary to hold, in protection to the shipper, that the carrier could not contract against its own negligence. The immense force of the legal talent employed by these great corporations has for years presented to court after court argument to withdraw from the shipper the protection of this most just and necessary rule of the common law, as will be seen by reference to the numerous cases in the reports of the various states of this Union. This has been met in some of the states by acts of the Legislature forbidding such concession to the carriers, as in Iowa, Kansas, Mississippi, Nebraska, etc., in some others, as in Texas, even by constitutional provision to the same effect, and in England a partial

departure from the common-law rule by the courts was promptly corrected by an act of Parliament. Where this has not been done, the furthest that any court has yielded the common-law rule that the carrier shall not contract against his own negligence is that the carrier may stipulate for a reasonable and just sum to be paid in case of loss, if there is a *bona fide* valuation, made voluntarily by the shipper and the carrier, but the court will hold void "an arbitrary preadjustment of the measure of damages." Yet that is exactly what, by the evidence, was done in this case. There was in proof no examination of the stock in this car by the agent of the carrier and the shipper, with a voluntary agreement as to fair average value of the mules to be paid in case of their loss. Such agreement some courts have upheld, not as a stipulation against liability for its own negligence by the carrier, but as a method of fairly adjusting the loss beforehand. The objection to this apparently fair arrangement is that it has led to the practice of which this case is an example.

Here the carrier had his "preadjusted arrangement" in the shape of a bill of lading, in which it had already printed, as a part of it, the provision that if any horse or mule was killed by the negligence of the carrier, the carrier's liability should "not exceed $100 per head." (253) The shipper was forced to take the terms the carrier offered, because the latter had prescribed of its head and power a most effective penalty of some $250 in the shape of additional freight if the carrier insisted on his common-law *right* to hold the carrier liable for the actual value of a mule if killed by the defendant's negligence. It was stated, and not denied in the argument here, that the alternative freight was $450 on this car load. The device resorted to requires no discussion. The carrier had as much right to make the additional freight $1,000 as $250, for the addition is so exorbitant that it shows its real purpose, the actual freight paid being $205. In *Brown v. Tel. Co.*, 111 N. C., 187; 32 Am. St., 793, we held that a telegraph company could not stipulate against liability for its own negligence, though there the additional charge was only a few cents (one-half of the original charge), and that for additional service of repeating the message.

Indeed, the stipulation here is not even "an average." If the animal is worth ever so much more than $100, when it is lost by the carrier's negligence, the shipper can in no event recover more than $100; while if the animal is worth less, the shipper can recover, under the terms of this bill of lading, only its true value. This is not a contract, but, in homely, everyday language, "a jug-handle proposition," all on one side. Such stipulation was held, therefore, invalid. *Conover v. Express Co.*, 40 Mo. App., 31; *R. R. v. Sowell*, 90 Tenn., 17; *Eels v. R. R.*, 52 Fed., 903; *Calderon v. S. S. Co.*, 69 Fed., 574, and in other cases.

It is not a contract besides, because it was not voluntary. The shipper had to take what was tendered him. He could not pay $250 penalty to get his rights as they are recognized by the common law and our own decisions, and unrepealed by any statute.

It was, further, not a contract because there was no actual agreement shown—which is essential to a contract—as to the valuation, no *bona fide* examination and valuation of the average value of the mules in this car load, which it devolved upon the defendant to prove, but merely a printed rate in the bill of lading fixing $100 as an "arbitrary preadjustment," which all courts have denounced as illegal. *R. R. v. Hall,* 124 Ga., 322; 4 L. R. A. (N. S.), 898, and notes; Sutherland Damages, sec. 904; Hutchinson on Carriers, 250; 6 Cyc., 392, and cases there collected; 5 A. & E. (2 Ed.), 308, and cases there cited; 4 Elliott R. R., sec. 1497, citing a long list of authorities, State and Federal.

This Court has often passed on this matter, and our decisions should not be overruled, under which we have heretofore maintained the protection which shippers are entitled to at common law, that a (254) carrier "shall not stipulate against liability for loss incurred by its own negligence." This was reaffirmed by a unanimous Court as late as *McConnell v. R. R.,* 144 N. C., 90, citing *Everett v. R. R.,* 138 N. C., 68; *Parker v. R. R.,* 133 N. C., 335; *Gardner v. R. R.,* 127 N. C., 293; *Mitchell v. R. R.,* 124 N. C., 238.

In *Gardner v. R. R.,* 127 N. C., 293, it is said: "It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss caused by its own negligence," citing *Steam Co. v. Ins. Co.,* 129 U. S., 397, and numerous other decisions.

In *Everett v. R. R.,* 138 N. C., 68, *Hoke, J.,* speaking for a unanimous Court, says: "It is the settled law of this State that a common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration, but *it cannot so limit its loss or damage resulting from its negligence.*" And, he adds, "They can contract neither for total nor partial exemption so occasioned. *Capehart v. R. R.,* 81 N. C., 438; *Gardner v. R. R.,* 127 N. C., 293. The same doctrine is very generally accepted in other jurisdictions." *Judge Hoke* further says: "It would be an idle thing for the courts to declare the principle that contracts for total exemption from such loss are subversive of public policy and void, and at the same time permit and uphold a partial limitation," citing *Hosiery Co. v. R. R.,* 131 N. C., 238. He also quotes *Express Co. v. Backman,* 28 Ohio St., 156: "To permit carriers to fix a limitation to the amount of their liability for negligence is, in effect, to permit them to exempt themselves from such liability." He quotes with approval extracts from

Moulton v. R. R., 31 Minn., 89; Hutchinson Carriers, sec. 250, and other authorities. To same effect, *McConnell v. R. R.,* 144 N. C., 90, and cases cited.

Has that been attempted here? It is agreed by the parties—

1. That said mule, while in possession of defendant in transit, was ruined and rendered wholly worthless *by and through the negligence of the defendant,* and was thereupon killed.

2. That the actual value of said mule was $201.81 and had cost plaintiff that sum. *Q. E. D.*

Still the defendant insists that the plaintiff can recover only $100. If so, what becomes of the above and other decisions of this and other courts which have preserved hitherto to shippers in this State, as elsewhere, the protection of the common-law rule that carriers cannot contract, in whole or in part, against liability for loss *caused by* (255) *their own negligence?* It has not been repealed by any statute.

The defendant relies upon *Jones v. R. R.,* 148 N. C., 581. But that opinion, in its language, dealt only "with a voluntary agreement, fixing in good faith a reasonable value on a species of property of uncertain value." Here there was not shown either a "voluntary agreement" or any "fixing in good faith a valuation," nor was $100 for a mule which the defendant admits cost and was worth $200 a "reasonable value," nor was the species of property of "uncertain value," for rarely is the value of any property more readily ascertainable. But even had that decision lacked these limitations, a rule so long and universally recognized as essential to the protection of the public should not be set aside by the authority of a single decision; but, rather, if such decision were found to be contrary to the "well-settled law," as *Hoke, J.,* terms it in *Everett v. R. R.,* 138 N. C., 68 (approving *Gardner v. R. R.,* 127 N. C., 293), we should take this first opportunity to correct it and restore to the shippers of the State their ancient and accustomed right, of which they should not be deprived by any act of ours.

The device of charging more than double the freight if liability for loss caused by the carrier's own negligence is not waived (as to half the value of the freight) is transparent. Besides, as many courts have held, "the measure of care required of the carrier cannot be made to depend on the rate paid." Many other courts have held that "shipper and carrier are not on equal footing, and to allow the latter to absolve itself from the duty of exercising care and fidelity is inconsistent with the very nature of its undertaking." 4 Elliott Carriers, sec. 1497; *R. R. v. Lockwood,* 84 U. S., at pp. 379, 381, 384.

The duty of the carrier to carry without negligence goods entrusted to him is of the very essence of his duty to the public as a common car-

rier, and cannot be dispensed with, either in whole or in part, by any contract or device, even if voluntary on the part of a shipper, much less by an "arbitrary preadjustment," as in this case, to pay less than half the loss caused admittedly by the carrier's own negligence. When property entrusted to a carrier is damaged or lost by its negligence, no reason can be given why the true value shall not be ascertained and paid, as at common law.

This Court held in *McNeill v. R. R.*, 135 N. C., 682, that the carrier could not protect himself from liability for damage caused by its own negligence by a stipulation on the back of a free pass, when all charges had been remitted. Certainly it cannot do so in consideration of a mere alleged reduction in rate. In *Brown v. Tel. Co.*, 111 N. C., 187, we held that a telegraph company could not stipulate against (256) liability for its negligence even when the alternative rate, with such liability, was only fifty cents more, and that, too, for additional service in repeating the message. Certainly the defendant cannot stipulate against its negligence when the alternative rate, with the common-law liability, is $250 more, and more than double the rate. The difficulty of adjusting the damage in the loss of a mule or other goods is less than that of fixing the damage from the negligent transmission of a telegram.

If the defendant can in this case stipulate against over one-half of the loss, which it admits was caused by its negligence, it can stipulate against its liability for its own negligence beyond one-tenth or even one per cent. There is no safety to the public when any inroad, under any device, is allowed upon the common-law rule that common carriers cannot contract against liability for their own negligence. They are common carriers and cannot be released from the public duty to carry without negligence. The shipper cannot deal with them on an equal footing, and any contract relieving the carrier from his duty to the public, under whatever guise, should be held absolutely null and void.

Cited: Stringfield v. R. R., 152 N. C., 130, 139; *Breeding Asso. v. R. R., ibid.*, 346; *Harden v. R. R.*, 157 N. C., 250; *Mule Co. v. R. R.*, 160 N. C., 224, 247; *Horse Exchange v. R. R.*, 171 N. C., 72.

Note.—The *Cummins Amendment* has settled the law as stated in the dissenting opinion.

ELIZABETH BELLAMY, EXECUTRIX AND INDIVIDUALLY, v. GEORGE W. ANDREWS ET AL.

(Filed 3 November, 1909.)

1. **Appeal and Error—Referee—Report Confirmed—Supreme Court—Findings.**

Upon appeal from the confirmation by the trial court of the report of a referee setting aside a deed as having been obtained by undue influence amounting to fraud, the Supreme Court has no power to make findings from the evidence, but can only determine as to whether there is sufficient legal evidence to support the findings which have been made.

2. **Deeds and Conveyances—Consideration—Fraud—Money Advanced—Equity.**

A conveyance obtained by one whose position gave him the power and influence over the grantor, without proof of actual fraud, shall not stand at all, if without consideration; and where there has been a partial or inadequate consideration it shall stand only as a security for the sum paid or advanced.

3. **Appeal and Error—Referee—Report Confirmed—Fraud—Evidence.**

In this case the evidence tended to show that the defendant, a grandson of the grantor, an aged woman, induced her to make a conveyance to him of her home in consideration of his assuming her debt secured by a mortgage thereon she was in dread of being foreclosed; that defendant retained the deed but did not perform his agreement; that the defendant agreed with the plaintiff, a granddaughter of the grantor, that he would pay the interest on the debt if she would pay the taxes, which was done up to the death of the grandmother, and that plaintiff was kept in ignorance of the conveyance until after she had qualified as executrix. The grandmother remained in possession to the time of her death, but was kept in ignorance by the defendant of his failure to assume the mortgage indebtedness. In a suit by the plaintiff as executrix and heir at law: *Held*, evidence sufficient to set aside the deed.

APPEAL by defendants from *Lyon, J.*, at April Term, 1909, of (257) WAKE.

This action is to set aside a deed. The action had been referred to Hon. Thomas B. Womack as referee. Exceptions were filed to his report by the defendant. His Honor overruled the exceptions and confirmed the report. Defendant appealed.

The facts are stated in the opinion of the Court.

W. A. Montgomery, J. N. Holding and R. N. Simms for plaintiff.
W. N. Jones, Armistead Jones and James H. Pou for defendant.

BROWN, J. The plaintiff sues to set aside a deed made by her grandmother, Elizabeth Johnson, to the grantor's grandson, the defendant

George W. Andrews, upon the ground that the execution thereof was obtained by undue influence and fraud, and to declare void a deed by said Andrews to his brother, the defendant William R. Andrews, for a portion of the land, upon the ground that said William R. Andrews took with notice.

Elizabeth Johnson, on 24 January, 1903, devised said property to plaintiff by will, duly probated 6 October, 1905. After the death of said Elizabeth Johnson, which occurred on 26 September, 1905, the plaintiff ascertained for the first time that the defendant George W. Andrews was claiming said land under a deed from said Elizabeth Johnson, bearing date 11 April, 1898.

Among the findings made by the referee are the following:

24. That the deed executed on 11 April, 1898, by Elizabeth Johnson to George W. Andrews was obtained by undue influence, which amounted to fraud, though without moral turpitude. (258)

27. That the defendant W. R. Andrews purchased with full knowledge.

Upon said findings, and others, the referee held as one of his conclusions of law that "the plaintiff is entitled to a rescission and cancellation of the deed of 11 April, 1898, upon paying to George W. Andrews all sums advanced by him and by William R. Andrews for him, with interest from the respective dates of payment."

It was admitted upon the argument by appellant that the only question before this Court is the sufficiency of the evidence to support this finding of the referee.

We have examined all the evidence set out in the record, and also the very clear, concise and complete report of the referee, and are led to the conclusion that his Honor committed no error in sustaining his judgment. We have no power to make findings ourselves from the evidence. We can only determine whether there is sufficient legal evidence to support those made below. Whether the evidence discloses evidence sufficient to support a charge of moral turpitude, or fraud, in its everyday significance, it is unnecessary to decide. It is not essential that it should. The evidence does disclose a state of facts which amounts to legal fraud, and warrants a court of equity in avoiding the deed and charging the property with the money paid out by the defendants, as was done by the referee and confirmed by the judge.

It is an established doctrine, founded on a great principle of public policy, that a conveyance obtained by one whose position gave him power and influence over the grantor, without proof of actual fraud, shall not stand at all, if without consideration, and that where there has been a partial or inadequate consideration it shall stand only as a security for the sum paid or advanced.

These authorities, we think, support this statement of the law. *Huguenin v. Basely,* 14 Ves. Jr., 273, where *Lord Eldon* set aside a voluntary settlement obtained by a clergyman from a widow. *Harvey v. Mount,* 8 Beavan, 437; *Buffalow v. Buffalow,* 22 N. C., 241; *Mullans v. McCandless,* 57 N. C., 425; *Futrill v. Futrill,* 58 N. C., 64; *S. C.,* 59 N. C., 337; *Franklin v. Ridenhour,* 58 N. C., 421.

The evidence discloses that Elizabeth Johnson was a very aged woman at the time she executed the deed, and for some time before was exceedingly feeble and helpless, dependent almost entirely upon the plaintiff and plaintiff's mother for her support. The only property she
(259) owned was the house and lot in controversy, where she resided, and craved most earnestly to remain there until she died. There was a mortgage upon this property for $3,625, bearing eight per cent interest, held by one Moore, upon which the interest was in some part unpaid. This mortgage was a source of extreme anxiety to Mrs. Johnson, who feared it would be foreclosed. George W. Andrews induced his grandmother to make and execute a will, devising to him the property absolutely. The inducement to make the will was the promise of said Andrews to assume and discharge the mortgage indebtedness above mentioned. Andrews took the will in his possession and kept the plaintiff in entire ignorance of it. He then induced plaintiff to agree to pay all the taxes on the property, upon the understanding that said Andrews would pay the interest on the mortgage. In pursuance of this agreement, said Andrews did pay the interest annually on the mortgage debt, and plaintiff paid out of her earnings as a school-teacher the annual taxes upon the property, amounting to over nine hundred dollars. Subsequently, George Andrews informed his grandmother that she must make him a deed for the property or he would not comply with his prior agreement to assume the mortgage debt. This deed was drawn by Andrews' attorney and is the deed sought to be set aside. It recites that George Andrews agrees "to assume the payment of said encumbrance or indebtedness" as a condition upon which the deed was executed.

The evidence shows that George W. Andrews did not assume the mortgage debt, but on the same day the deed was executed he caused to be prepared a note and mortgage to the Dime Savings Bank to obtain money with which to pay the Moore mortgage. This new mortgage was given to secure a note for $3,800, all of which money George W. Andrews received and used it in paying the Moore mortgage. This new note and mortgage was executed by Elizabeth Johnson and was her obligation. Said Andrews signed them with her, but erased his name, without her knowledge, before delivery to the bank, thus releasing himself from all liability.

At this time Elizabeth Johnson was eighty years of age, very infirm

physically and very greatly worried over the prospect of losing her house. Under such circumstances it was quite an easy matter for her grandson, in whom she reposed confidence, to persuade her to make this deed by agreeing to assume the mortgage debt. The fact that he did not pay it or even assume it, but, without his grandmother's knowledge, erased his name from the note, is some evidence of a fraudulent purpose on his part. As an inducement to make the deed, he had promised positively to assume the mortgage debt, and the first thing he (260) does after he gets the deed is to evade all liability himself and leave his grandmother solely liable to the bank and exposed to foreclosure at any time after maturity of the debt.

Then, again, he studiously concealed from the plaintiff the execution of the deed and that he was endeavoring to get title to property upon which she was paying the annual taxes, in good faith, in pursuance of their previous agreement, in order to save their grandmother a home. Not only was plaintiff paying the taxes, but she was assisting continually in the support of Mrs. Johnson.

In reviewing the evidence, the manifest thriftiness of George W. Andrews in dealing with his aged and helpless grandparent is in striking contrast with the noble and unselfish generosity and devotion of Elizabeth Bellamy.

This defendant incurred no legal obligation whatever for his grandmother and has paid nothing for this property except what interest he has paid on the mortgage debt, and this sum, under the decree, will be returned to him.

The evidence justifies the finding that the value of the property at the date of the transaction was $7,000, and the sum paid out is therefore manifestly inadequate, under the circumstances and upon the conditions under which the deed was made.

We are of opinion that there is evidence to support the several findings of fact of the referee, and, applying the principle of law to the facts as found, the court below committed no error in setting aside the deed and charging the money paid out upon the property.

The judgment of the Superior Court is

Affirmed.

Cited: Pritchard v. Smith, 160 N. C., 84; *Daniel v Dixon,* 161 N. C., 381.

B. F. SMITH v. GLOBE HOME FURNITURE MANUFACTURING COMPANY.

(Filed 11 November, 1909.)

1. **Appeal and Error—Grouping Exceptions, Etc., Relied On—Rule of Court—Appeal Dismissed.**

Where there is a failure of the appellant to group, number and assign in an orderly manner the exceptions taken during the course of the trial, as required by the rule of the Supreme Court, the appeal will be dismissed. The Supreme Court in this case, as required by the statute, examined the record and found no error therein.

2. **Same—Nonsuit—Another Action.**

When it appears that the appellant, the plaintiff in the lower court, has been nonsuited, and the merits of the case have not been passed upon by any conclusive ruling of that court, he may again bring his action after his appeal has been dismissed for his failure to comply with the rules of this court to group, number and assign the exceptions taken upon the trial.

APPEAL by plaintiff from *Long, J.*, at August Term, 1909, of (261) GUILFORD.

The facts are stated in the opinion of the Court.

George M. Patton for plaintiff.
King & Kimball, T. S. Beall and G. S. Bradshaw for defendant.

WALKER, J. The plaintiff alleges that he was injured while in the employ of the defendant, by defective machinery. The difficulty we encounter in deciding the case arises out of the failure of the appellant (the plaintiff) to ask for any special instructions upon the evidence, and the fact that the charge of the court is not before us. We have nothing but the process, pleadings, judgment and what purports to be a case on appeal, but which merely states the evidence in the cause. Judgment was given against the plaintiff, but it does not appear whether upon the pleadings or the evidence. There is no assignment of errors. The plaintiff, having been nonsuited, may sue again, if so advised, and he will not be estopped or barred by the judgment in this case (*Tussey v. Owen,* 147 N. C., 335), for the merits of the case, it appears, have not been passed upon by any conclusive ruling of the court. We must insist upon a strict compliance with the rule, which requires an assignment of the errors relied on in this Court. It is a most reasonable rule, because the appellant is thereby notified of the specific matters which will be involved in the appeal; it enables counsel to prepare their case with greater ease, eliminating all immaterial questions; and, lastly, but

by no means the least of all, it places before the Court in condensed form the entire case, so that we can the more readily understand the argument of counsel and consider the case more intelligently as the discussion before us progresses. But it is sufficient to say that it is the rule of this Court, which was adopted after mature consideration, and is far less drastic or exacting in its requirements than similar provisions in other appellate tribunals, where even an assignment of errors, strictly conforming to our rule, would not be tolerated for a moment. We have more than once held, with some degree of emphasis, that this, as well as the other rules of the Court, will be enforced, reasonably, of course, but according to their plain intent and purpose. (262) In this case it seems that the appellant failed to comply with the rule which requires the errors, which were pointed out by exceptions taken during the course of the trial, to be grouped and numbered or assigned in an orderly manner. We are therefore not permitted to consider the able and carefully prepared brief of his counsel, or to enter upon a consideration of the case upon its merits. It is our duty, though, under the statute, to examine the record. We have done so, and find no error therein. The appellee moved to affirm the judgment, under the rule as construed by this Court in *Davis v. Wall,* 142 N. C., 450; *Marable v. R. R.,* 142 N. C., 564; *Lee v. Baird,* 146 N. C., 361; *Thompson v. R. R.,* 147 N. C., 412; *Ullery v. Guthrie,* 148 N. C., 417. As the case is now presented to us, we must allow the motion and affirm the judgment.

Affirmed.

Cited: Pegram v. Hester, 152 N. C., 765; *Jones v. R. R.,* 153 N. C., 422; *Keller v. Fiber Co.,* 157 N. C., 576; *Barringer v. Deal,* 164 N. C., 249; *Wheeler v. Cole, ibid.,* 380; *Porter v. Lumber Co., ibid.,* 397; *Register v. Power Co.,* 165 N. C., 235; *Carter v. Reaves,* 167 N. C., 132; *Culbreth v. R. R.,* 169 N. C., 727.

R. G. CAMPBELL v. D. K. HUFFINES.

(Filed 11 November, 1909.)

Partnership—Duplicated Agreement—Annulment of Partnership—Fraud—Innocent Persons.

One who has entered into a partnership with another, expressed the agreement in duplicated and signed writings, and then agreed to annul the partnership, leaving the duplicate agreement in the hands of the other party, is liable to a stranger who is thereafter fraudulently induced by the other partner to lend money, in good faith, upon exhibition of the duplicate partnership agreement, within the period of its stated duration, and for

purposes within its expressed scope. He has put it within the power of the other partner to commit the fraud, and should suffer loss rather than an innocent stranger who has advanced the money in good faith.

APPEAL by defendant from *Long, J.*, at June Term, 1909, of GUILFORD.

The evidence discloses the following facts: One W. H. Harp, on 23 May, 1903, applied to plaintiff for a loan of $500. Harp was in the retail whiskey business, in Greensboro, and doing business in a building owned by defendant. Harp called plaintiff into his place of business. The plaintiff at first declined to make the loan; that Harp was not considered solvent. Harp took from his safe a written contract of partnership between him and defendant, dated 5 June, 1902, which, among other things, stipulated that Harp should manage the business, do the buying, pay the bills, make all contracts, sign all checks and have
(263) entire control of the business; that each of the partners was the owner of one-half; that defendant had loaned Harp the money to buy a one-half interest in the business of C. A. Miller & Co.; that the business should be conducted under its then name, C. A. Miller & Co., until 1 July, 1902, and after then should be changed to such name as might be agreed upon; that the partnership should continue until 1 July, 1903. Plaintiff testified that he knew the signature of D. R. Huffines, and, after seeing the written agreement, loaned the money and took the note, signed "Harp & Huffines"; that Harp told him the money was needed to pay bills; that Huffines was out of town; that the money would be repaid in a short time; that $200 was repaid him by Harp, by check given him by Harp in the place of business. The defendant admitted signing the contract of partnership; that on the next day thereafter he decided not to proceed further; that he agreed with Harp to cancel the contract; that he tore up his copy and Harp promised to tear up and destroy his copy; that he did furnish Harp the money to buy a one-half interest in the business of C. A. Miller & Co. and took his note for $1,200, and that Harp had paid him $700. The jury found, in response to issues submitted without objection, that the defendant and Harp were partners at the time plaintiff loaned the money, and that the defendant and Harp were both indebted to plaintiff for the balance due. The defendant Huffines alone appealed from the judgment rendered on the verdict.

John A. Barringer for plaintiff.
A. L. Brooks and Thomas & Hoyle for defendant.

MANNING, J. We think the judgment of the court below is sustainable by the application of a few well-settled principles. The first head-

note (which the opinion sustains) of *Cotton v. Evans,* 21 N. C., 284, declares: "A mercantile instrument, given in the partnership name, binds all the partners, unless the person who took it knew or had reason to believe that the partner who made it was improperly using his authority for his own benefit, to the prejudice, or in a way that might be to the prejudice, of his associates." Again, it is declared in that opinion: "In such a case there is a loss to fall on one of two innocent persons; and the question is, which of them ought to bear it? Manifestly he who entrusted the power. It was susceptible of abuse, and he knew that when he conferred it. It is not, in point of form, exceeded; and if it has been employed for a different purpose than that for which is was created, that is a risk that must have been seen and undertaken from the beginning." This case has been cited with approval in (264) *Powell v. Flowers, ante,* 140, in which other cases are cited sustaining the same principle. The defendant signed the articles of partnership; gave Harp, his copartner, a duplicate original; permitted him to keep it; Harp took it out of the iron safe in the place of business, showed it to plaintiff, and plaintiff, knowing the defendant's signature, loaned the money on the faith of it. The date of the loan was within the time stipulated for the duration of the partnership. The defendant put it in the power of his associate, Harp, to mislead the plaintiff and to defraud himself. The question simply is, which should suffer the loss, the plaintiff or the defendant? It is well settled by many adjudications, here and elsewhere, that the party putting it within the apparent power of another to commit a fraud should suffer a loss, rather than a stranger who has innocently and in good faith acted upon this apparent power. *Ellison v. Sexton,* 105 N. C., 356. By the written contract the defendant was an actual partner, not simply an apparent partner. What the partner, Harp, did was strictly within his power, under the written agreement and within the time stipulated for the duration of the partnership. "Where a man holds himself out as a partner, or allows others to do so, he is properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted." 22 Am. & Eng. Enc., 55; *Thompson v. Bank,* 111 U. S., 529. The defendant could easily have seen that the duplicate original held by Harp was destroyed, and the protection of himself from liability would clearly seem to have demanded it. We have carefully examined the exceptions taken by the defendant at the trial, both in the taking of the evidence and to the charge of his Honor, and the authorities cited in the able brief of his attorney, and we find no error. The judgment is therefore

Affirmed.

THE LANCASTER TRUST COMPANY v. J. B. MASON.

(Filed 11 November, 1909.)

1. **Contracts Written—Correspondence—Shares of Stock—Dividends Reserved—Questions of Law.**

When the transactions leading to and consummating a sale of certain shares of stock are embraced in the correspondence between the parties and put in evidence, it is a written contract of sale, and its construction is a question of law.

2. **Same—Interpretation.**

When the purchaser of certificates of stock in a corporation has accepted a proposition from the owner reserving the "January dividends," all sums theretofore set apart for distribution as dividends among the stockholders and payable in January following are reserved to the seller."

3. **Same—Extra Dividends.**

A purchaser of certificates of stock under an agreement reserving to the seller the dividends to be declared in January, and without the knowledge of either party the corporation had declared an extra cash and stock dividend then to be paid, is liable to the seller for the extra cash dividend and the value of the stock dividend which he thereafter has received and collected from the corporation.

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

APPEAL by plaintiff from *Long, J.*, at March Term, 1909, of cover of the defendant the value of a certain dividend collected by him (265) DURHAM.

Action by plaintiff, as trustee of Margaret G. Arnold, to re- for the Durham Cotton Mill Company.

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

At conclusion of plaintiff's evidence a motion to nonsuit was allowed, and plaintiff appealed.

Giles & Sykes for plaintiff.
Foushee & Foushee for defendant.

BROWN, J. The plaintiff sues to recover certain dividends declared by the Durham Cotton Manufacturing Company at the meeting of the directors of said company on 16 December, 1907, viz., a 6 per cent extra dividend and a 50 per cent stock dividend, said dividends amounting to $120 and $1,000, respectively.

On 16 December, 1907, the directors of the Durham Cotton Manufacturing Company met at Watts's office in the city of Durham and declared a 4 per cent semiannual, a 6 per cent extra and a 50 per cent stock dividend, payable to the stockholders of record of said company on 2 January, 1908.

On said date, 16 December, 1907, the plaintiff, as trustee of Margaret G. Arnold, both of the city of Lancaster, State of Pennsylvania, was the owner of four shares of the capital stock of the said Durham Cotton Manufacturing Company of the par value of $2,000. On said date, 16 December, 1907, the defendant, J. B. Mason, a resident of the city of Durham, State of North Carolina, was a stockholder in said company.

On 27 December, 1907, the plaintiff forwarded to the Citizens National Bank, of Durham, N. C., four shares of stock held by (266) it in the Durham Cotton Manufacturing Company, attached to a sight draft on J. B. Mason, the defendant, pursuant to the following letters and telegrams, which said letters and telegrams embrace the contract of sale of said stock by the plaintiff to the defendant, viz.:

(*a*)

DURHAM, N. C., 19 December, 1907.

LANCASTER TRUST COMPANY,
Lancaster, Pa.

DEAR SIR:—Some time ago I was informed that you had a client who desired to dispose of some stock of the Durham Cotton Manufacturing Company. I was not in a position to handle any at that time; but if you still hold this stock, I would handle it promptly at $650 per share, and if you desire to accept this offer you can forward certificate to J. Harper Erwin, treasurer of Durham Cotton Manufacturing Company, with instructions to transfer same on payment of above price. This offer is for not over ten shares. Please advise prompt acceptance of this offer by wire, at my expense, and oblige,

Yours truly, J. B. MASON.

(*b*)

LANCASTER, PA., 23 December, 1907

MR. J. B. MASON,
Durham, N. C.

DEAR SIR:—We are in receipt of your favor of the 19th inst., stating that you would handle the four shares of the Durham Cotton Manufacturing Company's stock at $665 per share. In reply, beg to say that we have other parties who are desirous of purchasing this stock. If you will put an offer into our hands of $675 per share, *allowing the January dividend to us*, we will consider making the sale. To this note we await your prompt reply. Yours very truly, JOHN HERTZLER,
President.

Telegram from Mason to Lancaster Trust Company:

(*c*)

DURHAM, N. C., 25 December, 1907.

JOHN HERTZLER,
President Lancaster Trust Company,
Lancaster, Pa.

Answering you letter 19th, your offer accepted. Attach stock, properly endorsed, to demand draft at price named, with January
(267) dividend added, and I will honor same on presentation. Send draft to Citizens National Bank, this city, and same will be remitted at par. Send stock to reach here Saturday. Party out of town after this date. Answer. J. B. MASON.

(*d*)

DURHAM, N. C., 25 December, 1907.

JOHN HERTZLER,
President the Lancaster Trust Company,
Lancaster, Pa.

DEAR SIR:—I wired you today as follows, which I now beg to confirm: "Answering your letter of the 19th, your offer accepted. Attach stock, properly endorsed, to demand draft at price named, with January dividend added, and I will honor same on presentation. Send draft to Citizens National Bank, this city, and same will be remitted at par. Send stock to reach here Saturday. Party out of town after this date. Answer."

My client will leave Saturday, and he desires to know whether he will get the stock in order that he could arrange payment for same before leaving; hence I telegraphed instead of writing. The offer is for $675 per share, with January dividend. Yours very truly,

J. B. MASON.

(*e*)

LANCASTER, PA., 27 December, 1907.

J. B. MASON,
Durham, N. C.

Offer accepted. Will forward four shares today to Citizens National Bank. JOHN HERTZLER,
President.

(*f*)

LANCASTER, PA., 27 December, 1907.

MR. J. B. MASON,
Durham, N. C.

DEAR SIR:—We are in receipt of your telegram, under date of the 25th inst., as follows:

"Answering your letter 19th, your offer accepted. Attach stock, properly endorsed, to demand draft at price named, with January dividend added, and I will honor same on presentation. Send draft to Citizens National Bank, this city, and same will be remitted at par. Send stock to reach here Saturday. Party out of town after that date. Answer."

To which we have replied this morning, as follows:

"Offer accepted. Will forward four shares today to Citizens Bank." (268)

We are also in receipt of of your letter of the 25th inst. We are today forwarding the four shares Durham Cotton Manufacturing Company stock to the Citizens Bank, Durham, with instructions to deliver same to you upon the payment of $2,780. Any charges the bank may make for this transaction are to be paid by you.

Yours very truly,

JOHN HERTZLER,
President.

On 31 December, 1907, the four shares of stock purchased by J. B. Mason of the Lancaster Trust Company, trustee, were transferred on the books of the Durham Cotton Manufacturing Company—two shares to J. B. Mason and two shares to Y. E. Smith, superintendent of said company.

The 4 per cent semiannual and the 6 per cent extra dividends were paid to the defendant, J. B. Mason, and Y. E. Smith, and the stock representing the 50 per cent stock dividend was issued to them. Only the 4 per cent semiannual dividend has ever been received by the Lancaster Trust Company, trustee. At defendant's suggestion, that was embraced in the draft drawn by plaintiff for the purchase price of the stock certificates and voluntarily paid by defendant, although admittedly not embraced in the contract of sale.

The validity of the payment of the dividends by the corporation to Mason and Smith is not questioned, as they were the owners of record of this stock on 31 December, 1907, and the corporation had no notice of the plaintiff's claim.

The question is, as between plaintiff and defendant, did the latter acquire title under the contract of sale to anything more than the cer-

tificates of stock duly assigned to him? If he acquired title to nothing more, then he and Smith are jointly liable for the extra dividends which they wrongfully collected as stockholders of record, for it seems to be admitted, or, if not admitted, it appears plainly enough that in the purchase of the stock the defendant was acting as the agent of Smith as well as for himself.

The "friend and client" referred to by defendant as being in such a hurry to "leave town on Saturday," and for whom the defendant professed to be acting, does not seem to materialize and appears to be as mythical a character as Sarey Gamp's celebrated friend, Mrs. Harris.

The entire contract being in writing, it is a matter for judicial construction, and in construing it we think the court below was in (269) error. We are aware that this Court has once decided that a sale of shares of stock in a corporation carries with it the dividends declared by the company, when they are to be paid at a day subsequent to the transfer of the stock. *Burroughs v. R. R.*, 67 N. C., 377.

In his valuable work on Corporations, Judge Womack states that this case is against the great weight of authority. Section 520. But it is not necessary now to question it.

In this contract of sale there in an express reservation of the January dividend. The word "dividend" denotes a fund set apart by a corporation out of its profits, to be apportioned among the shareholders. Black Law Dicty., 381.

This fund had been set apart on 16 December, 1907, and the contract of sale was made on 23 December. If the language of reservation will embrace the 4 per cent dividend it will likewise embrace the others. The plaintiff did not reserve only the so-called regular dividend. He reserved the "January dividend." The reasonable and natural construction is that plaintiff intended to reserve and did reserve any dividend payable in January. It is a matter of common knowledge that corporations frequently declare extra dividends at the close of the year, payable when their regular dividends are payable. Such dividends are as much dividends of this corporation as their regular dividends. It is therefore manifest that plaintiff intended to reserve all sums set apart for distribution among stockholders in January, and intended to sell only the naked stock certificates.

This construction is fortified by the fact that in defendant's letter of 19 December he proposes to buy, not the new stock to be issued, but the shares which plaintiff had previously held.

It is true that at defendant's suggestion the plaintiff added the 4 per cent dividend to the purchase price of the original shares and drew on defendant for the total amount, but that was done for convenience and was no part of the terms of sale. It is perfectly manifest that plaintiff

did not know of the existence of this large melon to be cut and distributed in January. It is not to be supposed that plaintiff intended to sell something that neither plaintiff or its client knew that the latter owned.

Plaintiff's *habitat* was a long distance from Durham, and this news had not traveled in nine days even the short distance from Watts' office to defendant's banking house; for, although defendant was then a stockholder, he swears in his answer that when he purchased plaintiff's stock he had never heard of the extra dividends. It is therefore equally manifest that he did not intend to purchase anything more than the original shares of stock. He could not have intended to buy that which he did not know of. From defendant's own admission, the extra dividends were not in the contemplation of either party to the con- (270) tract. The entire correspondence, along with defendant's answer, indicates that the minds of the seller and the buyer met in one common understanding, and that the contract embraced and was intended to embrace only the original shares of stock held by Margaret Arnold.

It is immaterial to consider whether defendant was actually purchasing for his friend, who was so anxious "to leave on Saturday," or not. The evidence shows that these identical shares were transferred directly to him and his associate, Smith, and that they received the extra dividends.

We are of opinion that his Honor erred in sustaining the motion to nonsuit, and that upon the facts contained in this record the plaintiff is entitled to the special cash dividend of 6 per cent and the cash value of the stock dividend, with interest from the date when received.

As this case is to be tried again, we think it proper to suggest that Y. E. Smith be made a party defendant. The judgment of nonsuit is set aside.

New trial.

F. R. MANGUM ET AL. v. B. W. MANGUM ET AL.

(Filed 11 November, 1909.)

1. Judicial Sales—Deferred Payments—Title—Defenses—Arbitration.

Purchasers of land at a judicial sale resisting payment of their notes given for deferred payments, upon the ground that the lands overlapped an adjoining owner, and that therefore the commissioner could not make title, having agreed to submit this question to arbitration, are bound by the award made in conformity with their agreement, in the absence of fraud, misconduct, corruption, partiality or bad faith on the part of the arbitrators.

2. Arbitration—Award, Correct Form—Reasons and Evidence.

Arbitrators are not required to set out in their award any reasons for it, or any of the evidence upon which it is based.

APPEAL from *Long, J.*, at March Term, 1909, of DURHAM.

Motion in the cause. His Honor denied the motion to set aside an award made by arbitrators, and gave judgment against respondents, J. W. Smith and S. P. Mason, who appealed.

The facts are stated in the opinion of the Court.

(271) *Giles & Sykes and W. W. Mason for appellants.*

W. B. Guthrie, R. O. Everette, D. W. Sorrell and Jones Fuller for appellees.

BROWN, J. The respondents purchased at the judicial sale, made under the decree in this cause, certain real estate known as the High lot, for the sum of $4,370, payable one-third cash, one-third at six months and one-third at twelve months, with interest. The respondents failed to pay said notes, and the commissioners moved in the cause for judgment. The respondents made defense that the boundary of the lot was in dispute, and that the boundary as sold by the commissioners lapped over on the lot of one Christian at least five feet, and that the commissioners could not make title thereto. In the Superior Court it was agreed by all the parties, including these respondents, to refer the question as to quantity and boundary lines and title to three arbitrators, whose award should become the judgment of the court.

The arbitrators were selected and made their award, and these respondents except to the award.

By the submission the parties agreed that the dispute as to the quantity of the land and the boundaries thereof should be decided by the arbitrators.

These parties were capable of submitting their controversy to arbitrament, and consequently must be bound by the award, unless the arbitrators have transcended their authority. *Milsaps v. Estes,* 137 N. C., 535. The basis of the award is the submission, and under it the duties of the arbitrators are emphasized: "The special duty of these artitrators shall be to ascertain and determine whether or not the commissioners can convey the amount of land which they offered to convey to the purchasers." This was the matter in dispute; this was submitted to the arbitrators, and their award determines and puts an end to that dispute.

Respondents do not allege fraud, misconduct, corruption, partiality or bad faith on the part of the arbitrators. In the absence of such al-

legation and proof to support it, the award will not be set aside. *Ezzell v. Lumber Co.*, 130 N. C., 205, 207; *Henry v. Hilliard,* 120 N. C., 479, 487 and cases cited.

The arbitrators have given no reasons for their award, and have stated with commendable clearness exactly what their award is, viz.: "We hereby award that the lines of the land sold by the commissioners in these proceedings to Messrs. J. W. Smith and S. P. Mason are as shown on the plot of E. C. Belvin of the property of J. S. and W. Mangum, on Chapel Hill Street, Durham, N. C., made 23 March, 1907, a copy of which is hereto attached and made a part hereof, and (272) we hereby ascertain, determine and award that said commissioners can convey the amount of land and the identical land which they offer to convey to the purchasers, J. W. Smith and S. P. Mason."

Arbitrators are not required to set out in their award any reasons for it, or any of the evidence upon which it is based, and it is best they should not. *Osborne v. Calvert,* 83 N. C., 365 (369 and 370); *Henry v. Hilliard,* 120 N. C., 479, 486 *et seq.*; *Keener v. Goodson,* 89 N. C., 273, 276.

The judgment of the Superior Court is

Affirmed.

W. J. YOUNG v. BROOKS MANUFACTURING COMPANY.

(Filed 11 November, 1909.)

Issues—Technical Error—Verdict—Harmless Error.

This case was properly submitted to the jury upon conflicting evidence and under proper instructions; and while there was technical error committed as to one issue, it was cured in the manner in which the jury answered it.

APPEAL from *Long, J.*, at August Term, 1908, of CHATHAM.

This litigation grows out of the following contract:

NORTH CAROLINA—Durham County.

This contract, made this 9 February, 1906, by and between R. J. Teague, of Person County, North Carolina, party of the first part, and W. J. Young, of Durham County, North Carolina, party of the second part, witnesseth:

That whereas said R. J. Teague has this day sold to said W. J. Young, for the sum of $1,185.50, one 35-horsepower boiler (Cornish) and engine (Ajax) and sawmill fixtures, the said engine and boiler manufactured by A. B. Farquhar Company, of York, Pa., and the sawmill and fixtures manufactured by the Salem Iron Works, of Salem, N. C.; also a large belt, one 52-inch saw and four wheels for lumber truck,

upon all which property, together with other property, the party of the second part has this day executed a mortgage and lien to the party of the first part for the purchase of said property and for the faithful performance of this contract:

And whereas said sawmill, boiler, engine and outfit is furnished to the party of the second part by the party of the first part to enable said party of the second part to cut and manufacture the timber
(273) and lumber hereinafter mentioned:

Now, therefore, in consideration of the premises and the further sum of $1 in hand paid to the party of the second part by the party of the first part, and other consideration between them moving, the said party of the second part hereby agrees to cut and manufacture into lumber all the timber bought by R. J. Teague and by R. J. and E. N. Teague in Chatham County, North Carolina, which consists of timber bought from Hugh Peebles, Ruffin Jones and wife and A. M. Burns and wife by said R. J. and E. N. Teague, and that timber bought from L. Hatley, G. W. Maddocks and _____ Murdock by R. J. Teague, all of which timber (except that of L. Hatley) is more specifically described by the deeds of the above-named parties, of record in the office of the Register of Deeds of Chatham County, to which reference is hereby made and taken as a part of this contract; and the said party of the second part agrees to take the trees as they now stand in the woods and cut and manufacture the same into lumber, at his own expense, and cut all of said trees down to eight or ten inches across the stump; and said party of the second part agrees to pile said lumber on sticks, as it is cut, high enough off the ground to prevent damage from moisture, said planks to be piled straight over each other, with sufficient space between the same to allow the air to properly circulate through, and in warm weather to stack said lumber from the saw as it is cut. Said party of the second part agrees to manufacture said lumber into such sizes and specifications as shall be furnished by said R. J. Teague or his agents, from time to time, and said lumber to be stacked 300 feet from the sawmill site, and all the aforesaid work said party of the second part agrees to do in first-class, workmanlike manner. And the said party of the first part agrees to allow the said party of the second part the sum of $5 per thousand feet for the aforesaid work, and said amount to be credited upon the aforesaid debt of $1,185.50 owing to said Teague by said Young for sawmill outfit above described; the engine and boiler to be delivered to said Young at Pittsboro, N. C., and sawmill at Goldston, N. C., both in Chatham County, and said Young to pay all freight charges on same.

W. J. YOUNG. (Seal)
R. J. TEAGUE. (Seal)

After plaintiff had begun to perform the contract, Teague assigned, on 23 May, 1906, all his rights, and transferred his obligations under it to the Brooks Manufacturing Company, with the knowledge of the plaintiff Young. It was alleged by the defendant that the plaintiff agreed, at the time of the transfer to it by Teague, that he (274) would use in the manufacture of the lumber a cut-off saw and a lath machine, and that the price of making laths was agreed upon. In the late summer, or early fall, 1906, differences arose between the plaintiff and defendant, each alleging that the other was violating the contract, and each denying the charge of the other. These differences culminated in this litigation. On 16 October the plaintiff began suit against the defendant in the Superior Court of Chatham County, and on 22 October the Brooks Manufacturing Company began suit against Young in the Superior Court of Guilford County. Each sought and obtained restraining orders and injunctions until 1 January, 1907, when, at a term of the Superior Court of Guilford County, then in session, *Justice, J.,* entered an order removing the Guilford case to Chatham and directing a consolidation of the two cases, and this order contains this agreement: "It is agreed by the parties that no claim for damages by the defendant (meaning Young) by reason of the plaintiff's (meaning Brooks Manufacturing Company) taking control of the premises and cutting and sawing logs and timber be made, and that no claim shall be made by the plaintiff (Brooks Manufacturing Company) by reason of the defendant's (Young) failing to cut and saw timber and logs since the institution of this action, or for any alleged abandonment of the contract set out in the pleadings. This is not to affect the right of the plaintiff to recover, nor of the defendant to recover, for work done and for damages alleged in his complaint in the cause pending in Chatham County, if he can establish right thereto; no damages to be shown after this date." The two cases being consolidated, *Peebles, J.,* after hearing some of the evidence, made an order of reference, both plaintiff and defendant objecting and insisting upon a jury trial of the issues arising upon the pleadings. The referee appointed heard the case at length and filed his report to March Term, 1908, stating the facts found by him and his conclusions of law separately. Both parties filed exceptions, the plaintiff demanding a jury trial and tendering issues upon the material disputed facts. The referee found that plaintiff was indebted to the defendant in the sum of $176.21. The case came on for trial before *Long, J.,* the plaintiff insisting upon a jury trial. The following issues were submitted to the jury, whose response is stated to each issue:

1. Did the Brooks Manufacturing Company commit a breach of its contract with plaintiff, Young, as alleged in the complaint? Answer: Yes.

2. If the Brooks Manufacturing Company committed such a (275) breach, was it done in such a way to prevent Young from fully performing his contract, and under circumstances when he could have performed it but for such breach? Answer: Yes.

3. What amount, if anything, was due Young by the Brooks company under the contract prior to 13 April, 1907? Answer: Eleven hundred and sixty-seven dollars.

4. What amount, if anything, is Young damaged by reason of his being prevented from carrying out his contract, if Young was so prevented, as he alleges? Answer: Eleven hundred dollars.

5. What amount, if anything, has Young been damaged by reason of the injunction sued out against him by the Brooks company? Answer: Two hundred and fifty dollars.

6. Did W. J. Young commit a breach of his contract originally made between him and Teague, and afterwards between him and the Brooks Manufacturing Company? Answer: No.

7. Is W. J. Young indebted to the Brooks Manufacturing Company, as alleged in the pleadings filed by it, and, if so, in what amount? Answer: Two notes, $395 each, with interest.

8. What damage, if any, is the Brooks Manufacturing Company entitled to recover from W. J. Young and his bondsmen on account of the injunction granted in this case against the Brooks company? Answer: None.

The defendant excepted to the issues submitted, and tendered the following issues:

1. Did W. J. Young commit a breach of his contract originally made between him and Teague, and afterwards between him and the Brooks Manufacturing Company?

2. Is W. J. Young indebted to the Brooks Manufacturing Company, as alleged in the pleadings filed by it, and, if so, in what amount?

3. Was the Brooks Manufacturing Company indebted to W. J. Young at the time of the commencement of the action on 16 October, 1906, and, if so, in what amount?

The defendant excepted to the refusal of his Honor to submit the third issue tendered by it. It further appears in the record that both parties agreed that damages arising from the restraining orders and injunctions should be assessed, if any; and evidence was submitted to the referee on such damages by both parties. At the trial before *Long, J.*, the evidence taken before the referee was used and no witnesses were examined. There was judgment upon the verdict for the plaintiff, and defendant appealed to this Court.

Hayes & Bynum for plaintiff. (276)
H. A. London & Son, Justice & Broadhurst, W. D. Siler and David Stern for defendant.

PER CURIAM: We *are satisfied, after a careful reading of the record* and after carefully considering his Honor's charge, that no reversible error was committed at the trial. The questions determinative of the case were exclusively questions of fact. While there was technical error committed in the third issue, the finding of the jury on that issue was reached by allowing the plaintiff for cutting 994,000 feet at the contract price and deducting therefrom the amount claimed by the defendant to have been paid the plaintiff; so that, the technical error worked no harm to the defendant. The evidence by defendant showed that plaintiff had cut about 3,000 feet in the time from 1 January to 13 April, which amounted to $15.40, at the contract price. We have repeatedly held that a new trial will not be granted for harmless errors, but only when we can see that the error complained of was prejudicial to the appellant. The principles of law governing the measure of damages, the construction of and the breach of the contract were correctly laid down to the jury. The jury—the triers of the fact—found the disputed facts in favor of the plaintiff and against the defendant, upon evidence legally competent and to which no exception is assigned as error. Under issues submitted, both parties were able to present, and did present, every phase of the controversy as set forth in the pleadings and in their agreement. The question presented in the third issue tendered by the defendant was presented by his Honor to the jury under the issues submitted by him, as well as all the contentions of the defendant thereon, and the jury were fully instructed that if the defendant owed the plaintiff nothing, then to answer the third issue "Nothing." In our opinion, there is no error, and the judgment is

Affirmed.

Cited: Pickerell v. Wholesale Co., 173 N. C., 698.

B. MACKENZIE v. DAVIDSON COUNTY DEVELOPMENT COMPANY.

(Filed 11 November, 1909.)

1. Justice's Court—Judgments—Appeal—Docketing—Laches of Justice—Principal and Agent.

A motion in the Superior Court for a *recordari* or an attachment under Revisal, 1493, is the remedy given an appellant for the failure of the justice to send up an appeal, and it is no legal excuse for the appellant to show that he had paid to the justice his fees and those of the clerk, and that the justice had failed to docket it as required by the statutes. The appel-

lant would thus make the justice his agent and for his neglect he would be responsible.

2. Justice's Court—Appeal—Docketing—Judgment—Laches—Void Appeal.

An appeal from a judgment of a justice of the peace must be docketed at the next ensuing term of the Superior Court commencing ten days after the notice of appeal, and an attempted docketing at a later term is a nullity. Revisal, 307-8.

(277) APPEAL by defendant from *Long, J.*, at June Term, 1909, of GUILFORD.

The facts are stated in the opinion of the Court.

Stern & Stern for plaintiff.
E. D. Kuykendall for defendant.

CLARK, C. J. The plaintiff obtained judgment before a justice of the peace in Guilford on 23 March, 1909. A term of the Superior Court for said county began on 29 March. A regular term for two weeks began on 12 April. On the tenth day after the judgment the defendant paid the justice thirty cents, the justice's fee for a return to the appeal, and fifty cents, with request to send it to the clerk, to docket the appeal. This the justice did not do. The appeal was not required to be docketed at the March term, as it began within less than ten days after the judgment. But it should have been docketed at the April term. This not having been done, the appellant, if in no default, should have asked at that term for a *recordari*. *Boing v. R. R.*, 88 N. C., 62; *Blair v. Coakley*, 136 N. C., 409; *Lentz v. Hinson*, 146 N. C., 31. Or he could have compelled the justice to make his return by attachment. Revisal, sec. 1493, provides: "The justice shall, within ten days after the service of notice of appeal on him, make a return to the appellate court and file with the clerk thereof all papers, proceedings and judgment in the case, with the notice of appeal served on him. He may be compelled to make such return by attachment."

The appellant did not try to docket the appeal nor avail himself of either of the remedies allowed by law if he was unable to do so. Nineteen days after the April term adjourned, the appeal was at last docketed, on the first day of the term of the Superior Court beginning 15 May. Revisal, 1905, sec. 607, provides "That if the appellant shall fail to have his appeal docketed, as required by law, the appellee may, at the next term of said court next succeeding the term to which the appeal
(278) is taken, have the case placed upon the docket, and, upon motion, the judgment of the justice shall be affirmed and judgment rendered against the appellant accordingly."

Revisal, sec. 608, provides: "When the return is made, the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court." The appellant did not comply with the statutory requirements as to appeals. Merely praying an appeal is insufficient. He must personally see that the appeal is perfected. These sections of the Revisal mean that the appeal must be docketed at the next ensuing term, and an attempted docketing at a later term is a nullity. In *Davenport v. Grissom,* 113 N. C., 38, it was held that the judge "had no discretion to permit the appeal to be docketed at a subsequent term to the one to which it should have been returned," and that "the attempted docketing at such subsequent term was a nullity." This ruling has been cited and approved. *Pants Co. v. Smith,* 125 N. C., 590; *Johnson v. Andrews,* 132 N. C., 380; *Johnson v. Reformers,* 135 N. C., 386; *Blair v. Coakley,* 136 N. C., 407; *McClintock v. Ins. Co.,* 149 N. C., 35.

In *Hawks v. Hall,* 139 N. C., 176, relied on by the appellant, the appeal was docketed in apt time and the appellee entered a general appearance, but after the case had been on docket for several terms moved to dismiss because the return to the appeal had not been signd by the justice of the peace. In *Johnson v. Andrews,* 132 N. C., 376, the appellant paid the clerk his fee and the clerk told him the case was docketed. It being a criminal term, no civil docket was made up, and the appellant having done all in his power, and being in no laches, the court held that the appeal should not have been dismissed.

But here the appellant did not pay the clerk his fee for docketing, and let the two weeks of April term pass by without any effort to get the appeal docketed, though the statute required it should be docketed at that term.

As this Court has said, in *Pepper v. Clegg,* 131 N. C., 316. "If a person has a case in court, the best thing he can do is to attend to it." The payment of the clerk's fee to the justice cannot avail him, for this should have been paid to the clerk, and its payment to the justice merely made the justice his agent. If he has lost any rights, he has lost them through the carelessness of his agent and his own neglect to avail himself of the remedies of *recordari* and attachment that the law gives him. He cannot now be heard to complain, for, as the Court says, in *Fain v. R. R.,* 130 N. C., 31, he was the actor, the mover in all this matter.

Affirmed.

Cited: Peltz v. Bailey, 157 N. C., 169; *Abell v. Power,* 159 N. C., 349; *Tedder v. Deaton,* 167 N. C., 480.

(279)

W. R. JACKSON ET AL. V. JESSE FARMER ET AL.

(Filed 11 November, 1909.)

1. Trusts and Trustees—Judicial Sale—Consideration—Evidence.

In an action to declare by parol an express trust on certain lands under an alleged agreement that the purchaser bought the lands at an administrator's sale to hold in trust for plaintiffs, the children of the deceased, evidence is competent, although the sale has been confirmed, to show the adequacy or inadequacy of the price paid, as a circumstance tending to show the alleged agreement.

2. Trusts and Trustees—Judicial Sale—Purchaser—Evidence—Instructions.

In an action by the children of deceased to impress a trust upon certain of his lands sold by his administrator, now deceased, under an alleged parol agreement made by him with the purchaser F., the defendant, that he, F., would so hold it, testimony of several witnesses that they heard the administrator say, not in the presence of F., that F. agreed to buy the land for the plaintiffs, that he wanted no one to bid against him, is sufficient; and when the evidence shows that the sale was fair, without suppression of the bidding, etc., it is proper for the trial judge to instruct the jury to find for the defendant.

3. Trusts and Trustees—Absolute Ownership—Limitations of Actions.

When a judicial sale of lands has been confirmed and the purchaser has gone into the possession exercising absolute ownership with the knowledge of the plaintiffs, seeking, in the action, to establish that the purchaser bought and held the land in trust for them, their cause of action may be barred by lapse of time; and when it appears that the plaintiffs were not under disability as minors or otherwise for a period of twenty years, during which the purchaser so held the land in question, their action will be barred.

4. Trusts and Trustees—Limitations of Actions—Discovery of Fraud—Evidence.

A plea of plaintiffs to a defense of the statute of limitations being that suit was brought within three years after the discovery of the fraud alleged and relied on, will not be sustained when it appears that the only evidence in support of the plea is public statements made at the sale as to the fraud some twenty years previous, and necessarily more notorious at the time they were made.

APPEAL by defendants from *W. R. Allen, J.*, at April Term, 1909, of SAMPSON.

The facts are stated in the opinion of the Court.

H. A. Grady and Faison & Wright for plaintiffs.

George E. Butler, J. D. Kerr and F. R. Cooper for defendants.

CLARK, C. J. Randall Jackson died in 1863, seized of the premises, leaving a widow and two children, the latter these plaintiffs. Dower was allotted in October, 1864. The widow married the (280) defendant, Jesse Farmer, in 1867. In January, 1868, the land was sold by Needham Warren (the father of the said widow), as administrator and commissioner, under the order of the court, and was purchased by the defendant, sale was confirmed and title was conveyed to the defendant in January, 1869, who has lived on the land ever since. The plaintiffs became of age, respectively, in 1877 and 1883. Both remained in the State some years after becoming of age, when they removed, but have been on visits here since. In January, 1884, the defendant Jesse Farmer conveyed the land to his son and codefendant, who was at that time a minor. The mother of plaintiffs died in July or August, 1902. This action was begun 11 October, 1906.

The material issues submitted were: 1. Did the defendant Jesse Farmer buy the land in controversy at the sale in 1868 under an agreement with Needham Warren that he would purchase the same and hold the title thereto for the benefit of the plaintiffs and their mother? 2. Is the cause of action barred by the statute of limitations?

The commissioner's deed recites a consideration of $55. The answer avers that by inadvertence of the penman this was inserted instead of $255, the true consideration which they put on proof to show was a fair consideration in the then condition of the land and of the country, the land being subject to the dower which had been laid off. The plaintiffs offered evidence of inadequate consideration. The sale having been confirmed, this last is only competent as a circumstance tending to show the alleged agreement to hold in trust.

There was no evidence of an agreement between Warren and Jesse Farmer beyond the evidence of two or three witnesses that Warren (now dead) stated that day that he wanted no one to bid against Farmer; that arrangements had been made for Farmer to buy the land for his wife and the children. There was no evidence that Farmer was near enough to hear the remark, nor, indeed, that he was then present, and the defendant excepted. One witness testified that he heard Farmer say that day that he had bought the land as last and highest bidder and had a good title. There was also evidence of a report in the crowd that day that Warren wanted Farmer to buy the land and live there with the children. There was evidence from plaintiffs themselves that Farmer had raised the plaintiffs and had also furnished $100 to one of them when tried for murder.

The defendant Jesse Farmer testified that he bought the land for $225; that there were other bidders; that he bought the land for himself alone—paid full price for it; that there was no agreement with

(281) Warren to purchase it for his wife and the children, and that he has improved the land and put buildings on it. He also put on several witnesses, who testified that it was an open, fair sale, and no suppression of bidding, and that they heard of no agreement between Warren and Farmer.

The issue was as to the express trust, and the court should have given the fifth prayer of the defendant, which was as follows:

5. There is no evidence fit and proper to be considered by the jury tending to show an agreement by the defendant Jesse Farmer to buy the land in this action for the plaintiffs and hold this land in trust for the plaintiffs, and the jury will find for the defendants. *Cobb v. Edwards,* 117 N. C., 250, 251; *Avery v. Stewart,* 136 N. C., 426.

There was no issue as to the implied trust and the suppression of bidding, though averred in the amended complaint. Besides, it was 29 years after the elder plaintiff became of age and 23 years after the other became of age before this action was begun. Any implied trust was barred. 1 Beach Trusts, sec. 209; 2 Perry Trusts, sec. 865; Wood Limitations, sec. 200. It is true that plaintiffs allege that they sued within three years after discovery of the alleged fraud. But the only evidence of the alleged fraud was public statements of their grandfather at the sale, which, if made, were more notorious twenty-odd years ago than now. They were on the premises and saw the defendant exercising ownership and taking the crops in disavowal of any trust, even if it was an express trust, in their favor. After such conduct, which would have put the statute in force, the plaintiffs are barred by their long failure to assert their rights.

Error.

ALLIE TISE v. TOWN OF THOMASVILLE.

(Filed 11 November, 1909.)

1. Cities and Towns—Negligence—Subsequent Repairs—Evidence Contradictory.

In an action for damages alleged to have been caused by plaintiff's horse stepping into a hole in the street negligently left there by defendant town, it is competent for plaintiff to show that the hole had been filled after the accident to contradict the defendant's evidence tending to show it had been filled before the accident; though incompetent to show negligence by the mere fact of subsequent repairs.

2. Cities and Towns—Negligence—Subsequent Repairs—Evidence Corroborative.

When plaintiff seeks to recover damages of a town for its alleged negligently leaving a hole in the streets which caused the injury complained

of, and the defendant has introduced evidence tending to show that it had theretofore filled the hole, it is competent for plaintiff to show that the hole was afterwards filled as corroborative of her evidence of the existence of the hole at the time and place.

3. Evidence—Restrictive—Exceptions—Appeal and Error.

When evidence is competent for some purpose, its general admission is not reversible error unless the appellant asks at the time of the admission that it be restricted.

4. Instructions—Appeal and Error—Presumption.

When nothing to the contrary appears of record on appeal, the presumption is that the lower court gave correct instructions to the jury.

5. Negligence—Permanent Damages.

In this case the court properly permitted the jury to assess permanent damages to plaintiff, under the evidence, for injury received by reason of her horse stepping into a hole left by defendant upon its street.

APPEAL by defendant from *E. B. Jones, J.*, at February Term, (282) 1909, of DAVIDSON.

The facts are stated in the opinion of the Court.

Watson, Buxton & Watson and McCrary & McCrary for plaintiff.
Emery E. Raper for defendant.

CLARK, C. J. Action for damages for personal injuries to plaintiff, from her horse stepping into a hole in the street. The defense put on evidence that the hole had been filled up before the day the injury was alleged to have occurred. The plaintiff, in reply, was allowed to show that the hole was filled after the accident, and the defendant excepted.

The general rule is, that the plaintiff cannot show that after the accident the defect which caused the injury was repaired. *Lowe v. Elliott,* 109 N. C., 581; *Myers v. Lumber Co.,* 129 N. C., 252.

Subsequent repairs are not an admission of previous culpable negligence, nor should the parties be deterred from making repairs for fear it should be so held. But here, the defendant having put on evidence that the hole in the roadway had been filled up before the day of the injury, it was competent to show that the repairs were made afterwards —not that the repairs were evidenced tending to prove negligence, but simply to prove their date to contradict the defendant's witnesses. *Westfeldt v. Adams,* 135 N. C., 601. (283)

The evidence was also competent in corroboration of the plaintiff's evidence of the existence of the hole at that time and place. The defendant contends that, in this view, the court should have instructed the jury that this evidence was admitted only in corroboration. But Rule 27 (140 N. C., 662) provides that this is not error, "unless the ap-

pellant asks, at the time of admission, that it be restricted." *Hill v. Bean,* 150 N. C., 437. Indeed, it does not appear that the judge did not give a proper instruction. The presumption is that he did, as there is no exception that he did not. *S. v. Powell,* 106 N. C., 638; *S. v. Brabham,* 108 N. C., 796; *Byrd v. Hudson,* 11 N. C., 211.

The only other exception is, that the court permitted the jury to consider "permanent injury" as an element in assessing the damage. The court submitted to the jury the question whether or not there was permanent injury, and there was evidence which justified him in so charging.

No error.

Cited: Norris v. Mills, 154 N. C., 480; *Pearson v. Clay Co.,* 162 N. C., 225; *Boggs v. Mining Co., ibid.,* 394; *McMillan v. R. R.,* 172 N. C., 856; *S. v. McGlammery,* 173 N. C., 749.

B. B. BOULDIN v.. GARLAND DANIEL.

(Filed 11 November, 1909.)

Discretion of Trial Court—Verdict—Weight of Evidence—Testimony of Witnesses.

Motion for new trial upon affidavit in respect to the testimony of a witness, and for that the verdict is contrary to the weight of the evidence, are matters strictly within the discretion of the lower court.

APPEAL by defendant from *Long, J.,* at August Term, 1907, of GUILFORD.

Stedman & Cooke for plaintiff.
G. S. Bradshaw and C. E. McLean for defendant.

PER CURIAM: Upon an examination of the record in this case, the Court is of opinion that the questions involved are entirely questions of fact and that they have been settled by the verdict of the jury.

We find no merit in the assignments of error relating to the evidence and the charge.

The motion of the defendant for a new trial, based upon the defendant's affidavit in respect to the testimony of Vanderford, is a
(284) matter strictly within the sound discretion of the judge below.

The same is true in regard to a motion for new trial for that the verdict is contrary to the weight of the evidence. *Freeman v. Bell,* 159 N. C., 146; *Benton v. R. R.,* 122 N. C., 1009.

Affirmed.

G. F. MOREFIELD v. MILTON LACKEY ET AL.

(Filed 11 November, 1909.)

A controversy of fact fairly submitted to the jury without error.

APPEAL by plaintiff from *Long, J.*, at July Term, 1909, of RANDOLPH.

The action was commenced before a justice of the peace. There was a verdict for the defendant and a judgment thereon, from which plaintiff appealed.

H. M. Robins for plaintiff.

John T. Brittain, Hammer & Spence and Elijah Moffitt for defendants.

PER CURIAM: Upon an examination of the record, we are of opinion that the matters in controversy are exclusively those of facts, and that the cause was fairly presented to the jury.

We find no error in the record.

No error.

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(285)

E. M. DAIL v. LEE J. TAYLOR, TRADING AS CROWN BOTTLING WORKS.

(Filed 18 November, 1909.)

1. Vendor and Vendee—Negligence—Liability.

This being an action for negligent injury brought by the vendee, or one of them, against the vendor, the principles of law applicable as to the responsibility of a vendor to third persons for the negligent default in the sale of goods does not in strictness apply.

2. Same—Goods Sold—Defects—Questions for Jury.

In the absence of evidence tending to show a breach of warranty, in an action by the vendee to recover of the vendor damages for the alleged negligent default in the sale of goods, in this case for an injury caused by the explosion of a bottle charged with gas in bottling Coca-Cola, the question presented is whether there is sufficient evidence of actionable negligence to carry the case to the jury—*i. e.*, a breach of some legal duty on the part of defendant incident to the contract relationship between them, and not contained within the terms and stipulations of the agreement.

3. Same—Latent Defects—Vendor's Knowledge.

When a vendor sells goods having a latent defect of a kind likely to cause some physical injury to the vendee, of which the vendor was aware or which he could have ascertained by proper care and attention, he is liable in damages to the vendee for an injury received as the proximate cause of this breach of duty.

4. Vendor and Vendee—Goods Sold—Latent Defects—Negligence—Questions for Jury.

A vendee who seeks to recover damages of the vendor for an injury he has received from a latent defect in the goods sold which was likely to cause the injury complained of, is not required to establish his case by direct or positive proof, but the issue must be submitted to the jury whenever facts are shown forth in evidence from which a fair and reasonable inference of negligence may be drawn.

5. Same—Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* only applies to cases where, on proof of the occurrence and the injury, the existence of negligent default is the more reasonable probability; and it is inapplicable to this case wherein the injury complained of was caused by the explosion of a bottle of Coca-Cola, which is ordinarily charged with a gas pressure of sixty pounds to the square inch, shipped, in this instance, in crates or cases quite a distance and handled by various parties, and the mere explosion of one bottle thereof causing the injury is not evidence sufficient to carry the case to the jury upon the question of negligence, in an action by the vendee against the vendor.

6. Same.

In an action by the vendee against the vendor for an injury received from the unexpected explosion of a bottle of Coca-Cola, while the fact of the explosion of one bottle thereof and injury resulting are not in themselves sufficient upon the question of negligence, a nonsuit upon the evidence should not be granted when there is additional evidence tending to show a want of proper care on the part of the defendant, that the bottles of defendant had thus exploded in several instances, and, by one witness, that this had frequently occurred for the last two years.

7. Nonsuit—Evidence, How Considered.

In a motion for nonsuit upon the evidence, the evidence making for plaintiff's claim must be taken as true and interpreted in the light most favorable to him.

APPEAL by plaintiff from *Cooke, J.*, at Spring Term, 1909, of PAMLICO.

There was evidence tending to show that at the time of the injury, and some time prior thereto, defendant was engaged in the business (286) of manufacturing, bottling and sale of a beverage called Coca-Cola, and other soft drinks; that plaintiff and a Mr. Mann were engaged in business and dealt in soft drinks, and from time to time bought quantities of these soft drinks of defendant, and resold same by retail to their customers.

E. M. Dail, plaintiff, speaking more directly to the occurrence, testified as follows: "I am plaintiff. Was injured on 27 June, 1907, in my store at Oriental. I and Mr. Mann were engaged in business and we dealt in soft drinks. I had no idea of any danger in handling the bot-

tles. A customer came in and wanted to purchase an article. In order to get to that article I had to remove a full box of Coa-Cola which I had purchased the week before from the defendant and had only opened that morning. I stooped over and took out two of the Coca-Cola bottles, and I stooped over to take hold of the third bottle, and as soon as I grasped the bottle and started to draw it out, it exploded and particles of the bottle struck me in the eye and destroyed the sight. The bottles were in a crate, crown end down. I bought the crate the week before (this was Monday), from the defendant."

Mark Hargett, a witness for plaintiff, testified as follows: "I know the plaintiff. I bought some Coca-Cola from him that was bottled by defendant, and carried it home, the latter part of the week before Mr. Dail got hurt. The defendant's name was on the bottle." Question: "What happened to any of the bottles?" Answer: "On the Saturday some customers came to my little store and wanted a drink of Coca-Cola. I took up a bottle and went to pull off the cap, and the neck of the bottle came off, and on Sunday I went to take out a bottle from the crate and it exploded and a piece of the glass cut my arm and a piece went through my shirt and stuck in my shoulder, and a piece struck a girl's shoe that was standing fifteen feet away, went through the shoe and cut her foot to the bone. I did not strike the bottle against anything nor shake it up. I just turned it over. When it was in the crate the small end was down."

C. S. Weslett testified: "I live in Bayboro. I have bought Coca-Cola in this town, in bottles which were made, Crown Bottling Works, Lee J. Taylor, all along for the last two years. Nothing happened to those I bought. But all along for the last two years I have seen those bottles explode in the store. I mean the Lee J. Taylor and Crown Bottling Works bottles. I examined the labels of one or two of those that I saw explode, and they had 'Crown Bottling Works' and 'Lee J. Taylor' marked on them. I don't call the pulling off a part of the mouth when opening a bottle an explosion. I don't remember more than but two of them exploding; that was during last year and this. One (287) was when I was taking a bottle from the ice box. The other one was an explosion by one in the crate."

At the close of plaintiff's evidence defendant moved to nonsuit, under the Hinsdale Act. Motion allowed, and plaintiff excepted and appealed.

D. L. Ward, T. W. Davis and H. L. Gibbs for plaintiff.
Simmons, Ward & Allen for defendant.

HOKE, J., after stating the case: The plaintiff in this case was the purchaser of the goods, or one of them, and therefore the many authori-

ties cited as to when and to what extent a vendor is responsible to third persons for negligent default in the sale of goods do not, in strictness, apply; and, there being no evidence tending to show a breach of warranty, express or implied, the appeal presents the question whether there is sufficient evidence of actionable negligence as between vendor and vendee to carry the case to the jury; that is, has there been legal evidence offered tending to show a breach of some legal duty on the part of defendant incident to the contract relation between them and not contained within the terms and stipulations of the agreement? Such breach of duty could be said to exist when a vendor sells goods having a latent defect of a kind likely to cause some physical injury to the vendee, and of which the vendor was aware or which he should have ascertained by proper care and attention (Wharton on Negligence, sec. 774; 29 Cyc., 430-431), and may be referred to the general principle announced in the notable case of *Heaven v. Pender,* 11 L. R. (1882-83), p. 503, where it was said that "Whenever one person is by circumstances placed in such a position towards another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct, with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

Considering the case in this respect, it is very generally held that, in a claim of this character, a plaintiff is not required to establish his case by direct or positive proof, but the issue must be submitted to the jury whenever facts are shown forth in evidence from which a fair and reasonable inference of negligence may be made. Speaking to this question, in Shearman & Redfield on Negligence, sec. 58, the authors say: "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover, unless
(288) the defendant produces evidence to rebut the presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default, but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not required to prove his case beyond a reasonable doubt, though the facts shown must be more consistent with the negligence of the defendant than the absence of it. It has never been suggested that evidence of negligence should be direct and positive. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence, and as that fact is always a relative one it is susceptible of proof by evidence of circumstances bearing more or less di-

rectly on the fact of negligence—a kind of evidence which might not be satisfactory in other classes of cases open to clear proof. This is on the general principle of the law of evidence which holds that to be sufficient and satisfactory evidence which satisfies an unprejudiced mind."

This statement is cited with approval in the opinion of the Court in *Fitzgerald v. R. R.,* 141 N. C., 530-534, and in that case it was held as follows:

"2. Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances; and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence."

There are instances where this requirement is met by simply proving the occurrence and the resultant injury, a doctrine which finds expression in the phrase, *Res ipsa loquitur,* and which has been considered and applied in several recent decisions of this Court, as in *Fitzgerald's case, supra; Ross v. Cotton Mills,* 140 N. C., 115; *Stewart v. Carpet Co.,* 138 N. C., 60; *Womble v. Grocery Co.,* 135 N. C., 474.

Plaintiff insists that these authorities apply in his favor here, and that he should have been allowed to go to the jury on proof of the occurrence and the injury, without more, but we do not think this position can be sustained. The principle only applies to cases where, on proof of the occurrence and the injury, the existence of negligent default is the more reasonable probability, and should not be allowed to prevail where, on proof of the occurrence, without more, the matter still rests only in conjecture. As said in Labatt on Master and Servant, sec. 843, quoted with approval in some of the cases referred to, "The *rationale* of the doctrine is that in some cases the very nature of the occur- (289) rence may, of itself, and through the presumption it carries, supply the requisite proof; it is applicable when, under the circumstances shown, the accident presumably would not have happened if due care had been exercised. The essential import is that on the facts proved, the plaintiff has made out a *prima facie case* without direct proof of negligence."

While Coca-Cola seems to be a recognized article of merchandise, not usually or necessarily dangerous, under ordinary conditions, the evidence shows that it is put up in glass bottles, charged with gas to a pressure of not less than sixty pounds to the square inch, in this instance shipped in cases or crates for quite a distance and handled in various ways and by different parties; and the facts present a case where it would be entirely unsafe to permit the application of the principle contended for, or to hold that the explosion of one single bottle of such an article, under such circumstances, should of itself rise to the dignity of legal evi-

dence sufficient, without more, to carry a case to the jury. *Glazer v. Seitz,* 71 N. Y. Supp., 942.

While we hold this to be a correct position as to mere proof of the occurrence, we are of opinion that there was error in sustaining defendant's motion of nonsuit, for the reason that there was additional testimony tending to show a want of proper care on the part of the defendant. The witness Mark Hargett testified that he bought Coca-Cola of plaintiff, which was bottled by defendant, the latter part of the week before plaintiff received his hurt; on Saturday some customers came, and in taking a bottle out the neck came off, and on the following day (Sunday), in taking another bottle from a crate it exploded and a piece of glass cut witness's arm, another piece struck a little girl's shoe standing by, went through the shoe and cut her foot to the bone. Another witness, C. S. Weslett, testified "That all along for the last two years witness had seen these bottles from defendant's works explode in the store." True, the witness seems subsequently to have given evidence qualifying this statement, but we are not at liberty to select the more favorable portion of a witness's statement and act on it for defendant's benefit. In a motion of this kind we have repeatedly held that the evidence making for plaintiff's claim must be taken as true and interpreted in the light most favorable for him; and, applying this rule, we think the additional testimony indicated, with the evidence describing the occurrence, presents a case which requires that the issues raised should be submitted to the jury and that the order directing a nonsuit was erroneous.

There was testimony offered on the part of plaintiff purporting
(290) to be expert evidence and tending to show additional circumstances indicating negligence on the part of defendant; but, as the court made no finding on the question of the witness being an expert, and the facts are not fully set out, we purposely refrain from expression on this question.

The order of nonsuit will be set aside and the cause restored to the docket for trial.

Reversed.

Cited: Turner v. Power Co., 154 N. C., 135, 137; *Houston v. Traction Co.,* 155 N. C., 8; *Hamilton v. Lumber,* 156 N. C., 523; *Dail v. Taylor, ibid.,* 589; *Poe v. Telegraph Co.,* 160 N. C., 316; *Beck v. Bank,* 161 N. C., 206; *Brown v. R. R., ibid.,* 579; *Ridge v. R. R.,* 167 N. C., 521; *Morgan v. Fraternal Asso.,* 170 N. C., 80; *Bloxham v. Timber Corporation,* 172 N. C., 44; *Cashwell v. Bottling Works,* 174 N. C., 325.

W. H. SHIVES v. ENO COTTON MILLS.

(Filed 18 November, 1909.)

1. Verdict Non Obstante—Pleadings.

While the common law rule has been relaxed so that a judgment *non obstante veredicto* may sometimes be granted the defendant, it is only when the pleadings entitle him to it irrespective of the verdict.

2. Master and Servant—Safe Place to Work—Defect—Implied Knowledge.

An aperture negligently left in the floor of a cotton mill, dangerous to employees going to and from their work at night, with the knowledge of the foreman directly in charge, fixes the principal with such knowledge.

3. Same—Negligence—Damages.

It is the duty of the employer to provide on his premises a safe way for his employees to go to and from their work; and when a dangerous aperture in the floor of a cotton mill has been left over night by one in charge of making repairs, who would not have left it had he known that the employees would return that night to their work, the negligence of the foreman directly in charge in not informing the one doing the repairs of the fact is attributable to the principal, and the latter is liable for an injury to an employee directly and proximately caused by the negligent act.

4. Verdict—Non Obstante—Discretionary Power—Appeal and Error—Judgment.

When the trial judge has erroneously held that the defendant is entitled to judgment *non obstante veredicto*, he has exercised no discretionary power, and judgment upon the verdict in plaintiff's favor will be rendered in the Supreme Court.

APPEAL from *Long, J.*, at May Term, 1909, of ORANGE.

Civil action for personal injury.

These issues were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes. (291)

2. Did the plaintiff contribute to his injury by negligence on his part, as alleged in the answer? Answer: No.

3. What damages, if any, is plaintiff entitled to recover of defendant? Answer: Damages, three thousand dollars.

The court refused to render a judgment in favor of the plaintiff upon these issues.

The defendant moved for a new trial, and insisted that the court erred in its failure to sustain the motion to nonsuit when made, and that, having reserved the question until after verdict, his Honor should now sustain the motion.

Thereupon the judge rendered this judgment: "The foregoing judgment is tendered the court to be signed; but, the court being of opinion,

upon the whole record, that plaintiff is not entitled to recover, *non obstante veredicto,* the action is dismissed."

Whereupon the plaintiff appealed.

S. M. Gattis and Bryant & Brogden for plaintiff.
John W. Graham and James H. Pou for defendant.

BROWN, J. In entering a judgment *non obstante veredicto* for the defendant we think the learned judge below misconceived the usages and practice of the courts in respect to such judgments. At common law they were never rendered for a defendant.

The usual definition of a judgment *non obstante* is "a judgment entered by order of the court for the plaintiff in an action at law, notwithstanding a verdict for the defendant." 2 Tidd. Pr., 922; Rap. & L. Law Dict.; Black Law Dict.

At common law a judgment *non obstante veredicto* could be entered only when the plea confessed the cause of action and set up matters in avoidance which were insufficient, although found true, to constitute either a defense or a bar to the action. In such case the plaintiff was entitled to a judgment in his favor, notwithstanding a verdict for the defendant. *Cotton Mills v. Abernethy,* 115 N. C., 403; *Walker v. Scott,* 106 N. C., 57; *Riddle v. Germanton,* 117 N. C., 387.

The practice was adopted, says *Pearson, J.,* to discourage sham pleas by the defendant. *Moye v. Petway,* 76 N. C., 329.

Hence it follows that at common law a judgment *non obstante* could only be granted upon motion of the plaintiff—never for a defendant—and that its use was consequently very restricted.

This rule, however, has been relaxed in many jurisdictions, especially where counterclaims are pleaded and where the Code system prevails, and it is held that such judgment may be rendered on the plead-
(292) ings for either party entitled to it, irrespective of the verdict. 11 Enc. Pl. & Pr., 914.

In no case, however, can such a judgment be rendered for any party, except when the pleadings entitle the party against whom the verdict was rendered to a judgment. *Grant v. Ins. Co.,* 76 Ga., 575; *Willoughby v. Willoughby,* 51 E. C. L., 722; *Gregory v. Brunswick,* 54 E. C. L., 481; *McFerran v. McFerran,* 69 Ind., 29; 11 Enc. Pl. & Pr., 914, and cases cited.

It is manifest that this is not a case where, upon the pleadings, judgment can be appropriately rendered for the defendant, notwithstanding the verdict.

This brings us to consider whether, in any view of the evidence, the plaintiff is entitled to recover.

The plaintiff's evidence tends to prove that he was the "boss dyer" of defendant, but had nothing to do with putting in machinery or repairing it. In fixing some pipes in the mill the workmen took up two planks in the dyeing department, leaving a hole sixteen inches wide and sixteen feet long, in order to pass from the dye room to the cement floor below, where they were fitting in a drainpipe. The plaintiff was injured by falling in this hole, about 6 or 7 o'clock p. m. At the time he fell in the hole, the evidence shows the dye room was badly lighted—worse than usual. Plaintiff had a lantern in his hand, but as the room was full of steam he could not see well. This large aperture was left entirely unguarded by the repairers when they "knocked off" for the day.

Mangum, the superintendent of the mechanical department, testified: "The dryer was not complete, and I knew we had to go under there. It was part of my business to have the dryer completed. In completing the dryer I was working under the general orders of the superintendent, Mr. Roberson. I knew that people were working in the dye room, but I did not know it was going to run that night. If I had known it was going to run that night, I guess I would have stopped the hole up. Mr. Robinson did not tell me it was going to run that night."

By reference to the record it appears the motion to nonsuit was based upon the ground that the plaintiff had failed to make out his case in the following respects:

1. Because plaintiff has shown that the defects from which he was injured were not brought to the knowledge of the defendant and had existed less than one hour when he was injured.

2. Because the injury was caused, according to plaintiff's testimony, by the negligence of a fellow-servant of the plaintiff.

3. Because plaintiff's evidence shows that he was guilty of contributory negligence.

In respect to the first proposition, it may be said that it is fully supported by *Hudson v. R. R.*, 104 N. C., 500, a case which (293) has been repeatedly approved by this Court, but the principle does not apply to the facts of this case.

The aperture through which plaintiff fell was made by the master or by those to whom it had delegated its authority. The duty of providing a reasonably safe place in which to work is one of the primary or absolute duties of the master; and when the master delegates the discharge of such duty to a servant, whether he be called foreman, a superintendent, or what not, he represents the master, and the latter will be held responsible for the manner in which the duty is discharged. *Tanner v. Lumber Co.*, 140 N. C., 479, and cases cited.

Knowledge possessed by such person is the knowledge of the master, and any negligence of such servant while discharging this primary

duty for the master, with respect to taking suitable action for the protection of employees, is the negligence of the master. Thompson on Neg., sec. 4961; *Tanner v. Lumber Co., supra.*

It was the superintendent's duty to inform Mangum, the foreman of the mechanical department, who was doing this repair work, that the dye room would be in use that night. If he had done so, Mangum says, "I would have stopped the hole up."

This view of the case disposes of the defendant's second ground for nonsuit. According to plaintiff's evidence, both Mangum and Roberson were the representatives of the master to do this repair work, and one or the other should have seen to it that when the mechanics stopped work for the day the planks were replaced or the aperture carefully protected, for the safety of those who, the superintendent knew, would be on duty in the dye room that night.

It follows, therefore, logically, that, upon the facts of this case, as now presented, the question of injury by a fellow-servant does not arise.

As to the third ground of nonsuit, it must be borne in mind that contributory negligence is a defense and that a nonsuit can only be sustained on that ground, when such negligence is manifest upon the evidence offered by the plaintiff.

From his standpoint we find no evidence of contributory negligence. If the duty of making these alterations or repairs was delegated to Mangum by Roberson, the superintendent, and Mangum had charge and control of them, the plaintiff had a right to expect, when he returned to his dye room at 6 p. m., that Mangum had protected the hole; and if in the dimly lighted room plaintiff fell into it accidentally, such act
(294) will not be attributed to his negligence.

There are some views of the case arising upon the defendant's evidence which, if taken by the jury, would have justified a finding of contributory negligence, but we can consider upon a motion to nonsuit only the plaintiff's evidence, and unless contributory negligence is manifest from his standpoint it is not a ground for nonsuit.

The next question to be considered is, what judgment shall this Court render?

The record states that "At the conclusion of the evidence the defendant renewed its motion to nonsuit, for the reasons set out in the original motion. Motion denied, and defendant excepts. His Honor stated that, while he would let the case go to the jury, he was doubtful as to the plaintiff's right to recover, upon the whole evidence, and would reserve that question to be passed on after verdict. There was no objection by either side to such course."

This practice is not to be commended, as it may do injustice to the defendant by preventing a consideration, on appeal, of the exceptions

taken by the defendant on the trial, for a party cannot well appeal from an unconditional judgment in his favor granting all he demands.

But this defendant acquiesced in the action of the court, we presume, for the purpose of putting an end to the litigation, one way or the other.

Under such circumstances, the authorities hold that the appellate Court should render such judgment as the court below should have rendered, and thus give effect to the verdict of the jury. Inasmuch as his Honor does not rest his judgment upon an exercise of discretion, but upon the legal ground that the defendant is entitled to a judgment notwithstanding the verdict, we think the plaintiff is entitled to a judgment thereon. In summing up the authorities on the subject the Enc. of Pl. & Prac. says: "If a verdict is rendered for the plaintiff, subject to a demurrer to evidence which is erroneously sustained, the appellate Court, on reversing the judgment, will render a final judgment for plaintiff for the damages assessed by the jury." Vol. 6, 459. See, also, *Heard v. R. R.*, 26 W. Va., 455; *Hollimon v. Griffin*, 37 Tex., 453; *Harwood v. Blythe*, 32 Tex., 800. Our own decisions are in line with these authorities. *Abernethy v. Yount*, 138 N. C., 344; *Wood v. R. R.*, 131 N. C., 48; *Drewry v. Davis, post*, 295.

The cause is remanded, with direction to enter judgment upon the verdict.

Reversed.

Cited: *Holton v. Lumber Co.*, 152 N. C., 69; *Doster v. English, ibid.*, 341; *Ferrall v. Ferrall*, 153 N. C., 179; *Pritchett v. R. R.*, 157 N. C., 102; *Elks v. Hemby*, 160 N. C., 23; *Pigford v. R. R., ibid.*, 101; *Tate v. Mirror Co.*, 165 N. C., 280; *Davis v. R. R.*, 170 N. C., 600; *Fowler v. Murdock*, 172 N. C., 350; *Tuthill v. R. R.*, 174 N. C., 78.

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DREWRY-HUGHES COMPANY v. D. S. DAVIS.

(Filed 18 November, 1909.)

1. Compromise, Offer of—Certified Check—Previous Agreement—Acceptance—Partial Payment.

When a debtor has sent his creditor a check to be accepted upon condition that it should be in full of an undisputed debt, and the creditor has it certified at the bank on which it was drawn, it is competent for the creditor to show in evidence, as a waiver or withdrawal of the condition, that the parties had agreed before the check was certified that it would only be a partial payment on the claim.

2. Same—Statute.

While under the statute, Revisal, secs. 2337 and 2338, the certification of a check by the bank on which it is drawn is equivalent to the acceptance, and the bank then becomes the debtor to the holder, against whom he may maintain his action, it does not affect the enforcement of an agreement between the original parties, made before certification of the check, that the debtor had agreed to waive or withdraw a condition annexed to the acceptance of his check that it was to be received by the payee, his creditor, in full compromise of his debt, in a larger amount.

3. Issues, Material—Issues Set Aside—Judgment—Discretion—Appeal and Error.

The setting aside of material issues found by the jury in favor of a plaintiff, which, in connection with the other issues, would entitle him to recover, and giving judgment on the verdict as it then stood for defendant, does not involve matters resting within the sound discretion of the trial judge, but those of "law or legal inference," from which an appeal lies; and error in setting aside the issues being found by the Supreme Court a judgment for plaintiff will be ordered.

APPEAL by plaintiff from *W. J. Adams, J.*, August Term, 1909, of UNION.

The plaintiff brought three actions against the defendant, before a justice of the peace, upon two notes, less than $200 each, and upon an open account, the three demands amounting to $491.36, exclusive of interest. The defendant admitted the notes and account, and pleaded accord and satisfaction, in that, on 28 December, 1908, he sent plaintiff a check for $327.34, being sixty-six and two-thirds per cent of his indebtedness to plaintiff and marked across the face of the check, "In full of account and notes." The plaintiff, on 30 December, 1908, wrote defendant that it could not accept the check in full of account and notes, and would hold the check until it could hear from defendant. The defendant, on 15 January, 1909, wrote plaintiff that he had been notified by a bank in Monroe that it held one of his notes for collection, and requesting plaintiff to recall the note, as he could not pay it. During the last of January plaintiff sent the notes, account and check
(296) to its attorney, who wrote defendant to call and see him. The defendant called and requested the attorney to accept the check. The attorney informed the defendant he could not do so. In February the attorney went to Waxhaw, where defendant lived, and requested defendant's permission to have the check certified by the bank in Waxhaw, on which it was drawn. The check was certified and the attorney and the defendant differed as to what occurred, the defendant testifying that he told the attorney to go ahead and have it certified, if he would take it as "payment in full." The attorney testified that defendant told him to have it certified; that he intended to pay that much anyhow,

and, after having it certified, the defendant told him that he meant if the check was certified it should be as payment in full. The attorney told him he did not so understand it. Whereupon defendant asked him to write his clients and have them accept the check as payment in full. At and before the trial before the justice of the peace, and again at the trial in the Superior Court, the plaintiff tendered the check to the defendant. He declined to accept it. His Honor submitted the following issues to the jury, who responded thereto, as set out below:

1. Did the plaintiff procure the check in question to be certified by the Waxhaw Banking and Trust Company, as alleged? Answer: Yes.

2. Was the check certified upon an agreement between the plaintiff and defendant that the check should be accepted in part payment of the plaintiff's claim? Answer: Yes.

3. Was the certification of said check procured by the fraud or deceit of the defendant? Answer: No.

4. In what amount, if any, is defendant indebted to the plaintiff? Answer: $164.02, with interest.

His Honor instructed the jury to answer the first issue, yes, and the third issue, No; and if they, upon his charge and the evidence, found the second issue for the plaintiff, to answer the fourth issue, $164.02, this being the difference between the amount of the notes and the account, $491.36, and the check for $327.34. Upon the rendition of the verdict, the plaintiff moved for judgment. The defendant moved his Honor to set aside the finding on the second and fourth issues and for judgment on the first and third. The defendant's motion was allowed and judgment rendered that the plaintiff take nothing by its action and that the defendant recover his costs. The plaintiff duly excepted to the several rulings of his Honor and, assigning the same as error, appealed to this Court.

J. J. Parker and R. N. McNeely for plaintiff. (297)
A. M. Stack for defendant.

MANNING, J., after stating the case: It is manifest that the learned trial judge conceived the view that the findings of the jury on the first and third issues were determinative of the rights of the parties, and their rights, so fixed, could not be affected by the other facts found by the jury. These findings to the first and third issues ascertained that the certification of the check was procured by the plaintiff, not induced by any fraud on the part of the defendant; and so little were the matters involved in these two issues controverted that his Honor instructed the jury, and properly so, to answer them as they did. The view of his Honor was rested upon sections 859, 2337 and 2338, Revisal, and the de-

cisions of this Court in *Petit v. Woodlief,* 115 N. C., 120; *Kerr v. Saunders,* 122 N. C., 635; *Cline v. Rudisill,* 126 N. C., 525; *Wittkowsky v. Baruch,* 127 N. C., 315; *Ore Co. v. Powers,* 130 N. C., 152; *Armstrong v. Lonon,* 149 N. C., 434. Section 2337 is as follows: "Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance." And section 2338 provides: "Where the holder of a check procures it to be accepted or certified, the drawer and all endorsers are discharged from liability thereon." These cases establish the doctrine as stated in *Ore Co. v. Powers, supra,* "Having accepted the check, with a statement in the letter that it was for balance in full, and cashed the check, the plaintiff is bound thereby, in the absence of evidence of fraud or other conduct on the part of the defendants, to relieve the plaintiff from the effect of its acceptance of the check in full payment." The effect of the finding of the jury on the second issue was to establish "the other conduct on the part of the defendant to relieve the plaintiff from the effect of its acceptance of the check in full payment." The defendant desired the plaintiff to accept the check in full payment, though there was no denial or controversy about the amount due plaintiff by defendant. The plaintiff declined to accept the check with this condition. The check was, then, a mere offer or proposition by the defendant. The attorney of the plaintiff, in his efforts to collect, without suit, the notes and account due by defendant, procured the check to be certified, with the agreement, as found by the jury, that the check should be accepted in part payment of the plaintiff's claim. It was competent for the defendant to waive or withdraw the condition he had annexed to the acceptance of the check, and the evidence offered at the trial was sufficient to support this finding by the jury. *Strack v. Transp. Co.,* 51 N. Y., Supp., 327; *Rank v. Wolf,* 110 N. Y., 923; *Miller v.* (298) *Holden,* 18 Vt., 337; *Coal Co. v. Parlin,* 117 Ill. App., 622; *Perin v. Cathcart,* 115 Iowa, 553; *Potter v. Douglas,* 44 Conn., 541; *Sicotte v. Barber,* 83 Wis., 431; *Fuller v. Kemp,* 138 N. Y., 231; 20 L. R. A. (old series), 785, where many cases are collected and reviewed. Giving to the two sections of the Revisal (2337 and 2338) that meaning which their words plainly import, that the certification of a check by a bank is equivalent to the acceptance of the check and the bank becomes then the debtor to the holder, against whom he can maintain his action, and that the drawer or endorser, if any, becomes discharged from liability by this change of relation of the holder to the bank, we cannot see that this would deny to the drawer the power to waive, before certification, and before the contract was completed, the condition which he attached to the acceptance of the check. We think, therefore, that the second issue was material and the evidence offered at the trial required the issue to be submitted to the jury for the determination of the truth of the matter.

The fourth issue was properly answered, being the difference between the admitted indebtedness to the plaintiff and the check.

We come now to the second question presented by the appeal. It does not appear in the judgment signed by his Honor, or in the statement of the case on appeal, that the setting aside the findings of the jury to the second and fourth issues was in the exercise of the discretionary power of the trial judge. If this appeared, his ruling would be irreviewable by this Court; but even then, these issues being material, he could not have rendered judgment against the plaintiff, but could only have directed a new trial on these issues. After a full and careful review of the conflicting decisions in this State, this Court, in *Abernethy v. Yount,* 138 N. C., 337, settled the rule of practice as follows: "The verdict of a jury is a valuable right, of which a person may not be deprived, except in accordance with the law; and the action of a judge in setting it aside will not be ascribed to discretion unless he plainly says so, or there is no other explanation of his conduct." This case has been cited with approval in *Jarrett v. Trunk Co.,* 142 N. C., 466; *Billings v. Observer,* 150 N. C., 540. In our opinion, as it establishes a rule of practice and procedure, the weightiest considerations suggest that, when established, it should remain undisturbed, that the uncertainties and doubts arising from confusion may be avoided. In those cases where the rule applies both parties have the right of appeal—the one to sustain the ruling and, if not sustained, to have this Court pass upon any exceptions taken by him during the trial and duly assigned as error; the other, to convince this Court of the error of the trial judge. This course was followed in *Cole v. Laws,* 104 N. C., 651, and *Metal Co. v. R. R.,* (299) 145 N. C., 293. Adhering to the rule of practice so established, and assuming, as we must, that his Honor's rulings were made in observance of the rule, they involved "a matter of law or legal inference" and were not made in the exercise of his sound discretion. In our opinion, these rulings were erroneous and plaintiff was entitled to judgment upon the verdict. The judgment is reversed, and the Superior Court of Union will proceed to render judgment on the verdict.

Error.

Cited: Shives v. Cotton Mill, ante., 294; *Aydlett v. Brown,* 153 N. C., 336; *Woods v. Finley, ibid.,* 499.

J. C. BRITTINGHAM v. B. STADIEM ET AL.

(Filed 18 November, 1909.)

1. Husband and Wife—Tort—Husband's Liability.

The husband living with his wife is jointly liable with her for damages resulting from an injury received by a customer through the negligence of a clerk in her store, if she is liable therefor. Revisal, 2105.

2. Parent and Child—Tort of Child—Servant—Agent—Parent's Liability.

The mere relationship of parent and child does not make the former liable in damages for the tort or negligent act of the latter. It must be shown that he approved such acts, or that the child was his servant or agent.

3. Master and Servant—Negligence of Minor Employee—Dangerous Instrumentalities—Pistols—Care Required—Negligence—Questions for Jury.

Those who deal in dangerous articles are held to a degree of care commensurate with their dangerous character; and when the evidence tends to show that defendants employed their 12-year-old boy as a clerk in their pawnshop, where, among other things, second-hand pistols were dealt in, and that while carelessly handling a pistol on which a loan was desired the boy unexpectedly shot and injured another customer in the store, and that the defendants had not taken the precaution to see that the pistol was unloaded or harmless, it is sufficient to take the case to the jury upon the question of defendant's actionable negligence, though the one negotiating the loan on the pistol informed the boy, at the time, that it was unloaded.

APPEAL by defendant from *Moore, J.*, at February Term, 1908, of GUILFORD.

The plaintiff sued the defendant to recover damages for injuries received by him while on business in the store owned by the female
(300) defendant, B. Stadiem, from a pistol-shot wound inflicted by the twelve-year-old son and an employee of the defendants, while carelessly handling the pistol. The defendant denied all the allegations of the complaint, and the matters at issue were presented to the jury in two issues, to wit:

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

2. What amount of damages, if any, is the plaintiff entitled to recover?

The jury having responded to the first issue, Yes, and to the second issue, $350, judgment was rendered against the defendants, from which they appealed to this Court.

Stern & Stern and Taylor & Scales for plaintiff.

J. A. Barringer for defendant.

MANNING, J. If the *feme* defendant, Bettie Stadiem, is answerable to the plaintiff for the damages resulting from the tort alleged, then the defendant D. Stadiem, her husband, living with her at the time, is jointly liable. Revisal, sec. 2105; *Roberts v. Lisenbee,* 86 N. C., 136. The tortious act alleged having been committed by Moses Stadiem, the twelve-year-old son of the defendants, the first question presented is the liability of the defendants by virtue of this relationship. "Relationship does not alone make a father answerable for the wrongful acts of his minor child. There must be something besides relationship to connect him with such acts before he becomes liable. It must be shown that he approved such acts, or that the child was his servant or agent." *Johnson v. Glidden,* 74 Am. St., 795, in the note to which a large number of the decisions of the American courts are collected by Mr. Freeman. *Mirich v. Suchy,* 74 Kan., 715; *Chastain v. Johns,* 120 Ga., 977; *Evers v. Krouse,* 66 L. R. A., 592; 21 A. & E., 1057. Wherever the principles of the common law prevail, this is the well-established doctrine. If there were in this case nothing more than the relationship to connect the parent with the wrongful act of his child, we would be constrained to reverse the judgment and hold that defendants were not liable.

The complaint, however, proceeds upon a twofold theory, and evidence was produced at the trial to support it, to wit: 1., That the boy, Moses Stadiem, was the servant and employee of the defendant, doing work in the store as clerk, and the injury to plaintiff was caused by the negligent and careless act of this servant, while about his master's business and while doing an act he was directed to do. 2. That the defendant, as a part of her business, conducted a pawnbroker's shop and received in pawn various articles, among them pistols, which (301) she also carried in stock for sale, and that these dangerous weapons were carelessly and negligently permitted to lie on the counters and in the windows of the store, within reach of a boy of the size of Moses Stadiem, and that he "fooled with them." The immediate circumstances of the injury are thus described by the plaintiff: "I went into the store to pawn my watch. I was to receive $7. The man went to get the money for me and laid it down on the counter, and just as I was in the act of picking it up a pistol went off; the ball hit the counter, just in front of me, struck my little finger, went through left thumb, went into my right hand and lodged at the base of my third finger, where it was immediately afterwards cut out. I turned to see where the shot came from, and there was a boy standing in front of me with the smoking pistol in his hand. At the time I was shot, Stadiem grabbed the boy and told him, 'I have been telling you about fooling with pistols.' " The plaintiff further testified that the boy had been waiting on customers and asked his father what he was going to let him have on the watch. Another witness

for the plaintiff testified that he had seen the boy in the store, selling goods and handling them and behind the counter, and that there were a lot of guns and pistols lying on the counters and in the windows, so that anybody that wanted to could handle them. The boy, Moses, testified that a man came to pawn a pistol; then plaintiff came in. "Before loaning the money, we wanted to see whether it was all right. I snapped it to see," and it fired. Phelps, another clerk in the store, stated that while he was making out the pawn ticket he told the boy to bring the pistol to him, and while he was bringing it, it fired; that the man who pawned it said it was not loaded; that he did not examine it, but laid it on the counter and was waiting on plaintiff. The evidence produced at the trial, as to the employment of the boy to aid in the work of the store as clerk, was sufficient to carry the case to the jury, and it was for them to determine the fact. Wood on Master and Servant, p. 584; *Perry v. Ford,* 17 Mo. App., 212.

Passing the sufficiency of the evidence to establish the additional relation of master and servant to that of parent and child, we will consider the duty of the defendant (the proprietor of the store) to the plaintiff, a customer, while in the store. In *Swinarton v. Le Bouttelier,* 28 N. Y. Supp., 53, the duty is thus declared: "We hold, furthermore, that, having invited the plaintiff into his store for his benefit, and having authorized and induced her to confide in the good conduct of his servants, to whom, in the transaction of his business, he committed (302) her, he thereby assumed the duty, by the exercise of reasonable care, of protecting her from injury by the misconduct of such servants, and that he is answerable to her for any injury she has sustained by such misconduct." In *Mattson v. R. R.,* 95 Minn., 477; 70 L. R. A., 503, it is held: "The degree of care required of persons having the possession and control of dangerous explosive, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article." The same doctrine is held by this Court. *Haynes v. Gas Co.,* 114 N. C., 203; *Witsell v. R. R.,* 120 N. C., 557; *Ross v. Cotton Mills,* 140 N. C., 115; *Horne v. Power Co.,* 144 N. C., 375; *McGhee v. R. R.,* 147 N. C., 142. See also, *R. R. v. Currie,* 10 L. R. A. (new series), 367, and "subject note," where the American and English cases are collected and digested. In Cooley on Torts, star page 539, the learned author lays down this generally accepted doctrine: "It is immaterial to the master's responsibility that his servant at the time was neglecting some rule of caution which the master had prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and the injury

which actually resulted is attributable to the servant's failure to observe the directions given him." In *Dixon v. Bell,* 5 Maule & S., 198, the facts were that the defendant, being possessed of a loaded gun, sent a young servant girl to fetch it, with directions to a man named Leman, who had charge of it, to take the primings out, which was accordingly done. The girl presented it, in play, at the plaintiff's son and drew the trigger, when the gun fired and inflicted the injury for which damages were sought. *Lord Ellenborough,* C. J., said: "The defendant might and ought to have gone further; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and, though it was the defendant's intention to prevent all mischief, and he expected this would be effectuated by taking out the priming, the event has unfortunately proved that the order to Leman was not sufficient; consequently, as by his want of care the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly, but I think the action is maintainable." Applying these principles to the evidence in this case, it will be seen that the defendant was liable because of the negligent act of her servant while doing work within the scope of his employment, and that the defendant was negligent in entrusting to a servant of twelve years of age such a dangerous (303) instrument as a pistol, without being careful to make it "innoxious." We have carefully examined his Honor's charge, in view of the exceptions taken to it by the defendants, and we think it placed the defendant's liability upon the correct grounds and fairly presented to the jury the different phases of her liability arising upon the evidence. This case is another illustration of the danger arising from the careless handling of pistols supposed to be unloaded and harmless, the pointing of which at another is condemned by section 3622, Revisal. Finding no reversible error committed at the trial, the judgment is

Affirmed.

Cited: Monroe v. R. R., post, 377; *Linville v. Nissen,* 162 N. C., 99; *Barnett v. Mills,* 167 N. C., 582; *Taylor v. Stewart,* 172 N. C., 207.

OWENSBORO WAGON COMPANY v. H. L. RIGGAN & CO.

(Filed 18 November, 1909.)

1. Contracts of Consignment—Indefinite Duration—Termination at Will.

A contract for consignment of goods without fixing a date for its duration is terminable at the will of either party.

2. Same—Notification.

When, under the terms of a contract for consignment of goods, it is provided that if the defendants keep the goods for eight months they were to purchase at a stipulated price, there is a failure of mutual agreement of sale upon the notification by the consignee within the eight months' period that he would not keep the goods.

3. Same—Plaintiff's Liability—Measure of Damages.

When plaintiff has consigned goods to defendants under an agreement terminable at will, and therefore fails in his suit to recover the price of the goods in his action for goods sold and delivered, he is liable to defendant for storage of the goods after being notified of the termination, for freight paid by him, and for necessary repairs made.

APPEAL by plaintiff from *Jones, J.*, at September Term, 1909, of FORSYTH.

The contract between the parties is contained in the following letter:

(304) FORM X.

OWENSBORO WAGON COMPANY,
INCORPORATED.

OWENSBORO, KY., March 18, 1907.

To H. L. RIGGAN & Co.,
Winston-Salem, N. C.

DEAR SIRS—Respecting your request to handle our wagons on consignment in your vicinity, we shall be pleased to commission same to you as your orders may be approved by us from time to time; proceeds of sales, less invoice price, to be your commission. In consideration of our so doing, and extending you this business, we ask you to undertake and contract as follows:

1. Of such goods, handle and sell ours to the exclusion of all other makes.

2. Until goods consigned hereunder are sold, diligently do all business required for selling said goods, pay all taxes, freight and any other expenses on same, keep same well housed and protected from the weather and in good order, keep same insured with loss clause payable to us, and in case of loss or damage by fire or other cause, pay us invoice price.

3. On the first of each month, and whenever requested so to do by us or our authorized traveling men or collectors, to render a statement of all goods on hand.

4. Invoice prices shall be as mutually agreed upon at the time orders are accepted for shipment.

6. At the end of each month, or whenever requested, you will remit to us your four-months note for all sales made, and if requested by us, approved collateral notes endorsed by you and attached as security, or cash, less a discount of five per cent, the cash discount not to be allowed on sales made after eight months from date of each invoice. Your monthly remittance, so made, we will place to the credit of your account, and you will continue to make monthly settlements for sales as hereinbefore provided.

7. You will, if we so demand, purchase at invoice price with your four-months note, with approved collateral notes attached, if requested, or in cash, less five per cent, on all goods unsold after eight months from date of each invoice, or at once, in case you sell or dispose of the merchandising business in which you are engaged.

8. To extent of invoice price, money, notes, proceeds or securities taken or received by you on account of goods shall be our property, received and held in trust for us and kept by you as a separate fund for us until goods are settled for us as above, and the title of all goods shipped on this contract shall be and remain in Owensboro Wagon Company until we receive settlement therefor. (305)

9. We can revoke this contract at any time if you fail to discharge any obligation hereunder, or if we have reason to believe you unable to perform same; and upon the return of goods for any cause, or upon termination or revocation of this contract, you will deliver to us in your town all our goods then on hand, in as good condition as when received, paying for any damages to same, free of all charges. If, however, termination hereof is made other than by reason of your act or breach, then we will pay actual freight, which shall be a claim against us, subject to offset of any claim we may have against you.

10. We deliver all goods free on board Owensboro, Ky., and will endeavor to ship by cheapest route, making freight as low as possible, but will not be responsible for any overcharges.

11. Our failure to enforce at any time any provision of this contract, to exercise any option reserved to us herein, or our waiving performance on your part of any provision hereof, for the time being, shall in nowise impair or affect the validity of this contract, or of such provision, or of our right to enforce the same at any time thereafter.

If this is satisfactory, please sign as indicated below, and return to us, on receipt of which we will, at this office, at which place this con-

tract shall be considered executed, consummate same by our signature between us, sending you a copy, which embodies our entire understanding and cannot be modified, except by writing, duly executed by us.

Consummated: OWENSBORO WAGON COMPANY,
By S. D. KENNEDY.

The above is satisfactory. H. L. RIGGAN & Co.

On the same day the contract was signed, the defendants signed an order for plaintiff to ship them six wagons, at a price of $385.05, and this order specifically provided that they be sold on the following conditions as to payment:

"Terms: We agree to settle for the above by terms of consignment contract, eight months limit. No collateral notes."

The plaintiff shipped the wagons on 19 April, 1907, and 25 May, 1907, and they received them soon after. In June, 1907, the defendants notified the plaintiff's agent personally, and the plaintiff twice by letter, that they could not sell the wagons, and requested plaintiff to appoint another agent. In October they wrote the following letter:

(306) WINSTON-SALEM, N. C., October 5, 1907.

OWENSBORO WAGON COMPANY,
Owensboro, Ky.

GENTLEMEN:— . . . As we wrote you some time ago, we must insist that you have another agent appointed at this place, or allow us to turn the wagons over to some one else, as we have tried hard to sell them and we cannot do it, as the people cannot be convinced that this make or style of wagon will take the place of the kind they have been using. . . .

Yours truly, etc. H. L. RIGGAN & Co.

This is an action by plaintiff to recover the price of the wagons, having refused the defendant's offer to return them. The jury found that the defendants had terminated the contract within eight months, and that the plaintiff was indebted to the defendant $52 for storage (after the notice to remove, given by defendant in February, 1908), freight paid and repairs. Plaintiff appealed.

L. M. Swink for plaintiff.
Manly & Hendren and Watson, Buxton & Watson for defendant.

CLARK, C. J., after stating the case: This was a contract for consignment. No definite date was fixed for its duration, and therefore it was terminable at the will of either party. *Solomon v. Sewerage Co.*, 142 N. C., 445; *Currier v. Lumber Co.*, 150 N. C., 694.

Under the terms of the contract, if the defendants should keep the wagons without objection, not offering to return them for a period of eight months, then they agreed to purchase them at the invoice price; but when they indicated that they did not want to keep the wagons, there was a failure of the minds to meet upon the proposition to sell.

The letters from defendant were admissible to show the termination by them of the contract and the notice to remove the wagons. The defendants were entitled to recover storage therefor, freight paid by them, and repairs.

No error.

(307)

COMMISSIONERS OF DAVIDSON COUNTY v. T. S. F. DORSETT ET AL.

(Filed 18 November, 1909.)

1. Principal and Surety—Sureties—Justification—Different Amounts—Contribution.

Contribution between sureties upon a sheriff's bond, as it relates to their rights between themselves alone, rests upon the principle that "equality is equity," and though they may have justified in different amounts, upon the same bond for the same penalty, the burden must be borne by them in equal proportions, in the absence of evidence tending to show that they had otherwise agreed among themselves.

2. Same—Interpretation of Statutes.

In an action wherein judgment had been rendered in a certain sum against an ex-sheriff and the sureties on his bond, and continued to determine the liability of the sureties among themselves, who had justified at the foot of the bond in different amounts. *Held*, the intendment of Revisal, sec. 310, was to provide a statement under oath to show the solvency of the sureties and afford information to the county commissioners under like sanction that the aggregate amount of the bond equaled the penalty required, and does not affect the doctrine of contribution as it relates to the rights of the sureties to contribution between themselves.

3. Appeal and Error—Sureties—Contribution—Procedure—Final Judgment.

Ordinarily, a court is not permitted to determine the rights to contribution between the sureties on a bond until there has been payment made in excess of the rightful proportion; but as the matter presented in this appeal was the lower court directing execution on a judgment theretofore obtained against the principal and sureties on his bond, the order of the lower court sufficiently partakes of the nature of a final judgment for the Supreme Court to express its opinion.

APPEAL from *E. B. Jones, J.,* at April Term, 1909, of DAVIDSON.

Action, to determine the relative liabilities of sureties, by reason of a judgment on the official bond of their principal, a former sheriff of DAVIDSON. From the judgment of the court, H. C. Grubb, one of the sureties, having excepted, appealed.

Walser & Walser for defendant Grubb.
Other parties not represented.

HOKE, J. At a former term of the Superior Court, judgment had been duly rendered in favor of plaintiffs on the official bond of defendant T. S. F. Dorsett, a former sheriff, and his sureties, for the penalty of the bond, to wit, $30,000, to be discharged on the payment of $10,879.82, the amount of the default. The cause having been (308) continued for further orders and decrees, and to determine the liability of the sureties as among themselves for the amount of such default, on the hearing it appeared that the bond had been executed for $30,000 by the defendant sureties, and at the time same was executed and accepted said sureties had justified thereon for different amounts, that of appellant Grubbs being for $15,000 and the others for smaller sums; the form of said justification being as follows:

"The undersigned, each for himself, maketh oath that he is a resident of North Carolina and worth over and above his liabilities and his property exempted by law, the sum set opposite his name."

On these facts the court adjudged that the defendant sureties, as between themselves, were "responsible in proportion to the amount each had justified for at the bottom of the bond, and not liable for equal amounts," and in this there was error. The doctrine of contribution between persons under a common obligation of this character rests upon the principle that "equality is equity"; and while such persons may change or regulate the application of the principle as among themselves by a binding agreement to that effect, in the absence of such an agreement and any and all evidence tending to establish it, the general doctrine must be allowed to prevail and the burden must be borne in equal proportion. *Smith v. Carr,* 128 N. C., 150; Adams Eq., 269-270; Beach on Mod. Eq. Jurisprudence, sec. 822 *et seq.*

In the citation to Adams Eq., just made, it is said: "The right of contribution arises among sureties, where one has been called on to make good the principal's default and has paid more than his share of the entire liability. If all the sureties have joined in a single bond, the general rule, in the absence of any express or implied contract, is that of equality. If their liabilities have been created by distinct bond, the contribution is in proportion to their respective penalties."

Nor is the principle in any way affected by the fact that the sureties have justified at the foot of the bond in different amounts. This is an official requirement, which is not contractual in its nature as between the parties, but a perusal of the statute (Revisal, sec. 310) gives clear indication that its chief purpose is to provide a statement, under oath, that the surety is worth the specified amount over and above his debts and liabilities and homestead and personal property exemptions, and to afford information to the commissioners, under like sanction, that the aggregate of the amounts will equal the penalty required by the law.

It may be well to note that we speak throughout of the rights of the sureties as between themselves. In respect to the obligees (309) in the bond, the State or county or any relator having a legal demand to enforce, the general rule is that the entire penalty of the bond, when required, is collectible against all or any one of the sureties.

Ordinarily a court is not permitted to determine questions of the kind presented here until there has been payment made in excess of the rightful proportion; but as the matter is for the purpose of directing execution on a judgment heretofore rendered, the order so far partakes of the nature of a final judgment that we have determined to express the opinion of the Court on the facts as presented.

There is error in the judgment of the court below, and the burden will be borne equally among the parties liable.

Error.

CITY OF NEW BERN v. WADSWORTH ET AL.

(Filed 18 November, 1909.)

1. Cities and Towns—Condemnation Proceedings—Streets—Easements—Abutting Owners—Title—Issues—Damages.

When a city under and in accordance with the provisions of its charter has widened certain of its streets and appealed to the Superior Court from the award of commissioners upon claims made for damages on that account by abutting owners, all the proof showing that claimants were occupying the property and claiming it as such owners, which position had been recognized by both sides, the issue of title is not raised.

2. Same—Measure of Damages.

When the proceedings by a city for condemnation of lands to widen its street under the provisions of its charter do not raise an issue of title, but only the question of the measure of damages to the abutting owners, it is permissible for the city to show in diminution of damages, by proper evidence, that it had theretofore acquired the easement to the width required, and, upon its doing so, damages for the additional burden only should be allowed.

3. Cities and Towns—Streets—Easements, How Acquired.

For a city to establish that it has an easement in lands for a street it must show by proper testimony that it had acquired the easement in some recognized manner by condemnation, or by dedication and acceptance, or by estoppel or adverse possession for twenty years.

4. Cities and Towns—Easements—Streets—Limitation of Actions.

The statute of limitations of actions does not run against an easement in lands acquired by a city for a street for the use of the public.

5. Cities and Towns—Condemnation Proceedings—Easements—Streets—Abutting Owners—Issues—Damages—Evidence—Title—Verdict.

When the only question presented in the action is the measure of damages to abutting owners for the widening of a street by a city for public use under proceedings in condemnation in accordance with its charter provisions, it is error to admit evidence for the purpose of affecting adversely defendants' title as abutting owners, and for the court to so regard it as shown in his charge to the jury, though it was otherwise competent on the question of the measure of damages; and this is not cured by the verdict awarding defendants damages only for the moving of houses from the easement, it appearing that in thus finding they must necessarily have considered the question of title.

(310) APPEAL from *Cooke, J.*, at February Term, 1909, of CRAVEN.

Cause tried and determined on issues submitted. A very correct statement of all preliminary proceedings appears in the case on appeal settled by the court, as follows:

"This was a proceeding begun by the city of New Bern to open and extend Pollock Street from Queen to End Street, in said city, under the provisions of its charter (chap. 82, sec. 53, Private Laws 1899). The city adopted the ordinance for opening said street, which appears in the record. Each of the defendants, under the provisions of section 53 of the charter of said city, filed a claim for damages to his land by reason of the opening of said street. Whereupon the city, by an ordinance (a copy of which appears in the record) appointed William Dunn, George D. Dail and Henry A. Brown as assessors to appraise the damage done to the property of said claimants. The appraisers assessed the damages and filed the report, with map attached, which appears in the record. Whereupon the city of New Bern filed exceptions to said report, and the proceeding was docketed in the Superior Court of Craven County for trial."

Under a charge of the court, the jury rendered the following verdict:

1. What damages, if any, has Noah Powell suffered by the opening of the street across his land? Answer: One hundred and fifty dollars to move house.

2. What damages, if any, has E. Wilson and wife suffered by the opening of the street across his land? Answer: Eighty dollars to move house.

3. What damages, if any, has Lucinda Stanly suffered by the opening of the street across her land? Answer: Fifty dollars to move house.

4. What damages, if any, has Enoch Wadsworth suffered by the opening of the street across his land? Answer: Fifty dollars (311) to move house.

5. What damages, if any, have M. L. Hollowell and wife, Emma, suffered by the opening of the street across their land? Answer: One hundred and fifty dollars to move house.

There was judgment on the verdict, and defendants excepted and appealed.

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

HOKE, J., after stating the case: This was a proceeding to condemn land, instituted by the city of New Bern, and his Honor below very properly submitted issues only on the question of damages. It appeared that Pollock Street, to the point of its intersection with Queen Street, has heretofore been opened and used by the public to a width of sixty feet, and beyond that point, to End Street, the highway has been extended and used at a width of about thirty feet, and has been usually known as Trent Road; that in December, 1906, the municipal authorities passed an ordinance to open Pollock Street to a width of sixty feet for its entire length to End Street; whereupon the defendants, as owners and occupants of property lying along the proposed route, filed a claim for damages. Pursuing the method indicated and required by the charter, the city appointed three assessors, who viewed the property, assessed the damage done defendants by the "opening and broadening of Pollock Street from Queen to End Streets," and made report. The city, being dissatisfied with the amount awarded, filed exceptions to said report and appealed, and the cause was thereupon certified to the Superior Court for trial.

Upon these facts, and in this condition of the record, it was not open to plaintiff to assail the title of the defendants as abutting owners of the property along the line of the proposed route. No such issue was anywhere raised in the record. All the proof showed that the claimants were in the occupation of the property, claiming it as owners, and this position had thus far been recognized throughout by both sides of the controversy, and, as heretofore stated, the only relevant issues arising on the record were those as to the amount of damages. While there was no issue raised as to defendants' title as abutting owners, it was no doubt permissible for the city of New Bern to show, if it could, by proper evidence on the issues as to damages, that the extension of Pollock

Street to the proposed width of sixty feet did not exceed the ease-
(312) ment which had been already acquired by the public; for, if it had been so acquired, no length of time or adverse user would bar or destroy it; such a right coming within the principle that statutes of limitation do not ordinarily run against the sovereign, king or commonwealth. *Turner v. Commissioners,* 127 N. C., 153; *Moore v. Carson,* 104 N. C., 431; Elliott on Roads and Streets, sec. 883. If the right, therefore, had ever existed in the public, and to the extent that it did exist, no damage should be allowed for its present exercise; but in order to make such a position available in reduction of the claim of defendants, the easement for the benefit of the public must have taken its rise in some recognized manner by condemnation, by dedication and acceptance, by estoppel or adverse user for twenty or more years, and must be established by proper testimony; and it is not permissible, at least in this present case, to attain such a result indirectly by evidence in impeachment of defendants' title as abutting owners. As to title by dedication and acceptance or by adverse user, see *S. v. Fisher,* 117 N. C., 733.

On the trial there was testimony admitted, over defendants' objection, to the effect that a Mr. Meadows, one of the grantors in defendant Wadsworth's deed, at some survey had by him prior to such conveyance, had directed the surveyor to leave as much as sixty feet along the Trent Road to "widen it to that"; and deeds to some of the defandants were shown in evidence which called for the northern boundary of the property conveyed as "Trent Road or Pollock Street extended." These were relevant circumstances on the question whether an easement to the extent claimed had ever been acquired for the public, but this evidence was also admitted as testimony affecting adversely defendants' title as abutting owners. This additional purpose was not only declared at the time the evidence was introduced, but it was given such effect in the charge of the court, as follows:

"If you find that the northern line claimed by Enoch Wadsworth was the line of Pollock Street, and that the line of Pollock Street extended would include all of the thirty feet, then, under his deed, he would not hold any of the land to be occupied by the widening of the street, and you would answer the issue as to this claimant, Nothing."

It is no satisfactory answer that the error suggested is cured by the verdict, which in effect upholds the title of defendants as abutting owners by awarding them damages; for, while damage is awarded, it clearly appears from a perusal of the verdict, more especially in the response to the fourth and fifth issues, that the assault made on the title of defendants was given substantial consideration by the jury, and
(313) damages only allowed for moving houses off the property taken. The verdict so expressly states; and, referring more especially to

the verdict on the fifth issue, here the lot, the one in the apex of the angle formed by junction of Queen and Pollock streets, would seem to be well-nigh destroyed for building purposes, and yet the award is only for moving the buildings off the lot.

As heretofore indicated, it is competent for plaintiff to show on the issue as to damages the extent and nature of the easement already acquired for the public benefit, and the damages should only be allowed for the additional burden (*Creighton v. Commissioners,* 143 N. C., 171); but it is not open to plaintiff, on this record, to show that defendants are not abutting owners, or to offer testimony for the purpose of impeaching their titles as such; and, for the error in allowing this, we are of opinion that, as to those who have appealed, the cause should be referred to another jury.

New trial.

JOHN M. DUNN v. SOUTHERN RAILWAY COMPANY.

(Filed 18 November, 1909.)

Master and Servant—Negligence—Defective Tools—Ordinary Use—Accident.

When in the ordinary and everyday use of a tool, simple in structure, an injury is caused an employee by a defect in it, which was not observed by him after working with it for several hours, the employer is not liable in damages by reason of the defect alone; and when an injury was thus caused to the plaintiff by the unexpected flying off of a striking-hammer used by another in striking a riveting-hammer held by him while riveting bands together in the course of his employment, the employer is not responsible in damages for plaintiff's resultant injury.

APPEAL by defendant from *Jones, J.,* at August Term, 1909, of SURRY.

The following issues were submitted by his Honor to the jury, and responded to by them as set out:

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

2. What damage, if any, has plaintiff sustained? Answer: Seven hundred and fifty dollars.

From the judgment rendered upon the verdict the defendant appealed to this Court.

The only evidence at the trial was the testimony of the plaintiff, (314) examined in his own behalf, and was as follows: "I am the plaintiff. On 14 January, 1908, I was a member of the bridge force and was engaged in work for the Southern Railway, under A. C. Wall as foreman. We were building a bridge over Mulberry Creek, in Wilkes County.

Thomas Hendrix and I were instructed by our foreman to take a piece of iron up to the blacksmith shop in Wilkesboro and rivet it together where it was broken. To do this we spliced it on either side with a piece of iron and had holes drilled through for rivets. There were nine rivets to be put through. After dinner we began driving the rivets in, and after putting in three or four, some of them would not fit and would have to be cut out, and it was while fixing the last rivet, about 5:30 in the afternoon, that I was hurt. The rivets would be heated red-hot and placed through the rivet holes, and I would hold over the end of the rivet what is known as a rivet set, or dollie, this being used to make a head on the rivet, so it would hold. The rivet set is something like a two-pound sledge hammer, only in one end of the hammer there is a cavity, which is placed down over the end of the rivet, and the other end of the hammer part is struck by a heavy hammer in the hands of another man which makes a head on the rivet. The handle to the rivet set is about 18 inches long. I was holding the handle of the rivet set, and Thomas Hendrix, another employee of the defendant, was striking the rivet set with an eight-pound sledge hammer, the handle of which was 2½ feet long. While in the act of striking the rivet set of the last rivet, just as the hammer came over Hendrix's shoulder, it flew off the handle and struck my hand, hitting an awful lick and badly bruising it, fracturing one of the bones. The hammer that Hendrix was using we took with us from the bridge that morning. It belonged to the defendant. It was in use when I went on the bridge force, in August preceding the time I was hurt, and had been in use ever since. It was in general use on the force. It was my left hand that was injured. I have not been able to use the hand since. All of my fingers, except my thumb, are now stiff. It hurts me today. It pains me in the joints. Not a day since it was injured that it does not hurt. Some time after I received my injury, I made a statement to Mr. Nottingham, law agent of the defendant, in which I described the occurrence as follows: I had not noticed the condition of the hammer before, and I do not know what caused it to come off the handle. We had been using that same hammer, more or less, every day. This was the first time it had given any trouble at all. So far as me and Hendrix was concerned, it was accident. I don't know who is to blame, but I think the company ought to do the right
(315) thing by me."

At the conclusion of the evidence, defendant moved the court for judgment as of nonsuit. Motion overruled, and defendant excepted.

W. L. Reece and John H. Dobson for plaintiff.
Manly & Hendren for defendant.

MANNING, J., after stating the case: The decision of this Court in *Martin v. Mfg. Co.*, 128 N. C., 264, is directly in point and is conclusive of this case. "Tools of ordinary and everyday use, which are simple in structure and requiring no skill in handling—such as hammers and axes—not obviously defective, do not impose a liability upon employer for injuries resulting from such defects." The testimony of the plaintiff himself excludes every idea of obvious defects. The hammer which occasioned the injury to him had been used by him and Hendrix from about 1 p. m. to 5:30 p. m., and they were engaged in fixing the last rivet when the injury occurred. "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." *Martin v. Mfg. Co., supra; Lassiter v. R. R.*, 150 N. C., 483, and cases cited.

We think that his Honor should have granted the motion to nonsuit. The case is remanded, that the judgment of nonsuit may be entered.

Reversed.

Cited: House v. R. R., 152 N. C., 399; *Hipp v. Fiber Co., ibid.*, 748; *Rumbley v. R. R.*, 153 N. C., 458; *Simpson v. R. R.*, 154 N. C., 53; *Russ v. Harper*, 156 N. C., 448; *Bunn v. R. R.*, 169 N. C., 651; *Wright v. Thompson*, 171 N. C., 91; *Rogerson v. Hontz*, 174 N. C., 30.

CHARLES R. HOWELL v. EUGENE FULLER AND SOUTHERN RAILWAY COMPANY.

(Filed 18 November, 1909.)

1. Parties Defendant—Joinder—Same Cause of Action.

Causes of action for "injuries with or without force to persons and property, or to either," may be joined (Revisal, sec. 469), and different causes of action for such injuries may be joined against one or more defendants, provided that each of such causes affects all the parties defendant.

2. Same—Master and Servant—Foreman—Medical Treatment.

In an action for damages for personal injury received by the plaintiff while at work within the scope of his employment for defendant corporation under the codefendant, F., its foreman, the complaint alleged that defendants failed to provide sufficient helpers for the work required of him; that he was required by defendants to do this work in a dark, dangerous, unsafe and unlighted place; that the injury was caused by certain specified negligent acts of both defendants; that the injury was made permanent by the careless medical treatment given by defendant F., who was not a physician, with medicines furnished by the corporation, his code-

fendant, to be administered or applied by him to employees with like injuries: *Held*, that while the responsibility of defendant F., for the first occurrences is not alleged with the precision and fullness desirable, by fair intendment, both as to the original occurrence and the subsequent treatment, a joint wrong on the part of both defendants is sufficiently alleged under our statute, Revisal, sec. 469.

(316) APPEAL from *Long, J.*, at August Term, 1909, of ROWAN.

Cause heard on demurrers to complaint. There was judgment overruling the demurrers, and defendants excepted and appealed.

The facts are stated in the opinion of the Court.

Clement & Clement and R. Lee Wright for plaintiff.
Linn & Linn for defendants.

HOKE, J. The complaint alleges, in effect, that at the time of the injury plaintiff was an employee of defendant company, doing work as foreman of a stripping gang in said company's repair shops at Spencer, N. C., and in such occupation and employment was under the control and direction of defendant Eugene Fuller, who was foreman of the erecting shops of the defendant company, and, in respect to the occurrence stated in the complaint, represented and stood for the company in its relation to plaintiff; that, while so employed, plaintiff was required to do the work in which he was engaged without sufficient help, and that there was danger in doing said work, by reason of the lack of sufficient help, and that plaintiff had often demanded of defendants that they furnish additional and sufficient help to do the work, and they had failed and refused to comply with such request, though they well knew that such help was necessary to the proper discharge of plaintiff's duties. Allegation is further made that, owing to insufficient lights in the room where the work was to be done, it was impossible for the employees engaged in the work to see the signals required and necessary to its proper performance; that on 28 November, 1908, while plaintiff in the line of his duty, was engaged in lowering an engine onto its trucks, and by reason of the lack of sufficient and adequate help, and by reason of the lack of sufficient light, plaintiff was struck in his right eye by an infectious piece of iron, causing a serious injury to same, and as a result of which the sight of one eye was destroyed. A detailed descrip-
(317) tion of the occurrence is further set forth, showing in what manner the alleged lack of adequate help and sufficient light directly brought about plaintiff's injury. The complaint further alleges that plaintiff reported his injuries to defendant's *alter ego*, Eugene Fuller, one of the defendants in this action. The said Eugene Fuller, acting in the capacity of a medical expert and adviser of the defendant Southern

Railway Company, did undertake, by and with the consent of the Southern Railway Company, to administer to plaintiff's wants and treat said eye. The said Eugene Fuller did then and there act negligently and carelessly in treating said eye, and, without being a licensed physician, did put into plaintiff's eye some concoction furnished and prepared by the defendant Southern Railway Company for the treatment of such employees as should be likewise injured; that plaintiff is advised and believes that the defendant Southern Railway Company kept the defendant Eugene Fuller in its employment with full knowledge of the fact that he was incompetent, reckless and a careless foreman of the erecting shop, and a nonexpert in the treatment of diseases, especially injuries to the eye; but, nevertheless, said defendant procured and obtained for said defendant Fuller compounds to be used by him on its employees in various and sundry methods when they became in anywise injured; that plaintiff, by reason of the following acts of negligence, was permanently injured and has lost the sight of his eye:

1. By reason of the defendant failing to provide said plaintiff with sufficient helpers to do the work required of him as foreman of the stripping gang.

2. By reason of requiring and demanding the plaintiff to work in a dark, dangerous and unsafe and unlighted place.

3. By reason of negligent and careless handling of the crane when operating, thereby causing the same to jerk the chains out of the plaintiff's hands, causing said chain to strike the boiler of said engine and throw a piece of infectious iron into plaintiff's eye, thereby permanently injuring the same.

4. By the negligent and careless treatment of plaintiff's eye by the defendants Eugene Fuller and Southern Railway Company, thereby permanently injuring and disabling plaintiff, to his damage in the sum of $5,500 dollars.

Wherefore plaintiff demands judgment against defendants in the sum of $5,500, for costs and such other and further relief as plaintiff may be entitled to.

While the responsibility of defendant Fuller for the first occurrence is not alleged with the precision and fullness that is desirable, the meaning, by fair intendment, appears to be as stated; and the complaint, both as to the original occurrence and the subsequent (318) treatment, alleges a joint wrong on the part of defendants, and, under our statute and many authoritative decisions, presents a cause or causes of action where said defendants may be properly joined in an action by plaintiff seeking redress. Revisal 1905, sec. 469; *Hough v. R. R.*, 144 N. C., 692; *Oyster v. Mining Co.*, 140 N. C., 135; *Tate v. Bates*, 118 N. C., 287; *Benton v. Collins*, 118 N. C., 196; *King v. Far-*

mer, 88 N. C., 22; *Hamlin v. Tucker,* 72 N. C., 502; *Land Co. v. Beatty,* 69 N. C., 329; *R. R. v. Dixon,* 179 U. S., 131.

Our statute (*supra,* sec. 469, subdiv. 3) permits the joinder of causes of action for "injuries with or without force to person and property, or to either," and the three last North Carolina decisions (*King v. Farmer, Hamlin v. Tucker* and *Land Co. v. Beatty*), construing this section, hold that different causes of action for such injuries may be joined against one or more defendants, provided that each of such causes affects all of the parties defendant, and *Gattis v. Kilgo,* 125 N. C., 133, and *Logan v. Wallis,* 76 N. C., 416, are to like effect.

Under these decisions, therefore, whether the complaint be considered as containing one or more causes of action, the wrongs being alleged as joint wrongs, both defendants are affected in each, and the joinder was proper, both as to causes of action and the parties. There was no error in the judgment overruling the demurrer, and the same is

Affirmed.

Cited: Worth v. Trust Co., 152 N. C., 244; *Chemical Co. v. Floyd,* 158 N. C., 460.

CORA REEVES, ADMRX., v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 18 November, 1909.)

1. **Railroads—Negligence—Moving Trains—Brakemen—Scope of Employment.**

When it appears that the plaintiff, a brakeman, has received the injury complained of from a defective handhold by following a custom of brakemen in jumping off and on another train ahead of his own train in order to reach a switch to change it, and such custom was known to and approved by the superior officers of defendant, a motion to nonsuit upon the evidence on the ground that he acted therein outside the line of his duties, will not be sustained.

2. **Same—Evidence—Nonsuit.**

The rule that persons cannot recover damages of a railroad company for an injury received while getting on and off a moving train, does not apply in its full strictness to brakemen acting in the line of their duty.

3. **Railroads—Negligence—Moving Trains—Brakemen.**

The test of whether a brakeman, while engaged in his employment with defendant railroad company, was guilty of contributory negligence and barred of recovery in his action for damages for an injury sustained by him while jumping on or off his moving train, is whether a person of ordinary prudence, in his position, would have acted likewise.

4. Railroads—Moving Trains—Brakemen—Contributory Negligence.

If a brakeman jumps on or off a moving train, when it is obviously dangerous for him to do so, he is guilty of such contributory negligence as will bar recovery. As there was conflict of evidence in this case as to the speed of the train the question was properly submitted to the jury.

APPEAL from *Long, J.*, at April Term, 1909 of GUILFORD. (319)

Action to recover damages for the negligent killing of Joseph Reeves.

The three issues of negligence, contributory negligence and damage were submitted to the jury, and answered by them in favor of the plaintiff. From the judgment rendered, the defendant appealed.

The facts are stated in the opinion of the Court.

J. A. Barringer for plaintiff.
Wilson & Ferguson for defendant.

BROWN, J. The only assignment of error relied upon in defendant's brief is to the denial by the court of the motion to nonsuit.

The evidence tends to prove that deceased was a yard brakeman on the new Pomona yards, and that his duties required him to switch cars, change switches and get on top of cars to tie the brakes. At the time he was killed he was proceeding in the discharge of his duty to the switches, to shut them, so that yard engine 682, to which he was attached, could go on its way to Greensboro on the main line. Engine 1632, with cars attached, had the right of way and preceded No. 682. Deceased jumped on one of the cars attached to 1632 to go to the switches to close them, after 1632 had passed out, as was his duty. As he took hold of the hand-hold, placed on the cars for the purpose, it broke and he was killed.

The motion to nonsuit is based upon two grounds:

1. It is contended that he was guilty of contributory negli- (320) gence, as he was outside of the line of his duty.

This cannot be sustained, as the evidence shows that it was the duty of Reeves to go down there and close the switch, and that it was the habit of the yard brakeman and all other brakemen of the Southern Railway Company on the Pomona yards to jump on moving cars and ride to the place where they changed the switches, and that was known to the men who were in control of the Southern Railway Company here in Greensboro and on the Pomona yards, where the alleged injury happened, and permitted by them. This takes the case out of the principle laid down in *Bailey's case,* 149 N. C., 169.

2. It is contended that the intestate was guilty of negligence, *per se,* in attempting to board a moving train.

We admit the general rule, as well established, that persons who are injured while attempting to get on or off of a moving train cannot recover for any injuries they may sustain. *Whitefield v. R. R.*, 157 N. C., 236; *Burgin v. R. R.*, 115 N. C., 673; *Johnson v. R. R.*, 130 N. C., 488; *Morrow v. R. R.*, 134 N. C., 99. But this rule does not apply with absolute strictness to "train hands," brakemen and the like, who are accustomed, from the nature of their duties, to getting on and off moving trains, where, as in this case, the custom is general, and not only tolerated, but approved by their superior officers. Of course, if a "train hand" attempts to board a train moving so rapidly that a person of ordinary prudence in his position would not attempt it, and is injured, he cannot recover. We are unable to say, as matter of law, based upon the evidence, that such was the case here. His Honor therefore left that to the jury, under proper instructions. *Johnson v. R. R.*, 130 N. C., 488.

We think the court below did not err in denying the motion.

No error.

Cited: *Heilig v. R. R.*, 152 N. C., 472; *Carter v. R. R.*, 165 N. C., 254.

J. E. ALEXANDER ET AL. V. T. L. FARROW ET AL.

(Filed 24 November, 1909.)

1. Deeds and Conveyances—Assignment—Liens—Priorities—Taxes—Levy.

The sheriff and tax collector of a county are not entitled to priority of payment of taxes by the trustee of a corporation under a deed of assignment over creditors who reduced their claims to judgment and had execution issued before the assignment was executed and recorded, the property being personal and they having failed to levy for the taxes due them, respectively. Revisal, 2863.

2. Corporations—Officers—Laborers and Workmen—Statutory Liens—Interpretation of Statutes.

Officers and owners of a corporation are not entitled, under Revisal, sec. 1206, to priorities of payment for work and labor done by them over the other creditors, as such officers do not come under the meaning of the words "laborers" and "workmen" used in the statute, and were not so intended.

(321) APPEAL from *E. B. Jones, J.*, at September Term, 1909, of FORSYTH.

Appeal by certain defendants, other than Farrow.

The action was brought by J. E. Alexander, assignee and trustee of the K. Howard-Fitch Company, a corporation, against the creditors of the corporation, to have determined the priority of their claims in the distribution of its assets. Certain creditors obtained judgments against the corporation, and, upon execution issued thereon, the sheriff of the county levied the same upon the property of the corporation, consisting entirely of personal property. Subsequently, and on the same day, the corporation made a deed of assignment to J. E. Alexander, trustee, to secure its creditors equally and *pro rata*. The sheriff of the county and the city tax collector filed their claims, respectively, for the taxes due by the corporation to the State and county and the city of Winston. F. M. Fitch and L. W. White each filed a claim for $40, for services rendered as laborers; and the sheriff, the tax collector of the city, Fitch and White each claimed a priority of payment over the judgment creditors, whose executions had been levied. Neither the sheriff nor the city tax collector had levied for taxes due. As to the claims of Fitch and Howard, his Honor finds the following facts: "They were officers of the corporation; Fitch was secretary and treasurer, and White was vice-president. These two, with John T. Martin, who was president, were all the stockholders of the corporation and filled all its offices; that Fitch and Howard, each within two months prior to the assignment, did manual labor for the company, such as buying and selling furniture, repairing same, hauling and delivering furniture, sweeping the store, collecting its bills, and the like." His Honor adjudged that the sheriff, city tax collector and Howard and Fitch were entitled to be paid prior to the judgment creditors. They duly excepted and appealed to this Court. The trustee, Alexander, reported that the assets of the corporation were insufficient to pay the judgment creditors, in full, their judgments, and the creditors whose claims were adjudged to have priority of payment. (322)

L. M. Swink for creditors.
W. T. Wilson for defendants Fitch and White.

MANNING, J. The sheriff of Forsyth County and the tax collector, Farrow, of the city of Winston are not entitled to priority of payment before the creditors in whose favor judgments were taken and execution levied, before the deed of assignment was executed and recorded. The officers did not levy for the taxes due them, respectively, and the property of the corporation consisted entirely of personalty. Revisal, sec. 2863; *Shelby v. Tiddy*, 118 N. C., 792. The claim of those judgment creditors, whose executions were levied before the registration of the deed of assignment, to priority of lien and payment, before all creditors

claiming under and through the deed of assignment, is not contested. Fitch and Howard, however, claim priority for their demands of $40 each, under section 1206, Revisal. Under the facts found by his Honor, we do not think they are included within the provisions of that section. They were officers of the corporation and directors; they controlled, not only in the stockholders' meetings, but in the meetings of the directors, and thereby controlled and managed the corporation. Their interest as stockholders and directors and officers was sufficient to induce them, in every way possible, to make the business of the corporation profitable; they were familiar with its entire business and its financial condition. By whom they were employed, or that they were regularly employed at all, is not found by his Honor, nor is there any allegation or evidence upon either of these matters; all that is found by his Honor is that they performed the services mentioned. It may well be that these were performed with a view to make the business of the corporation profitable to themselves, as stockholders, and were rendered to prevent the bankruptcy of the corporation in which they were so largely interested and which they controlled. In New Jersey, which State has a statute substantially of the same meaning and language as ours, the Chancery Court of that state says, in *Weatherby v. Woolen Co.*, (N. J.), 29 Atl., 326: "The preference given by the sixty-third section of the corporation act is in derogation of the right of creditors to be paid equally, and must not be extended by construction. Officers can only be included in the phrase,

'laborers and employees,' by construction, and that, too, of a very
(323) strained character. It cannot be that the Legislature, in any of

the enactments respecting preferences meant to include officers in the words 'laborers' or 'employees,' for there has been no period in the history of legislation upon this subject when these different classes have not been broadly distinguished." *England v. Organ Co.*, 41 N. J. Eq., 470; *Coal Co. v. R. R.*, 29 N. J. Eq., 252; *In re Stryker*, 158 N. Y., 526. In *Bruce v. Mining Co.*, 147 N. C., 642, this Court said: "To constitute a lien for work and labor done, it must not only be actual work and labor done, but it must be done under a contract for actual work and labor. *Moore v. R. R.*, 112 N. C., 236; *Cook v. Ross*, 117 N. C., 193; *Broyhill v. Gaither*, 119 N. C., 443; *Nash v. Southwick*, 120 N. C., 459." While in the present case no contract for work and labor is found, and although some of the work actually done by the claimants was the work of ordinary laborers or employees, we think it more in accordance with the policy of the statute to hold that officers of a corporation are not embraced within the words "laborers" and "workmen," used therein. To hold otherwise would be to open wide the door for frauds upon creditors who extend credit to the corporation and deal with it upon their faith in its management by its officers. For the reasons given, the judgment of his Honor

is erroneous, and the appellants, judgment creditors, are entitled to be paid their judgments before distribution to the sheriff, tax collector and Fitch and White.

Error.

Cited: *Iron Co. v. Bridge Co.*, 169 N. C., 514.

JENKINS BROS. SHOE CO. v. G. V. RENFROW & CO.

(Filed 24 November, 1909.)

1. Partnership, Dissolution—Notice—Principal and Agent.

In the absence of evidence tending to show that an agent would be unlikely to communicate to his principal facts affecting the latter's dealing with third persons so as to bring it within the exceptions to the general rule, notice to a traveling salesman of the retirement of a partner from a firm to whom he sold goods, is sufficient to bind the principal with such knowledge, it appearing that it was a part of his duty to report changes in partnerships among his customers, and that at times he collected money on account of goods sold for his principal, though not directly so authorized to do.

2. Same—Conditional Sale—Acceptance.

An order for goods given by a partnership to the traveling salesman of the creditor subject to the latter's confirmation, is not a completed sale until so confirmed; and when its acceptance is only evidenced by the shipment of the goods the sale and delivery are of that date.

3. Same—Time—Retiring Partner—Liability.

A partnership having given an order for goods to the plaintiff's traveling salesman subject to the plaintiff's acceptance, one of its members retired and gave due notice before its acceptance to the salesman, who was the plaintiff's accredited agent for the purpose: *Held*, (1) such notice was a rescission of the order; (2) its sufficiency in point of time was not limited to the date of the order; (3) that as the goods were not sold and delivered until shipment made after such notice was duly given, the retiring partner is not responsible therefor.

APPEAL from *Webb, J.*, at May Term, 1909, of FORSYTH. (324)

The plaintiff corporation sued the defendants, as partners, to recover an amount due it for goods sold and delivered. The defendant T. J. Renfrow alone answered and contested the plaintiff's right to recover against him. The plaintiff, in its complaint, alleged "that on 27 May, 1907, it sold and delivered to the defendants a lot of shoes, of the value," etc. The contesting defendant denied his liability, on the ground that the partnership between him and his codefendant had been dissolved on 28 March, 1907, and notice of dissolution had been published in a

newspaper published in Wilkesboro, N. C., where the partnership did business, the plaintiff doing business in Winston-Salem, and that notice of such dissolution had been given to W. N. Horn, the traveling salesman of plaintiff, its agent who had taken the order sued upon and all other orders from defendant for plaintiff. It was admitted by the defendant that the partnership existed up to 28 March, 1907, and was formed in 1904; that his copartner, G. V. Renfrow, his son, had the entire management of the business and did all its buying and selling; that he lived in Mecklenburg County; that when the partnership was dissolved he took from his copartner his note, secured by a mortgage on certain described lands in Mecklenburg County. The plaintiff offered evidence of the continued advertisement in the paper stated by G. V. Renfrow & Co. for some months after the alleged dissolution, and denied it had any notice of the dissolution at the date mentioned in the complaint. It further appeared in evidence that the salesman of the plaintiff, Horn, took the order from G. V. Renfrow on 4 April, 1907, but it was subject to acceptance by the plaintiff. The plaintiff's salesman admitted he received notice of the dissolution before 15 May; that it was within his duty to notify plaintiff when he received notice of dissolution of partnerships who were dealing with it, and he sometimes received money from customers when they offered it. It was in evidence that the agent, Horn,
(325) was notified on 4 April of the dissolution, but this was denied by him. His Honor charged the jury that unless the notice of dissolution was given to the agent, Horn, on or before 4 April, no subsequent notice would avail the defendant. The defendant excepted. The jury answered the issue of indebtedness in favor of the plaintiff. From the judgment rendered upon the verdict the defendant T. J. Renfrow appealed to this Court.

L. M. Swink and F. D. Hackett for plaintiff.
Manly & Hendren for defendant.

MANNING, J., after stating the case: If Horn was such an agent of the paintiff that notice to him would be imputed to the plaintiff, then we think his Honor was in error in restricting the time at which the notice of the dissolution should have been given, in order to be binding upon his principal, the plaintiff, to the date "on or before 4 April." While the order for the goods sued for was taken by Horn on 4 April, it was made by Horn subject to the acceptance of the plaintiff. The acceptance of the order was signified by the shipment of the goods on 27 May, and in no other way. The complaint alleged both sale and delivery on that day, and in our consideration of this appeal we must consider the plaintiff concluded by this allegation of his pleading. This allegation was

distinctly presented to his Honor by the defendant, and instructions asked and refused. The agent admitted he had notice of the withdrawal of the defendant T. J. Renfrow from the partnership before 15 May, and that he was then the agent of the plaintiff, with the same scope and extent of authority as theretofore.

In Mechem on Agency, sec. 721, the learned author deduces the following rule from the authorities: "The law imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it. Provided, however, that such notice or knowledge will not be imputed (1) where it is such as it is the agent's duty not to disclose, and (2) where the agent's relation to the subject-matter or his previous conduct render it certain that he will not disclose it, and (3) where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal." There is no evidence in this case bringing it within any of the exceptions named in the proviso of the above rule. This Court, in *Straus v. Sparrow,* 148 (326) N. C., 309, quotes with approval this principle, as stated in *Cox v. Pearce,* 112 N. Y., 637; 3 L. R. A., 563: "1. The failure of an agent to communicate to his principal information acquired by him in the course and within the scope of his agency is a breach of duty to his principal; but as notice to the principal it has the same effect as to third persons as though his duty had been faithfully performed." *Mfg. Co. v. Rutherford,* 65 W. Va., 395.

If, therefore, Horn was such an agent that notice to him was notice to his principal, the plaintiff, then, under the above authorities, it must follow that the plaintiff had notice of the withdrawal of the defendant T. J. Renfrow from the firm, and its dissolution before 15 May—between 6 and 15 May, as fixed by Horn. No credit had then been extended for the goods ordered on 4 April. In *Bisban v. Boyd,* 4 Page Chan., 16, it is held: "If he (a former customer) was informed of the dissolution of the partnership immediately after the sale and while the goods remained in his own hands, undelivered, a court of equity would never permit him to recover for those goods against the former partners of the vendee." Notice of the dissolution is a rescission of the order. *Goodspeed v. Plow Co.,* 45 Mich., 522. The correctness of these doctrines cannot be controverted. It cannot be consistent with any just conception of fair dealing to subject a retired partner to the payment of debts contracted after notice of dissolution of the partnership has been given to the creditor extending the credit. Such a creditor cannot assume the status of part-

nership to be unchanged when he has actual notice of a change imputed to him from the knowledge of his agent. Was Horn such an agent that notice to him was notice to his principal? The evidence offered at the trial tends to show that Horn was a traveling salesman of the plaintiff, and defendants made all their purchases, extending over several months, from plaintiff through Horn; that he was the sole representative of plaintiff in the section in which defendants did business, and visited their place of business nearly every thirty days; that he reported to plaintiff references given by new customers; that he reported dissolutions of partnerships with whom plaintiff was dealing, and sometimes received payments for bills due, when offered him by merchants, but that he was not instructed to collect bills; that he in a general way inquired about the condition of the business of those with whom he was dealing for plaintiff.

In *Cowan v. Roberts,* 133 N. C., 629, this Court held: "The (327) notice should have been given to the plaintiffs or to some one of their employees who had charge of the credit department. The 'man,' the defendant, Redmond, found 'working on the books' may have had no duties connected with any department of the business, except to keep an account of the cash, so far as we know. Of course, if any salesman had been notified of the dissolution of the firm, and that salesman had afterwards sold goods to Roberts, Redmond would not have been liable." In reviewing this decision in *Straus v. Sparrow,* 148 N. C., 309, *Hoke, J.,* speaking for this Court, said: "The decision, while eminently sound in principle, goes very far, certainly on the fact of that particular case, in upholding a demand against a retired partner." A careful consideration of *Cowan v. Roberts, supra,* does not convince us that that decision militates against our holding that the evidence was sufficient to support a finding that Horn was a competent agent to receive notice, and that notice to him was notice to the plaintiff, his principal. Horn was, by his course of dealing and the scope and extent of his power, the medium of negotiations between plaintiff and defendant partnership. The learned judge who tried this case seemed to be of this opinion, but erroneously, as we think, in view of the distinct allegation of the complaint, restricted the binding effect upon the plaintiff of the notice to him to the date of the order. The case has been made complicated and the decision more difficult by the variance between the proof and the allegation in apparently treating 4 April as the day of the accepted order and the day when the proposition to buy became a contract of purchase and sale. We have not passed upon the other exceptions taken, as they may not be presented at the next trial. For the error pointed out, there must be a

New trial.

Cited: Furniture Co. v. Bussell, 171 N. C., 480, 484.

WATER AND LIGHT COMMISSIONERS v. M. M. CHAPMAN ET AL.

(Filed 24 November, 1909.)

1. **Appeal and Error—Procedure—Recordari—Appellant's Laches.**

It is no sufficient excuse for the failure of the appellant to have his appeal docketed and ready for argument upon the calling of his district under Supreme Court Rules 5, 17, 30 and 24, that the judge had the original papers and had not settled the case on appeal, when it appears that he was in default in not requesting the judge to fix a time and place therefor until forty days after appellee had returned his case with objections.

2. **Same—Case on Appeal—Appeal Dismissed.**

The Revisal, 591, makes appellee's case the case on appeal after fifteen days' delay by appellant to transmit papers to the judge. Appellant's motion for a *recordari* under such circumstances will be denied and appellee's motion to dismiss granted.

APPEAL by defendant from *Councill, J.*, at May Term, 1909, of (328) CABARRUS.

The facts are stated in the opinion of the Court.

Shepherd & Shepherd for plaintiff.

L. T. Hartsell and Welch Galloway for defendants.

CLARK, C. J. This case was tried below at May Term, 1909, of Cabarrus. The appeal should have been docketed and printed, ready for argument when that district was called at this term. Rules 5, 17, 30 and 34. That not having been done, the appellee moved to dismiss. The appellant asked for a *certiorari,* because the judge had not settled the case and the transcript of the record proper could not be sent up because his Honor had the original papers. This would justify granting a *certiorari* and the denial of the motion to dismiss, but only if the appellant itself was in no default. *Brown v. House,* 119 N. C., 622.

It appears from the record that the parties, by consent, extended the time for service of case on appeal and countercase, but that the appellant's case on appeal had been returned by appellee, with his objections, to appellant, on 21 August, 1909. The statute (Revisal, sec. 591) then prescribes that "the appellant shall *immediately* request the judge to fix the time and place for settling the case," and provides that if the appellant delays longer than fifteen days to make this request and to mail the case and exceptions thereto to the judge, the appellee's countercase (or appellant's case amended by appellee's exceptions) "shall constitute the case on appeal."

The appellant did not make such request of the judge till 1 October, a delay of forty days. This was gross laches and deprives the appellant of any right to a *certiorari* and necessitates granting the motion to dis-

miss. This has been often decided. *S. v. Jones,* at this term (where the delay was thirty-three days); *Stroud v. Telegraph Co.,* 133 N. C., 253; *Simmons v. Andrews,* 106 N. C., 201.

Appellants are too often prone to forget that appellees have rights. The intent of this section to safeguard them is evinced by the further provision that the judge, on receipt of appellant's request, shall *forthwith* notify the attorneys of both parties of the time and place to appear (329) before him for settling the case, "which time shall be not more than twenty days from the receipt of the request," and that the judge must settle the case within sixty days of the termination of a special term, or after the courts of the district shall have ended, under a penalty of $500 on the judge, to be recovered by any person who shall sue for the same, for any failure to comply with the above or any requirement of this section. The section further provides that the appellant, on receipt of "case settled" from the judge, shall, "within five days" file the same with the clerk. The next section (Revisal, sec. 591) requires the clerk, "within twenty days" thereafter, to transmit a duly certified copy to the clerk of the Supreme Court.

Attention must be called to the amendment now incorporated into section 591, which, being comparatively new, may have escaped the notice of some members of the profession: "If the appellant shall delay longer than fifteen days after the appellee serves his countercase, or exceptions, to request the judge to settle the case on appeal and mail the case and countercase, or exceptions, to the judge, then the exceptions filed by the appellee shall be allowed, or the countercase served by him *shall constitute the case on appeal.* However, the time may be extended by agreement." Here there was no such agreement, and not only this Court could not send down a *certiorari* for the case, but if the judge had "settled" the case after the fifteen days' delay, without consent of appellee, he was *functus officio* and without authority, except where there was unquestionably valid legal ground to excuse the delay. The case here was "constituted" at the expiration of the fifteen days' delay of appellant to send the papers and request to the judge, exactly as the appellant's case becomes automatically the case on appeal if no exceptions or countercase is served within ten days. The appellant should therefore have sent up in apt time the case as "constituted" at the end of his fifteen days' delay.

The lawmaking power seemed to think that the statute, as formerly written, was not strict enough or not sufficiently complied with, and have thus amended it. It is our duty to observe it.

The motion of appellant for a *certiorari* is denied and the motion of appellee to dismiss the appeal is allowed.

Appeal dismissed.

Cited: McNeil v. R. R., 173 N. C., 730.

(330)

W. H. RUFFIN, ADMR., v. SEABOARD AIR LINE RAILWAY.

(Filed 24 November, 1909.)

1. Railroads—Deeds and Conveyances—Easement, Reservation of—Fee.

A provision in a deed of lands to a railroad company for depot purposes, that the grantor should have the right to erect a warehouse partly on the lands described and conveyed, provided a width of 115 feet be left to the railroad company, reserves to the grantor a descendible, assignable and transferable easement therein for the stipulated purpose and to the extent specified in the deed.

2. Same—Words of Inheritance.

An easement in fee in lands reserved by the owner in his deed thereto, does not require the use of the words inheritance, for the thing excepted is not granted and the grantor retains it by virtue of his original title.

3. Same—Statute.

Under the Code of 1883, sec. 1280, a reservation by the grantor in his deed of an easement in the lands conveyed will be construed to be an easement in the fee unless the contrary intent appears from the conveyance.

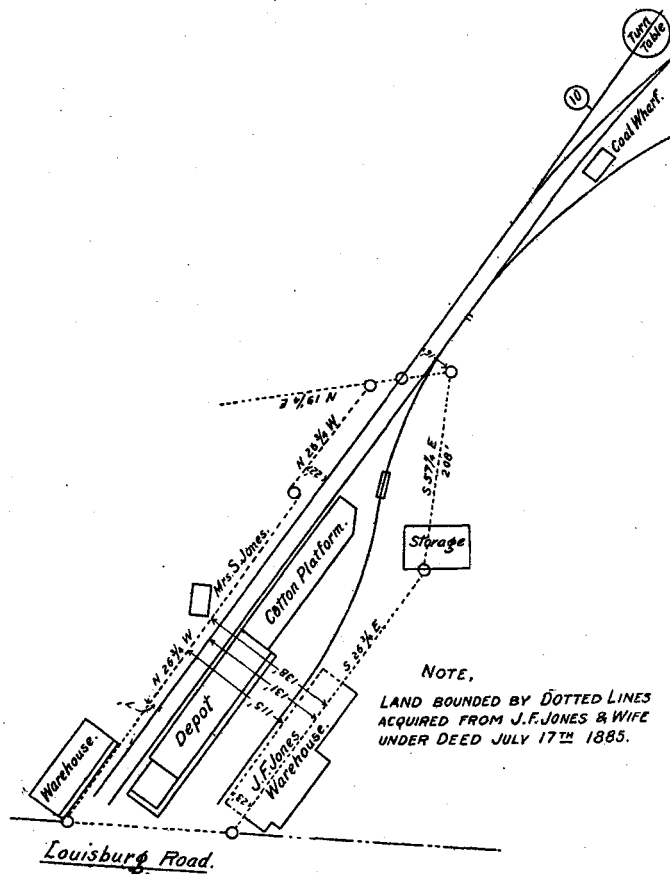
4. Same—Determinable Fee—Rights Appurtenant—Permissive User.

A stipulation in a deed of land to a railroad company for depot purposes was that the grantor shall have the right to erect warehouses along certain sides of the lands, provided they do not encroach upon any portion of the depot ground of the width of 115 feet, and in accordance with such right the grantor erected a warehouse partly on his own land and extending upon the lands conveyed a distance of twenty-three feet, which was occupied continuously as such since its erection by the grantor, his heirs and assigns: *Held*, (1) whether by way of reservation or exception, the grantor retained for warehouse purposes, a determinable fee in the land conveyed to the extent of the twenty-three feet; (2) that this right was appurtenant to the land covered by the other part of the warehouse; (3) that the question of whether a permissive user of a railroad right of way would ripen title to the easement reserved did not arise.

APPEAL from *Cooke, J.*, at January Term, 1909, of FRANK- (331) LIN.

On 17 July, 1885, J. F. Jones executed to the Louisburg Railroad Company a deed, conveying a depot site at Louisburg, N. C., the metes and bounds of which are set forth in said deed. This deed contained the following stipulation: "It is further stipulated that the said parties of the first part shall have the right to erect a warehouse along the southwest side of said lands and upon the southwest margin of said road, provided

(331)


Turn Table
10
Coal Wharf.
S 7 1/4 E
200
Storage
Mrs S. Jones.
Cotton Platform.
N 28 1/4 W.
S 28 1/4 E.
Depot
Warehouse.
J. F. Jones Warehouse.
Louisburg Road.
NOTE,
LAND BOUNDED BY DOTTED LINES
ACQUIRED FROM J. F. JONES & WIFE
UNDER DEED JULY 17TH 1885.

they do not encroach upon any portion of the depot ground, of the (332) width of 115 feet on the grade, so that the railroad company shall have a width of depot grounds of at least 115 feet on the grade."

In 1885 or 1886 J. F. Jones erected upon the margin of said land a warehouse, extending a distance of about twenty-three feet over upon the land of the said railroad, but leaving an unobstructed width of 115 feet of depot ground. This warehouse has been used and occupied by J. F. Jones and his heirs and assigns continuously since its erection, and is now so used as a warehouse.

J. F. Jones is dead, and William H. Ruffin has qualified as his administrator. In the course of the administration of the estate it became necessary for the administrator to file a petition to sell the land upon which the warehouse was erected, to make assets, and under said petition an order of sale was made and William H. Ruffin appointed commissioner.

The lot was sold to J. M. Allen for the sum of $2,205, but upon investigation it developed that the warehouse situated on the said lot extended twenty-three feet beyond the boundary of the land conveyed to the Louisburg Railroad Company, which lot now belongs to the Seaboard Railroad Company. J. M. Allen thereupon refused to complete the purchase unless some concession in price was made by the commissioner. The commissioner refused to make any concession and brought this action to force the said J. M. Allen to take the property and pay the price agreed upon.

The Seaboard Air Line was made a party defendant in this action and filed answer therein, setting up its right to the entire tract conveyed to the Louisburg Railroad Company by J. F. Jones, free from any right of the heirs or assigns of said J. F. Jones to occupy any part thereof for any purpose whatever.

The facts were agreed upon and the matter submitted to *Cooke J.,* at January Term, 1909, of Franklin. Upon the facts found, in accordance with the facts agreed, *Cooke, J.,* rendered the following decree:

"It is, therefore, by the court ordered, adjudged and decreed that the stipulation in said deed contained, reserved to the said J. F. Jones a descendible, assignable and transferable easement in, to and upon said strip of land described in the pleadings, on the southwest side or margin of said depot site, of the width of about twenty-three feet, for the use and occupation thereof for warehouse purposes, and that such easement descended to the heirs and assigns of the said J. F. Jones, and that the same is therefore salable and assignable by the said administrator and commissioner. But it is further ordered, adjudged and decreed that such easement is limited to the use and occupation of said (333) strip of land for warehouse purposes only.

"It is further ordered, adjudged and decreed that said administrator

and commissioner tender to the purchaser a deed for the land so sold, including said easement, as herein declared, and that upon the payment of the purchase price bid, to wit, $2,205, with interest on the same from 25 May, 1908, till paid, at the rate of six per cent per annum, the said commissioner deliver such deed to him.

"In the event of the refusal of said purchaser to take conveyance, as aforesaid, it is further ordered, adjudged and decreed that said William H. Ruffin, commissioner, make resale of said premises, after thirty days' advertisement in some newspaper, as required by law, and that at such sale he shall sell separately the easement in, to and upon said strip of land, about twenty-three feet in width, along the southwest margin of the depot site of the defendant railway, as herein declared, and shall sell separately the remainder of said land and premises, to wit, that part of the land owned by said J. F. Jones in fee.

"Said commissioner will report his proceedings herein to this court.

"It is further ordered that the costs of this action shall be paid by the commissioner, out of the proceeds of sale."

The defendant Seaboard Air Line Railway excepted to the foregoing decree and appealed.

W. H. Ruffin, Bickett & White and Spruill & Holden for plaintiff.
Murray Allen for defendant.

CLARK, C. J., after stating the case: This case presents a single question, *i. e.*, the construction of the stipulation contained in the deed from J. F. Jones to the Louisburg Railroad Company, by which it was agreed that the said Jones should have the right to erect a warehouse on the land conveyed, provided an open space 115 feet was left for use by the railroad company as depot grounds. It is admitted that the defendant has 115 feet of open space, and that the warehouse erected by J. F. Jones extends twenty-three feet over the southwest boundary of the land conveyed by the deed of 1885.

The court below took the view that this stipulation reserved to J. F. Jones a descendible, assignable and transferable easement in the twenty-three-foot strip of land, but that this easement is restricted to warehouse purposes.

(334) The contention of the Seaboard Air Line Railway is that this stipulation in the deed is nothing more than an agreement between the Louisburg Railroad Company and J. F. Jones, or license, that he could erect a warehouse, and that the right to occupy the land for that purpose expired upon the death of the said Jones.

We do not think the clause in the deed from Jones can be construed to be a license to him—a license is granted by the owner of the land;

besides, as a rule, a license is voidable at the will of the owner (Washburn Easements, 3 Ed., sec. 15; Jones Easements, sec. 69), which certainly was not the intention here.

The defendant's contention, that if this was an easement it expired at the death of the grantor, Jones, cannot be maintained. It was created by way of exception, and, "If created by way of exception, words of inheritance are not necessary to create an easement in fee, if the grantor owned the fee of the premises at the time of the conveyance, for the simple reason that the thing excepted is not granted, and the grantor retains a part of the estate by virtue of his original title." 14 Cyc., 1165; Jones Easements, sec. 89.

Hamlin v. R. R., 160 Mass., 459, held that a deed of a railroad right of way, releasing all claims for damages, but reserving to the grantor a private crossing over the track, along the course of a previously existing cartway, excepts the cartway from the grant and does not create a new right in the grantor by way of reservation; and hence the word "heirs" is not necessary to make the easement of crossing perpetual. This case is more especially in point, because that court, in common with North Carolina, holds to the common-law distinction or doctrine. Washburn Easements, 3 Ed., p. 5.

If it be contended that the clause was in effect a reservation, and that under the strict rule of law an instrument creating an easement in fee by way of reservation must contain words of inheritance, such contention is met and avoided by the provisions of our statute in existence at the time of the conveyance (section 1280, Code of 1883), which provides that conveyances are held and construed to be in fee unless a contrary intention appears from the conveyance.

Whether the right is by way of exception or reservation, the intention of the grantor, to be ascertained from the language used and the attendant facts and circumstances, was not to except or reserve a mere life estate, but a perpetual right of user, provided always that the grantee held absolutely 115 feet. As was said by this Court in *Merrimon v. Russell,* 55 N. C., 470, "Few would be at the expense of erecting a mill if the supply depended upon the uncertainty of life." And the (335) grantor would not have excepted or reserved the right in this case to erect an expensive warehouse—a building ordinarily erected for time, so far as human foresight and power can extend—if the tenure depended on the uncertain term of his own life. Taking into consideration that the erection of such a building was to the direct benefit of the railroad by making it a contributing factor in building up the business of the then new railroad, and taking into consideration, further, that such buildings always have been and always will be contributing agencies to the business of railroads, it is clear that the intention of both parties

was to create a perpetual user. It was deemed by them to be one which would always be of benefit to both grantor and grantee. *Hall v. Turner,* 110 N. C., 292, indicates that the grantor's right in the twenty-three feet was a determinable fee.

Jones on Easements, secs. 92 and 106, says: "When it appears by the true construction of the terms of a grant that it was the well-understood purpose of the parties to create or reserve a right, in the nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, no matter in what form such purpose may be expressed, whether it be in the form of a condition, or covenant, or reservation, or exception, such right, if not against public policy, will he held to be appurtenant to the land and binding on that conveyed to the grantee, and the right and burden thus created and imposed will pass with the lands to all subsequent grantees." Jones on Easements, secs. 92 and 106.

Patton v. Educational Co., 101 N. C., 408, is very much like the case grantor's other lands is a strong indication of his intention that it should be appurtenant to his estate and not merely personal to himself." Jones on Easements, sec. 94, p. 76.

"A reservation of an easement which is intended to be appurtenant to the land retained by the grantor is not within the rule that the word 'heirs' must be used to create an estate which will extend beyond the party making the reservation," etc. Jones on Easements, sec. 93.

Patton v. Educational Co., 101 N. C., 408, is very much like the case at bar. In that case there was a grant of lands in fee, reserving an easement, as follows: "With the following reservation—that is to say, the said M. M. Patton reserves thirty-three feet for a street running from the cross street down L. C. Clayton's fence to J. P. Jordan's fence; then up Jordan's fence to the street that leads down to Patton's house." There was in the deed, as in the case at bar, a conveyance of lands by
(336) metes and bounds, and the reservation was made within such bounds and was made without words of inheritance. The heirs of Patton brought suit for the enjoyment of the easement, which had been obstructed, and the defendant there, as here, contended that the user was confined to the life of the grantor; but the Court held that the easement descended to the heirs. It will be noted that this was not the case of a dedication of a street for public use, but the reservation of an easement for a private right of way, though it was called a street. No interest of the public appears. That case contains a review of the authorities on this point.

In the case at bar, in any event, the reservation was at the least a determinable fee, even without words of inheritance or without construction to ascertain the intent of the parties to the deed (*Hall v. Tur-*

ner, 110 N. C., 292), and under it the perpetual user of the land for warehouse purposes was retained. Our conclusion is, that, whether by way of exception or reservation is immaterial; the grantor retained for warehouse purposes a determinable fee in the land conveyed to the railroad company, outside of the 115 feet, for the length of the warehouse he erected—this right appurtenant to the ownership of the land covered by the other part of the warehouse. No rights of the defendant railroad, as a common carrier, in respect to rights of way, etc., are involved; it is not a question of permissive user of a part of its right of way, which cannot ripen into an easement, but this is the exception of a portion of the land granted, or a reservation at the least of it to the grantor; and the railroad, in its relation thereto, stands just as any other grantee not a common carrier would stand. It was a right that lay in grant, and the railroad granted nothing—had nothing then to grant— but got the clear depot space of 115 feet, as provided in the exception contained in the deed.

The judgment below is

Affirmed.

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(337)

WILLIAM L. KENNEDY v. SUSAN DOUGLAS ET AL.

(Filed 24 November, 1909.)

1. **Wills—Requisites.**

A paper-writing drafted by an attorney from stenographer's notes taken from dictation of deceased as to the disposition of her property after death, unsigned and unwitnessed, is not admissible as a last will and testament. Revisal, 3113.

2. **Wills, Nuncupative—Witnesses—Requisites.**

It is necessary to the validity of a nuncupative will that the testator state her wishes in the presence of two witnesses and "specially require them to bear witness thereto."

3. **Same—Two Present—One Witness.**

The declaration of a testator made in the presence of two witnesses that a paper-writing contained the disposition he desired made of his property and that he desired its provisions carried out, without reading or having the paper read at the time, but relying upon the assertion of a person then present that it contained his wishes as dictated by him several months before, is invalid as a nuncupative will: (1) the dictation was made to one witness alone; (2) there was no sufficient declaration then and there of the testator's wishes in the presence of two witnesses from which they could reduce their recollection to writing within ten days. Revisal, 3127 (3).

4. **Wills, Nuncupative—Writing—Intent—"Last Sickness."**

A paper-writing which the deceased had therefore dictated but postponed executing from time to time and which he finally declared to be his will without reading it, at a time he was in his last sickness not expecting to recover and physically unable to execute it, is invalid as a nuncupative will: (1) his intent that it should be a written will is evidenced by his conduct; (2) the dictation was not in law "during his last sickness."

5. **Wills, Nuncupative—Validity—Interpretation of Laws.**

The position cannot be maintained that nuncupative wills are not now legal in North Carolina because of the exception in regard to them in Revisal, 3113. The whole Revisal should be construed together, and section 3127 (3) expressly provides for their probate.

APPEAL from *Lyon, J.*, at August Term, 1909, of BRUNSWICK.

This proceeding was instituted before the clerk for probate in solemn form of the nuncupative will of Susan Thomas Kennedy. On appeal, his Honor, at the close of the propounder's evidence, held that the evidence was not sufficient in law to establish a nuncupative will, and entered judgment that it was not entitled to be probated and recorded. Appeal by propounder.

Robert Ruark for appellant (propounder).
John D. Bellamy and E. K. Bryan for defendants.

CLARK, C. J. The facts, as condensed from the record, are: The deceased, with the intention of making a written will, dictated instructions to her friend, Minnie I. Knox, some nine months before her death, and Minnie I. Knox made written notes as to the disposition which the deceased desired to make of her property. Such instructions were delivered some two or three months later, at the request of the deceased, to Robert Ruark, an attorney, with the request that he should (338) prepare a form of written will, embodying the wishes of the deceased, as set forth in the said notes. The said attorney did prepare a form or draft of a written will, embodying the wishes of the deceased, as expressed in the said notes, which will was delivered by him to the witness J. J. Knox and by him in turn delivered to Minnie I. Knox. All of this occurred some months before the death of the deceased, but while the deceased was sick, and from which sickness she did not recover. Upon a number of occasions during the six months thereafter the draft of the will was carried by Minnie I. Knox to the home of the deceased and conversations had between her and the deceased concerning the same. On two occasions, at least, Minnie I. Knox was accompanied by the witness J. J. Knox. It also appears that from time to time the deceased put off and delayed the execution of the written will. Eleven days before her death the written will was

carried by Minnie I. Knox to the home of the deceased, she being accompanied by the witness J. J. Knox. The deceased was at the time sick and in bed, and apparently had abandoned hope of recovery. The matter of the execution of the will was brought to her attention, and the importance of its execution, if she desired to make a written will, was mentioned to her by the witness J. J. Knox. On that occasion the deceased declared her inability, because of physical infirmity, to go through the ceremony of executing the will, and also declared her belief that she would never be able to do so. She was informed by the witness Minnie I. Knox that the paper contained the provisions which she had dictated to her, but the contents were not read over to her nor stated. In the presence of Minnie I. Knox and J. J. Knox, and while she was sick and in bed, she stated to them that the paper was all right—that it contained her wishes with reference to the disposition of her property, and that she wished them to see that her wishes, as expressed in the paper, were carried out. There was evidence of the testamentary capacity of the deceased at the time. She was in her last illness, in her own habitation, and in possession of her faculties.

This paper-writing is condemned by the Revisal, sec. 3113, unless it is authorized to be probated as a nuncupative will, under the Revisal, sec. 3127 (3).

It is evident that the "instructions" were not intended as a nuncupative will at all. The deceased was giving instructions many months before her death for the preparation of a written will, which failed of being perfected. It cannot be taken as a compliance with the requirements as to a nuncupative will, for more reasons than one.

The testator did not state her wishes in the presence of two wit- (339) nesses, nor "specially require them to bear witness thereto." It is true that Minnie I. Knox stated to the deceased that the paper had been written according to her previous instructions, and there is evidence that the deceased said in the presence of two witnesses that it contained her wishes as to the disposition of her property, and she wished them to see that the directions in the paper were carried out. Conceding that this was a sufficient request to them to be witnesses, yet the paper was not read over to her in their presence, nor were the contents even orally stated. M. I. Knox was doubtless sincere in saying to the deceased that the paper-writing contained her wishes, as dictated to her months before, but she may have misunderstood the deceased, or the lawyer may have misunderstood her. At any rate, there was no declaration, then and there, by the testatrix of her wishes, nor did she call upon two witnesses to bear witness as to the statement of her wishes (for she made none), and for the same reason they did not and could not reduce their recollection to writing within ten days. The "instructions"

were given many months previous; they were not intended at all for a nuncupative but for a written will, which, if read by the testatrix or read over to her, she might have corrected or amended before signing. That she was not decided is shown by her again and again putting off signing the paper drafted by counsel.

Certainly reference to a paper whose contents were not read over by the deceased, nor to her in the presence of two witnesses, cannot make such paper a nuncupative or oral will. *Estate of Grossman,* 175 Ill., 425; *Knox v. Richards,* 110 Ga., 5; 30 A. & E., 2 Ed., 564; *McDowell v. Unger,* 75 Miss., 294; *Mole's case,* 49 N. J. Eq., 266; *In re Hebden,* 20 N. J. Eq.

That there must be a verbal statement of the testator's wishes in the hearing of two witnesses is indispensable. Even if the dictation of instructions for the drafting of a written will could be considered—since such dictation was not intended to be final, but to be submitted for revision and signature—still that dictation was made to only one witness and was not, in law, "during the last sickness," though there was no recovery from the sickness. *Stricker v. Glover,* 55 Pa. St., 386; *McDowell v. Unger,* 75 Miss., 294.

We are not inadvertent to, but cannot concur in, the appellee's contention that nuncupative wills are no longer legal in this State, because the exception in regard to them, in what is now the Revisal, sec. 3113, was stricken out in the Code of 1883. That was done doubtless (340) because unnecessary, since authority to probate them is expressly conferred by the Revisal, sec. 3127 (3), and the whole Revisal is to be construed together. The validity of nuncupative wills has been recognized by numerous cases since the clauses referred to have been stricken out, among them *Newman v. Bost,* 122 N. C., 533.

The judgment below is

Affirmed.

C. S. HOLTON ET AL. *v.* FRANK H. ANDREWS.

(Filed 24 November, 1909.)

Lessor and Lessee—Monthly Payments—Lease—Tenant by the Year—Contract, Interpretation of.

A lessee paying rent by the month, but under a lease providing that it would be renewed from year to year for a period of four years, without change in its terms, upon his request in writing, and holding over from the first year without making such request, is a tenant by the year. And when he vacates the premises before the expiration of the year he is liable to the lessor for the stipulated rent for the unexpired term, provided the latter, with reasonable diligence, could not have rented to another within that time.

HOLTON *v.* ANDREWS.

APPEAL by plaintiff from *Webb, J.,* at July Term, 1909, of MECKLENBURG.

Action for damages for breach of contract, appealed to the Superior Court by plaintiff from a magistrate's judgment.

The facts are stated in the opinion of the Court.

Robert S. Hutchinson for plaintiff.
E. R. Preston for defendant.

CLARK, C. J. The premises were leased for one year, from 1 June, 1907, rent payable monthly. The lease contained this provision: "The parties of the first part bind themselves, upon the request of the party of the second part, in writing, to renew this lease, without change in terms, from year to year, for a period of four years." On 1 June, 1908, the defendant continued in possession of the store, without making such request, in writing or otherwise, paying rent monthly, as before. In January, 1908, erroneously conceiving that he was therefore renter from month to month, the defendant gave due notice, as such, and vacated the premises on 1 February. The lessor objected, (341) and brings this action to recover the rent from 1 February to 1 June, less the rent from 23 April to 1 June. If the plaintiff's testimony is true, that with reasonable diligence he could not rent the store till 23 April, he is entitled to recover rent from 1 February, 1909, to that date.

His Honor erred in holding this to be a tenancy at will. The requirement that the request for renewal should be in writing was in favor of plaintiff. If not given, he could have refused to renew. The defendant, by continuing on, was presumed to be in for a year, as before, on the same terms as to time, price and monthly payments, and with a right to three years more if requested in writing. A case exactly in point is *Scheekley v. Koch,* 119 N. C., 80. Also, *Harty v. Harris,* 120 N. C., 408. The defendant was no doubt misled into thinking that he was a renter from month to month by the payments being monthly.

Error.

Cited: Murrill v. Palmer, 164 N. C., 53.

R. L. JORDAN v. THE HANOVER FIRE INSURANCE COMPANY.

(Filed 24 November, 1909.)

1. **Insurance, Fire—Loss—Denial of Liability—Proof—Waiver.**

A distinct denial by a fire insurance company of liability under a policy after loss, and within the time prescribed for the proofs, upon the ground that there is no valid contract of insurance, is a waiver of proofs of loss.

2. **Insurance, Fire—Title—Policy Provisions—Ownership.**

A vendee of land under an executory contract of purchase, who has paid a portion of the purchase price and entered into possession is an "unconditional and sole owner" in fee simple in respect to the usual clause in a policy of fire insurance relating to the title; and such does not avoid the policy on the house under a provision therein that the policy shall be void if the interest of the insured is other than unconditional and sole ownership of the fee simple title, in the absence of allegation of misrepresentation as to title and encumbrances.

3. **Same—Equity.**

In relation to the usual clause relating to the title of the insured in a fire insurance policy, equity treats that as done which ought to have been done, or the doing of which the vendor and vendee contemplated in the final execution and consummation of the contract as specifically executed; and in the absence of allegation of misrepresentation of title and encumbrances, a policy is not void on the ground that the insured, in possession, held under an executory contract of purchase.

4. **Deeds and Conveyances—Unregistered—Parties—Enforceable.**

An unrecorded bond for title is good and enforceable as between the original parties.

(342) APPEAL from *E. B. Jones, J.*, at September Term, 1909, of FORSYTH.

These issues were submitted to the jury:

1. Was the storehouse of the plaintiff insured in the defendant company on 6 March, 1908? Answer: Yes.

2. Was said house insured under policies Nos. 2206 and 2282, terms of which were like policy marked Exhibit A? Answer: Yes.

3. Was plaintiff the owner and had an insurable interest in the store building insured by the defendant and destroyed by fire? Answer: Yes.

4. What was the actual cash value of the building at the time of the fire? Answer: Five hundred dollars.

5. Did the plaintiff give notice to the defendant company, in writing, of the fire, and make proofs of the loss, as required by the terms of the policy? Answer: No.

6. Did the defendant company waive the giving of notice and making of proofs of loss, as required by the terms of the policy? Answer: Yes.

The court rendered judgment against defendant and it appealed.

Watson, Buxton & Watson for plaintiff.
A. H. Eller for defendant.

BROWN, J. This action is brought to recover of the defendant upon a policy of insurance issued by its agent and covering a certain house belonging to the plaintiff.

It is unnecessary to consider any questions relating to proofs of loss, as the defendant denies its liability, in any event, under the policy.

It seems to be well settled that a distinct denial by an insurance company of liability under a policy, after the loss and within the time prescribed for the proofs, upon the ground that there is no valid contract of insurance, is a waiver of proofs of loss, becase in such a case the proofs do not tend to induce the company to pay the loss, and they are therefore futile. *Ins. Co. v. Pendleton,* 112 U. S., 696; *Tayloe v. Ins. Co.,* 9 How. (U. S.), 390.

In the answer of the defendant there are no allegations of fraud or misrepresentations of fact or false warranty set up as a ground for avoiding the policy, but the defense is rested upon "the lack (343) of title in the plaintiff" (quoting from the answer), founded upon this clause in the contract of insurance: "This entire policy, unless otherwise provided by agreement, endorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional or sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

The undisputed facts are that plaintiff purchased the lot for $300 from M. A. Masten, and paid him one dollar and executed his note for $299, payable two years after date. Masten executed and delivered to plaintiff a valid bond for title, in due form, fully describing the property and containing this provision: "Now, therefore, if the said M. A. Masten, on receiving the balance of said purchase money, together with the interest thereon accrued (provided the same be tendered within sixty days after the maturity of the last of said bonds), shall execute and deliver to the said R. L. Jordan and his heirs a good fee simple deed to the aforesaid premises, free from all encumbrances, then this obligation shall be null and void; otherwise to remain in full force and effect. In testimony whereof, the said M. A. Masten has hereunto set her hand and seal, this 10 June, 1907."

The plaintiff erected at his own expense a frame store building on the lot, and had taken out with the defendant company two policies in the

sum of $250 each on said building, the policies being standard in form and without endorsement as to interest or title. At the time of the insurance the plaintiff held the bond for title and was in the exclusive possession of the property. Although the bond had not then been recorded, it is elementary that it was good between the parties, and as between them would be enforced.

The only question presented for our consideration is whether a vendee of land, occupying the same under an executory contract of purchase, on which he has paid a portion of the purchase price, and on which he has erected a storehouse building, is an "unconditional and sole owner" in fee simple, within the condition of a policy of insurance providing that it shall be void if the interest of the insured is other than unconditional and sole ownership of the fee-simple title. As before observed, there is no allegation in the answer that, at the time the contract was entered into, the plaintiff made false representations as to his title, encumbrances or the like, but the defense rests upon the theory that the title of the plaintiff is such that it avoids the policy, because it fails to meet its requirements in respect to title. That the plaintiff had an insur-
(344) able interest in the property is not questioned, but it is denied that he was an unconditional owner of the fee.

For the purpose of an insurance contract, this contention cannot be upheld. It has been settled adversely to the defendant by the courts as well as the text writers. The idea is that equitable ownership is, properly speaking, entire and sole ownership in fee, as regards the real purpose of the provision commonly used in insurance contracts on that subject.

Mr. Ostrander says: "A sells to B, who takes a contract of purchase, conditioned that, when certain payments are made, the former will execute to the latter a legal title. B becomes the sole and unconditional owner of the property when he enters into possession, under a contract of this character." Fire Insurance, sec. 63, and cases cited in notes.

The Supreme Court of Pennsylvania quotes the identical clause from a similar policy in a case exactly like this, and says: "In respect to the insurance, such purchaser is to be regarded as the entire unconditional and sole owner." *Ins. Co. v. Dunham,* 117 Pa. St., 460. The decisions upon this question are numerous and are all founded upon recognized equitable principles.

When, as in this case, the agreement is executory, the vendor covenanting to make title on payment of the purchase money at a future day, a court of equity treats that as done which ought to have been done, or which the parties contemplate shall be done, in the final execution and consummation of the contract as specifically executed.

The following cases will be found to be in point: *Loventhal v. Ins.*

Co., 112 Ala., 108; *Ins. Co. v. Kerr*, 129 Fed., 723; *Ins. Co. v. Crockett*, 7 La., 725; *Tuck v. Ins. Co.*, 56 N. H., 326; *Knop v. Ins. Co.*, 101 Mich., 359; *Baker v. Ins. Co.*, 65 Am. St., 807; *Ins. Co. v. Cox*, 98 Pa. Rep., 552; *Ins. Co. v. Rhea*, 123 Fed., 9; *Ins. Co. v. Erickson*, 111 Am. St., 419; *Evans v. Ins. Co.*, 118 Am. St., 1009; *Matthews v. Ins. Co.*, 115 Wis., 274; *Dooley v. Ins. Co.*, 58 Am. St., 26.

In this last case, wherein the title is similar, it is held that breach of the condition in a policy of fire insurance that the policy should be void if the assured was other than conditional or sole ownership, or if the subject of insurance was a building on ground not held by the assured in fee simple, would not prevent a recovery by the assured for loss where the application for a policy was an oral one and no intentional misrepresentation in regard thereto was made by the assured. (345)

Such was the conclusion reached in *Senis v. Ins. Co.*, 29 Fed., 490; *Ins. Co. v. Hughes*, 108 Fed., 497; *Hall v. Ins. Co.*, 32 Am. St., 497.

No error.

Cited: McIntosh v. Ins. Co., 152 N. C., 53; *Higson v. Ins. Co., ibid.*, 210; *Lancaster v. Ins. Co.*, 153 N. C., 290; *Watson v. Ins. Co.*, 159 N. C., 639; *Millinery Co. v. Ins. Co.*, 160 N. C., 135; *Lowe v. Fidelity Co.*, 170 N. C., 446.

BALFOUR QUARRY COMPANY AND AMERICAN STONE COMPANY v. WEST CONSTRUCTION COMPANY.

(Filed 24 November, 1909.)

1. **Pleadings—Demurrer—Admissions.**

Every demurrer directed to the incapacity of the plaintiff to sue, to the misjoinder of parties or causes of action, or to jurisdiction, admits the facts alleged for the purpose of the demurrer. *Merrimon v. Paving Co.*, 142 N. C., 556, cited and approved.

2. **Pleadings—Demurrer—Misjoinder—Parties—Causes of Action.**

When the complaint alleges that the defendant is indebted to each of the two parties plaintiff in different amounts for goods sold and delivered, in this case crushed rock for street purposes, under a contract with one of them, the other performing a part of the contract of the coplaintiff with the consent of the defendant, a demurrer for misjoinder of parties and causes of action is bad: (a) if the defendant were solely liable to one of the plaintiffs under his contract for both amounts, the joinder of the other plaintiff would be superfluous and harmless; (b) and, if he were responsible to both plaintiffs upon a joint contract, it would be bad, for both of them would be interested in both causes of action. The precedents upon this principle reviewed, discussed and applied by WALKER, J.

APPEAL by defendant from *E. B. Jones, J.*, at February Term, 1909, of ROWAN.

The facts are stated in the opinion of the Court.

Clement & Clement and Walser & Walser for plaintiff.
E. E. Raper for defendant.

WALKER, J. This action was brought by the Balfour Quarry Company and the American Stone Company against the West Construction Company to recover the sum of $2,113.84, the amount alleged to be due under a contract between the plaintiff and the defendant to furnish crushed granite or rock for the purpose of enabling the West Construction Company to perform a contract with the town of Lexington to macadamize certain streets in said town. The contract for furnishing the crushed rock was originally made by the town of Lexington with the Balfour Quarry Company, by which the quarry company con-
(346) tracted and agreed to furnish about 14,000 tons of the crushed rock, divided into different quantities, of specified sizes or quality. There were special provisions in the contract not necessary to be stated, as they are immaterial to the decision of the case. It is sufficient to say that the quarry company furnished a part of the stone itself and sublet, if we may use that term, a part of its contract to the construction company, by which the American Stone Company was permitted by the construction company to furnish the rest. There was correspondence, by letters, between the quarry company and the construction company with reference to the contract of the former company with the American company, in which the quarry company, by letter, dated 7 June, 1907, requested the construction company to ratify or confirm its contract with the stone company. To this letter the construction company replied as follows: "We can only confirm that part of your letter that this order was placed with the Balfour Quarry Company and that they have asked you to ship us, and as we wish to state that on all shipments you make us to Lexington, N. C., we will pay you at the rate named in your letter, of 90 cents per ton of 2,000 pounds of stone at quarry, and freight at 40 cents per ton. We can use all the stone that you can ship us, and would thank you to make prompt shipments, but you can readily understand that we have made a contract with the Balfour Quarry Company for all stone that we will need on this work, and could not recognize you in the matter or agree to any assignment of contract, as we could only hold the Balfour quarry people responsible; but, as stated to you before, we will make prompt settlement with you for all stone you can ship. Please bear in mind that in making shipments of this stone to us we wish you to make same in

gondola or bottom-dump coal cars, as we have secured a trestle in Lexington on which cars will be run out and dumped; so bear in mind that under no circumstances do we want flat-bottom cars. We trust that the above will be satisfactory to you."

There is no contention that the quarry company or the stone company failed to comply with their part of the contract, and there could not well be at this stage of the case, as compliance is alleged in the compaint; and the demurrer, as matter of law, admits the facts therein stated, for the purpose of passing upon the validity of the complaint, or, more concisely speaking, the question raised by the demurrer. As is so well said by our former associate, *Justice Connor,* in *Merrimon v. Paving Co.,* 142 N. C., 556, "Every demurrer directed to the incapacity of the plaintiff to sue, the misjoinder of parties or causes of action or jurisdiction, admits the facts alleged, for the purpose of the demurrer. Any other construction of the demurrer which did (347) not reach the merits of a controversy would make it a vain thing."

The complaint shows that there are two causes of action set forth—one for the recovery of the amount due by the defendant to the quarry company, and the other for the recovery of the amount due by the defendant to the other plaintiff, the American Stone Company; the amount due to the quarry company being $1,405.74, and to the American Stone Company, $708.10, as shown by itemized accounts, annexed as exhibits to the complaint.

The defendant demurred to the complaint upon the following grounds: "There is a misjoinder of parties plaintiff and also of causes of action, as follows: The first cause of action is in favor of the plaintiff, Balfour Quarry Company, against the defendant, in which the coplaintiff, American Stone Company, is in nowise interested, and to which the American Stone Company is an improper party. In the second cause of action there is set out a cause of action in favor of the American Stone Company, in which the coplaintiff, Balfour Quarry Company, is not interested and therefore not a necessary or proper party."

The court below overruled the demurrer, and the defendant appealed.

Our opinion is that Judge E. B. Jones, who presided at the trial, took the right view of the case and should be sustained in his ruling. The demurrer is predicated upon the contradictory notion that there was a contract between the defendant and the stone company, and that there was not. If there was a separate contract with the latter company which, by its terms or by clear legal intendment, released the quarry company and relieved it to the extent of the crushed rock to be furnished by the stone company, there might be some merit in the demurrer, because in that case there would be two distinct contracts—one by the

qarry company to furnish a part of the crushed rock, and the other by the stone company to furnish the remainder. But the letter of the defendant to the stone company, dated 11 June, 1907, sufficiently disposes of any such contention. By that letter it expressly refused to discharge the quarry company from liability or to substitute the stone company in its place. But if that letter is construed as making a joint contract between the quarry company and the stone company on the one side and the defendant on the other, the demurrer must necessarily fail,

(348) as *both* plaintiffs in that case would be interested in *both* causes of action, and consequently there would be no misjoinder of parties or causes of action. If the quarry company was responsible solely to the defendant for furnishing the rock, then there is no harmful misjoinder, as the joining of the stone company as a "superfluous" plaintiff would be immaterial and could in no way prejudice the defendant in the trial of the case. It would seem vain and idle to attempt the demonstration of these propositions by argument or the citation of authorities, but we will refer to a few of the precedents in this Court. *Green v. Green,* 69 N. C., 294; *Warrenton v. Arrington,* 101 N. C., 109; *Perkins v. Berry,* 103 N. C., 131; *Abbott v. Hancock,* 123 N. C., 99. In *Green v. Green* the correct principle is substantially stated by *Pearson, C. J.,* as follows: A defect of parties is ground of demurrer, but too many parties is mere "surplusage," and is easily cured by a judgment for costs or a disclaimer. A nonjoinder of one who is a necessary party is fatal, for he will not be bound by the judgment; this affects the merits, but a misjoinder of one who is not a necessary party, and whose interests, therefore, cannot be prejudiced by the judgment, is clearly harmless. It was in this case that the great Chief Justice expressed his earnest desire to decide every case according to the very right of it, without any reference to the nature of it or to those who may be concerned in its results. What he said is worthy of repetition here: "This Court is willing at all times, before the opinion is filed, to avail itself of the aid of the members of the bar in 'the search after truth,' by briefs filed, presenting a new view, based on the facts of the case, or a reference to additional authorities directly in point." And again: "We take this notice of the point made by the defendant's attorney, out of the great respect we have for his learning and ability, and with the hope that it will be an admonition to counsel hereafter not to allow their professional zeal to result in overlooking the facts of the case in order to present 'a nice point of law' to the Court." We add to this, although not specially applicable to this case, that counsel will render their clients a great service if, at the very beginning of their briefs, especially the appellant's counsel, they will make a fair and succinct statement of the case, so that this Court may see almost at a glance what

are the issues of law between the parties and the more understandingly listen to the oral argument. Such a statement also greatly lessens the labors of the members of this Court in hearing, considering and deciding the case. Our work here is already very hard and onerous, at the best, due largely to the difficulty in extracting the material facts from the records. This can to some extent be remedied by a careful observance, in preparing briefs, of the positive rule of this Court (349) requiring such a statement. It must not be understood by what we have said that the latter words of *Chief Justice Pearson* quoted by us, though not literally, apply to the defendant's counsel in this case, as they do not, for no more diligent and painstaking or more fair or frank an attorney has ever appeared before us. He is always true and loyal to his client, "flinging away the scabbard and fighting for a funeral," to be sure, when the battle line has been formed, but he is also equally true and loyal to this Court. "He brings nothing false before it," but tries his cases upon their real merits. And this tribute extends to members of the bar generally.

Returning to the precise question involved, if the stone company acquired any interest in the contract, as a partner with the quarry company, by virtue of the correspondence between the parties, we must still decide that the two causes of action were properly joined, as the interests of the plaintiffs as against the defendant were joint and not several. We collect here—and hope it will be of some service to those who may hereafter bring actions of this kind—some of the decisions upon this important subject. The writer of this opinion and *Judge Connor,* our former associate, did not agree with their brethren, at the time some of the decisions were made, in all that is said in the cases cited, but I will abide by what the majority of the Court have declared to be the law, for that is my duty. The law as thus declared by our predecessors may be thus stated:

1. If the grounds of the bill be not entirely distinct and wholly unconnected, if they arise out of one and the same transaction or series of transactions, forming one course of dealing and tending to one end, if one connected story can be told of the whole, then the objection cannot apply. *Bedsole v. Monroe,* 40 N. C., 313.

2. The plaintiff may unite in the same complaint several causes of action when they arise out of the same transaction or transactions connected with the same subject of action, the purpose being to extend the right of the plaintiff to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which the plaintiff may have against the defendant arising out of the same *subject* of action, so that the court may not be forced "to take two bites at a cherry," but may dispose of

the whole subject of controversy and its incidents and corollaries in one action. *Hamlin v. Tucker,* 72 N. C., 502.

(350) 3. We are of the opinion that the bill is in no sense multifarious; it is true that it embraces the claims of both companies, but their interests are so mixed up in all these transactions that entire justice can scarcely be done without a union of the proprietors of both companies; and if they had not been joined, the bill would have been open to the opposite objection that all the proper parties were not before the court, so as to enable it to make a final and conclusive decree, touching all their interests, several as well as joint. *Oliver v. Peall,* 3 How., 33.

4. We find it held that if the grounds be not entirely distinct and unconnected, if they arise out of one and the same transaction or series of transactions, forming one course of dealings and all tending to one end, if one connected story can be told of the whole, the objection of multifariousness does not arise. Story Eq. Pl., sec. 271; *Bedsole v. Monroe,* 40 N. C., 313. And if the object of the suit is single, and it happens that different persons have separate interests in distinct questions which arise out of a single object, it necessarily follows that such different persons must be brought before the court in order that the suit may conclude the whole subject. *Young v. Young,* 81 N. C., 91; *Salvidge v. Hyde,* 5 Mad., 138.

5. The several causes of action are such (as will be hereinafter shown) that they may be and should be united, not only under the provision of the Code, but according to the practice in former equity proceedings. As to the cause assigned for misjoinder of causes of action, section 126 of the Code provides that the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, when they all arise out of the same transaction or transactions connected with the same subject of action; and subdivision 7 of the section requires that the cause of action "must affect all the parties to the action." It was evidently the purpose of the Legislature in enacting this section to prevent a multiplication of actions by uniting in the same action different causes of action, where they might be joined without subjecting defendants to the trouble and expense of making different and distinct defenses to the same action. No general rule has been or can be adopted with regard to multifariousness. It is most usually a question of convenience, in deciding which the courts consider the nature of the causes united, and if they are of so different and dissimilar a character as to put the defendant to great and useless expense they will not permit them to be litigated in the same records; but where the different causes of action are of the same character and between the same parties

plaintiffs and defendants, and none other, and no additional ex- (351) pense or trouble will be incurred by the joinder of the several causes, the courts, in the exercise of a sound discretion, on the ground of convenience, usually refuse to entertain an objection to the joinder. The Code, sec. 267, subdiv. 1, provides that causes of action may be joined when they arise out of the same transaction or transactions connected with the same subject of action. This section of the Code, we do not think, makes any substantial change in the rule of practice which obtained before the adoption of the Code in the courts of equity with regard to multifariousness. Whatever effect it may have had has been to enlarge the right of uniting in one action different causes of action *King v. Farmer,* 88 N. C., 22.

6. Suppose a demurrer for misjoinder (of parties) were sustained, the court could merely order the action divided into two actions, and then on the trial of each of these actions the same witnesses would be introduced, the same transaction proved and the same questions of liability would arise, thus doubling the time and expense of the litigation, without possible benefit to any one. It is to prevent this very state of facts that the Code, sec. 267, expressly provides that "the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, when they arise out of the same transaction or transactions connected with the same subject of action." *Cook v. Smith,* 119 N. C., 350. This is clearly the law.

In this case there is the same subject of action throughout—that is, in the plaintiff's complaint, calling upon the defendant to respond in damages to his claim to recover for the price of the stone furnished the defendant under the contract. If the defendant's contention had been well founded, the remedy would have been either to dismiss or simply to divide the action, as the nature of the misjoinder required, which would have caused the prosecution of two actions, with increased cost to the parties and the public as well, with no benefit apparently to the defendant. The joinder of causes of action and parties in this action is fully justified by the precedents and is in the interest of the full and fair investigation of plaintiff's claim against defendant, with as little cost as possible. *Fisher v. Trust Co.,* 138 N. C., 224.

We are unable to see what the defendant can gain, in any conceivable way, even if his demurrer should be sustained. It is better for the defendant that it should be overruled and the case tried before the jury upon its actual merits, if it has any real defense. We have discussed this question somewhat at length, because of the frequency with which similar matters have been brought before us, and in the (352) hope that the principles discussed and the many authorities

cited may tend in some degree to a more perfect understanding of the spirit of the Code as to the joinder of parties and causes of action.

For the reasons stated the judgment of the court must be

Affirmed.

Cited: *Lee v. Thornton,* 171 N. C., 213.

A. S. CRAVEN AND A. S. CRAVEN, NEXT FRIEND *v.* THE WORTH MANUFACTURING COMPANY.

(Filed 24 November, 1909.)

1. **Master and Servant—Employee, Inexperienced—Latent Danger—Negligence.**

The plaintiff is liable in damages for the act of the boss of his lapper room in directing an inexperienced minor, an employee over whom he had charge, to do certain work dangerous to him without further instructing him as to his duty, or as to dangers incident to it which would not be observable by an inexperienced, untrained workman.

2. **Nonsuit—Defendant's Evidence.**

A motion to nonsuit predicated largely on defendant's own evidence will be denied.

APPEAL from *E. B. Jones, J.,* at March Term, 1909, of RANDOLPH.

Action to recover damages for injuries caused by alleged negligence on the part of the defendant company. The action was brought by T. W. Craven, a minor, suing by next friend, for injuries done to himself, and by T. W. Craven, the father, for damages by reason of loss of services during the minority of the son, and no objection was made by defendant to such joinder. The jury rendered the following verdict:

1. Was plaintiff T. W. Craven injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff contribute to his own injury by his own negligence? Answer: No.

3. What damage, if any, is plaintiff T. W. Craven entitled to recover? Answer: Nine hundred dollars.

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

(353) *Hayes & Bynum and R. H. Dixon for plaintiff.*

Hammer & Spence and Morehead & Sapp for defendant.

PER CURIAM: There is no reversible error appearing in this case. The evidence on the part of plaintiff tended to show that T. W. Craven, a minor (between sixteen nad seventeen years of age, and without experience in this work, was sent by his foreman and boss into the lapper room to learn to run the lapper, and for that purpose was placed under one Wiley Spivey, the boss of the lapper room; that soon after going into the room plaintiff was directed by Spivey to clean off the rollers, without further instructions as to his duty or the dangers incident to it, these dangers not being observable by an inexperienced, untrained workman; that in the effort to carry out the order, and owing to his lack of training and failure to receive proper instructions, plaintiff's hand was caught in one of the machines and seriously and permanently injured.

This testimony brings plaintiff's case within the principles declared in *Chesson v. Walker,* 146 N. C., 511, and *Avery v. Lumber Co.,* 146 N. C., 592, and other cases of like tenor. The objection chiefly assigned by defendant was the failure on the part of his Honor below to sustain his motion of nonsuit, but this motion was predicated largely on the defendant's evidence, which the jury have rejected. Under a charge free from error they have accepted the plaintiff's version of the occurrence, and, on the authorities cited, plaintiff's cause of action is clearly made out.

There is no error, and the judgment below is

Affirmed.

Cited: *Horne v. R. R.,* 153 N. C., 240; *Dunn v. Lumber Co.,* 172 N. C., 136.

S. A. COPELAND v. WILLIAM FOWLER.

(Filed 24 November, 1909.)

1. Contract, Breach of—Note—Maturity—Suit, When Brought—Procedure.

Under evidence tending to show that defendant agreed to give plaintiff a certain amount to boot in a horse trade, in the form of a note, payable at a time subsequent to the action, and to secure it with a chattel mortgage on the horse thus obtained, which he put off from time to time and failed to do, finally selling the horse to another, it is error to sustain defendant's motion to nonsuit upon the evidence, on the ground that suit was brought before the maturity of the note. Upon the breach of the agreement to give the note and security the action presently lies.

2. Same—Measure of Damages.

For the breach of an agreement to give a note, secured by a chattel mortgage for the balance due plaintiff on a trade, the measure of damages, in an action thereon brought prior to the time the note was to have matured, will ordinarily be the amount indicated by the contract,—if the note was to bear interest, the amount and interest; if not, the present value of the note with interest thereon from time of suit.

3. Contract, Breach of—Note—Maturity—Suit, When Brought—Arrest and Bail—Procedure.

The ancillary process of arrest and bail on an affidavit charging fraud and deceit, on the part of defendant, in the contract by which plaintiff's property was obtained, does not change the nature of the plaintiff's action brought for damages for breach of the contract, and such course is allowed under Revisal, 727, subsec. 4; but on recovery had there can be no imprisonment under final process unless the issue of fraud has been expressly submitted to and determined by the jury against the defendant.

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

(354) APPEAL from *Long, J.*, at March Term, 1909, of DURHAM.

Action heard on appeal from a justice's court. The evidence of plaintiff tended to show that, in October, 1907, the plaintiff exchanged a mare for defendant's mule, and, as a part of the trade, defendant agreed to give $65 to boot and to execute his note therefor, payable 1 November, 1908, and to execute a chattel mortgage on the mare, and some additional personal property to secure the same; that the exchange was made at plaintiff's house in the country, and the understanding was that defendant was to come to Durham in the course of a few days and give the promised security; that defendant failed to comply with this agreement, and put plaintiff off from time to time on different pretexts, until the spring of 1908, when plaintiff ascertained that defendant had disposed of the mare, and instituted the present suit, laying his damage at $65, the promised boot.

There was evidence on the part of defendant contradicting that of plaintiff. At the close of the testimony, the court, on motion, dismissed the action as on judgment of nonsuit; the reason indicated in the assignment of error being that as the boot was not to be due till 1 November, 1908, the action had been prematurely brought.

Plaintiff excepted and appealed.

Foushee & Foushee for plaintiff.
Bryant & Brogden and Aycock & Winston for defendant.

(355) HOKE, J., after stating the case: There was error in the order dismissing the case as on judgment of nonsuit, arising, if the

assignment of error correctly indicated the reason for the ruling, from a misconception of the nature of plaintiff's demand. According to plaintiff's version, the contract between these parties was not confined to an exchange and $65, payable 1 November, 1908, but contained the further stipulation that defendant was to secure this boot by a chattel mortgage on the mare and additional personal property; and plaintiff's evidence further tended to show that defendant has failed and refused to comply with the agreement to give the chattel mortgage, and that he has put it out of his power to make full compliance by disposing of the mare to some third party. If these facts are accepted by the jury, the authorities are all to the effect that an action presently lies, and that ordinarily the damages will be the amount indicated by the contract —if the note was to bear interest, the amount and interest; if not, then the present value of the note, with interest thereon from the commencement of the suit. *McRae v. Morrison,* 35 N. C., 46; *Young v. Dalton,* 83 Tex., 497; *Rinehart v. Olwine,* 61 Pa. St., 157; *Hanna v. Mills,* 21 N. Y., 90; Bishop on Contracts, sec. 827; Clark on Contracts, page 448.

In *Rinehart v. Olwine* it was held: "When goods are sold on credit, the vendee to give his note, which he refuses to do after the goods are delivered to him, an action may be maintained for a breach of the contract before the expiration of the credit, in which the measure of the contract is the price of the goods."

And in *Hanna v. Mills, supra,* the Court held as follows: "Where goods are sold, to be paid for by a note or bill, payable at a future day, which is not delivered according to the terms of sale, the vendor may sue immediately for a breach of the special agreement and recover as damages the whole value of the goods, allowing a rebate of interest during the stipulated credit. He cannot, however, maintain *assumpsit* on the common counts until the credit has expired."

Nor is this position in any way affected by the fact that plaintiff has sued out the ancillary process of arrest and bail on an affidavit charging fraud and deceit on the part of the defendant in the contract by which plaintiff's property was obtained. This does not change the nature of the action at all, which is for a breach of the contract; and, on the facts indicated in the affidavit, the course pursued comes within the express provisions of the statute (Revisal 1905, sec. 727, subsec. 4), in part, as follows: "When defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought." (356)

It may be well to note that, in cases of this kind, our decisions are to the effect that, on recovery had, there can be no imprisonment under final process, unless the issue of fraud has been expressly submitted and determined by the jury against the defendant. Pell's Revisal,

sec. 625, and authorities cited, notably *Ledford v. Emerson,* 143 N. C., 527.

For the error indicated, the order of nonsuit will be set aside.

Reversed.

MANNING, J., did not sit.

P. W. WHITE, ADMR. v. THOMASVILLE LIGHT AND POWER COMPANY.

(Filed 24 November, 1909.)

1. Electricity—Defects, Employee to Repair—Negligence, Rule of.

An electric company does not owe the same duty to a competent workman employed to remedy a dangerous defect in its system as it does to the public, its patrons or its ordinary employees, in respect thereto; and when such employee is killed while thus engaged, it is error for the trial judge, in an action by his administrator for damages for the negligent killing, to try the case upon the theory that the same principles as to negligence apply.

2. Same—Assumption of Risk—Contributory Negligence.

An electric lighting company is not liable for damages for the death of its employee caused by a current of electricity from a defect in its system of wires which the employee, competent and properly instructed, and in the course of his employment, had undertaken to remedy, there being no suggestion or evidence that defendant had failed or refused to furnish proper implements or appliances with which to do the work and no negligence supervening on part of defendant, and if, upon competent evidence, the jury find the facts so to be, his recovery would be barred, for in undertaking to do the work the plaintiff assumed the risk; and if he did not avail himself of the appliances furnished, he would be guilty of contributory negligence.

3. Evidence—Nonsuit—Defendant's Evidence.

When evidence in defense is necessary to be considered in passing upon defendant's motion to nonsuit upon the evidence, the motion will not be sustained.

APPEAL from *Jones, J.,* at April Term, 1909, of DAVIDSON.

Action to recover damages for alleged negligent killing of intestate. The jury rendered the following verdict:

1. Was the plaintiff's intestate's death caused by the defend- (357) ant's negligence? Answer: Yes.

2. Did the plaintiff's intestate contribute to his own injury? Answer: No.

3. What damage, if any, is the plaintiff entitled to receive? Answer: Five thousand dollars.

There was judgment on the verdict for plaintiff, and defendant appealed, assigning for error several exceptions noted during the progress of the trial, and to the judge's charge.

E. E. Raper and McCrary & McCrary for plaintiff.
A. F. Sams and Watson, Buxton & Watson for defendant.

HOKE, J., after stating the case: There was testimony on the part of the defendant tending to show that the defendant company owned and operated an electric plant in the town of Thomasville, N. C., and was engaged in supplying the town and citizens of the community with light and power; that just preceding the occurrence several Tungsten lamps had been burned out, indicating a defect somewhere in the system, very likely caused by a leakage from the power to the arc-light wire; and on 6 June, 1908, the intestate, having been employed for the purpose, was sent by the company to discover and repair the defect and replace one of the lamps, and while so engaged was killed by an electric current passing through his body from the arc-light wire to the ground.

There was no evidence that the intestate was an untrained or inexperienced hand; on the contrary, the testimony showed that he had received instructions and had much practical experience in the work, and had given intelligent instructions to other employees who were less careful or not so well informed.

Speaking to this question, the witness John W. Lambeth said: "White began with us when we organized and started to build the plant; was working for us on the day he was killed. He had not worked all the time during that period, but had a majority of the time. He was called our main lineman—a foreman—and had charge of the construction work under Mr. Bryant, the general manager. I had a small plant at the factory, and White kept it up for me for three years. He did not work all the time, but when I had any trouble he would help me out."

And B. W. F. Bryant, electrical engineer and general manager, testified: "I had instructed him and the other men under him several times; he had instructed the other men to be careful—men that were less careful than he."

Nor was there any suggestion or evidence tending to show lack of proper appliances with which to do the work; on the contrary, (358) all the evidence was to the effect that safe and proper appliances were furnished by the company; nor was there evidence tending to show any negligence on the part of the company which arose or supervened after the intestate had undertaken the work or while he was engaged in it; and if this view is accepted, and the evidence believed by the jury, no recovery can be had by plaintiff, for the tragedy resulted

either from the very defect he was employed and sent to remedy, or by his failure to use the appliances furnished for his protection, having been properly instructed concerning them; and in either event no responsibility would attach to the company. In the one case the intestate assumed the risk, and in the other he would be guilty of contributory negligence.

This doctrine of assuming the risks incident to defective machinery which a competent employee is expressly engaged to repair depends upon the principle that while the owner may, under certain circumstances, rest under obligations and duties to the public, or its patrons, or to its ordinary employees, by reason of defects importing danger to them, he owes no such duty to a competent workman who is employed expressly to discover and repair the defect, and is very well brought out in *Spinning Co. v. Achord,* 84 Ga., 14-16. In that case *Bleckley, C. J.,* thus speaks to the question presented: "While it is the duty of a master to furnish his servant safe machinery for use, he is under no duty to furnish his machinist with safe machinery to be repaired, or to keep it safe whilst repairs are in progress. Precisely because it is unsafe for use, repairs are often necessary. The physician might as well insist on having a well patient to be treated and cured as the machinist to have sound and safe machinery to be repaired. The plaintiff was called to this machinery as infirm, not as whole. An important part of his business was to diagnose the case and discover what was the matter. If he failed in this branch of his profession, it was either his fault or his misfortune. So far as appears, no one knew more of the state and condition of the machinery at the time than he did, and the object of calling him in the room was that he might ascertain the cause of the trouble and apply the remedy."

Other decisions by courts of high authority uphold and apply the principle. *Moore v. R. R.,* 167 Pa. St., 493; *Anglin v. R. R.,* 60 Fed., 553. And Mr. Thompson, in his Commentary on Negligence, sec. 4617, states it as an accepted principle, thus: "From the foregoing, it
(359) may easily be concluded that an employee assumes the risk of injury from defects in premises, machinery, mechanical contrivances or appliances which he is employed to repair or which it is his duty in the course of his employment to repair."

This well-recognized principle was entirely ignored in the trial, and the question of defendant's responsibility has been determined solely in reference to its duties and obligations to the public or to its ordinary employees. It would not be proper to sustain defendant's motion to nonsuit because the evidence referred to comes from defendant and was offered by it in support of its defense, and there was evidence of negligence *ultra* arising on the testimony introduced by plaintiff, but the

point is sufficiently raised in several exceptions to the judge's charge, and for the error indicated there must be a

New trial.

Cited: *Lane v. R. R.*, 154 N. C., 96; *Lloyd v. R. R.*, 166 N. C., 31; *Bunn v. R. R.*, 169 N. C., 652.

THE BANK OF SAMPSON v. H. B. HATCHER ET AL.

(Filed 1 December, 1909.)

1. **Negotiable Instruments—Endorsee—"Without Recourse"—"Due Course."**

An endorsee of a negotiable instrument is not deprived of the position as holder in due course by the fact, and that alone, that said endorsement is in form "without recourse."

2. **Same—Vendor and Vendee—Equities—Notice.**

An endorsee for value and "holder in due course" of a negotiable instrument given for the purchase price of goods under an executory contract is not subject to equities and defenses existent between the vendor and vendee of which he had no knowledge or notice, and when he was not interested in the goods or the transaction concerning them, otherwise than as such endorsee.

3. **Same—Infirmities—Interpretation of Statutes.**

An endorsee will not be affected with notice of an infirmity in a negotiable instrument taken from the payee without recourse and arising from a breach of warranty in an executory contract between the original parties, when it does not appear that he was aware of its terms, or there was nothing in the contract restricting the negotiability of the note or indicating fraud or imposition or an existent breach; and this is true though the note or instrument may contain on its face an express statement of the transaction which gives rise to the instrument. Revisal, 1905, sec. 2153. *Howard v. Kimball*, 65 N. C., 175, cited and commented on.

APPEAL from *W. R. Allen, J.*, at May Term, 1909, of SAMP- (360) SON.

Action to recover the amount of a promissory note for $144. On the trial it appeared in evidence for plaintiff that on 16 May, 1907, the defendant executed the note in question for $144 to C. S. Lothrop & Co., payable on 25 November, 1907, with interest at six per cent., for value received, and on 22 May, 1907, the same was endorsed by said payees "without recourse" to the plaintiff bank at a discount of ten per cent.

In the justice's court the defendant filed a written answer, admitting the execution of the note and its endorsement for value to plaintiff at the time stated, and alleged, by way of counterclaim, in effect, that the note

was procured by false and fraudulent representations on the part of the payees, of which the plaintiff bank was cognizant at the time of the endorsement. The defendants alleged, further, that the note was given in a transaction in which defendants had bought from payees the right to sell a "safety sash lock," and that there had been a breach of warranty as to the value and salability of such lock, causing damage, and that the damage incident to such breach was available against the plaintiff bank, who was associated in interest with the payees in the contract and had taken part therein.

In support of their counterclaim, the defendants offered testimony tending to show that C. S. Lothrop & Co., payee, held a contract with the Nickel Manufacturing Company, of Illinois, to manufacture the safety locks, and said company had given an accompanying guarantee that the locks would be manufactured "as per sample and be delivered in perfect working order," and to furnish same as they would be ordered by agents, at the contract price of $2 per dozen. Said payees, holders of such contract, had joined in this stipulation, had sold to defendants the exclusive right to sell said lock in the county of Northampton, and, in connection with other agents, to sell the same in Sampson and other counties, and agreed that for every sixty dozen of locks ordered the defendants should have control of an additional county, etc.; that defendants executed the note sued on in pursuance of this contract, and some time thereafter, to wit, in June or July following, had ordered a quantity of the locks, and, having procured a number of agents, endeavored to sell same. One of defendants, testifying, said that the sample showed a good, well-made, workable lock, but the goods sent were made of inferior material, rough moulded, not smooth, weak spring, would not work, bind, and would not hold the windows, and were worthless and unsalable, and all of them had to be filed before they would spring; that the agents had to stop, and the locks ordered were left on plaintiff's
(361) hands.

It was further agreed upon, as facts relevant to the inquiry, that said contract was delivered to the defendants at the time the note was executed, and as a part of one transaction; that plaintiff bank knew of this fact and of said contract at the time it took the note; that the transaction between defendants and a member of the firm of Lothrop & Co., took place in the law office of H. A. Grady, who was also vice-president of the bank. The said H. A. Grady and the cashier of the bank had a similar contract with the payees, and they had both advised defendants that they thought it was a good thing; that the vice-president and cashier were on the discount committee of the bank, and had passed upon this note; that the note in question was written on a form of the bank, a number of which were in the office of H. A. Grady at the time, and

was signed in the office of said H. A. Grady; that an arrangement had been made with plaintiff to discount at ten per cent all these notes by Lothrop & Co., and that these payees left the State on 25 May, 1907, and had not since returned. There was also testimony to the effect that H. A. Grady and the cashier had made inquiry and received assurances to satisfy them of the standing and solvency of Lothrop & Co., and there was no evidence that this information was incorrect.

At the close of the testimony, and on the additional facts agreed upon, the court charged the jury, if they believed the evidence, they would render a verdict for plaintiff. Verdict for amount of the note and interest. Judgment on the verdict, and defendant excepted and appealed.

Faison & Wright and F. R. Cooper for plaintiff.
George E. Butler for defendant.

HOKE, J., after stating the case: There was no evidence tending to establish any breach of contract at the time plaintiff became endorsee for value of the note sued on, the testimony showing that the locks were not ordered by defendant until June or July following, and the defects complained of were not disclosed until some time thereafter. Nor was there any testimony amounting to legal evidence to show that the plaintiff bank was interested with the payees in their transaction with defendants, otherwise than as endorsees of the notes, nor to show fraud on the part of the bank in connection with the matter, or any knowledge or notice of it. On the contrary, while the trade was made in the law office of H. A. Grady, Esq., who was at the time vice-president of the bank, it appears that said Grady and the cashier of the bank had made a contract with Lothrop & Co. similar to that of defendants, (362) and had taken the precaution to inquire as to the business standing and solvency of the payees, and had received assurances that both were good, and there was nothing offered to show that these assurances were untrue.

There are several well-considered decisions of the Court which support this view of the facts in evidence, among others, *Farthing v. Dark,* 111 N. C., 243; *Applegarth v. Tillery,* 105 N. C., 407; and our statute on the subject (Revisal, sec. 2205) is conclusive:

2205. Actual Knowledge Necessary to Constitute Notice of Infirmity. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts, that his action in taking the instrument amounted to bad faith.

It has further been held with us (*Evans v. Freeman,* 142 N. C., 61) that the form of the endorsement, "without recourse," does not affect

the question, and the defense indicated in the counterclaim can only be sustained, if at all, on the ground that at the time of the endorsement the plaintiff bank was cognizant of the fact that defendant's obligation arose out of an executory contract and was aware of its terms, and when there was nothing in such contract restricting the negotiability of the notes nor to indicate fraud or imposition or an existent breach; and the correct doctrine is against the defense suggested, on the principle stated and upheld in *Mason v. Cotton Co.,* 148 N. C., 492. Even when such a notice appears on the face of the note, the authorities are against defendant's position. *Siegel v. Bank,* 131 Ill., 569; *Ferriss v. Tarbell,* 87 Tenn., 386; *Bank v. Barrett,* 38 Ga., 126.

The only decision we find which tends to support a contrary view is one in our own Reports (*Howard v. Kimball,* 65 N. C., 175). An examination into the facts of that case will disclose that the assignee of a note which expressed upon its face that it was given as purchase money of a certain tract of land not only had actual notice of the defect of title at the time he purchased but he had taken a deed for such defective title from the original vendor, and held same, to be conveyed to the vendee when the note was paid. The case, therefore, is undoubtedly well decided; but, in so far as the opinion gives countenance to the position that a defect of title is available against an endorsee for value of a note for the purchase money, from the fact, and from that alone, that the note on its face is expressed to be for the purchase money
(363) of land or a given tract of land, the case is not in accord with the better-considered decisions. As an authority for such a position, it was in effect disapproved by a subsequent decision of this Court, in *Bank v. Michael,* 96 N. C., 53, in which a note of that kind was held to be "negotiable"; the term "negotiable" being used in the sense that an endorsee for value, without notice, *ultra,* became the owner of the note, unaffected by the equities and defenses existent between the original parties to the contract.

Our present statute on the subject would seem to put the matter at rest (Revisal 1905, ch. 54, sec. 2153). This, being one of the sections defining what constitutes negotiability of notes, provides:

2153. What Promise Unconditional. An unqualified order or promise to pay is unconditional, within the meaning of this chapter, though coupled with (1) an indication of a particular fund, out of which reimbursement is to be made or a particular account to be debited with the amount, or (2) *a statement of the transaction which gives rise to the instrument.* But an order or promise to pay out of a particular fund is not unconditional.

In the charge of the court and in the trial there was

No error.

Cited: *Sampson v. Barbery,* 152 N. C., 278; *Myers v. Petty,* 153 N. C., 468; *Bank v. Brown,* 160 N. C., 24; *Bank v. Branson,* 165 N. C., 352.

E. T. BILLINGS v. WESTLY JOINES.

(Filed 1 December, 1909.)

1. **Judgments, Irregular—Irregular Process—Justice of the Peace—Procedure.**

To set aside a judgment of a justice of the peace by default for irregularity upon the ground of irregular service of summons, the complaining party must proceed in due time to move before the justice to that end.

2. **Judgments—Executions—Lands—Purchase Price—Homestead Exemption.**

A judgment debtor cannot claim his homestead exemption in lands upon which execution has been issued under a valid judgment on his note given for their purchase price and so certified in the transcript docketed in the Superior Court.

3. **Judgments Set Aside—Fraud—Allegations Necessary.**

To invalidate a judgment for fraud it is necessary to allege the facts constituting the fraud with sufficient certainty and fullness to apprise the opposing party of what he is called upon to answer; and in an action to restrain an execution issued thereunder, the mere allegations that the judgment is fraudulent, illegal and void, and that the transcript execution and levy and all other proceedings are illegal, are insufficient.

APPEAL by defendant from *Councill, J.,* at August Term, 1909, (364) of WILKES.

Action to restrain the sale of certain lands under execution by the defendant, heard upon motion to continue the injunction to the final hearing. The court continued the restraining order, and defendant appealed.

The facts are stated in the opinion of the Court.

Hackett & Gilreath for plaintiff.
W. W. Barber for defendant.

BROWN, J. The facts upon which the injunction is based are about as follows: In March, 1905, the defendant obtained judgment against the plaintiff for the balance due upon a note alleged to have been given for the purchase money of the land, the selling of which has been enjoined.

Plaintiff appealed to the Superior Court, and his appeal was dismissed. The plaintiff now alleges that the appeal was dismissed at the instance of the defendant, who sent plaintiff word not to attend court, as he should not attend, and that by means of this fraud practiced upon him defendant procured the dismissal of plaintiff's appeal. The latter made no move to have the order of dismissal set aside.

This feature of the case is rendered wholly immaterial by the fact that the defendant, on 18 March, 1907, commenced another action against plaintiff upon the same debt and as set out in the summons for "the sum of $76.20 due for former judgment and demanded by said plaintiff, which is for the purchase money of a tract of land in Trap Hill Township, N. C."

The record shows that this summons was returnable at the justice's residence on 27 March, 1909, at 3 p. m., and that it was duly served on plaintiff by a deputy sheriff. Judgment was rendered for Joines, plaintiff therein, against Billings, and no appeal was taken.

In his affidavit Billings admits that while he was waiting at Trap Hill, in pursuance of the notice given him by the deputy sheriff, the defendant, Joines, was up at the justice's residence, and took judgment against him by default.

The summons was returnable at the residence of the justice in Trap Hill Township, and plaintiff should have appeared there and made defense, if he had any.

Plaintiff admits that he had notice of the action, and that it
(365) was given him by the officer. If there was any irregularity in the service of the summons, and the judgment by default was in consequence irregular, he should have proceeded in due time to move before the justice to set it aside. The record is regular and the judgment is valid on its face.

On 29 March, 1907, a transcript was duly docketed in the Superior Court, reciting, as it should, that the judgment was rendered for the purchase money of the tract of land described in the transcript. Execution was issued in due form and course, and it is this execution the plaintiff seeks to enjoin.

Plaintiff, in his affidavit, does not attempt to set up a defense to defendant's judgment even if he could do so at this late day and in this manner. He does not even deny that the note was given for purchase money of the land, or that he went into possession under a contract of purchase. It is plain that, upon this record, plaintiff is not entitled to a homestead in the land. It is true that in one of his affidavits the plaintiff avers "that he is informed and believes the aforesaid second judgment is fraudulent, illegal and void, and that the transcript, execution, levy and all other proceedings are illegal," but he sets out no facts whatever

upon which to base his allegation of fraud. "It is no sufficient averment to allege in general terms that a judgment was procured by fraud; but the facts constituting the fraud must be set out with sufficient certainty and fullness to indicate the defense and apprise plaintiff of what he is called upon to answer." *Mr. Justice Hoke,* in *Mottu v. Davis, ante,* 237.

We are of opinion that the court below erred in granting the injunction, and the order is therefore

Reversed.

R. W. WARD v. HARGETT, ADMINISTRATOR, ET AL.

(Filed 1 December, 1909.)

1. Bankruptcy—Trustee—Title Upon Adjudication—Location of Property.

On an adjudication of bankruptcy followed by subsequent appointment of trustees, the property of a bankrupt available for distribution among his creditors and situate anywhere within the United States or any one of them, passes to such trustees as of the date of the adjudication.

2. Same—Liens—Preferences Avoided.

After an adjudication of bankruptcy any and all attempts by an existing creditor to obtain within the United States an advantage or to secure a lien which would result in a preference, is of no avail; and where such attempt is made by means of court process, State or Federal, the same will be avoided on timely and proper application on the part of the trustees.

3. Same—Procedure—Attachment Vacated.

In this case, after the adjudication of the debtor as a bankrupt in the State of New York, the plaintiff instituted his action here to recover judgment for the amount of a note he held against the debtor, and when the summons was issued he levied an attachment upon real estate of the debtor situated within the county, and caused the summons and warrant of attachment to be served by publication. After the levy of the warrant of attachment the petitioners filed their petition showing that they were the duly appointed and qualified trustees in bankruptcy of the estate of the creditor: *Held,* the procedure of the trustees was appropriate, and that the attachment should be vacated.

4. Bankruptcy Laws—Amendment—Adjudication—Registration—Title.

The amendment to the Bankruptcy Act of 5 February, 1903, directing the trustee to file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded, in every county where the bankrupt holds real estate not exempted from execution, etc., is directory only and does not affect the principle that the bankrupt's title passes by operation of law to the trustees in bankruptcy as upon the date of his adjudication.

(366) APPEAL from *W. R. Allen, J.*, at Spring Term, 1909, of ONSLOW.

Motion by trustees in bankruptcy to dissolve an attachment. The relevant facts are as follows:

On 25 April, 1908, a petition in involuntary bankruptcy was filed against Thomas A. McIntyre in the District Court of the United States for the Southern District of New York, and on 21 May, 1908, the said Thomas A. McIntyre was adjudged a bankrupt, and the petitioners were duly appointed trustees of the estate of the said McIntyre, and duly qualified and gave bond on 24 July, 1908.

On 9 June, 1908, after the filing of the petition in bankruptcy against the said Thomas A. McIntyre, and after he was adjudicated a bankrupt, the plaintiff instituted this action to recover judgment for the amount of a note he held against said McIntyre, and in said suit at the time of the issuance of the summons caused to be issued and levied upon some real estate of the said Thomas A. McIntyre, then standing in his name upon the records of Onslow County, an attachment, and caused the summons and warrant of attachment to be served by publication, as shown in the record. After the levy of the warrant of

(367) attachment the petitioners filed their petition, showing that they were the trustees in bankruptcy of the estate of the said Thomas A. McIntyre, appointed and qualified as hereinbefore stated, and asked that the attachment be vacated. It further appears that since this suit was instituted the said Thomas A. McIntyre has died and his administrator has been made party defendant.

The court denied the motion, and the trustees (Burlingham, Peck and Bonynge, petitioners) excepted and appealed.

Louis Goodman, E. K. Bryan and Preston Cumming for appellants.
Frank Thompson and Rountree & Carr for appellees.

HOKE, J., after stating the case: Under the present statute, on an adjudication of bankruptcy, followed by subsequent appointment of trustees, the property of the bankrupt available for distribution among his creditors, and situate anywhere within the United States or any one of them, passes to such trustees as of the date of the adjudication. Bankrupt Act, sec. 70; Remington on Bankruptcy, secs. 1112, 1116, 1117; Loveland on Bankruptcy, 366.

Remington, *supra*, sec. 1112, is as as follows:

1112. Title Vests in Trustee by Operation of Law. That is to say, in every part of the world over which the laws of the United States are paramount, the bankrupt's adjudication, in and of itself, without any

assignment, transfer or other act of the bankrupt, operates to divest him of all title and to vest it in the trustee of his creditors.

The same author (sections 1117-1116) further interprets the statute as follows:

1117. The date of cleavage between the old and new estates of the bankrupt is the date of the adjudication.

1116. Title vests in the trustee for creditors upon his appointment and qualification, but then relates back to the date of the bankrupt's adjudication.

To hold, as contended for by plaintiff, that the effect of the adjudication on the property of the debtor is confined to the ordinary territorial jurisdiction of the bankruptcy court, would thus be contrary to the express provisions of the statute, and in many cases frustrate what is perhaps the chiefest purpose of the law, to insure the equal distribution of the assets of an insolvent among his creditors. From the principle stated, it follows that, after adjudication, any and all attempts by an existing creditor to obtain within the United States an advantage, or secure a lien which would result in a preference, is of no avail; and where such attempt is made by means of court process, State or (368) Federal, the same will be avoided on timely and proper application on the part of the trustees. Remington, sec. 1125; *Muller v. Nugent,* 184 U. S., 1; *Bank v. Sherman,* 101 U. S., 403; *Reed v. McIntyre,* 98 U. S., 507; *Bank v. Dickson,* 95 U. S., 180; *Bank v. Cox,* 143 Fed., 91; *In re Bank,* 137 Fed., 818; *Hatfield v. Moller,* 4 Fed., 717; *Mixer v. Guano Co.,* 65 N. C., 552; *Whitridge v. Taylor,* 66 N. C., 275; *Randale v. McLean,* 40 Ga., 162.

In *Mixer v. Guano Co., supra,* an attachment had been levied on property of the debtor in this State, and, on motion to dissolve same by the assignee in bankruptcy, appointed in proceedings had in the United States District Court of Rhode Island, it was held: "The defendant is a corporation, created by the laws of the State of Rhode Island, did business in this State and owned property here. Within six weeks after a warrant of attachment had been executed on the estate of defendant situate in this State, it was declared a bankrupt, on its own petition, by the District Court of the United States of the District of Rhode Island, and a deed of assignment of all the estate of defendant was made to the assignee: *Held,* (1) that the warrant of attachment, although executed on the estate of defendant, is but *mesne process;* (2) that the effect of the appointment of the assignee was to vest the entire estate of the defendant in such assignee, and that the order for the dissolution of the warrant of attachment and the restitution of the estate of defendant to the assignee was proper."

And *Rodman, J.,* delivering the opinion of the Court, thus correctly

states the doctrine applicable: "It is true that the District Court of Rhode Island has no means of enforcing upon a Superior Court of North Carolina a compliance with the act of Congress or with the orders of the District Court. If the plaintiffs in the present action resided within the district of Rhode Island, the District Court could enforce its orders by process *in personam* against them. As they reside beyond the jurisdiction of the District Court, that means is not open. But every court of the State of North Carolina owes obedience to an act of Congress, concerning a matter within the power of Congress (as a bankrupt law confessedly is), as fully as a court of the United States does. Any contumacious attempt to evade such obligation would be defeated finally, upon well-recognized principles. The District Court of Rhode Island having jurisdiction over the person of the present defendant, and having adjudged it a bankrupt, no court of North Carolina can rightfully dispute such adjudication, and the legal consequences must be
(369) submitted to. We consider the adjudication of the District Court of Rhode Island as equal in all respects, for the present motion, to a similar adjudication by a District Court of the United States for the district of North Carolina."

And the same position, in different aspects, finds support in the other cases cited, and in Remington, sec. 1125, it is said:

1125. Nor can a lien by legal proceedings be meanwhile obtained thereon after the adjudication.

The authorities are also to the effect that the course taken by the trustees in the present instance is the appropriate method of procedure. Loveland on Bankruptcy, 99-100. Nor is this position in any way affected by the amendment to the Bankruptcy Act of 5 February, 1903, to which we were referred by counsel, and which directs the trustee to "file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded, in every county where the bankrupt holds real estate not exempt from execution, and pay the fee for such filing," etc., etc. This is required for the purpose of giving more general notice as to the status of the property, but more especially with a view of affording more facile proof of title in behalf of local or other purchasers of the estate under the bankruptcy proceedings. But the title, as heretofore stated, passes by operation of law as of the date of the adjudication; and this provision, as it affects the title, is to be regarded only as directory. Under the Bankruptcy Act of 1867 the title passed by formal deed from the judge or the register to the assignee, and related back to the filing of the petition, and the assignee was directed by the statute to have such deed recorded in the various registry offices where the realty of the bankrupt was situated, within six months, etc.; and, under the decisions construing that statute, it was held that this

requirement was directory and that the title was not otherwise affected. Bankruptcy Act 1867, sec. 14; Bump on Bankruptcy (6 Ed.), 393-394; *Phillips v. Helmbold,* 26 N. J. Eq., 202-208.

In this last case, speaking to this question, *Chancellor Runyon,* delivering the opinion, said: "The bankruptcy law, indeed, directs that the assignment be recorded; but it has been repeatedly held that the recording of the assignment is not necessary to the validity of the transfer to the assignee, and is not designed to operate under the registry acts."

In our case, and under the present law, as heretofore stated, the title passes by operation of law as of the date of the adjudication; and, under the authorities cited, and for like reason, the requirement of this amendment, that the certified copy of the adjudica- (370) tion shall be filed in the register's office, should be held directory only.

There was error in refusing to vacate the attachment on petition of the trustees, and this will be certified, to the end that proper order should be made in conformity with this opinion.

Reversed.

DELLA HELMS, ADMRX. v. SOUTH ATLANTIC WASTE CO.

(Filed 1 December, 1909.)

1. Master and Servant—Negligence—Duty of Employer—Safe Appliances—General Use—Evidence.

It being the duty of the employer to furnish the employees proper implements and appliances which are reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use, and to keep them in repair by the exercise of reasonable care and supervision, where an employee sues to recover damages for an injury alleged to have been caused by his negligent failure to furnish them, etc., it is competent to show by proper testimony what implements were in general use at the time in the same mill or in other well-equipped and well conducted mills of the kind in which the employee received the injury or in which power was applied in the same or similar manner.

2. Same.

The plaintiff employed in defendant's mill received the injury complained of while using a detached stick furnished by the latter, to shift a belt from a loose to a fast pulley on a machine run by steam power: *Held,* competent to show that in this and other mills where power was applied by a belt in the same manner, it was usual and customary to have a safer device for the purpose called a shifter; and it was not material whether the machines were of different kinds or used for different pur-

poses, if the method of applying the power and dangers incident to it were substantially the same; and while an isolated and single instance is not sufficient to establish a custom, it is competent to begin with one instance if followed up by others sufficient to show that such use was general and customary. *Marks v. Cotton Mills*, 135 N. C., 287, cited and distinguished.

3. Master and Servant—Negligence—Cause of Injury—Direct Evidence.

Testimony of a witness that he saw the plaintiff in the act of pushing a belt with a detached stick from a loose to a fast pulley to communicate power to a machine at which he was at work, and that he saw the belt snatching the plaintiff down in the machine after he, witness, had reached down for more cotton and had raised up again, is direct evidence that the plaintiff's injury was caused by the belt.

(371) APPEAL from *Councill, J.*, at March Term, 1909, of MECKLENBURG.

Action to recover damages for alleged negligent killing of plaintiff's intestate.

There was evidence tending to show that on 1 August, 1908, the intestate, an employee of defendant company, at work in its mill, was killed in the endeavor to push the belt, by which the power was applied to a machine, called a waste cutter, or waste chopper, from the loose to the tight pulley. The belt was in motion at the time, and the intestate, in the effort to push the belt from the loose to the tight pulley, as stated, was using a detached stick, supplied by the defendant for the purpose, and, while so engaged, was caught in the belt and thrown against the machine and killed.

There was further evidence, admitted over defendant's objection, tending to show that on the other similar machines in this mill there was a device called a shifter, by which the belt was pushed from one pulley to the other, the device operating by leverage and enabling the employees to shift the belts in comparative safety. It was further shown—and this, too, over defendant's objection—that in this and other mills, where the power was applied by a belt in the same manner, it was usual and customary to have this device, called a shifter.

The jury rendered the following verdict:

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

2. Did plaintiff's intestate contribute by his own negligence, as alleged in the answer, to his injury and death? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover? Answer: $3,850.

Judgment on the verdict, and defendant excepted and appealed.

Stewart & McRae for plaintiff.

Cameron Morrison for defendant.

HOKE, J., after stating the case: In *Hicks v. Mfg. Co.,* 138 N. C., 325, it is said to be "accepted law in North Carolina that an employer of labor to assist in the operation of railways, mills and other plants where the machinery is more or less complicated, and more especially when driven by mechanical power, is required to provide for his (372) employees, in the exercise of proper care, a reasonably safe place to work, and to supply them with machinery, implements and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like kind and character; and an employer is also required to keep such machinery in such condition, as far as this can be done, in the exercise of proper care and diligence. *Witsell v. R. R.,* 120 N. C., 557; *Marks v. Cotton Mills,* 135 N. C., 287."

The principle, so stated, was reiterated in the same terms in *Fearington v. Tobacco Co.,* 141 N. C., 80, and has been upheld before and since in numerous cases before us (as in *Pressly v. Yarn Mills,* 138 N. C., 410; *Lloyd v. Hanes,* 126 N. C., 359; *Sims v. Lindsay,* 122 N. C., 678. Having established this as an arbitrary standard—that is, machinery, implements and appliances which are reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use—and imposed the duty on the employer of supplying such implements, and keeping them in order by the exercise of reasonable care and supervision, it is clearly permissible to show by proper testimony what implements were in general use in the same mill or in other well-equipped and well-conducted mills of like kind, or where power was applied in the same or similar manner. Thompson's Commentary on Negligence, sec. 7776. This was the line of testimony suggested as competent in the case of *Marks v. Cotton Mills,* 135 N. C., 287, a case which seems to have been very closely followed in the present trial. True, in that case it was held that testimony by a single witness of having seen one other frame with the "cogs boxed up" was not of itself sufficient to show that such a custom existed, but decided intimation is given that proof of the custom in a "number of other mills could be shown," and it was not at all decided in that case that plaintiff could not begin this proof by showing its existence in one mill if it had been properly followed up by showing similar conditions in other mills. As said in the opinion: "The question and answer were not excluded, but admitted, and there was no additional evidence offered by the plaintiff tending to show that cog wheels in mills other than the one mentioned by the witness are boxed. The plaintiff perhaps might have shown that boxes were in general use by proving that a number of mills used them, but this he did not attempt to do. He had the full benefit

of the right to begin his proof, and did begin it, but failed to
(373) complete it."

It will thus be seen that while a new trial was awarded in that case, it was because the testimony as to "another machine" stood as an isolated and single instance to establish a custom, and not that it was incompetent to begin with one instance if followed up by others sufficient to show that such use was general and customary. The position urged by counsel, that the testimony was incompetent because it was not applied to machines of the very same kind as the one presented here—that is, a waste chopper—is not tenable. The danger arose from the method of applying the power by the shifting of the belt, the negligence being the failure to furnish the usual device by which the incident danger was minimized, and it does not appear that the character of the machine would seriously or substantially affect the result. It was the drawing power of the belt and the danger of being caught in it which rendered the use of the shifter desirable and necessary for the employee's protection; and therefore the testimony as to its customary and general use in this and other mills, where the power was similarly applied and the belt controlled, was competent, under the rule. Nor can the objection be sustained that there was no sufficient testimony that the injury was caused by the belt. Not only was such a result probable from the objective facts, but there is direct evidence to that effect.

Thus, Nathaniel Fincher, a witness for the plaintiff, testified, among other things, as follows: "Mr. Helms was standing on upper side. He had a stick, pushing belt on tight pulley; he had a stick and was pushing the belt. The stick was about three feet long. He took the stick in his hand and pushed it against the belt, moving the belt from toward him. When I saw Mr. Helms pushing on the belt, I reached for some more cotton, and when I raised up I saw the belt snatching him down in the machine. The stick flew out of his hand."

There was no reversible error shown, and the judgment below is affirmed.

No error.

Cited: Rogers v. Mfg. Co., 157 N. C., 485; *Tate v. Mirror Co.*, 165 N. C., 282.

W. H. MONROE AND WIFE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 December, 1909.)

Negligence—Vacant Lot—Permissive User—Licensee—Liability of Owner.

One who, with others, is accustomed to use, with the knowledge of the owner, a pathway across a vacant lot for his own convenience, without any enticement, allurement or inducement being held out to him by the owner, goes there at his own risk and enjoys the license subject to its concomitant perils; and while the owner may not place new and dangerous pitfalls and obstructions along the path without warning to those likely to use it, and escape liability for an injury thereby directly caused to one of them without fault on his own part, he owes no such duty when the pitfall or obstruction has remained there continuously for some time, in this case for a period of two years. *Bunch v. Edenton*, 90 N. C., 431, cited and distinguished.

APPEAL from *W. J. Adams, J.*, at April Term, 1909, of CUM- (374) BERLAND.

The plaintiff sued to recover damages for personal injuries received by the *feme* plaintiff, C. B. Monroe, under the following circumstances: On Sunday night, 14 June, 1903, the plaintiff was returning to her home from service at the Presbyterian Church, and, while walking through a vacant lot of the defendant, in the town of Fayetteville, fell into a pit and was severely and permanently injured, breaking her leg and some of her ribs, and otherwise injuring her. The path along which she was walking was about eight feet wide and was clearly defined. The path traversed diagonally an unused lot of the defendant, was unlighted at night, and furnished a nearer approach to plaintiff's residence. A large number of people used this path, and had been accustomed to use it for their convenience, by night and day, for more than two years prior to plaintiff's accident. The plaintiffs had been using it, both night and day, since the previous spring, and weeds and shrubs had grown up around the borders of the pit, that concealed it from sight, and the plaintiff C. B. Monroe did not know of its existence. The pit was left uncovered more than two years before plaintiff's injury, when a house for the repairs of engines was removed. It was near the path—so near that a person traveling the path and unaware of it might by a misstep fall into it, though the path diverged at this point from its course to go around the pit. It was several feet deep and its bottom was covered with logs.

The defendant offered no evidence, but moved the court to nonsuit the plaintiff, which motion was denied, and thereupon requested the judge to charge the jury to answer the first issue, No, which was

(375) refused, and further requested his Honor to charge the jury as follows: "The court charges you that, as a matter of law, the defendant owed the plaintiff no duty, except that it should not wantonly or willfully injure her, and there is no evidence in this case that the injury, if any there was, was done wantonly or willfully." This instruction was refused.

There was no exception to the charge of his Honor, and the case is presented upon the exception taken to the rulings of his Honor upon the questions as stated above.

The three issues, of defendant's negligence, plaintiff's contributory negligence, and damages, were submitted to the jury and answered in plaintiff's favor, and damages to the amount of $3,000 fixed. From the judgment rendered on the verdict defendant appealed.

H. McD. Robinson, Terry Lyon and V. C. Bullard for plaintiffs.
Rose & Rose for defendant.

MANNING, J., after stating the case: The conclusion reached by us, after a most careful consideration of this case, is that the motion of the defendant to nonsuit the plaintiff, at the close of the evidence, ought to have been allowed, and in refusing it his Honor was in error. The principle controlling the decision of this case, and the doctrine generally accepted by the American and English courts, is stated with great clearness and precision by *Bigelow, C. J.*, in *Sweeney v. R. R.*, 10 Allen, 368; 87 Am. Dec., 644, as follows: "There can be no fault or negligence or breach of duty where there is no act or service or contract which a party is bound to perform or fulfill. All the cases in the books in which a party is sought to be charged on the ground that he has caused a way or other place to be encumbered or suffered it to be in a dangerous condition, whereby accident or injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another, without right, can not maintain an action if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So a licensee who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, can not recover damages for injuries caused by obstructions or pitfalls. He goes
(376) there at his own risk and enjoys the license, subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either ex-

pressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for the use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon." This doctrine has been approved by this Court in the following cases: *Quantz v. R. R.*, 137 N. C., 136; *Peterson v. R. R.*, 143 N. C., 260; *McGhee v. R. R.*, 147 N. C., 142; *Briscoe v. Lighting Co.*, 148 N. C., 396; *Bailey v. R. R.*, 149 N. C., 169; *Muse v. R. R.*, 149 N. C., 443. It has also been approved in the following decisions of other courts, and by the textbook writers: *Gillis v. R. R.*, 59 Pa., 129; 98 Am. Dec., 317; *Zoebish v. Tarbell*, 10 Allen, 385; *R. R. v. DeBoard*, 91 Va., 700; *R. R. v. Bingham*, 29 Ohio State, 364; *R. R. v. Griffin*, 100 Ind., 221; *Reardon v. Thompson*, 149 Mass., 267; *Redigan v. R. R.*, 14 L. R. A., (Mass.), 276; *Burbank v. R. R.*, 4 L. R. A. (La.), 720; *Benson v. Traction Co.*, 20 L. R. A. (Md.), 714; *Manning v. R. R.*, 20 L. R. A. (W. Va.), 271; 3 Elliott on Railroads, secs. 1250, 1251; Wharton on Neg., sec. 351; 7 Thompson on Neg., secs. 945, 946, 947, 949; Whitaker's Smith on Neg., pp. 60, 61, 62, 63, and note. This doctrine is clearly distinguishable from that announced in *Bunch v. Edenton*, 90 N. C., 431, in which case it is held that liability exists where a pit is left open and unprotected so near a sidewalk or street that a person using the street, without concurring negligence, by misstep, falls into and is injured. This doctrine is also held in *Beck v. Carter*, 68 N. Y., 283; *Graves v. Thomas*, 95 Ind., 361; *Lepnick v. Gaddis*, 72 Miss., 200; 48 Am. St. Rep., 547; *Grumlich v. Warst*, 86 Pa. St., 741. Nor does the application of this principle protect from liability the owner of a lot or a railroad company who, with knowledge of the user of his property as a pathway across or along it, places, without warning to those likely to use the pathway, a new and dangerous pitfall or obstruction. This is illustrated by the cases of *R. R. v. DeBoard*, 91 Va., 700; *Graves v. Thomas*, 95 Ind., 361; *Beck v. Thomas*, 68 N. Y., 283; *Burton v. R. R.*, 98 Ga., 783. This is further illustrated by this language of Wharton on Negligence, quoted in *Graves v. Thomas, supra*: "Nor am I justified in making excavations, either on the path which I have permitted other persons to traverse, or so near a public road that travelers, in the ordinary aberrations or casualties of travel, may stray or be driven over (377) the line and be injured by falling into the excavation." The same doctrine finds expression in those cases like *Troy v. R. R.*, 99 N. C., 298; *Byrne v. R. R.*, 104 N. Y., 362, where the defendant was held liable because of the act of active negligence, as contradistinguished from passive negligence. Nor does the principle held to be decisive of this case in any way contravene or impinge upon the doctrine illus-

trated and applied in *Finch v. R. R., ante,* 105, and *Brittingham v. Stadiem, ante,* 299, and *Phillips v. R. R.,* 124 N. C., 126. It must commend itself as based upon sound reason and just principle that an owner of property, knowing that his property is frequently used by a large number of people, and such use acquiesced in by him, can not, without giving warning, increase the peril and danger of such use, even though the use be solely for the convenience of those persons using it. They must, if they use it for their convenience, take it as they find it, with its concomitant perils, and at their own risk; but these perils should not be increased by the owner having knowledge of the use, without notice of the increased hazard. In the present case there was no increase of the danger or risk by any act of the defendant. The pathway was used by the public solely for its own convenience, to make less the distance, than by the streets, between two points. It was not used by the public in transacting any business with the defendant or in reaching its warehouse, office, station or any place where it invited the public dealing with it to come. There was nothing to attract attention on the lot or to invite the public to come upon it, even from curiosity. The buildings that had been on the lot had been removed for more than two years, and the lot was not used by the defendant for any purpose whatever that the evidence discloses. Under the authorities cited, the plaintiff was using the property at her own peril, and the defendant, upon the facts proven, violated no duty it owed her. While she was unfortunately injured and has suffered much in consequence of her injuries, it was her misfortune. For the reasons given, his Honor erred in not sustaining the motion of defendant to nonsuit the plaintiff.

Reversed.

Cited: *Money v. Hotel Co.,* 174 N. C., 512.

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(378)

JOHN L. LOVE ET AL. V. D. R. HUFFINES.

(Filed 1 December, 1909.)

1. Justice of the Peace—Pleadings—Record—Jurisdiction.

A substantial statement of the cause of action brought before a justice of the peace, should appear in the summons, pleadings, or otherwise in his record, so as to show jurisdiction; and the method of pleading generally adopted of issuing a summons for defendant to appear and answer a complaint upon a cause of action not stated, is disapproved. In this case, for a recovery of $194.78, the court inferred an action upon contract from the use of the word "indebted," though otherwise the magistrate's jurisdiction would not have appeared.

2. Justice of the Peace—Appeal—Time of Docketing—Criminal Term.

Revisal, sec. 607, requiring the justice to make a return to the Superior Court and to file the return of the appeal within ten days after service of notice, etc., applies to criminal as well as civil terms, and upon failure of the appellant to docket his appeal as required by law, whether the next term be criminal or civil, the appellee may have the case placed upon the docket and move to dismiss according to the provisions of Revisal, sec. 1493.

3. Same—Superior Court—Jurisdiction—Procedure—Appellee's Laches—Waiver.

By docketing an appeal from a justice's court in the Superior Court, the latter court acquires, derivatively, the jurisdiction of the justice, and nothing more; and while the appellant may lose his appeal to the Superior Court unless perfected in the manner prescribed by the statute, the appellee must not sleep upon his rights, but make the motion to dismiss in apt time.

4. Same.

An appellee may by his own laches or conduct waive his right to dismiss an appeal from a justice's court to the Superior Court for failure of appellant to perfect his appeal under Revisal, secs. 607 and 1493, as such matters relate only to irregularities in the procedure and not to the inherent jurisdiction of either court; and the appellee's motion under the latter section is too late when made upon the trial of the cause in the Superior Court after evidence has been introduced.

APPEAL from *Long, J.*, at May Term, 1909, of GUILFORD.

The facts are stated in the opinion of the Court.

Scott & McLean and John A. Barringer for plaintiff.

A. L. Brooks for defendant.

WALKER, J. This is an action originally commenced before a justice of the peace to recover the sum of $194.78. We will say in the beginning that we do not approve the method of pleading generally adopted in the State, of issuing a summons for a defendant, merely requiring him to appear and answer a complaint upon a cause of action not stated in the summons and not afterwards stated before the (379) magistrate and recorded in his docket. We again call the attention of the profession to the provision of the statute that a plaintiff must somewhere, either in the summons or in the complaint before the justice, state substantially his cause of action, and the defendant must also set forth his defense in some way. The form of the pleadings is disregarded, but something must be done by the *pleader* (used in its technical meaning) to advise the court of the issues between the parties. The only allegation in this case is that $194.78 is due by the defendant and demanded by the plaintiff. It may be money due upon a broken con-

tract or for the conversion of property, and in the last case the court would have no jurisdiction. We infer, from the use of the word "indebted," that the cause of action is founded on contract, and therefore we will assume, upon this small bit of allegation, that the justice had jurisdiction, but we call the attention of the very able judges of our Superior Courts to the very careless manner in which pleadings before justices of the peace are framed, and urge upon them to require a more explicit statement of the causes of action and defenses, by amendment in their courts.

It appears in this case that the plaintiff commenced his action on 15 August, 1904; the defendant filed answers and the parties and their attorneys personally appeared before the justice on 16 August, 1904. Evidence was introduced by the respective parties, and, after hearing the case, the justice entered a judgment for the plaintiff on 16 August, 1904, the day agreed upon for the trial. It also appears that a criminal term of the Superior Court of Guilford County was held on 22 August, 1904, and a term for the trial of civil cases on 19 September, 1904. The appeal in this case was not docketed until 24 September, 1909. The case was not calendared or continued until May Term, 1909, when the case was called, and, after a jury had been impaneled, the plaintiff's counsel moved to dismiss the appeal and to affirm the judgment, which motion was allowed by the court.

The statute provides as follows: "If the appellant shall fail to have his appeal docketed as required by law, the appellee may, at the term of said court next cucceeding the term to which the appeal is taken, have the case placed upon the docket, and, upon motion, the judgment of the justice will be affirmed." Revisal, sec. 607. "The justice shall, within ten days after the service of the notice of appeal on him, make a return to the appellate court and file with the clerk thereof the papers, proceedings and judgment in the case, with the notice of appeal
(380) served on him." Revisal, sec. 1493.

The defendant utterly failed to enforce compliance with the second provision of the statute above quoted. The notice of appeal was served on 16 August, 1904, the day the judgment was rendered, and the appeal was filed in the clerk's office on 24 September, 1904. A criminal court was held in the county of Guilford on 22 August, 1904, and on 19 September, 1904, a civil term was held, according to the law in such case made and provided. The clerk's fee for docketing the case was not tendered or demanded. The case was docketed by the clerk on 24 September, 1904.

It also appears that the case was placed on the calendar for trial at the September Term of the court, and that prior to that time the defendant, after notice to plaintiff, had taken the deposition of a witness,

to be used at the trial, and that when the case was called for trial at the September Term a jury was impaneled, and after the court had commenced the trial before the jury the plaintiffs moved to dismiss the appeal, upon the ground that the defendant had not complied with the statute in the particulars already mentioned.

We think the court erred in dismissing the appeal. If the plaintiffs had not slept upon their rights and had made their motion to dismiss in apt time, we probably would have decided with them. *Johnson v. Andrews,* 132 N. C., 376; *Blair v. Coakley,* 136 N. C., 408; *Lentz v. Hinson,* 146 N. C., 31; *Pants Co. v. Smith,* 125 N. C., 588. In the cases cited we held that, "Upon a full consideration of this statute, the Court has decided that the appeal must be taken and the return made to the next term, whether criminal or civil, under the provisions of the statute." In the case of *Blair v. Coakley,* cited above, the question as to when and how an appeal should be taken from the inferior courts to the Superior Court (being a court of record) is fully discussed and the authorities cited. But this case, we think, does not come within the principles as stated in those cases. The justice had jurisdiction of the cause of action and, by the service of process, of the parties. The Superior Court, by the docketing of the case, acquired, derivatively, the jurisdiction of the justice, and nothing more. *Raisin v. Thomas,* 88 N. C., 148, and cases cited, especially *Love v. Rhyne,* 86 N. C., 576. But it does not follow that the appellee, by whom the judgment before the justice was obtained, could not waive his right to object to any irregularities in the procedure by which the case was carried into the Superior Court, by his own laches or by such conduct as would be tantamount to an admission on his part that the irregularities had (381) worked no harm to him, and therefore he was willing to accept the jurisdiction of the higher court, as derived from the lower court, and try the case in the former court upon its merits.

This is not a case wherein there is any inherent lack of jurisdiction, in the magistrate or the Superior Court, of the cause of action or the person. If it had appeared that there was such failure in the jurisdiction of either court, that of the Superior Court being derivative only, as we have shown, then the defendants could not waive it, even by consent. This proposition is too plain and well settled for any further discussion or the citation of authorities. But in this case the appellees merely allege that there were irregularities in taking and perfecting the appeal, and, so far as appears, nothing was done or omitted to be done by the appellants which affected the appellees injuriously, upon the merits of the case.

The appellant cites the "aphorism" that "if a person has a case in court, the best thing he can do is to attend it." This is very true, and no

one would hesitate to endorse it. But the appellant forgot, perhaps, that in the Superior Court it applied as well to him as, in the transition of the case from the justice to the Superior Court, it applied to the appellee in this Court, the defendant in the action. It was the plaintiff's plain duty to act promptly, and at least diligently, in attacking the right of the defendant to be heard in the Superior Court. If they intended to take advantage of any technical delay of the defendant in carrying his case to the higher court, it was simple justice and even fairness that they should have said so before they entered upon the trial of the case, having accepted a jury in the Superior Court, and thereby expressed their willingness in the most emphatic way that the case should be heard in that court upon its real and legal merits. Litigants may waive their rights, and even their constitutional rights. We have so held. An appellee can waive any irregularity in serving a case on an appeal from the Superior Court to this Court by sending the case to the judge for settlement. *Byrd v. Bazemore,* 122 N. C., 115. Appearance waives informalities in depositions, but does not impart vitality to void process. *McArthur v. Rhea,* 122 N. C., 614; *Erwin v. Bailey,* 123 N. C., 628. The filing of an affidavit for removal of a case from one justice to another is a waiver of defects in the service of process. *Kiser v. Blanton,* 123 N. C., 402. The failure to plead to the jurisdiction involving the right of a judge to preside at a court is a waiver of the court's (382) right to proceed in the cause to final judgment. *Short v. Gill,* 126 N. C., 803. An objection that a summons returnable before a judge at chambers, instead of at term, is waived by failure to move for a transfer to the proper docket. *Jones v. Comrs.,* 135 N. C., 218. The lack of service of a summons is waived by appearing and asking for a *recordari. Johnson v. Reformers,* 135 N. C., 385. Many other cases in our own reports might be cited to the same effect. The requirement of notice to the appellee by the party who appeals from a justice was not mandatory, in the sense that, under the law, it is essential to confer jurisdiction upon the Superior Court, for it may be expressly or impliedly waived by the appellee. When the defendant agreed to enter upon the trial and to the impaneling of the jury for that purpose, he thereby waived, in the most emphatic manner he could express his waiver, all prior irregularities or mere matters of form and all objections to the trial of the case in the Superior Court, except such as related to the jurisdiction of that court of the cause of action and the parties. This is perfectly clear to us. Let us, though, cite a few authorities. "By appearing generally on appeal, an appellee waives all defects and irregularities in the proceedings for an appeal." 24 Cyc., 694. "Appellees, in an appeal from a justice of the peace, having entered their appearances generally in the Circuit Court before a motion

to dismiss was made, such appearance was conclusive evidence as to the jurisdiction of such court, aside from the question as to whether an appeal was taken in time or proper return was made, and the judgment of dismissal should be reversed. On appeal from a judgment of a justice, an entry of general appearance by the appellee in the Circuit Court is conclusive of the jurisdiction of that court; so that, thereafter, a motion to dismiss the appeal because not taken in time, and because no returns had been made to it, cannot be entertained." *McCombs v. Johnson,* 47 Mich., 592. "Where an unauthorized appeal to the District Court was taken from the judgment of a justice of the peace, and the parties appeared in the District Court, submitted to its jurisdiction, amended their pleadings and consented to the trial of the case on the day fixed, the District Court acquired jurisdiction to hear and determine the case on its merits, notwithstanding the irregular mode in which it was brought into that court." *Wrolsen v. Anderson,* 53 Minn., 508; *Knies v. Green,* 53 Minn., 511. "Where, on an appeal from the judgment of a justice of the peace to the District Court, the appellee makes a general appearance, the court thereby acquires jurisdiction, though the transcript was not filed therein within thirty days after the ren- (383) dition of the judgment, as required by the Code of Civil Procedure, sec. 1011." *Steven v. Ins. Co.,* 29 Neb., 187. "Where, on trial from a justice, both parties appear and proceed to trial, without objection to the want of service or failure to file the transcript, the defects will be considered waived." *Rosenberg v. Barrett,* 2 Ill. Ap., 386. We need not go as far as some of the above-cited cases do, in order to reverse the judgment in this case.

The reasons we have given and the authorities cited by us we think, with all deference to the very learned judge who presided at the trial of the case, and to the counsel who so ably presented the case in this Court, sufficiently dispose of the assignments of error adversely to the appellants.

The order of the judge dismissing the appeal is reversed and the cause is remanded, with directions to award a new trial.

Reversed.

Cited: Rawls v. R. R., 172 N. C., 212; *Lindsey v. Knights of Honor, ibid.,* 822.

W. A. BALLINGER v. W. P. RADER ET AL.

(Filed 1 December, 1909.)

1. Insane Persons—Hospitals—Directors and Superintendent—Discharge—Negligence—Interpretation of Statutes.

The directors and superintendent of a hospital for the insane acting under the provisions of Revisal, 4596, in discharging or releasing a patient therefrom, cannot be held responsible in damages by the subsequent killing by such patient of another under a charge of negligence. Revisal, 4560.

2. Same—Proximate Cause.

The act of an insane person in killing another about six months after his discharge or release by three directors and the superintendent of a hospital for the insane under authority conferred by Revisal, 4596, was a mere condition arising from the discharge or release, which the directors and superintendent by the exercise of ordinary care and caution, could not have anticipated, foreseen or expected, and for which they could not be held responsible in damages as arising from negligence on their part.

APPEAL from *Justice, J.*, at May Term, 1909, of CATAWBA.

The complaint alleges that the defendants—one of whom is the superintendent and the other three directors of the State Hospital for the Insane, located at Morganton, North Carolina—negligently discharged one Lonnie Rader, an insane patient committed to said hospital, from confinement therein, and that six months later the said Rader, (384) while insane, killed the plaintiff's intestate.

The defendants demurred, because the complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them, individually or collectively:

1. Because it appears from said complaint that defendant John McCampbell is superintendent of the State Hospital for the Insane, at Morganton, N. C., and the defendants Shuford, Davis and Armfield are members of the board of directors thereof; that said defendants, by virtue of their said offices, and acting within the scope and limits of authority conferred by law, discharged or released Lonnie W. Rader, a patient, from said hospital; that said McCampbell and his codefendants are, by section 4560 of the Revisal of 1905, exempted from all personal liability for the alleged acts and omissions complained of in plaintiff's complaint.

2. That said John McCampbell and his codefendants, as appears from said complaint, were acting in their official capacity in the discharge of a duty imposed by law and in the exercise of a legal discretion vested in them, and are not liable to plaintiff for discharging said Lonnie W. Rader, of which the plaintiff complains.

3. That said John McCampbell and his codefendants, in doing the acts complained of in the plaintiff's complaint, were in the discharge of judicial duties and functions imposed by law, and were acting within the limits of their authority, and are therefore not liable to the plaintiff in this action on account thereof.

4. That the allegations in said complaint, that said defendants, knowing that said Rader was dangerously insane and, notwithstanding said knowledge, negligently caused the said Rader to be discharged from said hospital, do not state facts sufficient to constitute a cause of action against said defendants or either of them.

5. That there are not facts or alleged facts set forth in the complaint of plaintiff which could legally cause the damages claimed by him.

His Honor sustained the demurrer, and the plaintiff appealed.

Witherspoon & Witherspoon, A. A. Whitener and L. C. Caldwell for plaintiff.

W. D. Turner, W. A. Self and S. J. Ervin for defendants.

CLARK, C. J., after stating the facts: The defendants were public officers and were acting as such at the time that the said Lonnie Rader was discharged by them from further confinement in the (285) said State Hospital. The statute (Revisal, sec. 4596) provides: "Any three of the board of directors of any hospital . . . shall be a board to discharge or remove from their hospital any person admitted as insane, when such person has become or is found to be of sane mind, or when such person is incurable and, in the opinion of the superintendent, his being at large will not be injurious to himself or dangerous to the community; or said board may permit such person to go to the county of his settlement, on probation, when, in the opinion of the said superintendent, it will not be injurious to himself or dangerous to the community, and said board may discharge or remove such person upon other sufficient cause appearing to them."

The defendants discharged Lonnie Rader under and pursuant to the said statute, and this discharge of Lonnie Rader is complained of as a negligent act on their part.

We need not discuss the other grounds of demurrer, which were ably and interestingly argued before us by counsel for both sides, for the first ground of the demurrer is conclusive. The statute under which the hospital was created, organized and now exists provides that "No director or superintendent of any State hospital shall be personally liable for any act or thing done under or in pursuance of any of the provisions of this chapter." Revisal, sec. 4560. The discharge was made under

and by virtue of the authority conferred by the above section (4596) of the Revisal.

But we will add that it does not seem to us that the discharge of Rader on 5 March, even if negligently made, was the proximate cause of the death of the young girl, which occurred 13 September following. The allegation is in the nature of *"post hoc, ergo propter hoc."*

The defendants could not, by the exercise of ordinary care and caution, have anticipated, foreseen or expected that the death of the plaintiff's intestate would follow as the natural result of their act in discharging Rader from the hospital.

Their erroneous or mistaken opinion or judgment—that Lonnie Rader was sane, or insane—that his being at large would not be injurious to him or dangerous to the community, or that there were other sufficient reasons why he should be discharged—and their act in discharging him, did not cause her death. It may be that if they had kept Rader confined in the State Hospital he might not have killed her; but it is equally true that if he had never been born or had never become insane
(386) he would not have killed her. The discharge of Rader, his absence from the hospital, his presence in Catawba County, and his presence at church on the day of the homicide, was a mere condition which accompanied, but did not cause, the injury. Like the presence of the freight in the depot at Lincolnton when the depot was accidently destroyed by fire (*Extinguisher Co. R. R.*, 137 N. C., 278), or the lumber on the right of way of the railroad at Elk Park when the hotel was destroyed by fire (*Bowers v. R. R.*, 144 N. C., 684), the absence of Lonnie Rader from the hospital was a mere condition which accompanied, but did not cause, the injury.

Counsel pertinently ask, is the absence of the policeman from his beat and this dereliction of duty on his part the cause of the burglary which happens in his absence and which his presence would have prevented? Is the act of the Governor, who pardons a criminal, the cause of the homicide which such criminal subsequently commits? Is the conduct of the judge or justice in declining to remove a prisoner to another jail for safekeeping the cause of the death of the prisoner in the event he is hanged by a mob?

The judgment sustaining the demurrer is

Affirmed.

Cited: S. c., 153 N. C., 488.

C. F. BOWMAN v. JULIUS POOVY.

(Filed 1 December, 1909.)

1. **Taxation—Special Tax—Re-canvass—Elections—Fraud—Evidence, Immaterial.**

Upon an issue as to whether the majority of the qualified voters in a certain school district voted in favor of a special school tax, the registrar and judges of election declared one result, and, subsequently, the registrar, and one of the judges of election again canvassed the votes and certified to the county commissioners another result: *Held*, that evidence to show alleged misconduct in the recanvass is incompetent.

2. **Taxation—Special School Tax—Elections—Nonresidents—Questions for Jury.**

In an action to determine the true result of an election held for the purpose of voting a special school tax, it appeared that the result was really to be determined by whether a certain voter living nearest to the dividing line of the district was a qualified voter or not; and the verdict of the jury, upon legal evidence and under a proper charge, having found the location of the line in question in favor of defendant's contention, and thereby established the fact that the voter was a nonresident, it is conclusive of the question.

APPEAL by plaintiffs from *Justice, J.*, at May Term, 1909, of (387) CATAWBA.

The facts are stated in the opinion of the Court.

W. A. Self for plaintiffs.

A. A. Whitener and E. B. Cline for defendants.

CLARK, C. J. This is an action to have it judicially determined that at a school-tax election held in District No. 13, in Catawba County, on 11 April, 1908, the majority of the qualified voters did not vote in favor of the said special tax.

The jury find, by consent: (1) That the registrar and judges of election, on the night of the election, counted the ballots and declared the result to be: registered voters, 54; voting for the special tax, 27; against special tax, 26. (2) That on 25 April the registrar and one of the judges of election again canvassed the votes and signed the certificate sent to the county commissioners, showing: registered qualified voters, 49; votes in favor of the special tax, 25; against special tax, 24; not voting, 1—and declaring the special tax adopted.

Upon the issues and undisputed facts in this trial, the facts were found to be that there were 47 registered qualified voters, of whom 24 voted in favor of the tax and 23 against.

The exceptions based upon the exclusion of evidence offered to show the alleged misconduct in the recanvass of the vote, and declarations of the poll holders in regard to it, need not be considered. This action being to determine the true result of the election, the only pertinent inquiry is as to what occurred on that day—how many duly qualified electors there were, and how many voted for the special tax. Upon this investigation the result is really determined by the answer to the fourth issue, as to whether C. F. Bowman was a qualified voter or not, as he was nearest the dividing line between District No. 13 and District No. 1, of those who, voting against the tax, were found to be nonresidents. Upon that issue the jury, upon legal evidence and under a proper charge, found as a fact that said line so ran as to sustain the defendant's contention that said Bowman did not reside in District No. 13 and was not therefore a qualified voter. This, taken in connection with the findings of fact by his Honor, from an inspection of the pleadings, and the undisputed facts, determines the result.

No error.

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(388)

T. C. MAY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 December, 1909.)

Railroads—Rights of Way—"Floating"—Rights Barred—Questions of Law—Limitation of Actions.

The grant to a railroad company of an undefined or "floating" right of way over the owner's lands is of an executory nature, and where no consideration has been paid by the company, the right may be lost by lapse of ten years upon failure of entry and of location by the company; and in this case there was a delay of twenty-one years barring the right as a matter of law. Even if there had been a deed, with metes and bounds, the adverse possession of twenty years would bar the company under the statute of limitations. Revisal, 384.

WALKER, J., dissenting.

APPEAL by defendant from restraining order, granted by *W. R. Allen, J.*, out of term, in NASH, on 9 February, 1909, by consent.

The facts are stated in the opinion of the Court.

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

CLARK, C. J. Upon the facts agreed, it appears that on 14 December, 1886, the plaintiff granted the Wilmington and Weldon Railroad Company, now the Atlantic Coast Line Railroad Company, the defendant, a right of entry and right of way 130 feet wide, through his farm, "for the use, operation and business of a branch road then in contemplation" by said railroad company, with a provision, "The said company to take no benefit from and incur no obligation by the execution of this deed, unless the branch road shall be located over the land of the party of the first part."

This was not an unlimited grant by the plaintiff, to be left open for all time, without any compensating advantage from the party of the second part. The true and just construction of this agreement is that the railroad company did not obligate itself by accepting this paper to locate their track over the plaintiff's land, and the plaintiff stipulated that the grant of the easement and right were to be void "unless the branch road shall be located over the land," meaning "within a reasonable time," of course. It could not be contemplated that the branch road should be located at once, nor, on the other hand, that the location of the road should be indefinitely delayed.

As a matter of fact, it is agreed that the branch road has not yet been located over the plaintiff's land, and the defendant made no offer to enter upon the land for that purpose, nor did any act under (389) said agreement of 14 December, 1886, till 11 December, 1907, nearly twenty-one years, during all which time the plaintiff has been in continuous, uninterrupted possession of the land and cultivating the same.

The agreement of 14 December, 1886, conveyed no land by metes and bounds, but merely gave the railroad company the right to enter and lay out a right of way, with a stipulation that the defendant was not to be compelled to locate their road there, and that the easement was void if the road was not located.

The defendant having taken no action in nearly twenty-one years, his Honor properly held that the defendant could not now enter by virtue of the agreement. This was merely an executory contract, without any lines or boundaries which the railroad company might have executed and made definite by locating their track (*Hemphill v. Annis,* 119 N. C., 518), but, having delayed to do so for more than ten years, the right to do so is lost, even if there had been no express stipulation of forfeiture by failure to locate. *Beattie v. R. R.,* 108 N. C., 437; *Willey v. R. R.,* 96 N. C., 408.

Even if this had been a deed for a valuable consideration and for fixed and definite boundaries, the defendant would be barred by the adverse and exclusive possession for more than twenty years. Revisal, sec.

384. This is not a case where the railroad company has taken possession of its right of way and operated its road. In such case the company is not barred of the right to take any part of its right of way which it has not till then seen fit to call for, by reason of any length of occupation, however. *R. R. v. Olive,* 142 N. C., 271. But here the defendant, having delayed over twenty years to enter and locate under its executory contract, has never acquired a fixed, definite right of way. It can still do so by purchase or by condemnation, but not under this contract.

As the defendant would acquire a right by entry and two years user if the landowner took no action within that time, it cannot complain that it has lost the right to enter—for which it paid nothing—by twenty-one years delay to render any benefit to the landowner by locating its track and building and operating its road.

The delay here is so great that the court properly held it unreasonable as a matter of law. *Claus v. Lee,* 140 N. C., 555.

The unlocated "floating" right of way was purely executory and was lost by the lapse of so great a length of time, without effort to
(390) locate it. *Lumber Co. v. Hines,* 127 N. C., 131; *Willey v. R. R.,* 96 N. C., 408. The injunction is

Affirmed.

CALDWELL LAND AND LUMBER CO. v. GLOBE LUMBER CO.

(Filed 1 December, 1909.)

Deeds and Conveyances—Title—Boundaries—Agreement of Parties—Evidence Immaterial.

When it is agreed between the parties in a suit to establish title to land that the controversy depended upon the beginning corner of E. grant, and if so found the controverted territory would not be covered by plaintiff's grant, evidence of declarations for the purpose of establishing certain pine and maple corners of a grant to G. irrelevant.

APPEAL by plaintiff from *Justice, J.,* at May Term, 1909, of CALDWELL.

Action for damages, to restrain the cutting of timber by defendant on lands to which plaintiff claims title.

W. C. Newland and Jones & Whisnant for plaintiff.
Mark Squires and Lawrence Wakefield for defendant.

PER CURIAM: The appellant abandons all exceptions except the second, which was to evidence as to the declaration of Gragg as to a cer-

tain maple being a corner in his boundary, and the seventh, as to a paragraph in the charge in regard to a pine corner in Gragg's line.

It is not necessary to consider these exceptions, for this controversy was submitted to the jury, not on the location of the Gragg line, but on the beginning corner of the Estes grant. It was admitted that if the beginning corner of the Estes grant was at "30" on the map, then the controverted territory was not covered by plaintiff's grant.

Upon this view alone was the case submitted to the jury. The jury have found such corner according to defendant's contention. The location of the Gragg line depended altogether on the location of the Estes grant; the jury have located that, and the plaintiff admits of record that if the corner of the grant to Estes is at "30," then it has no claim to the controverted territory.

If, therefore, any error has been committed, the plaintiff is in (391) nowise prejudiced thereby.

No error.

J. T. HUTCHINS v. B. J. KENNEDY.

(Filed 1 October, 1909.)

Questions for Jury.

This case presented an issue of fact upon conflicting evidence as to the location of the division line between the lands of plaintiff and defendant depending upon the location of a certain white oak, and the verdict of the jury, under proper instructions, is final.

APPEAL from *Justice, J.*, at January Term, 1909, of WILKES.

Action for the recovery of land. These issues were submitted:

1. Is the plaintiff the owner and entitled to the possession of the land bounded by the lines indicated on the map by the corners A, 1, and X? Answer: Yes.

2. Is defendant in the wrongful possession of said land? Answer: Yes.

From the judgment rendered the defendant appealed.

W. W. Barber for plaintiff.
Hackett & Gilreath for defendant.

PER CURIAM: Upon the record in this case, we have concluded that the controversy is one exclusively of fact. Plaintiff and defendant derived their titles from Christian Cozart, who conveyed to Hugh Montgomery. The latter conveyed to his two daughters, Rachel and Rebecca. In 1839 partition was had between the two, one of whom married Wellborn and the other Stokes.

The question in controversy is the location of the dividing line between Rebecca Wellborn and Rachel Stokes.

It is a question of boundary, and not of title. Rebecca Wellborn owned the land west of this line, while Rachel Stokes owned the land east of said line. The question in dispute is the point where the white oak stood at the forks of the road near the pole bridge. If the white oak stood at the point indicated on the map, "A," then plaintiff is entitled to recover. If the white oak stood at "E," then the plaintiff is not entitled to recover.

This being a question of boundary, and the evidence being con-
(392) flicting as to the location of the white oak, it was the province of the jury to settle the matter in controversy, and, under proper instructions from the court, their verdict is final.

We think the matter was fairly and correctly presented to the jury, and, after careful consideration of the exceptions, we are of opinion that no error has been committed of sufficient importance to warrant us in directing another trial.

No error.

P. W. MICHAEL ET AL. v. P. C. McINTYRE.

(Filed 1 December, 1909.)

Evidence—Nonsuit.

In this case testimony of certain witnesses being properly excluded and there being no evidence to sustain the contention of fraud and conspiracy there was no error in allowing the motion to nonsuit.

APPEAL from *Justice, J.*, at May Term, 1909, of CATAWBA.

A. A. Whitener and W. A. Self for plaintiff.
E. B. Cline for defendant.

PER CURIAM: Upon an examination of the record, we are of opinion that the three exceptions to the ruling of the court below excluding certain evidence of the plaintiff, Michael, and of the witness, Pape, are without merit, as the evidence had no bearing upon the issue raised by the pleadings.

We are of opinion that there is no sufficient evidence to sustain the allegations of conspiracy to cheat and defraud.

We think, upon examining all the evidence, that the motion to nonsuit was properly allowed.

Affirmed.

(393)

AMERICAN PURE FOOD COMPANY v. G. W. ELLIOTT & COMPANY.

(Filed 8 December, 1909.)

1. **Contracts—Fraud—Parol Evidence.**

It is competent by parol evidence to show fraud in the procurement of a contract for the sale and delivery of goods, whether the contract itself is oral or written.

2. **Contracts—Sale of Goods—Principal and Agent—Declarations—Res Gestæ.**

In an action upon contract for the sale and delivery of goods, it is competent for the defendant to show, *as a part of the res gestæ*, the declarations of the plaintiff's agent at the time of the sale, as tending to establish his defense of fraudulent representations to avoid the contract.

3. **Contracts Voidable—Fraud and Deceit—Counterclaim—Void in Toto.**

In an action upon contract for the sale and delivery of goods the defendant may not avoid his contract for fraud and recover damages upon a counterclaim measured by the contract, for having elected to treat the contract as void as to plaintiff's cause of action, it will be regarded as void *in toto*.

4. **Contracts—Fraud and Deceit—Special Damages.**

In setting aside a contract for the sale and delivery of goods for fraud, while the defendant cannot recover on a counterclaim measured by the contract, he can recover special damages to his reputation or business arising from the sale of an inferior or spurious article directly and proximately caused by plaintiff's tort, if shown by proper evidence.

5. **Same—Evidence—Questions for Jury.**

To recover damages upon a counterclaim set up in defense to an action for the sale and delivery of goods alleged to have arisen from plaintiff's fraud and deceit in its procurement, it is necessary for the defendant to show the particulars of his injury so as to enable the court to see if they come within the recognized principles of the law and are allowable; and an estimate by defendant that he has been damaged in a certain sum, at least, is too vague, indefinite and uncertain, and invades the exclusive province of the jury by permitting him to assess his own damages.

6. **Contracts—Fraud and Deceit—Special Damages—Pleadings—Evidence Restricted.**

Evidence that defendant has been damaged in a certain sum by reason of plaintiff's fraud and deceit in inducing a contract for the sale and delivery of goods, must be taken in connection with the allegations relating to the character of the damage alleged in his counterclaim; and when defendant alleges his damages to have arisen from a loss of profits, his evidence that he has been damaged in a certain sum must be taken to mean by the loss of profits.

7. Contracts—Fraud and Deceit—Samples—Loss of Profit—Proximate Cause.

Profits that would have been made had the goods sold and delivered come up to the samples shown and representations made at the time of sale by the salesman, may not be recovered when they are too speculative or remote, the rule being that they must proximately and naturally flow from the tortious act, and are reasonably definite and certain.

8. Same—Evidence.

To recover damages alleged by defendant by way of counterclaim for alleged profits lost, and to have arisen from plaintiff's fraud in inducing a contract for the sale of baking powders, to wit: that the powders sold were fraudulently represented as being as good as the Royal baking powder, it is necessary that the evidence disclose a basis upon which the jury can estimate the alleged profits lost, the cost price of the genuine article of Royal baking powder, or the average sales of the article in his business by the defendant, or the profits usually made, or the demands therefor.

(394) APPEAL from *Long, J.*, at July Term, 1909, of RANDOLPH.

Action commenced before a justice of the peace and tried upon appeal.

These issues were submitted, without objection:

1. Is the defendant indebted to the plaintiff, as alleged in the complaint, and, if so, in what amount? Answer: No.

2. Did the plaintiff's agent, at the time of the sale, falsely represent and warrant the powders to be the same kind and quality as the Royal baking powder? Answer: Yes.

3. Did the said agent, at the time, know the representations as to kind and quality of the goods to be false, and were they made with intent to deceive defendant? Answer: Yes.

4. Did the defendant rely and act upon the said representations, and was he deceived and induced thereby to make the order? Answer: Yes.

5. What amount, if anything, is defendant entitled to recover on his counterclaim? Answer: Fifty dollars.

The court rendered judgment against the plaintiff for the sum of fifty dollars, from which judgment plaintiff appealed.

Thomson & Hoyle and John T. Brittain for plaintiff.
Hammer & Spence for defendant.

BROWN, J. The plaintiff sues to recover the sum of $187.50 for five hundred cans of baking powder sold and delivered to defendants. The defendants appealed to the Superior Court from the judgment of the justice of the peace, and, while the cause was there pending, they, by permission of the court, filed a written answer, setting up a counterclaim.

The answer avers that the defendants were induced to purchase the goods upon the false and fraudulent representations of (395) the agent selling them, and that the defendants repudiated said contract after selling a few cans, and, ascertaining the worthless character of the goods, refused to receive them. The defendant further avers: "That the representations made by the plaintiff, through its agent, were false, and said baking powder was, at most, only a cheap alum baking powder, which was absolutely worthless to this defendant, and he was greatly damaged by attempting to handle said baking powder at all; that by reason of the false guaranty and the deceit of the plaintiff, through its agent, the defendant was greatly damaged in its custom in selling baking powders, and also lost the profit that he would have obtained, to wit, the sum of $50."

There are ten assignments of error pointed to the evidence upon the second, third and fourth issues, which are without merit and do not require discussion at our hands. Suffice it to say that it is immaterial whether the contract was in writing or verbal. It is, in either case, competent to offer parol evidence that the buyer was induced to enter into the contract by false and fraudulent representations as to the quality of the goods. In this case the goods were not present and there was no opportunity for inspection, even if such a thing were practicable as to a commodity packed in sealed cans.

It is also competent to offer the declarations of the agent of plaintiff at the time of the sale. They were part of the *res gestae* and are as competent as if made by the employer himself.

These principles are elementary and need no citation of authority to support them.

We think his Honor properly refused plaintiff's prayer for instruction, and that there is no merit in the exceptions to the charge, except upon the fifth issue, relating to damages, which instruction is: "If you answer the second, third and fourth issues, Yes, in behalf of the defendant, and you come to pass upon the fifth issue, the court instructs you that his damages for the breach of contract would be such damages as is found to be the difference between the alleged contract price and the market value at the time when and the place where the goods should have been delivered by the terms of the contract. The burden of this fifth issue is upon the defendant to satisfy you of the truth of it by the greater weight of the evidence. There is evidence here that has been offered on both sides as to the value of these goods at the time they were delivered and at the place delivered, the evidence of the defendant being to the effect that these goods were not worth more than about ten cents a can, and the evidence of the plaintiff being to the effect that the (396) goods were worth all that they were sold for at the time, $187.50.

The defendant, however, has not set up its damages for more than $50 in any event, and does not demand any more damages than $50."

We think, in view of the charge upon the first issue, that this is an erroneous conception of the measure of damage in this case. The court had already instructed the jury: "But if you find, at the time that the contract was made, that the defendant company's agent did falsely represent and warrant the powders to be the kind and quality of the Royal baking powder, and that these representations were false, to the knowledge of the agent of the plaintiff company making these representations, and that this defendant company relied upon these representations and was deceived thereby and induced to make the contract, then, under the first issue, your answer would be Nothing." This charge was correct only on the assumption that the contract had been rescinded and repudiated by the defendants *in toto,* and that they had refused to take the goods when they discovered the fraud. When these goods were received by the defendants and they discovered the fraud, they had the right either (1) to refuse to accept the goods; (2) if purchase money had been paid, to return the goods and sue for the money paid; (3) or they may plead the breach of warranty in diminution of the price. *Mfg. Co. v. Gray,* 111 N. C., 93; *S. c.,* 124 N. C., 322; *Hadley v. Baxendale,* 9 Exchq., 341; Sedg. on Dam., 291. The evidence of the defendants shows that they elected to take the first course. They aver in their answer that they repudiated the contract at once, and Elliott testifies that he refused to receive the goods.

This being true, the defendants, upon their counterclaim, cannot sue on the contract for its breach, but can recover special damages only. Therefore his Honor's charge is erroneous. If the defendants had elected to keep the goods and had pleaded damages for the breach of the contract in diminution of the price, the charge would have been correct.

It is generally held that rescission of a contract of sale for fraud is a waiver of a right to recover damages, as an action for damages proceeds upon an affirmance of the contract. 14 A. & E., 170; *Roome v. Jennings,* 2 Misc. N. Y., 259. But this is not always true. Rescission will bar a recovery of damage when the only damage sustained is in not getting what was bargained for, and no special damage has been sustained.

According to the weight of authority, if special damage has been sustained, so that the party defrauded is damaged, *notwithstanding*
(397) the rescission, his rescission of the contract will not bar a recovery of such special damage. *R. R. v. Hodnett,* 29 Ga., 461; *Nash v. Ins. Co.,* 163 Mass., 574; *Warren v. Cole,* 15 Mich., 265; *Lenox v. Fuller,* 39 Mich., 268; 14 A. & E., 170.

It is said by our present Chief Justice that "Special damages are rarely allowable, except in cases of fraud in inducing the contract." *Mfg. Co. v. Gray,* 111 N. C., 93. They must be specially pleaded, and must, of course, be proven as laid. *S. c.,* p. 94.

What are the special damages pleaded by the defendants in their counterclaim?

1. That their business was greatly damaged by attempting to sell the said baking powder before discovering the fraud.

Inasmuch as the defendant has elected to repudiate the contract, and therefore cannot sue on it, the basis of his counterclaim must of necessity lie in tort. Consequently, if by the fraud and deceit practiced upon defendants, their reputation and business have been injured by the sale of a few boxes of the spurious article before they discovered its true character, and repudiated the contract, that is an injury flowing directly from the tort, for which defendants can recover, if the claim is supported by evidence from which the jury can fairly estimate the damage sustained.

The record is extremely meager as to evidence of damage, the whole of it being as follows: "Q. How much were you damaged, if any, by this transaction? A. I have been damaged right smart; I could not tell exactly. Q. Give an estimate. A. I have been damaged at least fifty dollars, I know."

It is manifest that this extract from the record contains no facts from which the jury can estimate the damage done to the defendant's business. The defendant so testifying cannot be permitted to assess his own damage. That is the exclusive province of the jury. He must state the particulars of his injury, so the court can see if they come within the recognized principles of the law and are allowable.

Damages must be reasonably certain, both in their nature and in respect to the cause from which they proceed. 1 Sutherland, sec. 53.

If the evidence of injury to defendant's business is so vague, indefinite and uncertain that it does not furnish a basis for the estimating of damages by the jury, then they cannot be recovered. *Hart v. R. R.,* 101 Ga., 188; *Fletcher v. Packing Co.,* 58 N. Y. Sup., 612; 1 Sutherland, sec. 53.

The party injured cannot be permitted to simply "guess at it." The defendant does not state that any portion of his estimate of (398) fifty dollars was injury to his business, nor does he testify that his business was injured at all.

The second ground of special damages, as pleaded, is that defendants "lost the profit that they would have obtained, to wit, the sum of fifty dollars." Thus we see that the defendants' estimate of fifty dollars is based solely upon loss of profits, and not injury to their business. There

are three reasons why profits upon the contract cannot be recovered upon the facts as presented in this record:

First. The defendants do not seek to recover for a breach of the contract, for that would be a suit upon the contract. They ask to set aside the contract and to be relieved themselves from its performance, upon the ground that they were induced to enter into it by fraud, and for damages flowing from the tort committed. They cannot treat the contract entered into by themselves as void on the ground of fraud, and at the same time as in force for the purpose of recovering damages upon the contract for loss of prespective profits growing out of its nonperformance. 14 A. & E., 170, and notes.

In reference to a contract, relating to an exchange of personal property, which was sought to be set aside on the ground of fraud, the Supreme Court of Maine says: "Such a contract is not absolutely void, but voidable only, at the election of the party defrauded. The party having such election must rescind the contract wholly; he cannot consider it void to reclaim his property and at the same time in force for the purpose of recovering damages for its breach." *Junkins v. Simpson,* 14 Me., 364. *Lord Ellenborough* held "that when a contract is to be rescinded at all, it must be rescinded *in toto.*" *Hunt v. Silk,* 5 East Rep., 449. To same effect is *Shaw, C. J.,* in *Rowley v. Bigelow,* 12 Pick., 307. *Mellen, C. J.,* says, in *Seaver v. Dingley,* 4 Greenleaf, 306: "But the law does not allow a party to rescind a contract and at the same time make use of it as subsisting for the purpose of claiming damages for its breach."

See, also, *Parsons, C. J.,* in *Kimball v. Cunningham,* 4 Mass., 502; A. & E., *supra.* As profits upon a contract necessarily flow from it, and must be gauged by its terms, when the purchaser elects to treat the contract as void, and to return the property, he is debarred from recovering possible prospective profits as damages arising from its breach, although he may recover damages for the injury done him in his business by the fraud and deceit practiced upon him. A second reason why profits cannot be recovered under the evidence here is that they are too
(399) uncertain and speculative, even if defendant had affirmed the contract and was suing for its breach.

There is no evidence that defendants had contracted to sell any of the genuine Royal baking powder, or that profits were reasonably certain to have been realized had the contract been performed. There are numerous authorities to the effect that damages recoverable for breach of contract include "profits which the party *certainly* would have realized but for the other's fault, though speculative or contingent profits are not recoverable." *Griffin v. Colver* (N. Y.), 69 Am. Dec., 718. This

is a leading case on the subject, and in the elaborate notes of Judge Freeman the subject is fully considered.

This Court has held that where profits are lost by the tortious conduct of another, proximately and naturally flowing from his act, and are reasonably definite and certain, they are recoverable. *Johnson v. R. R.*, 140 N. C., 574. That decision is based upon evidence showing that the plaintiff had subsistent contracts for his goods outstanding, which he had undertaken to fill at a fixed price, so that his prospective profits could be definitely ascertained.

In the opinion of the Court, *Connor, J.*, says: "This, of course, excludes any evidence in regard to profits not covered by contracts. They would be speculative. There might be no demand for crates, prices might decline," etc.

A third reason is that the evidence discloses no basis whatever upon which the jury can estimate the profits with any sort of accuracy. We have no testimony as to the cost price of the genuine article of Royal baking powder or of the average sales of the article by the defendants in their business, or of the profits usually made, or whether there was any demand for it. In his evidence the defendant Elliott states substantially that he did not wish to buy the goods at the time, although he thought the article was genuine, but that he was "overpersuaded by the agent." It is fair to presume from this that there was no demand for it, or that defendants were overstocked with baking powder.

We are of opinion that there should be another trial, guided by the principles as laid down in this opinion.

New trial.

WALKER, J., dissents.

Cited: Machine Co. v. Bullock, 161 N. C., 14; *Machine Co. v. McKay, ibid.,* 587.

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(400)

JAMES R. RHYNE, BY HIS NEXT FRIEND, v. WILLIAM H. RHYNE.

(Filed 8 December, 1909.)

1. **Contracts, Interpretation of—Intent—Reasonable Support—Blanks Supplied—Certainty.**

A bond in a certain sum given in consideration of certain lands, conditioned upon the obligor's supporting in a certain manner an imbecile son of the obligee for and during his natural life, if the son think it proper to live with him, and that if he "shall be minded to live with another

person" the obligor shall pay the son yearly for and on account of his maintenance "at such other place the sum of_____dollars per year," evidences the intent that the father desired to provide for the support and maintenance of the son; and the blank left therein does not avoid the undertaking if the son live with another person, but manifests a purpose not to limit the amount thought necessary for the son's support except as it is imposed by the condition of life in which he lived.

2. Contracts, Interpretation of—Reasonable Support—Measure of Damages—Value of Services—Instructions—Harmless Error.

In a suit upon a bond and undertaking given to another for the support of an imbecile son, if he think it proper to live with the obligor, and if not, by construction, a reasonable allowance to the son in keeping with his condition in life, it was shown that the son was an average field hand and worth about $65 a year. The son lived with another person than the obligor: *Held,* (1) it was error in the trial judge to instruct the jury that recovery could be had of the amount necessary to support the son in his condition of life for the period he had not lived with the obligor, as it allowed no deduction for the value of the son's services during that time; (2) it appeared from the verdict that the jury had made this deduction, and the error was harmless.

WALKER, J., dissenting.

APPEAL from *Councill, J.,* at May Term, 1909, of GASTON.

This action is brought on a bond executed by defendant, of which the following is a copy:

STATE OF NORTH CAROLINA—Gaston County.

Know all men by these presents: That I, William H. Rhyne, am held and firmly bound unto James R. Rhyne in the sum of one thousand dollars, good and lawful money of the United States, to the true and faithful payment whereof to him, the said James R. Rhyne, his heirs, executors and administrators, jointly and severally, firmly by these presents, signed with my hand and sealed with my seal, this the 11 May, 1886.

The condition of the above obligation is such that, whereas the above bounden William H. Rhyne hath this day contracted and agreed
(401) to maintain the said James R. Rhyne during his natural life. And the said William H. Rhyne, in consideration of six hundred dollars in hand paid by Jacob A. Rhyne, the receipt of which is hereby acknowledged, hath covenanted and agreed, and by these presents doth covenant and agree in manner and form following: That is to say, that he, the said William H. Rhyne, his heirs, executors and administrators, shall and will, at his and their own proper costs and charges, maintain

and keep the said James R. Rhyne for and during his natural life, with good and sufficient meat, drink, apparel, washing and lodging, at his, the said William H. Rhyne's, dwelling house, if the said James R. Rhyne shall think proper to live with him, and if the said James R. Rhyne shall be minded to live with any other person, that then in such case he, the said William H. Rhyne, his executors and administrators, shall and will well and truly pay the said James R. Rhyne, yearly, for and on account of his maintenance at such other place, the sum of _____ dollars per year, and after that rate for any greater or lesser time than a year that the said James R. Rhyne shall be mindful as aforesaid to dwell with any other person than the said William H. Rhyne.

In witness whereof, the said William H. Rhyne has hereunto set his hand and affixed his seal, on the date above written.

WILLIAM H. RHYNE. (Seal.)

Witness: JOHN LABAN RHYNE.

James R. Rhyne did not reside with the defendant, and brings this action to recover such sum as was reasonably necessary for his support while residing with J. Laban Rhyne.

These issues were submitted to the jury:

1. Is the plaintiff's cause of action, or any part of it, barred by the statute of limitations? Answer: No.

3. What sum is due to the plaintiff on account of the breach of the contract? Answer: $775.

The court rendered judgment for the plaintiff, and the defendant appealed.

A. G. Mangum for plaintiff.

Burwell & Cansler and George W. Wilson for defendant.

BROWN, J., after stating the case: The parties to this action were sons of Jacob A. Rhyne, who, being quite old, on 6 May, 1886, conveyed certain real property to his two sons, William H. Rhyne and John Laban Rhyne, for the purpose of providing a support for himself and his imbecile son, James R. Rhyne. The tract conveyed to Laban was for the grantor's benefit. The tract conveyed to this defendant (402) was then worth about six hundred dollars, and the consideration for the conveyance was the contract hereinbefore set out.

The plaintiff and his father resided with Laban, at the home place, and, after the father's death, the plaintiff continued to reside there, where he had lived all his life.

This action is brought to recover under the last clause of the contract, which reads as follows: "And if the said James R. Rhyne shall be mind-

ful to live with any other person, that then and in such case he, the said William H. Rhyne, his executors and administrators, shall and will well and truly pay the said James R. Rhyne, yearly, for and on account of his maintenance at such other place, the sum of _____ dollars per year, and after that rate for any greater or lesser time than a year that the said James R. Rhyne shall be minded as aforesaid to dwell with any other person than the said William H. Rhyne."

The right to recover depends upon whether, under a proper construction of the entire instrument, the defendant can be required to contribute to plaintiff's support while living with his brother, Laban; for it is admitted that if, under the conditions of the bond, with the blank space unfilled, the defendant can only be required to support plaintiff while he lived with defendant, then plaintiff cannot recover. The solution of the question depends upon the construction to be placed upon the bond itself, considered in the light of the circumstances surrounding the parties at the time it was executed.

His Honor charged the jury that "The execution of the contract having been admitted by the defendant, and that under its terms and provisions the plaintiff had a right to reside at any place he might desire, that the obligation rested upon the defendant to pay him such sum of money as would be reasonable and sufficient to support him in a manner equal to the one referred to in the contract, taking into consideration his station in society and his relation in life, and taking into consideration what was in contemplation by the parties at the time of the execution of the contract." To this charge defendant excepted.

We are of opinion that this interpretation of the instrument is correct. We do not think that the failure to fill up the blank space avoids the contract and renders it impossible for plaintiff to recover. On the contrary, we are of opinion that the failure to fill up the blank manifests a purpose not to limit the amount thought to be necessary for plaintiff's support when not living with defendant, except by such limita-
(403) tion as is imposed by the condition of life in which plaintiff had lived.

To arrive at the intent of the parties it is proper to look at the entire instrument, the condition of the parties and the purpose for which it was entered into.

The father had made provision for himself, and at the same time he undertook to provide for his weak-minded son. The sole purpose which induced the father to convey the land to the defendant was to secure a support for plaintiff. It is hardly conceivable that he intended to place plaintiff in defendant's absolute power by forcing him to reside with him and leave the old home, where plaintiff had lived all his life. Why put in the clause that plaintiff might live elsewhere and then purposely

cut him off from a support in case he exercised the very privilege conferred on him? Such construction is antagonistic to the words of the instrument and at variance with the manifest purposes of the parties to it.

We recognize the general rule that if a blank be left in an instrument the omission may be supplied only if the instrument contains the means of supplying it with certainty. But this instrument can be easily and fairly construed to be a completed contract without filling in the blank. The obligation is to pay one thousand dollars, and the contract, the performance of which the bond is intended to secure, is the maintenance of plaintiff; and the failure to fill in the blank appears to us to indicate a purpose to measure the cost, not with exactness, but by the reasonable needs of plaintiff from year to year, under the changing conditions of his life.

None of the authorities cited by the learned counsel for defendant appear to give us much light, for the cases cited relate to definite promises to pay, and are coupled with nothing else.

To illustrate: In the Illinois case (*Church v. Noble*, 24 Ill., 291) the contract contained several independent provisions, which were enforceable, but also contained a clause as follows: "And shall, in addition, pay the said party of the second part (the plaintiff) the sum of _____"

Of course, this provision was held not to be enforceable, for where there is so great uncertainty that it cannot be known what is contracted for, the contract is necessarily void on that account.

The other assignments of error relied on in defendant's brief are predicated upon alleged error in his Honor's charge, wherein he instructed the jury that the plaintiff would be entitled to recover from the defendant such an amount as the jury should determine a reasonable charge for his annual support and maintenance, without deducting anything therefrom on account of the value of the labor (404) which he rendered during said time. We think this charge erroneous, and would entitle defendant to a new trial but for the manifest fact that the jury, disregarding the charge or failing to understand it, cured the error of the judge by deducting from the cost of plaintiff's support the value of his labor.

The defendant offered no evidence, and that relating to the cost of supporting plaintiff, as well as to the value of his services, comes from plaintiff's witnesses.

The smallest estimate placed upon the cost of supporting plaintiff is one hundred dollars per year. The testimony as to the value of his labor is that a good field hand is worth sixty-five dollars per year; that plaintiff was forty-two years old when this contract was executed and is now sixty-five; that a part of the time he was an average field hand,

although very feeble-minded and fit for nothing else; that for ten years past he has been physically feeble and not an average field hand and able to work but little. The jury gave $775 for a period of about twenty-two years, up to 25 March, 1908, when this action was commenced, or about thirty-five dollars per annum, which is the difference between the lowest estimated cost of supporting plaintiff and the highest estimate placed upon the value of his labor. It is also about six per cent interest on the value of the land conveyed to defendant at the date he received it.

If the plaintiff is entitled to recover at all, then, in any view of the evidence, he is entitled to recover as much as the sum awarded by the jury.

Upon a review of the record, we find no error which, in our opinion, necessitates a new trial.

Judgment affirmed.

WALKER, J., dissenting.

Cited: Bryan v. Cowles, 152 N. C., 770; *Rhyne v. Rhyne,* 160 N. C., 559; *Martin v. Martin,* 162 N.C., 45; *Temple Co. v. Guano Co., ibid.,* 90.

J. M. MACE v. SOUTHERN RAILWAY COMPANY.

(Filed 8 December, 1909.)

1. **Carriers of Passengers—Ticket Stipulations—Shortest Route—Negligence —Parol Evidence.**

   A passenger traveling by rail upon a round-trip ticket limiting his route to his destination and return to the shortest one, may show, in his suit for damages for being put off the train, that he was erroneously informed by defendant's station agent that the route he had taken was the shortest, not as a variation of the stipulation printed upon the ticket, but that it was through the negligence of the defendant's station agent that he had taken the longer route.

2. **Carriers of Passengers—Ticket Stipulations—Shortest Route—Incorrect Information—Ejection of Passenger—Negligence—Damages.**

   A plaintiff may recover of the defendant railroad company such actual damages as he may have sustained by being put off the latter's train, when he was traveling a longer route to his destination than that stipulated for in his ticket, the stipulation calling for the shortest one, when it appears he was acting upon erroneous advice as to the shortest distance given by defendant's station agent, that he did not know which was the shortest route and reasonably relied upon the information given him.

3. Same—Conductor.

The fact that a conductor acted within his duty, and without insult, violence or rudeness, in putting a passenger off of his train who was traveling on a ticket to his destination stipulating another route thereto, does not exculpate the defendant railroad company for liability for the negligence of its station agent in causing the passenger, without his fault, to take this route as the one called for in his ticket.

WALKER, J., dissenting.

APPEAL by defendant from *Justice, J.*, at May Term, 1909, of (405) CATAWBA.

These issues were submitted:

1. Was the plaintiff, J. M. Mace, wrongfully put off the defendant's train, as alleged in the complaint? Answer: Yes.

2. If so, was the expulsion of the plaintiff, J. M. Mace, malicious, wanton or accompanied with violence or rudeness and insult? Answer: No.

3. What damages, if any, is the plaintiff, J. M. Mace, entitled to recover? Answer: One hundred and fifty dollars.

The court rendered judgment for the plaintiff, and the defendant appealed.

The facts are stated in the opinion of the Court.

C. L. Whitener and W. A. Self for plaintiff.
S. J. Ervin for defendant.

BROWN, J. The plaintiff purchased of defendant's agent, at Rock Hill, S. C., on 1 July, 1908, tickets for transportation to Hickory, N. C., and return, good until 8 July, 1908. The tickets contained stipulations, printed on their face, that they were good for transportation of the passenger *"via* short line only," and were "good for return same route only." (406)

The evidence was that the plaintiff used this ticket in payment of transportation from Rock Hill, S. C., to Hickory, N. C., coming by way of Charlotte and Statesville, the shortest and most direct route, and that on returning to Rock Hill he undertook to return by way of Marion, N. C., and Blacksburg, S. C., to Rock Hill, which route was a distance of fifty-one miles farther than the way he had come, and that on plaintiff's embarking on defendant's train at Hickory, N. C., on his return by way of Marion, N. C., the defendant's conductor in charge of said train refused to accept this ticket in payment of transportation on this route, and demanded that plaintiff pay fare to Marion, N. C., or else that he alight from the train at the next station; and that the plaintiff thereupon refused to pay fare to Marion and alighted from the

train at Connelly Springs, the first station west of Hickory, and the next day returned by way of Statesville and Charlotte.

It was in evidence that the shortest and most direct route was by way of Charlotte and Statesville, and that it was fifty-one miles farther by way of Marion and Blacksburg.

The objection is made by the defendant that the declarations of defendant's agent, made to plaintiff at Rock Hill and Hickory, are incompetent for the purpose of varying the contract of transportation, as set out on the face of the ticket. We quite agree with the learned counsel for defendant, but the evidence does not appear to have been received for any such purpose.

The reason for the competency of the evidence is that the plaintiff had the right to be informed as to which is the shortest route, and the defendant's agents were the proper persons for him to apply to.

The matter was put before the jury with such clearness that they evidently did not fail to comprehend what was the true issue. His Honor instructed them as follows: "If you find from the evidence that the ticket that has been introduced in evidence is a copy of the tickets which were issued to the plaintiff and contained the stipulation, '*via* the short route and return the same way,' then the plaintiffs would be bound by that, and they would have to go the shortest route and return the same way, unless the agent who sold them the tickets at Rock Hill told them that they were good by way of Marion as well as by way of Statesville and Charlotte; if the agent told them that, and the plaintiffs did not know which was the shortest route, and could not by reasonable diligence have ascertained that, then they had a right to rely upon
(407) the statement made to them by the agent at Rock Hill; and if, under those circumstances, they went to Hickory, and, in order to ascertain whether they could go on the train to Marion, applied to the agent at Hickory, and he confirmed the statement that was made by the agent at Rock Hill by telling them they could go by Marion, then they had a right to rely upon the statement of the two agents and to return by way of Marion; and if they were ejected from the train after offering that ticket and informing the conductor, then they were wrongfully put off the train, and the defendant would be liable in actual damages, it makes no difference whether the ejectment was with or without rudeness, with malice or without, or wanton or not wanton."

We think that a correct statement of the law governing this case.

The fact that the conductor did nothing wrongful upon his part does not exculpate the defendant from liability for the negligence of its station agent in causing plaintiff to take the wrong route on his return home. This liability is upon the same principle that when a passenger holds a ticket good on one train and one route, by direction of the gate

keeper is made to take another train going in the wrong direction, the carrier is liable for the negligence of its agent.

While the ticket contains the contract, it furnishes no indication as to which is the shortest route or the proper train to take.

Had there been no misdirection and no inquiry, there would be no liability, if the passenger had made the mistake himself. *Hufford v. R. R.*, 8 Am. St., 859; *Head v. R. R.*, 11 Am. St., 434; *R. R. v. Gaines*, 59 Am. St., 465.

No error.

WALKER, J., dissenting.

Cited: Harvey v. R. R., 153 N. C., 573; *Norman v. R. R.*, 161 N. C., 339; *Hallman v. R. R.*, 169 N. C., 131; *Sawyer v. R. R.*, 171 N. C., 16.

H. M. ROBERTS ET AL. V. J. J. BALDWIN.

(Filed 8 December, 1909.)

1. Surface Waters—Diverting Natural Flow—Damages.

One is liable for damages caused to the lands of another by his diverting the natural flow of surface water thereto.

2. Same—Limitation of Actions—Permanent Damages—Easement.

The damage caused to the lands of another by the unlawful diverting of surface water thereon by means of a ditch is not barred by the three-year statute of limitation from the time the ditch was dug. The trespass is not continuing, but the irregular downpouring of the water upon the land, in varying quantities, to the injury of the land, and the recovery of damages is limited to those accruing within three years prior to the commencement of the suit, both as to annual or permanent damages, unless by acquiescence for twenty years the presumption of a grant or easement arises.

APPEAL from *J. S. Adams, J.*, at May Term, 1909, of HENDER- (408) SON.

Action for the recovery of damages for the unlawful diversion of surface water from plaintiffs' lands, by means of a ditch constructed by defendant, to the lands of the plaintiffs, and the plaintiffs sought to recover annual damages for the loss of crops and also for permanent damages to the land.

His Honor, at the close of the plaintiffs' evidence, intimated that he would charge the jury that if they believed the evidence the plaintiffs' cause of action was barred by the statute of limitations. The plaintiffs submitted to a nonsuit and appealed.

Staton & Rector, O. V. F. Blythe and C. F. Toms for plaintiffs.
Bartlett Shipp for defendant.

CLARK, C. J., after stating the facts: In *Rice v. R. R.*, 130 N. C., 376, *Douglas, J.*, says that the doctrine has been thus generally stated: "No one can divert water from its natural flow, so as to damage another. They (the upper proprietors) may *increase and accelerate, but cannot divert. Hocutt v. R. R.*, 124 N. C., 214; *Mizzell v. McGowan*, 120 N. C., 138; *S. c.*, 125 N. C., 444; *S. c.*, 129 N. C., 93; *Lassiter v. R. R.*, 126 N. C., 509; *Mullen v. Canal Co.*, 130 N. C., 502." To the same effect are many other cases, among them *Staton v. R. R.*, 109 N. C., 337; *Jenkins v. R. R.*, 110 N. C., 446; *Fleming v. R. R.*, 115 N. C., 696; *Parker v. R. R.*, 119 N. C., 687; *Mizzell v. McGowan*, 120 N. C., 138; *Clark v. Guano Co.*, 144 N. C., 76; *Briscoe v. Parker*, 145 N. C., 17, and there are others.

The defendant pleaded the three-years statute of limitations and relied upon Revisal, sec. 395 (3): "Action for trespass upon real property. When the trespass is a continuing one, such action shall be commenced within three years from the original trespass, and not thereafter." His Honor erred in sustaining the plea. This is not a continuing trespass. It is irregular, intermittent and variable, dependent upon the rainfall as to quantity of water poured upon the plaintiff's land, and in frequency of occurrence. It is true the ditch, which was dug more than three years before suit brought, has been continuously there, but (409) that is on the defendant's land. The trespass is the pouring down of water upon the plaintiff's land, which comes down at irregular periods and in varying quantities, to the injury of his crops and land. The plaintiff can recover for any injury, caused by water diverted from its natural course, within three years before the action began.

A case exactly in point is *Spilman v. Nav. Co.*, 74 N. C., 675, where the Court held that an action to recover damages to the plaintiff's land, caused by flowing water upon it and sobbing it by seepage from the dilapidated condition of the defendant's canal, was not barred by the above-cited three-years statute, although the first flooding occurred more than three years before suit brought. In that case the land was sobbed every day continuously by the oozing and percolation of the water from the canal, yet the Court held that it was not a continuous trespass. Indeed, *Reade, J.*, says in his opinion that to liken the injury to the land in such cases to that sustained by laming a horse, which continued lame, was "an amusing fallacy which is worth preserving." The counsel who presented that "fallacy" was the writer of this opinion.

In the present case the water does not pour down daily and hourly upon plaintiff's land, damages for which even would not be barred

(*Spilman v. Nav. Co., supra*), but only after each rain. The trespass is not a continuing one, for it does not accrue from a completed act done more than three years ago, but by floodings repeatedly occurring within that time.

"Until by acquiescence in such flooding for twenty years the presumption of the grant of an easement arises, an action will always lie." *Parker v. R. R.*, 119 N. C., 685; *Geer v. Water Co.*, 127 N. C., 353. Of course, however, the recovery in such actions is limited to damages accruing within three years prior to suit brought. We think this action was not barred, either as to such annual or permanent damages as accrued within that period.

Reversed.

Cited: S. c., 155 N. C., 277; *Hooker v. R. R.*, 156 N. C., 157; *Earnhardt v. Comrs.*, 157 N. C., 237; *Duval v. R. R.*, 161 N. C., 450; *Barcliff v. R. R.*, 168 N. C., 270.

CALDWELL LAND AND LUMBER COMPANY v. J. A. TRIPLETT.

(Filed 8 December, 1909.)

1. Boundaries—Declarations—Evidence.

Declarations of deceased persons and common reputation, under certain circumstances are received here as evidence on questions of private boundary, the limitations as to declarations being that they should have been made *ante litem motam;* that the declarant is dead when they are offered and was disinterested when they were made; and as to both species of evidence it is required that the testimony should attach itself to some monument of boundary or natural object or be fortified by some evidence of occupation and acquiescence tending to give the land some fixed and definite location.

2. Same—Presence of Declarant.

In the case of declarations it is not required that the declarant should be physically present at the point indicated if he describes the same so that it can be located with a reasonable degree of certainty.

3. Same—Trespass—Reputation—Declarations—Definiteness.

In an action of trespass on land it was admitted that the answer to an issue as to the beginning corner of a grant at a black gum tree would control in the locating the land in dispute. Evidence was offered by a witness of the declarations of one L. which did not speak of the beginning corner in express words as a "gum," but that it was "right at the intersection of" certain definite trails and a ridge, and the marked gum was

subsequently found where he had stated. The witness had the calls of the tract of land read to declarant, and in the calls was "the character of the tree": *Held*, evidence of declarations sufficiently definite to designate the tree as the beginning corner of the grant.

(410) APPEAL from *Justice, J.*, at May Term, 1909, of CALDWELL.

Action for trespass on land and to restrain the cutting of timber.

Plaintiff claimed title under two grants, Nos. 900 and 907, to G. W. Folk, dated in 1874. These grants were introduced, and it was admitted that plaintiff had *mesne* conveyance of this title, and that same covered the land in dispute.

Defendant claimed title under two grants to Reuben Estes—one, dated in 1802, for 300 acres, and the second, dated in 1803, for 100 acres; and the question was in the location of these two grants, and this, in turn, depended on the correct location of the beginning corners, respectively. To determine these questions, admitted to be controlling, issues were submitted and responded to by the jury, as follows:

1. Is the black gum at the point designated on the map, 1, at the index, the beginning corner of the 300-acre grant, No. 3113, to Reuben Estes, in 1802? Answer: Yes.

2. Is the maple at the point designated on the map as No. 5, at the index, the beginning corner of the 100-acre grant, No. 3295, to Reuben Estes, in 1803? Answer: Yes.

On the trial, J. M. Bernhardt, a witness for defendant, was allowed, over plaintiff's objection, to state the declarations made to witness by one Luther Moore as to the placing of the beginning corner of the 300-acre grant, under which defendant claimed part of the land, Luther Moore being dead at the time of the trial, and the declarations (411) having been made to witness before controversy had arisen, the declarant being sixty-five or seventy years of age at the time and not being in any way interested; the statement of the witness being as follows: "I have heard Luther Moore say where this corner was. The trail represented on this map runs from the black gum down to about the point marked 'creek' on the large map. The path led from main Wilson Creek across by this black gum, and then from Rock House Creek, and then on to the Gragg prong at Madison Gragg's house. The main Yancey Ridge is shown by these dots. I only know what Luther Moore said as to whether he ever did any surveying. I know that he was a hunter."

Q. What did he say to you about the beginning corner? A. He said it stood near the intersection of these two trails—one up Yancey Ridge, and the other leading from main Wilson's Creek to Madison Gragg's.

Q. What did he say it was a corner of? A. The 300-acre Estes grant.

Q. Did you afterwards find it? A. I found a gum tree there, marked as a corner.

Q. How far from the intersection of those trails? A. Not over twenty feet; marked on the large map. At the time Moore was talking to me, he was at the Globe, five miles from this point. He told me the corner stood right at the intersection of those trails—Yancey Ridge and the one leading from Silas Coffey's, on main Wilson's Creek, across Rock House Creek to Madison Gragg's. I think he said the beginning corner; I am certain he did. I don't think he told me what sort of beginning corner it was. He didn't say whether it was pine, black gum, oak or chestnut. I had the calls of the piece of land. I had it and read it to him. The calls had the character of the tree.

W. C. Newland and Aycock & Winston for plaintiff.
Jones & Whisnant and Mark Squires for defendant.

PER CURIAM: The declarations of deceased persons as evidence on questions of private boundary and general reputation on such an issue has been the subject of a number of recent decisions of this Court. *Lumber Co. v. Branch,* 150 N. C., 240; *Bland v. Beasley,* 140 N. C., 629; *Bullard v. Hollingsworth,* 140 N. C., 634; *Hemphill v. Hemphill,* 138 N. C., 504; *Yow v. Hamilton,* 136 N. C., 357; *Shaffer v. Gaynor,* 117 N. C., 15.

As to declarations of a single witness, it is required that the declarant be dead when they are offered, and they should have been made before the controversy arose, and by a disinterested person; and, (412) both as to declarations and general reputation, the evidence must not be indefinite and general in its nature, but, as said in *Bland v. Beasley, supra,* "It must attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location."

In *Gaynor's case, supra,* the declaration was in reference to a tree. In *Hemphill's case, supra,* the general reputation was admitted that a divisional line ran along the top of a certain ridge, a natural object, otherwise described and defined in the testimony. The objection chiefly urged to the testimony admitted in the present case was that the declarant was not physically present at the corner when the declarations were made, and that he did not sufficiently designate and describe the tree. But this first question has been expressly decided against appellant's position in *Westfelt v. Adams,* 131 N. C., 379, citing *Scoggins v. Dalrymple,* 52 N. C., 46; and on the second, while the declarant did not speak of the beginning corner in express words as a gum, the tree designated as the beginning corner in the grant, he gave a very clear

indication of its placing, the important question; "right at the intersection of those trails, Yancey Ridge and the one leading from Silas Coffey's, on main Wilson's Creek, across Rock House Creek to Madison Gragg's," and the marked gum was found just where he had stated. Even if it be conceded that the witness should name the tree designated in the grant, this, by fair intendment, was also done; thus, "He didn't say whether it was a pine, black gum, oak or chestnut. I had the calls of the piece of land. I had it and read it to him."

The objection that there was no evidence as to the location of the 100-acre grant is without merit. There was evidence as to the location of the beginning corner called for in this grant, "A maple standing on the N. E. side of the ridge," and there was testimony as to natural objects called for in the grant, which further tended to locate it.

We find no reversible error in the trial, and the judgment on the verdict is affirmed.

No error.

Cited: Lamb v. Copeland, 158 N. C., 138.

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(413)

W. L. BRYAN ET AL. v. J. R. HODGES ET AL.

(Filed 8 December, 1909.)

1. **Ejectment—Lands—Title—Common Source—Estoppel—Burden of Proof.**

An action of ejectment, under our present procedure, is an action to recover land, placing the burden upon plaintiff to establish title in himself good against the world, or good against the defendant by estoppel, or to show a common source of title with the defendant so as to bring himself within the rule of convenience, sometimes called an estoppel.

2. **Ejectment—Lands—Title—Questions for Jury—Instructions.**

An instruction which erroneously assumes that plaintiff has established his title in an action of ejectment, when the issue in the case is one of mixed law and fact to be found by the jury, under instructions of the court, is properly refused.

3. **Ejectment—Title—Defendant's Denial—Verdict—Costs.**

In an action of ejectment the jury found the issue as to title in plaintiff's favor, except as to a small tract of land, and, also, that they were not entitled to recover damages: *Held,* that as defendants denied plaintiff's title and right of possession to the entire tract it was error for the court to refuse plaintiff's motion to tax them with the costs, their disclaimer not being broad enough.

BRYAN *v.* HODGES.

APPEAL by plaintiff from *Murphy, J.*, at Fall Term, 1909, of WATAUGA.

The facts are stated in the opinion of the Court.

J. C. Fletcher, F. A. Linney and L. D. Lowe for plaintiff.
Mark Squires for defendant.

WALKER, J. The plaintiffs, as tenants in common, brought this action to recover a tract of land in Watauga County, containing 420 acres. The defendants denied the plaintiffs' title to the land described in the complaint, except two tracts, or "boundaries," as they are called by the defendants, containing together something more than forty acres, the metes and bounds of which are set forth in the answer. The defendant entered no disclaimer as to the rest of the land, consisting of many acres.

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

1. Are the plaintiffs, or either of them, the owners of and entitled to the possession of the land described in the complaint, or any part thereof? Answer: Yes; the plaintiffs are the owners and entitled to the possession of all the lands described in the complaint, except that 100-acre tract claimed by defendant, as shown on plat by red lines; and the lines of the plaintiffs should run with the lines of Hodges and (414) Harley, as shown on plat by purple line and dotted red lines.

2. What damages are the plaintiffs entitled to recover, if any? Answer: None.

The plaintiffs' counsel, upon the rendition of the verdict, requested the court, in due form and apt time, to tax the defendant with the costs. This motion was denied, and the plaintiffs excepted.

The plaintiffs requested the court to give three special instructions. The court gave the first and third of these instructions and refused to give the second, which was as follows:

"The burden is upon the defendant to locate the grant under which he claims title, and it is the duty of the defendant to locate his beginning corner by a preponderance of the evidence; and unless you find from the evidence that the defendant has established the pine as his beginning corner, then he must begin at some known corner of the tract to establish and locate his grant."

We discover no error in the refusal of the court to give this instruction. If it was not substantially given by the court in the third of the special instructions which were requested by the plaintiffs, we think the court properly rejected it. The plaintiffs must remember that in an action of ejectment—now, under our present procedure, an action to recover land—the burden rests upon the plaintiff to establish a title in

himself to the land, good against the world, or, at least, good against the defendant by estoppel, or by what we sometimes call an estoppel, though not strictly so, as it is a mere rule of practice or convenience by which the defendant is precluded from denying the plaintiff's title, because both claim from a common source and the plaintiff has the older title of the two, and when it is apparent that both parties acted in recognition of the common predecessor, in their chains of title, as being vested with the true title. *Christenbury v. King,* 85 N. C., 230; *Fisher v. Mining Co.,* 94 N. C., 397; *McCoy v. Lumber Co.,* 149 N. C., 1; *Sample v. Lumber Co.,* 150 N. C., 161. As in this case, the burden was on the plaintiffs to show title, the second of the instructions asked by the plaintiffs to be given assumed that the plaintiffs had conclusively shown a good title, when that was a matter still open for the jury to pass upon, it being one of the issues in the case and a mixed question of law and fact.

But we are of the opinion that the judge erred upon the question of costs. As the defendants denied the title of the plaintiffs, and the right of possession of the plaintiffs to the entire tract, they were neces-
(415) sarily required to prove their title and incur the costs and expense of so doing, and, under the able and clearly expressed opinion of *Avery, J.,* speaking for the Court, in *Moore v. Angel,* 116 N. C., 843, the plaintiffs were entitled to a judgment for their costs. *Cowles v. Ferguson,* 90 N. C., 308; *Harris v. Sneeden,* 104 N. C., 369; *Murray v. Spencer,* 92 N. C., 264; Revisal, sec. 1264. In not ruling in favor of the plaintiff upon the question of costs, the court erred, and to this extent the judgment is modified. In all other respects it is affirmed, as we do not find any reversible error in any of the other rulings, after a most careful examination of the record and the brief of the plaintiffs' counsel, and a full consideration of the case.

Modified and affirmed.

Cited: Bowen v. Perkins, 154 N. C., 453; *Van Gilder v. Bullen,* 159 N. C., 297.

C. A. LITTLE ET AL. v. TOWN OF LENOIR.

(Filed 8 December, 1909.)

1. Appeal and Error—Injunction—Completed Acts—Appeal Dismissed.

An appeal from the refusal of the lower court to continue an injunction to the hearing will be dismissed when it appears that the acts apprehended as a threatened injury and invasion of plaintiff's rights have become accomplished and completed and that the injury may now be measured by actual results and effects.

2. Injunction—Sewerage—Damages Doubtful—Court's Noninterference.

In this case an injunction is sought against the action of the city in emptying its sewer into a stream by certain of the landowners along its course where the sewer empties. The court affirming the doctrine of the city's liability for damages as laid down in *Metz v. Asheville*, 150 N. C., 748, and other cases cited, will not interfere by injunction, it being doubtful, from the record, as to the character and extent of the damage.

APPEAL from *Justice, J.*, from CALDWELL, denying, in May, 1909, the motion of plaintiffs to continue an injunction to the hearing.

The plaintiffs, many in number, all owning land on Lower Creek, in the counties of Caldwell and Burke, sued the defendants, the town of Lenoir, its mayor and board of commissioners, to enjoin them from emptying the sewage of the town, through its sewerage system, then being constructed, into Lower Creek. The affidavits show (416) that this creek partially encircles the town of Lenoir, is sluggish in its flow; its bed has for several miles below the town been filled up with sand and *debris;* its banks will average, for several miles, about eighteen inches or two feet above the water, as it ordinarily flows in the creek; that the bottom lands on both sides are about 200 to 250 yards wide; that these lands are overflowed by the ordinary freshets in the creek, and are lower in many places than the bed of the creek; that much of the overflowed water cannot, for this reason, return to the stream, but forms pools that become stagnant; that a considerable number of people live on the hills facing this stream, from one-fourth to one mile from it; that there are a few springs, from which some of the families obtain their drinking water, reached by the overflow waters of the creek; that the bottom lands are now too wet and sobby for cultivation, and are used exclusively for the pasture of cattle; that the flow of said creek is estimated to be between 12,000,000 and 17,000,000 gallons for each twenty-four hours; that before building its sewerage system much of the garbage and sewage of the town was carried by the rain into Lower Creek and its tributary; that the town has an estimated population of 3,500 people and was authorized to construct the system, and its qualified voters approved an issue of bonds by the city for this purpose; that the estimated amount of sewage discharged through the system is 33,000 gallons per day of twenty-four hours.

Affidavits of several physicians, some resident of the town and county, others nonresident, differed in their opinion as to the effect of the discharge of sewage and its being scattered over the bottom lands in time of freshets, upon the healthfulness of the homes of the plaintiffs and others living near the creek and below the places of discharge.

Justice, J., after hearing the matter, declined to continue the injunction, upon the grounds "that the prospective injury complained of is

not a certain injury which will follow the action of defendants as a necessary consequence, but a conjectural and apprehended injury." The plaintiff excepted to the order and appealed to this Court. After the order of his Honor was entered, the defendant finished its plant, and the sewage is now being discharged in Lower Creek.

Avery & Avery and Avery & Erwin for plaintiffs.

Jones & Whisnant, Lawrence Wakefield, W. C. Newland and M. N. Harshaw for defendants.

MANNING, J., after stating the case: It was admitted on the argument before us that, after his Honor declined to continue the injunction to the hearing, the town of Lenoir completed its system of sewerage, and the same has been in use now for several months; so that, what the plaintiffs apprehend as a threatened injury and invasion of their rights has become an accomplished and completed act, and may now be measured, not by uncertain conjecture and speculation, but by actual results and effects. The question presented is, therefore, an abstract question as to the injunction against a threatened injury, and, under *Pickler v. Board of Education,* 149 N. C., 221, perhaps the appeal should be dismissed; but, as the action is not finally disposed of, we proceed to discuss the questions argued before us.

In Dillon on Mun. Corp., sec. 1047, the learned writer says: "It is impossible to reconcile all the cases on the subject, and courts of the highest respectability have held that if the sewer, whatever its plan, is so constructed by the municipal authorities as to cause a positive and direct invasion of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable." In Wood on Nuisances, sec. 427, the author says: "The right of a riparian owner to have the water come to him in its natural purity is as well recognized as the right to have it flow to his land in its usual flow and volume. . . . The pollution of water by artificial drainage, which causes sewage to flow into a stream, spring or well, whether done by a municipal corporation or an individual, constitutes a nuisance which entitles the owner to damages therefor, the rule being that a municipal corporation has no more right to injure the waters of a stream or the premises of an individual than a natural person." In Joyce on Nuisances, sec. 284, this author says: "Though a municipality or other body has power to construct and maintain a system of sewers, and although the work is one of great public benefit and necessity, nevertheless such public body is not justified in exercising its power in such a manner as to create, by a disposal of its sewage, a private nuisance,

without making compensation for the injury inflicted or being responsible in damages therefor, or liable to equitable restraint in a proper case; nor can these public bodies exercise their powers in such a manner as to create a public nuisance, for the grant presumes a lawful exercise of the power conferred, and the authority to create a nuisance will not be inferred. It therefore constitutes a nuisance to pollute and contaminate a stream by emptying sewage of a city therein, ren- (418) dering it unwholesome, impure and unfit for use." The conclusion of these eminent writers is sustained by the decisions of all the courts to whom this question has been presented. We cite a few of the most apposite to the present case: *Mansfield v. Balliett,* 65 Ohio St., 451; *Chapman v. Rochester,* 110 N. Y., 273; *Morgan v. Danbury,* 67 Conn., 484; *Seifert v. Brooklyn,* 101 N. Y., 136; *Jacksonville v. Doan,* 145 Ill., 23; *Good v. Altoona,* 162 Pa. St., 493; *Owens v. Lancaster,* 182 Pa. St., 257; *Phinzy v. Augusta,* 47 Ga., 263; *Hutchins v. Frostburg,* 68 Md., 100; *Hasbell v. New Bedford,* 108 Mass., 208. The doctrine of liability, with its limitation of damages, declared in these authorities, is recognized by this Court in *Williams v. Greenville,* 130 N. C., 93; *Downs v. High Point,* 115 N. C., 182; *Hull v. Roxboro,* 142 N. C., 453; *Myers v. Charlotte,* 146 N. C., 246; *Fisher v. New Bern,* 140 N. C., 506; *Metz v. Asheville,* 150 N. C., 748. While it is clear, under the doctrine of these cases, that the town of Lenoir will be liable to the plaintiffs for such damages as they can prove, under the decisions of this Court, *supra,* that they have sustained and will sustain, yet much doubt and uncertainty as to the extent of the damages probably resulting is created by the conflicting views of the learned experts and others whose affidavits were presented to his Honor. In this condition of the case, and in the absence of specific findings of a jury covering these questions, we do not think his Honor erred in refusing to continue the injunction. The principle controlling in such cases is stated by *Hoke, J.,* in *Cherry v. Williams,* 147 N. C., 452: "Courts are properly very reluctant to interfere with the enjoyment of property by the owner, and there is a line of cases in this State—and they are in accord with established doctrine—to the effect that when the owner of the property is about to engage in an enterprise which may or may not become a nuisance, according to the manner in which it may be conducted, courts will not usually interfere in advance to restrain such an undertaking, and especially when the apprehended injury is doubtful or contingent or eventual; but these decisions will very generally be found to obtain in causes where the apprehended injury was threatened by reason of some industrial enterprise which gave promise of benefit to the community, affecting rather the comfort and convenience than the health of adjoin-

ing proprietors, and giving indication that adequate redress might in most instances be afforded by an award of damages, as in *Simpson v. Justice,* 43 N. C., 115; *Hyatt v. Myers,* 71 N. C., 271; *Hickory v. R. R.,* 143 N. C., 451; *Durham v. Cotton Mills,* 141 N. C., 615; *Vickers v. Durham,* 132 N. C., 880. "When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the courts will refrain from interfering." *Dorsey v. Allen,* 85 N. C., 358. It appears from *Vickers v. Durham, supra,* and it is well sustained by experts who have investigated the subject with the care and thoroughness its extreme importance demands, that there are well-known methods, approved and in use, by which the sewage of towns and cities is rendered harmless to health and inoffensive to the senses. If the injury to plaintiffs is as serious as they apprehended at the time this action was brought, the defendant town may discover it to be more economical to install one of these methods approved by science and use, rather than answer the judgments in favor of the plaintiffs.

For the reasons stated, it is not manifest that there was error in his Honor's ruling, and we affirm his order.

Affirmed.

Cited: Moser v. Burlington, 162 N. C., 143; *Hines v. Rocky Mount, ibid.,* 412; *Donnell v. Greensboro,* 164 N. C., 334; *Scott v. Comrs.,* 170 N. C., 330; *Price v. Trustees,* 172 N. C., 85.

H. S. HALL, RECEIVER, v. J. A. JONES ET AL.

(Filed 8 December, 1909.)

1. **Liens—Subcontractor—Material Men—Statutory Provisions.**

Those who have furnished a subcontractor materials for the erection of a building and who have not acquired their liens on the property of the owner in accordance with the provisions of the statute, Revisal, secs. 2020, 2021, stand only in the relation of creditor of the subcontractor.

2. **Same—Contractor—Order—Acceptance.**

When an order on the contractor given by a subcontractor in favor of one furnishing the latter materials for the building has been unconditionally accepted by the former, to be paid from moneys coming into his hands under his contract with the owner, it is a valid assignment of such moneys *pro tanto,* and good against the claims or demands of other material men who have likewise furnished the subcontractor and who have not notified the contractor or acquired liens on the building in accordance with the statutory provisions.

3. Same—Future Payments—Receiver—Completing Contract.

When, by unconditionally accepting an order given on him by a subcontractor in favor of one furnishing the latter material for the building, the contractor has made a valid assignment of funds coming into his hands under his contract with the owner for the payment of the debt, and thereafter the subcontractor, a corporation, goes into the hands of a receiver who, by agreement, satisfactorily completes the work, the assignment is valid as to such sum or sums of money as may have become due under the accepted order as against material men creditors of the subcontractor of whose claims the contractor had not been notified, and who had not acquired a lien under the statutory provisions.

4. Liens—Contractor—Contracts, Interpretation of—Payments Reserved—Material Men—Trusts and Trustees.

A provision in a contract between the owner and a contractor to erect a building, that the architect shall make a monthly estimate of the labor and material put into the building during each preceding month, and the owner pay the contractor therefor after reserving a certain per cent, is for the benefit of the contractor and the protection of the owner, and does not create a trust in the reserved payments in favor of laborers and material men of a subcontractor. For the material men to acquire a lien they must proceed under the statutes.

WALKER, J., dissenting.

APPEAL by defendant, Mott Iron Works, from *Councill, J.*, (420) passing upon referee's report, at June Term, 1909 of MECKLENBURG.

On 8 August, 1905, the Highlands Hotel Company, Incorporated, entered into a written contract with J. A. Jones for the erection and entire completion of the Selwyn Hotel. On 22 August, Jones entered into a written contract with the Carolina Heating and Plumbing Company, for the plumbing, heating, gas fitting and electric work required by his contract with the hotel company. The J. L. Mott Iron Works furnished the plumbing company with a large quantity of material required by its contract with Jones, and the plumbing company was indebted to it therefor, on 18 October, 1906, in an amount exceeding $4,400. The Southern States Electric Company also furnished material to the plumbing company required by its contract with Jones, for which the plumbing company was indebted to it, on 7 January, 1907, in the sum of $1,125.26, of which sum $998.63 was contracted on and prior to 26 October, 1906. On 18 October, 1906, the plumbing company gave the Mott Iron Works an order on Jones for $4,400 "for goods furnished on Selwyn Hotel," to be paid "as same becomes due to" the plumbing company, which order Jones "accepted" on that date. The sum of $4,400 was not then due the plumbing company by Jones. On 8 December, 1906, the plumbing company was placed in the hands of H. S. Hall as receiver. The contract with Jones being uncompleted, under order of

the court, the receiver, Hall, completed the contract, at a cost of $1,774.46, and the work required by the contract with Jones was duly accepted as satisfactory. On 7 January, 1907, the electric com-
(421) pany was indebted to it in the sum of $1,125.66, attached a detailed statement of its claim, and further stated, "We claim a lien for this amount." Upon the completion of the contract of the plumbing company, the sum of $5,369.21 was due it. This action was begun on 24 May, 1907, and Jones, the Mott Iron Works and the plumbing company were made defendants. On 23 November, 1908, the parties to the action agreed, in writing, that Jones should pay Hall, the receiver, $1,774.45; that he should pay the Mott Iron Works $2,469.12 as a credit on its order of $4,400, and that he should pay to the clerk of the Superior Court of Mecklenburg the sum of $1,125.64, to abide the determination of this action—these three amounts aggregating $5,369.21. This agreement further provided: "That the question as to the liability of the said J. A. Jones to pay interest on the amount of his indebtedness to the Carolina Heating and Plumbing Company, to wit, the sum of $5,369.21, shall also abide the final decision of the court." The preamble of this agreement provided: "That a partial settlement of said controversy shall be had, without prejudicing the rights of any of said parties, as to so much of said controversy as shall remain unsettled." The agreement was performed by Jones. The contract between Jones and the hotel company, among other stipulations, contained the following, deemed pertinent to this appeal:

3. The contractor shall find all materials, labor and services, tools and scaffolding, implements and power of every kind necessary for the full completion of said building, as set forth in these specifications.

5. The sum payable under the last clause shall be paid by installments in the following manner, viz.: the architect will, on or before the first of each month, make an estimate of the material and labor put into the building during the past month, deducting fifteen per cent, which estimate will be paid by the owner to contractor on presentation of same. On completion, to the satisfaction of the architect, and acceptance of the work, the remaining fifteen per cent will be paid to the contractor by the owner, the right to any and all payments being subject to the contractor's compliance with the lien and building laws of the State of North Carolina.

The contract between Jones and the plumbing company, among other stipulations, contains the following deemed pertinent to this appeal:

5. To discharge all debts that become or may become a lien
(422) on the building, for work done or materials furnished on the prosecution of the contract.

6. To give to J. A. Jones a good and satisfactory bond, in the sum of $6,000, for the full and faithful performance of this contract by the Carolina Plumbing and Heating Company. J. A. Jones, party of the second part, agrees to pay the Carolina Plumbing and Heating Company the sum of $21,283.88 as full consideration of the performance of this contract by the Carolina Plumbing and Heating Company, the same to be paid on the certificate of the architects, as follows: eighty-five per cent of the work done to be paid at the end of each month, and full settlement to be made when the work is completed and accepted by the architects.

Upon the foregoing facts the referee concluded that Jones was liable for interest from 15 July, 1907 (the first day of the return term of court), to 23 November, 1908; that the Mott Iron Works was entitled to have the remainder of its order of $4,400 paid in full, and the balance, after paying the costs of court, should be paid to the electric company. Exceptions were filed by Jones to the conclusion that he was liable for interest, and by the electric company to the other conclusions of the referee. His Honor, after hearing the matter, overruled Jones' exception, from which he did not appeal, and, upon the exceptions of the electric company, held that the money paid into the clerk's office, increased by the amount of interest due by Jones, should be divided *pro rata* between the Mott Iron Works and the electric company in proportion to their respective claims, and the costs, including the referee's allowance, should be paid by the two said companies in the same proportion. To the judgment directing the distribution of the fund *pro rata*, and the payment of the costs, the Mott Iron Works excepted and appealed therefrom to this Court.

Burwell & Cansler for Electric Company.
McNinch & Justice for Iron Works.

MANNING, J., after stating the case: In the outset it is well to eliminate certain matters presented in the able and exhaustive briefs of counsel, that, in our opinion, are not material in determining the rights of these two contending creditors. The hotel company is not a party to this action, and it is admitted that no notice was given to it, as owner, under sec. 2020, Revisal, by either of these creditors of the plumbing company before its full and final settlement with Jones. Therefore, in our opinion, the contract between the hotel company and Jones, or any of its stipulations, are not material to or do not affect the determination of the rights of these creditors. No lien upon the hotel (423) company's property and no liability against the hotel company is sought to be declared or adjudged. The effect of the agreement between

all parties to this action on 23 November, 1908, was to leave for adjustment (1) the liability of Jones for the interest; (2) the disposition of this interest, if he were adjudged liable to pay it, and the disposition of the sum of $1,125.64 paid by Jones into the clerk's office. It is not suggested by the appellant, Mott Iron Works—and as the electric company did not appeal, it could not suggest it—that Jones was liable to any personal judgment (except for the interest) for any sum. The only question, therefore, presented by this appeal is, was his Honor right in directing the distribution of these funds between these two creditors *pro rata* in proportion to their debts against the plumbing company? The appellant iron works contends that the order of 18 October, accepted by Jones, was an assignment of that much of the amount of the contract price, and to be paid by Jones as it became due the plumbing company, and, as between Jones and the plumbing company, was a discharge and satisfaction of that amount of the contract price; that the consideration, expressed in the order and, in fact, admitted, was for the value of materials furnished by the appellant iron works and used in the construction of the Selwyn Hotel; that at the date of the order Jones had no notice that the electric company was furnishing materials to the plumbing company, and no notice of any indebtedness therefor by the plumbing company to the electric company, and no notice was given Jones until 7 January, 1907. The appellee contends (1) that the contract between Jones and the plumbing company, and Jones and the hotel company, impresses the fifteen per cent of each contract price to be retained respectively by Jones and by the hotel company, with a trust in favor of all laborers and material men; and the particular provisions of the contract between Jones and the plumbing company which produce this result are sections 5 and 6, quoted in the statement preceding this opinion; (2) that Jones could not, in view of these provisions, by accepting an order, defeat the rights of laborers and material men whose claims might become a lien on the hotel company's property; that appellee's claim was such a claim; and, further, that Jones' acceptance of the order was conditional and not absolute, and therefore not tantamount to a discharge and satisfaction *pro tanto* of the contract price.

Both the appellee and appellant are "material men," and for the materials furnished under contract with the plumbing company (424) are primarily creditors of the plumbing company, and, it being admitted that neither has availed himself of the provisions of our statutes regulating and giving a lien for its protection, each must assert and work out its rights through the plumbing company, without aid from the provisions of those statutes. In *Broyhill v. Gaither*, 119 N. C., 443, this Court held that the lien for materials was only by

virtue of the statute. *Clark v. Edwards,* 119 N. C., 115. Adapting the language of this Court in *Snow v. Comrs.,* 112 N. C., 335, to the facts of the present case, it becomes obvious that the work of the plumbing company was the plumbing, heating, gas fitting and electrical equipment and its installation, a portion of which was done by the Mott Iron Works and the electrical company—not for the hotel company or on its credit, not for Jones or on his credit, but for the plumbing company and on its credit. Neither Jones nor the hotel company have ever owed the iron works or the electric company (except by the accepted order in favor of the iron works) for that work. The relation of debtor and creditor has not existed between them (except as created by the accepted order in favor of the Mott Iron Works). It was entirely competent for Jones, the debtor, and the plumbing company, the creditor, to agree that the iron works should receive a certain part of the money to become due the plumbing company by Jones, as no third party had acquired any lien on the fund. "The effect of the arrangement between these parties was as if Brewster had drawn a draft on Ellington, Royster & Co., in favor of Snow, for the sum mentioned in the note, to be paid out of the contract price, *and Ellington, Royster & Co., had accepted the draft.*" *Snow v. Comrs., supra.* It is held in that opinion, by *Burwell, J.,* that the facts created an assignment of so much of the contract price to become due as was necessary to discharge the note. It is obviously true that Jones was not absolutely and unconditionally bound by his acceptance of the order directing him to pay the Mott Iron Works, as the installments of the contract price became due the plumbing company, to pay $4,400 to the Mott Iron Works; but his acceptance, absolutely and unconditionally, obligated him to pay such sums as they became due, and for such sums Jones became debtor to the Mott Iron Works. *Beardsley v. Cook,* 143 N. Y., 143. It is admitted by Jones that the contract with the plumbing company was satisfactorily performed and he became liable for the full contract price, and that the admitted balance was $5,369.21, increased by the interest charge. It cannot be material that in December, when the receiver of the plumbing company was appointed, the plumbing company had not completely performed its contract, and that the receiver, by direction of the court, completed it to (425) the entire satisfaction of Jones. Jones makes no complaint of delay, nor did he object to the receiver's finishing the work. *Herter v. Goss,* 57 N. J. L., 42. It does appear, however, that at the date of the appointment of the receiver about ninety per cent of the work contracted for by the plumbing company had been performed. In *Lauer v. Dunn,* 115 N. Y., 405, it is held that an *unaccepted* order, drawn by a contractor on the owner, in favor of a creditor of the contractor, was an assignment *pro tanto* of the fund in the owner's hands, though at the time,

under the contract between the contractor and owner, the amount was not then payable to the contractor and he could not have sued therefor. The following cases sustain the doctrine that an accepted order on a fund, though not payable at the time, is an assignment *pro tanto,* and several of these cases are similar in their facts to the present case: *Bourne v. Cabot,* 44 Mass., 305; *Risley v. R. R.,* 62 N. Y., 240; *Bates v. Bank,* 157 N. Y., 322; *Harvey v. Bremer,* 178 N. Y., 5; *Brick Co. v. Stratton* (Tex. Civ. App.), 53 S. W., 703; *Herter v. Goss,* 57 N. J. L., 42; *Beardsley v. Cook,* 143 N. Y., 143; *Ellison v. McCahill,* 10 Daly (N. Y.), 367; 1 Daniel Nego. Instr., secs. 508, 513. In our opinion, these authorities clearly establish the contention that the order of the plumbing company on Jones, in favor of the Mott Iron Works, and accepted by Jones, was an assignment *pro tanto* of the contract price, subject only to the condition that the contract should be performed and accepted by Jones. This was done. The electric company, however, contends that the contract price was impressed with a trust in the hands of Jones, which he was required to see executed, to wit, "the discharge of all debts that become or may become a lien on the building for work done or material furnished in the prosecution of the contract." This contention is rested upon the decision of this Court in *Gastonia v. Engineering Co.,* 131 N. C., 359, and *Gastonia v. Engineering Co.,* 131 N. C., 363.

The electric company and the Mott Iron Works occupied, in any view, the same relation to the plumbing company, to Jones and the contract between Jones and the plumbing company; both were material men, having furnished material to the plumbing company; both were creditors of the plumbing company. If the claim of one could become a lien, the claim of the other could; if one was a beneficiary of any trust, the other was. So, while occupying this relation, the iron works secured the order on Jones from the plumbing company and Jones' acceptance;
(426) Jones had no notice, at that time, that the electric company was a creditor of the plumbing company and certainly had no right to so assume. Jones paid the plumbing company nothing after his acceptance of the order. The contract between Jones and the plumbing company does not set aside any named percentage or amount as a fund, out of which laborers and material men shall be paid. The plumbing company was, without this stipulation in the contract, bound to pay its own debts. The obviously paramount and controlling purpose of this provision was to protect the building of the owner from liens. It is admitted that this was done; that neither of these creditors attempted to subject the building to a lien. That no particular sum is set apart will appear from this provision of paragraph 6 of the contract: "The same to be paid on certificate of the architects, as follows: eighty-five per cent

of the work done to be paid at the end of each month, and full settlement to be made when the work is completed and accepted by the architects."

We do not think, under the decision of this Court in the cases of *Gastonia v. Engineering Co., supra,* any trust was impressed upon the contract price stipulated to be paid by Jones to the plumbing company by the provision of this contract. In the *Gastonia case,* in which numerous cases are cited, it is held that the property of a city is not subject to a lien for work done or material furnished, in the absence of a statute expressly permitting it, and it is in accord with public policy that the contracts with cities should contain such provisions. The distinction between the present case and the *Gastonia case* is clearly set out in the following extract from the opinion of *Gray, J.,* in *Bates v. Bank,* 157 N. Y., 322, where the provision of the contract considered was more definite and specific than the provisions of this contract: "The reasoning to this conclusion (that the purpose of the provision was the protection of the lienors, the laborers and the material men) was made upon the authority of certain cases in this court, which were thought to be controlling, viz., *Bank v. Mayor,* 97 N. Y., 355, and *Bank v. Winant,* 123 N. Y., 265. These cases related to contracts made by the city of New York in 1875 and 1876. They contained, by direction of an ordinance of the city, this clause: 'The said party of the second part (meaning the contractor) hereby further agrees that he will furnish said commissioner (meaning the commissioner of public works) with satisfactory evidence that all persons who have done work or furnished materials under this agreement, and who may have given written notice to said commissioner, . . . have been fully paid or secured such balance. And in case such evidence be not furnished, as aforesaid, such amount (427) as may be necessary to meet the claims of the persons aforesaid (meaning the persons who had done work or furnished materials) shall be retained from any moneys due the said party of the second part, under this agreement, until the liabilities aforesaid shall be fully discharged or such notice withdrawn.' Those cases held, in effect, that the purpose of that provision was to protect those employed under the contractor. That was its only purpose, and the reason for it was obvious. At the time when the contracts were made, there was no lien law relating to work done and materials furnished on public works in cities. Such an act was not passed until 1878. The construction of the ordinance which required such a provision in city contracts as given in the *Bank cases, supra,* was that it did not secure to persons furnishing labor and materials to contractors with the city some of the advantages which the lien laws of the State gave to mechanics and material men. The city, in such

a contract, assumed no express liability to pay them, and could not be sued therefor; but it was placed under the implied obligation to hold, as trustee, the unpaid balance due upon its contract for the benefit of such persons. . . . The distinction between these cases and the cases where the contract is between private parties is marked; for in the latter a lien could be acquired which would be binding upon the owner, and therefore the presence of a clause in the contract dispensing the owner from the obligation of payment, if there were liens upon the building, is only for his relief and protection." *Lumber Co. v. Struck,* 146 Cal., 266; *Schrieber v. Bank,* 99 Va., 257. There is a uniform concurrence of the authorities we have been able to find, that there is a provision for reserving a certain percentage of the contract price until final completion, and such contracts are not made with public corporations, the stipulation for reservation may be waived by the owner of the property affected by the contract, unless he has received such notice of claims as is required to be given by the lien laws in force. Some of the States have made this the subject of legislation and forbidden a waiver or variation from the terms of the contract, to the injury of laborers and material men; and in this State the Legislature has made provision and prescribed the conditions for subjecting the amount retained by the owner to the payment of the debts contracted by the contractor for labor and materials. Revisal, sec. 2021. The provisions of our lien laws are comprehensive, adequate and simple; but for laborers and material men to obtain their protection, they must comply with their con-
(428) ditions. We do not think, therefore, that Jones, the debtor, violates any principle of law or equity by agreeing to pay the Mott Iron Works an admittedly just debt against the plumbing company, his creditor, having no notice of any indebtedness of the plumbing company, to the electric company. At the time, what difference could it make to Jones whether he paid the plumbing company or paid its creditor upon its order? His only concern could have been that the total payments did not exceed the contract price—certainly when he knew that what he agreed to pay was applied to the payment for materials used in the hotel building.

In our opinion, his Honor should have directed the payment of the balance due the J. L. Mott Iron Works on its order, and the remainder of the fund to be paid to the electric company. In refusing to so order, there was error. The costs of the action will be readjusted. The electric company will pay the costs of this appeal.

Error.

WALKER, J., dissenting.

ROBERT McFARLAND ET AL. *v.* ROBERT L. CORNWELL.

(Filed 15 December, 1909.)

1. **Equity—Pleadings.**

In order to obtain equitable relief the party seeking it must allege such facts as will entitle him to it.

2. **Mortgagor and Mortgagee—Purchaser—Adverse Possession—Void Mortgage—"Color"—Limitations of Action.**

A possessory action brought by the heirs at law of a mortgagor alleging that the mortgage is void, and seeking to recover the land independent of the mortgage, and claiming nothing by virtue of it, but claiming the land against it, may be barred by lapse of time; and it appearing that defendant had entered under a deed good as color of title and showed adverse possession of himself and those under whom he claimed for seven years: *Held,* that plaintiffs are not entitled to recover.

3. **Mortgagor and Mortgagee—Seal—Procedure—Invalid Mortgage—Limitation of Actions—Equities.**

In a possessory action to recover lands and not to assert equitable rights to redeem the land, the ten-year statute, Revisal, sec. 391, subsec. 4, has no application.

4. **Same—"Color"—Parties—Tenant—Adverse Possession.**

In an action of ejectment the owner is not a necessary party, and the length of his absence from the State should not be considered where there is a tenant in possession against whom suit may be brought.

5. **Mortgagor and Mortgagee—Invalid Mortgage—Right of Possession—Adverse Possession.**

A void mortgage of lands confers no right of possession to the purchaser at a sale under its terms, and when he takes a deed and enters into possession, the mortgagor has the legal right of possession and can recover it at any time notwithstanding the instrument, until barred by lapse of time.

WALKER, J., dissents.

APPEAL from *Joseph S. Adams, J.,* at Spring Term, 1909, of (429) POLK.

Ejectment. These issues were submitted, without objection:

1. Are the plaintiffs the owners of and entitled to the possession of the land described in the complaint? Answer: No.

2. Is defendant in possession of said land? Answer: Yes.

3. Are plaintiffs barred by the statute of limitations? Answer: Yes.

From a judgment for the defendant the plaintiffs appealed.

R. S. Eaves and James P. Morris for plaintiffs.

Shipman & Williams for defendant.

BROWN, J. The land in controversy was the property of J. C. McFarland, who in 1891, undertook to mortgage it to F. M. Burgess. The mortgage is defective, in that it has no seal. The land was sold under the power contained in the mortgage, and was conveyed to W. E. Hill by F. M. Burgess on 9 August, 1894; Hill conveyed to F. M. Burgess, 11 August, 1894; Burgess conveyed, 10 September, 1894, to R. S. Abrams, for the consideration of $350, who then entered into actual and exclusive possession. On 15 April, 1897, Abrams conveyed to defendant, Robert L. Cornwell, who has been in actual possession ever since. The uncontradicted evidence of the witness M. A. Cornwell shows that he entered into possession of the land in October, 1894, as tenant of R. S. Abrams, grantee of Burgess, and that he has been in possession of the same ever since; that he cultivated the land as tenant for Abrams until Abrams conveyed it to the defendant, and that he has continued to cultivate it for the defendant ever since. This action is brought by the heirs at law of J. C. McFarland and was commenced on 9 September, 1907. The merits of this appeal may be fully considered in passing upon the correctness of the judge's ruling upon the statute of limitations, and that depends upon the character of the action. Is it an action equitable in its nature, brought by the heirs of a mortgagor for redemption of the land sold under the mortgage, which may be commenced
(430) within ten years after the right of action accrues? Revisal, sec. 391, subsec. 4. If it is, then the defendant, Robert L. Cornwell, was a necessary party, and his Honor erred in instructing the jury "that if you find from the evidence that the land has been in the possession of the defendant, and those under whom he claims, since October, 1894, as claimed by defendant; and that the defendant has had a tenant in possession of said land continuously since the date of his deed, in 1897, it will be immaterial as to whether or not the defendant himself has been residing within or without the State."

When the personal presence of a defendant in the action is essential to the granting of the relief, the time when he is absent from the State is not to be counted, and section 366, Revisal 1905, applies.

We are of opinion that the plaintiffs, have elected to stand upon their strict legal rights, as the holders of the legal title, and that they do not seek in this action to redeem the land. It may be the land is not worth redeeming, and that plaintiffs have good and sufficient reason for their course.

It is unquestioned that if the plaintiffs had chosen to assert their equitable rights and had sought a redemption of the land, the statute would not bar them under ten years from the date when the cause of action accrued, and that the time when the defendant was absent from the State would not be reckoned against them. Revisal, sec. 366;

Bruner v. Threadgill, 88 N. C., 362. But we take it that to get the benefit of such statute the plaintiffs must present a cause of action to the adjudication of which such defendant is personally a necessary party.

The complaint in this case alleges that the plaintiffs are the owners in fee of the land, that the defendant is in the wrongful possession thereof, and that the mortgage and deeds under which defendant claims are absolutely void and of no effect, and demands judgment for possession of the land.

In order that there should be no misunderstanding as to plaintiffs' cause of action and what relief they desired, after the reading of the pleadings, the court asked the question as to whether or not this was intended as an action of ejectment or an action to foreclose or redeem a mortgage, and also asked the question as to whether or not the pleadings should be amended so as to set forth more clearly the contentions of the parties. This was followed by the court directing the parties to proceed, stating at this time that he would allow such amendments, after the evidence was in, as might appear to be necessary to administer justice. Neither party, after this, asked permission to amend their pleadings. The plaintiffs evidently did not desire any equitable relief, as they not only failed to ask for it, but refused to set out (431) the necessary facts and allegations which would have entitled them to it, even when invited to do so. It is true that the court will award such relief, regardless of formal prayers, as the pleadings and the facts found entitle a party to, but it has never been held that the court will dispense with allegations in the pleadings which are necessary to warrant the relief which, upon proper pleadings and findings, would be given, whether asked for or not.

It is plain that plaintiffs declined to amend their complaint because they preferred to stand upon their supposed legal right to recover the land in ejectment, freed from any obligation to repay the money loaned, upon the theory that the mortgage, not being under seal, was so absolutely void that the defendant acquired no right whatever, equitable or otherwise, under it. For this reason, the plaintiffs tendered no issues and were content with those submitted. The court therefore submitted the only proper issues to the jury raised by the pleadings. The court could not have treated the action as an action to redeem, without submitting issues not raised by the pleadings and without converting an action in the nature of an action of ejectment into a different action altogether.

The plaintiff cannot declare upon one cause of action and recover upon an entirely different cause of action. *Sams v. Price,* 119 N. C., 572.

It cannot be gainsaid that the plaintiffs, who are *sui juris,* may forego

whatever equity they may have had, and rely solely on their legal title, which they already held, notwithstanding the mortgage.

Cases such as *Wittkowski v. Watkins,* 84 N. C., 456, relied on by plaintiffs, have no application here. In that case the legal title passed to the mortgagee and he was permitted to recover the possession of the land because he held the legal title. These plaintiffs claim as heirs at law of McFarland, who died seized of the land, but they do not claim anything under the paper-writing he signed, not even an equity of redemption. They repudiated all rights under the instrument and claim the land adversely to it. In other words, they have elected to stand just as if no mortgage had been made. For this reason, the principles applied in *Froneberger v. Lewis,* 79 N. C., 426; *Parker v. Banks,* 79 N. C., 480, and *Bruner v. Threadgill,* 88 N. C., 362, and similar cases, do not apply here. In those cases all parties, plaintiffs and defendants, recognized the mortgages as valid, and claimed through and under
(432) them. In the last-named case it was held that where a mortgagee sells and conveys to one who reconveys to him, the latter's possession under such deed is not adverse to the mortgagor, for *the reason that the mortgagee, having the legal title, was entitled to possession* upon default, and that the mortgagor, or his representatives, unless they have ratified the sale, can call upon the mortgagor for an accounting at any time within ten years after the cause of action accrues. In that case, the plaintiffs set out their equity, claimed under the mortgage, and asked for an accounting. It was strictly a bill in equity to redeem.

In the case at bar, plaintiffs repudiate the mortgage—claim nothing under it, but everything against it. The difference between the cases is obvious.

The instrument signed by McFarland was not a common-law mortgage, and the legal title never passed out of him. He and his heirs had the legal right to the possession, and could have recovered it at any time, notwithstanding the instrument, until barred by lapse of time. The instrument conferred no right of possession on the defendants herein, but only a bare equity, requiring the intervention of a court, at their instance, to charge the land with the money loaned. *Atkinson v. Miller,* 9 L. R. A., 544; 1 Jones on Mortgages, sec. 168.

Although the defendant has pleaded the statute of limitations in the form of action stated in the complaint, it was not necessary to plead it. Statutes of limitation act on the remedy, whereas possessory statutes confer title which is created by possession.

As against plaintiffs, claiming, not under, but against the mortgage, the defendant could set up a title by color and continuous adverse possession, either in person or by his tenant.

The fact that for a part of the time the defendant was out of the

State made no difference. He was exposed to an action for possession, through his tenant in possession during that time. *Weaver v. Love,* 146 N. C., 414. The uncontradicted evidence shows that the tenant of defendant was in continuous adverse possession since October, 1894, and at any time since then an action to recover the possession could have been brought.

The plaintiffs allege that the deed to the defendant is absolutely void and conveys nothing. That being true, it is nevertheless color of title, because it fails to convey the true title, and with seven years adverse continuous possession under it a legal title to the land is perfected. *Mobley v. Griffin,* 104 N. C., 112. (433)

The judgment of the Superior Court is

Affirmed.

WALKER, J., dissents.

Cited: *Bond v. Beverly,* 152 N. C., 61; *Owens v. Hornthal,* 156 N. C., 22.

G. T. BARGER v. C. E. BARRINGER.

(Filed 15 December, 1909.)

1. Private Nuisance—Light and Air—"Spite Fence"—Motive—Damages.

Ordinarily the owner of lands may erect such improvements thereon as he sees fit, and any resultant injury to the adjoining owner is *damnum absque injuria;* but he may not, without liability as for a private nuisance, erect an unsightly "spite fence" on his own land for the sole malicious purpose and effect and without benefit to himself, of shutting out the light and air from his neighbor's windows.

2. Same—Prescriptive Rights.

Plaintiff and defendant had erected a wire divisional fence between their adjoining lands whereon they resided, and thereafter the plaintiff, as chief of police of the town, reported, in accordance with his official duty, the filthy condition of defendant's stable. From vengeance and malice, and without benefit to himself, the defendant then erected a very rude and unsightly board fence eight feet six inches high on his own side of the division fence, within four feet of plaintiff's window, so as to shut out his view, light and air therefrom: *Held,* that though a prescriptive right in light and air cannot be acquired, the defendant's motive in constructing the fence in the manner indicated can be considered, and he will be liable in damages as for maintaining a private nuisance.

APPEAL from *Justice, J.,* at May Term, 1909, of CATAWBA, heard on appeal from a justice of the peace to the Superior Court.

The action was brought to recover damages for the malicious, useless and unlawful erection of a high board fence, commonly called a "spite fence," on defendant's lot, immediately adjoining plaintiff, for the sole purpose of cutting off light and air from plaintiff's windows. At the close of the evidence, his Honor, being of opinion that plaintiff could not recover, granted defendant's motion to nonsuit, and plaintiff appealed.

The facts are stated in the opinion of the Court.

A. A. Whitener for plaintiff.
Defendant not represented in this Court.

(434) BROWN, J. The plaintiff's evidence in this case tends to prove that the premises of plaintiff and defendant adjoin, and that they mutually constructed a four-foot wire fence on the division line; that thereafter the plaintiff, as chief of police of the town of West Hickory, was compelled by his duty to report the filthy condition of defendant's stables; that, from pure, unadulterated vengeance and malice, the defendant erected a very rude, unsightly board fence, eight feet six inches high, on his side of the division fence and within four feet of plaintiff's windows, which cuts off plaintiff's view, air and light, so much so that plaintiff testifies he cannot see how to shave by sunlight since the fence was built.

His Honor's ruling was based upon what we admit to be the generally received view of the common law of England, that the erection of a fence upon one's own land is not an actionable injury to one's neighbor, although he may be deprived of light and air thereby and the act may be dictated by motives of ill will. Counsel for plaintiff does not deny the general proposition that one has a right to improve his property as he sees fit, and that resultant injury would be *damnum absque injuria.* But it is contended that if one in the use of his property is actuated solely by a malicious purpose to injure his neighbor, with no benefit accruing to himself, he will not be permitted to use his property for such an unworthy purpose.

It must be admitted that this position embodies good morals, and we think it is supported by recognized authority and well-considered precedent. We are therefore disposed to follow those courts which in this respect teach that the principle of the common law above stated should not be held to authorize the creation and maintenance of a nuisance for the sole purpose of gratifying a most ignoble passion. There are respectable authorities in this country which support the view that malice makes that actionable which would otherwise not be so, and the doctrine has been held to be well founded, both in law and morals,

that "a fence erected maliciously and with no other purpose than to shut out the light and air from a neighbor's window is a nuisance." 12 A. & E., 1058, and cases cited in note; 1 Cyc., 789.

This question came before the Supreme Court of Michigan in 1888 and the court was equally divided. An elaborate and well-reasoned opinion was delivered by *Justice Morse* (69 Mich., 383), from which we cannot do better than quote at length. The learned Justice says: "It is arged that, while it is true that when one pursues a strictly legal right, his motives are immaterial, yet no man has a right to build and maintain an entirely useless structure for the sole purpose of injuring his neighbor. The argument has force and appears irresistible in the light of the moral law that ought to govern all human action. And the (435) civil law, coming close to the moral law, declares that he who, in making a new work upon his own estate, uses his right without trespassing, either against any law, custom, title or possession which may subject him to any service towards his neighbors, is not answerable for the damages which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others without advantage to himself. Thus the civil law recognizes the moral law, and does not permit the owner of land to do an act upon his own premises for the express purpose of injuring his neighbor, where the act brings no profit to himself. The law furnishes redress, because the injury is malicious and unjustifiable. The moral law imposes upon every man the duty of doing unto others as they would that they should do unto him; and the common law ought to and, in my opinion, does require him to so use his own privileges and property as not to injure the rights of others maliciously and without necessity. It is true that he can use his own property, if for his own benefit or advantage, in many cases, to the injury of his neighbor; and such neighbor has no redress, because the owner of the property is exercising a legal right which infringes on no legal right of the other. Therefore, and under this principle, the defendant might have erected a building for useful or ornamental purposes and shut out the light and air from complainant's window; but when he erected these screens or obscurers for no useful or ornamental purpose, but out of pure malice against his neighbor, it seems to me a different principle must prevail. I do not think the common law permits a man to be deprived of water, air or light for the mere gratification of malice. No one has an exclusive property in any of these elements, except as the same may exist or be confined entirely on his own premises."

This opinion was approved by a unanimous court, the *personnel* of which had been changed in 1890, in *Flaherty v. Moran,* 81 Mich., 52, in which it is held that a fence erected maliciously and with no other purpose than to shut out light and air from a neighbor's windows is a

nuisance. This ruling was again unanimously approved in 1893 by the Michigan Court, although its membership had again been changed, in *Kirkwood v. Finegan,* 95 Mich., 543, and again in *Kuznak v. Kozminsky,* 107 Mich., 444. In 1896 the same court, again differently constituted, unanimously followed and approved those precedents. *Peak v. Roe,* 110 Mich., 52; *Sanky v. Academy,* 8 Mont., 267; *Havens v. Klein,* 49 (436) How. Pr., 95. The same principle has been applied by other courts where the owner of land upon which there is an underground spring of water attempts to cut off the underground flow from his neighbor.

It is held generally that any person may rightfully appropriate the whole of the water from the spring on his own land, or of water which percolates through it, without forming a well-defined stream. Hale on Torts, 425; *Roath v. Driscol,* 20 Conn., 533.

Nevertheless there are able courts which hold that if such appropriation is maliciously done to injure a neighbor, it is actionable. Hale, 426; *Wheatley v. Baugh,* 25 Pa. St., 528, and cases cited. In this last case *Lewis, C. J.,* quotes the same extract from the civil law (Domat, sec. 1047) quoted by *Justice Morse,* and says "these principles of the civil law are the recognized doctrines of the common law." In a strong opinion in *Greenleaf v. Francis* the Massachusetts Court holds that the owner of land may dig a well on any part of it, notwithstanding he thereby diminishes the water in his neighbor's well, unless in doing so he is actuated by a mere malicious intent to deprive his neighbor of the water without benefit to himself. 18 Pickering, 117.

In commenting on this case *Lewis, C. J.,* says: "Neither the civil law nor the common law permits a man to be deprived of a well or spring or stream of water for the mere gratification of malice. The reason is that water, like air, is of such a nature that no man can have an exclusive right to it."

This doctrine is approved by the Supreme Court of Maine in an elaborate opinion citing the above cases. *Chesley v. King,* 74 Me., 177. In that case the defendant dug a well on his own land, as alleged, solely to injure plaintiff, without benefit to himself. The court, recognizing the defendant's paramount rights, says: "It cannot be regarded as a maxim of universal application that malicious motives make that a wrong which in its own essence is lawful." The court further says: "We think this plaintiff had rights in that spring which, while they were completely subject to the defendant's right to consult his own convenience and advantage in the digging of a well in his own land for the better supply of his own premises with water, should not be ignored if it were true that defendant did it 'for the mere, sole and malicious pur-

pose' of cutting off the source of the spring and injuring the plaintiff, and not for the improvement of his own estate."

Judge Cooley also recognizes that malice makes a decided difference when human actions, otherwise lawful, are weighed in the scales of justice. "If a discomfort is wantonly caused from malice or (437) wickedness, a slight degree of inconvenience may be sufficient to render it actionable." Torts, 596.

Mr. Washburne, in his treatise on Easements, quotes with favor *Wheatley v. Baugh,* and says: "Neither the civil nor the common law permits a man to be deprived of a spring or stream of water for the mere gratification of malice." We fail to see why this principle should not apply with equal force to light and air, especially in a State where no prescriptive rights can be acquired in windows.

Justice Morse, in his admirable opinion already cited, asks this pertinent question: "If a man has no right to dig a hole upon his premises, not for any benefit to himself or his premises, but for the express purpose of destroying his neighbor's spring, why can he be permitted to shut out air and light from his neighbor's windows, maliciously and without profit or benefit to himself?"

Light and air are as much a necessity as water, and all are the common heritage of mankind. While, for legitimate purposes, a person's rights in them may sometimes be curtailed without consulting his comfort or convenience, the common welfare of all forbids that this should be needlessly permitted in order to gratify one of the basest and most degrading passions that sometimes take possession of the human heart.

The law would be untrue to its soundest principles if it declared that the wanton and needless infliction of injury can ever be a legal right.

Instead of saying that malice will not make a lawful act unlawful, it is much more consistent with elementary principles of right and wrong to say that willful and wanton damage done to another is actionable unless there is some just or legal cause or excuse for it. An eminent English judge has declared this to be a general rule of English law, in these words: "At common law there was a cause of action whenever one person did damage to another willfully and intentionally and without just cause or excuse." *Lord Justice Bowen,* in *Skinner v. Shaw* (1893), 1 Ch., 422.

Mr. Justice Holmes, delivering the opinion of the Supreme Court of the United States, stated the same rule more fully: "It has been considered that *prima facie* the intentional infliction of temporal damage is a cause of action which, as a matter of substantive law, whatever may be the form of pleading, requires a justification, if the defendant is to escape. . . . If this is the correct mode of approach, it is

(438) obvious that justifications may vary in extent according to the principles of policy upon which they are founded; and, while some, for instance, at common law, those affecting the use of land, are absolute, others may depend upon the end for which the act is done." *Aikens v. Wisconsin,* 195 U. S., 194; Pollock on Torts (7 Ed.), 319. See, also, *Law Quarterly Review,* 1906, 118.

In the administration of the criminal law the motive with which an act is committed has a marked effect upon the guilt of the accused and in determining the degrees of crime. Why not, for the same reasons, let it become a potent element in determining civil rights, so as to deter malicious persons from the infliction of wanton injury upon their fellowmen?

This involves no harmful restriction upon the right of ownership of property. There are many limitations placed by the common law upon such rights, and we see no difficulty in principle in limiting an owner's rights so far that he shall not be permitted to use his land in a particular way, with no other purpose than to damage his neighbor. This has been done without injurious effect in the matter of so-called "spite fences" by some of the most enlightened States of this Union, which have remedied by legislation the errors of the courts in failing to recognize this "fundamental doctrine of the rights of man" when dealing with this kind of injury.

In cases brought under such statutes the courts have declared that *malevolence* must be the dominant motive, without which the fence would not have been built, in order to bring the case within the statute. 12 A. & E., 1058, and cases cited; *Lord v. Langdon,* 91 Me., 221; *Rideout v. Knox,* 148 Mass., 368; *Smith v. Morse,* 148 Mass., 407; *Hunt v. Coggin,* 66 N. H., 140.

If the right to use one's property solely for malicious purposes, in a manner which would be lawful for other ends, is a legal right and an incident to the legal exercise of such property, which the courts ought not and cannot rightfully deny, how can such right be taken away by legislation, as legislatures, no more than courts, have power of confiscation? Yet those statutes have been upheld by the courts and approved by the people of those States wherein they have been enacted.

The truth is that the right to use one's property for the sole purpose of injuring others is not one of the immediate and indestructible rights of ownership, and such acts may and ought to be prohibited by courts without the aid of legislation. Such rights are established for very different ends, and, as is said by *Holmes, J.,* in *Rideout v. Knox, supra,* "It has been thought by most respectable authorities that, even at com-
(439) mon law, the extent of a man's rights in cases like the present, might depend upon the motive with which he acted," citing with

approval *Greenleaf v. Francis, supra; Carson v. R. R.,* 8 Gray, 423; *Rooth v. Driscoll,* 20 Conn., 533; *Sweet v. Cutts,* 5 N. H., 439, and *Wheatley v. Baugh, supra.*

In an action brought under the statute of Connecticut, the Supreme Court of that State recognizes a right of action at common law for damages by saying: "Where one, from pure malice, shuts air and light from his neighbor's dwelling, this statute obviously intends to give the injured person more effective and speedy relief than comes from successive and long-delayed actions at law for damages." *Harbison v. White,* 46 Conn., 108.

In commenting upon the enactment of such statutes, *Mr. Justice Morse* says, with much force: "It is said that the adoption of statutes in several of the States, making this kind of injury actionable, shows that the courts have no right to furnish the redress without statutory authority. It has always been the pride of the common law that it permitted no wrong with damage, without a remedy. In all the cases where this class of injuries have occurred, proceeding alone from the malice of the defendant, it is held to be a wrong accompanied by damage. That courts have failed to apply the remedy has ever been felt a reproach to the administration of the law; and the fact that the people have regarded this neglect of duty on the part of the courts so gross as to make that duty imperative by statutory law, furnishes no evidence of the creation of a new right or the giving of a new remedy, but is a severe criticism upon the courts for an omission of duty already existing and now imposed by statute upon them, which is only confirmatory of the common law." *Burke v. Smith,* 69 Mich., 389.

We are aware that this Court has recognized the general principle that malice disconnected with the infringement of a legal right is not actionable, as in *Richardson v. R. R.,* 126 N. C., 100, where the master discharged his servant, there being no fixed term of employment. It was properly held, the present Chief Justice speaking for the Court, that as either party had the legal right to terminate the service at will, the motive could not be inquired into.

We also adhere to the law, as declared in *Lindsey v. Bank,* 115 N. C., 553, that in this country the easement of light and air cannot be acquired by prescription, upon which ground this Court refused to enjoin the erection of a building, one wall of which excluded the light from plaintiff's photograph gallery. There was no allegation that the obstruction was useless and erected for malicious purposes solely.
The difference between these cases and this is apparent upon (440) even a cursory reading.

We are not aware that this Court has ever extended the rights of ownership in property so far as to authorize an owner to use it for the ex-

press purpose of creating a nuisance, and no other; and if it had, in the light of further investigation, we should feel impelled to hold the case not well decided. There are many annoyances arising from *legitimate improvements* and businesses which those living near must endure, but no one should be compelled by law to submit to a nuisance created and continued for no useful end, but solely to inflict upon him humiliation as well as physical pain.

The ancient maxim of the common law, *Sic utere tuo ut alienum non laedas,* is not founded in any human statute, but in that sentiment expressed by Him who taught good will toward men, and said, "Love thy neighbor as thyself." Freely translated, it enjoins that every person, in the use of his own property, should avoid injury to his neighbor as much as possible.

No one ought to have the legal right to make a malicious use of his property for no benefit to himself, but merely to injure his fellow-man. To hold otherwise makes the law an engine of oppression with which to destroy the peace and comfort of a neighbor, as well as to damage his property for no useful purpose, but solely to gratify a wicked and debasing passion.

The doctrine of private nuisances is founded upon this humane and venerable maxim of the law. If it can be successfully invoked to prevent the keeping of stables and hogpens so near one's neighbor as to cause discomfort, why cannot he whom it is sought to needlessly and maliciously deprive of air and sunlight also seek the *aegis* of its protection?

The right thus to injure one's neighbor with impunity cannot long continue to exist anywhere in an enlightened country where God is acknowledged and the Golden Rule is taught. On this subject, if need be, we will do better to follow the pandects of the heathen Romans, whose jurists have inculcated a doctrine more consistent with the teachings of Him whom they permitted to be crucified than to be governed by the principles of the common law as expounded by some Christian courts and text writers.

The judgment of nonsuit is set aside and the cause remanded, to be proceeded with in accordance with the principles laid down in this opinion.

New trial.

(441) HOKE, J., dissenting: It is accepted doctrine with us that the easement of light and air as appurtenant to the ownership of a given piece of property does not arise except by grant or contract, expressed or fairly implied from the circumstances of the transaction.

Such an easement does not exist as an ordinary incident of ownership, nor can it be acquired by prescription or adverse user.

The last decision upholding this position was that of *Lindsay v. Bank*, 115 N. C., 553. In that case the defendant, the owner of an adjoining piece of property, had erected a building which entirely shut off the light from a photograph gallery and rendered the latter entirely unfit for the purpose indicated. Recovery was denied, and *Avery, J.*, delivering the opinion, said: "The easement of light and air cannot be acquired, according to the general current and weight of authority, in this country, even by prescription; and, of course, no right to object to the obstruction of one's windows by a wall erected on the land of an adjacent owner can be said to exist independently of the English doctrine," citing the A. & E., in support of the position.

In the publication referred to (19 A. & E., at p. 118) it is said: "The English doctrine of ancient lights above stated has not been adopted to any extent in the courts of the United States, which are practically unanimous in holding that no right to light and air can be acquired by prescription or adverse user."

And in this same work (p. 121), it is said: "Even where the right to light and air is recognized, this does not include the right to view or prospect, however much this may contribute to the enjoyment of the estate. And the general rule is that no action can be maintained by one property owner against another for cutting off his view, unless the right of action is given by statute."

This being the recognized doctrine with us, the present suit can only be maintained, if at all, by reason of the fact that the erection of the fence in question, entirely on the land of the defendant, was prompted by a malicious motive. The principal opinion frankly rests its approval of plaintiff's case on the ground stated, and, that being true, I am constrained to dissent from the position of the Court, believing that such a decision is wrong in principle, unwise in policy and contrary to the great weight of well-considered authority.

In countries like ours, which base their system of jurisprudence on the principles of the common law, it is very generally held that no actionable wrong can arise unless there has been some invasion (4422) of another's right, and without this essential feature a person's conduct cannot be made the subject of a suit in the municipal courts, though it may have caused damage to another, and though it may have been prompted solely by malicious motive. In Broom's Legal Maxims the author, in treating of "fundamental principles," thus refers to the question presented: "So a man may lawfully build a wall on his own ground in such a manner as to obstruct the lights of his neighbor, who may not have acquired the right to them by grant or adverse user; so he may

obstruct the prospect from his neighbor, etc., etc. In this and similar cases the inconvenience caused to his neighbor falls within the description of *damnum absque injuria,* which cannot become the ground for an action. And, although it may seem to be a hardship upon the party injured to be without a remedy, by that consideration courts of justice ought not to be influenced. Hard cases, it has been already observed, are apt to introduce bad law."

And that this principle is not affected by the presence or absence of a malicious motive will be found approved and sustained in *Oglesby v. Attrill,* 105 U. S., 605; *Land Co. v. Commission Co.,* 138 Mo., 445; *Hunt v. Simmons,* 19 Mo., 583; *Kelly v. R. R.,* 93 Iowa, 436-452; *Iron Co. v. Uhler,* 75 Pa. St., 467; *Smith v. Johnson,* 76 Pa. St., 196; *Phelps v. Walker,* 72 N. Y., 45; *Ratcliff v. Mayor,* 4 N. Y., 200; *Mahan v. Brown,* 13 Wendell, 261; *Piscard v. Collins,* 25 Barber, 444-459; *Boulier v. McCauley,* 91 Ky., 135; *McCune v. Gas. Co.,* 30 Conn., 524; *Walker v. Cronin,* 107 Mass., 556-564; *Mfg. Co. v. Hollis,* 54 Minn., 253; *Transportation Co. v. Oil Co.,* 50 W. Va., 611; *Lancaster v. Hamberger,* 70 Ohio St., 156, reported with annotation in 1st A. & E. Anno. Cases, 249; *Bank v. Bank,* 21 Vt., 535; *Raycroft v. Tainter,* 68 Vt., 219; *Guarantee Co. v. Horne,* 206 Ill., 403, and numerous other decisions of recognized authority.

To make a few citations from the cases mentioned, in *Iron Co. v. Uhler, supra,* it is held, among other things, "That a lawful act is not actionable, though it proceeded from a malicious motive."

In *McCune v. Gas Co., supra, Sanford, J.,* delivering the opinion, said: "The allegation that the defendant cut off the supply of gas maliciously and wantonly and with intent to injure the plaintiff if of no importance in the determination of this question. Where a party has a legal right to do a particular act at pleasure, the motive which induced the doing of the act at the time in question can never affect his legal liability for the act, to whatever effect such motive may have upon
(443) the *quantum* of damages when his liability is fixed."

In *Walker v. Cronin, supra, Wells, J.,* delivering the opinion, and in reference to the question we are discussing, said: "One may dig upon his own land for water or any other purpose, although he thereby cuts off the supply of water from his neighbor's well (citing *Greenlee v. Francis,* 18 Pick., 117). It is intimated in this case that such acts might be actionable if done maliciously, but the rights of the owner of the land being absolute therein, and the adjoining proprietor having no legal right to a supply of water from the lands of another, the superior right must prevail. Accordingly, it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive

another of advantages or cause a loss to him without violating any legal right."

And in *Transportation Co. v. Oil Co., supra,* it was held: "A legal right must be invaded in order that an action for tort may be maintained. The mere fact that the complainant may have suffered damage of a kind recognized by law is not sufficient, as there must also be a violation of a duty which the law recognizes."

In regard to buildings and other superstructures affecting light and air, I find no American decisions in opposition to the principle sustained by these authorities, except those in the Supreme Court of Michigan. A contrary doctrine seems to have been engrafted upon the jurisprudence of that State, though it was originally established by a divided court in *Burke v. Smith,* 69 Mich., 380. In that case two of the judges, Campbell and Champlin, dissented. *Campbell, J.,* filed a forcible and learned opinion, and *Champlin, J.,* concurring with *Judge Campbell,* thus tersely states his position: "The decisions have been quite uniform to the effect that the motive of a party in doing a legal act cannot form the basis upon which to found a remedy against such party. Under these circumstances, it should be left to the Legislature to define and prohibit the act and declare a remedy, as has been recently done in Massachusetts, Vermont and some of the other States."

In *Sanky v. Academy,* 8 Mont., 265, sometimes cited as being in accord with the Michigan decisions, it will be found that the defendant had constructed a fence on the plaintiff's side of a common alley, and the decision was made to rest upon the fact that there had been a wrongful invasion of plaintiff's right.

And several of the other citations made and relied upon in the opinion of the Court not only fail to give it support, but are (444) directly contrary to the position maintained. Some of them, as in *Aikens v. Wisconsin,* 195 U. S., 194, were actions upon statutes affecting the question, and the fact that legislation was enacted on the subject gives indication that such action was required, and that without it no suit would lie. Others, as in *Wheatley v. Baugh,* 25 Pa. St., 528, were suits for injuries caused by interrupting the flow of underground water having a well-defined channel and in which the owner of the servient tenement has some legal rights not to be interfered with, except in the reasonable user of the dominant tenement; and the case of *Chestley v. King,* 74 Me., may also be upheld upon the same principle. See Gould on Waters (3 Ed.) sec. 290, where *Greenleaf v. Francis,* also relied upon in the principal opinion, is said to have been overruled on the question presented by the subsequent case of *Walker v. Cronin, supra,* and the author says that the doctrine announced in this last case is a settled law as to percolating water.

In the citation to 1 Cyc., 789, in the opinion of the Court, the entire section is as follows: "If an erection which deprives the adjoining owner of light and air is lawful, it is not *per se* a nuisance, and the law will not inquire into the motive with which the erection was made. It has been held, however, that obstruction by one owner with intent to injure his neighbor, and without any advantage to himself, is unlawful." The last clause being predicated upon the Michigan decision, above adverted to.

In 12 A. & E., 1058, also referred to in the principal opinion, the statement is as follows: "According to the recent view of the common law, the erection of a fence upon one's own land is not an actionable injury to one's neighbor, although the erection may deprive him of light and air and may be dictated by motives of ill will. Special liability may, however, arise where title to the interrupted enjoyment of light and air has been acquired by contract; and in England, and perhaps one or two American jurisprudences by prolonged user, under the doctrine of ancient lights. There are some authorities of the United States which support a contrary rule with which malice makes that actionable which would otherwise not be so, and a doctrine has been declared that a fence erected maliciously and with no other purpose than to shut out the light and air from a neighbor's window is a nuisance," citing for the last position the Michigan decisions and the Montana case, above referred to.

The doctrine as established in England will be found to accord
(445) with what I consider the overwhelming weight of American authority, as above indicated. See *Chastmore v. Richards,* 7 House of Lords, 349 and 388; *Allen v. Flood,* Appeal Cases, 98, 1. In this last case *Lord Watson,* in his opinion, thus states what is to my mind the correct principle, as follows: "Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is itself a legal wrong, carrying with it liability to repair its necessary and natural consequence, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent. But the existence of a bad motive in the case of an act which is in itself not illegal will not convert that act into a civil wrong for which reparation is due."

A like doctrine prevails in Canada, as announced in *Perrault v. Gautheir,* 28 Can., 241. And text writers of approved excellence are to like effect. Thus, in Cooley on Torts, 1503, marginal, 830, the author says: "In the course of the preceding pages it has been made very manifest that when the question at issue is whether one person has suffered legal

wrong at the hands of another the good or bad motive which influenced the action complained of is generally of no importance whatever. What was said in the opening chapter of the work, that the exercise by one man of his legal right cannot be a legal wrong to another, has been abundantly shown to be justified by the authorities, even if it were not in itself a mere truism. 'An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.' 'Any transaction which would be lawful and proper if the parties were friends cannot be made the foundation of an action merely because they happened to be enemies. As long as a man keeps himself within the law by doing no *act* which violates it, we must leave his motives to Him who searches the heart.' To state the point in a few words, whatever one has a right to do, another can have no right to complain of."

And Jaggard on Torts, 55, says: "A mere intent to do wrong, or mere malice not resulting in conduct which violates a right or duty, is not actionable." See, also, Pollock on Torts, 152.

There are no decisions more pronounced than our own in maintaining the doctrine that malice will not of itself constitute an action where there has been no invasion of another's rights.

Thus, in *White v. Kincaid,* 149 N. C., 415, in the opinion, at 419, the Court said: "It is a principle well established that (446) when a person, corporation or individual is doing a lawful thing in a lawful way, his conduct is not actionable, though it may result in damage to another; for, though the damage done is undoubted, no legal right of another is invaded, and hence it is said to be *damnum absque injuria. Thomason v. R. R.,* 142 N. C., 318; *Dewey v. R. R.,* 142 N. C., 392."

And in *Biscoe v. Lighting Co.,* 148 N. C., 404, *Connor, J.,* delivering the opinion, said: "In such cases the maxim, *sic utero tuo ut alienum non laedas,* is in no sense infringed. In its just sense it means, 'So use your own property as not to injure the *rights* of another.' When no right has been invaded, although one may have injured another, no liability has been incurred."

And in the case of *Richardson v. R. R.,* 126 N. C., 100, it was expressly held that "malice, disconnected with the infringement of a legal right, is not actionable."

In the presence of this vast array of adverse authority, fortified and upheld by the opinions of judges eminent for their wisdom, learning and piety, the statement that a contrary view is in accord with both good law and good morals would seem to be somewhat self-sufficing. Nor is the reference in the principal opinion to the moral aspects of the question any more illuminating. We are all, I trust, striving, at times somewhat blindly, to attain to the perfect righteousness of the great Teacher

as well as Saviour of men; but in the present stage of our development, and with our limited human ken, it has been found best to confine litigation in our civil courts to the enforcement of rights and the redress of wrongs growing out of an invasion of those rights, done or threatened, and not allow causes of action to be based upon motive alone. For here we enter upon the domain of taste and temperament, involving questions entirely too complex, varied and at time fanciful for satisfactory inquiry and determination by municipal courts. In a case so near the border line as to divide this Court on a fundamental question as to rights of property it is well to recur to the facts.

The plaintiff, a chief of police and owner of a house and lot, on complaint made, has caused the defendant to remove his stable from an adjoining piece of property. The defendant, smarting under a sense of defeat, makes some hasty and ill-considered expressions, erects a fence on his own land and in the protection of his own property. He is now brought into court on the charge that the fence has been constructed from malicious motives; that it is too high, the planks are rough
(447) and undressed, and the house of plaintiff, presumably one room of it, has been rendered so dark that he cannot see how to shave. If plaintiff can succeed in this, the next grievance will very likely be found in the shape of the roof or the color of the paint; and the defendant, who had supposed that he was the owner of a piece of property, no doubt descended to him from his fathers, will find that in the evolution of things modern he is only an occupant, holding subject to the capricious whims of some supersensitive and overly esthetic but influential neighbor.

I am of opinion that no cause of action has been stated in the complaint or in the evidence, and that the judgment of nonsuit should be sustained.

MANNING, J., concurs in the dissenting opinion.

STATE EX REL. NORTH CAROLINA CORPORATION COMMISSION AND MORGANTON RETAIL MERCHANTS ASSOCIATION v. SOUTHERN RAILWAY COMPANY.

(Filed 15 December, 1909.)

1. Corporation Commission—Appeal—Procedure—Notice.

When notice of appeal to the Superior Court is given to the Corporation Commission by a railroad company, and the other requirements of Revisal, sec. 1074, relating thereto, have been met by the company, it is sufficient without giving notice of the appeal to the complaining party in the proceedings had before the commission, as upon this appeal the statute makes the commission the party plaintiff.

2. Removal of Causes—Federal Court—Petition—Jurisdictional Facts—Matter of Right.

In proceedings for the removal of a cause from the State to the Federal courts upon the question of diversity of citizenship under the Federal statute, applicable, the State court is not bound to surrender its jurisdiction until a case has been made which on the face of the petition shows the petitioner has a right to the transfer of the cause to the Federal courts.

3. Corporation Commission—Legislative Agency—Quasi Judicial.

The Corporation Commission is not a judicial court but a mere administrative agency of the State possessing certain *quasi* judicial and legislative powers.

4. Removal of Causes—Corporation Commission—Legislative Functions—Police Powers—"Suits."

In a matter before the Corporation Commission wherein certain citizens of a town were seeking an enforcement of certain changes of location and conditions of a railroad company's depot therein, the commission held, "In view of the facts, it is the opinion of the commission that the removal of the depot to the north side of the railroad and enlarging the warehouse space will promote the convenience, security and accommodation of the public." From this order the railroad company appealed under the provisions of the State statute to the State Superior Court, and there, in apt time and due form, filed a petition to remove the cause to the Federal Court on the ground of diverse citizenship, alleging the jurisdictional amount: *Held*, the action of the commission was the regulation by the State through its lawfully constituted agency of a legislative function falling within its police power, and was not a "suit," within the purview of the Federal statute, removable to an inferior Federal tribunal.

5. Removal of Causes—Corporation Commission—State Regulations—Federal Courts—Constitutional Law.

The Federal courts have no jurisdiction over regulations of a legislative character made by a State through its lawfully authorized agency, in this case, the Corporation Commission, unless the regulations are of such an unreasonable or arbitrary character as to be in effect not a mere regulation, but an infringement of ownership, or in some other way repugnant to the protective clauses of the Fourteenth Amendment of the Federal Constitution.

6. Same—Procedure.

The only remedy that the common carrier has in the Federal court for relief from a regulation of a State, legislative in its character, alleged to be in contravention of the Fourteenth Amendment to the Federal Constitution, is upon writ of error from the United States Supreme Court after the carrier has exhausted the right of review and appeal open to it under the laws of the State.

7. Removal of Causes—Federal Courts—Allegations of Petition—Jurisdictional Facts.

The allegation in a petition of a carrier filed for the removal of a cause to the Federal Court upon the ground of diversity of citizenship under the

Federal statute, that certain changes in its depot ordered by the Corporation Commission will cost it over two thousand dollars, does not *per se* make the regulation an infraction of the Fourteenth Amendment of the Federal Constitution or give inferior Federal tribunals jurisdiction to pass on the propriety of such an order.

8. Removal of Causes—Federal Courts—Jurisdiction—Corporation Commission—Legislative Acts—Federal Constitution—Constitutional Law.

Assuming that the mere fact that an order of the Corporation Commission made to compel the carrier to change the location and conditions of its depot to promote the convenience, security and accommodation of the public would be an invasion of interstate commerce, it does not transform the proceedings in which the order is made into "a suit at law or in equity," and, as such, removable from the Superior Court of the State to an inferior Federal tribunal, upon the ground of diverse citizenship.

9. Corporation Commission—Legislative and Judicial Powers—State Constitution—Removal of Causes.

The Corporation Commission in ordering a carrier to make certain changes in its depot for the security, etc., of the public under the legislative authority conferred, is not exercising strictly judicial functions, but those which are more legislative in their character; and whether the union of legislative and judicial functions of the Corporation Commission in a single hand is permissible under the State Constitution cannot be determined on an appeal by the carrier from the refusal of the Superior Court to grant its petition to remove the proceedings to the Federal Court.

WALKER, J., dissents.

(449) APPEAL from *Justice, J.*, at August Term, 1909, of BURKE.

This proceeding originated before the Corporation Commission and upon appeal by defendant was duly docketed in the Superior Court.

At said term the plaintiff moved to dismiss the appeal because no notice had been served on B. F. Davis, president of the Merchants Association of Morganton. At the same term the defendant filed a petition and bond for removal to the Circuit Court of the United States. The court declined to allow the petition to remove, and sustained the motion to dismiss the appeal.

The defendant excepted and appealed to the Supreme Court.

Avery & Avery, E. M. Hairfield and Avery & Erwin for plaintiffs.
S. J. Ervin for defendant.

BROWN, J. 1. The motion to dismiss was improperly allowed, as the law required no notice to be served on B. F. Davis, president of the Merchants Association, as he was no party to the proceeding. It is not claimed that said association is a legal entity; but if it was, it is no party to a proceeding of this kind.

The statute provides that when an appeal is taken from an order of this nature, made by the Corporation Commission, the State shall be the plaintiff, and that the cause shall be docketed, "State of North Carolina on relation of the Corporation Commission v. the appellant."

As it is admitted that the defendant filed exceptions to the order with the Corporation Commission, and, when it received notice of the decision of the commission overruling them, gave the commission notice of appeal in apt time and in due form, the appeal should not have been dismissed. Nothing else was required by the statute (Revisal, sec. 1074).

2. Although the petition and bond for removal appear to be in all respects regular, and were filed in apt time, we are of (450) opinion that it appears upon the petition itself that this proceeding is not such a suit at law or in equity, within the meaning of the acts of Congress, as can be removed into the Circuit Court of the United States.

When the defect appears upon the face of the petition, it is conceded that the State courts are not ousted of their jurisdiction, for they are not bound to surrender it until a case has been made which on its face shows the petitioner has a right to the transfer of the cause to the Federal Court. *Stone v. State,* 117 U. S., 430; *McCullock v. R. R.,* 149 N. C., 305; *Winslow v. Collins,* 110 N. C., 121.

It is admitted by the defendant that as long as this matter was pending before the commission it was not removable, under the act, inasmuch as that commission is not a judicial court, but a mere administration agency of the State, possessing certain *quasi* judicial and legislative powers. But it is contended that when an appeal was taken from the order of the Corporation Commission, and the record was certified by it to the Superior Court for trial, then the matter was no longer before a mere administrative tribunal, but was pending in a court of justice—a judicial court—and there was an adverse controversy, action, or suit, pending between parties litigant—a plaintiff and a defendant—and this suit, action, or controversy, could be removed into the Circuit Court of the United States on the petition of the defendant, who was a nonresident and a foreign corporation.

We admit this general proposition to be sustained by the Supreme Court of the United States in several cases: *Upshur v. Rich,* 135 U. S., 467; *Boom Co. v. Patterson,* 98 U. S., 403, and others. All these cases constituted the legitimate subject-matter of a suit between parties litigant.

Although the term, "suit of a civil nature," as employed in the act of Congress, is very comprehensive, it is construed to apply only to a proceeding in a court of justice by which a litigant pursues that remedy which the law affords him. *Weston v. Charleston,* 2 Pet. (U. S.), 449.

Or, as stated in later cases, it applies to any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim. *Sewing Machine Cases,* 18 Wallace, 553; *Cohens v. Virginia,* 6 Wheaton, 264.

And it matters not how the proceeding is formally disguised;
(351) if in substance it is "a suit," it will be treated as such for purposes of removal.

But the subject-matter of this proceeding does not, in the light of more recent decisions of the Supreme Court of the United States, constitute a suit, in the broadest acceptation of that word. The petition to remove describes this as "a proceeding to enforce the right of the Morganton Retail Merchants Association to have the North Carolina Corporation Commission order and direct this petitioner to remove its depot from the south side of the present main line of this petitioner to the north side of the present main line of this petitioner, and the matter actually in controversy involves the right of the defendant to have and maintain and use its present depot on the south side of its main line at Morganton, or whether or not it shall be compelled to construct another depot on the north side of its present main line, and the amount in controversy largely exceeds the sum of value of $2,000, exclusive of interest and costs."

The record shows that certain citizens of Morganton, informally organized as the Morganton Retail Merchants Association, filed a petition before the Corporation Commission setting forth their grievances in relation to the handling of freight by defendant at Morganton and alleging that the facilities provided were inadequate, and praying that the commission will cause an adequate freight depot to be constructed by defendant. The commission gave notice to the defendant and proceeded to examine into the complaint, visiting Morganton for the purpose of having a personal inspection and a hearing of the matter. At this hearing the complainants and the defendant were represented by counsel. The commission made full findings of fact, and concluded as follows: "In view of these facts, it is the opinion of the commission that the removal of the depot to the north side of the railroad and enlarging the warehouse space will promote the convenience, security and accommodation of the public. Therefore, be it so ordered." To the findings and order the defendant excepted and appealed.

Whether this order is justified by the facts is a controversy not now before us. That is a matter yet to be determined, when the defendant's appeal is finally heard.

We refer to the findings for the purpose of demonstrating that the order appealed from is not a judgment of a court, but an administrative regulation made by a State agency in the exercise of certain legislative powers which the General Assembly has conferred upon it. It cannot

be questioned at this day that railroads, from the public nature of their business and the interest which the public have in their operation, are subject, as to their State business, to State regulation, which (452) may be exerted directly by the legislative authority or by administrative bodies endowed with power to that end.

While the justness and feasibility of such regulations may be reviewed upon appeal by the State's own tribunals, endowed by legislation with such supervisory power, the Federal Courts have no jurisdiction over them, unless the regulation is of such an unreasonable or arbitrary character as to be in effect not a mere regulation, but an infringement upon the right of ownership, or is in some other way repugnant to the protective clauses of the Fourteenth Amendment to the Federal Constitution. *Stone v. Farmers L. & T. Co.*, 116 U. S., 307; *R. R. v. Minnesota*, 134 U. S., 418; *R. R. v. Corp. Commission*, 206 U. S., 1. And this can only be determined by the Supreme Court of the United States, upon writ of error, after the carrier has exhausted the right of review and appeal open to it under the laws of the State. *Prentis v. R. R.*, 211 U. S., 210. That court has expressly repudiated the idea that the Federal courts, under the guise of protecting private property, may extend their authority to the subject of State regulation, a matter not within their competency.

It is only when the assertion of the legislative power exceeds regulation and becomes equivalent to taking of property without due process or amounts to a denial of the equal protection of the laws, that the Federal power will interfere.

This is the principle upon which the regulation relating to a schedule connection with another carrier was upheld by the Supreme Court of the United States, commonly called the *Selma Connection case* (*R. R. v. Corp. Commission, supra*). While the judgment of this Court in that proceeding was reviewed and affirmed upon writ of error, it is perfectly manifest from the opinion that the supreme Federal tribunal never for a moment regarded the proceeding in that case as a "suit," within the meaning of the removal acts of Congress.

The fact alleged in the petition for removal, that it will cost the defendant over two thousand dollars to make the changes in its freight station at Morganton directed by the commission, does not *per se* make the regulation an infraction of the Fourteenth Amendment, nor does that allegation give the inferior Federal tribunals any jurisdiction to pass on the propriety of such an order. *R. R. v. Jacobson*, 179 U. S., 287; *Worcester v. R. R.*, 58 N. Y., 152; *People v. R. R.*, 70 N. Y., 569; *People v. R. R.*, 104 N. Y., 58.

Assuming for the moment that the order in question is an invasion of interstate commerce, as is contended, and as such may be (453)

declared void by the Supreme Court of the United States, upon review, by writ of error, that does not confer any jurisdiction to pass on it, under the removal act, upon the lower Federal Courts. The fact that the regulation may be void on that account does not make it any the less a regulation, nor does it transform the proceeding, in which the order is made, into "a suit at law or in equity."

But it is manifest that the regulation does not impinge upon any Federal law. The Federal Supreme Court has repeatedly recognized the right of a State, in the exercise of its police authority, to confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner and time of delivery of merchandise moving in the channels of interstate commerce. *R. R. v. Mays,* 201 U. S., 321; *Wire Co. v. Speed,* 192 U. S., 500; *McNeill v. R. R.,* 202 U. S., 543.

It is difficult to understand how a regulation intended to facilitate the receipt and delivery of freight by enlarging the facilities necessary for that purpose can be a burden upon or interference with interstate commerce.

But the principal contention of the defendant is that when, on appeal, this proceeding was docketed in the Superior Court, admittedly a judicial tribunal of general jurisdiction, it became a "suit at law" and at once removable into the Circuit Court.

In the consideration of this question it is immaterial whether the Corporation Commission is a court or an administrative body, or both. And it is equally immaterial that the power of review it given to a State court of general jurisdiction. The subject-matter of the controversy remains a mere regulation, under the police power of the State, and cannot be the subject of a suit, within the meaning of the removal acts of Congress.

When the State Courts undertake to review the propriety of the regulation in question, they do not exercise strictly judicial functions, but those which are more legislative in their character. *Prentis v. R. R.,* 211 U. S., 225. There is nothing in the Federal Constitution to prohibit this, or which injects into the case any Federal question. Whether this union of legislative and judicial functions in a single hand is permissible under the Constitution of this State cannot be determined upon this appeal.

In the rate-regulation case, above cited, the Supreme Court of the United States says: "But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none (454) the less so, that they have taken place with a body which at another moment or in its principal or dominant aspect is a court, such as is meant by section 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts,

and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and is therefore an act legislative, not judicial, in kind." Again: "Proceedings legislative in nature are not proceedings in a court, within the meaning of Revised Statutes, sec. 720, no matter what may be the general or dominant character of the body in which they may take place," citing *McNeill v. R. R., supra.* "The decision upon them cannot be *res judicata.* . . . All that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called."

To the same effect is the learned opinion of *Mr. Justice Bradley* in the prior case of *Upshur Co. v. Rich,* 135 U. S., 473; *R. R. v. Board,* 28 W. Va., 264.

That this proceeding is not a "suit at law" is further manifest from the fact that obedience to the order cannot be enforced by resort to the ordinary final process of courts of general jurisdiction. The State court can compel performance only by resort to the high prerogative writ of *mandamus,* and that by authority of a special statute. Revisal, sec. 1080. But the Circuit Court of the United States have been denied the authority to issue writs of *mandamus,* except as ancillary to or in aid of a preëxisting jurisdiction, and it has been held that the acts of congress subsequent to the Judiciary Act have not enlarged their jurisdiction in this respect. Therefore it has been repeatedly decided that a proceeding for an original writ of *mandamus* pending in a State court is not a suit of a civil nature, at law or in equity, within the meaning of the removal acts. *McIntyre v. Wood,* 7 Cranch, 504; *Davenport v. Dodge,* 105 U. S., 237; *Indiana v. R. R.,* 85 Fed., 1, and cases therein cited.

For the reasons given, we are of opinion that this proceeding is not removable into the Circuit Court of the United States, but that the order dismissing appeal of defendant was improperly made. (455)

Reversed.

WALKER, J., dissents.

Cited: Higson v. Ins. Co., 153 N. C., 38; *Pruitt v. Power Co.,* 165 N. C., 420; *Corporation Commission v. R. R.,* 170 N. C., 561, 568.

INTERSTATE COOPERAGE COMPANY v. EUREKA LUMBER COMPANY.

(Filed 15 December, 1909.)

1. **Venue—Legislative Regulation.**

The venue for civil actions is a matter for legislative regulation and is not governed by the rules of the common law.

2. **Venue—Injury to Realty—Contiguous Tracts—Separate Counties.**

There is a distinction drawn by the Revisal, sec. 419, as to the venue of an action "for injury to real property" and that of an ejectment brought to recover possession of land; and when it appears that, in an action of trespass for damages claimed by reason of defendant's cutting timber on certain contiguous tracts of land claimed by plaintiff and situated in two counties, the trespass complained of was entirely situate in an adjoining county to the one in which the action was brought, and the defendant having disclaimed title to all land in the county where action commenced, upon motion made in apt time the cause should be removed to the adjoining county in which the alleged injury was caused.

APPEAL by plaintiff from an order removing this cause for trial to the county of BEAUFORT. The motion was made at the return term, before the time to answer had expired, April Term, 1909, Superior Court of PAMLICO, *Cooke, J.*, presiding.

The facts are stated in the opinion of the Court.

Moore & Dunn and Small, MacLean & McMullan for plaintiff.
W. B. Rodman and Wiley C. Rodman for defendant.

BROWN, J. This motion was heard upon affidavits presented by both parties, and the record of the cause, at chambers in New Bern, on 13 May, 1909. The judge made the following finding of facts:

1. The court finds that this is an action to recover damages for an alleged trespass by the defendant by cutting timber upon lands claimed by the plaintiff.

2. That the lands described in the complaint are claimed by (456) the plaintiff under one deed, and that said lands, as located by the plaintiff, lie partly in the counties of Pamlico and Beaufort.

3. That the portion of the lands upon which the defendant has trespassed, if there has been any trespass, lies within the county of Beaufort, and that the defendant has not committed any act of trespass upon any of the lands of the plaintiff which lie in the county of Pamlico.

4. That there is a controversy between the plaintiff and defendant as to the ownership of the lands upon which the defendant has been cutting timber, but that this controversy does not extend to any of the lands described in the complaint which lie in the county of Pamlico, and that

the defendant has expressly in this action disclaimed any claim whatever to any of the lands described in the complaint which lie in the county of Pamlico.

The affidavits not only support these findings, but there seems to be no controversy in regard to their correctness. The venue of civil actions is a matter for legislative regulation and is not governed by the rules of the common law. *S. v. Woodard,* 123 N. C., 710.

The statute controlling in actions of this character is section 419 of Revisal of 1905; Clark's Code, sec. 190. In construing this section it has been held that where the lands claimed, in an action of ejectment brought to recover *possession* of them, are contiguous and situated in two adjoining counties, the action may be brought in either. *Thames v. Jones,* 97 N. C., 121. This is necessarily so, as the subject of the action is situated in both counties.

It is to be noted, however, that the statute makes a distinction between actions to recover possession of real property and those brought to recover damages "for injuries to real property." It declares that actions for "*injuries* to real property" must be tried in the county in which the subject-matter of the action, or some part thereof, is situate, subject, of course, to the power of removal in the cases provided by law.

The complaint shows that this action is brought to recover damages for an injury to real estate, and not to recover possession of it, and it is this injury to real estate which is the subject of this action. The findings of fact have located the injury exclusively in the county of Beaufort and no part of it in the county of Pamlico. Inasmuch as the defendants disclaim title to any land situated in Pamlico, and have done no injury to lands in that county, it would seem to be plain that the entire "subject-matter of the action" is situated in the county of Beaufort, and that, under the letter as well as the spirit of the law, the action must be tried therein. (457)

The order of removal is

Affirmed.

Cited: Perry v. R. R., 153 N. C., 119; *Norman v. R. R.,* 161 N. C., 329.

JOHNNIE WOOD, BY HIS NEXT FRIEND, *v.* McCABE & COMPANY.

(Filed 15 December, 1909.)

1. Master and Servant—Hazardous Occupation—Negligence—Precautions—Duty of Employer.

If by the exercise of a proper precaution a dangerous occupation can be engaged in without harmful results, it is the duty of those engaged in the business to use such precaution with reference to their employees, and if the employees are left in ignorance of the dangers incurred, the employers are chargeable for their injuries.

2. Same—Evidence—Nonsuit—Assumption of Risks.

Evidence of defendant's negligence is sufficient upon which to refuse defendant's motion to nonsuit thereon, which tends to show, that defendant, engaged in constructing a railroad, employed a sixteen-year-old boy to take charge of its dynamite magazine, and, among other things, to pick up and carry to the magazine dynamite sticks left scattered about by its workmen; that, if left exposed to the weather, these sticks would more readily explode from a slight jar; that defendant had not instructed the boy of the dangerous character of dynamite, he only knew dynamite would explode under a sixty-pound "jar," not understanding the meaning of the words; and that the injury complained of occurred while plaintiff was picking up some of the sticks left exposed by workmen several days before. In such instances the doctrine of assumption of risks is not presented.

APPEAL from *Justice, J.*, at July Term, 1909, of McDOWELL.

Action to recover damages for personal injury. The suit appears to have been originally brought against the South and Western Railway Company, as well as the defendants, McCabe & Co., but no answer was filed by the railway company and no issue was submitted as to it, and no judgment taken against it. It is presumed the suit as to the railway company was not prosecuted.

These issues were submitted to the jury:

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

2. Did the plaintiff, by his own negligence, contribute to his own injury, as alleged in the answer? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover of (458) the defendant? Answer: $6,441.

From the judgment rendered the defendants McCabe & Co., appealed.

Pless & Winborne and St. John & Shelton for plaintiff.

Hudgins, Watson & Johnston for defendants.

BROWN, J. After examination of the several assignments of error, we are of opinion that the merits of this appeal may be fully considered upon the motion to nonsuit.

The evidence tends to prove that the plaintiff, a boy of sixteen years, was employed by the defendants, McCabe & Co., contractors, engaged in the construction of the South and Western Railway, and placed in charge of the dynamite magazine; that, among other duties assigned to him, he had to pick up from the ground, where the roadbed was being constructed, the dynamite sticks, left scattered about by the workmen, and carry them to the magazine. The evidence shows that the boy was required to do this work without being given any instructions as to dynamite, its nature or dangers, the nature of the danger to be apprehended, or any other instructions of any kind as to handling it. The plaintiff so states, and no witness for the defendant claims to have given him any specific instructions nor to have described the danger, but some of them state that they had told him that it was dangerous. Plaintiff states explicitly that all he knew about the explosive qualities of dynamite was that it took a sixty-pound jar to put it off, but did not know what a sixty-pound jar was.

There is evidence tending to prove that dynamite, after exposure, becomes highly explosive, and a very slight jar will explode it. The plaintiff, in discharge of his duty, picked up some sticks left on the ground by the workmen for some two or three days, and they exploded and seriously injured him.

The defendants, in the exercise of ordinary care and prudence, should never have placed a boy of sixteen in charge of a dynamite magazine, but we are not now called upon to declare that such thoughtlessness is *per se* actionable negligence. The uncontradicted evidence shows the extremely dangerous duties of guarding, picking up and handling that highly dangerous explosive were assigned to this sixteen-year-old lad, without any instructions sufficient to enable him to guard against danger to himself. Had he been instructed that dynamite when exposed to the weather would explode more readily and from a very slight jar, he would have been forewarned and enabled to guard against a (459) danger he had been apprised of. Under such conditions, there might be some foundation for the application of the doctrine of assumption of risk.

If an occupation, attended with danger, can be prosecuted by proper precaution without harmful results, such precaution must be taken, or liability for injuries will follow if injuries ensue; and if laborers, engaged in such occupation, are left by their employers in ignorance of the dangers incurred, and suffer in consequence, the employers are chargeable for their injuries.

The explosive nature of dynamite and the increased danger of its explosion when left out, exposed to atmospheric influences, was undoubtedly well known to these railway builders, and such knowledge was a continuing admonition to them to take every precaution to protect those who handle it, certainly by imparting to them proper instructions.

In commenting on this subject, *Justice Field* has well said, in *Mather v. Rillston,* 156 U. S., 399: "So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves, as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced."

All courts and writers agree that the degree of care required of persons using such dangerous instrumentalities as dynamite in their business is of the highest, and what might be reasonable care in respect to grown persons of experience would be negligence as applied to youths and children. 7 A. & E., 441; *Matson v. R. R.,* 111 Am. St., 487.

Applying these settled principles to the uncontradicted evidence, it would seem to be plain that, in any view of it, the plaintiff is entitled to recover of the defendants, McCabe & Co., if such facts are found to be true.

Upon a review of the entire record, we find no reversible error.

No error.

Cited: Cochran v. Mills Co., 169 N. C., 62; *Barnett v. Mills,* 167 N. C., 583; *Dunn v. Lumber,* 172 N. C., 136.

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(460)

M. W. STERN v. W. J. BENBOW.

(Filed 15 December, 1909.)

1. **Deeds and Conveyances—Contracts to Convey Lands—Guarantee of Number of Acres—Parol Evidence.**

In an action to reform a written contract to convey land in conformity with an alleged guarantee of the vendor that the tract contained a certain number of acres, which, in fact, it did not contain, it is not necessary that the guarantee be in writing. The requirement imposed in this case, by the trial judge, that plaintiff show that defendant had omitted the guarantee from the written instrument, was not to defendant's prejudice and therefore not reversible error.

2. Deeds and Conveyances—Contracts to Convey Lands—Guarantee of Number of Acres—Option of Grantee—Remedy—Measure of Damages.

When plaintiff has alleged and proven that the defendant had guaranteed that a certain tract of land, the subject of a written contract to convey between them, contained a hundred acres, and in fact, that it contained something less than eighty acres, it is optional with him to cancel the contract or take a deed for the land with a *pro rata* abatement in the price. In the latter case he may recover such damages arising from the loss of rents and profits he may have sustained as the proximate and direct result of having been wrongfully kept from the possession, less the interest on the unpaid balance of the purchase price.

3. Same—Actual Damages—Rents and Profits.

Plaintiff having established by the verdict of the jury, under competent evidence and correct instructions of law, that a contract to convey lands made with him by defendant should be reformed so as to include a guarantee that it contained one hundred acres, and that in fact it contained less than eighty acres, and also, certain loss of rents and profits by reason of his having been wrongfully kept from possession, he is entitled to a judgment that defendant hold the lands as a security for the balance of the purchase price due, with interest thereon, ascertained by deducting from the purchase price the amount thereof theretofore paid, and such damages as directly and proximately resulted to plaintiff by the wrongful withholding of the possession by the defendant.

4. Deeds and Conveyances—Contracts to Convey Lands—Breach—Damages Remote.

The plaintiff cannot recover of the defendant, as damages for unlawfully withholding possession of certain lands he had contracted to convey, the expense of moving his son and family from an adjoining State and boarding them during the time the possession had thus been withheld, such damages being too remote.

5. Issues, Inconsistent—Verdict—Judgment.

The exception by appellant to a judgment rendered on the verdict in favor of appellee, on the ground of inconsistent issues, cannot be sustained when it appears that appellee was entitled to his verdict on the answer of the jury as to each.

MANNING, J., dissents.

APPEAL by defendant from *Long, J.*, at February Term, 1909, of (462) GUILFORD.

The facts are stated in the opinion.

King & Kimball for plaintiff.
Morehead & Sapp for defendant.

CLARK, C. J. The jury found, in response to the issues submitted, that the defendant contracted to sell and the plaintiff contracted to buy the lands referred to in the complaint and included in the survey set out in

the complaint; that the defendant represented to the plaintiff and guaranteed him that there were 100 acres in the tract, and the plaintiff, so believing, was induced to contract to pay therefor $5,850; that, in fact, the tract contained only 78 3-100 acres; that the plaintiff would not have bought the lands if he had known at the time that the area was less than 80 acres; that the defendant, falsely and fraudulently, in order to induce the plaintiff to buy the land, represented to him that the tract contained 100 acres, and the plaintiff, relying upon such representation, did purchase said land; that the plaintiff, on account of the deficiency in the acreage, is entitled to an abatement in the price of $1,238.45, and is also entitled to recover $355 damages.

Upon this verdict the court entered judgment that the defendant holds the lands described in the complaint, first, as a security for the balance of the purchase-money, and next thereafter for the benefit of and to be conveyed, with the joinder of his wife, to the plaintiff, on payment of the purchase money, to wit, $4,611.55, on account of the purchase price of the land, less $100 paid 12 November, 1906, which sum the defendant is entitled to recover of the plaintiff, less the further sum of $355, damages assessed by the jury, with interest on the balance from 12 November, 1906, upon payment of which sum the said defendant will execute deed in fee (with the joinder of his wife in the conveyance), with the usual covenants of warranty, seizin, etc., and give possession therewith to the plaintiff.

This action is brought for the purpose of reforming an agreement, entered into 12 November, 1906, between the defendant and wife and the plaintiff, giving the plaintiff an option for the purchase of the said lands, to make it speak the truth, by inserting a guarantee alleged to have been given by the defendant and wife that the said tract contained 100 acres, and to procure specific performance by the execution of a deed for the correct number of acres, upon payment of the agreed purchase price, reduced by a *pro rata* amount for the deficiency in the number of acres.

(462) It appeared in evidence that the defendant had advertised the land for sale in the *Greensboro Patriot* as containing 108 acres, and that he had listed it in writing, with a real estate agent, as his agent, to sell the same, as containing 108 acres, and that said agent so represented it to the plaintiff, and that the defendant, in a personal interview with the plaintiff, guaranteed that the tract contained 100 acres; that the tract of land consisted originally of three tracts, which had been bought by the defendant, and that, adding up the acreage set out in the three deeds to the defendant, the sum was between 75 and 80 acres. The defendant denied that he had guaranteed the number of acres or that anything was omitted from the contract in evidence.

When a contract is reduced to writing, parol evidence cannot be admitted, to vary, add to, or contradict the same. But when a part of the contract is in parol and part in writing, the parol part can be proven if it does not contradict or change that which is written. *Nissen v. Mining Co.*, 104 N. C., 310, and citation in annotated edition.

It is true, also, that an agreement for the conveyance of the land is not binding unless reduced to writing and signed by the party to be charged; but a guarantee of the number of acres, like the receipt of the purchase-money or recital of the consideration, is not required to be in writing. *Sherrill v. Hagan,* 92 N. C., 349; *McGee v. Craven,* 106 N. C., 356; *Currie v. Hawkins,* 118 N. C., 595; *Quinn v. Sexton,* 125 N. C., 452; *Brown v. Hobbs,* 147 N. C., 77.

In requiring, therefore, the plaintiff to show that the guarantee of the acreage was omitted from the instrument by mistake, the court placed an undue burden upon the plaintiff, but of this the defendant cannot complain.

In a contract to convey, or a conveyance of land, if there is a shortage in the number of acres, the grantee is not entitled to a *pro rata* abatement in the purchase price if both parties had equal source of information (which was not the case here), unless the vendee has taken a guarantee as to the number of acres. *Smathers v. Gilmer,* 126 N. C., 757. But this is what the plaintiff contends he did on this occasion, and the jury has found this issue in accordance with his testimony. It was optional with the vendee, in view of so material a shortage, to cancel the contract or to take the deed with *pro rata* abatement in the price. 26 A. & E. (2 Ed.), 116.

The defendant contends that the verdict was inconsistent in finding on the third issue that the defendant believed the land contained 100 acres, and in response to the sixth issue that he was guilty of fraud in inducing the plaintiff to believe that it con- (463) tained 100 acres. Both these allegations were in the complaint, there being two causes of action set out. There was evidence to support both, and the issues were submitted by consent. This is not the case of inconsistent findings upon the same evidence, nor is it the case where one finding would require a judgment in favor of the plaintiff and the other a judgment in favor of the defendant. In *McCaskill v. Currie,* 113 N. C., 316, it is said: "A careful review of the cases in which this Court has given its approval to setting aside verdicts on account of inconsistent findings discloses the fact that the rulings have invariably rested upon the ground that there were two responses to different issues in each case, one of which would support a decree for the defendant, while the other would entitle the plaintiff to recover. So that, the court could not proceed to judgment, because there was no principle of law

which empowered the judge to choose between the two contestants, both of whom had been declared by the jury to be the prevailing party. *Mitchell v. Brown,* 88 N. C., 156; *Bank v. Alexander,* 84 N. C., 30; *Morrison v. Watson,* 95 N. C., 479; *Turrentine v. R. R.,* 92 N. C., 638; *Porter v. R. R.,* 97 N. C., 66; *Allen v. Sallinger,* 105 N. C., 333; *Puffer v. Lucas,* 107 N. C., 322. But when the verdict points out who is the prevailing party, and determines distinctly the facts upon which the nature and measure of his redress depend, the court is not precluded from pronouncing the sentence of the law upon the findings, because, upon two allegations in the complaint, in the nature of separate counts in a declaration or distinct grounds of action, issues have been framed and responses returned which are not in perfect harmony with each other, when it appears that upon either finding, considered separately, the same party (here the plaintiff) would be entitled to precisely the same judgment. In the case at bar, whether the defendant inserted the description of the 150-acre tract of land in the deed before it was signed, and, by undue influence or false representation, induced the grantor to execute it in that shape, or whether, after execution, he forged the portion of the deed embracing the calls of that tract, in either event the court would declare the deed fraudulent and void as a conveyance of the 150-acre tract, and adjudge that the plaintiff recover the possession and costs in the action. . . . If the judge who presided in the court below entertained any doubt about the weight of the evidence and thought that the findings of the jury upon both issues, together with other circumstances, indicated that they were unduly biased in favor of the plaintiff, he might have set aside the verdict in the exer-
(464) cise of a sound discretion, and the order would not have been reviewable here. But we do not think that the verdict is so contradictory or inconsistent that the court could not see what judgment should be entered. Mere informality will not vitiate a verdict if it appears that no injustice will result from an adjudication upon its substance or general purport. *Hawkins v. House,* 65 N. C., 614; *McMahon v. Miller,* 82 N. C., 317; *Walker v. Mebane,* 90 N. C., 259. . . . We have extended our examination of authorities upon practice in cases of this kind to the text writers and decisions of other courts, and we have not found any case where two findings which support precisely the same judgment in favor of the same party have been set aside on the ground of inconsistency in the verdict."

The foregoing is the case presented here. The plaintiff is entitled to precisely the same relief, regardless of which of the issues (three and six) the jury answered affirmatively. In no phase of the case is the defendant entitled to a decree upon the findings of the jury; and by no

possibility, with reference to the relief sought, is injury done him by the findings on the sixth issue.

There were sundry exceptions to the evidence, in which we find no error and which require no discussion, in view of what we have said, which is also conclusive as to the exceptions for the refusal of certain prayers for instructions. The charge was full and complete, and not excepted to, in any material particular. The jury evidently understood the facts in issue and have determined them.

As to the ninth issue, the plaintiff was entitled to recover the net value of the wheat crop, if (as the jury found) it was to pass to the vendee, but not the expense of bringing his son and family from Virginia and boarding them while disappointed of getting possession. This was too remote. The damages while wrongfully kept out of possession of realty are the rents and profits, while the vendor is entitled to interest on the purchase-money. If there were any *mesne* profits, except the wheat, probably the parties can agree as to their value; if not, the court below will permit the plaintiff to amend his complaint, and there will be a new trial of the ninth issue, as to the wheat and value of other *mesne* profits. In all other respects we find

No error.

MANNING, J., dissenting: Concurring with the conclusion reached by the Court, that a partial new trial should be had, I regret that I cannot agree with them in the conclusion reached in the disposition of the principal questions presented by the appeal. In my opinion, the (465) option giving the plaintiff thirty days to determine his acceptance or rejection, it, when accepted, became the contract and embodied all its terms, and it was not permissible to add to or vary its terms. If this were permitted, *non constat,* that the defendant would have made such a proposition.

Cited: Hamilton v. Lumber Co., 160 N. C., 52; *Bethell v. McKinney,* 164 N. C., 78; *Palmer v. Lowder,* 167 N. C., 333; *Turner v. Vann,* 171 N. C., 129.

WILLIAM W. GUY *v.* U. S. CASUALTY COMPANY.

(Filed 15 December, 1909.)

1. **Insurance, Health—Notice of Sickness—Interpretation of Contracts.**

A policy of health insurance requiring "written notice to be given in ten days by the insured or his attending physician to the company" of the disease by reason of which the indemnity is claimed, by reasonable intendment and construction is to afford the company opportunity to

investigate conditions for the purpose of preventing imposition, and means that the notice must be given "within ten days of the beginning of that part of the illness for which the insured claims payment."

2. Same—Reasonable Notice—When Notice Not Required.

The notice to an insurance company of indemnity claimed under a health policy requiring that written notice be given to the company by the insured or his attending physician, is sufficient if given by any relative or friend, etc., acting on behalf of the insured, though their failure to do so when the insured is unable to request it is no bar on the insurance. The rule intimated in *Williams v. Casualty Co.*, 150 N. C., 598, cited and approved.

3. Evidence—Findings by Court—Irreconcilable Findings—Judgments—Appeal and Error—Procedure.

When the judge, in the trial court, who by agreement of the parties was to have found the facts, sets out certain evidence which is conflicting and irreconcilable, finds it all to be true and renders judgment thereon, it is reversible error, and the judgment will be set aside.

4. Same—Insurance—Health Policy—Notice of Sickness.

When the defense to an action to recover an indemnity for sickness under a health insurance policy is that notice was not given as required by the policy, and the judge, under an agreement of the parties, in finding the facts sets out evidence tending to show that plaintiff was incapacitated by the sickness to notify the defendant, or cause it to be notified, and evidence *per contra*, the court on appeal will set aside his judgment in favor of defendant on the evidence, and order a new trial.

(466) APPEAL by plaintiff from *Justice, J.*, at September Term, 1909, of MCDOWELL.

The facts are stated in the opinion of the Court.

Pless & Winborne for plaintiff.
W. T. Morgan for defendant.

CLARK, C. J. This is an action upon a health-insurance policy, begun before a justice of the peace, for eight weeks indemnity, at $10 per week, on account of plaintiff's sickness. The policy requires that "written notice of such disease be given by the insured or his attending physician to the company at its home office within ten days of its contraction."

In some cases, especially in certain diseases, the condition of the patient may be such, by reason of his mental condition or violent physical suffering, that he cannot give the notice. In such cases the rule intimated in *Williams v. Casualty Co.*, (this same defendant), 150 N. C., 598, is that, where the patient, on account of his condition, is unable

to give notice, he would be excused, if the failure to give notice is without negligence on his part.

Nor do we think that "within ten days of its contraction" can reasonably be construed to mean what the defendant contends that it does. In many, perhaps most cases, diseases are "contracted" months or years before the time when, like an underground river, they come to the surface. And, even then, many more than ten days may pass before the disease compels the sufferer to quit work or otherwise entitle him to claim benefit under a health insurance policy. We think the fair and just meaning is that the notice must be given "within ten days of the beginning of that part of the illness for which the insured claims payment," so that the company shall not be liable for more than ten days payment prior to the time when it receives notice; the object of the provision being that it may investigate and prevent imposition. In those very rare cases where the condition of the insured is such that he can neither give notice himself nor ask his physician to do so, failure to give notice is excused. Of course, the notice to the company may not only be given by the physician, but any relative or friend acting on behalf of the insured, though their failure to do so when the insured is unable to request it is no bar on the insured.

In the present case the plaintiff put in, besides oral testimony, the correspondence between himself and the defendant, and the proofs of loss made by himself, the affidavit of his attending physician and the statement of his employer. It was agreed that the judge (467) should find the facts; but, instead of doing so, he sets out the testimony and the above affidavit, statement and correspondence, "all of which the court finds to be true, as stated." There is irreconcilable conflict. The attending physician's affidavit is that the plaintiff was *"totally disabled* for thirty days, from 12 February to 12 March, 1908, during which time he could give no *attention whatever* to business, and such disability was immediate and *continuous."* His own affidavit was to the same purport, and this evidence, if true, as the judge found, might have justified the delay in not giving the notice in ten days. On the other hand, there was oral evidence coming from the plaintiff and the defendant's letters, all likewise found to be true, which would have justified a different conclusion.

The judgment must be set aside. The evidence will be submitted to a jury (unless the parties again agree that the judge may find the facts) and the law applied as herein stated.

New trial.

HOKE, J., concurs in result.

IN RE CAROLINA, CLINCHFIELD & OHIO RAILWAY COMPANY, E. E. HENLEY AND SAMUEL MILLER, RESPONDENTS.

(Filed 15 December, 1909.)

Contempt.

In these proceedings for contempt no error is found on appeal after an examination of the evidence and findings of the lower court.

APPEAL from *Joseph S. Adams, J.*, as of February Term, 1909, of McDOWELL.

This is an appeal from the order of his Honor adjudging the above-named respondents in contempt. His Honor imposed a fine of $250 upon the corporation and a fine of $100 each upon the other two respondents. The respondents appealed.

Hudgins, Watson & Johnson and J. Norment Powell for respondents.
No counsel contra.

PER CURIAM: On 6 November, 1908, a restraining order was issued in the case of *Hefner v. The Carolina, Clinchfield and Ohio Rail-*
(468) *way,* pending in the Superior Court of McDowell County, enjoining the railway company above named and its agents from using a certain tramway across Hefner's land, as well as from removing certain steel rails laid down upon a tramway over said lands. This injunction was served on 7 November, 1908.

It was for willful disobedience of this order that the proceedings for contempt were instituted before Judge Adams, who was the successor of Judge Murphy as judge of the Fifteenth Judicial District.

We have carefully examined the findings of fact made by his Honor and the evidence introduced upon the hearing before him, and are of opinion that the findings of fact and the judgment of the court are fully warranted. The judgment is

Affirmed.

H. G. TYSON v. CITY OF SALISBURY.

(Filed 15 December, 1909.)

1. Bond Issues—Legislative—"Aye" and "No" Vote—Constitutional Law—Clerk's Erroneous Endorsement—Title of Bill.

An act to allow a city to issue bonds passed upon its various readings with the "aye" and "no" vote in accordance with the Constitution, is not rendered invalid after its passage in one branch of the Legislature by the erroneous endorsement of the clerk of the other branch thereof, when it appears there was no substantial difference therein, the numbers of the bill corresponded in every respect, the title on the face of the bill was

unchanged, no other bill of like import was introduced at that session, and that the one first introduced became the act as finally ratified. *Improvement Co. v. Comrs.*, 146 N. C., 353, cited and approved.

2. Bond Issues—Legislature—Various Issues—Different Purposes—Elections—Interpretation of Laws.

An act authorizing a city to issue bonds in the amount of $300,000, the issue in the first year not to exceed $100,000, and in any subsequent year not to exceed $50,000: *Held*, (1) a grant of legislative power for the issuance by the city of $300,000 in bonds if so much were required for the purposes set forth in the act, and if it were found by the city that so much would not be required, then for the amount ascertained by the city and designated by the act and in accordance with its terms is constitutional and valid; (2) the intent of the Legislature was that one election be held for the various issues of bonds, and that the issues were for various specified purposes does not affect the question or change this ruling.

3. Bond Issues—Elections—Notice—Legislative Acts—Substantial Compliance.

Objection made in this case to the regularity or validity of an issue of bonds by a city, that the ordinance calling an election and the notice of the election was clearly stated in two newspapers publishing it, and that a sufficient opportunity to register and vote was given to all the qualified voters of the city, and that the requirements of the act were substantially, if not fully, complied with by the city authorities.

4. Same—Maturity of Bonds.

It is not necessary for the aldermen of a city to state the maturity of certain bonds to be voted upon in the call or notice of the election, when the act giving authority therefor refers that matter to their determination. In this case it appears that these matters were specifically stated in the call of election, and that the voters fully understood the proposition.

APPEAL from *Justice, J.*, at May Term, 1909, of CATAWBA. (469)

This action was brought for the purpose of testing the validity of certain bonds intended to be issued by the city of Salisbury for the purpose of finding the city's floating debt of $50,000, and for the further purpose of extending, enlarging, maintaining and operating the waterworks and sewerage system of the city, and of building, constructing, improving and maintaining its streets and sidewalks. The city of Salisbury caused an act to be passed by the General Assembly of North Carolina authorizing and empowering the board of aldermen of said city to issue bonds, not exceeding the sum of $300,000, in such denominations and forms and payable at such times and places as the board of aldermen may determine, provided that not more than $100,000 should be issued the first year and $50,000 in any subsequent year, until a whole $300,000 shall have been issued. The parties waived a trial by jury and agreed that the judge might find the facts and enter such judgment thereon as in law he might think was proper, subject to the

right of appeal by either party. Under this agreement, the judge found the following facts and entered judgment in favor of the defendant, as will herein appear:

1. That the plaintiff is a resident and taxpayer of the city of Salisbury, North Carolina.

2. That the city of Salisbury is a municipal corporation, duly chartered and existing under and by virtue of the laws of North Carolina.

3. That on 6 March, 1907, the General Assembly of North Carolina passed, enrolled, ratified and sent to the office of the Secretary of State an act entitled "An act to allow the city of Salisbury to issue
(470) bonds," the same being published in the Private Laws of North Carolina, Session 1907, as chapter 335.

4. On 26 February, 1907, there was introduced in the House of Representatives a bill to be entitled "An act to allow the city of Salisbury to issue bonds."

5. This was the only bill which was introduced in the Legislature of 1907 providing for issuing bonds for the city of Salisbury.

6. This bill was passed on three separate readings in the Senate and in the House, with the yeas and nays duly entered on the journals of both branches of the Legislature on the second and third readings, and it was duly enrolled and ratified on 6 March, 1907, all of which is set forth on the back of the original bill.

7. That the journal entries on the bill are as set out in "Exhibit B," attached to the complaint therein.

8. That the bill, as originally introduced, was not amended in the House or in the Senate, and the original bill, which took the number 1566 in the House and 1428 in the Senate, is in the same words and figures as the act which was finally passed, enrolled, ratified and sent to the office of the Secretary of State.

9. That the board of aldermen of the city of Salisbury, after the passage of said act and on 22 July, 1907, duly and regularly enacted an ordinance providing for an election in the city of Salisbury to pass upon the question of issuing bonds under said act, as set forth in the ordinance.

10. Pursuant to said ordinance and to the notice of election, an election was held in the city of Salisbury on 1 October, 1907, in compliance with all provisions of the law governing such elections, and a majority of the qualified voters of the city of Salisbury, at this election, voted a ballot, as provided in the ordinance and in the notice, with the word "Issue" upon it.

11. The board of aldermen thereupon determined, after fixing the time and place of payment, the amount and the purpose of the issue, to issue $100,000 of bonds, which bonds were issued and sold, being dated

1 April, 1908; $50,000 of the proceeds of the sale of said bonds being used to fund the city's floating debt and the remaining $50,000 for street improvements, as provided in the act.

12. Thereafter, in due time, the board of aldermen of the city of Salisbury duly and regularly determined to lay bitulithic streets in the city of Salisbury, at a cost of $50,000, and to this end contracted with the Atlantic Bitulithic Company to do the work, agreeing to deliver to the said company, on or before 15 April, 1909, the proceeds from the sale of $50,000 of bonds, to be dated 1 April, 1909, or to deliver to (471) said company said bonds, in accordance with the terms of the agreement, and the city of Salisbury has been and is now negotiating for the sale of said bonds to pay for the work of the Atlantic Bitulithic Company, which has now been completed.

It is now, on motion of Burton Graige, counsel for the defendant, ordered and adjudged that the city of Salisbury is fully authorized by the act of the Legislature of 1907, referred to in the pleadings, and by the action taken thereupon by the board of aldermen of the city, to issue and sell the bonds in dispute, which, when duly and regularly issued by the board in the form prescribed and determined by the board of aldermen, will be legal and binding obligations upon the city of Salisbury. It is further ordered and adjudged that the motion herein for an injunction to prevent the issuance of the bonds be and the same is denied. It is further ordered that the plaintiff pay the costs, to be taxed by the clerk. B. F. LONG. Judge.

The plaintiff excepted to this judgment and appealed to the Supreme Court.

Edwin C. Gregory for plaintiff.
Burton Craige for defendant.

WALKER, J., after stating the case: We do not well see how there could be any doubt or uncertainty as to the authority of the city of Salisbury to issue the bonds, the validity of which is now questioned by the plaintiff. It sufficiently appears by the journals of the House of Representatives and the Senate that the bill, as it was first introduced, became the act as finally ratified, enrolled and transmitted to the office of the Secretary of State, all of which will appear from the numbers of the bill as it passed its several readings. There was nothing in the journal to show that it was ever amended in any way. The judge below has found as a fact, and it is not controverted, so far as it appears in the case and the briefs of counsel, that the only bill introduced in the Legislature pertaining to the issuing of bonds by the city of Salisbury during the session

of 1907 was a bill to be entitled "An act to allow the city of Salisbury to issue bonds," it being the same title as found in the bill which was ratified and sent to the office of the Secretary of State from the House and Senate, in both of which branches of the Legislature the numbers of the bill correspond in every respect. It is evident that the clerk of the House entered in his journal the title of the bill as it appeared
(472) on the back of the bill, and not the title as it appeared on the face of the bill. The two titles, as they appear in the case, are not substantially different, so as to disprove the identity of the bill when it passed its several readings in both houses. It is perfectly clear, from what appears in the facts as stated by his Honor, that the same bill which was introduced in the House and passed its several readings in that body, in perfect accordance with the requirements of the Constitution, is the one which also passed the Senate in the same way and was finally ratified, as prescribed by law, and transmitted to the Secretary of State. This is easily demonstrated by a bare statement of the facts, and no argument or discussion by us is required to establish the fact that the members of both houses understood distinctly and clearly the provisions of the bill as thus passed and ratified. It would be a perversion of law and justice if we should permit an erroneous statement of the true title of the bill, which is to be found on its back, to control the title as found on the face of the bill, and the provisions of the bill itself, so as to nullify what was done by the Legislature. In the case of *Improvement Co. v. Comrs.*, 146 N. C., 353, it being a case very much in point, the name, "Robeson County," in the title of the act, was changed to "Washington County" on one of its readings in the House. In that case we held: "It is apparent that the words 'Washington County' were intended for 'Robeson County' and is a mere clerical error. The number of the bill in its passage through the House, and the fact that the same bill, bearing House number 1483, passed the Senate under its proper title and was duly enrolled under said title and its proper House and Senate numbers, clearly prove the words 'Washington County' were intended for 'Robeson County.'" We now affirm that decision, and it applies directly and conclusively to the facts of this case. When the bill was passed on its several readings in each of the houses, it should have been read, and we must presume that it was read, according to the title and provisions of the bill itself as they appear on its face, and not according to the title appearing on the back of the bill. Any one having legislative experience must know that, under the facts and circumstances of this case, no member of either house, who are generally presumed to be men of a high order of intelligence, could have misunderstood what he was doing when he voted in favor of the passage of the bill, and this would seem to be the crucial test by which to determine whether the bill

was passed intelligently and in accordance with the requirements of the Constitution and with the due observance of legislative procedure.

We have no doubt as to the second point made in the case. The bill authorized the city of Salisbury to issue bonds to an (473) amount not exceeding $300,000, the issue in the first year not to exceed $100,000 and in any subsequent year not to exceed $50,000, until the entire amount of bonds, as designated in the bill or act of the Legislature and authorized by the latter, had been exhausted. It was a very wise provision, in the first place, to make, because it is manifest the city authorities did not, at the time the bill was introduced and the act was passed, know the exact amount that would be required for the purposes stated in the bill, and therefore it was so worded that they could issue the required amount within the limit prescribed by the bill or act. It would have been folly to have designated the particular amount, when it might have turned out by actual experience thereafter that such an amount was not required.The substantial effect of the act is to authorize the said authorities to issue $300,000 in bonds, if so much was required for the purposes set forth in the bill; and if it turned out that not so much would be required, then for such an amount as would be actually required for the uses and purposes of the city prescribed in the act.

Nor do we think it could be successfully contended that a special election was intended to be required for each issue of the bonds. It is manifest, from the very terms of the act, that the Legislature intended only one election, and conferred upon the city the authority to issue bonds for its uses and purposes, as designated in the act, but within the limit of $300,000. What good would be accomplished by having three or four special elections, when it was within the power of the Legislature to authorize the issue of the bonds by one election, to the extent of $300,000, if so much was required for the use of the city? If it had been intended that there should be as many elections as there were issues of bonds, the Legislature should certainly have expressed such an intention in clearer language than is to be found in this bill. It was for the very purpose of saving cost and expense to the city that the act was worded as it is. There are authorities sustaining our construction of the act, but it is so palpable that no other construction is permissible that we refrain from citing them. The mere fact that the bonds were to be issued for different purposes cannot affect or change the meaning of the act as we have declared it to be. There is no question made as to the regularity or validity of the election, except that the ordinance calling an election and the notice of the election are not specific. Without discussing this objection, we need only say that it is untenable, as it appears in both papers that the time of the election is clearly stated, and a sufficient opportunity to register and vote was given to all of the qual-

(474) ified voters of the city, and that the requirements of the act were substantially if not fully complied with by the city authorities. The amount to be issued in each year was not necessary to be stated in the call for or the notice of the election, as that was to be determined according to the very terms of the act, by the board of aldermen, and it would have been well nigh impossible to have ascertained what amount would have been needed in each year until after the election had been held. As to the date of the maturity of the bonds, it was not necessary that this should be stated in the call or notice, because the act also refers that matter to the determination of the board of aldermen. But it would seem that all these matters were specifically stated in the call for and notice of election, and that every voter understood full well the proposition for which he was casting his vote.

We have examined this case very carefully, the record and briefs of counsel, and the authorities bearing upon the questions at issue, and have concluded that there is no error in the judgment of the court below, over which Judge B. F. Long presided.

Affirmed.

Cited: Jones v. New Bern, 152 N. C., 66; *Gastonia v. Bank,* 167 N. C., 511; *Hill v. Skinner,* 169 N. C., 410.

In re CONSTANCE TURNER.

(Filed 15 December, 1909.)

1. Habeas Corpus—Custody of Child—Rights of Parents—Third Persons.

In the exercise of a sound legal discretion subject to review on appeal, the court, in *habeas corpus* proceedings, may, in proper instances, order the child into the custody of some third and fit person against the claims of the father and mother thereof.

2. Same—Industrial School—Custodia Legis—Visiting, Etc.

It appearing from the findings of the lower court in *habeas corpus* proceedings for the custody of a child, that both parents claimed it; that the father was improvident and traveled from place to place without a fixed place of abode; that the mother was scarcely a fit person, and resided beyond the borders of the State; the court ordered the child into the custody of the Home Industrial School at Asheville and that the father pay $80 for its care and maintenance there, with leave to the parents to visit and have access to it under the order and supervision of the court, the child to spend one-half the time during vacation with each of her parents, each to give a bond for $300 for the return of the child to the

jurisdiction of the court, retaining the cause for further orders: *Held*, no error, with the modification that the mother should not have the custody of the child in such a manner as to enable her to remove the child beyond the court's jurisdiction.

APPEAL from order rendered by *Joseph S. Adams, J.*, in (475) *habeas corpus* proceedings, at BUNCOMBE, September, 1909.

This is an application for a writ of *habeas corpus*, which was issued on the petition of Elizabeth Turner for the possession and custody of Constance Elizabeth Turner, hereinafter designated as Constance; and on the hearing of said petition, James B. Turner, father of Constance, came in and asked that he be made one of the petitioners with the original petitioner, Elizabeth Turner, which was granted. After considering all of the evidence adduced by the petitioner, Elizabeth Turner, the mother of Constance, the judge found the following facts:

1. James B. Turner and Claudia Turner were married in the year 1901, in the State of Florida.

2. In 1902 the said Constance was born to the said James B. Turner and Claudia, in Winston, N. C., and the said Constance is now a girl seven years of age.

3. James B. Turner and Claudia Turner did not for the last few years live happily together as man and wife, and before the final separation, hereinafter referred to, there had been a temporary separation between them. In the year 1908 the last and final separation occurred, at the time of which the said Claudia Turner, respondent, and petitioner, James B. Turner, were living in the State of Florida.

4. In 1908, when the final separation occurred, the said Constance remained in the custody of Claudia Turner.

5. The respondent, Claudia Turner, shortly after the separation, decided to take a business course of study, and while she was taking such course she left Constance with an aunt of the respondent in the city of Atlanta, and after some months the said aunt notified the petitioner, James B. Turner, that he must come and get his child, and in response to such notice the petitioner, James B. Turner, did go to Atlanta, Ga., and get the child, and turned her over to his brother, Harold Turner, at that time residing in Statesville, N. C.

6. The child, Constance, remained in the possession and custody of the said Harold Turner for about eight months, and in August, 1909, the said Harold Turner delivered the child to the petitioner, Elizabeth Turner, the mother of the petitioner, James B. Turner, in Asheville, N. C., where the child remained until the beginning of these proceedings.

7. The respondent, Claudia Turner, consented that the child might be taken from her aunt, in Atlanta, and carried to the (476)

home of Harold Turner and kept there until she had finished her course in a business college and was able to provide for the child.

8. In September, 1909, the respondent, Claudia Turner, came to Asheville, went to the house of Elizabeth Turner and took possession of the child, over the protest and resistance of the family of the petitioner, Elizabeth Turner. At the time of this taking possession of the child, the petitioner, James B. Turner, was not in the State of North Carolina, but had left the State with the declared purpose of going to a Western State and securing work and of traveling from one place to another, but upon receiving notice of said proceedings James B. Turner returned to Asheville and was present at the hearing of this writ.

9. During the continuance of the married life of James B. Turner and Claudia Turner he inadequately provided for his family, frequently left them alone, and on one occasion they were ejected from a house in Durham while the said James B. Turner was away, in Norfolk, Va.

10. James B. Turner is a plumber by trade, but an improvident man, without property and without any fixed place of abode, who travels from place to place and frequently travels on railroads without paying his fare. He cannot be relied upon to make provision for his child and is an unfit person to have the custody of her.

11. It was contended by the respondent that Claudia Turner had not, during the whole of her married life, been true to her marriage vows and there was some evidence adduced before me arousing some suspicions, but not to justify the finding that she is not a virtuous woman.

12. Claudia Turner is a hard-working, industrious and capable woman, twenty-three years of age. At present she is a stenographer in the office of the Griffing Nursery Company, in the city of Jacksonville, State of Florida, and is earning $15 a week and is financially capable of providing for and taking care of the child.

13. There was much evidence before me that she at present sustains a good character in Jacksonville, Fla.

14. The petitioner, Elizabeth Turner, is a very aged lady, of good character and limited means, but it is manifest that the feeling between her and Claudia Turner is such that to give her the custody of the child would make it impractical for the mother to ever see the child.

15. The feeling existing between the family of the petitioner, (477) Elizabeth Turner, and Claudia Turner is very bitter.

16. In the year 1909 Claudia Turner obtained a divorce, in the State of Florida, from James B. Turner, but no personal service was made upon the said James B. Turner.

Upon the foregoing facts, I adjudge that the child be placed in the custody of Miss Stevenson, superintendent of the Home Industrial School, at Asheville. This is a high-grade institution for the education

of girls and young women, and the said Miss Stevenson is a woman of exalted character and high attainments, and I order that the said Constance be put in the said institution for one year, on the following conditions: The petitioner, James B. Turner, shall pay the sum of $80 for the maintenance of Constance for one year in the said institution; the petitioner and the respondent and the father to be allowed to visit and have access to the said child, under the order and under the supervision of the court; during the vacations the child to spend one-half of her time with the petitioner, James B. Turner, and one-half of her time with the respondent, Claudia Turner; each to give bond in the sum of $300 for the return of the child to the jurisdiction of this court.

This cause is retained for any further orders that the court may see proper to make. The clerk of this court will deliver or mail a certified copy of this to Miss Stevenson. Jos. S. ADAMS, Judge.

Zeb. F. Curtis and Zebulon Weaver for plaintiff.
Craige, Martin & Thompson and Warwich & Jennings for defendant.

WALKER, J., after stating the case: The ruling of Judge Adams in this case is, we think, fully sustained by the authorities and principles of law applicable to such cases. We repeat what we said in *Newsome v. Bunch,* 144 N. C., at p. 16, that the father is, in the first instance, entitled to the custody of his child. But this rule of the common law has more recently been relaxed, and it has been said that where the custody of children is the subject of dispute between claimants, the legal rights of parents and guardians will be respected by the courts as being founded in nature and wisdom, and essential to the virtue and happiness of society; still the welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion; and, therefore, they may, within certain limits, exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person, for good and sufficient reasons. *In re Lewis,* 88 N. C., 31; Hurd (478) on Habeas Corpus, 528, 529; Tyler on Infancy, 276, 277; Schouler on Domestic Relations, sec. 428; 2 Kent Com., 205. But, as a general rule and at the common law, the father has the paramount right to the control and custody of his children as against the world; this right springing necessarily from and being incident to the father's duty to provide for their protection, maintenance and education. 21 A. & E., 1036; 1 Blackstone (Sharswood), 452, and note 10, where the authorities are collected. This right of the father continues to exist until the child is enfranchised by arriving at years of discretion, when the empire of the father gives place to the empire of reason. 1 Blk., 453. But we also said in that case that the court, in the exercise of a sound legal dis-

cretion, may order the child into the custody of some person other than the father, when the facts and circumstances justify such an order in regard to the custody of the child. The law, as thus declared by us in that case, is strongly established by the great weight of authority, and we must abide by it. It is also applicable to the facts of the case now under consideration. Kent, one of our wisest, most humane and greatest chancellors, thus states the rule: "The father, and on his death the mother, is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But the courts of justice may, in their sound discretion and when the morals or safety or interests of the children strongly require it, withdraw the infants from the custody of the father or mother and place the care and custody of them elsewhere." We endorsed this statement of the law in *Latham v. Ellis,* 116 N. C., at p. 33. The judge properly refused to award the custody of the child to its nonresident mother, under the facts and circumstances of this case. *Harris v. Harris,* 115 N. C., 587; *In re Lewis,* 88 N. C., 31, where will be found an able and valuable opinion of the younger *Judge Ruffin* upon this subject. He conclusively shows that the court has the power to award the custody of the child, upon considerations affecting the comfort and welfare of the infant, and, in the language of the learned and just judge, "The court below did just what the authorities all say he should have done." In Tiffany on Domestic Relations, at p. 248, it is said that, "Though the courts have a discretion in contentions over the custody of children, and will take into consideration the welfare of the child, they cannot act arbitrarily and disregard the right of the father (parent) merely because the prospects and surroundings of the child will be brighter if he is awarded to some other and more wealthy person. The right of (479) the father is generally held to be a paramount one, if he is a fit person." This is all very true. It would be a shocking injustice for the courts to act arbitrarily in the matter. They have a discretion, but it must be a sound, legal discretion, subject in its exercise to review by this Court. This discretion must be exercised under the guidance of a proper sense of justice and a due regard for the welfare of the child and the interest of those who are its natural guardians. In this case the mother barely escaped the condemnation of the court below. While the judge should always finds the facts, and not state merely the evidence which tends to establish them, we think it sufficiently appears in the findings, as made, that the judge acted not only legally, but humanely, in making the order. He retained full control of the matter, and may make such orders as the happiness and welfare of the child, the interests of all concerned and the ends of justice require. The order appealed from was right, and we concur with his Honor, Judge Adams, in his rul-

ing, except that the custody of the child should not be committed to its mother, as is provided by the order of the court, in such a way as to enable her to remove the child beyond the jurisdiction of the court. This should be most carefully guarded against. *Harris v. Harris, supra.*

Modified and affirmed.

Cited: In re Alderman, 157 N. C., 512; *Littleton v. Hoar,* 158 N. C., 569; *Page v. Page,* 166 N. C., 91; *Floyd v. R. R.,* 167 N. C., 59; *Howell v. Solomon, ibid.,* 591; *In re Fain,* 172 N. C., 792, 795.

WAITS SMITH v. SOUTH AND WESTERN RAILROAD COMPANY.

(Filed 15 December, 1909.)

1. **Independent Contractors—Joint Torts—Master and Servant.**

A railroad company cannot be held liable as a joint tort feasor with its independent contractor for an injury to an employee of the latter, when there is no evidence or suggestion that the former assumed an active part, by encouragement, direction or control of the work wherein the injury complained of was received.

2. **Same—Release of Liability—Effect.**

The plaintiff received the injury complained of while engaged in the employment of an independent contractor of a railroad company in building the latter's roadbed, and brought suit against the railroad and the contractor, alleging that they were joint tort feasors. He introduced the contract between the defendants wherein it appeared that the contractor had agreed to indemnify the railroad from liability of the character demanded by plaintiff: *Held,* a release in full given by the plaintiff to the independent contractor in consideration of a compromise likewise released the liability of the railroad, in the absence of evidence tending to show that the latter actively participated in the alleged wrong. The principles of law applicable to the master's liability for the wrongful acts of the servants discussed by MANNING, J.

APPEAL from *Justice, J.,* at August Term, 1909, of RUTHER- (480) FORD.

The plaintiff sued to recover damages for an injury received by him, through the negligence of the defendants, while he was working for the Millard Quigg Construction Company, a corporation, under the laws of Virginia, engaged in constructing a part of the railroad of the South and Western Railroad Company. The injury was received in October, 1907. The plaintiff was employed to do the work of an ordinary laborer and belonged to the night force. The Millard Quigg Construction Com-

pany filed its petition to remove the cause to the Federal Court, and from the order disallowing its motion and retaining the action in the State Court this company gave notice of appeal to the Supreme Court, whereupon the plaintiff executed on 30 August, 1909, for the consideration mentioned therein, which was paid, the following paper-writing:

NORTH CAROLINA—Rutherford County.
Superior Court, August Term, 1909.

WAITS SMITH
against
SOUTH AND WESTERN RAILROAD COMPANY AND MILLARD QUIGG CONSTRUCTION COMPANY.

In the above-entitled cause, in order to secure a trial at this term of court, the plaintiff covenants and agrees with the Millard Quigg Construction Company, upon the call of the case for trial and upon entering upon a trial of the same at this term of court, to enter a nonsuit as to the defendant Millard Quigg Construction Company; and, in consideration of the sum of $550 paid to Waits Smith by the Millard Quigg Construction Company, the receipt whereof is hereby acknowledged, the said Waits Smith covenants and agrees with the Millard Quigg Construction Company not to prosecute any new or further action against the Millard Quigg Construction Company for any personal injuries sustained by the said Waits Smith whatsoever prior to this date, by any negligence of the Millard Quigg Construction Company.

(481) The defendant railroad company had, in its answer filed, denied all negligence, denied it had employed or had any control over the work of plaintiff; alleged that the construction company was an independent contractor; that the construction company had employed plaintiff, designated his work, and that if he was negligently injured it was the negligence of the construction company.

His Honor permitted amendments to the pleadings on the part of the defendant, setting up the paper-writing above quoted, and its effect, and the plaintiff to reply thereto. The trial proceeded against the railroad company, and evidence was offered, detailing the injury received by plaintiff, the time, place and circumstances, and also that plaintiff was employed, paid and directed in his work by the construction company. The paper-writing was also offered in evidence and admitted. The plaintiff also offered the written contract under which the construction company was doing the work, which contract contained the stipulation that the construction company would indemnify the railroad company, among other things, "from damages arising from injuries sustained by

mechanics, laborers or other persons, by reason of accident or otherwise, including cost and expense of defense, provided that he be duly notified of the bringing of suits in such cases, and he be permitted to defend the same by his own counsel if he should so select." In the progress of the trial the plaintiff admitted that he sought to hold the defendants only as joint *tort feasors,* and at the close of his evidence the defendants' motion to nonsuit was sustained. The plaintiff excepted and appealed to this Court.

R. E. Morris, J. M. Mull and J. T. Perkins for plaintiff.
Hudgins, Watson & Johnston for defendant.

MANNING, J., after stating the case: The only question presented for our consideration by the briefs and argument of counsel is the effect of the paper-writing executed by the plaintiff on 30 August 1909, to the construction company. Upon the facts presented, the decision of this Court in *Brown v. Louisburg,* 126 N. C., 701, approved in *Raleigh v. R. R.,* 129 N. C., 265, is decisive. If the construction company were an independent contractor, it would seem clear that the railway company would not be liable; and the plaintiff, therefore, by his agreement with the construction company has bound himself not to sue the only party legally liable to him. *Avery v. R. R.,* 137 N. C., 130. The only other theory of the liability of the railroad company to the plaintiff is that the railroad company was the master and the construction (482) company the servant or the railroad company, the principal, and the construction company the agent, doing its work within the scope of its agency. That they were not tort feasors would seem to be settled in *Brown v. Louisburg, supra,* in which case this Court said: "The defendants, however, were not joint tort feasors. To make persons joint tort feasors they must actively participate in the act which causes the injury." The railroad company had no active part, by encouragement, direction or control, in the doing of the work in which plaintiff was injured. There was no allegation or suggestion that the construction company was not a capable servant, or that the instrumentalities selected for doing the work were not properly suitable and in general use and good condition. The statement by plaintiff that he sought to recover from the defendants as joint tort feasors is not sustained by the authority cited or by the evidence offered.

We next consider the theory of liability growing out of the relations of master and servant or as principal and agent. The principle underlying the liability of the master for the acts of his agent is very clearly and succinctly stated by *Alderson, B.,* in *Hutchinson v. R. R.,* 5 Exch., 343: "The principle upon which a master is in general liable to answer

for accidents resulting from the negligence or unskillfulness of his servant is that the act of his servant is in truth his own act. If the master is himself driving his carriage and, from want of skill, causes injury to a passer-by, he is, of course, responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master. *Qui facit per alium, facit per se.*"

If the relation of master and servant existed, or the relation of principal and agent, the servant in one relation or the agent in the other relation did the careless and unskillful act which injured the plaintiff and was primarily liable for it, and upon the principle expressed in the maxim, *Qui facit,* etc., the master or principal would be liable. If this principle is invoked to impose liability, can it not also be invoked for protection? If the master is bound through his agent, can he not be released through his agent? If an act of negligence imposes liability, ought not an act of fidelity bring relief? This would seem to be obvious,

except in those cases where the master actively participates in
(483) the wrong and thereby makes himself a joint tort feasor. Every

doubt of the ultimate liability of the construction company for the injury to the plaintiff was removed when plaintiff offered in evidence the contract, which expressly stipulated that the construction company should save harmless the railroad company from liability for such injuries. If the plaintiff should recover a large sum from the railroad company, then, under the contract stipulation, the railroad company could recover from the construction company the judgment and expenses and costs. Such a result would be a complete destruction of the construction company's rights under its contract with the plaintiff. We think this view is sustained by this language of *Pearson, C. J.,* in *Russell v. Adderton,* 64 N. C., 417: "For which reason (the intention of the parties) the courts incline to adopt the construction which gives to the instrument the effect merely of a covenant not to sue, and the intention of the parties is carried out by allowing the creditor to take judgment at law, leaving the party who holds the covenant to his remedy in equity for a specific performance, by which he is fully protected, not only from paying any more directly, but, if there be securities, by restraining the creditor from collecting any amount out of them, because that would subject him to their action and thus indirectly violate the covenant." Under our present system, where law and equity, legal and equitable rights, are administered in the same action, his Honor, in the trial of

this action, accomplished what *Chief Justice Pearson* declared could be done by a suit in equity.

After a careful consideration of the authorities cited in the elaborate brief of the learned counsel for the appellant, we are unable to reach a different conclusion. The judgment of the court below is therefore

Affirmed.

Cited: Usury v. Watkins, 152 N. C., 761.

(484)

W. L. FARRIS, ADMR., v. SOUTHERN RAILWAY COMPANY, H. C. SMITH AND W. T. MOONEYHAM.

(Filed 15 December, 1909.)

1. Railroads—Negligence—Evidence Sufficient—Nonsuit.

In an action against a railroad company for damages for the negligent killing of plaintiff's intestate, a motion of nonsuit upon the evidence should be allowed if the evidence does not prove, or tend to prove, that a breach of duty resulted proximately in the injury complained of.

2. Railroads, Crossing—Custom—Notice Implied.

A custom of six months duration of a large number of employees of defendant railroad company to cross the yards and a large number of tracks of defendant in going at dinner time the shortest way to and from their homes, fixes the company with notice of the fact, and that it was the custom of its own employees.

3. Same—Employer and Employee—Trespass.

Employees who are accustomed in large numbers to cross defendant's railroad yards and a large number of its tracks in going to and from their dinner at the noon hour, with the knowledge and acquiescence of the defendant, cannot be regarded as trespassers in so doing.

4. Railroads—Flying Switch—"Kicking Cars"—Negligence Per Se.

It is negligence *per se* for a railroad company to make a flying switch or "kick" or "shunt" cars on its yard, wherein there are a large number of tracks, at a place where, and a time when it was the known custom of the company's employees to cross, without brakemen or other like employees of the company on the cars being thus placed to give notice or warning of their approach.

5. Same—Evidence Sufficient.

Evidence is sufficient to sustain a verdict on the issue of defendant's negligence which tends to show, that plaintiff's intestate, an employee of defendant railroad company, was run over and killed by defendant in making a flying switch while he was crossing the yard at a place where, and a time when the intestate, with a large number of other employees,

were accustomed to cross with the acquiescence of the defendant; that while he was crossing the tracks, they being close together, an engine running without warning or signals from thirty-five to forty miles an hour, passing in two feet of him, caused his hat to blow off on the track he had just crossed and the injury was caused when he was stooping to pick it up by cars which had been "shunted" coming upon him noiselessly at the rate of eight or ten miles an hour with no watchman on them to give warning.

6. Same—Continuing Negligence—Proximate Cause.

In this case the negligent act of the defendant, a railroad company and its conductor and engineer, in running an engine on its yards without signal or warning at the rate of thirty-five or forty miles an hour at a place where, and time when they knew, or should have known, that employees of the company would cross going to and from their homes for dinner, and which caused the death of plaintiff's intestate, one of such employees, continues up to the collision with the intestate, and, without fault on his part, is the proximate cause.

7. Railroads—Contributory Negligence—"Look and Listen," Exceptions to Rule—Evidence—Nonsuit.

The plaintiff's intestate, in an action against a railroad company for damages for negligent killing, in drawing back from an engine negligently running in two feet of him, at the rate of thirty-five or forty miles an hour, without signal or warning, and killed by cars "shunted" onto the track he had just crossed running at the rate of eight or ten miles an hour, without watchmen on them, while stooping to pick up his hat which the moving engine had caused to blow there from his head, the tracks being near together, is not held to that degree of care ordinarily required of one crossing a railroad track to stop, look and listen, and a motion of defendants to nonsuit upon this evidence on the question of contributory negligence was properly disallowed.

8. Contributory Negligence—Pleading—Proof—Burden of the Issue.

Contributory negligence will not be presumed in law, it must be alleged and proved by the defendant, the burden of the issue resting upon him and the burden of duty on the plaintiff.

9. Same—Evidence—Questions of Law.

To establish contributory negligence as a matter of law, the evidence must show such omission of caution by plaintiff, or the doing of such acts, that only the inference of plaintiff's negligence can be drawn therefrom by men of ordinary reason and intelligence.

10. Issues—Negligence—Contributory Negligence—Last Clear Chance.

In an action for the negligent killing by defendant of plaintiff's intestate, when there is evidence of concurring negligence of the plaintiff and defendant, it is proper to submit an issue of "the last clear chance," though such issue may thereafter become immaterial under the verdict rendered.

11. Same—Harmless Error.

In this case, where damages are sought against a railroad company for the negligent killing of plaintiff's intestate while crossing its tracks, evi-

dence tending to show that defendant company could have provided a safe way of crossing by building at small cost an overhead bridge, directed to the issue of negligence, was improperly submitted; but as defendant offered no evidence and there was, independently, plenary evidence of defendant's negligence to justify an instruction that the jury answer the issue against defendants, subject only to the credibility of the witnesses, the error was harmless.

APPEAL from *J. S. Adams, J.*, at June Term, 1909, of BURKE. (485)

His Honor submitted issues to the jury, presenting (1) the negligence of the defendants; (2) the contributory negligence of the plaintiff's intestate; (3) the last clear chance; (4) damages. The jury answered all the issues in favor of the plaintiff, and assessed damages in the sum of $6,000. The case was heard entirely upon the evidence of witnesses offered by the plaintiff. The defendant offered no testimony, and moved for judgment of nonsuit at the close of the evidence, which motion was disallowed, and defendant excepted. This exception, together with exception taken to the adverse rulings of his Honor in admitting certain evidence of the plaintiff, and exceptions to his Honor's charge, present the questions for consideration.

The evidence offered shows the following facts: Stanly Farris was killed on 29 May, 1907, at about 12 o'clock of the day, by being run over by four gondola cars moving on a track in the yard of (486) the defendant, Southern Railway Company, at Asheville. The intestate was an employee of the defendant company and had been in its service for about eight months prior to his death. The defendant company was doing on its yards at Asheville a large amount of work, rearranging its tracks, widening its yard, increasing the number of tracks and building a stock pen. The intestate had been constantly and regularly at work for defendant company, engaged in doing different jobs, as a water boy, carrying water for the other employes, etc., and for a week prior to his death had been assisting in building the stock pens. The stock pens were on the south side of the yards; the intestate lived on the north side of the yards. On the south side the embankment was about 3 or 3½ feet high; on the north side, about 25 feet, except at a depression. The employees of the defendant company, numbering from 100 to 150, some of whom worked on the yards, others elsewhere, together with other laborers working for a tannery on the south of defendant company's yard, crossed the yards to and from the depression in the embankment on the north side to and from the south side, from two to three times daily. A whistle, sounded at the roundhouse of the defendant company, gave the signal for its employees to stop at the noon hour for dinner. The place, above described, where the large number of employees crossed the yards, was about three-fourths of a mile to a

street crossing on the east and about 700 yards to a street crossing on the west, and from bank to bank was about 100 yards. This place contained eighteen or twenty tracks. When Stanly Farris, the intestate, started to cross the yards, on 29 May, 1907, at 12 o'clock of the day, there were many cars standing on the tracks to the east of him about 30 to 35 yards. He crossed the first and second tracks in safety and was walking down the space, from 6 to 8 feet wide, between these tracks. He was walking westward, and had gone a few steps, when an engine, moving on the third track, from the south, at from 35 to 40 miles an hour, passed him, blowing off his hat, which fell on the second track, and as he stooped to pick it up he was struck, run over and killed by the four gondola cars loaded with coal. The defendant company, through the codefendants, Smith, its conductor, and Mooneyham, its engineer, had made what was called a "flying switch," and four coal cars were sent westward on the second track and were moving at the rate of eight or ten miles an hour, and the engine took the third track. The switch at which the engine was separated from the coal cars was 25 or 30 yards east of the intestate. No bell was rung, whistle blown or other signal
(487) given by the rapidly moving engine. The coal cars were moving noiselessly, with no watchman on any of the four cars, and no warning given to intestate of their approach. The intestate was about seventeen years of age, sober, hard-working, in good health, saving of his wages, and was at the time earning $1.35 per day.

From the judgment entered on the verdict the defendants appealed to this Court.

Avery & Avery and Avery & Erwin for plaintiff.
S. J. Ervin for defendants.

MANNING, J., after stating the case: The question first presented for our consideration is the negligence of the defendants. If the evidence does not prove or tend to prove a breach of duty by the defendants towards the plaintiff's intestate, and that such breach of duty resulted proximately in the injury complained of, then it must follow that the motion to nonsuit ought to have been allowed for failure of proof on the first issue.

In *Wilson v. R. R.*, 142 N. C., 333, *Mr. Justice Brown,* speaking for this Court, said: "The attempt to make a running switch across a much-frequented street is not only a negligent but a most dangerous and unwarranted operation, and has been so held by a number of courts. *Bradley v. R. R.*, 126 N. C., 735; *Brown v. R. R.*, 32 N. Y., 597; *Falener v. R. R.*, 68 Miss., 355; *R. R. v. Summers*, 68 Miss., 566; *French v. R. R.*, 116 Mass., 537; *R. R. v. Garvey*, 58 Ill., 83; *R. R. v. Baches*, 55 Ill., 379.

It matters not whether the purpose was to 'shunt' the car off on a switch or to give it force enough to roll along on the same track; it is negligence to permit a car to be 'cut loose' and roll, uncontrolled by any one, across a much-used crossing." In *Allen v. R. R.*, 145 N. C., 214, the same learned justice said: "The word 'kicking' seems to be used in railroad parlance as synonymous with making a 'flying switch.' This Court has never held such operations to be *per se* negligence in respect of the *employees performing them.* It is the attempt to make a running switch when the detached car has no brakeman on it and is under no control that is declared to be negligence, because highly dangerous. *Wilson v. R. R.*, 142 N. C., 336, and cases there cited." *Vaden. v. R. R.*, 150 N. C., 700. In *Bradley v. R. R.*, 126 N. C., 735, this Court held. "A crossing which the public have been habitually permitted to use is treated as a public highway crossing. *Russell v. R. R.*, 118 N. C., 1098." In 3 Elliott on R. R. (2 Ed.), sec. 1265g, this learned writer says: "The practice of making running or flying switches is in- (488) herently dangerous, and is considered by the courts in numerous decisions. The courts have not hesitated to hold railroad companies liable for injuries to trespassers on the track, thus inflicted, on the ground of negligence. The case of this negligence seems specially plain where the cars are sent in swift motion, with no one at the brakes, upon switch tracks commonly used by persons for footpaths and crossings, without objection from the company, though not a public crossing. It would seem a duty owed by the railroad company, even to trespassers, to station lookouts in such positions on the moving cars, that they can watch ahead of them and warn persons thereon of their danger." *Conley v. R. R.*, 89 N. Y., 402; *R. R. v. Crosnoe*, 72 Tex., 79. In *Vaden v. R. R.*, 150 N. C., 700, *Mr. Justice Brown,* speaking for the Court, in stating the facts of that case, said: "The evidence for the plaintiff tends to prove that he was killed about *thirty* feet from where Tomlinson Street crosses the tracks. The evidence of the 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 people 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 of caution in moving its cars at that point. *R. R. v. Smith,* 18 L. R. A., 66."

In the present case the intestate of plaintiff occupied toward the de-

fendant the relation of employee, and of this relationship the law certainly fixes the company with knowledge. He was not a trespasser in crossing its tracks. He, together with a large number of other employees of defendant company (among them, others, not employees, were intermingled), some of whom worked on the yard, others on the stock pens, had been accustomed for about six months to cross the yards at or about the place where plaintiff's intestate was killed, and at least one of the hours during the day, when they crossed the yard, was indicated by a whistle from the roundhouse of defendant company. Crossing at this point enabled the employees to reach their homes and boarding places more quickly and to return to their work more promptly. A (489) custom of its own employees continuing for six months, and observed by it without protest or objection from the defendant company, we must hold to have continued long enough to fix the defendant with knowledge of its existence. In addition, the defendants, in their joint answer, admit that the intestate of plaintiff was *accustomed,* in going in a direct course to and from his place of employment to his boarding house, to pass through the yards of the defendant company and cross its tracks. In *Bordeaux v. R. R.,* 150 N. C., 528, it was held "undoubtedly culpable negligence" to "kick" a car on a track in a shifting yard, resulting in injury to plaintiff, who was at work on a car on that track, but who failed to observe a rule of the company by placing a signal flag on the car as notice to engineers operating the shifting engine, there being evidence that the rule was much violated on "short jobs," to the knowledge of the superintendent and engineers on the yard, and that the employees of the kicking engine saw repairers at work on the car. Under the authorities cited, we think the evidence clearly sufficient to sustain the finding of defendant's negligence by the jury in response to the first issue, and that the negligent act of the defendants continued up to the collision of the cars with plaintiff's intestate, and without which the accident would not have happened.

We proceed next to the consideration of the motion to nonsuit, as it applies to the second issue—the contributory negligence of the plaintiff's intestate. Upon this issue his Honor charged the jury: "It is the duty of persons going on the track of a railroad company to stop and look and listen for any train that may be moving or lying on the track of such company and on its yards, where there are several tracks used for shifting cars, to be continually alert and on the lookout for a moving train or cars; and if a person fails in this duty, and in consequence of such failure is injured by moving cars, the person would be guilty of contributory negligence." While the burden of this issue rested on the defendants, the burden of duty rested upon the intestate. The law does not presume contributory negligence; it must be alleged and proven;

the defendant must show such facts—either omissions to observe such cautions or the doing of such acts—from which only one inference, to wit, the plaintiff's negligence, can be drawn by men of ordinary reason and intelligence. Of the conduct and acts of the intestate the evidence discloses these facts: When he entered upon the yard he saw an engine and cars moving east of him; he crossed the first and second tracks, moving somewhat to the northwest; he had taken a few steps between the second and third tracks and was about to cross the third track, when the engine sped by him at the rate of thirty or forty miles (490) an hour; the draught caused by the rapidly moving engine blew off his hat, blowing it on the second track, which he had just crossed in safety; as he stooped to catch his hat he was struck by the coal cars and killed. The cars were moving at the rate of eight or ten miles an hour. The switch was 25 to 30 steps east of intestate. To make the flying or running switch with engine moving in front, it is, of course, necessary that the start must be made sufficiently beyond the switch to enable the engine to acquire such speed as to be uncoupled before reaching the switch so far in advance of the cars as to permit the switch to be thrown and to send the detached cars a desired distance on the track. The engine had acquired the speed of thirty-five or forty miles per hour, and must have been making the noise usual to engines moving at such speed. According to one of the eye-witnesses, the detached cars were moving noiselessly. It can easily be inferred that, in the close presence to the rapidly moving engine, the intestate could not have heard any noise from the moving cars. He had just crossed in safety the track upon which these cars were noiselessly moving, unguarded by any person stationed on them to warn him of their approach. His position and purpose were known to the defendants. The danger of a misstep or of deviating from an exactly straight line was obvious to the defendant engineer. The rapidly moving engine, passing intestate, was naturally calculated to make him draw away from it. The natural impulse was to grab at his hat and to stoop to pick it up. A watchful brakeman on the cars, "keeping a continuous lookout," would, assuredly, seeing his position of peril, have warned the intestate, and by such timely warning a human life would have been saved. *Sawyer v. R. R.*, 145 N. C., 24. There was however, no brakeman or guard on these cars; no warning was given of their noiseless approach, and the only negligent act of the intestate which, the defendants allege, contributed to the intestate's death and was its proximate cause, was his yielding, under the circumstances described, to a natural impulse in stooping to grab his hat. It is not apparent that if intestate had turned to look behind to see if danger approached, he would not have been stricken, as the space between the cars passing on the adjacent track did not exceed two feet. While we are in nowise in-

clined to relieve the person crossing the tracks of a railroad from the imperative duty of observing the measure of caution so well established for his safety by the well-considered decisions of this and other courts, yet "it cannot always be said that he is guilty of contributory negligence, as a matter of law, because he did not continue to look and listen (491) at all times continuously for approaching trains, where he was misled by the company or his attention was rightfully directed to something else as well" (3 Elliott on Railroads, sec. 1166a), or that he failed to look in opposite directions, at the same moment of time. As is said by *Mr. Justice Hoke,* in *Sherrill v. R. R.,* 140 N. C., 252, "It is further held that, negligence having been first established, facts and attendant circumstances may so qualify this obligation to look and listen as to require the question of contributory negligence to be submitted to the jury, and in some instances the obligation to look and listen may be altogether removed." *Inman v. R. R.,* 150 N. C., 123; *Morrow v. R. R.,* 146 N. C., 14.

It must not be overlooked, in reaching a conclusion in this case, that the act which occasioned plaintiff's intestate to be killed was immediately caused by the rapidly moving engine, passing within two feet of him, at a time and place where defendants admit that they knew the intestate would be crossing, and at a time and place where the uncontradicted evidence shows that between 100 and 150 employees of defendant company and others were accustomed to cross the tracks of the yard. We are therefore of the opinion that the motion to nonsuit, upon the evidence bearing on the second issue, ought not to have been allowed, and that his Honor did not err in submitting this issue to the jury.

The defendants objected to his Honor's submitting the third issue—that issue presenting the "last clear chance." While this issue has become immaterial, in view of the finding of the jury on the first and second issues, we think it was proper for his Honor to have submitted it. If the jury had found with defendants on the second issue, having found the first issue with plaintiff, the ultimate liability of defendants would have been determined by their finding on the third issue. In the presence of the concurring negligence of a plaintiff and a defendant, it is a generally accepted doctrine, and well settled in this State, that the ultimate liability must depend upon whether the defendant could at the time have avoided the injury by the exercise of reasonable care, under the attendant circumstances. *Ray v. R. R.,* 141 N. C., 84; *Reid v. R. R.,* 140 N. C., 146; *Lassiter v. R. R.,* 133 N. C., 244; *Arrowood v. R. R.,* 126 N. C., 629; *Pickett v. R. R.,* 117 N. C., 616.

During the trial, the plaintiff, over defendant's objection, was permitted to offer evidence tending to show that the defendant company could have provided a safe way of crossing by building at small

cost an overhead bridge. This evidence was directed solely to the (492) first issue; and while we are of the opinion that neither the defendant company nor its codefendants were under the duty, under the facts of this case, to erect such overhead walkway, or bridge, yet, as we have concluded that the uncontradicted testimony, independent of this evidence, was plenary of the defendant's negligence, and his Honor, upon such other testimony, would have been justified in instructing the jury to answer the first issue against the defendants, subject only to their belief in the credibility of the witnesses, we cannot see, under such circumstances, that the admission of such evidence was reversible error. This evidence could in no way have influenced the finding of the jury to the second, third or fourth issues. The defendants, at the trial, offered no evidence at all, and no evidence in any way to relieve the inference of their negligence, to be drawn from the other evidence, uncontradirected in any particular by them. The testimony objected to suggested a cause of damage too remote, and for this reason we cannot see that its admission prejudiced the defendants with a jury of the intelligence we must assume our juries to possess. If we felt constrained to grant a new trial to the defendants for the admission of this evidence, we would feel constrained to restrict it to the first issue only. *Bull v. R. R.*, 149 N. C., 427; *Reeves v. R. R.*, 149 N. C., 244; *Spence v. Canal Co.*, 150 N. C., 160; *Gaither v. Carpenter*, 143 N. C., 240; *Smith v. Lumber Co.*, 142 N. C., 26; *Hosiery Co. v. Cotton Mills*, 140 N. C., 452; *Cherry v. Canal Co.*, 140 N. C., 422; *Jennings v. Hinton*, 128 N. C., 214; *Clark v. Moore*, 126 N. C., 1. As we have reached the conclusion that no reversible error was committed in the trial of this action, the judgment of the court is affirmed.

No error.

Cited: Snipes v. Mfg. Co., 152 N. C., 45; *House v. R. R., ibid.*, 399; *Heilig v. R. R., ibid.*, 471; *Edge v. R. R.*, 153 N. C., 215; *Wolfe v. R. R.*, 154 N. C., 576; *Boney v. R. R.*, 155 N. C., 108; *Zachary v. R. R.*, 156 N. C., 503; *Johnson v. R. R.*, 163 N. C., 445, 447; *Talley v. R. R., ibid.*, 571, 579; *Kenney v. R. R.*, 165 N. C., 103; *Shepard v. R. R.*, 166 N. C., 545; *Gray v. R. R.*, 167 N. C., 437; *Buchanan v. Lumber Co.*, 168 N. C., 47; *Penninger v. R. R.*, 170 N. C., 475; *Lutterloh v. R. R.*, 172 N. C., 118; *McManus v. R. R.*, 174 N. C., 737.

SLADEN, FAKES & COMPANY v. J. G. LANCE AND M. R. JONES.

(Filed 15 December, 1909.)

1. Partnership—Limited Authority—Notice—Liability.

When one deals with a partner with notice that his acts exceed the limitation imposed upon his authority by the partnership, the partnership is not bound, and the remedy is restricted to the partner with whom he deals.

2. Same—Evidence.

One who has entered into a partnership with another in a business conducted in a different town from that of his residence, under a parol contract by which it was agreed that the other partner should conduct the entire business and only buy such goods as he was able to pay for promptly, is not liable to a creditor of the firm to whom he had given notice of the agreement, and who acted in disregard of the notice and in such a manner as to keep him in ignorance of the true status of the account.

(493) APPEAL from *Ferguson, J.*, at May Term, 1909, of BUNCOMBE.

The defendant M. R. Jones alone was served with summons, and defended the action. The plaintiffs sued to recover a balance of $292.22 and interest for the value of the goods sold and delivered to the partnership of L. G. Lance & Co., the company being the defendant, Mrs. M. R. Jones. The goods were sold on the strength of Mrs. Jones' connection as a partner. The defense was rested upon allegations that the partnership agreement, being verbal, provided that Lance, who was the active partner in the entire management of the business, should not run into debt, but should buy only such goods as he was able to pay for promptly; that the defendant Jones communicated this stipulation to members of the plaintiff firm; that she did not wish the plaintiff to permit him to trade with him unless he kept his bills promptly paid; that, as she did not live in Asheville, where the plaintiffs and the partnership of J. C. Lance & Co. did business, but in Buncombe County, she made frequent inquiries, from time to time, of salesmen of plaintiff who visited the store conducted by her brother and herself in the county, if Lance was keeping his bills paid up, and was always told that he was; that during the period covered by these inquiries plaintiffs were permitting the said Lance to run in debt; that when finally she found out that the partnership was about to fail, she went to see plaintiff, and the following conversation occurred: "I asked why they did not notify me of the fact that they were letting Lance run behind, and he (Dr. Fakes or Mr. Sladen) said that he was sorry that he did not—that he ought to have done it; and I asked for a statement, and they said that they would give it to me if I would not let Lance know it, and I asked why they did not want him to know it, and they said that it would make him mad. They

gave me a statement and I took it and went home." This was after the full indebtedness sued for had been contracted, and the first and only statement over furnished defendant Jones. That defendant had not received anything whatever from the partnership; that what was left of the goods was sold and the entire proceeds turned over to plaintiffs.

At the trial the defendant Jones admitted, in writing (1) the existence of the partnership during the period covered by plaintiff's account; (2) that the itemized account sued on was correct; that the goods so sold were for the use of the partnership and had not been paid (494) for, and (3) that the defendant assumed the burden of proof on the issue submitted. His Honor held that the admission established a *prima facie* case for the plaintiffs. Without objection, his Honor submitted this issue to the jury: "Is the defendant Mary R. Jones indebted to the plaintiffs on account of the partnership of J. G. Lance & Co.? If so, how much?" The jury having responded to the issue, "Nothing," judgment was rendered against the plaintiffs for costs, and they appealed to this Court.

Tucker & Lee and Merrimon & Merrimon for plaintiffs.
Frank Carter and H. C. Chedester for defendants.

MANNING, J., after stating the case: The principal question presented by this appeal is the correctness of his Honor's refusal to instruct the jury, upon the evidence, to return a verdict for the plaintiffs, for the reasons that the defense pleaded was not good, and that it was unsupported by any sufficient evidence, in view of the written admissions of the defendant at the trial. We are against the plaintiffs upon both propositions. It is undoubtedly a generally accepted doctrine that "Whatever, as between the partners themselves, may be the limits set to each other's authority, every person not acquainted with those limits is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people." *Powell v. Flowers, ante,* 140; Lindley on Part., 124; George on Part., 215. The doctrine stated is so generally held and so well established that no further citation of authority is needed for its support. It is equally well settled that where a party dealing with a partner has notice of the limitation upon the partner's authority, the partnership is not bound; his remedy would be restricted to the partner with whom he dealt. Story on Part., secs. 128, 129, 130; George on Part., 215; Lindley on Part., 168, 169; 1 Bates on Part., secs. 323, 324; Parsons Partnership, 115; 22 A. & E., 142; *Cotton v. Evans,* 21 N. C., 284; *Long v. Carter,* 25 N. C., 241; *Baxter v. Clark,* 26 N. C., 127; *Gallaway v. Matthews,*

10 East, 264; *Winship v. Bank,* 5 Peters, 529; *Knox v. Buffington,* 50 Iowa, 320; *Bramley v. Elliott,* 38 N. H., 287; *Livingston v. Roosevelt,* 4 Johnson, 251; *Pollock v. Williams,* 42 Miss.; *Fertilizer Co. v. Pollock,* 104 Ala., 402; *Wilson v. Richards,* 28 Minn., 337; *Radcliffe v. Varner,* 55 Ga., 427; *Williams v. Barnett,* 10 Kan., 455; *Hastings v. Hopkinson,* 28 Vt., 108; *Chapman v. Devereaux,* 32 Vt., 616; *Cargill v. Carley,* 15 Mo., 425. As opposed to a doctrine established by the well-
(495) considered decisions of learned and eminent jurists, the counsel for the plaintiffs cite *Johnston v. Bernheim,* 86 N. C., 339, and the same case, 76 N. C., 139. We think that in those two cases there will be found an express recognition of this doctrine. At page 140, 76 N. C., the Court says: "It is otherwise where the partnership is not general, but is upon special terms, as that purchases and sales must be with and for cash. There the power to each is special in regard to all dealings with third persons, at least, who have notice of the terms." But the Court adds: "But even in that case, if the terms are violated, as if a partner buy on time when he ought to buy for cash, and the thing bought come into the partnership and the partnership take the benefit, the partnership must pay for it." This language was quoted by the learned Chief Justice, who spoke for the Court in delivering the opinion in the 86 N. C., 339, when the case of *Johnston v. Bernheim* was again before this Court, and was evidently predicated upon the evidence in that particular case, which tended to show that the partner sought to be charged had knowledge of the delivery of the goods bought on credit and recognized the debt. The language of the Court, applied to that state of facts, is sustained by reason and authority, and is in agreement with the many well-considered opinions which we have examined. It is obviously true that when notice that the limitations upon the power of a partner contained in the partnership agreement are exceeded, or the restrictions therein imposed disregarded, is brought home to the other partner or partners, and, having such knowledge, the other partner or partners permit the partnership to enjoy the fruits of the abuse of power and to receive benefits therefrom, or fail promptly to disavow the act of such partner, the partnership and its members would and ought to be bound; but, without such limitation, we think the language of this Court in the opinions quoted from above states the proposition too broadly, and is not sustained by the text writers and the well-considered opinions of other courts whose opinions are above cited. The evidence in this case tended to prove that in the partnership agreement it was stipulated that Lance should not go in debt for goods purchased; that Mrs. Jones notified a member of plaintiff firm of the agreement, and that she wished them to quit selling to him if he did not pay promptly; that she inquired from time to time of plaintiff's sales-

men if Lance was keeping his bills paid up, and was uniformly told that he was; that when she was told that Lance had run the business in debt she promptly complained to plaintiffs and they admitted that they ought to have informed her; that plaintiffs were permitting (396) Lance to become and remain indebted to them during the period she was inquiring if Lance was indebted; that she offered to turn over the stock of goods to plaintiffs and they refused to accept it; that she sold the stock, inventoried by an employee sent by the plaintiffs, and paid the plaintiffs the entire proceeds; that plaintiffs hesitated, upon her demand to give her a statement of the account, for the reason it might make Lance mad; that plaintiffs sold goods to the partnership upon the financial strength of Mrs. Jones. We think his Honor committed no error in submitting the case to the jury upon this evidence, and that the jury were justified in their verdict. While the plaintiffs were not, upon the evidence, guilty of that fraud which necessarily involves moral turpitude, yet their conduct was a fraud upon the right of the defendant, for the fraud in such case consists in the knowledge that the partner was violating, with their aid, a stipulation of the partnership agreement, without the consent of the other partner and against her express instructions. *Livingston v. Roosevelt, supra;* Bigelow on Fraud, 242; Story on Part., sec. 131; 1 Bates on Part., sec. 323; *Cotton v. Evans, supra.*

We have carefully examined the exceptions taken at the trial by the plaintiffs, appellants, to the rulings of his Honor upon the evidence, and to instructions prayed and refused, and to certain parts of his charge, and we find no reversible error. The judgment is therefore

Affirmed.

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(497)

ROBERT CATES v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 23 December, 1909.)

1. **Telegraph—Office Hours—Notification of Employees.**

A telegraph company may observe reasonable office hours for the transaction of its business in the transmission and delivery of telegrams, and it is under no obligation to keep its employees in each of its offices informed of the time when every other office is closed for the night.

2. **Telegraph—Office Hours—Message Subject to Delay.**

A message received at 8:25 p. m. by an agent of the defendant telegraph company "subject to delay," the agent informing the sender of the message at the time that it could be delivered during the night, provided that the defendant had a joint office with the railroad at the place of destination,

but not if the office was a separate one, imposes no duty upon the defendant to deliver the message that night if the office at the destination was in fact not a joint office.

3. Same—Instructions.

Where there is evidence tending to show that the defendant telegraph company received a death message for transmission at 8:25 p. m., and that, at the time, its agent informed the sender that the message would only be delivered if the defendant had a joint office with the railroad at the place of destination, and not if it had a separate office there; that in fact the office was a separate one, at which the hours were from 8 a. m. to 8 p. m., and that the injury complained of arose from the plaintiff's not being able to catch a train leaving at 8 a. m., owing to the delivery of the message to the plaintiff at 9:40 a. m. at his place of business after the messenger had carried it to his residence a mile and a quarter from defendant's office, the defendant is entitled to an instruction that it was under no obligation to deliver the message except between the hours of 8 a. m. and 8 p. m., and if the jury find the office hours at the place of destination to be from 8 a. m. to 8 p. m., and it delivered the message a reasonable time after 8 a. m. of the following day, to answer the issue as to negligence for the defendant.

4. Telegraph—Office Hours—Destination—Receiving Message for Transmission—Agreement Implied—Negligence.

In order to hold a telegraph company liable for damages for not delivering a message at its place of destination when the office there had been closed for the night in the observance of reasonable office hours, it must be shown that defendant's agent, who received the message for transmission and delivery, by an agreement with the sender, expressed or implied, undertook that the message would be delivered that night, and the mere fact that the message was received after the office at the destination had been thus closed for the night is not evidence of negligence *per se* on the defendant's part. In this case the "mental-anguish" doctrine is commented upon and approved by WALKER, J., for the Court.

5. Appeal and Error—Weight of Evidence—Discretion of Court.

It is within the sound discretion of the lower court to determine whether the verdict of the jury should stand as being against the weight of the evidence, and its decision is not reviewable.

(498) APPEAL by defendant from *Long, J.*, at May Term, 1909, of ALAMANCE.

This action was brought to recover damages for an alleged negligent delay in delivering a telegram.

The material facts are as follows:

On 13 March, 1907, at 8:25 o'clock p. m., Tignall Lashley, a brother-in-law of the plaintiff, filed with the defendant's operator at Haw River, N. C., the following telegram, addressed to the plaintiff, at his home in High Point, N. C.: "Jim Cates' daughter dead; wants you and all to come tomorrow." Assuming, for the sake of argument, that the message

sufficiently discloses its importance to the plaintiff, it will be observed that it does not state at what time Robert Cates and the others would be expected to arrive at Haw River. The hour of the funeral is not given. But, waiving this aside as irrelevant to the decision of the case upon its merits, we will proceed to state the other facts. The message was written by S. A. Vest, the operator at Haw River, for Lashley, the sender. S. A. Vest testified that he told Lashley, at the time of writing the message for him, that it could be delivered during the night, provided the defendant had a joint office with the railroad company at High Point, but not if its office was a separate one, and that he wrote on the message, "Sent subject to delay"; and all of the evidence tended to show that the defendant's office at High Point was separate from the office of the railroad company. There was no direct communication by wire between Haw River and High Point, but the message had to be sent by way of Charlotte, N. C., or Richmond, Va. The operator at Haw River tried to connect with the office at Charlotte, but the operators had left that office, though it was apparently open for the transaction of business. He then tried the office at Richmond, Va. There would have been no difference in the time of the transmission of the message through either office. The message was actually received at the High Point office about 8 o'clock a. m., on 14 March. When received, it had to be written out by the operator, copied and entered on the delivery sheet. The messenger boy started with the message for the purpose of delivery at 8:30 o'clock a. m. on the 14th, and it was delivered at 9 o'clock to plaintiff's wife, at 69 Smith (499) Street, the home of the plaintiff, which is about a mile and a quarter from defendant's office in High Point. She opened it, read it and sent it to her husband, who was not then at home, but at the shop of the Globe Home Furniture Company, where he was employed. He received it about 9:40 a. m. A train of the Southern Railway Company passed High Point for Haw River, and stations beyond, at about 7 o'clock a. m., and if plaintiff had received the message during the night or in the early part of the morning, in time to have taken that train, he and his family would have reached Haw River in time to attend the funeral.

The defendant requested the court to give the following instructions:

"Telegraph companies have a right to fix reasonable office hours for the conduct of their business; and if you believe the evidence, you will find that the hours from 8 a. m. to 8 p. m. were the office hours in effect at High Point, N. C., on the date of the message in controversy, and that such hours were reasonable."

The court responded to this instruction as follows:

"The court does not give you the instruction in the language asked, but

modifies it by leaving it to the jury to find the facts, so that instead of using the words 'if the jury *believe* the evidence,' the court modifies the instructions by saying, "if the jury, from the evidence, finds the facts to be as stated in the instruction.'

"The defendant was under no obligation to deliver the message in question, except between the hours of 8 a. m. and 8 p. m.; and if you find that those were the office hours at High Point at that time, and that it delivered the message in question within a reasonable time after 8 a. m. on the morning of 14 March, 1907, then you will answer the first issue No.

"The court gives you the instruction, adding, however, the following: 'unless you find that the defendant company waived the benefit of its office hours by the acts and conduct of its agent at Haw River at the time this message was accepted by him for transmission.'

"The defendant also asks me to give you the eighth and ninth instructions, as follows: 'If the jury shall find from the evidence in this case that the first train which left High Point, and on which the plaintiff could go to Haw River after 8 o'clock a. m. on 14 March, 1907, was caught by the plaintiff, then you will answer the first issue No. If the jury shall find from the evidence in this case that the first train
(500) which left High Point, and on which plaintiff could go to Haw River, after 8 o'clock a. m. on 14 March, 1907, was caught by the plaintiff, then you will answer the second issue, Nothing.'

"These instructions are given, unless you find, under the instructions given you, that the message could have been and should have been delivered by the defendant to the plaintiff, in the exercise of due care and diligence on its part, in time for the plaintiff to have come from High Point to Haw River on the night of the 13th or on an earlier train than that referred to in the instructions on the morning of the 14th."

The jury rendered a verdict for the plaintiff upon the issue as to negligence, and assessed his damages at $225. Judgment was entered upon the verdict, and, the defendant having duly excepted and assigned errors, appealed to this Court.

Plaintiff not represented in this Court.
King & Kimball and T. S. Beall for defendant.

WALKER, J., after stating the case: There is no merit in this case, and it should not have been submitted to the jury in the manner it was. The defendant, by the undisputed testimony, did everything within its power to deliver the message in question. It acted with due diligence and dispatch; and if the plaintiff has sustained any damages, the cause from which they flowed must be imputed to his own misfortune and not to the defendant's fault.

It would serve no practical purpose to reproduce the instructions of the court here, but it may be said generally that the case was tried upon the wrong principle, and the error pervades the modifications of the special instructions as well as the charge itself. It seems to have been supposed that we had decided in *Carter v. Telegraph Co.*, 141 N. C., 374, that the receipt of a message at night for transmission, not within the established office hours, implies an undertaking or agreement on the part of the telegraph company to deliver it, as if it had been received within its regular office hours, or under an express or implied contract to deliver with diligence and dispatch, and without any regard to office hours; whereas we did not so decide, as will appear from the language of the Chief Justice, who wrote the opinion for the Court in that case. "The telegraph company," he said, "has the right to fix hours during which its offices shall be open, provided they are reasonable. We need not discuss that in this case, for, conceding that 7 p. m. was a reasonable hour for closing the defendant's office at Spout Springs, it waived it, so far as sending the message was concerned, by actually send- (501) ing this message and receiving pay therefor. This was, it is true, not a waiver as to the receiving office. But that office waived the closing-hour limitation by receiving the message without demur. Had the operator at Sanford immediately replied that he could not undertake to deliver the message until next morning, and would consider it as not received, except on that condition, there would have been no contract to deliver. But the operator at Sanford did not make any objection to the receipt of the message at that hour, and says he did not make any effort to let the sending office know that it would not be delivered." The two cases differ essentially in this; that in this case the operator at High Point did not receive the message until 8 o'clock the next morning.

It cannot be rightly contended that a telegraph company may not establish reasonable hours for receiving and delivering telegrams, and that it is liable for a failure to receive, send and deliver even an important telegram which is tendered to it within such hours. It has been thoroughly settled by many courts and text writers that such a company may adopt reasonable office hours for the transaction of its business in the transmission and delivery of telegrams, and it is under no obligation to keep its employees in each of its offices informed of the time when every other office closes for the night, or to deliver a message received after the closing of the office. The authorities to this effect are most abundant. We cite only a few of them. *Sweet v. Telegraph Co.*, 22 R. I., 344. In that case it appeared that a newspaper correspondent, who, it seems, was also a telegrapher, but not employed by the company, received the message sent, and placed it on the filing hook for the operator who was employed by the defendant, but who had left the office for the

night. The message was delivered the next day at 9:25 a. m. With reference to this state of facts, the learned Chief Justice, for the Court, stated the rule of law applicable to the case, and we quote liberally from his opinion, because what he says had occurred to us as being not only the correct but the just rule of the law:

"The controlling question is whether the receipt of the message for transmission after the terminal office had closed was an act of negligence. This depends upon whether the receiving agent was bound to know the time of closing in the terminal office. The decisions on this point are practically unanimous that a receiving agent is not so bound, for the reason that, in view of the great number of telegraph offices all over the country, and their variant conditions—some large and requiring (502) constant service, others small and with infrequent calls—a requirement that every agent should know the hours of every office would be unreasonable, if not impossible. To hold a company to such a duty would either require a uniform time of closing in all offices which are not constantly open, or a directory of all such officers, with their various hours at different seasons of the year. The former alternative would compel a service at small stations far beyond their needs, and the latter, as *Mr. Justice Miller* said, in *Given v. Telegraph Co.*, 24 Fed., 119, would be 'onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for neglect of which it must be held liable to damages.' This rule, stated in Croswell on Electricity, sec. 421, notes 1 and 2, and 25 A. & E., 785, *note g*, is supported by the cases cited.

"The plaintiff relies on *Telegraph Co. v. Broesche*, 72 Tex., 654 (1889), which went to the extent of holding that the fact that the company's office at Burton was closed at the time its agents at Austin received the message for transmission, was no defense for failing to transmit and deliver the message.

"But in *Telegraph Co. v. Neel*, 86 Tex., 368 (1894), the same question came again before the court, and it was held that the company should have the right to establish reasonable hours within which their business is to be transacted, adding this very sensible conclusion: 'It seems to us that the reasonableness of a regulation as to hours of business is sufficiently obvious to suggest to the sender of a message, who desires its delivery at an unusually early hour for business, the propriety of making inquiry before he enters into the contract.' This decision was affirmed in *Telegraph Co. v. May*, 8 Tex., Civ. App., 176, and in *Telegraph Co. v. Wingate*, 6 Tex. Civ. App., 394 (1894); so that, we cannot regard *Telegraph Co. v. Broesche, supra*, as stating the law of Texas at the present time.

"For the reason stated, we are of opinion that the receipt of the tele-

gram in Boston without knowledge of the receiving operator or notice to the sender that the office at Pawtucket had closed for regular business was not an act of negligence by the defendant. It is also clear that the defendant company is not made liable by the fact that it was received by one not in its employ and not its agent for that purpose, who was allowed to remain in the office and to use the wires of the company for other purposes.

"The plaintiff argues that, as the addressee of the message, he has a right of action different from that of a sender, because he is not a party to the contract, and hence not bound by its stipulations. (503) However this may be, the plaintiff has no cause of action, except that of the defendant's negligence. Having found that the defendant was not guilty of negligence, there is no ground for action in either case." See, also, *Given v. Telegraph Co.*, 24 Fed., 119; *Telegraph Co. v. Harding*, 103 Ind., 505 (a very instructive case); Jones on Telegraphs and Telephones, secs. 349 and 351, and cases cited in the notes. This is a most reasonable rule of law, and the one which the plaintiff seeks to apply would cause great injustice and oppression. There are a vast number of offices of each company at different places in this country, and it would most assuredly be exacting too much from these companies to require them to keep their offices open at all hours of the day and night. There is no other employment in which the law requires so much from the proprietors. If the cupidity of these companies suggests such a course, they may have day and night employees and transact their business continuously and even incessantly, but the law requires only a reasonable service from them, and will not compel them to serve the public day and night."

In *Telegraph Co. v. Harding, supra,* the principle is sustained by cogent reasoning: "In this view, it seems clear to us, contrary to our first impression, that the penalty is not incurred unless there is a failure to receive and transmit during the usual hours, both at the point where the message was received and that to which it is to be transmitted. To hold otherwise would involve the telegraph company in the necessity of having its offices open for the reception and delivery of messages at all points and an equal length of time. If the requirements of its business at one point made it necessary to keep its office open twenty-four hours in the day, its usual office hours at such point would be continuous. It would, according to the instruction contended for, be compelled to receive messages during usual office hours at that point. If it must transmit them, without delay, to every other point to which they may be directed, or incur the statutory penalty, irrespective of the requirements of its business at other points, then of necessity it must have no offices at all at points where it cannot have them open continuously. We do not think

this was the purpose of the statute." *Given v. Telegraph Co., supra,* would seem to be directly in point. The opinion in the case was delivered by *Circuit Justice Miller,* as great a lawyer as ever sat in the Supreme Court of the United States, not counting *Chief Justices Marshall* and *Taney.* This learned jurist said: "We do not see that it is the duty of the Western Union Telegraph Company to keep the em-
(504) ployees of every one of its offices in the United States informed of the time when every other office closes for the night. The immense number of these offices all over the United States, the frequent changes among them as to time of closing, and the prodigious volume of a written book on this subject seem to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for neglect of which it must be held liable for damages. There is no more objection to do this in regard to offices in the same State than those four thousand miles away, for the communication is between them all, and of equal importance." To the same effect is *Stevenson v. Telegraph Co.,* 16 N. C. Q. B., 530. So, in *Telegraph Co. v. Cotton Co.,* 94 Ga., 444, it is said: "In the absence of a special contract to transmit immediately, or of an express request for information, it is not obligatory upon a telegraph company to acquaint a customer with the office hours of the company at a point to which the message delivered by him for transmission is directed." Some of the authorities sustaining the rule in its varying application to the facts of each particular case are as follows: *Telegraph Co. v. May,* 8 Tex. Civ. App., 176; *Telegraph Co. v. Wingate,* 6 Tex. Civ. App., 394; *Telegraph Co. v. Neill,* 86 Tex., 368; Jones on Telegraph and Telephone Companies, pp. 330, 331 and 347; *Starkey v. Telegraph Co.,* 53 Tex. Civ. App., 333; *Telegraph Co. v. Ayres,* 41 Tex. Civ. App., 627; *Telegraph Co. v. Scott,* (Ky.) (unreported), 87 S. W., 289; *Telegraph Co. v. Henderson,* 89 Ala., 510; 1 Joyce on Elec. Law, sec. 488; *Gibson v. Telegraph Co.,* (Tex.) (unreported), 53 S. W., 712; Davis v. Telegraph Co., (Tex.) (unreported), 66 S. W., 117; *Telegraph Co. v. Crider,* 107 Ky., 600; *Telegraph Co. v. Steenburgen,* 107 Ky., 469; 2 Joyce on Electricity, sec. 809b; *Telegraph Co. v. VanCleave,* 107 Ky., 464; *Telegraph Co. v. Love-Banks Co.,* 73 Ark., 205; 1 Joyce Electric Law, sec. 488; 27 A. & E., (2 Ed.), 1037; 25 A. & E. (1 Ed.), 785.

We would not be in alignment with the controlling authorities and decisions in this country or England if we should hold that the mere receipt, not within office hours, of a telegram for transmission, which could not be received at the other end of the line, because the office there had closed, in accordance with the usual and reasonable office hours established by the company, would still impose a liability upon it. Such

a holding would be contrary to every principle of reason and justice, and we cannot assent to it.

The authorities cited by us, and the reasons given for our decisions, are not at all in conflict with *Carter v. Telegraph Co., supra,* or with *Suttle v. Telegraph Co.,* 148 N. C., 480. In the case first cited, the Court substantially asserts the very rule which we have said (505) should govern this case. There the operator at Sanford received the message over the line of the defendant from the operator at Spout Springs, without notifying the transmitting operator that he could not deliver it that night. He, by the clearest implication, undertook and agreed to use due diligence in delivering the message. He was informed by the telegram that it was sent in behalf of a woman who, it appeared, was then in the pains and throes of labor, and who required the immediate presence and medical attention of her physician. He was at least informed by the message that a woman, one of his patients, required his immediate services. His silence, after receiving such an important and urgent message, must be construed as an agreement on his part, in behalf of his principal, the telegraph company, to deliver the message with due diligence that very night. Common humanity and the general conduct of persons under such circumstances require us inevitably to draw such an inference. His silence was calculated to mislead the sender, who could have procured the early attendance of her physician at her bedside by other means if she had known of the true situation. That decision was right, and is in perfect accord with our conclusion in this case. The very able and learned judge who presided at the trial in this case misconceived its scope, and by reason thereof charged the jury to the prejudice of the defendant. Nor is there any conflict between what we now decide and *Suttle v. Telegraph Co.,* 148 N. C., 480. Why, the case directly and emphatically sustains our present ruling! There we held that the defendant, by its operator, who was its agent, with authority to make the contract, received the message at Raleigh and expressly agreed to deliver the same at a time which was not within its prescribed office hours, and, having so agreed, it was its legal duty to do so. Who will say that it was not? Besides, it appeared from the contents of the message that quick service was expected, and the message was filed for transmission within office hours, and the defendant had ample time within which to transmit and deliver it before the closing hour of the defendant's office at Smithfield, the home of the plaintiff and his wife, the sendee. We held, and now hold, that Judge Long, who presided at the trial of this and that case, ruled correctly upon every controverted question in that case, and affirmed the judgment. That case has no special bearing upon this case, except in declaring the general principles applicable to contracts between a telegraph

company and its patrons, and as impliedly holding that if the
(560) office at the terminal point (Smithfield) had been closed when, under the reasonable rules and regulations of the telegraph company, the message should have reached that office, if the company had exercised reasonable diligence, it would not have been liable, without an express or clearly implied agreement on the part of the company that it would deliver the message at all events, or, without regard to its rules, that evening. But it appeared in the report of that case that it had full time to comply with its contract within its office hours, which had been established both at the initial and terminal points.

Our conclusion is that the court erred in submitting this case to the jury with improper instructions upon the law as applicable to the special facts, and therefore the defendant is entitled to another jury.

Whether a verdict, upon the evidence in this case, in favor of the plaintiff should be allowed by the court below to stand is a question which relates to the weight of the evidence, and should be decided by the presiding judge, and not by us. It rests in his sound discretion, which should be exercised always, not arbitrarily, but with a view to a correct administration of justice, according to law.

The doctrine of "mental anguish," as it is called, was recognized and firmly established in our jurisprudence long before I came to this bench (*Young v. Telegraph Co.*, 107 N. C., 370; *Thompson v. Telegraph Co.*, 107 N. C., 449), by a Court of exceptional ability and learning. It has been repeatedly upheld by other decisions, when the *personnel* of the Court had changed, and it cannot at this late day be successfully assailed as being against the principles of the common law. Having been thus deeply rooted in our jurisprudence, and having received the sanction and approval of our most eminent jurists many years ago, it should now be accepted as an acknowledged principle of law, and the cases in which it is involved should be tried and determined as other cases in which there has been no disagreement as to what is the law as to the cause of action.

We conclude by saying that *Bright v. Telegraph Co.*, 132 N. C., 317 has no special application to this case. It appeared in that case that the message had been filed with the company's operator at 8 o'clock p. m., at Wilkesboro, N. C., to be transmitted to Burlington, N. C., where it was received thirty minutes afterwards, and the operator at Burlington, by the messenger of the company, actually attempted to deliver it, and by negligence failed to do so. We can see at a glance that a very different question was presented in that case from the one now under con-
(507) sideration. That case has been approved and affirmed frequently by this Court, the courts of other States and jurisdictions, and by

the law writers. The plaintiff cannot sustain his contention by anything that was said in that case.

I do not wish to be understood as not concurring with the able judges who took part in deciding *Young v. Telegraph Co., supra,* and *Thompson v. Telegraph Co., supra,* for the principle, as established by these cases, receives my full assent. I believe that what we call "the doctrine of mental anguish" is based upon a sound principle of common law, which is elastic enough to meet new conditions as they arise, and to adjust itself and its well-settled rules to the ever-changing circumstances of a progressive civilization and the onward march of reform in the administration of justice. It would be a reproach to the law if telegraph companies can wantonly neglect their duty and obligation to their patrons with impunity and without any responsibility for their wrong, committed sometimes without the slightest excuse and under exasperating circumstances. I speak now only for myself, and am not committing the Court, as a body, to my views.

New trial.

Cited: *Shaw v. Telegraph Co., post,* 643; *Carswell v. Telegraph Co.,* 154 N. C., 115, 116, 120.

MORGANTON HARDWARE COMPANY v. MORGANTON GRADED SCHOOLS ET AL.

(Filed 23 December, 1909.)

1. **Appeal and Error—Agreement of Counsel—Rehearing—Procedure.**

In a former appeal in this case counsel agreed that the matter decided was the only question involved; if otherwise, or in case of inadvertence of the court, as to other questions presented, a rehearing should have been petitioned for. Hence the opinion found reported in 150 N. C., 680, may not thus be reviewed. The Court, however, decided against the plaintiff on the merits of the case.

2. **Public Schools—Subcontractor—Material Men—Statutory Liens.**

A building used for graded-school purposes is a public building upon which no lien can be acquired, except with legislative sanction. *Gastonia v. Eng. Co.,* 131 N. C., 363; *Snow v. Comrs.,* 112 N. C., 335, cited and approved.

3. **Statutory Liens—Subcontractor—Material Men—Debtor and Creditor—Privity of Contract.**

Between the subcontractor or material man and the owner there is no privity of contract, and the former cannot make the latter their debtor except with his consent, or by following the provisions of the statute giving them a lien, and then only according to the status of the contract.

between the owner and the contractor with reference to the amount owed the contractor thereunder at the time of notice and the relation thereto of other like claimants. Revisal, secs. 2019, 2020, 2021.

4. Same—Interpretation of Statutes.

Revisal, secs. 2019, 2020, 2021, does not create the relationship of debtor and creditor between the owner of a building and the subcontractor or material man, except as to the extent of liens acquired in accordance with its provisions, and in the manner indicated.

5. Public Schools—Subcontractor—Material Men—Statutory Liens.

Neither by the enforcement of a lien, nor by anything in the nature of an equitable proceeding, nor directly by sale under execution, was it the intent of Revisal, secs. 2019, 2020, 2021, etc., to subject one of its public corporations, organized as necessary to the administration of its governmental affairs, to the privation or loss of its buildings for public school purposes.

6. Same—Judgments.

A public schoolhouse cannot be sold under execution, except with legislative authority, and a judgment in favor of a subcontractor, or those furnishing materials for its construction, would be in vain, and the courts will therefore not render such a judgment.

(508) APPEAL from *Justice, J.*, at August Term, 1909, of BURKE.
The facts are stated in the opinion of the Court.

J. T. Perkins, S. J. Ervin and Riddle & Huffman for plaintiff.
Avery & Erwin for defendant.

WALKER, J. This case was before us at the last term in 150 N. C., 680. Counsel agreed then, as the briefs on file in this Court show, that the real question involved was whether the plaintiffs were entitled to liens upon the graded school building, and virtually conceded that, if they were not, the plaintiffs had not made out their case and the judgment below was wrong. It may also be said that if the reversal of the judgment in that appeal affected injuriously the plaintiff's rights, they should have brought the matter to the attention of this Court by a petition to rehear, which they have not done. This was also virtually an admission that the judgment of this Court was right; otherwise the plaintiff would have asked that it be reheard or reviewed, or called the alleged inadvertence to the attention of the Court, so that it might be corrected, provided there was any inadvertence. But there was not.

In the former opinion the Court confined the discussion solely to
(509) the very point which counsel agreed was the one presented in the case, and to which their arguments in this Court were addressed. We will not, though, place our decision entirely upon the ground just

stated, but will also discuss and decide the case upon its merits, as if the case were here upon an order for a rehearing.

We decided before that a public building, such as a graded school, is not the subject of a lien, under our statute (chapter 48 of the Revisal). Our decisions, as well as those of other States, support this view. *Gastonia v. Eng. Co.*, 131 N. C., 363; *Snow v. Comrs.*, 112 N. C., 335; 1 Phillips on Mech. Liens (3 Ed.), secs. 179 and 179a. The other cases supporting the principle were cited in our former opinion. Even a cursory perusal of our statute (Revisal, ch. 48) will make it plainly appear that a subcontractor or a person who furnishes materials for the construction of the building has no claim against the owner apart from the claim he acquires by virtue of his lien after notice to the owner and before he settles with the contractor. The statute was not intended to change the well-settled general principle that there must be privity of contract before any liability by one person to another can arise. We know that this general principle has its exceptions, arising out of the peculiar nature of the cases to which they apply. *Gorrell v. Water Co.*, 124 N. C., 328; *Gastonia v. Eng. Co., supra; Wadsworth v. Concord*, 133 N. C., 594; *Jones v. Water Co.*, 135 N. C., 554; *Voorhees v. Porter*, 134 N. C., 591. In the case last cited the authorities are collected and the application of the rule and its exceptions discussed. One person cannot make another his debtor without his consent or the sanction of the law. It is true that a lien, generally speaking, implies the existence of a debt, the payment of which is secured by it, but it does not follow always, and conversely, that a debt implies the existence of a lien. The latter arises by contract of the parties or by some provision of the law, common or statute. Revisal, secs. 2019, 2020 and 2021 of ch. 48, clearly import, by their words, that the subcontractor or material man, if he gives the required notice, shall have a lien; and when he acquires a lien by giving the proper notice, the owner of the property upon which the lien rests becomes his debtor to the amount owing by the owner to the contractor at the time of the notice. The language of section 2021 is perhaps the strongest in favor of the plaintiff's contention in this case. But it will be observed that the closing words of that section distinctly qualify and explain what precedes. They are (510) as follows: "Upon the delivery of such notes to such owner or his agent, the person giving such notice shall be entitled to all the liens and benefits conferred by this section or by any other law of this State, in as full and ample a manner as though the statement had been furnished by the contractor, architect or such other person." Section 2022 further elucidates this question and shows clearly what the Legislature means. "Section 2022—Sums Due by Statement, a Lien—The sums due to the laborer, mechanic or artisan for labor done or due the person

furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the Superior Court." Who can successfully assert, after reading the sections quoted, that it was or could have been the purpose and intent of the Legislature to give the subcontractor a simple action of debt against the owner, when they had never been brought into contractual relations with each other? The contract of the material man or subcontractor was with the contractor, and not with the owner, and the material man has no direct claim against the owner as *his* creditor, under the contract or by any known principle of law. He may subject the debt due by the owner to the contractor, when he has acquired no lien under the statute, in certain cases, by process of the law, such as an attachment or supplementary proceedings, and, in the latter case, after reducing his claim to judgment and complying with the necessary procedure; or, if he has acquired a lien on the debt by contract with the owner or by any provision of the law, he may subject it, by suit, to the payment of the debt. Under the statute, his right as against the owner, must be worked out through the lien it gives him upon the property of the owner, after notice of his claim and to the extent of his claim, provided it does not exceed what is due the contractor by the owner. It would seem to be unnecessary to cite authorities for our construction of the statute. In *Walker v. Paine,* 2 E. D. Smith (N. Y.), 662, the very question arose, and (at page 664) the Court said: "In an action against the owner of a building to recover, under the lien law, the value of work or materials furnished *to a contractor,* there can be no personal judgment against the owner, but a mere foreclosure of the lien upon his interest in the premises, with a judgment directing the sale of such interest to pay the amount found due to the claimant, with the costs, as provided in the first section of the amendatory act, passed 13 April, 1855. (a) A personal judgment thus erroneously entered against the owner will be
(511) reversed on appeal." Numerous other authorities could be cited, but this one states the principle so clearly that we will not encumber the opinion by referring to them. In the case of *Pinkston v. Young,* 104 N. C., 102, the Court distinctly recognizes the doctrine that what the laborer, subcontractor or material man acquires by notice to the owner is a lien upon his property, and that his remedy, in order to secure payment of this debt, is by enforcing this lien. It has been held that a judgment charging the premises with a lien cannot be rendered except as an incident to a personal judgment against one holding a contract relation with the plaintiff, and that there must always be privity of contract between the parties. *Stemkamper v. McManus,* 26 Mo. App., 51. Our statute does not establish privity of contract, but merely confers

upon the material man a lien upon the property, if the property is subject to lien, but not if he fails to acquire a lien by the laches of himself or of the contractor, whose negligence will be imputed to him when he fails to protect his own interests in the way prescribed by the statute.

But there is another insuperable obstacle in the way of the plaintiff's recovery. Property held for necessary public uses and purposes, such as courthouses, jails, schoolhouses, and so forth, cannot be sold under execution. *Gooch v. Gregory,* 65 N. C., 142; *Vaughn v. Comrs.,* 118 N. C., 636. It would be a vain thing to render a judgment for a debt which cannot be enforced. The plaintiff may, perhaps, proceed by *mandamus* against the corporate body having power to levy taxes for the purpose of paying his claim, but he cannot subject the property itself to its payment. The government of the State and its subordinate departments would be so crippled or obstructed by such a course as to be of little value to the people. It could eventually be destroyed. The method of collecting debts created for public uses and purposes is by taxation; and if the body charged with the duty of laying the necessary taxes to pay the same fails in its duty, the procedure or remedy is by *mandamus* to compel its performance, as the above cases will show.

Phillips on Mechanics' Liens (3 Ed.), states (in section 319) that a building which would otherwise be subject to the lien may be exempt on ground of public policy. In considering the question of lien, the authorities say the whole of the remedy, including the right to issue execution, must be considered in order to determine whether it is the proper remedy in any given case. Not to do so would be too abstract and impracticable; for the lien, abstractly, is nothing; its consequences or results, everything. The question of lien, therefore, must be regarded with reference to the legal consequences of it; and if (512) they would necessarily contravene settled principles; it is evident that such an effect should not be given and was not intended by the law; and if it be incapable of the practical results assigned to it by the law, it is inoperative and there is no lien. Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally exempt from the operation of the mechanics' lien law, unless it appears by the law itself that property of this description was meant to be included; and, to warrant this inference, something more must appear than the ordinary provisions that the claim is to be a lien against a particular class of property, enforcible as judgments rendered in other civil actions. Therefore, under an ordinary statute, a lien cannot be acquired for work done or materials furnished towards the erection of a public-school house erected in accordance with public law. See *Brickerhoff v. Board of Education,* 60 Pa. St., 27; *Williams v. Controllers,* 18 Pa. St., 275; *Charnock v. Colfax,* 51 Iowa,

70; *Board of Education v. Neidenberger,* 78 Ill., 58; *Wilson v. Comrs.,* 7 Walls & Serg. (Pa.), 197; *Poillon v. Mayor,* 47 N. Y., 666. It cannot be supposed that the Legislature could intend in any case to subject one of its public corporations, organized as necessary to the proper administration of its governmental affairs, to the privation or loss of its buildings, so indispensably necessary for the public benefit and accommodation, and in which every individual of the community has a deep interest. It can make little or no practical difference whether it is done by the enforcement of a lien, by anything in the nature of an equitable proceeding, or directly by sale under execution. Phillips on Mech. Liens, sec. 179. If there is any difference, it would seem to be against the latter and in favor of the former proceedings, which would be less drastic and summary.

This Court held, in *Hildebrand v. Vanderbilt,* 147 N. C., 639, that where a lien is once acquired by a material man upon property, an action can afterwards be maintained personally against the owner thereof, even though the lien may have been lost by the laches of the material man in not bringing an action to enforce the lien within six months, allowed by the statute for that purpose. This question is not involved in this case, as here no lien was ever acquired, as we held in the former decision (150 N. C., 680) and now hold.

In any view we are permitted by the law to take of this case, the plaintiff has failed to show that he is entitled to a favorable considera-
(513) tion of it by us. There was no error in the ruling of Judge Justice.

Affirmed.

Cited: Granite Co. v. Bank, 172 N. C., 357; *McCausland v. Construction Co., ibid.,* 712.

P. H. BUSBEE ET AL. v. WESTERN NORTH CAROLINA LAND AND LUMBER COMPANY ET AL.

(Filed 23 December, 1909.)

1. Evidence—Questions for Jury.

In this case the lower court erred in not submitting the case to the jury, there being sufficient legal evidence in plaintiff's behalf. As it may prejudice the party against whom the ruling is made, the Supreme Court did not discuss the evidence, but called attention to the rulings in sundry cases.

2. Issues—Necessary Findings—Trespass—Title—Fraud.

In an action for trespass upon land involving the questions of title, fraud and damages, the court submitted only one issue, to wit: "What

damages, if any, are the plaintiffs entitled to recover?" The Supreme Court disapproved of submitting the case to the jury upon this single issue, though, it seemed, the cause was tried upon its merits, and *Held*, that issues should be so framed as to present for the consideration of the jury every material controverted fact, necessary to be found in order to constitute a good cause of action or defense, so that the appellate court can intelligently pass upon the questions of law presented.

APPEAL by plaintiffs from *Ferguson, J.*, at July Term, 1909, of SWAIN.

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

A. M. Fry and W. T. Crawford for plaintiff.
Bryson & Black for defendant.

WALKER, J. We think the court erred in not submitting the case to the jury upon the evidence introduced. It is difficult to enter upon any discussion as to whether there is evidence which tends to establish the plaintiff's case and to state what it is, by reason of the fact that such a discussion is very apt to prejudice the party against whom the ruling is made. We have laid down the rule in differing forms of expression, by which the court should be guided in passing upon the question as to how the evidence should be viewed when determining whether the case should go to the jury. "It is well settled that on a motion to nonsuit or to dismiss, under the statute, which is like a demurrer (514) to the evidence, the court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true, and construed in the light most favorable to the plaintiff, and every fact which it tends to prove must be taken as established, as the jury, if the case had been submitted to them, might have found those facts upon the testimony. Tested by this rule, we think there was some evidence which tended to show that Townsend was acting as agent for the defendant when he bought the lumber." *Brittain v. Westhall,* 135 N. C., 495.

"The verdict may be set aside by the court if found to be against the weight of the evidence, but the right of the plaintiff to have it submitted to the jury cannot be denied or abridged, provided there is some evidence to establish the plaintiff's contention." *Avery v. Stewart,* 136 N. C., 430.

"A judgment of nonsuit requires us to assume that all the evidence which tends to establish the plaintiff's case is true, and to view it in the aspect most favorable to the plaintiff, drawing every reasonable and legitimate inference therefrom which the jury could have drawn had they passed upon the case. All the facts that make for the plaintiff must be taken as established and considered by us, and all those that

make against them must be rejected." *Millhiser v. Leatherwood,* 140 N. C., 234.

Justice Rodman, for the Court, said, in *Wittkowski v. Wasson,* 71 N. C., p. 451: "Where there is any evidence to support the plaintiff's claim, it is the duty of the judge to submit the question to the jury, who are the exclusive judges of its weight. Of course, after a while it became a question as to what was the meaning of the phrase, 'any evidence.' Did it mean the slightest scintilla of evidence, or such only as that from which a jury might reasonably infer the existence of the alleged fact? The latter view has been established in this State and in England, and, so far as my researches have extended, in other States generally."

The rule is clearly stated by *Justice Douglas* in *Craft v. R. R.,* 136 N. C., 50, as follows: "It is well settled, by a long line of decisions, that upon a motion for nonsuit the evidence of the plaintiff must be taken as true and construed in the light most favorable to him, and, when so considered, if there is more than a scintilla of evidence tending to prove the plaintiff's contention, the question must be left to the jury, who alone can pass upon the weight of the testimony and the credibility of the witnesses."

(515) Summing up all that has been substantially written by us upon the subject, we thus concluded in *Byrd v. Express Co.,* 139 N. C., 276: "It all comes to this: that there must be legal evidence of the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it."

In this case the plaintiffs sued the defendants, the lumber company; J. E. Rebstock and Pattie Ryan alleging that they were the owners of the land described in the complaint, and that the defendants had trespassed upon the same by cutting and removing trees therefrom and doing other injury and damage thereto. At the instance of the plaintiffs, a warrant of attachment was issued and levied upon land described in State grant No. 7324, which was issued to J. J. Calhoun, and it was alleged that the defendants, who were the equitable or beneficial owners of the land, Calhoun being but a trustee for them, had fraudulently caused the legal title to the said land to be conveyed to one Louise E. Mason. The court ordered Louise E. Mason to be made a party, so that the validity of her title might be determined, as between her and the plaintiffs, by issues based upon the allegations of the complaint and the denials of the answer. Louise E. Mason was made a party defendant, and filed an answer, denying the said allegations of fraud. The court submitted an issue, which, with the answer thereto, is as follows: "What damages, if any, are the plaintiffs entitled to recover?" Answer: "Three hundred dollars." We have often disapproved the submission of such

an issue. *Hatcher v. Dabbs,* 133 N. C., 239; *Denmark v. R. R.,* 107 N. C., 186. In *Hatcher v. Dabbs, supra,* it was said by us "to have been settled by the numerous decisions of this Court that only the issues of fact raised by the pleadings should be submitted to the jury, and not mere questions of fact growing out of the evidence (*Howard v. Early,* 126 N. C., 170), and such issues as are so raised should be submitted, with this qualification, that it is not required that all the issues should be thus submitted to the jury, but such of them only as are necessary to present the material matters in dispute (*Shoe Co. v. Hughes,* 122 N. C., 296; *Ratliff v. Ratliff,* 131 N. C., 425; *Warehouse Co. v. Ozment,* 132 N. C., 848), and as will enable each of the parties to have the full benefit of his contention before the jury (*Patterson v. Mills,* 121 N. C., 258; *Pretzfelder v. Ins. Co.,* 123 N. C., 164; 44 L. R. A., 424), and with this further qualification, that the issues must also be comprehensive enough to determine the rights of the parties and to support the verdict and judgment in the particular case. *Strause v. Wilmington,* 129 N. C., 99. The provision in our present system of procedure for submitting issues was adopted for the purpose of enabling the jury (516) to find the material facts with as little consideration as possible for principles of law, sometimes difficult for them to understand and apply, and so that the court, upon the facts thus found, may with greater ease and security declare the law and thus determine the legal rights of the parties. *Bowen v. Whitaker,* 92 N. C., 367. This result cannot be obtained in this case under the issue submitted to the jury. There is no separation of the facts from the law, but the jury are required to consider and decide both the facts and the law, under instructions from the court, it is true; but, nevertheless, in direct contravention of the spirit and purpose of the Code and the rule of this Court. There is another objection to the issue: it virtually implies that the defendant is liable to the plaintiff, and merely requires the jury to ascertain the extent of the liability, and in this respect it may have confused, if it did not mislead them, even though the instructions of the court embraced the various contentions of the parties and were correct in themselves.

We again direct attention to those decisions, in the hope that the issues may hereafter be so framed as to present for the consideration of the jury every material controverted fact necessary to be found by them in order to constitute a good cause of action or a good defense. This is very important in the trial of causes, for this Court cannot, on appeal, intelligently pass upon a case if the facts are not found by proper issues submitted to the jury. The issue as to the damages is not material if the decision of the jury upon the issues constituting the plaintiff's cause of action are found against him. Whether either party is entitled to damages depends upon the finding of the jury whether an injury (using

that word technically) or a wrong has been committed. The issue in this case is not even the general issue, which was permissible under the former system of pleading and practice, but has been discarded by the present system.

It seems, though, that upon this imperfect and anomalous single issue the case was tried upon its merits. We have examined the testimony carefully, and, while we refrain from expressing any opinion as to its weight, we must say there was far more than a scintilla of evidence to establish the plaintiffs' cause of action and their consequent right to damages.

There was therefore error in the ruling of the court. The case is remanded, with directions to set aside the judgment of nonsuit and submit the case to another jury, upon the evidence, under proper
(517) instructions from the court. We will not pass upon the other exceptions taken, as they may not arise again.

New trial.

WILLIAM G. BRADSHAW ET AL. V. CITY OF HIGH POINT.

(Filed 23 December, 1909.)

1. **Cities and Towns—Bond Issues—Necessaries—Charter Powers—Popular Vote—Constitutional Law.**

Under the charter of 1909, sec. 12, of the City of High Point, an issue of bonds by that city to complete payment under its contract for the erection of a waterworks plant and sewer system, about completed, is for a public necessity, not requiring a popular vote for its validity. Constitution, Art. VIII, sec. 4.

2. **Cities and Towns—Bond Issues—Charter Powers—Repealing Acts—Interpretation of Statutes.**

Section 31 (10) of the charter of the City of High Point, repealing all former laws affecting the government of the city, etc., except acts relating to the issue of bonds and granting of franchises, etc., was to prevent the invalidation of bonds already issued and franchises already granted, and not to continue restrictions which are inconsistent with the provisions of the charter of 1909.

3. **Same—Refunding Debts.**

Chapter 19, Private Laws 1907, authorizing an election by that city upon a proposition to issue bonds for divers purposes, among them, that of improving and extending its water plant and sewer system, does not restrict the power to issue bonds for such purposes without a popular vote granted by the charter of 1909, especially as the charter expressly authorizes the city council "to fund or refund by ordinance the whole or any part of the existing debts of the city or any future debt by issuing bonds."

BRADSHAW *v.* HIGH POINT.

APPEAL from *Biggs, J.*, at December Term, 1909, of GUILFORD.

This is an action brought by the plaintiff, a taxpayer and citizen of the city of High Point, against the defendant, to enjoin it from issuing bonds to the amount of $30,000, the proceeds of the sale of which are to be used in paying a debt contracted for a necessary expense of said defendant.

On 1 October, 1909, the city of High Point entered into a contract with the United States Construction Company to extend and improve its sewer and water systems, agreeing to pay therefor the sum of $30,000, same to be paid in installments, as provided in said contract, and immediately thereafter said construction company began said work, and the same will in a short time have been completed.

The defendant, not being able to provide for the payment for (518) said work out of its funds in hand or current revenue, after having passed an ordinance in full compliance with the provisions of its charter, was preparing to issue and sell bonds to raise the funds necessary, when the plaintiff instituted this suit to restrain further action on the part of the city, alleging two reasons why said proposed issue of bonds would be unlawful: first, because the defendant had not complied with chapter 19, Private Laws 1907, in holding an election on the proposed issue of bonds; second, because it has no authority to issue long-time negotiable bonds for the purposes expressed in said ordinance and set out in the pleadings.

His Honor held that the bonds are valid, and refused the motion for a restraining order. The plaintiff appealed.

G. S. Bradshaw for plaintiff.

Shaw & Hines and E. H. Farris for defendant.

CLARK, C. J., after stating the case: The contract was for a public necessity, and therefore a valid indebtedness, and a popular vote was not necessary, unless the charter or some statute required it. *Fawcett v. Mt. Airy,* 134 N. C., 125; *Davis v. Fremont,* 135 N. C., 538; Revisal, sec. 2916 (6).

The plaintiff relied upon chapter 19, Private Laws 1907, which authorized an election upon a proposition to issue $125,000 in bonds for divers purposes, among them that of improving and extending its water plant and sewer system, aiding the construction of a railroad, and other purposes. Had that statute prohibited the issuance of bonds for water and sewerage, unless so voted, this would have rendered the issuance of these bonds invalid, unless the statute has been repealed (*Wadsworth v. Concord,* 133 N. C., 587; *Robinson v. Goldsboro,* 135 N. C., 382; *Comrs. v. Webb,* 148 N. C., 120), for the Constitution, Art. VIII, sec. 4, places

the control and restriction of the powers of municipal bodies in contracting debts in the General Assembly.

By chapter 395, Laws 1909, the General Assembly enacted "An act to grant a new charter to the city of High Point, repealing all laws and parts of laws in conflict herewith." Section 12 of this act gave the city the fullest power to provide for a system of sewerage and waterworks. Section 27 (9) prescribes in detail the duties of the "superintendent of waterworks and sewerage." Section 31 (10) is as follows: "From and after the ratification of this act, the same shall thenceforth be the charter of the city of High Point, and all laws now constituting
(519) a charter of said city, affecting the government thereof in the grants heretofore made of its corporate franchise and powers (except the acts relating to the issue of bonds and granting of franchises), and all laws of a public and general nature inconsistent with or coming within the purview of this act, are hereby repealed, as far only as they may affect the city."

The plaintiff contends that the effect of this subsection is to except chapter 19, Private Laws 1907, from the general repealing clause. We do not think so, especially in view of the unrestricted power to establish a system of waterworks and sewerage conferred by section 12, above referred to.

The exception from repeal of acts relating to the issue of bonds and granting of franchises was to prevent the invalidation of bonds already issued and franchises already granted, but was not intended to continue restrictions which are inconsistent with the liberal provisions of the new chapter. Chapter 19, Private Laws 1907, was no longer necessary, and is completely eliminated by this "new charter." The bonds are therefore valid. *Greensboro v. Scott,* 138 N. C., 184.

The debt being valid, the municipal authorities can issue bonds to fund the same. *Comrs. v. Webb,* 148 N. C., 123. Besides, the "new charter" (Laws 1909, ch. 395, sec. 30) expressly authorizes the city council "to fund or refund by ordinance the whole or any part of the existing debts of the city or any future debt" by issuing bonds.

The judgment below is

Affirmed.

Cited: Ellison v. Williamston, 152 N. C., 149, 150; *Murphy v. Webb,* 156 N. C., 405; *Hotel Co. v. Red Springs,* 157 N. C., 139; *Robinson v. Goldsboro,* 161 N. C., 673; *Bain v. Goldsboro,* 164 N. C., 104; *Swindell v. Belhaven,* 173 N. C., 4.

S. P. PHILLIPS ET AL. v. BUCHANAN LUMBER CMPANY ET AL.

(Filed 23 December, 1909.)

1. State's Land—Assignment of Entry—Fraud—Registration—Purchasers for Value—Notice.

An assignment, though procured by fraud, of an entry upon the State's vacant and unappropriated land does not *per se* raise a presumption of fraud, and the recorded certificate thereof and of the entry cannot affect subsequent purchasers for value without notice or knowledge of the fraud.

2. Same—Trusts and Trustees—Limitation of Actions.

The plaintiffs, as heirs at law of an original entry upon the State's vacant and unappropriated lands, brought suit to declare defendants trustees for them, alleging, and establishing by the verdict of the jury, that the one under whom defendants derived title had fraudulently procured an assignment of the entry of their ancestor, which was duly recorded. It appeared that defendants were purchasers for value and without notice in a line of grantors, also purchasers for value without notice, under conveyances duly recorded, for a period of more than seventeen years. The facts being uncontradicted: *Held*, as a matter of law, plaintiff's action to have defendants declared a trustee was barred after a lapse of ten years from the date of the grant to the time of the commencement of the action. Revisal, 399.

APPEAL by plaintiff from *Ferguson, J.*, at September Term, (520) 1909, of GRAHAM.

The facts are stated in the opinion of the Court.

Morphew & Phillips and A. M. Fry for plaintiff.
A. S. Barnard for defendant.

CLARK, C. J. The complaint alleges that in 1853 S. P. Sherrill, the ancestor of the plaintiffs, entered the land, had it surveyed and paid the State part of the purchase money; that Sherrill died, and in 1886 Sherrill's son-in-law, one I. J. Slaughter, by fraud and a promise to hold the lands for the heirs of Sherrill, procured a certificate from the entry taker of Graham County, where the lands lay; that he was the assignee of Sherrill; that upon presentation of said certificate to the Secretary of State a grant was duly issued to said Slaughter, 13 October, 1886, and recorded in Graham County, 18 December, 1890. I. J. Slaughter conveyed the land to R. B. Slaughter; he conveyed to Lewis Thompson & Co., who sold to the Thompson-Canby Lumber Company, who in turn sold to James Charles, C. E. Boyd and George Belcher, who conveyed to the Buchanan Lumber Company, who conveyed to the Whitney Manufacturing Company.

This action is against the two defendant companies last named and I. J. Slaughter, to have them decreed trustees for the plaintiffs, heirs at law of Samuel P. Sherrill, for one-half of said tract. The jury found that I. J. Slaughter procured the certificate of the assignment of the entry by fraud, but that each and every of the successive grantees of land above named took without notice of the fraud.

These successive deeds were all duly recorded. The plaintiffs admit, in their brief, that these subsequent grantees were all purchasers without notice, but contend that they were fixed with constructive notice of the fraud, because by tracing the title back they would have seen that the grant was issued to Slaughter upon the certificate of an assignment of the entry. But such assignment is not *per se* presumption of
(521) fraud; and if the grantees had traced their title back to the grant, they would have found duly recorded the certificate of the entry taker of Graham County: "I do hereby certify that it appears, from information before me, that I. J. Slaughter is the assignee of Samuel P. Sherrill, deceased, and that grant for the within No. 2500 should issue in his name. This 20 August, 1886. N. G. Phillips, entry taker for Graham County."

This action was begun 17 March, 1908. There had been an action begun 22 March, 1907, in which a nonsuit was taken. The defendants (except I. J. Slaughter, who did not resist judgment) were purchasers for value and without notice, from a line of grantors, also purchasers for value and without notice, under conveyances duly recorded. The defendants pleaded the ten-years statute, the grant to Slaughter having issued more than twenty years and having been recorded more than seventeen years before this action was begun; and the action, in which nonsuit was taken, was begun less than a year prior to the institution of this.

Upon the issue on the statute of limitation the court instructed the jury to answer it No as to Slaughter, but that they need not answer it as to the other defendants, for they did not have notice and the plaintiffs did not have an interest in the land. He so found and adjudged in the judgment. As the facts are uncontradicted, this was a matter of law, though the judge, if so disposed, might have directed the jury to answer the issue Yes as to the other defendants. Revisal, sec. 399. An action to have a party declared a trustee is barred by ten years. *Johnston v. Lumber Co.*, 144 N. C., 717; *Norcum v. Savage*, 140 N. C., 472; *McAden v. Palmer*, 140 N. C., 258; *Ritchie v. Fowler*, 132 N. C., 788; *Norton v. McDevit*, 122 N. C., 759. An enterer of Cherokee lands is barred by ten years from the registration of the grant to another. *Frasier v. Gibson*, 140 N. C., 272.

Besides, a purchaser for value from one whose deed was procured by fraud gets a good title if he has no notice of the fraud. *Odom v. Riddick*,

104 N. C., 515, and cases there cited. Even a purchaser with notice of the fraud from an innocent purchaser without notice gets good title. *Glenn v. Bank,* 70 N. C., 205; *Fowler v. Poor,* 93 N. C., 466.

His Honor properly instructed the jury that, if they believed the evidence, the plaintiffs were not equitable owners of the land nor entitled to have the defendants declared trustees for their benefit.

The other exceptions require no discussion.

No error.

Cited: *Lynch v. Johnson,* 171 N. C., 615.

(522)

A. H. COLVARD v. CAROLINA AND TENNESSEE SOUTHERN RAILWAY COMPANY.

(Filed 23 December, 1909.)

Principal and Agent—Account Stated—Admissions—Receipt—Agent's Unauthorized Acts.

Plaintiff, being indebted to a bank, delivered, at an agreed price and under a contract of purchase with defendant railroad, a certain number of crossties at said road and told defendant to send statement and certificate of the amount to the bank. Thereafter defendant accepted the ties, but at a reduced price, and sent statement accordingly to the bank and had the bank to receipt the statement "in full of above account." The plaintiff notified both the bank and the railroad company that he would accept the payment only in part: *Held,* (1) the account rendered by defendant to the bank was no more than an admission that it owed the plaintiff the sum stated therein; (2) the receipt of the bank was not in full of plaintiff's demand, but only in full for the amount stated; (3) there was no evidence to warrant the bank to receipt for plaintiff in full of his demand, and such receipt would not be binding upon him.

APPEAL by defendant from *Ferguson, J.,* at July-August Term, 1909, of SWAIN.

The facts are stated in the opinion of the Court.

A. M. Fry for plaintiff.

Moore & Rollins for defendant.

CLARK, C. J. The plaintiff delivered certain crossties upon defendant's right of way at an agreed price. Subsequently the defendant reduced the price of ties, and thereafter inspected and accepted plaintiff's ties and offered to pay the reduced price. This the plaintiff declined to accept. There was no dispute as to the number of ties.

The plaintiff, being indebted to the bank, told the defendant to send a statement and certificate of the amount due him to said bank. The account, when rendered, was for the proper number of ties, but calculated at the reduced rate and totaling $316.20, being $73 less than the amount due on the basis of the contract price. The plaintiff notified both the defendant and the bank that he would accept said sum only in part payment. The bank receipted in full "of above account."

The defendant introduced no evidence that the plaintiff ever intended or agreed to accept less than the contract price. The evidence is plenary and uncontradicted that he did not. The account rendered was (523) no more than an admission by the defendant that it owed plaintiff $316.20. The bank's receipt was only for the "above account," *i. e.*, for the amount due upon that admission. It did not purport to be in full of plaintiff's demands, and had it been it would have been unauthorized. The defendant showed no such authority, and, indeed, the evidence of the bank and of the plaintiff was that the plaintiff refused to authorize the acceptance of the $316.20, except as part payment.

This case is totally different from *Kerr v. Sanders,* 122 N. C., 635, and the cases cited under it in the annotated edition. There a check was sent the creditor, reciting in the face of it "in full for services." This the defendant endorsed and cashed, thereby accepting it as full settlement. A later case is *Armstrong v. Lonon,* 149 N. C., 435.

No error.

T. B. CURTIS, ADMR., v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 23 December, 1909.)

1. Questions for Jury.

In this case the issue as to negligence was one entirely of facts, with the burden of proof on defendant, and no error is found to have been committed on the trial.

2. Measure of Damages.

In this case no error is found on the part of the lower court upon the issue of damages, as upon the evidence the damages awarded were proper upon defendant's own theory.

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

APPEAL from *Joseph S. Adams, J.,* at September Term, 1909, of BUNCOMBE.

Action, to recover damages on account of the negligent killing of plaintiff's intestate, B. Allen Bryant, a passenger, who was admitted to

have been killed in a collision between a passenger and freight train of defendant company, alleged to have been caused by the negligence of the defendant Leonard, a brakeman in the company's employment.

The two issues of negligence and damage were submitted and found for the plaintiff. The defendant appealed.

Zeb. F. Curtis and Craig, Martin & Thompson for plaintiff.
Moore & Rollins and W. B. Rodman for defendant.

PER CURIAM: 1. In respect to the issue of negligence, the mat- (524) ter in controversy is one of fact purely, with the burden upon the defendants to show that they discharged their duty to the passenger, and we find no error committed on the trial of it.

2. In respect to the assignment of error in the charge of the judge upon the issue of damage, we are of opinion that it is unnecessary to pass upon or discuss it. The evidence in regard to the net earnings of the deceased, and his age and condition in life, business, etc., is uncontradicted, and we think that it fully warrants the sum awarded by the jury, even if it be gauged with reference to the theory contended for by defendant.

No error.

The Chief Justice did not sit on the hearing of this case.

CHARLES E. MERRILL v. SOUTHERN RAILWAY COMPANY.

(Filed 23 December, 1909.)

Railroads—Negligence—Burden of Proof—Pedestrians, Unexpected Acts of—Evidence—Nonsuit.

According to plaintiff's evidence, in an action against a railroad company for damages for an injury alleged to have negligently been inflicted on him by defendant, he was a brakeman who had been left by one section of a freight train, and endeavored to catch the second section. He crossed the track upon which he saw this second section was switching, and walked along the track in a path used by employees. When the train was backed down the track going in the same direction, at a speed of four miles an hour, he became dizzy from faintness and, being a distance of eighteen inches from the track, fell on it, and was injured. There was no one on the end of the last car. There was testimony as to the distance of the train from him at the exact moment of his falling, though it appeared that the train must have been less than fifteen feet. There was no evidence that a train of this character could have been stopped in time to avoid the injury, under the circumstances: *Held*, there was no sufficient evidence that the injury would have been averted had there

been a brakeman on the last car, and as the burden was on plaintiff to show the proximate cause of the injury, which he failed to do, a motion for a judgment of nonsuit should be sustained.

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

APPEAL from *Joseph S. Adams, J.*, at September Term, 1909, of BUNCOMBE.

Action to recover damages for personal injuries sustained by
(525) plaintiff, a brakeman in the employment of the Southern Railway Company, at Statesville, on 13 May, 1905.

The usual issues of negligence, contributory negligence and damage were submitted to the jury and found for plaintiff. Defendant appealed.

Locke Craig, J. H. Merrimon and J. G. Merrimon for plaintiff.
W. B. Rodman and Moore & Rollins for defendant.

PER CURIAM: The Court is of the opinion that the motion to nonsuit should have been sustained, upon the ground that there is no sufficient evidence that the alleged negligence was the cause of the injury. The plaintiff, according to his own evidence, was a brakeman on the first section of No. 71, a freight bound for Asheville. Having been left at Statesville, he was endeavoring to catch the second section of No. 71. He crossed the track, upon which the Taylorsville train was switching, and then walked alongside the track, in a path used by defendant's employees, between the tracks. This train backed along the track, going in the same direction as plaintiff, at a speed of four miles an hour, with no one on the end of the last car. When plaintiff crossed the track and turned down it, he saw the Taylorsville train coming towards him. Plaintiff continued to walk on, alongside the track, until he became dizzy from faintness, and fell on the track and was injured by the Taylorsville train. He states that, before he fell, he looked back once, and this train, composed of an engine and three freight cars, was approaching him. He was eighteen inches from the side track when he fell; so that, if he had not fallen, the train would have passed him safely. He states that the last time he looked back and saw the train it was a half rail (about fifteen feet) from him. He does not know how much time elapsed between the time when he turned and saw the train, half a rail distant, and the moment he fell. We think there is no sufficient evidence that the injury could have been averted had there been a brakeman on the rear end of the train, and that the injury, however lamentable, was an accident, which, under the circumstances, could not well have been prevented.

There is no evidence that this train was as far off as fifteen feet when

plaintiff turned and saw it approaching. When he first saw it, as he crossed and turned down the track, it was three or four rails distant and approaching him at four miles an hour. It had gained on him, so that it was within half a rail when he last turned and saw it. How long after this it was before he fell on the track the plaintiff does not undertake to say. Neither he nor any other witness knows. The (526) train was evidently about up with plaintiff at the time he fell on the track, and there is no sufficient evidence that it could have been stopped in time to save him.

It is true witness Glenn testifies that he has seen an engine with two cars stopped in ten feet when going four miles an hour, but he also states that he will not undertake to say in what distance this Taylorsville train could have been stopped, as he did not know how it was loaded or how many cars it had.

The plaintiff, an experienced brakeman, who saw this particular train, does not say it could have been stopped in time, and does not pretend to know how close it was to him when he fell.

It is rudimentary that negligence, to be actionable, must be the proximate cause of an injury, and that the burden of proof is on the plaintiff to make out such a case. The plaintiff's evidence fails entirely to show that at the time he fell the train was far enough distant to be stopped before reaching him. In this respect his case is not helped by the evidence offered by the defendant, all of which is to the effect that plaintiff stumbled and fell across the track, almost immediately in front of the train, and that it could not possibly have been stopped before reaching him.

In this respect this case differs materially from *Sawyer v. R. R.*, 145 N. C., 24. The place where Sawyer fell and remained on the track was seventy-five yards from the log train and skidder, and the evidence was plenary that it was moving at a rate of two miles per hour and could have been stopped in twenty-five or thirty feet.

The motion to nonsuit should have been granted, and it is so ordered. Reversed.

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

(527)

ALICE D. WILKIE ET AL. v. NATIONAL COUNCIL UNITED AMERICAN MECHANICS.

(Filed 23 December, 1909.)

Insurance, Life—Fraternal Orders—Good Standing—Past Dues—Waiver.

In an action to recover upon a death certificate of the National Council U. A. M., it appeared that the insured was in arrears for weekly dues to the local lodge for eight months preceding his death. The condition of the insurance, as stated in the certificate, was that the insured must be a member in good standing in the subordinate lodge affiliating with the National Council, and in good standing of the Funeral Benefit Department; and by the Constitution and By-Laws of the Order, that he would forfeit all his rights and privileges, except that of being admitted to the council chamber during its session, if he should become more than thirteen weeks in arrears for weekly dues: *Held*, (1) that under the express stipulations of the certificate on which the cause of action was based, no recovery could be had; (2) a payment made by the local lodge to the National Council of a portion of certain fees due the latter by the former, necessary to preserve its connection and standing, could not be considered as a waiver.

APPEAL from *Justice, J.*, at January Special Term, 1909, of RUTHERFORD.

Action to recover on a death certificate. There was a verdict for plaintiff, and judgment, and defendant excepted and appealed.

McBrayer, McBrayer & McRorie for plaintiff.
S. Gallert for defendant.

PER CURIAM: The action is brought on a certificate, in terms as follows:

"The National Council, Junior Order United American Mechanics, United States of America (incorporated April 10, 1893), will pay to the legal dependent of C. D. Wilkie, within thirty days from the proof of his death, the sum of five hundred dollars ($500), upon the condition that the said C. D. Wilkie is now and shall be at the time of his death a beneficial member in good standing of a subordinate council of said order, and affiliating with the national council of said order, and also a member in good standing of the funeral benefit department of said national council, in Class B, in accordance with the laws of said national council, and his State and subordinate council, now in force or hereafter adopted prior to said death."

On the trial it appeared that the C. D. Wilkie mentioned had
(528) died in July, 1906, and that at the time of his death he was in arrears for dues to the local lodge for the eight months preceding

his death. It was further shown that the regulations of the order affecting the question were as follows:

"Constitution and By-Laws for the Government of Subordinate Councils of Junior Order U. A. M., under the jurisdiction of the State Council of North Carolina, on page 37, Article IX, sec. 3:

"Sec. 3. A member of this council who is thirteen weeks or more in arrears for dues forfeits all his rights and privileges, except that of being admitted into the council chamber during its session."

On page 38, Article X, sec. 4:

"Sec. 4. Any brother who is thirteen weeks or more in arrears for weekly dues shall not be entitled to any sick benefits, nor shall he, in case of death, be entitled to funeral benefits."

From this testimony it appears that, while the name of C. D. Wilkie had been kept on the roll of the lodge, he was not a member in good standing, but only entitled to admission into the council chamber; and, therefore, by the express stipulations of the certificate on which the cause of action is based, the plaintiff could not recover. The case is controlled by the decision in *Melvin v. Ins. Co.*, 150 N. C., 398, and the authorities cited in that opinion, notably *Supreme Lodge v. Keener*, 6 Tex. Civ. App., 267; *Carlson v. Supreme Council*, 115 Cal., 466.

The payment by the local lodge of the portion of certain fees due the national council could in no sense be considered a waiver, affecting the validity of this claim; such payment was necessary to preserve the connection and standing of the local lodge itself, because they had kept the name of C. D. Wilkie on their roll and did not at all import that he was "in good standing in the subordinate council," according to the express condition of the certificate sued on.

The court should have given the defendant's prayer for instructions, to the effect that if the jury believed the evidence they would answer the issue for the defendant. For the error indicated, defendant is entitled to a new trial, and it is so ordered.

New trial.

Cited: Page v. Junior Order, 153 N. C., 409; *Clifton v. Ins. Co.*, 168 N. C., 501; *Lyons v. Knights of Pythias*, 172 N. C., 410.

(529)

CORNELIA WRIGHT, ADMRX., v. CANEY RIVER RAILWAY COMPANY, C. J. MORROW, TRUSTEE, ET AL.

(Filed 23 December, 1909.)

1. **Tramways—Regulations and Liabilities—Railroads—Fellow-servant Act.**

A corporation organized under a charter conferring the power of eminent domain, and the privilege of constructing tramways, railways, etc., for the transportation of passengers and freight, including logs, lumber, timber, etc., is considered and held as a railroad, and subject to the regulations and liabilities affecting such companies, including the statute known as the Fellow-servant Act, though its chief purpose was to exploit certain timber lands and market the timber growing thereon.

2. **Trusts and Trustees—Active Trusts—Negligence—Liability.**

A trustee acting in the cutting of timber and the operation of a railroad for marketing it, under the power conferred in a deed of trust, with the sanction and for the benefit of the *cestui que trust*, and to a large extent under their control, renders the trust estate liable for his negligent acts committed within the scope of his powers and in the furtherance of their interests.

3. **Same—Railroads—Personal Injury.**

When, under an instrument of agreement made and executed between an insolvent corporation and its creditors, a trustee is appointed to cut and sell a large tract of timber at a price to be submitted to and approved by the creditors, and acting largely under their control, and for the purpose of hauling or marketing the timber has sublet a railroad from one of the largest creditors, he is liable as such trustee, certainly to the extent of the trust estate conveyed, for the negligent killing of plaintiff's intestate while employed in the operation of the railroad.

4. **Appeal and Error—Amendments—Domicile—Evidence.**

Exceptions to allowing amendments in this case and declarations on the question of a change of domicile are without merit.

APPEAL from *J. S. Adams, J.*, at June Term, 1909, of YANCEY.

Action to recover damages for the wrongful killing of Turner Wright.

The action was instituted by Cornelia Wright, as administratrix of Turner Wright, deceased, on 1 August, 1907, against the Caney River Railway Company, C. J. Morrow, trustee for creditors of the Wood-Galloway Company, operating the road at the time, under a sub-lease, and William Whitmer & Sons, Incorporated, original lessee of defendant road and one of the principal creditors of the Wood-Galloway Company; and there was evidence to show that on 13 July, 1907, Turner Wright, intestate of plaintiff, an engineer, while operating an engine in one of defendant's trains, was killed by the giving away of a defective

trestle of defendant company's road, and under circumstances indicating negligence on the part of defendants. (530)

Defendants answered, denying that plaintiff was the duly qualified administratrix of deceased; denied that the trestle was negligently constructed, claiming that same was caused to give way by the wrongful conduct of two boys in turning a stream of water on the foundation of the trestle, and thus constituting this intervening negligence of responsible and independent agents as the proximate cause of the injury, and offered evidence in support of these allegations. Defendants contended, further, that in any event the defendant C. J. Morrow, trustee, was not responsible for the wrong in his official capacity as trustee, nor could the trust funds held by him be subjected to the claim of plaintiff.

It further appeared that, by virtue of an attachment issued, there were funds of the company in control and custody of the court available for satisfaction of the claim, if it should be declared a valid charge against the trust estate.

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

1. Was the plaintiff's intestate domiciled in Yancey County at the time of his death? Answer: Yes.

2. Was the plaintiff's intestate, Turner Wright, killed by the wrongful act and negligence of the Caney River Railway Company, as alleged in the complaint? Answer: Yes.

3. Was the plaintiff's intestate, Turner Wright, killed by the wrongful act or negligence of the defendant C. J. Morrow, trustee, as alleged in the complaint? Answer: Yes.

4. Did the plaintiff's intestate, Turner Wright, by his own negligence, contribute to his death, as alleged in the answer? Answer: No.

5. What damage, if any, is the plaintiff entitled to recover? Answer: Six thousand dollars.

Judgment on the verdict for plaintiff, and defendants excepted and appealed.

Hudgins, Watson & Johnston for plaintiff.
S. J. Ervin for defendant.

HOKE, J., after stating the case: The defendant company was organized under a charter conferring the power of eminent domain and the privilege of constructing tramways, railways, etc., for the transportation of passengers and freight, including logs, lumber, timber, etc.; and while its chief purpose was, no doubt, to exploit certain timber lands and market the timber growing thereon, for all purposes relevant to the present inquiry it is considered and held as a railroad and (531) subject to the regulations and liabilities affecting such companies,

including the statute known as the Fellow-servant Act (*Hemphill v. Lumber Co.,* 141 N. C., 487); and from this it follows that the defendant railway and the trustee in charge and control at the time are responsible for actionable negligence done in the operation of the road under the lease and in the exercise of the franchise. *Mabry v. R. R.,* 139 N. C., 388, citing *Harden v. R. R.,* 129 N. C., 354; *Logan v. R. R.,* 116 N. C., 940; *Aycock v. R. R.,* 89 N. C., 321.

It is chiefly urged for error that the defendant C. J. Morrow, trustee, has been held liable in his official capacity and the trust fund subjected to the payment of this claim; but we are of opinion that, on the facts presented here, the objection cannot be sustained. It is true, as a general rule, that a trust fund cannot be subjected to legal liability by reason of the torts of the trustee or his agents and employees, but this doctrine ordinarily exists in the case of passing trusts, or, when active, in those instances where the power and duties of the trustee are so defined and restricted by the law, or the provisions of the instrument under which he acts, that the principle of imputed responsibility similar to that which obtains in the case of principal and agent does not and cannot prevail.

Thus, in *McLean v. McLean,* 88 N. C., 394, and several cases of like import cited and relied upon by defendants, it was held that a liability arising out of a transaction with an executor or administrator is personal in its nature, and will not, as a rule, be considered as an obligation of the estate. This is on the ground that these officers act under power conferred by the law for the purpose of settlement and distribution according to facts and conditions existent at the time of the death of the deceased; and the power to charge the estate or create liabilities against it is not recognized unless contained in the will. Though, even here, if it is shown that an obligation has been assumed by an executor for the protection of the estate, and has inured to its benefit, its payment will usually be allowed him in an account with the distributees. But no such limitation can be allowed on the facts presented here. It appears that the Wood-Galloway Company, a corporation, owners of large timber interests in the counties of Mitchell and Yancey, and elsewhere, and also of large amounts of lumber placed in various yards in said counties, estimated at several millions of feet, having become embarrassed, on 7 June, 1907, conveyed the same to C. J. Morrow, trustee, with power to haul out and market said lumber and dispose of the timber lands
(532) and other property conveyed, and distribute the proceeds among the creditors mentioned and described in the deed; that on 5 June, 1907, two days before the date of the said deed, William Whitmer & Sons, Incorporated, one of the principal creditors of the Wood-Galloway Company and *cestuis que trustent* in the said deed, sublet to the

trustee in same the railroad company for carrying out the purposes of the trust, and the trustee took charge of the road and was using and operating the same in hauling out the lumber and otherwise carrying out the purposes of the trust when the intestate was killed. Among others, the instrument contains the following provisions:

"For the purpose of carrying this trust into effect, it shall be the duty of C. J. Morrow, trustee, aforesaid, after giving a bond in the sum of $15,000, with good and sufficient security, to be approved by the Unaka National Bank and City National Bank, of Johnson City, Tennessee, to at once take charge of all said property for the benefit of said creditors, to take an invoice of the whole of said property as early as practicable and as convenient, and to furnish a copy of said invoice to each of the creditors above named; to immediately deliver said lumber, on sticks, in piles or other conditions, on board the cars at Huntdale, North Carolina, from there to be shipped, under the direction of William Whitmer & Sons, Incorporated, or other persons whom the majority of the creditors in money may select, for which said William Whitmer & Sons, Incorporated, are to receive five per cent commission on entire sale of lumber and trade discount two per cent thirty days for shipment; the said trustee making copies, one of which shall be preserved by said trustee, one to be forwarded to the said Whitmer & Sons, Incorporated, and the third to be deposited in the Unaka National Bank, of Johnson City, Tennessee, for the use and benefit of the said creditors herein above named, and further copies with each of the other creditors above named. It shall be the duty of the trustee, aforesaid, to make an estimate of the quantity and value of all the standing timber or timber remaining uncut, of every character and description, and to furnish a copy of said estimate to William Whitmer & Sons, Incorporated, and deposit one copy with the Unaka National Bank, of Johnson City, Tennessee, and each of the above creditors above named, for the use and benefit of the creditors hereinbefore named, and retain a copy of same in his own offices, which shall be subject to the inspection and examination by said creditors at any and all times, to be done at as early a date as practicable and convenient; to sell all the said standing timber remaining uncut for cash, to the best advantage to all the parties therein concerned; and, to make sale and disposition of (533) the aforesaid timber, it shall be the duty of the trustee, aforesaid, before any offer for said timber shall be accepted, to submit the price, in writing, to the creditors hereinbefore named; that the said trustee shall make monthly statement of the amount realized from the sale of said lumber and timber, on or before the first day of each month, and he shall at no time retain in his possession or control a sum greater than $5,000 of the proceeds of said sale, but he shall at all times deposit and

keep on deposit at the Unaka National Bank, of Johnson City, Tennessee, proceeds of said sale of the said timber and lumber, and shall distribute and prorate the money arising from said sale among the creditors herein named, less the expense of handling the same and the operating expenses of the Caney River Railway Company, which he may deduct from any moneys in his hands, furnishing an itemized statement, on or before the first of each month, of all expenses in conducting the said operation; and whenever he shall have on hand a sum equal to $5,000, the same shall be distributed among the creditors herein named, by prorating the amount according to the respective amounts due and owing each of the creditors above named.

"The said trustee shall receive as a salary the sum of $125 per month and his expenses from the time he enters upon his duty and until he discharges his trust, the same to be deducted and retained monthly in his monthly statement of expenses.

"It is further understood and agreed between the Wood-Galloway Company and the bank creditors, above named, that the said creditors shall have the right, and it shall be their duty, to furnish a competent inspector to inspect said lumber, whose duty it shall be to inspect and grade all such lumber, observing the rules prescribed by the National Hardwood Lumber Association; and the books and records of said trustee and inspector, aforesaid, shall at all times be open to the inspection of any or all of said parties concerned, their agents or representatives, to this transaction."

It will thus be seen that, under a lease to him, in his capacity as trustee, and under the powers contained in this deed, *inter partes,* the defendant C. J. Morrow, in the use and operation of the railroad, was acting throughout with the sanction and for the benefit of the creditors, the *cestuis que trustent,* and to a large extent under their supervision and control, and should be held responsible, certainly to the extent of the property conveyed and in evidence, for both the contracts and torts of their trustee, made and committed within the scope of his powers and in furtherance of their interests. *Sawyer v. R. R.,* 142 N. C., (534) 1; *Jackson v. Tel. Co.,* 139 N. C., 347.

Not only is this true under the general principles of imputed responsibility indicated in these cases, but on authority more directly apposite, the defendant Morrow should be held liable in his official capacity. Thus, in *Mersey Docks Board v. Gibbs, Lord Westbury* lays down the position that trustees may render the property of their beneficiaries liable to third persons for an act done by them in the exercise of their trust. And in *Bennett v. Wyndham,* 4 *De G. F. & J.,* 259, it was held that trustees should be indemnified out of the trust estate, by reason

of a recovery had against them for negligence of employees in carrying out an order given in the management of the estate.

Applying the same principle in the case of *Miller v. Smythe,* 92 Ga., 154, the Court held: "1. Where a trustee legally and rightfully assumes in his representative capacity the relation of landlord, he is liable, in that capacity, to answer to the tenant for violation of any duty which the general law attaches as an incident to that relation. Accordingly, where a trustee, duly authorized, rented a store belonging to the trust estate, and in the contract of rental agreed to keep the shelving in the store in thorough order and repair, the trust estate is liable for damages occasioned by his failure so to do."

And a ruling substantially similar has been made by our own Court in *Cheatham v. Rowland,* 92 N. C., 340. In that case it was held that the trust fund could be subjected to a liability created by the trustees in the performance of their duty concerning the trust property, and that the trustees only were required to be made parties in order to afford appropriate relief. The cases cited and relied upon by counsel for defendant, or some of them, seem to have proceeded on the principle that the acts of the trustee by which a liability was sought to be imposed upon the trust estate were not within the scope of the powers contemplated and conferred by the deed, or they were cases where the estate and the entire dominion over it for the purpose of the trust were placed in the trustee, and the beneficiaries had no right of interference and control in its management. In *Parmenter v. Barstow,* 22 R. I., 245, plaintiff, passing along the highway, had her eye injured by chips and pieces of stone flying in her face, and attributed to the negligence of defendant's "agents and servants," engaged in cutting and chiseling stone on the premises. The facts of this case are not given with sufficient fullness to enable us to consider it satisfactorily in reference to the question presented here, but it does not appear in any report of the case to which (535) we have access that the trustees were occupying the premises or carrying on the business indicated in furtherance of the trust, or that the beneficiaries had any direct interest in or control over it of any kind; and so, in *Falardeau v. Students' Association,* 182 Mass., 405, the entire interest in a lease on a building was assigned to trustees for the remainder of the term, and responsibility of the corporation, the assignor, for negligence of the employees and servants of the trustees in the management of the building was denied, because it appeared that the trustee had the entire and exclusive control of the property, and the employees could in no sense be considered the agents of the corporation.

But in our case the beneficiaries were parties to the deed; the operation of the road for their benefit was clearly contemplated, its expenses provided for, and they were expressly given the right of interference

and control in the main purpose of the trust, to wit, the disposition of the lumber, etc.

Other decisions apparently adverse were rendered, on the ground that the claim was asserted in a court of law, and a recovery could not be made effective without threatening the integrity of the trust fund and the entire frustration of its chiefest purposes; but no such objection can obtain here, in a court having full jurisdiction of legal and equitable issues, and where a part of the trust fund is in the control and custody of the court and available in satisfaction of the claim.

We must not be understood as questioning in any way the position upheld in *Taylor v. Mayo,* 110 U. S., 163, and *Mitchell v. Whitlock,* 121 N. C., 166, to the effect that a trustee is personally bound for his contract or acts done in the management of the estate, unless it is otherwise expressly or clearly stipulated.

In *Mitchell v. Whitlock, supra,* the principle referred to is thus stated: "A trustee, purchasing goods or incurring any other liability, is personally liable for the payment thereof, unless his liability is limited by an agreement, expressed or implied, with the creditor."

In *Taylor's case, supra,* it appeared that Charles Davis, a retiring trustee, having a claim for fees and expenses, giving him a lien on the trust assets, turned over the fund to his successors, who gave him their written obligation, signed as trustees, that they would apply the funds of the estate in payment of his claim as they came to hand. The estate having become insolvent and the assets exhausted in suit by the administratrix of Davis, the trustees were held individually liable, and the principle was declared: "That if a trustee, contracting for the benefit
(536) of the trust, wants to protect himself from individual liability in the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trustee."

But in neither of these cases was it held that the trust estate could not also be held responsible to the creditor, or that the defendants, the succeeding trustees, on payment of the demand, could not be reimbursed from the funds of the estate, if there had been such funds available for the purpose. And in the present case, no doubt, the defendant Morrow could have been sued and held liable as an individual, because the intestate was one of his employees; but responsibility also attaches to the trust estate, and will be imputed to the beneficiaries, who are parties to the deed and were allowed and took part in its actual management and control.

There is no merit in the other exceptions, and they were very properly not insisted on. The amendment allowed made no substantial change in the nature of the demand, and we have seen at the outset that our act as to fellow-servants applies to the defendant road and its lessees, oper-

ating the same, as well. Further, the declarations of a person, on a question of domicile, as to his intent in going to a given place, are always considered relevant, certainly when reasonably free from suspicion. 1 Greenleaf, 162c. And the charge of the court as to the burden of proof is in accord with our recent decisions on the subject. *Overcash v. Electric Co.*, 144 N. C., 576; *Stewart v. R. R.*, 137 N. C., 687.

There is no reversible error shown, and the judgment below will be affirmed.

No error.

Cited: Blackburn v. Lumber Co., 152 N. C., 363.

W. F. LLOYD v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 23 December, 1909.)

1. **Railroads—Damages—Illegal Conduct—Master and Servant—Orders of Master.**

An action will not lie when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the State, nor is this principle impaired by reason of the fact that plaintiff was acting under the orders of the defendant, his principal, for an agent cannot justify such conduct by showing he was so acting.

2. **Railroads—Master and Servant—Employees' Hours of Service—Public Benefit—Interpretation of Statutes—Violation of Statute—Liability of Master—In Pari Delicto.**

Chapter 456, Public Laws of 1907, prescribing the hours of service of employees of railroad companies, to wit: not more than sixteen consecutive hours, and declaring that working beyond such hours shall constitute a misdemeanor on the part of the employees and the company requiring it, while doubtlessly passed for the well-being of railroad employees, was also intended for the benefit of the public, and hence, when it is alleged that plaintiff, a fireman on defendant's road, having been compelled and directed by defendant company to work continuously for twenty-three hours without food, was for that reason so incapacitated that the injury was caused him while attempting to board a slowly-moving train to reach a shanty-car where he was directed to go to get food, the plaintiff and the defendant company are *in pari delicto*, and plaintiff, having alleged an act in violation of said chapter 456, in order to maintain his action, cannot recover.

3. **Interpretation of Statutes—Operative Effect—Presumption—Exact Time—Evidence.**

Where a statute is to be in force from and after its ratification it will be held effective from the first moment of the day of its enactment, in the absence of evidence of the precise time; such evidence, however, will always be received when required for the prevention of a wrong or the assertion of a meritorious right.

4. Interstate Commerce—Acts of Congress—State Regulations—Questions Affected—State and Federal Control.

The act of Congress passed 4 March, 1907, to become operative 4 March, 1908, prohibiting train crews on trains engaged in interstate commerce to work more than sixteen consecutive hours, etc., not being in force when plaintiff, an employee on defendant railroad company's interstate train, was injured by reason of his working twenty-three consecutive hours without food, does not affect or impair the validity of chapter 456, Public Laws of 1907, then effective; for conceding the validity of the act of Congress, it does not impair or affect State legislation unless the Federal law is in operation, or is prohibitive in its terms or in some way affects the very question which the State legislation undertakes to regulate and control. *Semble*: This State legislation would be upheld notwithstanding the existence of the act of Congress, it being a matter both sovereigns may supervise at the same time, there being no necessary conflict between them.

CLARK, C. J., dissenting.

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

(537) APPEAL from *Long, J.*, at March Term, 1909, of ORANGE.

Action to recover damages for alleged negligent injury.

The complaint alleged, in substance, and there was evidence tending to show, that on 5 March, 1907, about 1:45 p. m. of said day, the plaintiff, in endeavoring to get aboard a moving freight train, with which he was employed, missed his hold and was run over and seriously and permanently injured, to his great and irreparable damage; that the (538) train in question was one carrying freight from Monroe, Va., to Spencer, N. C., for defendant road; that the injury was brought about by reason of the fact that he had been compelled or directed by defendant to remain continuously upon duty for twenty-three hours, without any sleep and without proper nourishment or opportunity to get it, and was thereby so weakened in mind and body that he could not properly exert himself for his own safety and protection, etc. The portion of the complaint stating the cause of his injury is as follows:

"5. That in passing over the road, above referred to, from station to station, the plaintiff had become weary, overworked and very weak and hungry, and after 2 o'clock a. m. on the morning of 5 March he had no opportunity whatever to secure food or sustenance of any kind; that while at Greensboro yard, about the hour of 12:30 o'clock on 5 March, the conductor of the train requested plaintiff to come with him (the conductor) to the shanty car to eat something, while *en route* to High Point, provided a substitute could discharge the duties of the plaintiff; that it appearing the substitute could relieve plaintiff, the engineer, who was plaintiff's superior officer, directed him (the plaintiff) to get off the engine while it was moving and go back to the shanty car for some food;

that in obedience to said directions, while the train was in motion, plaintiff left a substitute as fireman, in order to go back to the shanty car for the purpose of obtaining something to eat; that the engineer upon the train on which he was riding, well knowing that unless the train was stopped plaintiff must board it while it was moving, carelessly and negligently did not stop the train for him to get off or on, but the plaintiff, at a time when the train was moving slowly, under the direction of the engineer, alighted from the engine and stood in a roadway between the two tracks, on defendant's right of way, at a point about one mile from High Point, until the caboose car should come by, so that he could board the car for the purpose of obtaining food, which he was compelled to have; that he stood in said roadway, on the right of way of the defendant, between said tracks, waiting for the shanty car to reach him; that the train was running slowly, and under ordinary circumstances the plaintiff would have been able to board the car without danger or injury to himself, but the defendant's lessee had carelessly, negligently, wrongfully and unlawfully constructed on the side of the roadway an embankment, about one foot high, out of rock ballast, which it had used in ballasting the track, and, by reason of the careless, negligent, wrongful and unlawful conduct of the defendant's lessee in requiring plaintiff to work so many hours consecutively without rest, and so many hours consecutively without food or nutrition or (539) sleep, the plaintiff was weak, fatigued and exhausted and was not in a normal condition of body or mind; that in his effort to board the moving shanty car, and in the exercise of due care, his feet came in contact with the embankment of ballast, above referred to, which defendant's lessee had carelessly and negligently placed there, and this broke his hold upon the shanty car and caused him to fall, throwing him on the track, under the car, and wounding, bruising and maiming him, as will more fully appear.

"6. That by reason of the negligence, carelessness and wrongful and the unlawful conduct of the defendant's lessee, as hereinbefore set out, the plaintiff was thrown down and under the car, his head wounded and bruised, his left ankle and knee cut, bruised and sprained, and his right leg so mangled, broken and cut as to require amputation six inches above the knee, and the plaintiff suffered great pain, both of body and mind, has incurred much expense for nursing, medicine and doctors' bills, lost time and his power to labor, and is now unfiitted to do work, all to his great damage, in the sum of $20,000."

There was a motion for nonsuit properly entered, which was overruled, and, on issues submitted, the jury rendered a verdict for plaintiff. Judgment on verdict, and defendant excepted and appealed, and now moves here that the Court dismiss the action, "for that the complaint

does not state a cause of action, and for that it appears from said complaint that the plaintiff, at the time of the alleged injury, was engaged in violating the criminal laws of the State of North Carolina, and that his alleged injuries grew out of such violation of the criminal laws of the State."

V. S. Bryant, Aycock & Winston and H. A. Foushee for plaintiff.
W. B. Rodman and S. M. Gattis for defendant.

HOKE, J., after stating the facts: On 4 March, 1907, the day before the occurrence, our General Assembly enacted a statute containing the following sections:

"Sec. 4. Any conductor, flagman, engineer, brakeman or other member of any train crew who shall work for any railroad company more than sixteen hours in any twenty-four hours shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court: *Provided,* that it shall not be held a violation of this act by any conductor, brakeman, flagman, engineer, fireman or other member of any train crew who shall work more than six-
(540) teen hours in any twenty-four hours in order to clear the track or tracks of said railroad company from wrecks, wash-outs or obstruction caused by the act of God, so that they may bring the train or trains operated by them to a station on said road, which station shall be either the scheduled destination of said train or the station at which there is regularly a change of train crews; nor shall it be held a violation of this act by the corporation, officers or agents thereof to permit the said conductor, flagman, brakeman, fireman, engineer or other member of a train crew to work overtime under the circumstances and conditions hereinbefore stated.

"Sec. 5. This act shall be in force from and after its ratification."

And, under and by virtue of this statute, which was then in force, we are of opinion that, on the facts as now stated in the complaint, no recovery can be had.

It is very generally held—universally, so far as we are aware—that an action never lies when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the State. In Waite's Actions and Defenses, Vol. 1, p. 43, the principle is broadly stated, as follows: "No principle of law is better settled than that which declares that an action cannot be maintained upon any ground or cause which the law declares to be illegal," citing *Davidson v. Lanier,* 4 Wallace, 447; *Rolfe v. Delmar,* 7 Rob., 80; *Stewart v. Lothrop,* 12 Gray, 52; *Howard v. Harris,* 8 Allen, 297; *Pearce v. Brooks,* L. R. 1 Exch., 213; *Smith v. White,* L. R. 1 Eq. Cases, 626.

And this statement of the doctrine is supported and fortified by numerous decisions here and elsewhere. *Smathers v. Ins. Co., ante.*, 98; *King v. R. R.*, 147 N. C., 263; *Edwards v. Goldsboro*, 141 N. C., 60; *McNeil v. R. R.*, 132 N. C., 510; *S. c.*, 135 N. C., 682; *Burbage v. Windley*, 108 N. C., 357; *Puckett v. Alexander*, 102 N. C., 95; *Turner v. R. R.*, 63 N. C., 522; *Warden v. Plummer*, 49 N. C., 524; *Sharp v. Farmer*, 20 N. C., 255; *Wallace v. Cannon*, 38 Ga., 199. The decision in *McNeil v. R. R.*, 132 N. C., 510, was reversed on petition to rehear in 135 N. C., 682, but the reversal seems to have been on the ground that it was not necessary to resort to the contract prohibited in that case as a basis for recovery; and, further, that the statute in the inhibitive feature was only operative on the company; but both opinions are in support of the position applied to the present case. Nor is the principle, in its application to this case, impaired or in any way affected by reason of the allegation that the plaintiff was acting under the orders of defendant, for an agent cannot justify illegal conduct by showing that he was (541) acting under orders of his principal. Lawson on Rights and Remedies, 187, note 2, in which is cited, among other decisions, *Johnston v. Barber*, 5 Ga., 425; *Perminter v. Kelly*, 18 Ala., 716.

True, as pointed out in *Smathers v. Ins. Co., supra*, there is a class of cases which hold that a plaintiff will not always be considered *in pari delicto* and barred of recovery on that account, when a statute in its prohibitive feature operates only on one of the parties, and is evidently enacted for the protection of the other. As stated by Clark, in his work on Contracts, p. 336, "Parties are not to be regarded as being *in pari delicto* where the agreement is merely *malum prohibitum* and the law which makes it illegal was intended for the protection of the party seeking relief." While the wellbeing of the railroad employees was, no doubt, one of the motives which induced this legislation, the statute was also enacted for the benefit and protection of the public; and the principle just referred to, stated as one of the exceptions to the general rule, has no application to the case presented here, when the claimant must allege his own violation of the criminal law as the basis for his claim.

It could not be contended that the mere placing of a lot of ballast along the track, to be used in the necessary repairs of the road, and at a point one mile from any yard or usual stopping place, would of itself constitute negligence; and the complaint itself states the proximate cause of the injury to be as follows: "And, by reason of the careless, negligent, wrongful and unlawful conduct of the defendant's lessee in requiring plaintiff to work so many hours consecutively without rest, and so many hours consecutively without food or nutrition or sleep, the plaintiff was weak, fatigued and exhausted and was not in a normal condition of body or mind; that in his effort to board the moving shanty car and in

the exercise of due care, his feet came in contact with the embankment of ballast, above referred to, which defendant's lessee had carelessly and negligently placed there, and this broke his hold upon the shanty car and caused him to fall, throwing him on the track, under the car, and wounding, bruising and maiming him, as will more fully appear."

Again, it was contended in the argument that the statute, having been enacted the day before the occurrence, 4 March, would not become effective till the last moment of that day; and, this being true, the plaintiff had not worked for the prohibited period of sixteen hours from and after the time when the statute went into effect; but the authorities do not sustain such a position. The better doctrine seems to be (542) that, while a court will hear evidence and determine the precise moment of time when a statute was enacted, whenever this becomes necessary to prevent a wrong or to assert a meritorious right, in the absence of any such evidence or means of proof the statute will be held effective from the first moment of the day of its enactment. Mr. Bishop, in his work on Statutory Crimes, states this to be the rule. Bishop Stat. Crimes, p. 21, sec. 28. And an examination will show this to be a correct deduction from the decisions. *Louisville v. Bank,* 104 U. S., 469; *Burgess v. Salmon,* 97 U. S., 381; *Lapeyne v. United States,* 84 U. S., 191; *Kennedy v. Palmer,* 72 U. S., 316; *Arrow v. Hamering,* 39 Ohio St., 573.

The last case gives a very clear statement of the question presented, as follows:

1. This act took effect on the day of its passage, and, by presumption of law, from the commencement of that day, and not from its expiration.

2. This presumption will not prevail where it is in conflict with any right acquired in actual points of time, on that day, before the act took effect. In such case the exact time of the day may be shown.

And it was contended for defendant that in any event the service after sixteen hours was the thing prohibited, and that this undoubtedly was after the statute was in operation. It was further suggested that Congress had enacted a statute prohibiting railroads from requiring or permitting train crews on trains engaged in interstate commerce to work more than sixteen consecutive hours, etc. The statute having been enacted 4 March, 1907, to become operative 4 March, 1908, and that the enactment of such a law would render the State legislation in question of none effect; but that view does not obtain with us. If it be conceded that the act of Congress, in its present form, is a valid law, we have held that such legislation does not impair or affect State legislation unless the Federal law is in operation, and is prohibitive in its terms or in some way affects the very question which the State legislation undertakes to

regulate and control. *Reid v. R. R.*, 150 N. C., 753. And, further, under the doctrine announced and upheld in *Smith v. Alabama*, 124 U. S., 465, it would seem that the State legislation on this subject would be upheld, nothwithstanding the existence of the Federal statute referred to, this being a matter which both sovereignties may supervise at one and the same time, at least, when there is no necessary conflict between them. In that case the State of Alabama had enacted a law to the effect "That it should be unlawful for the engineer of any railroad train in this State to drive or operate or engineer any train (543) of cars or engine upon the main line or roadbed of any railroad in this State which is used for the transportation of persons, passengers or freight, without first undergoing an examination and obtaining a license, as hereinafter provided." And, as applied to an engineer engaged at the time in interstate commerce, the court held: "(1) That the statute of Alabama was not in its nature a regulation of commerce, even when applied to such a case as this; (2) that it was an act of legislation within the scope of the powers reserved to the States to regulate the relative rights and duties of persons within their respective territorial jurisdictions, being intended to operate so as to secure safety of persons and property for the public; (3) that so far as it affected transactions of commerce among the States, it did so only indirectly, incidentally and remotely, and not so as to burden or impede them, and that in the particulars in which it touched those transactions at all it was not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence; (4) that so far as it was alleged to contravene the Constitution of the United States, the statute was a valid law."

The motion made by defendant is permissible, under the rule (140 N. C., 662; *Sutton v. Walters*, 118 N. C., 495-500), and we are of opinion, as stated, that no valid cause of action is stated in the complaint, and the same must be dismissed.

Reversed.

CLARK, C. J., dissenting.

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

Cited: Parrott v. R. R., 165 N. C., 309; *Zageir v. Express Co.*, 171 N. C., 695; *Hinton v. R. R.*, 172 N. C., 589; *Courtney v. Parker*, 173 N. C., 480, 481.

N. B. DAWSON v. G. N. ENNETT.

(Filed 23 December, 1909.)

Wills—Estates for Life—Remainder—Living Issue—Limitations Over—Title —Contract to Convey—Specific Performance.

An estate was devised to S. for life, and after her death and the death of the devisor, to M., and should M. die without issue, to F., said M. being now alive with no living issue, but the mother of a child long since dead. The plaintiff, having acquired and holding the estate and interest of M., and having bargained the same to defendant at a certain contract price, brings his action to enforce the payment thereof, defendant resisting upon the ground that the plaintiff's title was not a good one: *Held*, on the death of M. without issue then living, the estate would pass under the will to F., or his heirs and assigns, and the title thus being imperfect, under plaintiff's allegations set forth in the complaint, it was no error to sustain defendant's demurrer thereto.

(544) APPEAL from *Guion, J.*, at November Term, 1909, of CRAVEN. Action, heard on demurrer to complaint. There was judgment sustaining the demurrer, and plaintiff excepted and appealed.

T. D. Warren for plaintiff.
Simmons, Ward & Allen for defendant.

HOKE, J. The plaintiff, having acquired and holding the estate and interest of Marietta O'Leary in a certain piece of land in said county, bargained the same to defendant at the contract price of $400 and agreed to convey a good title. Defendant having failed to pay, the present action was instituted to recover the purchase price, and defendant resisted recovery, assigning for cause that the title offered was not a good one.

The title of plaintiff was averred to depend upon the estate and interest taken by Marietta O'Leary, as devisee, under the will of William Daniel O'Leary, deceased; and the contents of the will, and the facts relevant to the question presented, are stated in the complaint, as follows:

1. "I loan to my beloved wife, Sarah Ann O'Leary, at my death, all my real estate during her natural life.

2. "After the death of the said Sarah Ann O'Leary, and at my death, I give and bequeath to my grandchild, Marietta O'Leary, all of the real estate and one-half of the personal estate loaned to the said Sarah Ann O'Leary during her natural life, belonging to me at my death, both real and personal, to be held by her, her heirs, executors, administrators or assigns, forever.

3. "But if the within-mentioned grandchild, Marietta O'Leary, die without an issue, in that case I give and bequeath to my nephew, Francis

Castex, all my real estate at my death and at the death of my wife, Sarah Ann O'Leary, to the said Francis Castex, to be held by him, his heirs, executors, administrators or assigns, forever."

4. Said William D. O'Leary died in 1865; said Sarah Ann O'Leary died shortly after, and said Marietta O'Leary is still living. Said Marietta O'Leary was the mother of one child, long since deceased, and said Marietta O'Leary has no living descendants.

Upon these facts, our authorities are to the effect that, under (545) the will of *William Daniel O'Leary,* the devisee, Marietta, took an estate in fee simple, defeasible on her dying without issue living at the time of her death. *Harrell v. Hagan,* 147 N. C., 111; *Sessoms v. Sessoms,* 144 N. C., 121; *Whitfield v. Garris,* 134 N. C., 24; *Wright v. Brown,* 116 N. C., 26; *Buchanan v. Buchanan,* 99 N. C., 308; *Smith v. Brisson,* 90 N. C., 284; *Gibson v. Gibson,* 49 N. C., 425.

In the more recent case of *Harrell v. Hagan, supra,* speaking of the time to which the determination of a contingent estate of this character should ordinarily be referred, the Court said: "Under several of the more recent decisions of the Court, the event by which the interest of each is to be determined must be referred, not to the death of the devisor, but to that of the several takers of the estate in remainder, respectively, without leaving a lawful heir," citing *Kornegay v. Morris,* 122 N. C., 199; *Williams v. Lewis,* 100 N. C., 142; *Buchanan v. Buchanan,* 99 N. C., 308. And the authorities referred to fully support this statement.

Applying the doctrine, the title offered by plaintiff (being that taken by Marietta O'Leary, as devisee under the will) is defective, in that, on her death without issue then living, the estate would pass, under the will, to Francis Castex or his heirs or assigns.

In the case of *Hathaway v. Harris,* 84 N. C., 96, cited by counsel for the appellant, the devisee had issue living at the time of his death, and the question now presented did not appear.

There is no error, and the judgment of his Honor sustaining the demurrer must be

Affirmed.

Cited: Perrett v. Bird, 152 N. C., 221; *Elkins v. Seigler,* 154 N. C., 375; *Smith v. Lumber Co.,* 155 N. C., 391; *Rees v. Williams,* 165 N. C., 208.

CORA M. TRULL, ADMRX., v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 23 December, 1909.)

1. **Railroads—Death by Wrongful Act—Nonsuit.**

While the requirements of Revisal, sec. 59, giving a right of action for death caused by the wrongful act, etc., of another, provided it be "brought within one year after such death" is not in strictness a statute of limitation, but a condition affecting the cause of action itself, yet when such suit has been brought within the time specified by this section, it comes within the provisions of Revisal, sec. 370 (Code, sec. 166), to the effect that if an action shall be commenced within the time prescribed therefor and the plaintiff be nonsuited, etc., he may commence a new action within one year after such nonsuit, etc.

2. **Same—Bill of Peace—Procedure.**

When an action for death caused by a wrongful act of another, etc., has been brought within the time prescribed by Revisal, sec. 59, the provisions of Revisal, sec. 370, allowing another action thereon to be brought within one year, etc., applies as often as a nonsuit is taken; this on the idea that the time the first action was pending is not counted against plaintiff, the remedy to prevent vexatious litigation being some procedure in the nature of a bill of peace.

3. **Railroads—Crossings—Signals—Duty of Pedestrian—Look and Listen—Contributory Negligence—Evidence—Nonsuit.**

When it appears from the evidence that plaintiff's intestate was standing near a railroad crossing waiting for a train to be moved on a track in front of him, and unexpectedly and without explanation stepped from a place of apparent safety directly and immediately in front of a moving shifting-engine in plain view, and was thereby killed, though the engine did not give the customary crossing signals or warnings, the plaintiff has failed to exercise that degree of care for his own safety, which it was his duty to observe, and a motion of nonsuit upon the evidence should be sustained upon the issue of contributory negligence.

(546) APPEAL from *Webb, J.*, at October Term, 1909, of MECKLENBURG.

Action to recover damages for alleged negligent killing of the plaintiff's intestate.

It appeared in evidence that on 9 March, 1903, the intestate was run over and killed by a train of defendant company, as he was endeavoring to cross the railroad at a public crossing, in the town of Monroe, N. C.; that plaintiff, having duly qualified as administratrix, instituted an action to recover for the alleged negligent killing within twelve months of the occurrence, and that same was pending in the Superior Court of Union from term to term till Fall Term, 1904, when a judgment of nonsuit was entered, and within twelve months of such judgment plaintiff commenced a new action against defendant company in

the county of Mecklenburg, and same was there pending till April Term, 1908, when a second judgment of nonsuit was had, and plaintiff commenced the present action against defendant for such alleged cause on 10 March, 1909; and on the trial the facts and circumstances of the transaction as claimed by plaintiff were also shown in evidence. The case on appeal further states:

"At the conclusion of the plaintiff's evidence, the defendant moves to nonsuit, under the Hinsdale Act. The court granted the motion, upon two grounds: (547)

1. That the plaintiff's action is barred by the statute of limitations, not having been brought within the time the law requires actions in such cases to be brought.

2. From all the evidence introduced by the plaintiff, the court is of the opinion that the plaintiff is not entitled to recover.

Thereupon, judgment was rendered, as appears in the record, and from the foregoing ruling of his Honor, and from the said judgment in the case, the plaintiff appealed to the Supreme Court and assigned said ruling and judgment as error.

E. L. Preston and J. D. McCall for plaintiff.
Burwell & Cansler for defendant.

HOKE, J., after stating the case: The first ground for his Honor's ruling, as indicated in the above statement of the case on appeal, has been expressly resolved against the defendant's position in *Meekins v. R. R.*, 131 N. C., 1.

True, we have held in several well-considered decisions that the requirement of the statute (Revisal, sec. 59), giving a right of action for death caused by the wrongful act, neglect or default of another, that such action shall be "brought within one year after such death," is not in strictness a statute of limitation, but is a condition affecting the cause of action itself. *Gulledge v. R. R.*, 148 N. C., 567; *Best v. Kinston*, 106 N. C., 205; *Taylor v. Iron Works*, 94 N. C., 525. But in *Meekins v. R. R., supra*, the Court held that when an action has been originally instituted within one year from the death, this requirement of the statute was complied with, and thereafter the action was subject to the provisions of the Code, sec. 166, now sec. 370, Revisal, to the effect that if an action shall be commenced within the time prescribed therefor, and the plaintiff be nonsuited, etc., the plaintiff, etc., may commence a new action within one year after such nonsuit, etc.; and the present Chief Justice, delivering the opinion, said: "The defendant contends that this provision is under the title in the Code applying to *limitations*, and that the time prescribed under section 1498 is not strictly

a statute of limitations. *Best v. Kinston,* 106 N. C., 205. But the original action was brought within the time prescribed in section 1498, and therefore it does not here matter what the nature of that prescription is. On the other hand, the time within which a new action may be commenced after a nonsuit, etc., is a statute of limitation, and applies to all cases where a nonsuit, etc., has been sustained. This statute (Code, sec. 166) contains no exception of cases under section
(548) 1498, or of any other cases where the time prescribed for bringing the original action might not be strictly a statute of limitation. We know no cause why the privilege to commence a new action within a year after nonsuit should not apply equally to all cases of nonsuit. The statute makes no distinction, and there is certainly none in the reason of the thing, which is the same as to that class of cases as in any others."

This has been the accepted construction of the statute, now Revisal, sec. 370, as it affects causes of action of this character, since the decision was rendered, in September, 1902, and the case has since been cited with approval several times and held to be decisive. Thus, in *Gulledge v. R. R., supra, Associate Justice Brown* said: "Nor have we overruled *Meekins v. R. R.,* 131 N. C., 1, in which the original action was brought within one year after death," and quotes a portion of the opinion of the Chief Justice, as above stated.

And in *Nunnally v. R. R.,* disposed of at Spring Term, 1904, in a *per curiam* opinion (134 N. C., 754), the injury had occurred in June, 1902, causing intestate's death in October following, and the nonsuit was taken in January, 1904, and *Mr. Justice Connor,* writing for the Court, said: "The judgment of nonsuit must be affirmed. This does not prevent the plaintiff from bringing another action, if so advised."

Not only is this the primary significance of the language of the statute, giving a right of action in case of wrongful conduct causing death, and its true meaning, as established by these authoritative interpretations, but this construction is in accord with right, reason and justice. No doubt the chief consideration for this requirement of the statute was to notify defendants, frequently the employers of labor in large numbers, that their attention might be drawn to the occurrence, and the evidence bearing upon it noted and in some way secured and preserved, and this purpose is reasonably met by the original institution of the action within the time specified. On the contrary, after action is commenced, a trial can rarely ever be had within the year. A deserving plaintiff is sometimes unavoidably interrupted in the preparation of his case. At times he may be presently surprised on the trial; and to hold that a nonsuit, rendered necessary in some such way, should bar any further action,

would in many cases work grave injustice and amount to denial of a substantial right.

It wase urged on the argument that a proper construction of section 370 of the Revisal, allowing a new action to be brought within one year after nonsuit, would be that the provision applies only to one nonsuit, and thereafter the original restriction on these causes of (549) action should obtain. But we do not think this a correct position. In *Meekins v. R. R., supra,* it was said that the section in question applies to "all cases of nonsuit"; and, while we find no case at hand where the facts directly present the question, it has been the construction of the statute, uniformly acted on with us, that the provision applies as often as a nonsuit is taken; this on the idea that the time the first action was pending is not counted against the plaintiff, the only remedy in case of vexatious litigation being some procedure in the nature of a bill of peace.

Thus, in *Long v. Orrell,* 35 N. C., 123, it was held:

"By bringing an ejectment, a party then having the right of entry shall continue to have it as long as that action pends; and afterwards, also, if within one year afterwards he will bring another action, and so on, from time to time, no matter who may be at any time the tenant in possession."

And *Chief Justice Ruffin,* in the opinion, thus further refers to this position, as follows: "The Court is well aware of the consequences of this construction, as it leaves the right of entry without limitation, if the party entitled will bring an ejectment within seven years, and successive actions afterwards, within a year after a verdict, even, against him in prior suit. But the terms of the act, and the nature of the rights on which it operates, render it the unavoidable construction; and if it proves a mischief, it is not for the judiciary, but the Legislature, to apply the corrective by adopting a provision similar to that in the Statute of Anne, or requiring the second or some certain one of the actions to be prosecuted with effect, or in some other way giving the repose to which long possessions are entitled, in policy and justice."

And in *Freshwater v. Baker,* 52 N. C., 256, *Manly, J.,* said: "It has been repeatedly held that a nonsuit, though not especially named, is within the equity of the proviso in the fourth section of the Revised Statutes (Rev. Code, ch. 65, sec. 8). The time pending the first action *is not counted against plaintiffs,"* citing *Blackwell v. Hawkins,* 28 N. C., 428; *Long v. Orrell,* 35 N. C., 123.

It has been suggested that our present ruling is contrary to the principle this Court has upheld in interpreting certain contracts of insurance, by which a right of action is restricted to a specified time, as in *Muse v. Ins. Co.,* 108 N. C., 240. In *Muse's case* a careful examina-

tion of the facts will show that the first cause of action was on an
(550) award and the second was on the original policy of insurance
But if it be conceded that the position suggested correctly interprets *Muse's case,* we fail to find in this any sufficient reason for departing from our construction of this statute, accepted and acted on for a number of years, and which is in accord with the right reason and within the express meaning of its terms. And, further, in a subsequent decision of *Dibbrell v. Ins. Co.,* 110 N. C., 208, and as relevant to the question now presented, *Avery, J.,* thus speaks of the decision in *Muse's case:* "In *Muse v. Assurance Co., supra,* this Court, following the current of authority, held that the stipulation that there should be a forfeiture unless suit should be brought within twelve months after the loss operated as a contract which might be waived, and not as a statute of limitation. Indeed, in that case it was declared that plaintiff might have submitted to judgment of nonsuit and brought a new action within a year after such judgment, though after the expiration of twelve months from the fire, if the limit has been imposed by a statute instead of by contract."

While we hold that the trial judge made an erroneous ruling as to the nonsuits and their effect on the rights of the parties, we concur with his Honor in ordering a nonsuit, on the ground that the facts in evidence failed to disclose a good cause of action.

From these facts it appears that the intestate was killed at a public crossing, in the town of Monroe, by an engine of defendant company, which approached without giving the proper signals; that this approach was in the daytime, in full view, if the intestate, in the exercise of proper care, had been properly attentive to his own placing and the dangers incident to it, and that this negligence on the part of the intestate was concurrent with that of defendant's employees at the precise time and place of the injury, and comes clearly within the accepted definition of contributory negligence, as contained and approved in many well-considered decisions on the subject. In *Cooper v. R. R.,* 140 N. C., 209, the Court, in defining the respective duties of railroads and pedestrians on a public crossing, quotes with approval from *Improvement Co. v. Stead,* 95 U. S., 161, to the effect that "Both parties are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty," and, among other things, held:

"Where the view is unobstructed, a traveler who attempts to cross a railroad track, under ordinary and usual conditions, without first
(551) looking, when by doing so he could note the approach of a train in time to save himself, by reasonable effort, is guilty of contributory negligence."

And while we have held in many recent decisions on the subject that facts and attendant circumstances may so qualify this doctrine in certain cases, the question of contributory negligence should be submitted to the jury, as, in *Inman v. R. R.*, 149 N. C., 123; *Gerringer v. R. R.*, 146 N. C., 32; *Sherrill v. R. R.*, 140 N. C., 252, the present demand does not fall within any of the exceptions indicated in these decisions. From the testimony it appeared that the intestate was standing on a crossing and near the main line of defendant's road, having been stopped by reason of a train standing on a track further on his way. While he stood in this position, a shifting engine, doing its work on the main line, passed down this track, going to a water tank, some distance away. In a short time the engine returned and slowed down at a switch, some thirty or forty steps from the crossing. The fireman got out, changed the switch, and the engine continued its course on to the crossing, and without giving the usual signals. Just at the crossing, and at the precise time of the impact, the plaintiff stepped from a position of apparent safety onto the track, just in front of the moving engine, and was run over and killed. The track here was straight; there was nothing to obstruct the view, and, so far as the evidence discloses, there was nothing to explain or qualify the intestate's obligation to look and listen and be otherwise properly attentive to his own safety.

On this statement, we think the intestate was guilty of contributory negligence, barring recovery, and the order of the court below dismissing the case on a judgment of nonsuit must be

Affirmed.

Cited: Coleman v. R. R., 153 N. C., 327; *Lumber Co. v. Hayes*, 157 N. C., 338; *Talley v. R. R.*, 163 N. C., 573; *Penninger v. R. R.*, 170 N. C., 474; *Davidson v. R. R.*, 171 N. C., 636.

SCOTT LUCKEY v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 23 December, 1909.)

1. Telegraph—Negligence—Death Message, Failure to Deliver—Measure of Damages—Evidence—Conduct and Conversation.

Upon the *quantum* of damages recoverable for the negligent failure of defendant telegraph company to deliver to plaintiff a message announcing the death of his mother, requesting him to come, and giving date of the funeral, after showing that plaintiff had given his mother money to visit him at his residence in a different town and for other purposes, that plaintiff visited her, and the affectionate and kindly feelings existing between them, it is competent for plaintiff to testify to a conversation between them had at her home the last time he had seen her alive, about a week before her death, to the effect that he had promised, at her solicitation

and request, that if possible he would visit her should she become worse, and have him notified.

2. Same.

Upon the *quantum* of damages recoverable by a son in his suit against a telegraph company for the negligent failure to deliver a message announcing the death of his mother, asking him to come, and stating the hour of the funeral, it is competent to show the feeling between the mother and son as a fact directly relevant to and embraced in the issue, and also the conduct of the parties towards each other and conversations between them tending to show such feelings at the last time they had met, when the son was leaving her on her sick bed, about a week before her death, the circumstances being such as to exclude any reasonable suspicion of their sincerity.

(552) APPEAL from *Justice, J.*, at July Term, 1909, of McDOWELL.

Action to recover damages for negligent failure to deliver a telegram. The evidence tended to show that the defendant company had negligently failed to deliver to plaintiff the following telegram: "Your mother died last night. Come home today. Will bury tomorrow." And by reason of said negligence plaintiff was prevented from being present at the time she was buried and being with the bereaved relatives, etc.

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

The facts are stated in the opinion of the Court.

W. T. Morgan for plaintiff.
Avery & Avery for defendant.

HOKE, J. It was admitted on the argument that the defendant company had negligently failed to deliver the message, and thereby prevented plaintiff being present till after the mother was buried; and the objection urged for error was to ruling of the court on the reception of certain evidence affecting the issue as to the *quantum* of damages. The testimony tended to show that the plaintiff had been a dutiful son to his mother; that he had her to visit him at Old Fort, paying her expenses both ways; had supplied her with money, and that the association between them was affectionate and kindly; that, a short time before her death, having heard she was ill, he had visited her, and, with a view of showing the kindly sentiment existent between them, plaintiff was allowed, over defendant's objection, to introduce the following evidence:

Q. What did your mother say to you at that time, with reference to your coming back in case she got worse? (Defendant objects.
(553) Sustained.)

Q. What did you say to your mother, if anything, in reference to coming back to see her in case she got worse? (Defendant ob-

jects. Overruled. Defendant excepts. Third exception.) A. I told her to notify me if she got worse, and I would come back to see her.

Q. When was that, with reference to your leaving, that you said that to her? A. It was just as I was fixing to leave, and I was standing by her bed.

Q. What was she doing, if anything? A. She was lying in bed, talking to me.

Q. What did you say? A. I said, "Mother, if you get worse, and notify me, I will come back to you."

Q. How far apart were you? A. I was stooping down over her, and she was lying in bed, and I had hold of her hand, fixing to leave.

And again:

Q. State what your mother said to you, Scott, when you told her goodbye, about a week before she died. (Defendant objects. Overruled, and defendant excepts to both question and answer. Eighth exception.) A. She told me when I left that if she got worse she wanted me to come back and see her, and I told her I would come back if I got the word in time, and she said she wanted me to come back and see the last of her, and I told her I would.

We are of opinion that the evidence received was clearly competent. The state of feeling between the mother and son was a fact directly relevant to the issue and embraced in it; and where this is true, both the conduct of the parties towards each other and conversations between them tending to show such feeling are admissible, the limitation being that either or both should be, at a time, and under circumstances to exclude any reasonable suspicion of their sincerity. We so decided in *S. v. Draughan, post,* 667, and decisions elsewhere of recognized authority, and text writers generally, are to the same effect. *Commonwealth v. Trefethen,* 157 Mass., 180-188; *Trelawney v. Coleman,* 4 E. C. L., 1; Barnewell & Alderson, *ibid.,* 13; Greenleaf on Evidence (16 Ed.), sec. 162d; Wharton on Evidence, sec. 269; Taylor on Evidence, sec. 580; McKelvey on Evidence, pp. 207-208. In *Trelawney's case, supra,* it was held: "In an action for adultery, letters by the wife to the husband (while living apart from each other), proved to have been written at the time they bore date, and when there was no reason to suspect collusion, are admissible evidence, without showing distinctly the cause of their living apart." And *Lord Ellenborough,* delivering the (554) opinion, said: "I have no doubt that these letters were admissible evidence. What the husband and wife say to each other is, beyond all question, evidence to show their demeanor and conduct, whether they were living on better or worse terms. What they write to each other may be liable to suspicion, but when that is cleared up, that ground of objection fails. That was satisfactorily explained in the present case

by proof of the letters being written at the time they bore date, and long before any suspicion of the wife's misconduct." And *Bayley, J.*, concurring, said: "I think these letters were properly received. When it is once established that the manner in which the husband and wife conduct themselves towards each other (when together) is admissible evidence, it follows that letters which in absence afford the only means of showing their manner of conducting themselves towards each other, are also admissible." In the citation from Greenleaf the author says: "So, also, statements describing one's fear, belief, cheerful or melancholy feelings, or the like, physical disgust, hostility or affection, and the like. On this principle, in actions for criminal conversation, it being material to ascertain upon what terms the husband and wife lived together before the seduction (or in any other case in which the feelings of either toward the other is material), their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence." And so McKelvey (2 Ed.), on p. 260, says: "Where a condition of mind is involved, the court relies upon and admits as evidence what all men are accustomed to rely and act upon. The mind betrays its condition in manner and speech, and upon this must rest the conclusions of others with respect to it. It constitutes original evidence and not hearsay." And Taylor, speaking in reference to it, says, further: "That the question whether they are feigned or real is for the jury." The authorities, therefore, are against the defendant's position, and the judgment must be affirmed.

No error.

Cited: Sherrill v. Telegraph Co., 155 N. C., 254; *Weeks v. Telegraph Co.*, 169 N. C., 706.

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(555)

W. B. MOORE v. A. Q. MOORE AND WIFE ET AL.

(Filed 23 December, 1909.)

1. **Lands—Possessory Action—Title—Death of Party—Abatement.**

An action for the possession of land involving title does not abate by the death of a party except by order of the court. Revisal, sec. 415.

2. **Same—Order of Court—Next Term—Criminal Term—Summons—Service—Reasonable Time.**

In an action for possession of lands involving title, it appeared that the plaintiff claimed under a deed from the defendant and his wife, and that, the death of the defendant being suggested, the court ordered that his heirs be made parties defendant. No process or notice being issued or given under this order, the court again ordered that notice issue or the action abate at the next term. A criminal term intervened, but before

the next civil term, all the heirs, at least those resident within the State, had been served, and this within two years from the date of the death of their ancestor: *Held*, (1) the second order, by fair intendment, meant that the action should abate if process on the heirs was not served before the next civil term; (2) the defendants' motion for abatement should be denied, it appearing that the service upon the heirs was made within two years after the death of the ancestor, within the time fixed by the order, and that the mother of the heirs continued to be a party defendant. *Rogerson v. Leggett*, 145 N. C., 7, cited, approved and distinguished.

3. Deeds and Conveyances—Mutual Mistake—Color.

When defendants, the heirs at law of plaintiff's grantor, have failed to set aside his deed to plaintiff for mistake, which admittedly covered the *locus in quo*, the deeds incident to the title become the property of the plaintiff, the grantee, as muniments of his title, and thereafter the occupation of the grantor, or his heirs, even if adverse, would be without "color."

4. Deeds and Conveyances—Mutual Mistake—Parties—Beneficial Owner—Declarations—Evidence—Res Gestæ.

A. conveyed by deed to C. certain of his lands, and C. conveyed the same to W., the plaintiff, who brings his action against A. for possession, the action involving title, and the death of A. being suggested, his heirs are made parties defendant: *Held*, (1) if properly pleaded, the equitable defense is available that, by mutual mistake, the land in controversy was embraced in the description of the deed from A. to C.; (2) C. was not a necessary party as he had conveyed all his interests in the land to plaintiff, and especially when he was practically the beneficial owner of the land from the beginning; (3) the declarations of the plaintiff that there was a mistake in the deed from A. to C. as contended for by the defendants, are competent evidence, being by the principal party in interest, made in the treaty or purchase and directly relevant to the issue. So far as it appears in this case, it was a pertinent fact in the *res gestæ*.

APPEAL from *Joseph S. Adams, J.*, at May Term, 1909, of (556) HENDERSON.

Action to recover possession of a piece of land. Summons in the action was issued 18 August, 1902, by W. B. Moore, present plaintiff, against A. Q. Moore and wife, L. B. Moore, grantors in the deed to A. C. Moore. Some time in 1906, the precise time not stated in the record, the death of A. Q. Moore was suggested and an order was made that his heirs at law be made parties defendant. No process was issued or notice given under this order; and at November Term, 1907, an order was entered that notice issue or action abate at the next term. Prior to the next civil term, process was issued and some of the defendants served, and thereafter publication was made for certain other defendants who were nonresidents. On these facts the defendants moved that the action abate as to the heirs of A. Q. Moore. Motion denied, and defendants excepted.

The plaintiff claimed the land in controversy under a deed from A. Q.

Moore and wife, L. B. Moore, to C. E. Moore, in October, 1887, purporting to convey the land described in the complaint and deed from C. E. Moore to W. B. Moore, plaintiff, purporting to convey same land, and offered said deeds in evidence, and it was admitted that said deed embraced the land.

Defendants answered, denying plaintiff's title, set up the statute of limitations, and, for a further defense, alleged that A. Q. Moore and wife had only bargained and sold to C. E. Moore and W. B. Moore a tract of land, the correct description of which, in terms, and by the contract between them, did not embrace the land in controversy, and, by mistake of the parties, the deed in question was so drawn as to include said land; and on the trial defendants offered, with other evidence tending to show that the contract was as defendants claimed, certain statements of plaintiff claimed to be relevant to the issue.

The court excluded the testimony offered, on the ground that C. E. Moore, the grantor in the original deed, was not a party or present at the making of the statement, and, second, because the evidence was not connected with the execution of the deed in which the alleged mistake was alleged to have occurred, and defendants excepted. The court further held that on the testimony neither party had ripened title by possession, and defendants again excepted. Verdict for plaintiff, judgment, and defendant excepted and appealed.

H. B. Stevens and Charles F. Toms for plaintiff.
O. V. F. Blythe for defendant.

(557) HOKE, J., after stating the case: Under our statute (Revisal, sec. 415), where the right survives, an action does not abate by the death of a party, except by order of the court (*Burnett v. Lyman,* 141 N. C., 500); and while we have held in *Rogerson v. Leggett,* 145 N. C., 7, that a failure of the court to make such order for a period of eight years or more, and when there was nothing to indicate that the heirs of deceased were aware that an action was pending against them, was such an abuse of legal discretion as to constitute error, and might be available in some instances as a defense, the principle does not apply, we think, to the facts presented here, when the mother of these heirs was and continued to be a party of record, and these heirs themselves, or all who were resident in the State, were served within two years from the death of their ancestor and within the time fixed by order of the court; for we hold that the order which was made in this case, by fair intendment, meant the next civil term, and did not contemplate the intervening criminal term of the court; and there was no error, therefore, in denying defendants' motions for abatement of the action.

Nor was there any error in the ruling of the trial court as to the stat-

ute of limitations. Unless there was a mistake in the deed from A. C. Moore and wife, their title passed, for it is admitted that the deed, as it stands, includes the land in controversy. If the title was conveyed, the deeds incident to the title became the property of the grantee as muniments of his title, and thereafter the occupation of the grantors, even if adverse, was, so far as appears, without color and did not exist for the length of time required. In fact, it was not shown to exist for seven years, even if there had been color.

We are of opinion, however, that there was error in holding that, in order to make the equitable defense set up by defendants available, it was necessary that C. E. Moore, the grantee in the deed assailed, should be made a party. It is well established that an equitable defense of this kind in impeachment of plaintiff's claim is available if properly pleaded. *Warehouse Co. v. Ozment,* 132 N. C., 839; *Farmer v. Daniel,* 82 N. C., 153; *Stith v. Lookabill,* 76 N. C., 465; *Ten Broeck v. Orchard,* 74 N. C., 409. And, on the facts presented, such defense is available against W. B. Moore, the present plaintiff. The evidence shows that the original contract was made with him, the bond for title was so drawn, and he has all along been the owner of the beneficial interest or the greater portion of it. More than this, it appears that C. E. Moore has conveyed all the interest he had in the land to W. B. Moore, the present plaintiff, and, as between him and the defendants, the entire interest to be affected by this litigation is now before the Court. It may be that C. E. (558) Moore is a desirable party; that he could be made such by order of the Court; but he is no longer a necessary party, and all the rights involved in the case can be determined without his presence. *Mullins v. McCandless,* 57 N. C., 425; *Polk v. Gallant,* 22 N. C., 395.

In this last case it was held, among other things: "That an assignor is not a necessary party to a bill against an assignee when it appears from both bill and answer that all the interest of the assignee has been transferred." And, this being an issue properly raised, the evidence offered by defendants tending to show that W. B. Moore, plaintiff, stated that the contract of purchase and the deed to C. E. Moore was only to include the land as alleged and contended by the defendants, should have been received. It was a statement by the principal party in interest, made in the treaty of purchase and directly relevant to the issue. So far as now appears, it was a pertinent fact in the *res gestæ. Fraley v. Fraley,* 150 N. C., 501.

For the errors indicated, there must be a new trial of the case, and it is so ordered.

New trial.

Cited: Sills v. Ford, 171 N. C., 741.

BREVARD LIGHT AND POWER COMPANY ET AL. v. LIGHT AND WATER COMMISSIONERS OF CONCORD.

(Filed 23 December, 1909.)

Municipal Corporation—Municipal Agencies—Removal of Causes.

Under chapter 87, Private Laws of 1905, the defendant board was created a department or agency of the municipal corporation of Concord, and among other things, expressly created for the purpose of operating and maintaining a system of waterworks and lights for the city; and a cause of action for damages for breach of contract made by the board within the scope of its public duties brought in a different county should be removed to the county wherein the town is situate, irrespective of the question as to whether the damages arose for a negligent discharge of an administrative duty or a technically governmental one. Revisal, sec. 420 (2).

APPEAL from *Ferguson, J.*, at April Term, 1909, of TRANSYLVANIA.

Motion, heard by *Ferguson, J.*, at April Term, of TRANSYLVANIA, to remove the trial to CABARRUS.

His Honor overruled the motion, and defendant appealed. (559) The complaint alleged that the plaintiff is a partnership, composed of three named persons, located and doing business at Brevard, in Transylvania County; that the plaintiff's business is the furnishing lights to the town of Brevard and its inhabitants, and it has an equipment for that purpose; that, needing additional equipment, it contracted to buy from the defendant certain machinery offered by it for sale, and a cause of action arose to it by reason of the delay of the defendant, in violation of its contract with plaintiff, which resulted in the damages sued for. The defendant denied in its answer any breach of contract and liability to the plaintiff; and, in support of its motion, averred it was a corporation, created by the Legislature of this State as a branch or agency of the city of Concord, and all of its duties were public in their character and related solely to the discharge of the duties prescribed by law in the government of the said city, as set forth in chapter 71, Private Laws 1905, entitled "An act to amend the charter of the town of Concord."

Welch Galloway, R. L. Gash, W. W. Zachary and Shepherd & Shepherd for plaintiff.

Montgomery & Crowell and Smith & Schenck for defendant.

MANNING, J., after stating the facts: The learned counsel for the plaintiff concede in their brief that if the decision of this Court in *Jones v. Statesville*, 97 N. C., 86, is applicable, his Honor erred in

denying the motion of defendant to remove the action for trial to Cabarrus County. We are satisfied, from an examination of the provisions of the act creating the defendant, to wit, chapter 71, Private Laws 1905, entitled "An act to amend the charter of the town of Concord," that the defendant is nothing more than a public corporation—quasi municipal—a department or agency of the municipal corporation, the town of Concord, charged with prescribed duties and powers in the administration of the affairs of said town, and incorporated solely to enable it to better discharge the public duties imposed upon it. The sixth section of the act would seem to remove all doubt as to the correctness of this conclusion by providing that "the contracts and engagements, acts and doings of said board, within the scope of its duty or authority, shall be obligatory upon and be in law considered as if done by the board of aldermen of the city of Concord; and said board of commissioners shall, for the city of Concord, take and hold the land, real estate, rights, franchises and the property of every kind now owned by said city of Concord, all that may hereafter be purchased for the purpose of operating and maintaining a system of waterworks and lights for said city," etc. The cause of action alleged by the (560) plaintiff against the defendant arises from an alleged breach of contract in the sale of certain machinery belonging to the defendant and determined by it to be unnecessary in the proper performance of its duties, under the provisions of the act of creating it. Section 420 (2), Revisal 1905, provides that actions for the following causes must be tried in the county were the cause, or some part thereof, arose "against a public officer or person especially appointed to execute his duties for an act done by him by virtue of his office."

In *Jones v. Statesville, supra,* this section was construed by this Court, in the following language, to embrace a municipal corporation: "The defendant is a municipal corporation, public in its nature; it is an artificial person, created and recognized by the law, invested with important corporate powers, public and, in a sense, artificial in their nature, and charged with public duties, which it executes by and through its officers and agents. We therefore think that actions against it fairly come within the meaning of and are embraced by the statutory provision first above recited."

It is unnecessary to determine with exactness whether the duties of the defendant are administrative, in this character, for a negligent discharge of which an action for damages would lie, as in *Jones v. Statesville, supra; Fisher v. New Bern,* 140 N. C., 506, and that class of cases; or technically governmental in their character, for a breach of which an action for damages will not lie, as in *Metz v. Asheville,* 150 N. C., 748; *McIlhenny v. Wilmington,* 127 N. C., 146; *Hull v. Roxboro,*

142 N. C., 453; for the reason that the real question is whether the defendant is simply an agency of the city of Concord, charged with important duties, public in their nature. We think that it is. Our conclusion is sustained by the decisions of the Supreme Court of Massachusetts in *O'Brien v. Thorogood,* 162 Mass., 598; *St. Louis v. Shields,* 62 Mo., 247; *People v. Solomon,* 51 Ill., 37; *Horton v. School Comrs.,* 43 Ala., 598. In our opinion, the defendant's motion to remove the action for trial to the county of Cabarrus, in which the city of Concord is situate, ought to have been allowed, and his Honor erred in denying it. The order of his Honor is

Reversed.

Cited: Cecil v. Hight Point, 165 N. C., 432.

(561)

R. J. BURGIN ET AL. v. B. F. SMITH.

(Filed 23 December, 1909.)

1. **Necessaries—Courthouse.**

The building and repairing of a courthouse by the county is a part of its necessary expense.

2. **Counties—Quasi Corporations—State Agencies—Legislative Powers—Courthouse—Necessaries—Limitation of Expenditure.**

A county is a quasi corporation distinguishable from municipal corporations on the one hand and private corporations aggregate on the other hand. The Legislature has the power to control and govern them as its creatures and political agencies, and a limitation imposed by a special act upon the cost of repairing a courthouse is final, and may not be exceeded by the county authorities.

3. **Counties—Courthouse—Legislative Powers—Necessaries—Limitations—Bond Issues—"County Script."**

The notes or evidences of indebtedness issued by a county is within the meaning of an act authorizing a county to issue "coupon bonds" or "county script" for the purposes of improving the courthouse; and when the act authorizes the issue not to exceed $5,000, a limit to the cost of the improvements is placed in that sum and not merely a limit to the amount of issue of bonds.

4. **Same—Excessive Issue—Void Notes.**

When a special act of the Legislature places a limit upon the amount to be expended by a county in improving its courthouse, authorizing an issue of "coupon bonds" and "county script" not to exceed a certain sum, notes in excess of that amount given by the county for improvements under an entire contract calling for a larger amount than authorized, are void.

5. Same—Special Act—General Powers—Interpretation of Statutes.

When a special act of the Legislature has imposed a limit upon the expense of a county to be incurred in improving its courthouse, the commissioners cannot avoid the will of the Legislature as therein declared by setting up a general power of contracting debts for necessary expenses, limited only by the constitutional limitation of taxation, and thus under an entire contract made beforehand expend a larger amount for the purpose than that prescribed by the special act.

6. Counties—Courthouse—Acceptance—Necessaries—Legislative Powers—Limitations—Excess—Estoppel.

When a limit is placed by the Legislature upon the expenditures of a county in improving its courthouse, and an entire contract is made for the improvements in excess of the amount named, the county authorities, by accepting the work, are not estopped to deny the validity of notes issued and given for the excess by the mere fact that the work contracted for has been performed and accepted.

7. Counties—Courthouse—Acceptance—Necessaries—Legislative Powers—Limitations—Excess—Bond Issues—Payment of Interest—Ratification.

When a county has issued bonds for the improvement of its courthouse in excess of the amount limited therefor by the Legislature, in a special act, the payment of interest by the county on all the bonds does not have the effect of ratifying the bonds issued beyond the lawful limit, for a ratification can have no greater force than, or exceed, a previous authority.

8. Counties—Courthouse—Necessaries—Limitation of Powers—Excess—Void Notes—Procedure—Cancellation.

The county having unlawfully issued certain notes in payment for improvements made upon its courthouse in excess of the limit therefor fixed by a special legislative act, and the lower court having erroneously held them valid, the lower court is directed to enter judgment declaring the notes invalid, and ordering the defendant to surrender them to the clerk for cancellation.

9. Counties—Courthouse—Acceptance—Latent Defects—Contracts, Breach of—Damages—Mala Fides.

After the owner has accepted a building from his contractor, he must show *mala fides* upon the part of the contractor in inducing his acceptance, in order to recover damages for latent defects alleged not to have been discoverable at the time.

10. Same—Evidence—Nonsuit.

In this case the county commissioners contracted with defendant to put additions and improvements upon the courthouse, and by the method prescribed in the contract, accepted the work as entirely satisfactory, without *mala fides* on the contractor's part. In an action against defendant for latent defects, the evidence tended only to show that a certain brick wall was not as high as specified, that there were certain leaks, and that certain concrete work was imperfect. As to the concrete work, it was shown that with the best workmanship and materials it would

frequently show later the defects complained of; and that the contractor had offered, without avail, to make the work good: *Held*, that defendant's motion to nonsuit upon the evidence should have been granted.

PLAINTIFFS' APPEAL.

(562) Action, instituted in McDOWELL and duly removed for trial to BURKE, where it was tried before *J. S. Adams, J.*, and a jury, at May Term, 1909. Both parties appealed.

This action was originally begun by R. J. Burgin, on behalf of himself and other taxpayers of McDowell County, against the board of commissioners of said county, the treasurer and sheriff of said county and B. F. Smith, trading as the B. F. Smith Fireproof Construction Company, seeking to enjoin the payment of certain notes issued (563) by the board of commissioners of said county to B. F. Smith, in the sum of $1,500—three notes of $500—and to enjoin the collection of a special tax levied to raise money to pay the same, the Board of Commissioners of McDowell also brought suit against B. F. Smith, the purpose of this action being to recover judgment for defective work done under the contract, hereinafter more fully recited, for improving and enlarging the courthouse in said county. In the Burgin suit the then board of commissioners (its members having been changed) answered, admitting the allegations of the complaint and praying to be made party plaintiff. This was done, it seems, without objection, and the board of commissioners took a nonsuit in the separate action instituted by it against Smith. The pleadings were reformed to meet this change of parties. In the Burgin suit the restraining order was issued and continued to the hearing of the action. The first draft of the complaint alleged that the Board of Commissioners of McDowell were authorized by chapter 242, Laws 1901, to issue coupon bonds or county script, in an amount not exceeding $5,000, for the purpose of improving and enlarging the courthouse in Marion; that in January, 1902, the then board of county commissioners entered into a contract with the defendant, B. F. Smith, trading as the B. F. Smith Fireproof Construction Company, with the plans and specifications thereto attached, for the purposes specified in the act, and agreed to pay the said Smith the sum of $6,500 therefor, to raise which said sum the county agreed to issue and did issue $5,000 in coupon bonds of the county, and county script in the sum of $1,500—three notes of $500 each—payable in five years, with interest at five per cent per annum. The interest on the bonds was at the rate of six per cent and payable semiannually, evidenced by coupons attached to the bonds. The contract with Smith bound him "to well and sufficiently provide all necessary material, tools and appliances, and perform all the labor required in the proper con-

struction, erection and completion of a new addition to the county courthouse and appurtenances for said second party (board of commissioners), including metal fixtures and appliances," to be erected, etc., according to plans and specifications on file in the office of the register of deeds of said county. The commissioners reserved the right to make changes or alterations, and the contract provided a way for determining whether the alterations increased or diminished the contract price. The work was to be completed on or before 15 July, 1902. Then the contract proceeds: "In consideration of the foregoing covenants and agreements being well and faithfully performed by said first party (Smith), the said second party agrees to pay said first party, or (564) order, the sum of $6,500, as follows: $5,000 in cash and $1,500 in three notes, of $500 each, due and payable in five years from issue, drawing interest at five per cent, the county reserving the right to redeem any or all at any interest-paying period." As the work progressed it was stipulated that seventy-five per cent of the value of material furnished for and labor performed in the construction of said building and its appurtenances should be paid on or about the first day of each month, and the remainder upon final completion "of said building and its equipments and appurtenances, as required by said specifications." Smith was required to give bond in the sum of $6,500, and it was further stipulated that "said second party shall appoint a superintendent, or committee, qualified to judge as to the quality and character of the material and work required by this agreement, whose duty it should be to inspect and report upon the work and material during the construction of said building; and should any material be furnished therefor, or work be done thereon, which, in his or their opinion, is not in accordance with the requirements of the plans and specifications therefor, it shall be his or their duty to notify said first party thereof, in person or by written notice"; and the contract then provides the manner of adjusting any difference on this account, including arbitration; and "upon final completion of the work embraced in this agreement, the said second party shall examine the same, and, if completed according to contract, shall immediately accept the same and make final settlement with said first party therefor." It was also stipulated that "this contract covers the work in its entirety," and contained "all the understandings and agreements had between the parties hereto in relation to the erection and completion of said building and its equipments and appurtenances and the payment therefor," etc. The work was completed and accepted on 2 June, 1902, and the board of commissioners on that day gave a statement to Smith, saying that he had executed the contract to the entire satisfaction of he board of commissioners, and the workmanship was first-class and the work was in every respect up to

plans and specifications. During the progress of the work, there were some slight changes, but the cost of these was adjusted. On 20 March there arose a controversy as to whether the walls of the building were to be raised eighteen inches, and the board of commissioners requested a settlement of this matter pursuant to the terms of the contract. The defendant satisfied the board that the plans and specifications did not call for this, and the work proceeded. The board of commis- (565) sioners, under the provisions of the contract, appointed one Walter Graham as its superintendent of the work; then L. P. Crawford, chairman of the board; then J. G. Neal, a member of the board (who was dead at the time of the trial). The complaint alleged defective work and poor materials; that the walls were not raised to the height required, and that in a short time after the completion of the work the defects began to appear; that the acceptance was procured by the fraudulent devices and circumvention of the defendant, and the defective work so skillfully covered up and concealed that the commissioners could not discover it. The plaintiff further alleged that the three notes of $500 were void, as issued without authority and contrary to the provisions of chapter 242, Public Laws 1901, demanded their surrender and cancellation, and damages in the sum of $1,999.99 for breach of the contract. The defendant denied the allegations of the complaint, claiming that the work and materials were in accordance with the contract, denying any and all fraud, and stating that he had, upon the first notice of defective work, offered to make it good, and requested permission of the board of commissioners to make it good, and that they refused to permit him to make good the defective work. His Honor submitted issues to the jury, which, with the findings, are as follows:

1. Did the defendant fail to comply with his contract, as alleged in the complaint? Answer: Yes.

2. Did the defendant, by false and fraudulent representations or by false and fraudulent concealments of latent defects in the construction of the building, induce the board of commissioners to accept and approve the work and make settlement for the same? Answer: Yes.

3. Does the contract require the old walls of the building to be built higher; and, if so, did the defendant, by false and fraudulent representations to the board of commissioners as to the meaning of the plans and specifications, induce the said board to abandon and waive the right to require the walls to be built higher? Answer: Yes.

4. Did the board of commissioners exceed the power and authority vested in them by law in executing the notes referred to in the answer? Answer: No.

5. What damage, if any, have plaintiffs sustained by the fraud of the defendant? Answer: One thousand eight hundred dollars.

6. Is the plaintiff indebted to the defendant; and, if so, in what amount? Answer: No; for the reason that the notes or script pleaded as a counterclaim were not due at the beginning of this (566) action.

Upon the verdict his Honor rendered the following judgment: "This cause having been heard before the court and jury, and the jury having found the first, second, third and fifth issues in favor of the plaintiffs, as set out in the record: It is now, on motion of W. T. Morgan, Avery & Erwin and Avery & Avery, counsel for the plaintiffs, considered and adjudged that the plaintiff Board of County Commissioners of McDowell County do recover of the defendant, B. F. Smith, the sum of $1,800, the amount of damages assessed by the jury in response to the fifth issue, with interest on the same from 31 May, 1909, until paid, together with the costs of this action, to be taxed by the clerk of this court; and, further, that the script issued to defendant is valid, and the injunction heretofore issued be dissolved." From which judgment both parties appealed to this Court.

Avery & Avery, Avery & Erwin and W. T. Morgan for plaintiff.

Hudgins, Watson & Johnson, Pless & Winborne and C. M. Fulton for defendant.

PLAINTIFF'S APPEAL.

MANNING, J., after stating the case: The appeal of the plaintiffs presents but two questions, to wit: (1) Did the Board of Commissioners of McDowell have the power to exceed the amount authorized by chapter 242, Laws 1901, in the improving and enlarging the courthouse in that county? (2) is the county estopped by acceptance of the benefit of the executed contract to deny its liability?

It is well settled by several decisions of this Court that the building and repairing of the courthouse in a county is a necessary expense. *Halcombe v. Comrs.*, 89 N. C., 346; *Vaughan v. Comrs.*, 117 N. C., 429; *Black v. Comrs.*, 129 N. C., 121; *Ward v. Comrs.*, 146 N. C., 524. But "counties are but agencies of the State government." *White v. Comrs.*, 90 N. C., 437. They can be created, changed (*Dare v. Currituck*, 95 N. C., 189) or abolished (*Mills v. Williams*, 33 N. C., 558) at the legislative will. They are subject to legislative authority, which can direct them to do, as a duty, all such matters as they can empower them to do. *Harris v. Wright*, 121 N. C., 171; *McCormac v. Comrs.*, 90 N. C., 441; *Tate v. Comrs.*, 122 N. C., 812. In *Jones v. Comrs.*, 137 N. C., 579, this Court said: "These counties are not, strictly speaking, municipal corporations at all, in the ordinary acceptance of the term. They have many of the features of such corporations, but (567)

they are usually termed quasi public corporations. In the exercise of ordinary governmental functions, they are simply agencies of the State, constituted for the convenience of local administration, in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control, except where this power is restricted by constitutional provision." In *White v. Comrs.*, 90 N. C., 437, this Court said: "They are subdivisions of its (State's) territory, embracing the people who inhabit the same, created by the sovereign authority and organized for political and civil purposes. They are created by the sovereign, without any special regard for, or the solicitation, consent or desire of the people who reside in them. . . . They are not, in strict legal sense, municipal corporations; they are sometimes called *quasi* corporations, and this designation distinguishes them on the one hand from private corporations aggregate, and on the other from municipal corporations proper, such as cities and towns, organized under charters and special statutes, and invested with more and special powers, and endowed with more of the functions of corporate life." They may be sued only in such cases and for such causes as may be provided for and allowed by the statute. *Tate v. Comrs., supra,* was an action to compel by *mandamus* the commissioners of Haywood County to put in force a legislative enactment requiring the county authorities to work their roads by taxation. *Jones v. Comrs., supra,* was an action to compel by *mandamus* the commissioners of Madison County to obey a legislative act by issuing bonds to pay the existent debt of the county, contracted for necessary expenses. The power of the Legislature to compel the county commissioners to levy taxes to the constitutional limit to pay the necessary expenses of maintaining the county has never been questioned. In *Broadnax v. Groom,* 64 N. C., 244; *Cromartie v. Comrs.*, 87 N. C., 134; *Ward v. Comrs., supra,* and similar cases, the question involved was the *power of the courts* to interfere with the action of the commissioners, and not the power of the Legislature. In *Hightower v. Raleigh,* 150 N. C., 569, *Mr. Justice Brown,* speaking for this Court, said: "While it is within the province of the courts to determine what are necessary public buildings and what classes of expenditure 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 Legislature
(568) and municipal authority, and not in the courts. *Vaughan v. Comrs., supra.*"

In construing section 7, Article VII, Constitution of North Carolina, this Court, in *Evans v. Comrs.*, 89 N. C., 154, said: "This provision leaves the Legislature free to confer upon municipal organizations the

power to create debts and issue public securities in order to raise funds to meet those 'necessary expenses,' when it may be deemed expedient, and the legislation may be made dependent on the result of a popular vote for its efficacy." This power of the Legislature to prescribe the manner of contracting debts, even for necessary expenses, was further elaborated and enforced by this Court in *Wadsworth v. Concord,* 133 N. C., 587, and, when prescribed, is exclusive. Controlled by the doctrine announced in the foregoing decisions of this Court, which has for many years maintained the wise and salutary principle that the legislative department of the government has the power to control and govern the counties of the State as its creatures and political agencies, the conclusion is irresistible that in contracting a debt, even for such a necessary expense as the repairs of a courthouse, the Legislature has the power, if it choose to exercise it, to put a limitation upon the cost. The Legislature did, by act (chapter 242, laws 1901), limit the Board of Commissioners of McDowell to $5,000 for the purposes of enlarging and improving the courthouse in McDowell, and the commissioners had no power, in obeying the act of the Legislature, to exceed the limit prescribed for this expense. In the contract made by the commissioners with the defendant, in the attempt to carry out and obey the act of the Legislature, the commissioners did exceed the limit prescribed by the Legislature, and it appears from the evidence of Smith, the defendant, that he knew of the act and of its limitation. The contract was an entirety; the consideration a "lump sum." Where the Legislature has interposed its will and plainly declared it; where it has by its act prescribed the limit of expenditure, even for a necessary expense for a county, it cannot, under the decisions of this Court herein cited, be maintained that the commissioners can disregard and set at naught the legislative will by setting up a general power of contracting debts for necessary expenses, restrained only by the constitutional limitation of taxation. The fallacy of this condition is that the power to contract debts within the limit of the constitutional limitation of taxation is not without limit. The Legislature of the State—that power which made, at its pleasure, and can unmake at its will, the county itself—can interpose its will; and when it does so, its will is supreme and must be obeyed. The Legislature has enacted general laws (569) which control, in the absence of particular acts. It is, however, suggested that the act under consideration limited the issue of bonds, and not the cost of the improvement of the courthouse, but this construction of the act is too narrow. It is manifest that it was contemplated that the proposed enlargement of the courthouse would not cost more than $5,000, and the Legislature placed this limit upon it, "not exceeding the sum of $5,000," and authorized the commissioners "to

issue coupon bonds or county script." By "county script" is meant notes or evidences of debt, other than "coupon bonds." It is also contended that *Fawcett v. Mt. Airy,* 134 N. C., 125, is decisive of this case. We do not think so. That case is distinguishable from the present case upon its facts. In that case the town of Mt. Airy issued bonds to the amount of the legislative limit, $50,000 (Private Laws 1901, ch. 216, sec. 1), and expended the proceeds for the purposes authorized by the act. The town authorities did not attempt to issue any more bonds or incur any larger debt under the act, but after it had expended the $50,000 it was discovered that that sum was insufficient to complete the sewerage system and lighting plant authorized by the act, and the town then undertook to issue other notes to complete the plants. In this case the original contract was for $6,500—$1,500 in excess of the legislative limit. The contract was by express limitation an entire contract. In the *Fawcett case,* the main if not the only question considered by this Court was whether the building of a lighting plant and sewerage system was "a necessary expense," and this was clearly the only point considered. Over towns the power of the Legislature is more restricted (*Jones v. Comrs.,* 137 N. C., 579); but even as to these municipal corporations this Court, in *Wharton v. Greensboro,* 146 N. C., 356, said: "There can be no doubt that the General Assembly may thus restrict (section 2977, Revisal), the powers of municipal corporations to contract debts. They are but instrumentalities of the State for the administration of local government, and their power may be enlarged, abridged or withdrawn entirely, at the pleasure of the Legislature. *Lilly v. Taylor,* 88 N. C., 490; *Jones v. Comrs.,* 137 N. C., 592."

The only other question that remains for consideration is: Can the county commissioners avail themselves of their want of power to contract the debt in excess of $5,000, as the work has been performed, accepted and notes issued for $1,500 in payment of the excess contract price over $5,000? We think the defense is available to the county commissioners, and we do not think they are estopped by the (570) fact that the work contracted for has been performed and accepted and notes in payment therefor issued, to deny their validity. In *Davies v. Dickinson,* 117 U. S., 657, *Mr. Justice Gray* said: "The county court has no power to subscribe for stock in the railroad corporation, or to issue bonds therefor, except as authorized *by statute.* The statute authorized the county court to subscribe for such amount of stock only as should be fixed and proposed by the commissioners named in the statute and be approved by a vote of the majority of the voters of the county; and the authority of the county court either to levy taxes or to issue bonds was limited to the amount so proposed and voted. That amount was $250,000. The county court therefore had no

authority to issue bonds for a greater amount, and any bonds issued in excess of that amount were unlawful and void." Nor can the payment of interest on all the bonds have the effect of ratifying bonds issued beyond the lawful limit, for a ratification can have no greater force than a previous authority, and the county cannot ratify what it could not have authorized. *Marsh v. Fulton,* 10 Wall, 676. See authorities cited, 11 Rose's Notes, 131; *Comrs. v. Call,* 123 N. C., 308; *Comrs. v. Payne,* 123 N. C., 432; *Debnam v. Chitty,* 131 N. C., 657. In *Bank v. South Hadley,* 128 Mass., 503, it is held that "If a town treasurer borrows money in a manner unauthorized by statute, the lender cannot maintain an action against the town to recover it back, although the money is used by the treasurer in payment of debts of the town." The court further said: "It is sometimes said, indeed, with reference to money borrowed in disregard of positive prohibition, when both parties are in fault, that it cannot under any circumstances be recovered back, because that would be to defeat the prohibition in favor of a guilty party. *McDonald v. Mayor,* 68 N. Y., 23." In the *McDonald case,* cited *supra,* similar to the present case, the New York Court said: "It is plain that if the restriction put upon municipalities by the Legislature for the purpose of reducing and limiting the incurring of debt and the expenditure of the public money may be removed, upon the doctrine now contended for (receipt of benefit), there is no legislative remedy for the evils of municipal government." *Thomas v. Port Huron,* 27 Mich., 320; *Snyder v. Mt. Pulaski,* 176 Ill., 397; *Murphy v. Louisville,* 9 Bush (Ky.), 189; 4 Thomp. Corp., sec. 5262; 2 Herman on Estoppel, sec. 1224.

The defendant, in his testimony, stated that he knew of the act of the Legislature, and that the amount was limited to $5,000. The principle announced in *Trustees v. Realty Co.,* 134 N. C., 41, to wit, "Where a corporation is a party to an executed contract and has (571) received the benefit therefrom, it is estopped from pleading that the contract was *ultra vires,*" does not apply to counties, towns or cities, where they have exceeded the legislative limit in contracting the debt sought to be recovered.

For the reasons given, and under the authorities cited, we are of the opinion that the three notes, of $500 each, issued to the defendant by the Board of Commissioners of McDowell are invalid and unenforcible, and his Honor's judgment declaring them valid is erroneous. The Superior Court of Burke County will enter judgment declaring the notes invalid and ordering the defendant to surrender them to the clerk of said court, who will cancel them.

In the plaintiff's appeal the judgment is

Reversed.

DEFENDANT'S APPEAL.

MANNING, J. The commissioners of McDowell, desiring to improve and enlarge the county courthouse, advertised for plans. The defendant, Smith, went to Marion, discussed the matter with the commissioners, and was directed by them to prepare plans and specifications for additions and improvements, the argeement being that if his plans were accepted, and he became a bidder for the work and secured it, he would charge nothing for preparing the plans and specifications; but if they were accepted and another secured the work, he was to be compensated in an agreed way for them. Smith prepared the plans and specifications and sent them to the commissioners several weeks before the contract for the work was let. The commissioners accepted Smith's plans; the commissioners advertised for sealed bids, to be filed on or before 20 January, 1902. Smith, with two others, became bidders. Smith's bid was accepted, and contract with him was made on 20 January. Smith lived in Washington City, and it was not contemplated that he should give the performance of the contract his personal attention, but, of course, should have a competent person or superintendent. The plaintiffs alleged that Smith was a man of skill and ability in his business, both as a draftsman and a builder.

It was stipulated by the contract, among other things, as follows: "Said second party shall appoint a superintendent or committee, qualified to judge as to the quality and character of the material and work required by this agreement, whose duty it shall be to inspect and report upon the work and material during the construction of the said building; and should any material be furnished therefor or work done
(572) thereon which in his or their opinion is not in accordance with the requirements of the plans and specifications therefor, it shall be his or their duty to notify said first party (the defendant in this action) thereof, in person or by written notice, forwarded by registered mail to its proper address, unless he or they and said first party or its agent or subcontractor can agree upon the subject in controversy; and the part of the work affected by such notice shall cease and not be resumed until an agreement is reached upon the subject in controversy or settled by competent authority." The commissioners, in compliance with this provision, appointed as their superintendent one J. G. Neal, a man, according to all the evidence, of high character, successful as a business man, and who had been sheriff of the county for many years. He was daily at the work and sometimes oftener. He had absolutely unrestricted opportunity to inspect all material and all work. Not a single witness testifies that any of the work or material were attempted to be concealed from his inspection, or that anything was done to di-

vert his inspection. The defendant was present only once while the work was being done. A controversy arose about increasing the height of the walls eighteen inches; Smith was notified, as required by the contract, came to Marion, and he and the commissioners discussed the matter, and it was agreed by them that the building should be completed without raising the walls. The work then progressed to completion. On 2 June the work was completed, inspected and accepted, the commissioners accepting it, in writing, "as executed to the entire satisfaction of the commissioners, as meeting all their requirements, and that the workmanship and finish are first class, being in every respect up to plans and specifications." Smith was not even present. No witness testified that anything was done or said by Smith's superintendent to prevent the fullest and most minute inspection by the commissioners. The commissioners then settled with Smith in full, giving the three notes considered in plaintiff's appeal. Defects began to appear in the concrete work soon after the work was accepted, the witnesses differing somewhat in their recollection of the time, and the roof began to leak in a few places. No notice or complaint was made to Smith. After this action was begun by Dr. Burgin, Smith heard of it from his attorney, and at once wrote, complaining of this conduct, requesting information about the defects (in the meantime a new board of commissioners had been elected and come into office) and offering to repair any defects that were reasonably chargeable to bad work, but called attention to the provision of the contract above noted. He sent a man to Marion, not receiving any reply to his letter, and (573) he offered to repair the work, but the commissioners refused to let Smith do it. The commissioners did nothing to remedy the defects; they did not paint the metal roof, though their own witnesses stated it ought to be painted at least once in three years. That the roof leaks and that some of the cement work is very defective was proved beyond doubt. The defendant, Smith, testified himself that he went to Marion during the trial of this action—seven years after the work was done—and that some of the concrete work was bad. The witnesses for the plaintiff and the defendant seemed to agree that it was rarely practicable to make every job of concrete work good; that the most expert and capable man occasionally failed. We have carefully read and examined the entire evidence taken by a stenographer, and we do not find any evidence legally sufficient to justify the finding of the jury to the second and third issues, and his Honor ought to have instructed the jury to answer those issues "No." The mere development of defects is not sufficient.

In 3 Page on Contracts, sec. 1507, this learned writer says: "If the person for whom work is done inspects it as it progresses, and accepts

it, after such inspection, as full performance of the contract, he cannot recover damages for alleged breach which such inspection *could* have disclosed." There is no doubt that a proper inspection could have disclosed that the walls had not been raised eighteen inches, and that anchors had not been put in the walls, and that the roof leaked, and that the seams of the shingles were not straight. The plaintiff had witnesses who discovered these defects by inspections made by them. It is manifest that the stucco of the columns on the front porch could have been impracticable to have discovered whether the cement concrete would be lime or cement mortar. The character of the plastering in the old part of the building could have been discovered, because the men who did the work lived in Marion and were at the courthouse every work day for several months, and testified at the trial. It would have been impracticable to have discovered whether the cement concrete would be a good job or a bad job, but the commissioners were not required to accept this until they had become satisfied about it. In *Pauly v. Hemphill County,* 62 Fed., 698, a contract containing a stipulation in very nearly the exact words of the stipulation in the present case was considered by the court in the following language: "The proviso in the contract which placed it within the power of the defendant county to select its own commissioner to act as inspector during the building, if honestly carried out in accordance with its terms, would necessarily (574) have been of the greatest assistance and protection to both of the contracting parties, and would appear to be a wise and prudent precaution in the completion of such work, the actual supervision of which must necessarily be delegated to the representatives of each party. By it every opportunity in reason was given for the defendant (the plaintiff here) to secure good material and work. The plaintiff (defendant here) would at the same time be protected from the faults and negligence of its own servants, by being immediately informed of and enabled to correct them; also from any complaints that might be made subsequently, too late to determine their truth or falsity. The action of such an arbiter or supervisor, in the absence of any complaint made at the time and in the manner provided by the contract, is *prima facie* evidence of compliance with the contract, and should be conclusive, except upon clear and distinct proof of fraud." *R. R. v. March,* 114 U. S., 1035; *Kihlberg v. United States,* 97 U. S., 398; *Sweeney v. United States,* 109 U. S., 618. In *R. R. v. Gordon,* 151 U. S., 285, this language is used: "It is difficult to see what effect should be given the acceptance of the work by the superintendent, if not to foreclose the parties from thereafter claiming that the contract had not been performed according to its terms." *Church v. Brose,* 104 Ill., 206; *R. R. v. Price,* 138 U. S., 185; *Koof v. Lull,* 70 Ill., 420. The latent defects,

in order to preclude the owner from being concluded by an acceptance based upon such supervision as is stipulated in this contract, must be of such character as indicates *mala fides* on the part of the contractor. The evidence of the plaintiff not only failed to show *mala fides,* but showed that the defects appearing in the work of the defendant were consistent with honest dealing and occurred at times in work done by the most capable and honest contractors. We therefore are of the opinion that his Honor should have sustained defendant's motion of nonsuit on the cause of action stated in the complaint for damages for breach of contract, and in refusing to do so there is error, and the judgment against defendant on this cause of action is

Reversed.

Cited: County v. Construction Co., 152 N. C., 30; *Jones v. New Bern, ibid.,* 65; *Ellison v. Williamston, ibid.,* 150; *Highway Commission v. Webb, ibid.,* 711; *Haskett v. Tyrrell, ibid.,* 715; *Comrs. v. Bonner,* 153 N. C., 69; *Murphy v. Webb,* 156 N. C., 406; *Pritchard v. Comrs.,* 159 N. C., 638; *Construction Co. v. Comrs.,* 160 N. C., 306; *Comrs. v. Comrs.,* 165 N. C., 634; *Swindell v. Belhaven,* 173 N. C., 3.

(575)

E. H. HOWELL ET AL. v. E. J. HOWELL ET AL. AND COMMISSIONERS OF HAYWOOD COUNTY.

(Filed 23 December, 1909.)

1. **Taxation—Special School Districts—Objection, When and How Made—Procedure.**

The objection to a special school-tax district as determined upon by the County Board of Education, should be made at a meeting of the board, the times of which are fixed by statute, when the petition is presented to it for endorsement; and the equitable jurisdiction of the court will afford no relief by injunction or otherwise after the provisions of Revisal, sec. 4115, have been fully complied with, and the will of the qualified voters has been lawfully expressed favorably to its establishment, in the absence of fraud or misconduct on the part of the County Board of Education or any one officially connected with the election.

2. **Taxation—Special School Districts—Board of Education—Discretionary Powers—Equity.**

Should sec. 4129 be conceded as applying to all districts, whether ordinary or special, and the court is of opinion that the requirements to establish a special school district by the County Board of Education are fully contained in Revisal, sec. 4115, it is left to the discretion of that board whether the district is as compact in form as practicable and the convenience and necessities of the patrons were consulted, in forming it, with

which discretion the courts cannot interfere. The responsibilities and duty of the board of education commented on, especially in this case, where no map of the proposed district was presented to it.

3. Taxation—Special School Districts—Elections—Approval of Voters.

When the provisions of section 4115 have been fully complied with in establishing a special school-tax district, the votes cast are for the district as laid out as well as for the tax, and when the matter is carried it declares the will of the qualified voters, and the courts will not interfere.

APPEAL from *Ferguson, J.*, on motion of plaintiffs to continue restraining order to the final hearing of the action, heard 23 October, 1909. From HAYWOOD.

This is an action to set aside and annul the creation of a special-tax school district in Haywood County and to enjoin the collection of the special school tax therein. It is brought by certain taxpayers of Rock Hill School District against the Sheriff and County Commissioners of HAYWOOD and the School Committee of Rock Hill District.

The complaint alleges that the district was not laid off "as compact in form as practicable, and the convenience and necessities of the patrons were not consulted," and that the lines were so run to exclude (576) certain parties opposed to the tax and include others favorable to it.

In the hearing below, his Honor found as facts that "one-fourth of the freeholders of said district petitioned for the same; that the county board of education endorsed said petition, and that an election was regularly held, at which a majority of the qualified voters in said district voted for the tax."

Upon these facts the court held that the establishment of the district was a matter in the discretion of the county board of education and the court had no power to enjoin the collection of the tax.

Section 4115 of the Revisal of 1905 makes provision for the creation of special-tax school districts, and the part of this section material to this case is as follows:

"Special school-tax districts may be formed by the county board of education in any county, without regard to township lines, under the following conditions: Upon a petition of one-fourth of the freeholders within the proposed special school district, endorsed by the county board of education, the board of county commissioners, after thirty days notice at the courthouse door and three public places in the proposed district, shall hold an election to ascertain the will of the people within the proposed special school district whether there shall be levied in such district a special annual tax. . . . In case a majority of the qualified voters at the election is in favor of the tax, the same shall be

annually levied and collected in the manner prescribed for the levy and collection of other taxes."

The plaintiffs appealed to this Court from the order dissolving the injunction.

W. T. Crawford and Howell & Bohannon for plaintiffs.
S. C. Welch, W. J. Hannah and Bickett & White for defendants.

MANNING, J., after stating the case: The statute above quoted makes four requirements: (*a*) a petition from one-fourth of the freeholders within the proposed district; (*b*) the endorsement of this petition by the county board of education; (*c*) the holding of an election in the district upon this question; (*d*) the vote of a majority of the qualified voters in favor of the tax.

It is not alleged that any of these requirements of the statute have not been complied with, nor is there any allegation that the tax, the collection of which is sought to be enjoined, is levied or assessed for an illegal or unauthorized purpose, or that it is illegal or invalid, or the assessment is illegal or invalid. The county board of educa- (577) tion is not made a party to this action. All irregularities alleged in the complaint relate to the location of the lines of this special-tax district.

The statute vests the power of determining the boundaries of a district solely in the county board of education. There is no suggestion anywhere of misconduct or any impropriety on the part of any member of the board of education. None of the things complained of were done or are alleged to have been done by the board of education. The charges made refer to individuals, advocates of the special district, but in no way officially connected with the establishment of the same.

It appears that the petition for the establishment of this district was circulated among the freeholders and was well known to the plaintiffs herein. This petition had to be presented to the board of education and receive its endorsement. The time of the meeting of the board of education is fixed by law. If there were objection to the endorsement of this petition by the board of education, it was the duty of those objecting thereto to appear before the board of education and state their objections. It would be manifestly unfair to the board of education for plaintiffs to attack this action as unwise and unjust, when they had had the opportunity and the occasion to make known to the board the reasons why such action would be unwise and had failed to do so. If the board had refused to give them a fair and impartial hearing, the courts would have been open to them for relief upon the charges of fraud or misconduct; but they cannot stand by in silence, while the board takes such action as,

in the light of facts before it, seems wise, and then make complaint. They ought not to remain quiescent until the will of the qualified voters has been expressed, the verdict of the polls entered against them, and then apply to the court for the aid of its equitable power. *Covington v. Rockingham,* 93 N. C., 134; *Wilson v. Green,* 135 N. C., 351. The only matters alleged which can affect the proper creation of the district are contained in paragraph three of the complaint, where it is alleged that the district is not "as compact in form as practicable, and the convenience and necessities of the patrons were not consulted." "The county board of education shall divide the townships into convenient school districts, as compact in form as practicable. It shall consult the
(578) convenience and necessities of each race in setting the boundaries of the school district." It will be seen that this section bears upon the division of the various townships into the usual school districts and makes no reference to special-tax districts. We think that the Legislature set out in section 4115 all of the requirements essential to a special-tax district; but, admitting that section 4129 should be construed as applying to all districts, whether ordinary or special districts, we still think that the court has no right or power to annul this district upon the grounds. Necessarily, the questions of compactness and convenience must be addressed to somebody's judgment and discretion. The statutes unequivocally delegate this duty to the county board of education.

The only absolute standard of compactness would be a circle, with the schoolhouse in the center. Such would be a physical impossibility. All other opinions of compactness would be relative and not capable of exact definition. The only absolute standard of convenience would be a schoolhouse at every man's door, which, of course, is out of the question. These things are of necessity relative to and dependent upon many other circumstances and conditions, all of which have fluctuating values in the determination of what is best. The lay of the land, streams, roads, mountains and many other things must all be considered and given their proper influence. Conditions in adjoining districts, even, ought sometimes to control, since it may and does happen that a change in one district, apparently advisable for that district, would be on the whole unwise, because it would necessitate injurious changes in adjoining districts. There are 7,707 districts in the State, and it is highly probable that in each of these there are one or more persons who with some degree of reason think that, from the standpoint of convenience and compactness, the district is not correctly laid off. For the courts to undertake to pass upon such matters would be manifestly unwise. The county board of education is supposed to have acquired, by observation, study and experience, a knowledge of the varying needs of the county, which no

court could hope to obtain by a mere examination of witnesses. There is no principle better established than that the courts will not interfere to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion.

The leading case in our reports is probably that of *Broadnax v. Groom,* in 64 N. C., 244. This case is specially applicable, for that it was an action to enjoin the collection of a tax for building bridges, upon the ground that the commissioners were about to expend practically all of the tax levy to build a bridge "where none had ever (579) before been—not connected with any public road, and otherwise unnecessary, inconvenient and extravagantly expensive." *Pearson, J.,* in writing the opinion of the Court, says: "So 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 it should be erected, as heretofore, upon posts, so as to be cheap, but warranted to last for some years, or that it is better policy to locate it a mile or so above, at a heavier outlay at the start, but such as will insure permanence and be cheaper in the long run? 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 cannot 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 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 pepartment of the government or upon the county authorities."

This case has been frequently cited with approval by this Court. *Wilson v. Charlotte,* 74 N. C., 759; *London v. Wilmington,* 78 N. C., 111; *Ashcraft v. Lee,* 79 N. C., 35; *Evans v. Comrs.,* 89 N. C., 158; *Vaughan v. Comrs.,* 117 N. C., 434; *Herring v. Dixon,* 122 N. C., 422; *Stratford v. Greensboro,* 124 N. C., 132; *Black v. Comrs.,* 129 N. C., 125; *Wadsworth v. Concord,* 133 N. C., 394; *Bank v. Comrs.,* 135 N. C., 245; *Glenn v. Comrs.,* 139 N. C., 418; *Rosenthal v. Goldsboro,* 149 N. C., 134; *Board of Education v. Comrs.,* 150 N. C., 124.

In *Board of Education v. Comrs.,* 150 N. C., 121, *Mr. Justice Hoke* says: "It is recognized doctrine that the writ of *mandamus* is the appropriate remedy to enforce the performance of duty on the part of the 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 official to whom its performance is committed."

It would seem that where a board cannot be compelled to act (580) by *mandamus,* it cannot be restrained from acting by injunction.

The doctrine is well stated in High on Injunctions, sec. 1240: "An important modification of the doctrine of equitable interference with the proceedings of municipal corporations is found in the limitations and restrictions which are placed upon the jurisdiction in all cases where it is sought to interfere with or control the judgment or discretion of municipal bodies upon matters properly entrusted to them by law. A municipal corporation being a political body, clothed with certain legislative and discretionary powers, equity is ordinarily averse to interfere by injunction with the exercise of those powers at the suit of a private citizen. And no principle of equity jurisdiction is better established than that courts of equity will not sit in review on the proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed. And the fact that the court would have exercised the discretion in a different manner will not warrant it in departing from the rule."

In *United States v. California,* 148 U. S., 43, the Court says: "It is an universal principle that where a power or jurisdiction is delegated to any public officer or tribunal over the subject-matter, and its exercise is confined to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only question which can arise between an individual claiming a right under the acts done and the public or any person denying its validity are *power in the official or fraud in the party.*"

A case directly in point is *Trustees v. Directors,* 190 Ill., 390, where it is held that the decision of a county superintendent of schools in favor of forming a new school district will not be interfered with by injunction, upon the ground that such a district was unnecessary.

Another interesting case is *Lane v. Morrill,* 51 N. H., 422, where it is held that an injunction will not be granted to restrain the organization of a school district which is being made by the proper authorities, where the gravamen of the bill is that officials have acted upon illegal and improper evidence upon the hearing of the application for the formation of the district.

In *Roth v. Marshall,* 158 Pa., 272, the rule and the reason are so forcefully stated that we quote the opinion at some length: "The subject

of controversy in this case is the location of a district schoolhouse. Reduced to its simple terms, th question raised is whether (581) the exercise of official discretion of a board of school directors shall be supervised and directed by a court of equity. If so, the selection of teachers and text-books, the fixing of the rate for the levy of school and building taxes, the arrangement of the course of study, together with other similar duties, will be hereafter done subject to the opinion of the courts. The administration of the school laws will in that case depend on the discretion of a chancellor, whose decrees will be enforced by injunction or mandatory order. Such a conclusion would do violence to the school laws and to the well-settled rules that fix the limits of official discretion. If an officer neglects or refuses to enter upon the discharge of the duty which the law imposes on him, the courts will quicken or compel action by a writ of *mandamus*. If he goes beyond what the law requires, attempts that which is *ultra vires,* or abuses his discretion in any manner, the courts will restrain him by injunction. The ground intermediate between these extremes is the legitimate range of official discretion, within which the officer on whom the law had cast a duty may determine the manner of its performance."

In the text of the A. & E. Enc. of Law, 25 p. 32, it is said: "The primary authority to lay off territory into school districts is in the Legislature, and this without the assent of the inhabitants. But such power may be delegated to a subordinate body or officer."

In our State this power is delegated to the county board of education, and, being clothed by the Legislature with power to determine the very questions presented to the court, the action of the board within the limits of the power conferred is no more subject to review than the act of the Legislature itself.

Again, it will be well to observe that the board established a special-tax district, subject to the approval of the people at the polls. When the citizens voted, they voted not only for the tax, but for the district. Hence the question presented is in its analysis a political one, to be fought out on the hustings. The courts have always refused to enter into this domain. *S. v. Stanton,* 73 U. S., 50; 8 Cyc., 845; *Ward v. Comrs.,* 146 N. C., 536.

While we are constrained by the reasons given and the authorities cited, for which we are indebted to the able and conclusive argument in the brief of defendant's counsel, from which we have quoted at length, to hold the courts powerless to interfere and aid the plaintiffs, we cannot refrain from condemning any attempt to gerrymander a special-tax school district. The map of this district as established, attached to the record, shows that such an attempt was (582) successfully made, but the affidavits disclose that no map was

presented to the county board of education or the county commissioners, and we cannot believe they would have sanctioned it if they had been better informed. In the effort to secure better facilities and more enlarged opportunities for educating the children of a community, the overzealous overstep the limitations of prudence, even in a cause so praiseworthy, and create and engender strife and bitterness, which retard rather than advance the cause of education in such communities. The wisdom and sound judgment of the county boards are expected to correct such tendencies, and in every case, before final action, they should become familiar with every detail, so that strife and bitterness may, as far as possible, be eliminated and the education of the children of the communities under their charge be advanced in quiet, good feeling and justice. In so far as the boards of education fail to accomplish this, they fail to meet the high responsibilities imposed upon them. There is in his Honor's ruling

No error.

Cited: Gill v. Commissioners, 160 N. C., 184.

J. L. YOUNTS ET AL. v. COMMISSIONERS OF UNION COUNTY.

(Filed 23 December, 1909.)

1. **Elections—Special School Tax—Duty of Registrar—Time for Registration—Interpretation of Statutes.**

The requirements of Revisal, sec. 4323, "that it shall be the registrar's duty, between the hours of 9 a. m. and sunset on each day (Sunday excepted) for twenty days preceding the day for closing the registration books, to keep said books for the registration of any electors residing within said township, etc., and entitled to registration," does not require the registrar to be at his home or place of registration every moment of the twenty days between the hours indicated, and a reasonable requirement is all that is necessary. And when it has been found as a fact by the lower court that every qualified voter has had a fair and ample opportunity to register, an election declaring for a special school tax will not be declared invalid by reason of the fact that the registrar left the district for a part of two days out of the twenty days required for registration.

2. **Elections—Special School Tax—Benefits—Place of Election—Publication—Majority Vote—Ample Opportunity—Interpretation of Statutes.**

While the statute provides that places where elections are to be held should be fixed and published by the boards of commissioners authorized by statute to call them, an election declaring for a special school tax will not be held invalid for the failure to have done so, it appearing from the

facts found by the lower court that a majority of the qualified voters of the district had voted in favor of the tax, that the election was held at the place in the district that all elections were held, that all the voters knew of the place and a fair and full opportunity had been given them to vote upon the question. Revisal, sec. 4115. In this case the fact that a remote section of the district struggling to maintain its schools at its own expense received a benefit from the tax is no ground of complaint. Those invested with the power to call special elections are admonished to adhere to and observe with strictness all statutory requirements.

APPEAL from *W. J. Adams, J.*, at November Term, 1909, of UNION, and heard at chambers, on motion of plaintiffs to enjoin the defendants from levying special tax for school purposes, voted under section 4115, Revisal, in Indian Trail School District of Union County. Upon the hearing, upon due notice, and after considering the complaint and answers used as affidavits, and many other affidavits, his Honor made the following order, finding the facts as therein set out:

1. That on 3 May, 1909, the defendant board legally ordered an election to be held at Indian Trail Special School District, in Union County, North Carolina, on 5 June, 1909.

2. That on the said 3d day of May a register and judges of election were duly and legally appointed to conduct the said election, and the said registrar was on said day duly qualified as such, and the registration book turned over to him for the purpose of registering all qualified voters in said district; that said registrar, after taking the oath as such, received said registration book on 3 May and went immediately to his home in said Indian Trail School District, and arrived there some time in the afternoon of said day; that the same was kept open until 22 May, 1909, except as hereinafter found, and closed on 22 May, 1909.

3. That said registrar was in Charlotte a portion of the 20th day of May and a portion of the 21st day of May, but no one during that time applied for registration and no one was deprived of his right to register because the said registrar was in Charlotte.

4. That the clerk of the defendant board posted notices of the said special election at the courthouse in said county on the afternoon of 3 May, and duly mailed same to various places in said district on said day, which were posted in the district on 4 May, as required by law, copy of which notice is attached to the complaint, marked Exhibit B.

5. That the said election was held on 5 June, as ordered by the defendant board, at Indian Trail, where the schoolhouse in (584) said district is located, and also where all elections are held in said district, same being the case in the township for all elections, and where two special school elections have previously been held; that the place of election at Indian Trail was known and accepted by all voters

in the district as the place where this election would be held, and no voter was misled by the failure to advertise the place of holding the election, the place for holding said election being well known to all in the district, and did not discover the omission to designate the place of election until after this action was brought.

6. That the time and place for holding said election was well and generally understood and known by all in the district.

7. That every qualified voter in said district had a fair and ample opportunity to register and vote in said election if he had so desired.

8. That the election was held on 5 June, at which time there were 68 votes cast for special school tax and 34 votes cast against special school tax.

9. That there are within said district, including colored voters, one to seven male persons above the age of twenty-one years; that of this number there are eleven who could not have registered had they applied for a registration, to wit, W. J. Anderson, Elgin Thompson, Lewis Martin, Robert Broom, Buck Crowell, Joe Morrison, J. L. Broom, A. F. Ivey, J. A. Morrison, W. J. Weddington and A. B. Vickery; that there are sixteen who might have registered if they had applied, to wit, M. E. Conder, S. W. Gander, A. B. McRorie, Hamp Starnes, Mack Freeman, Mack Broom, Rufus Kellough, A. B. Garner, Adam Broom, Ambrose Noles, Sidney Noles, Ben Vickery, Hoyle Ivey, Dan Howie, Jesse Cline and Zeb Hartis, but failed to do so of their own choice, and of these sixteen eight would have voted for schools, to wit, Buck Crowell, A. B. Garner, Dan Howie, Hoyle Ivey, W. H. Starnes, Elgin Thompson, Robert Broom and W. J. Weddington; that two of the registered voters who did not vote, to wit, J. F. Privett and H. C. Privett, would have voted for schools if they had voted.

10. That if all the male persons in the district, including colored, and also including those who were disqualified, had registered, there would have been only one to seven on the registration books, and that 68, the number cast for the special school tax, would have been a majority.

11. That said election was fair, and the result is a fair expression of the wishes of the qualified electors therein.

(585) 12. That a copy of the order referred to in the first finding of fact is attached to the complaint therein, marked Exhibit A.

13. That on Monday, 7 June, 1909, certain residents and taxpayers in said district appeared before the defendant board and asked that the said election be declared illegal and that no tax be levied, but said board declined to set aside the election, and on the following Monday levied ____ cents on $100 valuation of property and ____ cents on the poll, within said district, and are preparing to turn over to the Sheriff

of Union County the tax books containing the said extra levy, with directions to collect the same.

14. That a majority of the qualified voters in said district voted for special tax.

Upon the foregoing findings of fact, it is adjudged that this election was legal and the levy in accordance therewith is legal; and it is ordered, adjudged and decreed that the temporary restraining order heretofore issued in the said cause be and the same is hereby dissolved.

From which order the plaintiffs appealed to this Court.

A. M. Stack for plaintiffs.

Adams, Jerome & Armfield and Williams & Lemmond for defendants.

MANNING, J. The plaintiffs seek to enjoin the levy of the special tax for school purposes principally upon two grounds, viz.: (1) That no place was named as the polling place in the order calling the election; (2) That the registration books were not kept open for the number of days required by law. As bearing upon the two questions, his Honor finds that the election was held at Indian Trail, where the schoolhouse is located and where all elections are held for that township and district; that the place where the election was held was known to all the voters and accepted by them, and that they knew this election would be held there; that the omission to name the particular place for holding this election was not discovered by any one until after this action was brought and after complaint was filed, so well understood was the place where the election would be held; "that the time and place for holding said election was well and generally understood and known by all in the district"; "that every qualified voter in said district had a fair and ample opportunity to register and vote in said election if he had so desired"; that the registration books were opened on 3 May by the regularly appointed and sworn registrar, and the books were kept open until and including 22 May, except on parts of the two days, 20 and 21 May. It appears that during the parts of these two days when the regis- (586) trar was absent from his home no person applied for registration.

Section 4115, Revisal, requires that "the election shall be held in the district, under the law governing general elections, as near as may be." Section 4323 prescribes that it "shall be his (the registrar's) duty, between the hours of 9 o'clock a. m. and sunset on each day (Sunday excepted), for twenty days preceding the day for closing the registration books, to keep open said books for the registration of any electors residing within such township, ward or precinct and entitled to registration." Disregarding the qualifying phrase, "as near as may be," in section 4115, Revisal, it was not in the contemplation of section 4323

that the registrar of election should be present at his home or the place of registration every moment of the twenty days, from 9 a. m. to sunset. A reasonable compliance is all that the law would require—such presence as would enable every citizen qualified to register to have his name placed upon the registration books. A full opportunity to register is the utmost that the statute contemplates, and this his Honor finds as a fact was afforded, "that every qualified voter in said district had a fair and *ample* opportunity to register." What more could any voter have required? Was not such an opportunity, at least ,"as near as may be," the strict and literal requirement of the words of the statute? All that any voter may require is a "full and ample opportunity" to complete his qualifications by registration as an elector. While we would not approve any substantial departure from the statutory period for registration for a general or special election, we would not feel justified in declaring void an election when the facts disclosed that no citizen qualified to vote was denied the opportunity to register. The purpose of every election is to ascertain the will of every citizen qualified to participate therein, and when "full and ample opportunity" is given him we do not conceive what more can be added. Upon the facts found by his Honor, which the evidence sustains, we conclude that there was no error committed by him in his ruling on this question. The decisions of this Court in the following cases support this conclusion. *DeBerry v. Nicholson,* 102 N. C., 465, in which this Court quoted these words of *Breese, J.,* in *Platt v. People,* 29 Ill., 72: "The rules prescribed by law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise and to ascertain with certainly the result." *Hendersonville v. Jordan,* 150 N. C., 35. Was the omission to name the particular place for holding the election, under the facts as found by his Honor, fatal to the election? Unless
(587) constrained to do so by some positive and unequivocal words of the statute law, we would not hold an election void where every person qualified to vote had "full and ample opportunity" to register, where he knew where the election was held, where the place was easily accessible to him, where the place at which the election was held was the place where every election for national, State, county and township officers was held. While we are not disposed to regard as directory, but as mandatory, the statutory provision that the places where elections are to be held should be fixed and published by the boards or commissioners authorized by statute, and while we recognize the rule that in cases of special elections it is incumbent upon the authorities vested by legislative enactment with the power to fix the time and place to name both in the order calling the election, we do not feel authorized to vitiate an election where it is found as a fact that every person in

the territory qualified to vote knew where the election was to be held and where it was held, and had an opportunity to register to qualify him to express his will, and where a clear majority of all those persons of full age and qualified (except for registration) had assented to the proposition. To annul such an election would disappoint and disregard the will of a majority, to ascertain which is the object of all elections. We, however, must again admonish those invested with the power to call special elections to adhere to and observe with strictness all the statutory requirements in order that their omissions may not jeopardize the expressed will of the people. It is always safe to regard as important what the statutes expressly direct; in observing them, no harm can result. In sustaining his Honor in this case, we can, fortunately, give effect to the express will of the majority of the qualified voters of this district without violating any well-settled principle of statutory construction. The fact that a remote section of the district, to wit, Stallings or Atalanta, struggling with the education of its children without calling upon the public fund for aid, is to receive some aid from the public fund, ought not to arouse the condemnation of those who believe in the beneficent effects of general education. In this great cause we would do well to keep in mind the generous words of Commodore Schley, sent after the battle of Santiago, "In our victory there is glory enough for us all." We find no error in the order of his Honor, and the same is

Affirmed.

Cited: Briggs v. Raleigh, 166 N. C., 153; *Hill v. Skinner,* 169 N. C., 409.

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(588).

ADA KIRKMAN v. JAMES A. HODGIN, MATTIE K. STONE, ADMRX. INTERVENER.

(Filed 23 December, 1909.)

Wills—Devisees—Contract for Division—Independent Property—Consideration—Chattels—Reservation of Life Estate—Covenants—Interpretation of Contracts—Intention.

In dividing the estate of the testator between his widow and two sons, A. and S., the widow having the life estate and the sons the remainder in certain portions, the widow and sons entered into and effectuated a written agreement among themselves, agreeing, among other things, that S. was to convey to A. certain property, and that the widow would hold until her death the proceeds of a certain note, which was her own property, and after her death the balance of the proceeds of the notes to go to

S., or his heirs: *Held*, (1) the contract to be a personal one between the parties; (2) that it should be construed to effectuate the intention of the parties; (3) the agreement will be construed as a distinct covenant that the widow shall have the use of the proceeds of the note during her life, and not as a conveyance of chattels, reserving a life estate to the grantor, and that the division of the estate under the contract was a sufficient consideration.

APPEAL from *Long, J.*, at June Term, 1909, of GUILFORD.

Action to determine the ownership of a fund of $1,000 in the possession of James A. Hodgin, trustee, heard upon exceptions to report of referee, which report is as follows:

In obedience to the order of reference made in this action, I proceeded on 6 May, 1909, to execute the same. The testimony taken is herewith submitted, and from the testimony and admission in the pleadings I find:

That W. L. Kirkman died testate, leaving his surviving widow, Lydia E. Kirkman, and two sons, A. L. Kirkman and S. O. Kirkman; that he devised and bequeathed his whole estate to his widow for life, with remainder as to part of his realty to his son A. L. Kirkman for life, remainder to A. L. Kirkman's wife and children, and the balance of his estate to S. O. Kirkman.

That shortly after the death of W. L. Kirkman, his said widow, Lydia E., and his sons, A. L. Kirkman and S. O. Kirkman, entered into a contract to divide the estate of the said testator, without waiting for the termination of the life estate. By this agreement A. L. Kirkman was to hold a part of the real estate devised to S. O. Kirkman, and S. O. Kirkman was to hold a part of the real estate devised to A. L. Kirkman, and in accordance with the terms of the agreement and contract S. O. Kirkman conveyed a part of his property to A. L. Kirkman. By (589) said agreement the personal estate was also divided.

In this agreement and contract, Lydia E. Kirkman, the widow, agreed to hold until her death the note of Webb Hunt, or the proceeds thereof, and after her death the balance of the proceeds to go to S. O. Kirkman. Some time after this agreement and contract was entered into, the said widow married John G. Davis, who had knowledge of this agreement and contract.

This Webb Hunt note was for $1,000 and was the separate property of Lydia E. before the death of her husband—was no part of his estate. She collected the note and deposited the proceeds in the Peoples Five Cent Savings Bank in December, 1905. Soon thereafter the widow, Lydia E., married John G. Davis. The Five Cent Savings Bank was afterwards consolidated with the Greensboro Loan and Trust Company, and the account of Lydia E. was transferred to the Greensboro Loan

and Trust Company, in the name of Lydia E. Davis. By order of Mrs. Lydia E. Davis, her account was transferred to her husband, John G. Davis, in February, 1896. Davis kept two accounts with the bank, keeping the account transferred to him by his wife separate from his other account. The principal of said deposit was kept intact.

Lydia E., A. L. and S. O. Kirkman have all since died. During their lives they held the property of W. L. Kirkman according to the terms of the contract, and it has since so been held.

A. L. and S. O. Kirkman administered, with the will annexed, upon W. L. Kirkman's estate, and since their deaths James A. Hodgin administered *de bonis non,* and has administered the same according to the terms of the agreement and contract.

Mrs. Lydia Kirkman died 20 February, 1905, and, some time after that, her surviving husband, John G. Davis, transferred and assigned to James A. Hodgin, trustee, $1,000 and the interest accrued since the death of my wife, in trust, to hold for Mrs. Ada Kirkman, plaintiff; this $1,000 being the proceeds of the Webb Hunt note, an account of which was kept separate, in the name of John G. Davis, as above stated, "Unless it shall be determined that said money belongs to the heirs of S. O. Kirkman," that question to be settled by the lawyers named, if they could agree; if not, to be settled by litigation. There is now in the hands of Hodgin, trustee, the sum of $1,174.64, principal and accrued interest, of amount deposited by Lydia E. Kirkman.

Upon the facts your referee concludes, as matter of law, that the agreement (Exhibit B) was a personal contract between the (590) parties thereto; and to effectuate the intentions of the parties, the proper construction is that at the death of Mrs. Lydia Kirkman-Davis the balance of the proceeds of the Webb Hunt note, *i. e.,* the amount of the deposit held by James A. Hodgin, trustee, should be paid to the representatives of S. O. Kirkman.

JAMES T. MOREHEAD, Referee.

The court overruled the exceptions and confirmed the report, and rendered judgment in favor of the defendant Mattie K. Stone, administratrix of S. O. Kirkman. The plaintiff excepted and appealed.

Justice & Broadhurst for plaintiff.
Scott & McLean for defendants.

BROWN, J. The basis of this action is the following paper-writing, referred to in the report as Exhibit B:

Agreement.—L. E. Kirkman, S. O. Kirkman and A. L. Kirkman. We, L. E. Kirkman, S. O. Kirkman and A. L. Kirkman, do this day

agree to the following form, in shape of division of the property of W. L. Kirkman, deceased, as follows:

L. E. Kirkman to hold until her death the note of Webb Hunt, or the proceeds thereof; also to hold the $500 to be collected from the estate of W. M. Kirkman, and after her death the balance of the proceeds to go to S. O. Kirkman or his heirs.

A. L. Kirkman's heirs are to hold the lot on South Elm Street, on the west side, known as the Kirkman building; also vacant lot on east side, and half the balance of the notes, accounts, mills, stocks, safe, etc.

S. O. Kirkman to hold the home place and the place what is known as the Dillon place; to hold all the personal property, stock, grain, hay, etc., now he is in possession of; and it is further agreed that each, A. L. Kirkman and S. O. Kirkman, shall, from this day on, have and derive such benefits as may arise from above-mentioned property allotted to each of us.

LYDIA E. KIRKMAN.
A. L. KIRKMAN.
S. O. KIRKMAN.

We agree with the conclusion reached by the learned lawyer who acted as referee in this case, that the agreement is a personal contract between the parties thereto; and to effectuate the intentions of the parties the proper construction is that at the death of Mrs. Lydia Kirkman-Davis the balance of the proceeds of the Webb Hunt note, *i. e.,* (591) the amount of the deposit held by James A. Hodgin, trustee, should be paid to the respresentatives of S. O. Kirkman.

This paper-writing is not an attempt by the absolute owner of chattels, by deed, to reserve a life estate for his own life and then to create a remainder interest in them by a limitation over to some one else. It is well settled that such limitation over is void and the grantor takes the whole estate under the reservation. *Dail v. Jones,* 85 N. C., 222.

The instrument signed by the then Mrs. Kirkman and the two sons does not purport to be a deed of conveyance of property, but an executory agreement, founded upon a mutual and valuable consideration, for the settlement of the estate of their testator, W. L. Kirkman.

Such an agreement may be enforced. 3 Pom. Eq., 1235. There is ample consideration to support it. To make a consideration, it is not necessary that the person contracting should receive any benefit; it is sufficient if the other party be subjected to loss or inconvenience. *Brown v. Ray,* 32 N. C., pp. 73 and 74; *Sherrill v. Hogan,* 92 N. C., 345. The findings of the referee show that the parties to this agreement, being desirous of making a division of the estate of W. L. Kirkman before the falling-in of the life estate of Lydia E. Kirkman, entered into the aforesaid agreement. It was an obligation on the part of Lydia E.

Kirkman-Davis to S. O. Kirkman and his heirs or next of kin; the consideration on the part of S. O. Kirkman being the conveyance by him of valuable real property in the city of Greensboro to his brother, A. L. Kirkman.

S. O. Kirkman parted with his property, both real and personal, in accordance with the terms of this contract, and this was a sufficient consideration to support the contract as against Lydia E. Kirkman and her assignee.

In order to give effect to the plain intention of the parties to this agreement, which is the true principle for the construction of all instruments, the Court will not construe it into a conveyance of chattels, reserving a life estate to the grantor, but rather as a distinct covenant that Mrs. Kirkman shall have the use of the property in controversy during her life, to which she assented. *Howell v. Howell,* 29 N. C., 491.

As said by *Mr. Justice Battle,* "Where, from the peculiar phraseology of the instrument, the benefit of an estate for life can be given to the grantor, or donor, by construing the apparent reservation into a covenant on the part of the grantee or donee that the other party shall enjoy the profits of the chattels granted or given, then, *Ut res Magis valeat, quam pereat,* the grantee or donee shall take the (592) property, subject to the covenant." *Lance v. Lance,* 50 N. C., p. 414.

The judgment confirming the report of the referee is
Affirmed.

Cited: Institute v. Mebane, 165 N. C., 650; *Potato Co. v. Jenette,* 172 N. C., 5.

M. P. CATHEY ET AL. v. BUCHANAN LUMBER COMPANY.

(Filed 23 December, 1909.)

1. **Deeds and Conveyances—Description Indefinite.**

When the descriptive part of a deed is indefinite, so it does not define the lands to be conveyed, the established rules to ascertain the intent of the parties are not capable of application.

2. **Same—Indefinite Part of Definite Whole.**

A conveyance of a part of a tract of land must itself furnish the means by which the part can be located—*i. e.*, a subject matter either certain within itself, or capable of being made certain by recurrence to something extrinsic to which the deed refers.

3. Same—Evidence Dehors.

When, in a conveyance, the boundaries of an entire tract of land containing 724 acres are described with exactness, of which 327 acres were intended to be conveyed, but without any words indicative of their location in the larger tract, or by which they can be identified or set apart, the deed is void for indefiniteness of description and may not be aided by parol and extrinsic evidence as to the location of the land intended to be conveyed.

4. Deeds and Conveyances—Description—Interpretation of Deeds—Habendum.

From the descriptive words of this deed it appeared that the grantor intended to convey an undefined 327 acres from a definitely described tract of 724 acres, as will also appear by the *habendum;* "to have and to hold the aforesaid 327 acres, being a part of the aforesaid tract of land."

APPEAL from *Ward, J.*, at August Term, 1909, of GRAHAM.

Action, to recover land and damages. These issues were submitted:

1. Are the plaintiffs the owners in fee of the lands described in the complaint? Answer: Yes; one-third interest.

2. Have the defendants cut and removed timber therefrom, as alleged? Answer: Yes.

3. What damage has been done to said land by reason of cutting and removing said timber? Answer: $1,033.50.

The case was made to turn upon the construction of a deed
(593) from A. W. Crisp and others to John M. King, dated 8 November, 1888, which is as follows:

STATE OF NORTH CAROLINA—Graham County.

This deed, made this 8 November, 1888, by Alfred W. Crisp and wife, Sarah J. Crisp, I. J. Sawyer and wife, M. J. Sawyer, and C. Randolph and wife, M. P. Randolph, of Graham County and State of North Carolina, to John M. King, of Graham County and State of North Carolina, witnesseth:

That, in consideration of $324 to them paid by said John M. King, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents does bargain, sell and convey to said John M. King, his heirs and assigns 324 acres of land, part of a certain tract of land composed of Nos. 3044, 3097 and 3098, in Graham County and State of North Carolina, adjoining the lands of Alexander Baring and others, beginning on a hickory, 4 poles S. of the N. W. corner of No. 3098, and runs S. 62 W. 22 poles to a black pine; thence N. 67 W. 66 poles to a Spanish oak on top of a ridge; thence S. 86 W. 80 poles to a chestnut on a former line; thence S. 70 poles to a Spanish oak on the line of 3097; thence S. 85 W. with the line of said No., 300 poles to a

small crooked chestnut oak on a ridge; thence S. 85 W. 11 poles to a stake and pointers, corner of Joel C. Sawyer's thirteen-acre lot; thence S. 70 E. with the same 50 poles to a Spanish oak; thence S. 40 E. 44 poles to a black pine; thence S. 35 W. 70 poles to a small black pine on the line of No. 3044; thence S. 70 E. with said line 114 poles to a crooked chestnut, corner of said No. on the bank of said Panther Creek; thence up said creek as it meanders 200 poles to a birch, beginning corner of said Sawyer lot; thence N. 70 W. with said lot 180 poles to a hickory and chestnut on the line of No. 3044; thence S. 35 W. with the same 100 poles to the S. W. corner of said No.; thence S. 70 E. 200 poles to the S. E. corner of the same; thence N. 35 E. with said No., 162 poles to a chestnut oak on the line of said No.; thence S. 82 E. 198 poles to a black oak on the divide between said creek and Cook's corner of Cook's lot; thence N. 38 E. 50 poles to a chestnut, corner of said lot; thence N. 11 W. 18 poles to a black oak, corner of the same; thence N. 57 E. with said lot 193 poles to a small maple on the S. bank of said creek on the line of 3098; thence N. with said No., 71 poles to the beginning, containing 724 acres, more or less.

To have and to hold the aforesaid 327 acres, being a part of the aforesaid tract of land, with all privileges and appurtenances (594) thereto belonging to the said John M. King, his heirs and assigns, forever, to their only use and behoof.

And the said Alfred W. Crisp and wife, Sarah J. Crisp, I. J. Sawyer and wife, M. J. Sawyer, C. Randolph and wife, M. P. Randolph, covenant that they are seized of said premises in fee and have the right to convey the same in fee simple; that the same are free from all encumbrances, and that they will warrant and defend the said title to the same against the claims of all persons whatsoever.

In testimony whereof, the said Alfred W. Crisp and wife, Sarah J. Crisp, I. J. Sawyer and wife, M. J. Sawyer, and C. Randolph and wife, M. P. Randolph, have hereunto set their hands and seals, the day and year above written.

From a judgment for plaintiffs the defendant appealed.

Morphew & Phillips for plaintiff.
Bryson & Black for defendants.

BROWN, J., after stating the case: The only controversy presented for our decision by the assignments of error arises upon the ruling of the court below, that the description of the land attempted to be conveyed by deed from C. Randolph *et al.* to John M. King, upon which the defendant relies to prove title, is insufficient and so indefinite as not to permit the introduction of parol evidence to locate the land.

We have considered with care the very full and well-prepared brief of the learned counsel for appellants, and are nevertheless of opinion that the deed is void for uncertainty in describing the property to be conveyed.

The object of a descriptive part of a deed is to define what the parties intend—the one to convey, the other to receive; and when that is doubtful, the settled rules of construction invoked by appellant and invented by courts to aid them in ascertaining the intent of the parties are resorted to. But the question presented here comes rather within the rules of evidence than of construction.

Parol evidence is never received for the purpose of varying or contradicting a deed, or to supply a description altogether wanting, or to complete one so vague and indefinite as to be wholly unintelligible. When the deed is not altogether void for uncertainty, but contains a defective description of real property, parol evidence is received to remove the ambiguity and to identify the property, but it is (595) never received to show the intention of the parties wholly outside and independent of the description contained in the instrument itself.

This is the substance of the many decisions in this State. The difficulty lies generally in applying the rule to the descriptive words of the conveying instrument.

The deed under which defendant claims does not purport to convey the whole of a described tract of land, but only a certain number of acres thereof, to wit, "324 acres of land, part of a certain tract of land composed of Nos. 3044, 3097 and 3098, in Graham County." The boundaries of the entire tract, from which the 324 acres are to be taken, are set out with exactness, and the entire tract, as stated in the deed, contains 724 acres.

The deed furnishes no means by which the 324 acres can be identified and set apart, nor does the instrument refer to something extrinsic to it, by which those acres may be located.

It is self-evident that a certain part of a whole cannot be set apart unless the part can be in some way identified. Therefore, where a grantor undertakes to convey a part of a tract of land, his conveyance must itself furnish the means by which the part can be located; otherwise his deed is void, for it is elementary that every deed of conveyance must set forth a subject-matter, either certain within itself or capable of being made certain by recurrence to something extrinsic to which the deed refers.

This case is somewhat like *Grier v. Rhyne,* 69 N. C., 350, wherein *Reade, J.,* said: "The difficulty in the defendant's way is that his contract of purchase of thirty or thirty-five acres, to be taken off the tract

of seventy acres, without saying where it is to be taken off, is so vague and indefinite that he cannot enforce it specifically. It is uncertain in quantity, and to ascertain the boundary there is no reference to anything by which the quantity or place could be made certain." In the case before the Court the deed in question does not even state whose lands this particular 327 acres adjoins. The reference, "adjoining lands of Alexander Barring and others," refers to the 735-acre boundary and not to the part to be taken off.

In *Harrison v. Hahn,* 95 N. C., 28, *Smith, C. J.,* said: "The office of the descriptive words is to ascertain and to identify an object; and parol proof is heard, not to add to or enlarge their scope, but to fit the description to the thing described. When they are too vague to admit of this, the instrument in which they are contained becomes inoperative and void."

In *Harris v. Woodard,* 130 N. C., 580, the Court held that a deed which attempted to convey three acres, to be taken from a forty-acre tract, without fixing the beginning point or boundary of (596) the three acres, was too vague and indefinite to admit of parol evidence to support it. This deed referred to a storehouse and grist mill which was situated on the three acres.

Other cases in point are *Harrell v. Butler,* 92 N. C., 20; *Dickens v. Barnes,* 79 N. C., 490; *Murdock v. Anderson,* 57 N. C., 77; *Allen v. Chambers,* 39 N. C., 125; *Capps v. Holt,* 58 N. C., 153; *Roberson v. Lewis,* 64 N. C., 734. In the case of *Dickens v. Barnes, supra,* speaking of the vagueness of the description in the deed, the Court said: "These questions cannot be answered by facts *dehors* the deed established by parol proof, because it is a patent ambiguity, a question of law for the court, and not of fact for the jury." In *Dail v. Jones,* 85 N. C., 221, it was held that parol evidence that grantor put grantee in possession immediately upon the execution of the deed was inadmissible for the purpose of identifying the land conveyed, where the description contained in the deed was void for uncertainty.

The question as to whether the grantors in this deed under consideration intended to convey the whole boundary, containing 724 acres, is set at rest by reference, not alone to the descriptive words, but to the language of the *habendum,* "To have and to hold the aforesaid 327 acres, being a part of the aforesaid tract of land," etc.

Upon a review of the record, we find

No error.

Cited: Bond v. Beverly, 152 N. C., 63; *Beard v. Taylor,* 157 N. C., 442; *Higdon v. Howell,* 167 N. C., 456; *Bartlett v. Lumber Co.,* 168 N. C., 284.

HENRY T. GRAEBER v. WILLIAM A. AND ANNIE SIDES.

(Filed 23 December, 1909.)

1. **Deeds and Conveyances—Husband and Wife—Existing Debts—Fraudulent Conveyances—Principal and Agent.**

A deed made by defendant to his wife without a valuable consideration and for the purpose of avoiding the obligations incurred to the Government under the distiller's bond, which plaintiff has signed as surety prior to the execution of the deed, the property conveyed being practically the entire estate of the defendant, the principal of the bond, is fraudulent and void as against the surety having been compelled to pay the bond.

2. **Same—Procedure.**

One who has signed as surety on a distiller's bond and who has been compelled to pay to the Government his principal's default thereon, may now proceed in an action to set aside his principal's deed subsequently made to the wife for the purpose of avoiding his obligations thereunder. The former method to test the validity of the deed was to sell the property under execution and then sue for its recovery.

3. **Principal and Surety—Payment by Surety—Implied Covenant—Cause of Action.**

One who has executed a distiller's bond to the Government as surety, incurs an outstanding existing obligation which he has thereby assumed for his principal, with an implied covenant on the part of the principal that he will indemnify him, as surety, against loss; and no cause of action accrues to the surety upon the implied covenant of indemnity until he has paid the bond according to its terms.

4. **Same—Deeds and Conveyances—Fraud—Limitations of Actions.**

The statute of limitations does not begin to run against one who has executed a distiller's bond to the Government as surety, and was subsequently forced to pay by judgment the Government for his principal's default thereon, until the date of such payment, in his action to set aside his principal's deed made to his wife since he executed the bond for the fraudulent purpose of avoiding paying the bond.

5. **Same—Registration—Notice.**

The registration of a deed made by the principal on a distiller's bond, to his wife, for the purpose of escaping liability on the bond, and void as to his surety who was forced to pay for his default thereunder, is not notice to the surety that it was made to defraud him, when he did not then know of his principal's default, or that he would be called upon to pay anything as surety.

(597) APPEAL from *E. B. Jones, J.*, at February Term, 1909, of ROWAN.

Action to subject certain land conveyed by the defendant, William A. Sides, to his wife, Annie, to the payment of $269.09 paid out by plain-

tiff, as surety for William A. Sides, on a bond in the penal sum of $500 executed to the United States, 16 July, 1897.

These issues were submitted without objection:

1. Is defendant, W. A. Sides, indebted to plaintiff? If so, what amount? Answer: $269.09, with interest since 22 August, 1906.

2. Was the deed from W. A. Sides to his wife, as set out in the complaint, executed with intent to hinder, delay, defraud and defeat the plaintiff's rights? Answer: Yes.

3. Was the defendant, W. A. Sides, after the execution of the deed to Annie Sides, his wife, thereby rendered insolvent? Answer: Yes.

4. At the time of the execution of the deed by W. A. Sides to Annie Sides, his wife, did he reserve property sufficient and available to pay his debts? Answer: No.

5. Did the *feme* defendant, Annie Sides, have knowledge of or participate in any fraudulent intent on the part of her hus- (598) band in the execution of said deed? Answer: Yes.

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

The court rendered a judgment against W. A. Sides for $308.82, with interest on $269.09 from 8 February, 1909, and decreed that the deed to the wife, Annie A. Sides, dated 1 August, 1903, be set aside and declared void as to plaintiff's demand. From this judgment the defendants appealed.

Kerr Craige and Burton Craige for plaintiff.

Clement & Clement and Adams, Jerome & Armfield for defendants.

BROWN, J. There are two assignments of error: (1) That the court erred in refusing to dismiss the action or to nonsuit the plaintiff as to the defendant Annie A. Sides at the close of the plaintiff's evidence; (2) That the court errod in submitting the case to the jury, and in not holding as a matter of law that the plaintiff's cause of action was barred by the statute of limitations as to Annie A. Sides, it appearing from the evidence of the plaintiff that the deed from the defendant William A. Sides to his wife, Annie A. Sides, was registered more than three years prior to this action and prior to the payment of the judgment by the plaintiff.

As the first assignment of error is not discussed in appellants' brief, we will not notice it, except as it is connected with the second assignment of error, relating to the statute of limitations.

The undisputed facts are: That on 16 July, 1897, the plaintiff and one Schenck became sureties to the United States for defendant William A. Sides upon a distiller's bond in the penal sum of $500, said defendant

being then engaged in operating registered distillery No. 216, in Rowan County. The defendant Sides made default to the Government under this bond, and in an action instituted by the Government against William A. Sides as principal and Henry T. Graeber and John W. Schenck as sureties on the bond the Government recovered judgment against the defendants, in April, 1905, for the penalty of the bond, to be discharged upon payment of $107.14 and interest, penalties and costs, aggregating $269.09. This sum was paid by plaintiff 22 August, 1906. This action was instituted 10 January, 1907, to set aside the deed of 1 August, 1903, made by the defendant W. A. Sides to his wife, Annie, to the end that the land be subjected, under execution, to the payment of the above obligation.

The proof is plenary that the deed was made to the wife with-
(599) out any valuable consideration and for the express purpose of avoiding the obligations incurred to the Government under the distiller's bond which plaintiff had signed as surety in 1897, and that the property conveyed was practically the entire estate of the grantor.

It requires no citation of authority to show that such a conveyance is fraudulent and void as against existing obligations, whether the grantee had knowledge of or participated in the fraud or not. The method formerly employed to test the validity of such a deed was to sell the property under execution and then sue for its recovery, but there is now no authority for this method of procedure. *Benton v. Collins,* 118 N. C., 196.

The bond of 16 July, 1897, which plaintiff had executed for the defendant William A. Sides, was an outstanding existing obligation, assumed by plaintiff for the said defendant before the deed to his wife was executed. *Catlin v. Catlin,* Bush (Ky.), 141; *Simpson v. Simpson,* 80 N. C., 332. Arising out of that relation of principal and surety there is an implied covenant, entered into in 1897, that the principal will indemnify his surety as against loss. While this is so, no cause of action had accrued to plaintiff until he paid the judgment rendered against him in 1906; consequently he could not bring action, either against William A. Sides or his grantee.

Ordinarily the statute of limitations begins to run, in favor of the principal and against the surety who pays the debt, from the time of such payment, and not from the time when the debt becomes due, because, until the surety has been compelled to make such payments, there is no breach of the implied promise of the principal to indemnify him. 1 Brandt Surety, sec. 252, and cases cited; *Odlin v. Greenleaf,* 3 N. H., 270.

It is true the deed of the husband to the wife was recorded more than three years before plaintiff paid the judgment recovered upon the bond

of 1897, but he had no cause of action until the husband had broken the implied covenant of indemnity arising upon the aforesaid bond. In fact, the entire evidence shows that plaintiff had no knowledge of any demand under the bond for nearly two years after the deed was recorded. While recording it would give notice to plaintiff that such an instrument had been made, he could not infer that it was executed to defraud him, since he did not know of any default on the bond, or that he would be called upon to pay anything on it as surety for the principal.

We find no error in the ruling of the trial judge.

No error.

Cited: Eddleman v. Lentz, 158 N. C., 73.

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(600).

J. D. PARKER v. JOHN W. GRIFFITH, SHERIFF OF UNION COUNTY.

(Filed 23 December, 1909.)

1. **Non-Intoxicants—"Near Beer"—License—Lawful Commodity—Prohibition Law.**

   Near beer and kindred non-intoxicating beverages mentioned in chapter 438, Public Laws of 1909, are now recognized articles of commerce and may be lawfully dealt in within this State, notwithstanding the general prohibition laws. *S. v. Danenburg,* at this term, cited and approved; *S. v. Parker,* 139 N. C., 586, cited and distinguished.

2. **Non-Intoxicants—"Near Beer"—License—Issuance—Mandamus.**

   The commissioners of Union County, in conformity with chapter 438, Public Laws of 1909, having levied a tax on "near beer" and kindred non-intoxicating drinks therein enumerated, the writ of mandamus will lie to compel the sheriff of the county to issue a license for its sale, upon his refusal to do so, as he is without discretion to grant or refuse the license.

APPEAL by plaintiff from *W. J. Adams, J.,* upon his dismissing plaintiff's petition for a writ of *mandamus,* filed in UNION, and heard at chambers on 28 September, 1909.

On 10 September, 1909, plaintiff tendered to defendant the sum of $40, and demanded that the defendant, as sheriff and in behalf of the State of North Carolina, and the county of Union, issue to plaintiff license to engage in the sale of malt, beerine, near beer and other non-intoxicating drinks in said county and State, for the period from 1 June, 1909, to 31 May, 1910. This defendant refused to do, alleging that he did not believe that said drinks could lawfully be sold in Union

County. Plaintiff thereupon instituted this action, petitioning for a writ of *mandamus* to compel defendant to accept the $40 tendered and issue to plaintiff the license demanded.

From the judgment of the judge below dismissing plaintiff's petition, plaintiff in due time excepted and appealed.

David Stern and J. J. Parker for plaintiff.
A. M. Stack for defendant.

BROWN, J., after stating the case: There is only one question presented by this appeal: Can malt, beerine, near beer and other nonintoxicating drinks, containing one-half of one per cent alcohol, or more, be sold in Union County lawfully by one who has paid the license tax and obtained a license under Public Laws 1909, ch. 438, Schedule B, secs. 26 and 63, and the resolution of the Board of Commissioners of
(601) Union County, of 7 July, above referred to?

This Court has recently held that, in consequence of the legislation of 1909, near beer and kindred nonintoxicating beverages mentioned in the act are now recognized articles of commerce and may be lawfully dealt in within this State, notwithstanding the general prohibition law. *S. v. Danenburg, post,* 718.

This ruling is based upon well-considered adjudications in other States where prohibition laws similar to ours are in force.

We know of nothing which exempts the county of Union from the effect and operation of the act of the General Assembly of 1909, which is an act to raise revenue and operates throughout the State. Of course, it does not repeal the general prohibition law, which prohibits only the sale of intoxicating drinks.

In obedience to the act of 1909, the commissioners of Union County have levied the tax on such beverages provided therein for counties, as well as for the State, as it was their duty to do.

Since the General Assembly, by the near-beer-tax act, has expressed the general policy of permitting its sale, the counties may not prohibit it, and incorporated cities and towns may only regulate but not forbid its sale or destroy the business by unreasonable and prohibitive taxation. *Campbell v. Thomasville,* 64 S. E. Rep., 821; *S. v. Danenburg, supra.* There are no exceptions in the act of 1909 which exempts Union or any other county from its operation.

The decision of this Court in *S. v. Parker,* 139 N. C., 586, was rendered in 1905 and was a construction of the public-local acts prohibiting the sale of intoxicating and alcoholic drinks in that county. The defendant was indicted under the act of 1903 (chapter 434). After he was convicted he moved in arrest of judgment, because, since his convic-

tion, the act of 1905 (chapter 497) had been enacted, which purported to make certain changes in the "Union County liquor laws." We declined to arrest the judgment, holding that the act of 1905 operated prospectively and did not so unqualifiedly repeal the act of 1903 as to prevent the imposition of the punishment imposed by the last-named act. This decision was followed by *S. v. Perkins,* 141 N. C., 797, and *S. v. Scott,* 142 N. C., 602.

The issuing of a license provided for by the revenue act is a mere ministerial act. No discretion is vested in the sheriff to grant or refuse the license. Hence the writ of *mandamus* will lie to compel the sheriff to issue same. 25 Cyc., 623; 26 Cyc., 160.

Nothing in this opinion is to be construed as denying incorporated cities and towns the right to adopt reasonable regulations (602) for the sale of near beer, as recognized and defined in *S. v. Danenberg, supra.*

Let the writ of *mandamus* issue, requiring the sheriff to accept the license tax imposed by law.

Reversed.

M. F. TEETER v. THE COLE MANUFACTURING COMPANY.

(Filed 23 December, 1909.)

Contracts, Breach of—Rescission—Intimation of Court—Fragmentary Appeal—Conversion—Measure of Damages.

In an action to recover the purchase price for certain lumber under a contract, it appeared from plaintiff's evidence that he had shipped a carload thereof, and after conversation had between himself and defendant it was ascertained that only a small portion of it came up to the sizes specified, and therefore unfit for defendant's purposes; and on that account it was agreed between the parties that the lumber should be left in the car to be otherwise disposed of, but that defendant thereafter, without plaintiff's knowledge, took from the car certain of the lumber which he found he could use. The lower court intimated that plaintiff could not recover for the contract price of the carload, but only the value of so much as defendant had taken therefrom, with the consequent damages to plaintiff. Plaintiff took a nonsuit and appealed. *Held,* the nonsuit and appeal were premature, and that plaintiff should have excepted and appealed from final judgment; (2) the plaintiff could not recover on the contract: (*a*) he had not performed it, (*b*) it had been rescinded by mutual agreement, (*c*) the action would be for conversion, and the damages the actual value of the lumber taken, with such damage to the carload lot as plaintiff had sustained by defendant's taking a portion thereof and leaving a remnant; (3) that if the contract had not been rescinded, defendant, by taking a part of the lumber, was not bound under the contract to take the remainder which did not come up to it.

APPEAL from *Councill, J.*, at May Term, 1909, of CABARRUS.

Action to recover the sum of $206.40, on account of a lumber transaction.

After the plaintiff had testified, the court intimated that, taking his evidence in its most favorable view, he would only be entitled to recover the value of such lumber as the defendant had taken from the car of lumber shipped, together with such damages as the plaintiff might have sustained by reason of the defendant selecting a portion of the
(603) lumber from the car and leaving the other as rejected. Upon such intimation of opinion, the plaintiff excepted and submitted to nonsuit and appealed to the Supreme Court.

Montgomery & Crowell for plaintiff.
L. T. Hartsell and Burwell & Cansler for defendant.

BROWN, J. 1. We are of opinion that the nonsuit, taken voluntarily by plaintiff, was premature. He should have excepted to the ruling of the court and proceeded with the trial. In any view, he was entitled to a judgment for some amount. We again call attention to repeated rulings of this Court, that "In order to avoid appeals based upon trivial interlocutory decisions, the right thus to proceed (viz., to take a nonsuit and appeal) 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." *Hayes v. R. R.*, 140 N. C., 131. "An intimation of an opinion by the judge adverse to the plaintiff upon some proposition of law which does not take the case from the jury, and which leaves open essential matters of fact still to be determined by them, will not justify the plaintiff in suffering a nonsuit and appealing." *Midgett v. Mfg. Co.*, 140 N. C., 361; *Merrick v. Bedford*, 141 N. C., 504; *Hoss v. Palmer*, 150 N. C., 17.

2. As the result to plaintiff is the same, whether we dismiss his appeal or affirm the ruling of the trial court, we will pass on the merits of the case, as it may tend to a settlement of the controversy. The plaintiff's complaint contains two causes of action—one for conversion of the lumber, and the other on a contract of purchase. The facts are, that plaintiff contracted to sell and deliver to defendant, whose place of business was in Charlotte, a car load of lumber, two inches thick. While the lumber was in the car, plaintiff conferred with defendant's agents in Charlotte about it, and this conversation occurred, as detailed by plaintiff: "I said, 'I am sorry there is a misunderstanding about it. You can use every stick of this lumber in your business here, some way. What will you give me for this lumber?' He said, 'I can't use a stick under two inches thick.' I said, 'Well, I can't afford to have my

lumber tore up for what little is over two inches. You need not take any of it.' He said, 'Well.' I asked him if he had any room on his yard I could stack it until I could dispose of it. He said, 'No; but you can stack it on the right of way of the railroad track.'"

Plaintiff then authorized Mr. Oglesby to sell the lumber for him, and went home. Some days thereafter, the defendant's (604) agents and employees entered the car and took out and used all the two-inch lumber in it.

The plaintiff cannot recover on the contract—first, because he did not perform it by delivering two-inch lumber; secondly, because, according to his own evidence, the contract was rescinded by mutual agreement and the lumber placed again on sale by plaintiff.

It necessarily follows that if the original contract of purchase was rescinded by agreement of the parties, and the defendant went in the car and took a part of the lumber after that time, that would be a conversion, and the plaintiff could recover only the value at the time of the conversion of the lumber actually taken, together with such damage to the car-load lot as plaintiff sustained by reason of the defendant unlawfully taking a portion of the lumber and leaving the remnant. Even if the contract had not been rescinded by mutual consent, the defendant, by taking the part of the lumber that was two inches thick, was not bound under the contract to receive the remainder, which did not come up to the contract and was less than two inches in thickness. *Freeman v. Skinner,* 31 N. C., 32.

Affirmed.

Cited: White v. Harris, 166 N. C., 228.

A. S. ANDERS ET AL. v. B. B. GARDNER.

(Filed 8 January, 1910.)

1. **Contracts—Restraint of Trade, Reasonable—Consideration, Assignment of.**

For and in consideration of the purchase of certain certificates of stock at a certain price, the vendor agreed not to enter or become employed in the same town in a certain business in which he was skilled, and which was carried on by the corporation: *Held,* the agreement is supported by a sufficient consideration, is a reasonable restraint of trade, and valid; and is assignable, especially when the corporation is the assignee, and the contract in restraint was also made for its benefit.

2. **Contracts—Restraint of Trade, Reasonable—Injunction—Damages.**

When it appears by affidavits, or otherwise, that one who has entered into a valid contract in restraint of his trade or business is acting in

violation of it, upon proper application of the other party in interest, a restraining order should be continued to the hearing, especially when it appears that resulting damages would be difficult to measure.

APPEAL by plaintiffs from *Webb, J.*, upon his rendering judg- (605) ment dissolving plaintiffs' restraining order in an action brought in GASTON. The judgment was rendered at chambers, at Concord, 31 August, 1909.

The facts are stated in the opinion of the Court.

A. G. Mangum, Jones & Timberlake and Burwell & Cansler for plaintiffs.

Tillett & Guthrie and O. F. Mason for defendant.

CLARK, C. J. The defendant owned one-third interest, ten shares (at par value, $1,000), in the Gastonia Livery Company. He sold these for $1,700 to M. G. Anders, one of the plaintiffs, with a contract, in writing, that the defendant would never engage again in the livery business within the corporate limits of the town of Gastonia nor work as an employee in such business therein, unless with the said company. The defendant was specially skilled in said business, and competition was sharp in the livery business. Such contract was deemed valuable by the parties, or it would not have been made. The defendant became an employee of the Gastonia Livery Company, but, that relation being severed, he took service in said town with the opposition livery stables, and the plaintiffs, who are said Mae G. Anders, (who now holds only one share of the stock) and the holders of the balance of the stock of the Gastonia Livery Company, seek to restrain him from so doing. The affidavits for plaintiffs are to the effect that said contract against defendant accepting employment in any other livery stable in Gastonia, or engaging in the business, was a valuable consideration; that it was made for the company as well as for the benefit of M. G. Anders, who later assigned it to the Gastonia Livery Company.

The restraining order should have been continued to the hearing, especially as damages would be hard to measure. *Jolly v. Brady,* 127 N. C., 142. The contract was a reasonable restraint of trade, and valid. This has been so often held by this Court that we need only refer to some of the cases where the matter has been fully discussed. *Cowan v. Fairbrother,* 118 N. C., 406; *Kramer v. Old,* 119 N. C., 6; *Jolly v. Brady,* 127 N. C., 142; *King v. Fountain* (livery stable), 126 N. C., 197; *Hauser v. Harding, ibid.,* 295; *Baker v. Cordon,* 86 N. C., 116.

Such contracts are assignable. *Cowan v. Fairbrother,* 118 N. C., 1. Besides, if the jury should find, in accordance with the plaintiff's affidavits, that the contract was made for the benefit of the Gastonia Livery

Company (as well as for the benefit of M. G. Anders), the other stockholders, as beneficiaries of such contract, could maintain (606) this action without any assignment thereof, even if M. G. Anders were not a plaintiff herein. *Haun v. Burrell,* 119 N. C., 544, and cases approving that case, cited in the annotated edition. Certainly, if the contract enhanced the value of the ten shares bought by M. G. Anders, it increased the value of all the other shares.

Reversed.

Cited: Wooten v. Harris, 153 N. C., 46.

E. S. WARLICK ET AL. v. H. P. REYNOLDS & CO. AND FIRST NATIONAL BANK OF HUNTINGDON, PA., ET AL.

(Filed 8 January, 1910.)

1. **Courts—Jurisdiction—Special Appearance—Continuance of Motion—Waiver.**

Jurisdiction in case of actions *in personam* can only be acquired by personal service of process within the territorial jurisdiction of the court, or by acceptance of service, or by general appearance, actual or constructive, this last usually arising by reason of some motion in the cause which can only be made in behalf of one who submits his case generally to the court's jurisdiction.

2. **Summons—Acceptance of Service—Attorneys at Law.**

An attorney at law, without having special authority, cannot make a valid acceptance of service of original process.

3. **Courts—Jurisdiction—Attorneys at Law—Special Appearance—Continuance of Motion—Waiver.**

By entering a special appearance, expressly restricted to the special purpose of moving to dismiss for want of jurisdiction, with a request for a temporary continuance of such motion, an attorney does not enter a general appearance, actual or constructive, or waive any rights of his client to dismiss accordingly.

4. **Courts—Jurisdiction—Injunction—In Personam.**

An injunction can only operate *in personam,* and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity, and on motion properly made it should be dismissed.

5. **Same—Promissory Notes—Nonresidents—Situs—Proceedings Quasi in Rem.**

Proceedings to restrain the negotiation of a note in the hands of a holder, a nonresident and beyond the borders of the State, should be dismissed, and not retained by the courts of our State as a proceeding *quasi*

in rem. The *situs* of the note, in matters of injunction, is governed by the general rule, that it is at the home of the creditor, differing from the exception to this rule made in proceedings in attachment.

6. Courts—Jurisdiction—Demurrer—Procedure.

A party defendant may enter a special appearance for the purpose of demurring to the jurisdiction of the court, and have the court determine and inform him of the validity of proceedings affecting a substantial right, and he is not required to test the validity by disobedience, and thereby risk the process of contempt. *Clark v. Mfg. Co.*, 110 N. C., 111, cited and approved.

7. Injunction—Substantial Right—Procedure—Appeal and Error.

An order continuing an injunction to restrain the holder from negotiating a promissory note affects a substantial right, and an appeal therefrom presently lies.

8. Courts—Jurisdiction—Nonresidents—Damages—Attachment—Situs of Credits.

While an order may not be granted retraining the negotiation of a promissory note in the hands of a holder who is a nonresident of the State and beyond its borders, the action may not be dismissed when there are allegations of damages sustained by reason of fraud in the procurement of the instrument and an attachment issued in the cause has been levied on indebtedness of resident debtors to the holder, within the jurisdiction of the court.

(607) ACTION heard on motion to dismiss and dissolve a restraining order, before *Justice, J.*, at chambers in Rutherfordton, N. C., on 15 October, 1909.

It appeared that on 25 August, 1909, E. H. Warlick *et al.*, plaintiffs, citizens and residents of Burke County, had instituted the action in the Superior Court of said county against H. P. Reynolds & Co., and the First National Bank of Huntingdon, Pa., citizens and residents of the State of Pennsylvania, *et al.*, claiming that plaintiffs, by fraudulent statements and practice on the part of defendants H. C. Reynolds & Co., had been induced to execute three promissory notes, for $1,200 each, payable respectively 10 September, 1909, 1910 and 1911, and that said H. P. Reynolds & Co. had placed said notes with the defendant bank in Pennsylvania, with the view and purpose of negotiating said notes and thereby passing them into the hands of holders in due course, and would do so, etc., unless restrained; and facts were also alleged indicating a right to recover damages for fraud and deceit in said transaction on the part of defendants. Pending the action, plaintiffs also sued out therein a warrant of attachment from the clerk of Burke, and caused same to be levied on certain indebtedness of third parties, citizens and residents in North Carolina, to H. P. Reynolds & Co. The affidavits, as stated, indicating a right to recover damages for the fraud alleged

against said defendants, the other facts directly relevant to the question presented are embodied in the judgment of his Honor entered on the hearing, and are as follows: (608)

This cause coming on for hearing before Hon. M. H. Justice, at chambers, in Rutherfordton, N. C., on 15 October, 1909, and being heard on motion of plaintiffs to continue restraining order heretofore issued to the hearing, and of the defendants' counsel entering special appearance H. P. Reynolds & Co. and the First National Bank of Huntingdon, Pa., to dismiss the action and to vacate and dismiss the restraining order, and to vacate order of attachment, as hereinafter set forth, the court finds the following facts:

That the summons was issued by the clerk of Burke Superior Court to the sheriffs of Burke and Randolph counties on 27 August, 1909; that the notes in controversy were in North Carolina at the date of the issuance of the summons, and were shortly thereafter returned to the defendant bank at Huntingdon, Pa.; that the plaintiffs, on affidavit filed, 1 September, 1909, had order of publication of summons made for H. P. Reynolds & Co. and the First National Bank of Huntingdon, Pa., and also sent a copy of the publication of summons and the statement of the cause of action to the sheriff of Huntingdon County, Pa.; that the sheriff of Huntingdon County, Pa., served the summons and statement of the plaintiffs' claim on H. P. Reynolds & Co. and First National Bank of Huntingdon, Pa., as shown in the record, and that the attorneys for each of the said defendants made the following entry on the back of said summons:

"Now, this 6 September, A. D. 1909, I accept service of notice of this action in the Superior Court of Burke County, N. C. Chas. T. Bailey, attorney for H. P. Reynolds.

"Now, 6 September, 1909, I accept service of notice of this action in the Superior Court of Burke County, N. C. John D. Dorris, attorney for First National Bank of Huntingdon, Pa."

That on 23 September, 1909, a restraining order was issued in this cause against said defendants, restraining them from disposing of or transferring said notes; that said restraining order was sent to and served on the said defendants by the sheriff of Huntingdon County, Pa., as shown, on 27 September, 1909.

That when the cause came on for hearing on plaintiffs' motion to continue the restraining order to the hearing on 5 October, 1909, at Hendersonville, N. C., the court received the telegram from Avery & Avery, attorneys, of Morganton, N. C., as follows:

MORGANTON, N. C., 5 October, 1909.

(609) HON. M. H. JUSTICE, Hendersonville, N. C.

Have just been retained in Warlick et al. v. Reynolds and Bank. Wish to enter special appearance, and make motion, supported by affidavits, to dismiss. Please continue hearing till Friday, the 15th inst. AVERY & AVERY.

That on receipt of said telegram, and in consequence thereof, the court continued the hearing, as requested, making the following orders on the back of the said restraining order:

HENDERSONVILLE, N. C., 5 October, 1909.

The within order, and the hearing thereof, is continued, to be heard at Rutherfordton, N. C., 15 October, 1909, in compliance with telegram, hereto attached, from Messrs. Avery & Avery.

H. M. JUSTICE, Judge.

The plaintiffs have leave to make any further service of this order and affidavits as they may be advised.

That on 5 October, 1909, the plaintiff had the following notice, together with the restraining order, affidavits, etc., served on Avery & Avery, as counsel for defendants H. P. Reynolds & Co. and First National Bank of Huntingdon, Pa., by the Sheriff of Burke County:

To H. P. REYNOLDS & CO. AND FIRST NATIONAL BANK OF HUNTINGDON, PA., AND AVERY & AVERY, Attorneys.

You are hereby notified to produce, on the hearing of the motion to continue the restraining order in this cause, before Judge M. H. Justice, at Rutherfordton, N. C., on 15 October, 1909, and allow the plaintiffs' inspection of the three notes in controversy in this action, and which are attacked for fraud, and dated about 10 September, 1908, and described in the affidavit, a copy of which and of the said restraining order hereto attached and served on you with this notice. This 6 October, 1909.

J. T. PERKINS,
JOHN M. MULL,
Attorneys for Plaintiffs.

That on the hearing on 15 October, at Rutherfordton, counsel for both parties appeared specially, and Avery & Avery asked to enter a special appearance of said defendants and moved to dismiss the action, to vacate and dissolve and dismiss the restraining order, and vacate the

order of attachment set forth in the record, and offered the affidavits filed of John Dorris and Thomas B. Bailey. (610)

It is further found as a fact that there was no actual service of summons or acceptance of service by defendants, except as appears by affidavits of Dorris and Bailey and return of service by the sheriff of Huntingdon County, Pa.

Upon said records, findings of fact and the affidavits filed, and the evidence of record, it is, on motion of J. M. Mull and John T. Perkins, attorneys for plaintiffs, ordered and adjudged that the restraining order heretofore issued be continued to the final hearing, and that said defendants H. P. Reynolds & Co. and the First National Bank of Huntingdon, Pa., their agents, servants and employees, be enjoined and restrained from assigning, transferring or disposing, in any manner whatsoever, the three notes, of $1,200 each, signed by the plaintiffs E. S. Warlick, W. H. York, O. L. Thornburg, J. A. Beach, J. H. Dale and others, made payable to the defendant H. P. Reynolds & Co., and dated on or about 10 September, 1909.

Upon the statement of counsel, Avery & Avery the said notes are not in their individual possession, but in the possession of their said clients, as they are informed; the production and impounding with the clerk of said notes is left open, without prejudice to plaintiffs, to move for further production and impounding with the clerk of Burke Superior Court, upon the filing of a complaint. The court refused to vacate the order of attachment, with the seizin thereunder, on the ground that defendants had given no notice of motion for same.

M. H. JUSTICE, Judge, etc.

At chambers in Rutherfordton, N. C., 15 October, 1909.

To these findings and order the defendants excepted and appealed.

J. M. Mull and J. T. Perkins for plaintiff.
Avery & Avery for defendant.

HOKE, J., after stating the facts: Jurisdiction in case of actions *in personam* can only be acquired by personal service of process within the territorial jurisdiction of the court, or by acceptance of service, or by a general appearance, actual or constructive, this last usually arising by reason of some motion in the cause, which can only be made in behalf of one who submits his case generally to the court's jurisdiction. *Vick v. Flournoy,* 147 N. C., 209; *Scott v. Ins. Co.,* 137 N. C., 515; *Bernhardt v. Brown,* 118 N. C., 701; *Pennoyer v. Neff,* 95 U. S., 715.

In the present case there has been no service in any of the (611) modes suggested—none by personal service nor by acceptance

personally—and our decisions are that an attorney at law, under his general authority as such, cannot make a valid acceptance of service of original process. *Anderson v. Hall,* 87 N. C., 381. And on the testimony it is found as a fact that the attorneys here had no special authority for the purpose indicated, nor has there been any general appearance, actual or constructive. True, there are decisions to the effect that when a motion for a continuance has been made and allowed, this will be considered a general appearance of the moving party, but such a ruling will no doubt be found to obtain in cases where the motion was made generally for the continuance of the cause, and not as here, where the appearance was expressly restricted to the special purpose of moving to dismiss for want of jurisdiction, and there was only a request for a temporary continuance of the motion. In so far as the action seeks to set aside the notes for fraud, and to enjoin their transfer, this is strictly an action *in personam.* An injunction can only operate *in personam;* and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity, and, on motion properly made, it should be dismissed. *Hinton v. Ins. Co.,* 126 N. C., 18; *Telegraph Co. v. Telegraph Co.,* 49 Ill., 90; *Hazelhurst v. R. R.,* 43 Ga., 13; High on Injunctions (4 Ed.), sec. 33.

In *Hinton v. Ins. Co.,* it was held: "The States of the Union being coequals in authority and power, no State, through its courts, can extend its coercive power, nor provide for personal service of process, nor affect by judicial determination property outside of its own territory. Any such attempt to extend its jurisdiction beyond its own limits over persons or property in another State is without authority and void."

In *Hazelhurst v. R. R.,* 43 Ga., *supra,* it was held: "That a court of equity of this State will not enjoin nonresidents of the State who are not and cannot be served with process, and who are outside of its boundaries, from doing acts of a personal character beyond the State lines and beyond the jurisdiction of its process for contempt of its order."

And in High on Injunctions, sec. 33, the doctrine is stated as follows: "The jurisdiction of equity by way of injunction being, as we have already seen, strictly *in personam,* it will not be exercised against persons and property beyond the borders of the State in which the proceedings are instituted. Neither law nor comity between distinct State governments recognizes the authority of one State to exercise jurisdiction over citizens and property beyond its borders. Nor will equity at-
(612) tempt by injunction to restrain a nonresident defendant, who has not been served with process, and who is not subject to the jurisdiction of the court, from performing some act beyond the State even though there has been constructive service by publication as to such defendant."

It is no satisfactory answer to this position that if the process is void, defendant need not regard it. One whose rights are involved and affected by an order of this character is not required to test its validity by disobedience, and thereby risk the process of contempt, but he may appear specially and have the court determine and inform him as to the validity of the proceedings; and if it be shown on the hearing that no personal service of process has been or can be had within the jurisdiction, the injunction should be dismissed (*Adams v. Lamar,* 8 Ga., 83-87) and if the ruling be against him, an appeal presently lies.

This is the very course suggested and commended in *Clark v. Mfg. Co.,* 110 N. C., 111, that the party affected should appear speciall, and if the ruling be against him he can preserve his rights by noting an exception and entering a general appearance. True, it is held with us that where a motion to dismiss for want of jurisdiction is overruled, the party can only note his exception and proceed with the cause, and that no appeal then lies; but this is on the ground that overruling such a motion to dismiss is not ordinarily an appealable order, in that no substantial right of the litigant is thereby affected; but when the process is that of an injunction, an order continuing same, if valid, then and there affects a substantial right, and so an appeal, as stated, presently lies.

It was suggested that this being an action to set aside the notes of resident debtors, it could be treated as a proceeding *quasi in rem,* as in cases of attachment, but this position is not sustained by authority. As a general rule, and for general purposes, the *situs* of negotiable notes is at the home of the creditor. It is otherwise, as indicated, in the case of attachment, wherein the *situs* of notes, for purposes of the process, is held to be at the home of the debtor. *Cooper v. Security Co.,* 122 N. C., 463. This exception to the general rule is made chiefly on the ground that the court process in such case operates on the indebtedness and affects the conduct of the debtor concerning it, to wit, in reference to its payment and satisfaction; and, this being recognized doctrine, creditors by note take and hold them subject to its application in cases where attachment lies. The same principle has been upheld in case of creditors' bills operating in the nature of equitable *fi. fas.* (Beach (613) on Injunctions, sec. 82 citing *Bragg v. Gaynor,* 85 Wis., 68); and also in actions affecting the title and interest of nonresidents in realty situate within the jurisdiction, as in *Vick v. Flournoy, supra; Arndt v. Suggs,* 134 U. S., 116.

But in our case the relief sought can only be made effective by operating on the creditor and his interest in the notes and his conduct concerning them; and the *situs* of the notes, for the purpose of this action, therefore, comes under the general rule and must be considered as at the

home of the creditor. *Hinton v. Ins. Co., supra; Adams v. Lamar, supra.*

In this last case, *Nisbet, J.*, quoting with approval from *Dearing v. Bank,* 5 Ga., 503, states the correct principle, as follows: "That the courts of this State have no extra territorial jurisdiction and cannot make the citizen of foreign States amenable to their process or conclude them by a judgment *in personam* without their consent; and a judgment *in personam* against a citizen of a foreign State, in a cause wherein he did not appear, although notice was served on him by publication, is a nullity."

We are of opinion, therefore, and so hold that defendants' motion in the present case was jurisdictional in its nature; that they had the right to appear specially, and, having properly noted their exceptions, they could test the validity of the injunction order by a present appeal, and that there was error in refusing to dissolve the injunction in accordance with their motion. On the record, however, we do not think the action could be dismissed, and this by reason of the claim for damages for faud and deceit on the part of defendants in obtaining the notes in question, and the attachment issued in the cause and levied on indebtedness to defendants of certain citizens of Caldwell County, etc. We have held, in *Worth v. Trust Co., ante,* 191, that under our statutes an attachment lies in a case of this character, citing, among other authorities, and as more especially pertinent to this case, *Paper Co. v. Searing,* 54 N. Y. Supreme Court, 237. And this process, as stated, having been levied on indebtedness to defendants from persons within the jurisdiction of the court, the cause will proceed for the purpose of condemning and applying the property levied on to such indebtedness as plaintiff may be enabled to establish on the trial. *Pennoyer v. Neff, supra.*

The injunction will be dismissed and the cause otherwise conducted in accordance with this opinion.

Error.

Cited: Finch v. Slater, 152 N. C., 156; *School v. Peirce,* 163 N. C., 430; *Armstrong v. Kinsell,* 164 N. C., 128; *Johnson v. Whilden,* 166 N. C., 109.

J. V. WALLACE v. TOWN OF NORTH WILKESBORO.

(Filed 8 January, 1910.)

1. **Injunction, Temporary—Order Dissolved—Appeal and Error—Acts Accomplished—Abstract Propositions.**

An appeal from the dissolution of a restraining order will not be considered, when it appears that acts sought to be restrained have been committed, the appeal thus presenting merely an abstract proposition.

2. Appeal and Error—Interlocutory Orders—Appeal Dismissed—Procedure.

The dismissal of an appeal from an interlocutory order dissolving an injunction does not necessarily dismiss the action, but leaves it pending in the Superior Court.

APPEAL by plaintiff from *Councill, J.*, refusing to grant an (614) injunction, heard at chambers in Hickory, 17 July, 1909; from WILKES.

Benbow & Caviness for plaintiff.
Finley & Hendren for defendant.

BROWN, J. This cause was duly instituted against the town of North Wilkesboro. A temporary restraining order was issued in said cause by *W. R. Allen, J.*, restraining the town of North Wilkesboro from purchasing the Hackett Mill property, to be used for municipal purposes in the way of installing a water system and supplying the town with drinking water.

The temporary restraining order was heard by *W. B. Councill,* resident judge of the Thirteenth Judicial District, at chambers, in Hickory, N. C., on 17 July, 1909, and, after being heard, was dissolved. From such judgment the plaintiff appealed.

It was admitted upon the argument that as soon as the judge below dissolved the restraining order the defendant commissioners purchased the property, and that the transaction has been completed by the execution of a deed.

It is further called to the attention of this Court that, since the said purchase has been made and the deed executed, the General Assembly of 1909 has ratified and fully confirmed the purchase. Chap. 112, sec. 21, p. 289, Private Laws 1909.

As this case is not before us upon its merits or upon any issues raised by the pleadings, but only upon an appeal from an interlocutory order, the necessity for the hearing of this appeal has been (615) obviated, since the defendant has accomplished, pending this appeal, the purchase of the Hackett property and the utilization of the same for the purposes for which is was purchased, and the purchase has been ratified by the lawmaking power.

The Court will not pass on a mere abstract proposition. *Pickler v. Board of Education,* 149 N. C., 223. In this case, *Clark, C. J.*, says: "Pending this appeal, the new schoolhouse has doubtless been built. If that appeared, we would not decide an abstract question." See, also, *per curiam* order in a similar case of *Harrison v. New Bern,* August Term, 1908.

The dismissal of this appeal from an interlocutory order does not dismiss the case. It is still pending in the Superior Court of Wilkes, and the parties may proceed as they may be advised.

Appeal dismissed.

Cited: Reid v. R. R., 162 N. C., 359; *Moore v. Monument Co.*, 166 N. C., 212.

J. B. CROCKETT v. R. B. BRAY, SHERIFF, AND M. MAKELEY.

(Filed 8 January, 1910.)

1. Judgments—Lands—Levy—Quieting Title—Injunction.

The plaintiff showing title to lands by deed expressing a valuable consideration, made and recorded prior to an attachment levied thereon by a judgment debtor of his grantor, may maintain his action to quiet title under the provisions of chapter 763, Public Laws of 1903, amending chapter 6, sec. 1, Public Laws 1893, now Revisal (Pell's), sec. 1589; and when defendant has answered alleging fraud of plaintiff in the procurement of his deed, an injunction will lie restraining the sale under the levy until the issue of title can be determined.

2. Deeds and Conveyances—Corporations—Officers—Present Consideration—Fraud—Questions for Jury.

A deed made by a lumber corporation to its principal officers of a large tract of land, expressing a present consideration, which, being subject to the lien of a prior mortgage, appears to be adequate, will not be declared fraudulent and void as a matter of law; and though the burden be upon plaintiff, alleging that he is a purchaser for value and without notice of fraud, if any existed, to show that he bought for a valuable consideration and without notice, the question is one for the determination of the jury under the issue raised by defendant's allegation that it was conveyed to defraud him and the other creditors of the grantor. *Edwards v. Supply Co.*, 150 N. C., 171, in which the consideration for the deed in controversy was a preëxisting debt, cited, approved and distinguished.

3. Injunctions Dissolved—Appeal and Error—Injunction Continued—Bond—Procedure.

The Supreme Court in this case having overruled the judgment of the lower court in dissolving the plaintiff's injunction, requires the plaintiff to give a bond in a certain named sum, payable to defendant, with sureties approved by the Superior Court clerk, with order that defendants be notified of its tender that they may object to its sufficiency; the bond to be filed within fifteen days from the filing with said clerk of a certified copy of this opinion, and conditioned to pay cost of the action and the principle and interest of the debt, if defendant's right of attachment and execution on the lands in question be finally upheld.

APPEAL from *Ward, J.*, from PERQUIMANS, on refusal of plain- (616) tiff's motion for injunction, in an action brought to the Fall Term, of the court, 1909.

In October, 1906, M. L. Eure conveyed to Crockett Lumber and Pile Company, a Virginia corporation, the Eure Farm, in Perquimans County, and certain personalty thereon situate, for the recited consideration of $13,000. On the same day, the lumber company executed to W. T. Shannonhouse, as trustee, a deed of trust, conveying all the property conveyed to it, to secure to said Eure the payment of notes aggregating $10,000, the balance of the purchase price. On 24 January, 1908, said company, for the recited consideration of $9,000, conveyed and sold said real estate, and sold certain personal property to J. B. Crockett and H. A. Crockett, by deed, duly recorded 24 May, 1908, and the said property was thereafter listed by the purchasers for taxation. On 8 September, 1908, H. A. Crockett sold and conveyed his interest in said property to J. B. Crockett. On 18 May, 1908, M. Makeley, Jr., brought suit in the Superior Court of Hyde County against the Crockett Lumber and Pile Company, which was returned not served. Alias summons was issued 15 August, 1908, which was also returned not served. On 19 August the plaintiff, M. Makeley, Jr., sought and obtained an attachment upon the property of the lumber company, and the same was levied by the defendant Bray, sheriff, upon the personal property and the land conveyed by the lumber company to the plaintiff, J. B. Crockett. In the action brought by Makeley the lumber company filed no answer and entered no appearance, and it was adjudged therein that the lumber company was indebted to plaintiff Makeley in the sum of $1,350 and interest and costs, and the attached property was condemned to its payment, and order of sale directed to issue. The plaintiff Crockett then brought this action, having by claim and delivery taken the personal property levied upon in the attachment, and sought to enjoin the sheriff and Makeley from selling the land pursuant to the adver- (617) tisement of sale. The defendant denied the plaintiff was a purchaser for value, and averred that the lumber company sold the property with the intent to defraud and delay its creditors; that the Crocketts were the principal officers of the corporation, the lumber company, and the deed was also, for this reason, fraudulent. The plaintiff denied all allegations of fraud, claimed he was a *bona fide* purchaser for value before Makeley brought this suit; that the corporation was solvent, and prayed the court to enjoin the sale of the real estate until the title of the plaintiff could be tried. His Honor declined to continue the restraining order and to enjoin the sale by the sheriff under the process issued from the Superior Court of Hyde County, and the plaintiff appealed to this Court.

W. T. Shannonhouse, Charles Whedbee and P. W. McMullan for plaintiff.

W. M. Bond and Aydlett & Ehringhaus for defendant.

MANNING, J. The evident trend of enlightened legislation is to remove, before sale, all defects of title to property sold under judicial process. Its object is to have property sold under process of the courts, bring the highest price, and, as far as possible, to eliminate speculation in defective titles to property sold by its process. The courts have been liberal in construing this remedial legislation. In *Campbell v. Cronly,* 150 N. C., 457, *Mr. Justice Connor,* in an able and elaborate opinion, reviews the policy and effect of this legislation and the decisions of many courts, and says: "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. . . . The unanimity with which judges have recognized the wisdom of the legislation, giving it a liberal construction, has made it effective." The first legislative act of this State looking to this end was the act of 1893 (ch. 6). Under this act, the Court held, in *Daniels v. Fowler,* 120 N. C., 14: "As to the fifth ground of demurrer, there is an allegation that the defendants claim that S. H. Fowler made a deed of trust, that what purports to be such is on record, and that defendants are holding under it. This is sufficient, under Laws 1893, ch. 6, to proceed to have the cloud removed, though the plaintiffs are not in possession." And in *McLean v. Shaw,* 125 N. C., 491, this Court said:

"Under a line of decisions of this Court, culminating with *Mc-*
(618) *Namee v. Alexander,* 109 N. C., 242, it was held that a plaintiff could not maintain an action to remove a cloud upon his title unless it appeared affirmatively that he was rightfully in possession of the land. The act of 1893 (ch. 6), extended such relief to those who were not in possession. *Daniels v. Fowler,* 120 N. C., 14. We think, however, that it is not in contemplation of the act that a judgment lien should be included in the terms 'estate' and 'interest,' as they are used in the act." This case was decided at September Term, 1899. The Legislature, at its session in 1903, by ch. 763, amended the Public Laws 1893, ch. 6, sec. 1, by adding thereto the following words: "And in any case in which judgment has been or shall be docketed, whether such judgment shall be in favor of or against the person bringing such action, or shall be claimed by him, or shall affect real estate claimed by him, or whether such judgment shall be in favor of or against the person against whom such action may be brought, or shall be claimed by him, or shall affect real estate claimed by him, the lien of said judgment shall be such claim of an estate or interest in real estate as is con-

templated by this act." The act was further extended by ch. 888, Laws 1907, but this amendment does not affect nor is it pertinent to the present action. It, however, illustrates the policy of enlarging this remedial legislation. These several acts will be found in sec. 1589, Pell's Revisal. We do not think that there can be any doubt that the uncontroverted facts of the present action bring it clearly within the provisions of ch. 763, Laws 1903. Makeley has had his debt ascertained and determined by a judgment of the court. By attachment levied on the land, he has brought the land within the jurisdiction of the court and has had it condemned as the property of the lumber company, to the satisfaction of his debt. The plaintiff claims the entire and absolute estate in the land, and the deeds under which he claims are offered in evidence, and antedate not only the action of Makeley, but the levy of the attachment. The real estate claimed by him is affected by the judgment and is specifically condemned to its payment, and is thus brought within the provisions of the act. He is therefore entitled to maintain this action.

The second question argued before us and presented by the record is that the deeds under which plaintiff claims are so clearly fraudulent, as against Makeley, that they are void, and ought not to be regarded by this Court as establishing even a *prima facie* case for the interposition of the court by injunction. The deed from the lumber company recites a present consideration of $9,000. At that date there was unpaid on the mortgage or deed of trust a very large sum, amounting to several thousand dollars, and plaintiff's purchase was (619) subject to this debt. The plaintiff alleges the price he paid was the full and fair price. There is no denial of these facts. The plaintiff further alleges he was a purchaser without notice of any fraud, if any existed. This is denied by defendants. While, under the principle announced in *Cox v. Wall,* 132 N. C., 736, the burden is on the plaintiff, as the purchaser of property alleged to be conveyed to defraud creditors, to show that he bought for a valuable consideration and without notice, yet an issue directly raising this question is presented by the facts of this case, and it is for a jury to determine the truth of it. It is further alleged that the lumber company was solvent and owned in this State other property than the property attached sufficient to pay the judgment of Makeley. We do not think the principle announced in *Edwards v. Supply Co.,* 150 N. C., 171, and cases cited, or *McIver v. Hardware Co.,* 144 N. C., 478, so conclusive of this case, as presented upon the affidavits, as to withdraw the determination of the alleged or presumed fraudulent intent and purpose from a jury. The grounds upon which the mortgage considered in the *Edwards case, supra,* was held invalid, are thus stated: "(1) The officers

of the company had no right to take advantage of this knowledge of its financial condition to secure a preference for themselves on all of its property as to a *preëxisting debt.* (2) The mortgage was executed without any authority from the stockholders. (3) In addition, so far as this mortgage for a *preëxisting 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." In the present case, so far as it now appears, the consideration was a present consideration, not a preëxisting debt, and a full, fair price for the property. In the *Edwards case, supra,* this Court said: "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." The decisions of this Court place upon plaintiff certain well-settled burdens of proof; but whether he can successfully carry them, either to the satisfaction of the trial judge or to the jury to whom he may submit the issues, it would be improper for us to forestall by the expression of any opinion. It seems to us, the facts, as they appear, sufficiently present a case for the interposition of the court, by its restraining order, preserve the *status quo* until the issues made (620) by the pleadings have been passed upon by a jury or the trial court. The plaintiff will be required to file a justified bond, in the sum of $2,000, payable to the defendants, with sureties approved by the clerk of the Superior Court of Perquimans County, and the defendants will be notified of the tender of the said bond, that they may object to its sufficiency. The bond shall be filed within fifteen days from the filing of a certified copy of this opinion with the clerk of the court of Perquimans County, and be conditioned to pay the costs of this action and the debt, principal, interest and costs of the defendant Makeley, if it shall be finally determined that the property attached was subject to the payment of said Makeley's debt; and, upon the acceptance of the bond, as directed, the defendants will be enjoined from proceeding to execute the power of sale until the final judgment. Upon plaintiff's failure to give the bond herein directed, the order of his Honor will remain undisturbed. The costs of the appeal will be divided equally between the plaintiff and defendants.

Error.

Cited: Hobbs v. Cashwell, 152 N. C., 190; *Bowman v. Ward, ibid.,* 603; *Eddleman v. Lentz,* 158 N. C., 73; *Smathers v. Hotel Co.,* 168 N. C., 71; *Harris v. Distributing Co.,* 172 N. C., 15.

ELIZABETH A. SMITH v. C. H. MILLER.

(Filed 8 January, 1910.)

1. **Estates—Contingent Remainders, Sale of—Statutes—Constitutional Law.**

Revisal, sec. 1590, providing for the sale of contingent remainders, is constitutional and valid.

2. **Estates—Contingent Remainders, Sale of — Interests Safeguarded — Void Decrees — Reinvestments — Funds in Hand—Incompleted—Investment, Sale of—Liens—Notice—Procedure—Appeal and Error.**

In an action brought under the provisions of Revisal, sec. 1590, to sell certain lands devised to E. for life and a contingent remainder to her children, it appeared that to further a scheme to erect a hotel on one of the city lots, the court had decreed the sale of certain other of the lands and had appointed a commissioner to act in furtherance of its object. The lands were sold and the proceeds applied to the building of the hotel, but only having funds sufficient to erect the skeleton work of the hotel, other of the lands were decreed by the court to be sold, and their proceeds to be likewise applied; these would not be sufficient for the purpose, and when erected the hotel would not be a desirable investment, especially in the unfurnished condition in which it then would be left: *Held*, (1) the decree for the further sale and reinvestment was void, not meeting the statutory requirement that the interests involved should be properly safeguarded; (2) that the court was without authority to order an investment or reinvestment of funds not then available, but depending upon the outcome of future sales of the land, and of this, notice was implied to third persons; (3) that the purchasers at the sale of the land derived a clear title thereto; (4) that the commissioner came under no personal liability to the contractor or material men of the hotel building; (5) that endorsers of a note made to procure money for building the hotel had no claim on the hotel lot; (6) that the commissioner sell the hotel lot and report to the court, and that the proceeds be held for the benefit of the devisees to the extent of the value of the lots and the costs of improvements thereon free from the claims of material men, etc.; (7) that the claim of priorities of material men among themselves may not arise, in this case, as the hotel property may not bring sufficient to pay the amount to be paid to the devisees, and this question will not be now passed upon.

HOKE, J., concurring in result; MANNING, J., did not sit.

APPEAL from *Peebles, J.*, at June Term, 1908, of BUNCOMBE, (621) by Engineering Company and S. J. Bean Company.

The facts are stated in the opinion of the Court.

George A. Shuford, Mark W. Brown and A. D. Monteith for Weaver & Stepp.

Moore & Rollins for appellant.

F. A. Sondley and A. S. Barnard for Miller.

WALKER, J. This action was brought, under sec. 1590 of the Revisal of 1905, for the purpose of selling certain land or lots, situated in the town of Asheville, and reinvesting the proceeds of sale in the improvement of other property belonging to the parties interested. The court below found the following facts, substantially:

1. In 1856, James M. Smith died, seized and possessed of two tracts of land, situated in the town of Asheville and fully described in the pleadings. He left a last will and testament, so as to pass real and personal property, and by it devised certain tracts of land to Elizabeth A. Gudger, to her sole and separate use and benefit, for and during her life, with remainder to such of her children as might survive her and those representing the interest of any that might die leaving children.

2. The plaintiff, Elizabeth Smith, is the life tenant mentioned in said will, and the defendants, Lula R. Miller (wife of C. H. Miller), J. H. Gudger, Mary E. Weaver, Lula R. Stepp, C. H. Miller, Jr., Henry V. Gudger, Joseph P. Gudger, John C. Gudger, Edwin Mc. Gudger, E. H. Miller, L. G. Miller, J. R. Miller and E. R. Miller, are the children and grandchildren of the said Elizabeth A. Smith, and, together with
(622) said Elizabeth, are all the persons *in esse* who have or may have any possible interest in said lands.

3. The tract situated in the angle of Main and College streets had some improvements on it, and yielded an annual income considerably in excess of the taxes and assessments on the whole of the property, while the other tract was unimproved and yielded little or no income. At the commencement of this action, and now, both of said tracts of land were not worth more than $130,000. The first order of sale authorized C. H. Miller to sell tract No. 2 (the unimproved tract). No sale was made under this order. At April Term, 1904, without any reference or finding of facts, an order was made, by consent (minors being interested), authorizing and directing C. H. Miller to sell such parts of tract No. 1 (the improved tract) as he thought best, not to exceed one-half thereof. From time to time, sales of parts of said tract of land were made, reported and confirmed, until, at March Term, 1906, said C. H. Miller, as commissioner, made a report to the court that he had sold parts of said tract of land, amounting to $24,205, and that, after paying all taxes, street assessments and costs, he had $2,729.08 left; "that, preparatory to investment of said sum, together with such other amounts as may be necessary to be realized from future sales, the commissioner has had torn away from the corner of North Main and College streets what has been known as the Old Buck Hotel building, and has had plans drawn, and devised ways and means looking to the erection on said site of a modern hotel and business block, which, according to the estimates of the supervising architect, will, when completed, cost nearly $150,000." This report

asked for an order to sell all of tract No. 2 (unimproved) and to apply the proceeds to the erection of a building at the corner of North Main and College streets, as hereinbefore indicated. This report was dated 31 March, 1906. Thereupon, the matter was referred to J. B. Cain, to report at his earliest convenience as to the advisability of reinvesting the proceeds in the manner indicated by said commissioner. At March Term, said Cain, as referee, made a report that, in his opinion, the interest of all parties would be enhanced by the reinvestment asked for. The report of said Cain, as referee, did not contain the finding of a single fact from which the court could determine the value or worthiness of Cain's opinion. At March Term, 1906, an order was made, granting leave to said Miller to reinvest the proceeds of sales heretofore had and hereafter to be made in improvements of the kind and character designated in said Miller's petition, to wit, in the erection of a hotel, etc., on the lot at the corner of North Main and College streets, such (623) investment to be made under the supervision and direction of said commissioner, who will give the matter his first and best attention and make a report of his proceedings as he may from time to time be required by this court. At the time this order was made, no itemized estimate as to the cost of the improvements had been exhibited to the court and filed.

4. The said C. H. Miller then made contracts for the erection or construction of the said building, including structural concrete work, concrete piers, steam heating, plumbing, stone work, electrical and telephone wiring and fixtures, cornering columns, plate and other glass, screens for windows and doors, painting, additional concrete walls, concrete flooring, elevators, partitions, upholstering, doors, inside trimming, etc., amounting in the aggregate to $193,350.53. The said Miller employed one R. S. Smith, a competent architect, to make plans for said building and to superintend the work on the hotel. There was no effort made to construct on said land any "business block." Shortly after the making of the above-mentioned contracts (which did not provide for the building of the outer walls, except in so far as the concrete pillars or upright beams would constitute a part of said walls), said R. S. Smith and C. H. Miller concluded to add to the cost of said structure, and placed the lowest estimate of the cost at $225,000. C. H. Miller made no contract with any one looking to or with the view of building a hotel on said corner lot at a cost of less than $193,250, and this did not include the building of the outer walls. The value of the corner lot in the angle of North Main and College streets, on which a skeleton of a concrete hotel had been built, without the skeleton concrete structure, is, and was when the concrete structure was commenced, worth $25,000. That, of the proceeds of the sales of land made by orders of this court, the sum

of $30,295.28 has been expended in the erection of the said concrete skeleton of a hotel—$24,313.10 by C. H. Miller, including his accounts against Faragher Company and Edwin McKay Company, and $5,982.18 by W. R. Whitson, commissioner. The said structure is a plain, rectangular building, with a hollow running about two-thirds of its length. This fact was found by a careful inspection of the structure by the judge himself. In order to complete the hotel according to the plans of the architect and the contracts signed by C. H. Miller, it will take at least $100,000, in addition to what has been spent. It is not to the interest of the James M. Smith devisees to sell any more of said lands and reinvest the proceeds in completing said hotel. If the proceeds
(624) of the sales of the balance of said lands were sufficient to complete the hotel, it would leave nothing with which to furnish the said hotel. No hotel man would lease the building and furnish it upon a term of less than twenty years, and such a lease could not be made. The location is well suited to attract commercial travelers, but very badly situated to attract summer and winter visitors, the city of Asheville being a health resort. On 20 October, 1906, C. H. Miller resigned as commissioner, and W. R. Whitson was appointed in his place.

5. The court further found that the first order of sale, made 1 December, 1903, described only tract No. 2, and that at April Term, 1904, this order was modified so as to authorize C. H. Miller, commissioner, to sell such part of the lot as he might select, not exceeding one-half thereof. The court rejected the proposal of those claiming liens against the land to complete the hotel by the sale of the balance of the James Smith lands, and found that it would not be to the interest of the devisees of James Smith to do so, and that the hotel, when completed in that way and without furniture, would not yield any income.

6. Numerous exceptions were filed to the report of the referee, and were heard by his Honor, *Judge R. B. Peebles,* at chambers, by consent of the parties; and in considering and passing upon the exceptions, his Honor found the foregoing facts, and upon them he adjudged that the court had no general jurisdiction, in law or equity, to sell the lands of J. M. Smith, and that it could act only by virtue of the statute (Revisal of 1905, sec. 1590), and that this statute conferred a special and limited power to sell the land and reinvest the net proceeds of sale, after deducting the costs and expenses; that the statute did not confer upon the judge or the court the power to borrow money or create a debt or charge upon the land.

The judge further held, as matter of law, that the decree authorizing C. H. Miller, the commissioner, to contract for the building of a hotel, at a cost of $193,503, or even at $150,000, when the court had less than $50,000 in cash and less than $40,000 worth of land which had been

ordered to be sold, but which had not been sold, was void upon its face; that all persons who dealt with C. H. Miller, as commissioner, were bound to examine the record to ascertain that the court had jurisdiction of the person and the thing or subject-matter of the action, and that an inspection of the record would have shown that the order authorizing C. H. Miller to build the hotel was void for want of power. No one of the parties to this action has any satutory lien on the hotel structure or the land on which it is situated, and no one of the (625) parties who furnished materials for or performed work on said structure has any personal claim against C. H. Miller, for the reason that it was not contemplated that he should be held personally liable. No one of the parties who endorsed C. H. Miller's note, or notes, to enable him to procure money from a bank, has any claim whatever on said hotel lot. That Gay Green has no right, title or interest in or to the purchase-money notes deposited with him by C. H. Miller, and that W. R. Whitson, as commissioner, is hereby ordered to collect the same and hold the proceeds, to be hereafter invested, by order of court, in real estate, subject to the same uses, trusts and limitations as those mentioned in the will of James Smith. That none of the parties who have intervened in this action has any statutory lien on the hotel or the land on which it is situated.

The court further held that certain of the parties who claim liens upon the lands, while they did not have any statutory liens, were yet entitled to an equitable lien upon the lot on which the hotel was erected, to the extent of the enhanced value of said lot by the labor done and materials furnished for the construction of the hotel building, subject, however, to a prior lien in favor of the devisees of James M. Smith, to the extent of the value of said lot and the proceeds of the sales of other lands put into the hotel structure. The court made other rulings concerning the rights and liens of the several claimants as between each other, with references to the priority of the liens and validity of the claims.

The court thereupon ordered that W. R. Whitson, as commissioner, sell the lot on which said concrete structure or hotel building is situated, in the angle of North Main and College streets, with the improvements thereon, to the highest bidder upon the premises, and gave special directions as to the notice of sale and the collection of the purchase-money, and directed the commissioner to report to the next term of the Superior Court. The court further directed that, out of the proceeds of sale, the commissioner should pay the costs of the sale and retain the sum of $25,000, the value of the lot, and $30,295.28, the proceeds of the sale of lands invested in said structure, with interest from 15 March, 1907, and the balance, if any, the commissioner was directed to pay the claimants,

or lienors, according to their rights and priorities therein, as set forth in the decree. It was further directed that the sums of $25,000 and $30,295.28, with interest, and the amounts realized from the sales of lands in the hands of the commissioner, or which may hereafter (626) come into his hands, together with what he may collect on the judgment of C. H. Miller or his surety, should be held by the said commissioner, W. R. Whitson, to be reinvested according to the provisions of the statute, and under the direction of the court, after deducting therefrom the costs and expenses of the sale of such lands as had theretofore been sold, with further directions to the commissioner that he make proper inquiry and report to the court what property should be purchased for the investment of said proceeds of sale and other funds in his hands, and requiring him to find the facts and state the evidence upon which they are based, in order that the judge presiding in the Superior Court and passing upon his report could give the directions as to the legal rights of the parties, upon the facts thus reported. The court, in its judgment, also directed how the costs and expenses of this proceeding should be paid, and retained the cause for further directions.

To the judgment of the court nearly all of the parties excepted and appealed to this Court, and the cause is now before us for the purpose of passing upon the correctness and validity of the judgment which Judge Peebles rendered in the court below. Before doing so, we must commend his Honor for the able, careful and painstaking manner in which he has considered the case in its various aspects and prepared the judgment, to which we have just referred. In several respects the case is a very complicated and difficult one, if we would undertake to pass upon the questions raised by the several claimants, who assert that they have liens upon the lot in the said angle at the corner of North Main and College streets, in the city of Asheville, but we do not consider it necessary to pass upon these questions until the lot and the structure thereon have been sold and the amount realized from the said sales can be definitely ascertained. It is true that his Honor finds that the value of the lot, by itself, is $25,000, and that something more than $30,000 has been invested in the uncompleted hotel building, but it may be that the actual sale of the property will show that a sufficient amount of money cannot be realized thereby to pay more than the sum which the court in its judgment finds as a matter of law belongs to the devisees of James Smith, to whom the lot belonged, and whose property had been sold and invested in the construction of the hotel building.

In this case the court would have had no power to order a sale of the property of James Smith but for the act of 1903, ch. 99, amended by the act of 1905, ch. 548 (Revisal, sec. 1590). We have con- (627) strued the statute and the section of the Revisal, to which we

have referred, as authorizing the court to sell property limited upon a contingency, as provided by the statute, and to invest the proceeds of sale, either in purchasing or in improving real estate, so that the parties who own the property originally devised may make the same profitable by sale or receive an income therefrom. In other words, we held the said statute to be valid, as being a rightful exercise by the Legislature of its authority under the Constitution. *Anderson v. Wilkins,* 142 N. C., 154; *McAfee v. Green,* 143 N. C., 411; *Hodges v. Lipscomb,* 133 N. C., 199; *Smith v. Gudger, ib.,* 627. But the statutes to which we have referred authorize the sale of property limited upon a contingency, and provides for properly safeguarding the interests of those who are not *in esse,* whether the estate so limited is to an uncertain person or upon an uncertain event. We quote the language of the statute: "The court shall, if the interests of all parties require or would be materially enhanced by it, order a sale of such property, or any part thereof, for reinvestment, either in purchasing or improving real estate, less the expense allowed by the court for the proceeding and sale; and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money, subject to its approval, until such time as it can be reinvested in real estate, such time not to exceed two years." Revisal, sec. 1590.

It will be observed that section 1590 of the Revisal, which we have just quoted, authorizes the court to order a sale of such property, or any part thereof, for reinvestment, either in purchasing or in improving real estate. It is evident that the intention of the Legislature was that there should be no reinvestment until the amount realized from the sale of the property had been ascertained, so that the court might restrict the investment within the limit of the amount of such proceeds of sale. It was not intended that the court should have the power to order a reinvestment of the proceeds of the sale of any property, for the purpose of a conversion, until it was known what was in hand to be so invested, for the simple reason that, if the investment so ordered before the sale of the property and before it could be ascertained what amount the court would have to invest in other property, the amount of the investment might far exceed the proceeds of the sale and involve the estate heavily in debt. The statute clearly points out the procedure by which a conversion of the property is to be accomplished, and it plainly appears, so that "he who runs may read," that the court must first know what amount it has to invest, before the investment is made (628) in order to avoid involving the estate in debt. We are therefore of the opinion, upon a careful perusal of the statute (Revisal, sec. 1590), that the court had the right and the power to order a sale of the

property, which was in fact afterwards sold, for the purpose of reinvestment, so that owners of the property, however their title may have been derived, might realize an income, which otherwise they would not do. This validates the title of the purchasers of the property which was sold, and brings us to the consideration of the other question in the case, namely, whether the court in this case had the power to anticipate what would be the proceeds of sale, and to reinvest the same in the improvement of the property which was situated at the angle of North Main and College streets. This case is a striking illustration and example of the unwisdom and impolicy of any such proceeding. It was surely not intended by the Legislature that an estate might be burdened by debt for the purpose of selling and reinvesting the proceeds, because such a course would manifestly defeat the object of the law, and the owners of the property might find their condition worse than it was before the sale was made. It was, therefore, not within the power of the court below to order a reinvestment of the proceeds of any sale of the property or to encumber the estate of James Smith with an indebtedness, for the purpose of improving the property above described, until the other property had been sold and the net proceeds of sale had been ascertained. How the statute can bear any other construction we do not well see.

We therefore hold that his Honor, Judge Peebles, was correct in his ruling that while the purchasers at the sale of the property, which was ordered to be converted into cash, for the purpose of improving the other property, acquired a valid title, or whatever title James Smith had therein, the court had no power to reinvest beyond the amount realized from the sale, and when it attempted to do so it was acting without its jurisdiction and without any authority given by the statute, which is the only one upon which the several claimants in this case rely. In this case the proceeds of sale are far less than the amount necessary to complete the building, and it will be necessary to sell other property in order to do so, and it is at least problematical whether the additional property, if sold, would bring enough to carry out or execute the present scheme of improvement. We therefore concur with his Honor in his said ruling, to the extent above set forth, and direct a sale of the
(629) property by the commissioner, W. R. Whitson, and a report to the court, as provided in the judgment.

The other questions as to the liens and priorities of the claimants, we need not now decide, because it may turn out, as we have already said, that the property in the angle may not bring more than the amount which his Honor, Judge Peebles, by the judgment he entered, required to be paid to the devisees; and if it does not bring more than enough for that purpose, the questions which were argued before us at very great length and with unusual ability and learning will never be pre-

sented to us for our consideration and decision. We held, in the case of *Gray v. James,* 147 N. C., at p. 139, that where, in a decision of the court below, or of this Court, the question presented in the argument or briefs of counsel or in the record, may never arise for adjudication, this Court will consider them as moot questions and will not undertake to pass upon them until it is ascertained by a sale of the property that they had become practical questions in the case. It follows, therefore, that we cannot pass upon these questions but must merely affirm the decision of Judge Peebles, based upon his and our construction of the statute, and remand the case, with instructions to proceed in the sale of the property and in other respects as directed in the judgment, leaving the other questions open for consideration and decision hereafter, if it becomes necessary to pass upon them.

If the property is sold and the amount in excess of that which is to be paid to the devisees of James Smith is realized from the sale, the claimants or alleged lienors can present the questions before us which they have argued, and we will then consider what are their respective rights in the surplus, and proceed in other respects to decide what may be then before us for our consideration.

Modified and affirmed.

HOKE, J., concurring in result. MANNING, J., did not sit.

Cited: *S. c.* 152 N. C., 314; *S. c.* 155 N. C., 243; *S. c., ibid.,* 248; *S. c.,* 158 N. C., 100; *Bullock v. Oil Co.,* 165 N. C., 68.

T. M. BATTLE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 8 January, 1910.)

1. **Telegraphs—Messages Announcing Sickness—"Morning Train"—Negligence—Evidence—Quickest Way—"Walked."**

When it is admitted that the first train a father could have taken to reach the bedside of his sick child would have been too late for him to have seen his child alive, had the message sued on, reading, "Your baby very sick; come on morning train," been promptly transmitted and delivered, yet it is competent for him to show that had the message been promptly delivered, and not negligently delayed in the delivery from 9 a. m. to the next day at 11 a. m., he could and would have walked the distance of thirty-five miles and have seen his child alive, thus avoiding the injury from which the damages demanded in his action arose.

2. **Same—Notice to Company.**

In an action for damages arising from the negligence of defendant telegraph company in the delivery of a message to a father reading, "Your baby very sick; come on morning train," the importance of the message is

shown by that part of the message relating to the sickness, and the latter part, "come on morning train," gives indication of the intent for him to come quickly; the company is put upon notice that the father may use the quickest way to get to the bedside of the child, and evidence that he could and would have accomplished this result in time by walking, as in this case, is competent, though it be admitted that it would have been too late if he had taken the train indicated in the message.

3. Telegraphs—Negligence—Delivery—Evidence of Affection—Measure of Damages.

In an action for damages alleged to have been caused a father by the negligent delay in the delivery of a message announcing the sickness of his child, with a request to come at once, by which he was prevented from seeing his child alive, evidence was competent, upon the measure of damages, that the child was a boy seventeen months old, could walk and talk, and could have recognized plaintiff, as he called him "papa."

BROWN and MANNING, JJ., dissenting.

(630) APPEAL from *Ferguson, J.*, at July Term, 1909, of SWAIN.

The facts are stated in the opinion of the Court.

W. T. Crawford for plaintiff.

George H. Fearons and Alfred S. Barnard for defendant.

WALKER, J. This action was brought to recover damages for the negligent delay of the defendant in delivering a telegram, in words and figures as follows:

BRYSON CITY, N. C., 29 January, 1906.

T. M. BATTLE, *Andrews, N. C.*

Your baby very sick. Come on morning train.

M. T. BATTLE.

The sender was the father of the plaintiff, whose child had been taken suddenly and seriously ill. He and his family, composed of his wife and several children, lived at Andrews, N. C., and his wife and children, on the said day, were visiting at the home of the plaintiff's (631) father, in Bryson City, N. C. The plaintiff, at the time the telegram was sent, had been living in Andrews about seven months and was employed by the Cherokee Extract Company. The distance by rail from Andrews to Bryson City is forty-five miles, and by the public road thirty-five miles. The message was received at Andrews in full time for delivery to the plaintiff early in the evening and prior to 9 o'clock p. m. The messenger boy received it and was informed where the plaintiff lived in the village of Andrews, and, when so informed, he replied that it was too far and too dark at that time to go

to the plaintiff's house for the purpose of delivering the message, and it was not delivered until 11 o'clock the next day. The morning train was due to leave Andrews at 8 o'clock a. m., and, according to the schedule of the railway company, it should have reached Bryson City at 10 o'clock a. m., but it was considerably late in arriving on the 30th of January. The child died at 10 o'clock on the 30th. It was admitted that the plaintiff could not have reached Bryson City by the train before the child died. He left Andrews for Bryson City on the second train and arrived at his father's home about 4 o'clock p. m. of the 30th. The plaintiff was permitted to testify, over the defendant's objection, that if the message had been delivered to him after 6 o'clock on the night of the 29th, or within a reasonable time after it was received by the operator on that night, he could and would have walked to Bryson City and reached his father's home before his child died. Why this evidence was not competent we cannot see. Evidence substantially similar was held to be competent in *Bright v. Telegraph Co.*, 132 N. C., at p. 326, where it is said: "In this connection may be noticed another of the defendant's objections, that the court permitted the witness Cooper to testify that he would have gone to Wilkesboro if he had received the message in time. We are unable to understand why this is not competent. It tended to prove the very fact which the defendant, in the last exception considered by us, asserted it was necessary for the plaintiff to prove in order to recover substantial damages, and it was necessary to prove this fact if the plaintiff sought, as she did by her complaint and evidence, to recover damages for the mental anguish which resulted from his failure to go to Wilkesboro." The case of *Bright v. Telegraph Co.* has been frequently affirmed, but we need refer to only one of the cases (*Hancock v. Telegraph Co.*, 137 N. C., at p. 503), in which *Justice Brown,* speaking for the Court, says: "In *Bright's case,* 132 N. C., 326, the Court (by the Justice who delivered its opinion), referring to defendant's objection to the testimony of Cooper, the addressee, that he would have gone to Wilkesboro had he received the telegram, (632) say that the testimony was not only competent, but indispensable, and uses the following language: 'We are unable to understand why this is not competent; it tended to prove the very fact which the defendant, in the last exception considered by us, asserted it was necessary for the plainiff to prove in order to recover substantial damages, and it was necessary to prove this fact, if the plaintiff sought, as she did by her complaint and evidence, to recover damages for mental anguish, which resulted from his failure to go to Wilkesboro.'"

Whatever the opinion of any other court may be, its conclusion is based upon what, with all possible respect for and deference to the ability and learning of its judges, we think, is reasoning clearly un-

sound, and its position is therefore untenable. But we believe a majority of the courts adopt our views. How could the fact be otherwise proved than by the testimony of the addressee, unless the jury are at liberty to infer the fact from the relation of the parties? And even if that be so, it would still be competent to show, by testimony equally as reliable and perhaps more certain in its character, that the addressee would actually have gone to Bryson City that night. There was evidence tending to show that he could have accomplished the journey from Andrews to Bryson City during the night. This evidence tended to corroborate the plaintiff, and was competent.

The defendant complains that the plaintiff and his wife were permitted to testify that their sick child was a boy seventeen months old, could walk and talk, and could have recognized plaintiff, as he called him "papa." This testimony was competent to show the degree of plaintiff's mental anguish, if it was not also competent upon grounds relating to the other features and facts of the case. But the defendant mainly relies upon the fact that the plaintiff was told in the message to "come on the morning train," and that if he had complied with this "instruction," as it is called, he would not have reached the bedside of his child before his death; and, further, that the defendant is not liable for any damages not in the contemplation of the parties at the time of making the contract. *Williams v. Telegraph Co.*, 136 N. C., 82; *Kennon v. Telegraph Co.*, 126 N. C., 232. As a general proposition, it is very true that the plaintiff is entitled to recover only such damages as were in the contemplation of the parties at the time of making the contract, and that the rule established by *Hadley v. Baxendale*, 9 Exch. Rep., 341, has been applied by us to contracts with telegraph companies, that
(633) rule being as follows: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." The question was discussed and the reasons for applying the rule to such contracts was fully stated in *Williams v. Telegraph Co., supra.* But has the defendant placed the correct interpretation upon this message, and is the view which it takes of the case the humane one? We think not. There are two facts stated in the message—first, the serious illness of plaintiff's child, for it had the croup, sometimes a very dangerous and even fatal disease. The message expressly says: "Your baby is *very* sick—croup." What meaning did this convey to plaintiff's mind? Why, of

course, that his child was so ill as to require his immediate presence. The added words, "Come on the morning train," were merely intended to impress upon his mind the very serious condition of his child, and the longing of his wife, its mother, and his father, that he would come as quickly as possible.

Although the fact is not distinctly stated in the case, it reasonably and by fair inference appears that if the plaintiff had not casually heard on the streets of the village of Andrews that his child was sick, and gone himself to the telegraph office to inquire if any message had come, he would have received the message too late to take the morning train. The plaintiff was not, in law, bound to adopt the way indicated in the message for reaching the bedside of his dying child. He had the right to act according to the natural instincts of a father and adopt the speediest method of reaching his father's home in Bryson City, where he had the right to infer that his little child, the object of his love and affection, was lying almost in the very throes of dissolution. If he desired to walk to Bryson City, he had the right to do so, and any man of ordinary intelligence, and having a moderate share of the common instincts of humanity, and knowing, too, the affection of a father for his child, and that upon reading the message his first impulsive thought would be to go to it as quickly as possible, might well have contemplated that the plaintiff would pursue the course he did. And yet the defendant retains possession of this message, not only over night, but until 11 o'clock a. m. the next day, without making the least effort to deliver it, and then contends that the plaintiff has no right to recover damages for the mental anguish he suffered. If this (634) is the law, we should remind the people, who hold in our republican form of government all the power the king and his parliament possessed, that "the right divine of kings (the people) to govern wrong," as Alexander Pope said in the "Dunciad," has not yet departed, and we should have some change in the law for the sake of being at least humane, if for no other reason. It would at least prevent the repetition of such wrongs in the future.

If the telegraph companies will not require their employees to act, in the performance of their very important duties to the public and their patrons, with common intelligence and humanity, they must suffer the consequences of their neglect and not complain of the law when they are made to indemnify those whom they have wronged. There is no use to cite authorities for our ruling, although they are abundant, for common sense and a reasonable regard for the rights of others teach us that it must be the correct principle.

The facts, as they appear in the record, disclose, if anything, the grossest case of negligence ever presented to this Court. What right,

in law, or even according to the rule which ordinarily obtains in business transactions of this kind, did the defendant have to withhold from the plaintiff information as to his child's serious illness, which it had been paid to impart to him? The answer to this simple question is too plain to require any further discussion as to its legal and moral duty under the circumstances. It had no such right, and its operator and the delivery messenger should have known it. The verdict against the defendant was a small one and was fully supported by the evidence.

The other exceptions taken by the defendant, who appealed from the judgment of the court, are without any merit.

No error.

BROWN, J., and MANNING, J., dissenting.

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(635)

RUDOLPH KLEYBOLTE & CO. v. THE BLACK MOUNTAIN TIMBER COMPANY ET AL.

(Filed 8 January, 1910.)

1. **Deeds and Conveyances—Probate—Certificates—Adjudication—Substantial Compliance—Sufficiency—Supreme Court—Appeal and Error.**

A substantial requirement with Revisal, secs. 999 and 1001, is all that is necessary to be observed by the clerk of the Superior Court of the county wherein the land lay, in passing upon the certificates to a deed thereto made and executed in another State; and when objection to the validity of registration is made on that ground and it appears of record on appeal that the certificates made in such other State are in fact sufficient, the validity of the registration will be declared and upheld by the Supreme Court.

2. **Deeds and Conveyances—Probate—Certificates—Adjudication—Substantial Compliance.**

When a deed in trust made and executed beyond the borders of this State conveying lands herein has been there acknowledged and probated before a notary public, and (unnecessarily) the clerk of the Supreme Court, in compliance with a statute there, has certified the official character of the notary and his authority as such, it is a sufficient compliance with Revisal, secs. 999 and 1001, for the clerk of the Superior Court of the county wherein the land lay, to certify that "the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved," etc.

APPEAL by defendants from *Ferguson, J.*, at July-August Term, 1909, of SWAIN.

The facts are stated in the opinion of the Court.

Bryson & Black for plaintiff.
Adams & Adams and W. P. Brown for defendant.

WALKER, J. This action was brought by the plaintiffs to foreclose a deed of trust executed by the defendant, Black Mountain Timber Company, to them, 22 February, 1907. The Nantahala Transportation Company claims a lien upon the property described in the deed of trust, by virtue of a warrant of attachment, issued in an action wherein the said company is plaintiff and the timber company is defendant, and levied upon the said property 2 September, 1908. The only question in the case, as admitted in the appellant's brief, is whether the deed of trust was properly probated and registered, so as to prevent any lien being acquired by the transportation company under the (636) levy of the warrant of attachment.

It appears from the certificates of probate annexed to the deed, and which were registered with it, that the execution of the deed of trust was duly acknowledged before Edward Carroll, Jr., a notary public in and for the county of Westchester, N. Y., on 12 February, 1907. The certificates, which are annexed to the deed, are in due form. The clerk of the Supreme Court for the county of New York, in said State, certified, under the provisions of a statute of that State, that at the time of taking the acknowledgment and probate of the deed of trust, Edward Carroll, Jr., having theretofore been duly commissioned, was a notary public, and that his commission had not expired, and, further, that he was duly authorized to take the proof and acknowledgment of the execution of the instrument. The clerk of the Superior Court of the county of Swain, in this State, when the deed with the annexed certificates were exhibited to him, certified as follows:

The foregoing and annexed certificate of Peter J. Dooling, a clerk of the Supreme Court in and for the county of New York and State of New York, duly authenticated by his official seal, is adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proven.

Let the foregoing and annexed deed of trust, together with the certificates and this certificate, be registered.

Witness my hand, this 20 February, 1907.

O. P. WILLIAMS,
Clerk Superior Court Swain County.

The deed of trust and certificates were thereupon and on the same day filed for registration and duly recorded in the office of the register of deeds.

It is now contended by the plaintiff that the registration of the deed is invalid, because the certificate of the clerk of the Superior Court of Swain County is defective, in that it does not conform to the requirements ofsections 999 and 1001 of the Revisal of 1905. Section 999 provides as follows: "Whenever the proof or acknowledgment of the execution of any instrument required or permitted by law to be registered is had before any other official than the clerk or deputy clerk of the Superior Court of the county in which such instrument is offered for registration, the clerk or deputy clerk of the Superior Court of the county in which the instrument is offered for registration shall, before the same shall be registered, examine the certificate or certifi-
(637) cates of proof or acknowledgment appearing upon the instrument; and if it shall appear that the instrument has been duly proven or acknowledged, and the certificate or certificates to that effect are in due form, he shall so adjudge, and shall order the instrument to be registered, together with the certificates." We think the clerk substantially complied with the provisions of that section. To hold otherwise would be a perversion of justice and right, and nothing more nor less than "sticking in the bark." The certificates are all before us, and *we* can see that they *are* "in due form." It may be true that the certificate of the clerk of the Supreme Court of New York, as to the authority of the notary public, was unnecessary, but it will be observed that the clerk makes two adjudications—first, that the certificate of the said clerk is "in due form and according to law"; and, second, that "the foregoing and annexed deed of trust is adjudged to be duly proven." From what source could the clerk of the Superior Court of Swain County have derived any knowledge of the due execution of the deed, or of its probate, except from the certificates of the notary? The clerk of the Supreme Court of New York did not certify to either fact, but simply to the official character of Edward Carroll, Jr., as a notary. We are as competent to pass upon the correctness of the certificates as the clerk, or, at least, I suppose we are, and we should be. If he adjudges the execution of the deed to have been duly proven and orders it to be registered, and acts upon certificates which, in fact, as we can plainly see, are in due form, how vain and idle to argue that he has not "substantially" complied with the law. Section 1001 of the Revisal only requires that there shall be a substantial compliance with the statute. (Sec. 999.) It expressly provides that no set form or phraseology shall be necessary in adjudging as to the probate of a deed. We consider *Cozad v. McAden,* 150 N. C., 206, as directly in point. Indeed, to decide the case otherwise than we have done would clearly overrule the principle established by that case, or, as we sometimes say, its *"ratio decidendi."* In that case *Justice Hoke,* quoting from *Deans*

v. Pate, 114 N. C., 194, says: "The adjudication by the clerk of the Superior Court of Wayne that 'The foregoing instrument has been duly proven, as appears from the foregoing seal and certificate,' does not follow the very words of the statute (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 the probate was, in fact, in due (638) 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." In *Deans v. Pate, supra,* the probate was taken by a nonresident notary public, and the clerk, in passing upon his certificates, adjudged as follows: "The foregoing instrument has been duly proven, as appears from the foregoing seal and certificate." This adjudication was upheld by this Court (*Clark, J.,* writing the opinion), although it did not use the exact language of the statute. It was contended in that case, as it is in this by the appellant, that the certificate or adjudication of the clerk in this State was defective, because he did not expressly declare the certificate of the notary to be "in due form," as required by the Code of 1883, sec. 1276. That section of the Code was surely not less strong and exacting in its requirements than is the language of section 999 of the Revisal, which we are now construing. The Court, in *Deans v. Pate,* repudiated the contention of the appellant as unsound and not warranted by the provisions of section 1276 of the Code of 1883. See, also, *Buggy Co. v. Pegram,* 102 N. C., 540; *Devereux v. McMahon,* 102 N. C., 284. The construction of a statute should never be so rigid and technical as to defeat the purpose of the legislation. We should ascertain from its language what is its will, and decide accordingly. Public confidence in the regularity and validity of judicial acts and proceedings would be greatly shaken if we should hold with the appellant in this case.

No error.

Cited: Power Corporation v. Power Co., 168 N. C., 222.

GUS SHAW v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 8 January, 1910.)

1. **Telegraphs—Nondelivery—Address—Negligence—Evidence—Questions for Jury.**

Evidence is sufficient of the negligence of a telegraph company in failing to deliver a message addressed to "No. 419 South Street," in a city, to take the case to the jury, which tends to show that there were two houses with this number about a block apart, one of them occupied by the sendee, who had been living and receiving mail there for two years preceding the time in question; that the messenger boy unsuccessfully attempted a delivery at the wrong number, a service for better address was sent, a postal card notice was mailed and received by the occupant of the wrong number (419); that information given on inquiry at the postoffice coincided with the address on the message; that in response to the service message the sender reiterated the address given on the message and that this was not communicated to the office of the destination and no further service message was sent by him.

2. **Telegraphs—Damages—Evidence—Mental Anguish—Measure of Damages—Instructions.**

In an action to recover damages arising from the nondelivery of a telegram sent by a brother of the sendee, reading, "Come at once; Ida and I are sick with malarial fever," it is competent for the plaintiff, the sender of the message, to testify, in answer to a question as to the effect his sister's failure to come had upon him, "It just killed me. I couldn't hardly tell what effect it had on me; it affected me pretty badly; caused me mental distress, because I didn't know what was the matter with her"; and from the face of the message and the extraneous facts and circumstances in this case, the defendant had implied notice of the character of the resultant damages as testified to, arising from its negligent failure to deliver the message.

3. **Same—Instructions.**

In this case the charge of the court confined the recovery to compensatory damages for mental anguish alone.

4. **Evidence—Exceptions Confined.**

Objection to the answer of a witness to a question asked him will not be sustained when it appears that a portion of the answer was competent. The objection should be made to that part which is claimed to be irrelevant.

MANNING, J., concurs in the result; BROWN, J., dissenting.

(639) APPEAL by defendant from *Long, J.*, at March Term, 1909, of DURHAM.

The facts are stated in the opinion of the Court.

Bramham & Brawley for plaintiff.

C. W. Tillett and F. L. Fuller for defendant.

WALKER, J. This action was brought by the plaintiff to recover damages of the defendant for the negligent failure to deliver a telegram, in words and figures as follows:

DURHAM, N. C., 29 June, 1908.

MRS. RINEY ROGERS, No. 419 South Street, Wilson, N. C.

Come at once. Ida and I are sick with malarial fever.

GUS SHAW.

The sendee was the sister of the plaintiff, the sender of the message. It appears that there are two houses in Wilson numbered 419—one at the corner of South and Lodge streets, and the other at the end of South Street—the two houses being "a block apart." A colored woman lived in the house at the corner, and the addressee lower down South Street. She and her husband and their children had (640) lived at their home on South Street about two years before the telegram was received by the operator at Wilson for delivery. They had four children, aged, respectively, fifteen, thirteen, eleven, and seven years. Mail had been delivered at the home of the addressee for her husband, who had lived in Wilson for sixteen years prior to 29 June, 1908. The delivery messenger of the defendant, who was at the time seventeen years of age, went to the house at the corner to deliver the message, and found that it was occupied by a colored woman, which fact was reported to the defendant's manager at Wilson, and he testified that it made him think that the corner house was not the one described in the message. He thereupon wired back to Durham a service message, inquiring for a better address. This message was carried by the delivery message at Durham to the home of the plaintiff, by whom the messenger was told that the address was correct and that Mrs. Riney Rogers did live at No. 419 South Street, in Wilson, and that she had received mail from the plaintiff addressed to that number—that is, 419 South Street, Wilson, N. C. The manager at Wilson testified that he did not receive any reply to the service message which he had sent to Durham, and that after he concluded the next morning the address was not correct, he did not notify the Durham office of the fact, as he expected to hear from the manager at that place. Inquiry was made at the post office in Wilson by the messenger boy as to the residence of Mrs. Rogers, and he was told that it was No. 419 South Street. A postal card was mailed to her at that address, but was delivered to Annie Moring, the colored woman who lived in the corner house. This and much more testimony was introduced to show the negligence of the defendant in failing to deliver the message. The plaintiff was asked by his counsel this question: "What effect, if any, did the failure of

your sister to come, in answer to your telegram, have upon you?" To which he answered: "It just liked to kill me. I didn't know what was the matter. I couldn't hardly tell what effect it had on me. It affected me pretty bad. It caused me mental distress, because I didn't know what was the matter with her." The defendant objected to the question and answer. The objection was overruled, and defendant excepted. It fairly appears, from the evidence, that the plaintiff was working in a hosiery mill and was not in good pecuniary circumstances, and that he wanted his sister to nurse him and his wife. Mrs. Rogers testified that had she received the message she would have gone to Durham to be with her brother. The defendant moved to nonsuit the plaintiff. This motion was overruled, and the defendant ex-
(641) cepted.

The court charged the jury to answer the first and second issues as they might find the facts to be, and correctly charged them, we think, as to what would constitute negligence. Indeed, the only inference that could be drawn from the evidence, if believed by the jury, showed a case of gross negligence on the part of the defendant—that the negligence was calculated to cause the plaintiff mental anguish, and, in fact, did produce that result. The charge of Judge Long, who presided at the trial, as to all the controverted questions in the case, was fair, full and explicit and in strict accordance with the principles of law so often decided by this Court, and which were applicable to the case. It gave the defendant the benefit of every defense it raised, under a correct statement of the law, and it has no cause whatever for complaint.

The question propounded to the plaintiff, while testifying in his own behalf, as to the effect the failure of his sister to come had upon him, with reference to his mental anguish, was clearly competent. *Thompson v. Telegraph Co.*, 107 N. C., 451; *Harrison v. Telegraph Co.*, 143 N. C., 150 (opinion by *Justice Brown*); *Sherrill v. Telegraph Co.*, 117 N. C., 362 and 363. We could cite many other cases to the same effect, but why do so, when the very "reason of the thing" and the nature of the case so completely sustain our ruling? *Bowers v. Telegraph Co.*, 135 N. C., 504, which the defendant's counsel cite in their brief, is not at all in point. The facts of the two cases are widely different. If any irrelevant matter crept into the answer, the defendant should have specifically excepted to *it*, as a part of the answer was certainly competent. But we do not think the defendant was injured by any part of the answer complained of, even if it was irrelevant. In this case the plaintiff had the right to presume that, if the defendant had performed its duty, his sister was informed of his condition and that of his wife, both being prostrated by sickness; and what he evidently

meant was that he suffered mental anguish, because, under the circumstances, she did not come to him, he being unable to account for her failure to come. This objection is so plainly untenable that it cannot receive any favorable consideration from us.

The motion to nonsuit was properly overruled. The plaintiff established every fact, if the witnesses were credible, which entitled him to recover damages—that is, negligence and mental anguish, and damages proximately caused thereby. As to negligence, the motion to nonsuit and the charge are amply sustained by *Sherrill v. Telegraph Co.,* 116 N. C., 655 and 658; *Rosser v. Telegraph Co.,* 130 N. C., 251; *Young v. Telegraph Co.,* 107 N. C., 370; *Lyne v. Telegraph Co.,* 123 N. C., 129; *Hinson v. Telegraph Co.,* 132 N. C., 460; *Woods v. Telegraph Co.,* 148 N. C., 6; *Codgell v. Telegraph Co.,* 135 N. C., 431; *Hendricks v. Telegraph Co.,* 126 N. C., 304. As to mental anguish, there was direct testimony that it existed and was caused by the defendant's unaccountable negligence. Besides, it was the natural result of such negligence, and common humanity required that the defendant should have inferred it from the very face of the message and the facts otherwise brought to its attention. Why the defendant will conduct its business with so little regard to the rights of its patrons, we are unable to conceive. In *Green v. Telegraph Co.,* 136 N. C., 492, this Court said: "Aside from this, we think the circumstances in which she was placed may well have caused it. It is true she suffered no insult or physical injury, but the question is, what would be the natural effect upon the mind and nervous system of a child of her age?" The defendants cited *Williams v. Telegraph Co.,* 136 N. C., 82, but the case sustains our ruling. It was there said: "In order to enable him to recover substantial damages, based upon his mental distress and suffering, it is necessary for him to show that the defendant could reasonably have foreseen from the face of the message that such damages would result from a breach of its contract or duty to transmit correctly, or that it had extraneous information which should have caused it to anticipate just such a consequence from a neglect of its duty toward the plaintiff." The language fits this case exactly. The defendant could easily have foreseen or anticipated what would be the result, both from the face of the message and the extraneous facts and circumstances, of which it had full knowledge.

The charge of the court upon the question of damages violated no principle of law, but was in exact accordance therewith in every particular. It confined the damages to compensation for mental anguish alone. This is the language of the Court: "The damages, as I have stated to you, if allowed at all, are allowed on account of his mental suffering that he endured by reason of the fact that his sister was

prevented by the defendant's negligence from coming and being with him when he was sick." The other exceptions are without merit and do not require any special comment. The case was well tried, and the record of it shows no error.

The defendant does not contend, as counsel stated, that there can be no recovery for mental anguish caused by the negligent failure
(643) to deliver a message announcing sickness or death. If it does, hereafter, with seriousness, when this Court has so often decided against such contention, we can only repeat what we have said in *Cates v. Telegraph Co., ante,* 497: "The doctrine of 'mental anguish,' as it is called, was recognized and firmly established in our jurisprudence long before I (the writer of this opinion) came to this bench (*Young v. Telegraph Co.,* 107 N. C., 370; *Thompson v. Telegraph Co.,* 107 N. C., 449), by a Court of exceptional ability and learning. It has been repeatedly upheld by other decisions, when the *personnel* of the Court had changed, and it cannot at this late day be successfully assailed as being against the principles of the common law. Having been thus deeply rooted in our jurisprudence, and having received the sanction and approval of our most eminent jurists many years ago, it should now be accepted as an acknowledged principle of law, and the cases in which it is involved should be tried and determined as other cases in which there has been no disagreement as to what is the law relating to the cause of action." And again, while speaking for myself and expressing my individual opinion, "I do not wish to be understood as not concurring with the able judges who took part in deciding the cases of *Young v. Telegraph Co., supra,* and *Thompson v. Telegraph Co., supra,* for the principle, as established by those cases, receives my full assent. I believe that what we call 'the doctrine of mental anguish' is based upon a sound principle of the common law, which is elastic enough to meet new conditions as they arise, and to adjust itself and its well-settled rules to the ever-changing circumstances of a progressive civilization and the onward march of reform in the administration of justice. It would be a reproach to the law if telegraph companies can wantonly neglect their duty and obligation to their patrons with impunity and without any responsibility for their wrong, committed sometimes without the slightest excuse and under exasperating circumstances. I speak now only for myself, and am not committing the Court, as a body, to my views."

The doctrine must therefore be considered as much a part of the law of this State as the rule in *Shelly's case,* and it is much more right and just, in principle, than is that rule, the reason for which has long since ceased to exist. But the doctrine is right and just in itself. The reasons advanced to overthrow it are utterly inadequate for that pur-

pose. Damages are allowed for mental anguish, by way of compensation, in other cases, and it never occurred to the courts that the alleged difficulty in assessing them was any good reason for denying them to a party who had been injured by the wrong of another. (644) It would be reducing the law to an absurdity should it be held that if a party recovers one dollar for an injury to his person or any other invasion of his rights, he may also recover damages for mental anguish, caused by the wrong; but if he does not sustain any loss, great or small, apart from that caused by mental anguish, resulting from the wrongful act of another, it is *damnum absque injuria,* however much he may have suffered. This would be refining to the last degree, and should not be accepted as a fair and equitable rule of the law. In some cases a person may suffer more—that is, in the sense of an injury to his rights—by mental anguish than if he had lost many dollars by the negligent act of the defendant in failing to deliver a telegram. When the question is seriously presented, we will express our views more at large upon the subject.

No error.

MANNING, J., concurs in result. BROWN, J., dissents.

Cited: Carswell v. Telegraph Co., 154 N. C., 118; *Betts v. Telegraph Co.,* 167 N. C., 81; *Peyton v. Shoe Co., ibid.,* 282.

STATE v. ENOCH WYNNE.

(Filed 15 September, 1909.)

1. **Indictment, Bill of—Offense Charged—Evidential Matters—Surplusage—Motion to Quash.**

The use of superfluous words in a bill of indictment should be disregarded, and it is error to dismiss a bill on motion to quash which sufficiently charges an "unlawful sale of liquor by the small measure," because of other matters therein found by the grand jury which are only evidential. Revisal, sec. 3254.

2. **Indictment, Bill of—Offense Charged—Special Verdict.**

The grand jury cannot find a special verdict by adding evidential matters in a bill of indictment which otherwise sufficiently charges the offense.

3. **Same—Questions for Jury.**

Evidential matters contained in a bill of indictment can furnish no ground for the trial judge to consider quashing the bill, when otherwise it is sufficient, as such would be an invasion of the province of the petty jury.

(645) APPEAL from *Peebles, J.*, at April Term, 1909, of WASHINGTON.

Attorney-General for the State.
Defendant not represented in this Court.

CLARK, C. J. The indictment is as follows: "The jurors for the State, upon their oaths, present: That Enoch Wynne, late of the county of Washington, on the ____ day of February, in the year of our Lord one thousand nine hundred and nine, with force and arms, at and in the county aforesaid, unlawfully and willfully did sell spirituous liquors by the small measure to Alex. Weaver and Alonzo Wynne, said sale having been made in manner as follows, to wit: Said Enoch Wynne ordered, at request of said Alonzo Wynne and Alex. Weaver, from Norfolk, Va., in a single shipment two separate bottles of whiskey for each of them, not separately marked and designated, and not capable of identification as to the several owners, and delivered one of said bottles to each of them in Washington County, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

It was error to grant the motion to quash. The bill charges an "unlawful sale of liquor by the small measure." It is unnecessary to pass upon the effect of the evidential matters charged. The bill is complete without them. *Utile per inutile non vitiatur.* A verdict of guilty, or not guilty, is only as to the offense charged—not of surplus or evidential matters alleged. Revisal, sec. 3254, forbids a bill to be quashed "if sufficient matters appear therein to enable the court to proceed to judgment." The use of superfluous words will be disregarded. *S. v. Guest,* 100 N. C., 411; *S. v. Arnold,* 107 N. C., 861; *S. v. Darden,* 117 N. C., 697; *S. v. Piner,* 141 N. C., 760. In the old indictment for murder, the depth, width and nature of wound, date of death and divers other matters were charged, including the "instigation of the devil," but were not required to be proven.

The charge of an unlawful sale of liquor is plainly made. If that is proved, the defendant is guilty. If it is not proved, he is not guilty. The additional facts charged are surplusage and ought not to have been charged. Their effect, if proven, is evidential only, and was a matter for instruction to the jury. The grand jury does not find a special verdict by adding evidential matters in a bill which sufficiently charges an offense.

The Court cannot approve of this reverter to the now obsolete practice of charging evidential matters in the bill. They are not required to be proven, and the court would, by quashing or refusing to quash, be passing on a supposed state of facts. The offense should be plainly

and simply charged. Whether a given state of facts falls within (646) the offense should be presented by a special verdict finding such state of facts, or by an instruction to the jury. That can still be done upon a trial on this bill.

Reversed.

STATE v. I. L. HOOPER.

(Filed 22 September, 1909.)

1. **Evidence—Notes of Committing Justice.**

The notes of evidence made by a committing magistrate upon the hearing are not conclusive as to the testimony of witnesses examined.

2. **Same—Parol Evidence—Independent Recollection.**

On the trial in the Superior Court it is competent for purposes of contradiction, to offer parol evidence as to what a witness testified to upon such preliminary examination.

APPEAL from *Peebles, J.*, at March Term, 1909, of PASQUOTANK.

Indictment for attempted burning of a dwelling house, the property of Tennie Walker.

There was a verdict of guilty. The defendant was duly sentenced, and appealed.

The facts are sufficiently stated in the opinion of *Mr. Justice Brown.*

Attorney-General for the State.

W. M. Bond, J. Heywood Sawyer and Aydlett & Ehringhaus for defendant.

BROWN, J. Upon the trial, Miles Jennings was a most important witness for the State, and upon the accuracy of his testimony very largely depends the identification of defendant Hooper, whom said witness states he saw as he was leaving the empty house at the time of the fire.

On the trial, defendant offered E. L. Sawyer, an officer, who committed defendant for trial, for the purpose of contradicting Jennings. Sawyer testified: "I am judge of the Criminal Court. Jennings was sworn and examined at the trial." The defendant asked witness if he remembered the testimony of witness Jennings at the trial before him in this cause, and, if so, to state what he said as to the identification of the defendants. Witness stated that he reduced the testimony to writing and had same in his hand. The State objected; ob- (647)

jection sustained, and defendant excepted. Witness produced his notes of the testimony, which were introduced.

We do not think that this exception can be sustained, for the reason that it does not appear that Sawyer had any independent recollection of any material evidence which he had not set down in his written notes of the evidence which were introduced by the defendant, who got the benefit of them. But we are impelled to the conclusion that his Honor erred in rejecting the evidence of Mrs. Jarvis Seeley, and that such error was highly prejudicial to the defendant. She was asked if she recalled the testimony of Jennings before the trial justice, and, upon answering in the affirmative, was asked to state what Jennings swore to at the trial as to the identification of Hooper. Objection by the State, for the reason that testimony of Jennings had been reduced to writing by the trial justice. Objection sustained, and defendant excepted.

It is plain that the purpose of defendant was to contradict Jennings by proving by Mrs. Jarvis what he testified to before the committing court. It was perfectly competent to prove by parol evidence that Jennings had made contradictory statements as to the identification of the defendant. *S. v. Wright,* 75 N. C., 439; *S. v. Roberts,* 81 N. C., 605; *S. v. Lyon,* 81 N. C., 600. The fact that the court had made notes of the evidence did not make such notes the only and the conclusive evidence. Such notes are usually offered to refresh the recollection of the official who made them (*S. v. Adair,* 66 N. C., 298), and it may be that they are competent as far as they go as independent evidence. *S. v. Pierce,* 91 N. C., 612. But it has never held that such notes are the only and the conclusive evidence of what the witness testified to. The exception must be sustained.

There are other assignments of error which it is unnecessary to consider, as the defendant is entitled to a

New trial.

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STATE v. LEAN COLLINS.

(Filed 29 September, 1909.)

1. Recorder's Court—Jurisdiction—Constitutional Law.

The act of 1909, ch. 633, sec. 4, creating a Recorder's Court of Nash County, giving it the jurisdiction of courts of a justice of the peace and additional jurisdiction of offenses below a felony, declaring such to be petty misdemeanors, and providing for an appeal to the Superior Court, does not contravene the State Constitution. Constitution, Art. IV, secs. 2, 12 and 14. The court follows former precedents.

2. Same—Superior Court—Quashing Bill.

An indictment for an assault with a deadly weapon is a misdemeanor and cognizable by the Recorder's Court of Nash County (Laws 1909, chap. 633), and the Superior Court of that county properly quashed the bill for want of original jurisdiction, the indictment having been found after the law creating the Recorder's Court had been enacted.

APPEAL by the State from *Peebles, J.*, at February Term, 1909, of BEAUFORT.

The facts are stated in the opinion.

Attorney-General for the State.
F. S. Spruill for defendant.

WALKER, J. The defendant was indicted in the Superior Court of Nash County for an assault with a deadly weapon on Will Swain. The defendant, before pleading to the bill, moved the court to quash it, for the reason that the Legislature had, prior to the return of the indictment by the grand jury, established a recorder's court in the county of Nash and had conferred exclusive jurisdiction upon that court to hear and determine a certain class of criminal offenses, including the one which is charged in the bill of indictment to have been committed by the defendant. The court quashed the bill, and the State appealed. The solicitor resisted the motion to quash, upon the ground that the act of the Legislature creating a recorder's court for said county is unconstitutional, as that body had no power to deprive the Superior Court of Nash County of jurisdiction of offenses below the grade of a felony. Some questions in the law must be considered as settled, and this is one of them. The act in question provides both for a trial by jury in the recorder's court and for an appeal from the judgment of that court to the Superior Court, where a trial *de novo* may be had, as in the case of appeals from the courts of justices of the peace. The Constitution of the State provides (in Art. IV) as follows:

Sec. 2. The judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior (649) Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law.

Sec. 12. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coördinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best, provide also a proper sys-

tem of appeals, and regulate by law when necessary, the methods of proceeding, in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution.

Sec. 14. The General Assembly shall provide for the establishment of special courts for the trial of misdemeanors in cities and towns where the same may be necessary.

These provisions, so plainly worded and so comprehensive in their scope, would seem to admit of no doubt as to the rightful exercise by the Legislature of its constitutional power in enacting the law by virtue of which the recorder's court of Nash County was created and afterwards organized, and to be a full answer to the contention of the State in the court below. But the question has been heretofore fully considered by this Court, and we reached the conclusion that the Legislature had the power, under the Constitution, to establish a recorder's court, not only for cities and towns (*S. v. Lytle,* 138 N. C., 738; *S. v. Baskerville,* 141 N. C., 811; *S. v. Jones,* 145 N. C., 460), but also for counties (*S. v. Shine,* 149 N. C., 480). In the case last cited the Legislature created the recorder's court of Monroe, in the county of Union, and further provided in the act by which the court was established, as follows: "Said court shall have exclusive original jurisdiction to hear and determine all other criminal offenses committed within the county of Union below the grade of a felony, as now defined by law, and all other such offenses committed within the county of Union are hereby declared to be petty misdemeanors." This language is at least substantially identical with that to be found in Laws 1909, ch. 633, by which a recorder's court for Nash County was created. If the former act was valid, and we so held, the latter must necessarily be. It may be well to quote the language of the act of 1909 (ch. 633, sec. 4), in order to make clear the striking similarity between the two enactments. It is as follows:
(650) "Said court shall have all jurisdiction and power in all criminal cases arising in said county which are now or may hereafter be given to justices of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal offenses committed in said county below the grade of felony, as now defined by law, and the same are hereby declared to be petty misdemeanors."

It follows as a conclusion from the facts of this case, when considered in the light of our former decisions, that when the recorder's court of Nash County was established, the Superior Court of that county lost its jurisdiction of offenses described in the act of 1909; and as the offense of assault with a deadly weapon is a misdemeanor, and conse-

quently below the grade of a felony, the judgment of the court quashing the bill for want of jurisdiction was in all respects correct.

Affirmed.

Cited: *S. v. Alston, post,* 650; *S. v. Brown,* 159 N. C., 468; *S. v. Dunlap, ibid.,* 493; *S. v. Tate,* 169 N. C., 374; *S. v. Burnett,* 173 N. C., 752.

STATE v. JONES ALSTON.

(Filed 29 September, 1909.)

For digest, see *S. v. Collins,* next above.

APPEAL from *Peebles, J.,* at February Term, 1909, of BEAUFORT.

The State appealed.

Attorney-General for the State.

B. A. Brooks and E. B. Grantham for defendant.

WALKER, J. The defendant was indicted in the Superior Court of Nash County for unlawfully and cruelly beating a horse. The indictment was returned by the grand jury after the recorder's court of Nash County was established, under the act of 1909 (ch. 633), and the case is therefore precisely like the one of *S. v. Collins, ante,* 648. The court, upon motion of the defendant, quashed the bill, and the State appealed. In thus disposing of the case, there was no error, as the Superior Court had no jurisdiction of the offense alleged in the indictment, which is below the grade of a felony.

Affirmed.

STATE v. ELIAS PRIDGEN.

(Filed 29 September, 1909.)

Legislative Acts—Creating Inferior Courts—Prospective Effect.

An act of the Legislature creating a court of inferior jurisdiction to the Superior Court operates prospectively, unless a contrary intention appears in the act itself, and when the latter Court has previously acquired jurisdiction of an offense included in the jurisdiction of the former by the finding of a bill, before the passage of the act, its jurisdiction in that instance is not divested by the new law, and the motion to quash the bill in this case was, therefore, properly disallowed.

(651) APPEAL from *O. H. Allen, J.,* at April Term, 1909, of NASH.

Attorney-General for the State.
F. S. Spruill for defendant.

WALKER, J. The defendant was indicted in the Superior Court of NASH for the unlawful sale of spirituous liquors. The bill was returned by the grand jury prior to the passage of the act of 1909 (ch. 633) which created a recorder's court for that county. Before pleading to the bill, the defendant moved to quash it, upon the ground that by that act the recorder's court was given jurisdiction of all criminal offenses below the grade of a felony, the unlawful sale of liquor being a misdemeanor. The State opposed the motion and contended that as the Superior Court had acquired jurisdiction by the finding of the bill before the act was passed, that jurisdiction was not divested by it. The court quashed the bill and the State appealed.

As a general rule, statutes operate prospectively rather than retrospectively. There are, of course, exceptions to the general rule, but this case is not within any of them. It is governed by the principle stated in *S. v. Littlefield,* 93 N. C., 614. In that case the Legislature conferred *exclusive* jurisdiction upon the inferior court of Buncombe and Madison counties of all crimes of which the said court then had concurrent jurisdiction with the Superior Court. The indictment against the defendant Littlefield was pending in the latter court at the date of the ratification of the act, and it was contended, as the defendant contends in this case, that the act deprived the Superior Court of jurisdiction, but this Court held otherwise, upon the ground that the act must be construed to have only a prospective operation. It was said by *Justice Ashe,* for the Court: "Such a construction would be giving a retrospective operation to the act, which is in violation of the general rule,
(652) that 'no statute should have a retrospective effect.' Although the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless a contrary intention is unequivocally expressed therein. Potter's Dwarris, p. 162, note 9, and cases cited. There is nothing in the act tending to show an intention in the Legislature to make it retrospective, but, on the other hand, from the use of the term *original jurisdiction,* it would seem that it was intended that indictments for offenses of which the inferior courts *then* had jurisdiction should thereafter be *originated* in that court, and that was what was meant by the use of the word 'original' in the statute."

We find that the act of 1909 is substantially like the one construed in that case, and the words "original jurisdiction" are used in both acts.

See, also, *S. v. Sullivan,* 110 N. C., 513. Besides, we do not think the Legislature intended by the act of 1909 to take away the jurisdiction of the Superior Court, so far as it had attached to cases then pending in that court.

There was error in quashing the bill. The judgment is reversed and set aside, and the Superior Court will further proceed in the cause, in the exercise of its rightful jurisdiction, according to law.

Error.

Cited: Waddill v. Masten, 172 N. C., 585.

R. D. HONEYCUTT v. J. E. WATKINS ET AL.

(Filed 13 October, 1909.)

Appeal and Error—Forma Pauperis—Defective Affidavit—Jurisdictional—Dismissal of Appeal.

The affidavit for an appeal *in forma pauperis* is defective which does not aver "that the appellant is advised by counsel learned in the law that there is error in matter of law," etc., Revisal, sec. 597; and the compliance with the provisions of this section being jurisdictional, the appellee can have the appeal dismissed as a matter of right upon the failure of appellant to comply therewith.

APPEAL by defendant from *Lyon, J.,* at April Term, 1909, of WAKE.

B. C. Beckwith for plaintiff.
W. J. Peele for defendants.

PER CURIAM: The motion to dismiss must be allowed. The (653) appeal is *in forma pauperis,* and the affidavit is fatally defective, in that it does not contain the averment required by the first proviso in Revisal, sec. 597, that the appellant "is advised by counsel learned in the law that there is error, in matter of law, in the decision of the Superior Court."

Giving bond on appeal, or the granting leave to appeal without bond, are jurisdictional, and, unless the statute is complied with, the appeal is not in this Court, and we can take no cognizance of the case, except to dismiss it from our docket. It has been always held that if the affidavit to procure an appeal *in forma pauperis* is defective, it is not a matter of discretion with the court, but the appellee can have the appeal dismissed as a matter of right. *S. v. Atkinson,* 141 N. C., 734; *S. v. Payne,* 93 N. C., 612; *S. v. Harris,* 114 N. C., 831; *S. v. Bramble,* 121 N. C., 603; *S. v. Gatewood,* 125 N. C., 695, and numerous cases cited in the last two cases.

Appeal dismissed.

STATE v. J. B. ARTHUR.

(Filed 13 October, 1909.)

1. **Indictment—Proof—Evidence—Variance.**

There is no fatal variance between the allegation of a bill of indictment and the proof, the former charging the burning of "a certain shop and storehouse," giving its ownership and its occupancy as "used in the trade of woodworking by H.," and the latter tending to show that defendant was seen to set fire to the "H. workshop."

2. **Criminal Cases—Supreme Court—Newly-Discovered Evidence—Power of Court.**

A new trial in criminal cases will not be granted by the Supreme Court upon the grounds of newly discovered evidence.

WALKER, J., concurs in result.

APPEAL by defendant from *Cooke, J.*, at June Term, 1909, of CARTERET.

Indictment for house burning.

The defendant was convicted, and from the sentence of the court appealed.

The facts are sufficiently stated in the opinion.

Attorney-General for the State.
Aycock & Winston for defendant.

BROWN, J. 1. The defendant was indicted for burning a "certain shop and storehouse, the property of one C. S. Wallace, occupied (654) by one W. A. Howland and used in the trade of woodworking."

The evidence in regard to the house is that the defendant was seen to set fire to "Howland's workshop. It was right under the side of the shop, under a tank of gasoline used for running the machinery in the shop. The house belonged to C. S. Wallace and was used by Howland for operating some working machinery."

The defendant was convicted, and brings the case to this Court upon the one exception, that there was a fatal variance between the allegation in the bill and the proof.

The witness Mann, who testified to seeing defendant set the building on fire, repeatedly called it "a shop," and we think it is properly so charged in the bill. The whole evidence tends to bring the structure within the description of a shop, as given in *S. v. Morgan,* 98 N. C., 643.

2. The defendant files a petition for a new trial, on the ground of nely discovered evidence.

We have not been cited to any case in this country where a new trial has been allowed in criminal cases by an appellate court upon the ground of newly discovered evidence, and it is not allowed in Great Britain. If such practice prevailed, the proper administration of the criminal law in which our entire people are interested, would be seriously impaired and the delays incident to it greatly increased.

The ease with which evidence would be "newly discovered" would give the accused, when convicted, too great an opportunity to postpone the sentence of the law almost indefinitely.

The State would, of necessity, be denied the right to ask for a new trial, for similar reasons, for when the accused is acquitted no new trial may be granted for any reason whatever. The Superior Court judge cannot even award a new trial to the State, and the right of appeal upon its part is extremely limited, and never lies after a general verdict of not guilty. The Superior Court judge may grant a new trial to the accused during the term, and his discretion is irreviewable.

And if the accused is finally convicted and sentenced, he may still apply to the Governor for executive clemency.

This question is fully discussed and all the authorities cited in the well-considered opinion of the Chief Justice in *S. v. Lilliston,* 141 N. C., 863. The soundest considerations of public policy require that we adhere to that decision, founded as it is in the wisdom of our forefathers. We are more firmly convinced of the wisdom of (655) our former judgment when we examine the newly discovered evidence set out by this defendant, which is mainly intended to contradict a State witness. With reasonable diligence it could have been presented either on the trial or to the presiding judge before he adjourned the term.

The judgment of the Superior Court is

Affirmed.

WALKER, J., concurring in result: While I concur with my brethren that there was no error in law committed in the trial of this case, it is impossible for me to agree with them that we cannot consider the motion (or petition) of the defendant for a new trial upon the ground of newly discovered testimony. It seems to me that such a ruling not only violates the cardinal rule of the common law, but nullifies an express enactment of the Legislature upon the subject. It is provided by statute (Rev., sec. 3272), that "the court may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases." The power and authority under the Constitution and the statute to grant new trials is identical in both classes of cases. It has been the undeviating course and practice of this Court

to grant new trials in civil cases for newly discovered evidence. Whence comes this power? It is suggested in some of the cases that this power arises from necessity, but necessity cannot supply constitutional and statutory omissions. The power must be found either in the Constitution or in the statute passed in pursuance of the Constitution; and if it cannot be found there, then it does not exist. But at this late day no one will be bold enough to say that the power does not exist to grant new trials for newly discovered evidence by this Court in civil cases; and if the power does exist in civil cases, then no ingenuity can show why it does not exist in criminal cases. The attempt to show it has been repeatedly made; but, with all possible deference to the Court, and certainly with entire respect, both for its learning and its facility of expression, it is not too much to say that no opinion yet has been written which has satisfied or can satisfy me and, I may safely say, the profession that a real distinction can be drawn between the power to grant new trials in civil cases and the power to do the same thing in criminal cases.

In *S. v. Lilliston,* 141 N. C., 866, the Chief Justice, in construing section 3272, construes the words, "when he is found guilty," to relate to the time—that is, of the court, to wit, the Superior Court—in (656) which the defendant is found guilty. It seems manifest to us that this is not the correct construction of this statute—"the courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases." "When he is found guilty" is the same as if it had been written "if he is found guilty," the purpose being not to authorize the granting of a new trial against the defendant, but one for him.

It is perfectly clear that the adverb "when" was used in the sense of the conjunction "if," meaning, of course, "in case that; granting, allowing or supposing that; introducing a condition or supposition," and not as referring to the time when a verdict is returned by the jury. If the latter be the true meaning of the term, how comes it that the Court has the power to grant a new trial for "newly discovered testimony" in civil cases? For the same word, "when," is used in the statute conferring the power in that class of cases, and the right to move for a new trial is restricted to the time "when" the trial occurred, and the statute expressly and specifically states the grounds upon which a new trial may be ordered in civil cases. We have held that the failure to make the motion *during the term,* for the cases set forth in the statute, is fatal, and yet we will entertain a motion in this Court, *when* we have acquired jurisdiction by the appeal, to set aside the verdict and grant a new trial for "newly discovered testimony."

I adhere to the opinion expressed by *Justice Connor* in *S. v. Lilliston,*

141 N. C., 866, in which I concurred at the time of the decision of that case, and in *S. v. Turner,* 143 N. C., 641. In the former case *Justice Connor* very tersely and forcefully said: "I have never been able to understand why, if this Court has power to grant a new trial for newly discovered evidence in a case involving property of ever so small value it has not like power where the liberty and life of the citizen is involved. . . . It is one of those questions which, to my mind, will only be settled when reasons more cogent than any yet advanced are found to sustain the conclusion of the Court." In the latter case language is not less worthy of serious consideration: "The cases in which the motion has been made were reviewed in *Lilliston's case.* I confess that, after examining them, I am unable to see or understand wherein the distinction is found which permits and, upon this record, would make it our duty to grant this defendant a new trial if she had been cast in a civil action involving the title to a tract of land or personal property of an insignificant value, but denies the power to do so when she stands convicted of a crime followed by a sentence of imprisonment at hard labor for life. It is not claimed that any statute confers (657) the power in one case and withholds it in another. The Constitution confers the jurisdiction to hear and determine civil and criminal appeals in exactly the same terms." *Justice Connor* and I agreed in our views upon this question when those cases were decided, and no reason or argument of sufficient force has since been advanced to change my opinion. This question was presented in *S. v. Starnes,* 94 N. C., 973, but the Court did not consider it upon principle and authority, but disposed of it adversely to the defendant, solely upon the ground that no precedent could be found in the decisions of this Court for such procedure. It did not require any precedent, because the "reason of the thing" and the perfect analogy between civil and criminal cases in this respect—not to say anything about the express words of the statute—were all sufficient to sustain a contrary ruling. When the question first arose, the Court seemed impressed by the fact that the question had not heretofore been raised, and concluded, because not raised, that it did not exist. If this Court will adopt the same process of reasoning, the constancy with which, notwithstanding adverse decisions, the question is now raised, will show that the decisions do not satisfy the professional mind. In *S. v. Council,* 129 N. C., 511, *Justice Douglas* stated his view of the law with his accustomed clearness and vigor: "Knowing that rehearings are constantly granted in civil cases, and finding no distinction between civil and criminal actions, either in the statute or the rules of this Court, I am unwilling to say, even by implication, that property is more valuable than life and liberty, or entitled to a greater degree of protection." We find that the best text-writers upon the

subject sustain the position taken by *Justices Connor, Douglas* and myself in former dissents. In 3 Graham & Waterman on New Trials, 227, the reasons for granting new trials in criminal cases are said to be more cogent than those which apply to civil cases. I quote from the standard text book as follows: "We cannot see any valid reason for interfering with the verdict in civil cases that would not apply with still greater force to criminal trials. The latter are certainly the more important, affecting, as they do, personal liberty, character and, perhaps, life. The sole object in interfering with the verdict in any case is the prevention of injustice. As the hazards of pecuniary loss are proportionately of less consequence than the loss of reputation, liberty
(658) or life, so greater scrutiny and greater latitude in granting a new trial should be allowed in the latter than in the former."

It is stated in the opinion of the Court that no case in Great Britain or in this country, in which a new trial had been allowed for newly discovered testimony, had been cited. If it is meant by this to imply that no such case can be found, I must respectfully differ from the majority. Indeed, the large majority of the cases relating to this question either hold that a new trial will be granted in criminal cases when the new evidence is of the kind required in civil cases, and the use of proper diligence to discover it has been shown, or recognize that as being the correct rule of law applicable to both civil and criminal cases. They will be found collated in 15 Cent. Digest, p. 142 and sec. 2306. Only one of the courts in the other States seems to decide the other way, and this is the Supreme Court of Iowa. I do not mean to assert this as a fact, but it is true, so far as my researches have enabled me to determine how the matter has been treated in other jurisdictions. In England, I believe, it is regulated by statute, and the decisions in Iowa are based upon statutory grounds. The rule has been held to apply not only to criminal, but even to capital cases. 1 G. & W. on New Trials, 481.

I have not attempted to state with any degree of fullness the reasons which should induce the Court to adopt the same rule in both classes of cases—civil and criminal—for I am satisfied with what has been so well said by our former associate, *Justice Connor,* in the two cases already cited.

In this case I concur in the result because I do not think the defendant has made a sufficient showing of diligence on his part to discover the alleged new proof, even if it is so decisive in its character as to produce the belief in our minds that on another trial it would probably change the result. Perhaps it would do so, but it would seem that the discrepancy or contradiction in the two statements of the principal witness as to the burning of the shop could have been discovered and exposed during the trial of the case. Surely there must have been some

witness present or attainable who knew how the building was constructed, and it does not sufficiently appear that if there was not such a witness an examination of the shop after the witness had testified could not have been made in time to have produced evidence of the inconsistent statements at the trial, or at least in time to have presented the matter to the court below. *Moore v. Gulley,* 144 N. C., 81; G. & W. on New Trials, p. 1027.

The grounds upon which such a motion will be granted are well stated in Baylies on New Trials and Appeals, at p. 524, with (659) a full citation of the authorities. Tested by what is there said, I do not think the defendant has brought his case within the rule applicable to such motions.

Cited: S. v. Ice Co., 166 N. C., 404.

STATE v. CHARLIE PARISH.

(Filed 13 October, 1909.)

1. **Appeal and Error—Forma Pauperis—Criminal Cases—Order Signed by Clerk.**

When the order allowing an appeal in *forma pauperis* in criminal cases is not signed by the judge as required by Rev., sec. 3279, but by the clerk, the defect is jurisdictional, without power of the appellate court to allow amendment, and the appeal will be dismissed.

2. **Same—Good Cause Shown—Deposit.**

But in this case the appellant asked to be allowed to make deposit in lieu of bond, and "good cause being shown," Rev., 593, the case was set for argument at a later date so that the necessary printing may be done.

APPEAL by defendant from *W. R. Allen, J.,* at August Term, 1909, of WAYNE.

Attorney-General for the State.
J. L. Barham for defendant.

PER CURIAM: The defendant attempted to appeal *in forma pauperis.* The affidavits were such as required by the statute (Rev., sec. 3278), but the order allowing the appeal without giving bond was not signed by the judge, as required by Rev., sec. 3279, but by the clerk. This latter is allowable only as to appeals in civil cases. Revisal, sec. 597.

Unless the requirements of the statute, both as to time and manner, are complied with, the appeal is not in this Court. The defect is juris-

dicional, and we have no power to allow amendments, and the appellee has a right to have the appeal dismissed. *S. v. Bramble,* 121 N. C., 603; *S. v. Galewood,* 125 N. C., 695, and numerous cases there cited.

The defendant, however, when the case was called, asked to be considered as appealing under bond, and to make the deposit now, in lieu of bond, in this Court, as allowed by Revisal, sec. 593, if "good (660) cause is shown." We think such cause has been shown, and, the deposit in lieu of bond having been made, the case will be heard. As, under the circumstances, the record and brief have not been printed, the cause will be set for hearing at the close of the call of causes from the Eighth District, that the printing may be done, as required in all except pauper appeals.

Motion allowed.

Cited: *S. v. Smith,* 152 N. C., 843.

STATE v. DON WILLIAMS.

(Filed 20 October, 1909.)

1. **Indictment—Presentment—Limitation of Actions.**

An indictment or presentment marks the beginning of the prosecution and arrests the running of the statute of limitations. Revisal, 3147.

2. **Nol. Pros. "With Leave"—Limitations of Actions.**

After the entry of a *nol. pros.* "with leave," the prosecution remains as it was under the original finding of the grand jury upon the bill, and the statute does not begin to run therefrom so as to bar the further prosecution of the indictment under a *capias* and arrest eventually ordered and made, in this case more than two years after the entry of the *nol. pros.* with leave.

APPEAL by defendant from *W. J. Adams, J.,* at February Term, 1909, of COLUMBUS.

The facts are stated in the opinion of the Court.

Attorney-General for the State.
Grady & Williamson for defendant.

WALKER, J. The defendant was tried on a bill of indictment for a nuisance, found by the grand jury at April Term, 1906, of the Superior Court of Columbus County, and appealed from the judgment of conviction. He relied upon the statute of limitations. A *nolle prosequi,* with leave to issue a *capias* upon the same bill, was entered at November Term, 1906. A *capias* was issued in December, 1908, and the defendant

was arrested on 4 January, 1909. The court held that the statute did not bar the further prosecution of the indictment, and whether it does or not is the only question presented by the assignment of errors. An indictment or presentment marks the beginning of the prosecution, and arrests the running of the statute of limitations, Revisal, sec. 3147; *S. v. Cox,* 28 N. C., 440. "A *nolle prosequi* in criminal proceedings does not amount to an acquittal of the defendant, but he may (661) again be prosecuted for the same offense, or fresh process may be issued to try him on the same indictment, at the discretion of the prosecuting officer." *S. v. Thornton,* 35 N. C., 257; *S. v. Thompson,* 10 N. C., 613; *S. v. Smith,* 129 N. C., 547. The Revisal, sec. 3273, provides as follows: "A *nolle prosequi* 'with leave' shall be entered in all criminal actions in which the indictment has been pending for two terms of court and the defendant has not been apprehended, and in which a *nolle prosequi* has not been entered, unless the judge, for good cause shown, shall order otherwise. The clerk of the Superior Court shall issue a *capias* for the arrest of any defendant named in any criminal action in which a *nolle prosequi* has been entered, when he has reasonable ground for believing that such defendant may be arrested, or upon the application of the solicitor of the district. When any defendant shall be arrested, it shall be the duty of the clerk to issue a subpœna for the witnesses for the State endorsed on the indictment." The prosecution was not ended by the entering of the *nol. pros.* with leave. This is the same prosecution as it was originally. The other suggestions made in the defendant's brief are without any force and require no separate discussion. The defendant has had a fair trial, according to the forms and with all the safeguards of the law, and he must abide the result.

No error.

STATE v. A. PERRY.

(Filed 27 October, 1909.)

1. **Cities and Towns—Health Ordinances—Selling Fish—Municipal Powers.**

An ordinance prohibiting the sale of fish within the corporate limits of a town outside of a certain market house therein, excepting fresh fish caught in the streams of the county at such places as may not be prohibited, is valid, being for the preservation of the public health.

2. **Same—Market House—Contract—Constitutional Law.**

It is within the power of a city or town to provide, by contract with its citizens, a market house and exclude with certain reasonable exceptions,

the sale of fish at other places, it appearing that, under the contract, the market house was to remain under the full control of the municipal authorities, and that reasonable accommodation had been provided for the vendors with reasonable charges for the stalls.. A contract of this character does not contravene Art. I, sec. 7, of the Constitution, relating to perpetuities and monopolies.

3. Same—Defense—Illegal Contract.

A defendant on trial for violating a valid ordinance of a city or town in selling fish outside of the market house, cannot avail himself of the defense that the market house was provided by a citizen under a contract with the municipality which was void by reason of the property being exempt from taxes under certain conditions; for, if such defense were otherwise sufficient, the ordinance is enforceable independently and regardless of the contract.

(662) APPEAL from *W. J. Adams, J.*, at May Term, 1909 of CUMBERLAND.

Indictment for violation of an ordinance of the city of Fayetteville. The ordinance is as follows:

"Sec. 13. No person shall sell any fresh fish within the incorporate limits of the city of Fayetteville, outside of said market house in said city: *Provided,* that fresh fish which are caught in the streams and waters in Cumberland County, when offered for sale in a fresh condition, shortly after they are caught, may be sold within the said city, at such places and points as may not be prohibited by law."

The defendant admitted that he sold fresh fish, after the passage of said ordinance and while it was in force, on the public streets within the corporate limits of Fayetteville, which fish were not taken or caught from the waters or streams of Cumberland County. There was a verdict of guilty. From the judgment of the court the defendant appealed.

The facts are stated in the opinion of the Court.

Attorney-General, George L. Jones, R. H. Dye and Cook & Davis for the State.

Thomas H. Sutton and C. W. Broadfoot for defendant.

BROWN, J. The only questions presented by this appeal which we deem it necessary to discuss are the contentions of the defendant that the ordinance is *ultra vires* and also in conflict with Art. 1, sec. 31, of our State Constitution, which forbids monopolies.

It appears to us that the passage of the ordinance in question was a valid exercise of the police power vested generally in municipal corporations.

The power of the public authorities to inspect and control the sale of articles of food intended for consumption is undoubted, the object being the preservation of the health of the community. The power exists, therefore, in municipal authorities to establish and then regulate and control public markets or places at which all articles (663) of food shall be offered for sale and sold, or to regulate and control markets established by private individuals and carried on as private enterprises. The health of the community, being one of the purposes of the organization of government, and the purity of food and drink having such an important effect upon the health, is universally held to be a ground for the exercise of the power. 1 Abbot on Mun. Corp., sec. 134; Smith Mod. Law, sec. 593 *et seq.;* Dillon on Mun. Corp., sec. 386.

This power to make by-laws relative to the public markets will not authorize corporations to prohibit the sale of fish and meats, etc., entirely within its limits, because that would be in restraint of trade, but it does empower them to prohibit the hawking about or vending by retail such articles of trade except at the public markets and within certain limits about them.

"The fixing the places and times at which markets shall be held and kept open," says the Supreme Court of New York, in *Bush v. Seabury,* 8 Johns., 418, "and the prohibition to sell at other places and times, are among the most ordinary regulations of a city or town police." Also, 1 Abbot, sec. 135, and cases cited in notes.

The power of the municipal authorities to enact ordinances regulating the sale of perishable food stuff, and the supervision thereof by the city's health officer, is an exercise of its police power, which has been so uniformly sustained in all the courts of the land that it seems to be firmly established.

A collection of the cases will be found in notes to *S. v. Sarradat,* 24 L. R. A., 584; *S. v. Moore,* 104 N. C., 714; *Intendant v. Sorrell,* 46 N. C., 49; *S. v. Pendergrass,* 106 N. C., 665.

But it is insisted that the ordinance was enacted in order to create a private monopoly, and conflicts with Art. 1, sec. 7, of our State Constitution, which declares that "Perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed." The facts, briefly stated, are these: The city of Fayetteville, having no public market house, and realizing the public necessity in the promotion of the health and comfort of its citizens for such a building, through its aldermen, entered into a contract with John Underwood and associates for the erection of this market house, which the city was not able or did not care to undertake to build. The city provides for supervision by its own officials, has quarters for health officers, and enforces

obedience to all regulations which may be from time to time enacted by the city. The contract also provides for the purchase of the (664) property by the city at stated periods, at its option. In fact, the entire market place is under the absolute control of the city; and it further provides that the rental for the stalls shall be reasonable, and, in order to establish what might be reasonable rent, it provides that it shall not be greater than that in other towns of similar size and under similar circumstances in North Carolina. And for all these benefits accruing to the public and furnishing the city quarters for its health officers, and other benefits accruing to the city, the city agrees to pay a rental equal to the amount of taxes imposed thereon by the city until such time as the enterprise might be on a paying basis of six per cent. The books and records of the company are at all times open to the examination of the city officials.

We do not think this contract is obnoxious to any section of our Constitution or violates any principle of public policy.

The contention that it is void because the property is exempted from municipal taxation is without basis upon the facts; but if it were true, this defendant could not raise the point under an indictment for violating a city ordinance, which in itself is a valid exercise of the police powers of the city and may be enforced, independent and regardless of the contract. *Imp. Co. v. Comrs.,* 146 N. C., 355.

To sustain the judgment it therefore becomes unnecessary to consider the contract; but as it was vigorously attacked by the learned counsel for defendant, and as it is to the interest of the city to set the question at rest, we will say that the right to enter into such a contract is clearly within the legitimate powers of the board of aldermen. The city has conferred no monopoly on Underwood and his associates. It is the city's market house, to all intents and purposes, governed, controlled and regulated by its authorities. Every fish and meat dealer, as far as the capacity of the market house will permit, is at liberty to rent stalls and do business there. Underwood and associates have no exclusive right to sell fish there themselves, nor to charge others their own price for space. Extortionate rents are carefully guarded against by the terms of the contract. The city had as much right to contract with Underwood to furnish it a public market house as it had the right to build one of its own. The purpose of the contract is to benefit the community, and municipal legislation which has for its object the protection of the health, morals, etc., of the municipality is entitled to liberal construction, and the scope, if within constitutional limits, is very largely within the discretion of the authorities and not subject to judicial (665) interference. 2 Smith's Mod. Law of Mun. Corp., sec. 1322.

We think the contract is valid, and that similar conventions have been heretofore sustained. *S. v. Sarradat, supra,* and notes; *Palestine v. Barnes,* 50 Tex., 538; *S. v. Natal,* 41 La. An., 887, 650, 722, and cases there cited; 1 Smith Mod. Law Corp., sec. 593.

The judgment of the Superior Court is

Affirmed.

STATE v. CHARLIE PARISH.

(Filed 27 October, 1909.)

In this case there was no evidence to sustain the conviction of the offense charged.

APPEAL by defendant from *W. R. Allen, J.,* at August Term, 1909, of WAYNE.

Attorney-General for the State.
J. L. Barham for defendant.

PER CURIAM: Upon an examination of the evidence in this case, we think there is an absence of any sufficient evidence tending to support the charge of an assault with intent to commit rape. In his argument, with his usual candor, the Attorney-General coincided with this view.

New trial.

STATE v. WATT BARRETT.

(Filed 27 October, 1909.)

1. Burning Barn—Motive—Evidence—Error.

It is competent for the State in showing motive upon the part of defendant in burning a barn for which he was being tried, and which was being used by the witness as a tenant at the time, to ask witness, on direct examination, whether he opposed defendant's application for membership in a certain lodge; but it was error in the trial judge to admit in evidence at an early stage of the trial, and before defendant had put his character at issue, the answer of witness that his reason for doing so was that defendant "had been convicted of stealing and sent to the chain-gang."

2. Same—Harmless Error.

opposing defendant's application for membership in a certain lodge, to
Error committed in admitting as evidence the reason of witness in

show motive for the burning of a barn, used by witness as a tenant, for which defendant was being tried, to wit: Defendant "had been convicted of stealing and sent to the chain-gang," is cured by the subsequent admission thereof by the defendant when under examination as a witness in his own behalf.

3. Burning Barn—Instructions—"Willfully and Wantonly"—"Feloniously"—Special Requests.

A charge of the judge on a trial of defendant for burning a barn, that they must find that defendant "willfully and wantonly set fire to and burned the barn," is not objectionable on the ground that the court failed to explain more fully what is meant by the words "willfully and wantonly," in the absence of special prayer for instructions requesting it; and his failure to instruct the jury that the act must be feloniously done, was not error. Revisal, sec. 3338.

(666) APPEAL by defendant from *W. J. Adams, J.*, at August Term, 1909, of UNION, from conviction, under an indictment for burning the barn of one Paul Huntley.

The facts are stated in the opinion of the Court.

Attorney-General, George L. Jones and A. M. Stack for the State.
Adams, Jerome & Armfield for defendant.

BROWN, J. The first assignment of error relates to the testimony of a witness for the State, Jeff Rivers, who was tenant on the place where the burned barn was situated, and occupied it with his produce and other property. This witness was asked on his direct examination "whether or not he opposed defendant's application to membership in the Grand Union." The defendant objected, and, his objection being overruled, excepted. The witness answered: "I opposed the defendant's application to membership in the Grand Union on the ground that he had been convicted of stealing and sent to the chain-gang." The defendant objected to the answer. Objection overruled, and defendant excepted.

It was entirely competent for the State to show motive upon the part of the defendant to burn the barn occupied and used by the witness, and to that end it was proper to show that bad feeling existed, and the reason for it, but that part of the reply of the witness in which he stated that defendant had been convicted of stealing and sent to
(667) the chain-gang should have been excluded and the jury carefully cautioned not to regard it.

The State had no right at that stage of the trial to put so damaging a fact in evidence. The defendant had not put his character in issue at that time. But we think he error entirely cured by subsequent proceedings.

The defendant was examined as a witness in his own behalf, and testified that he had been indicted for stealing corn and served four months on the chain gang for it.

The second and third assignments of error relate to the charge of the court.

The defendant's prayers for instruction are elaborate and carefully drawn, but we think in his charge the court gave him the full benefit of all he was entitled to.

It is not the duty of the judge to follow the verbiage of special instructions prayed by counsel. He must be allowed to charge the law in his own language, and this has been done very clearly, fully and accurately, with careful regard for defendant's rights.

Assignment of error No. 4. This assignment pertains to the failure of his Honor to charge the jury in what willful and unlawful intent consists, and for his further failure to charge the jury that defendant must have committed the crime feloniously.

The court charged the jury that they must find that defendant willfully and wantonly set fire to and burned the barn and stables. No special instruction was asked as to this, and we do not think it is reversible error because the court failed to explain more fully what is meant by the words "willfully and wantonly."

His Honor very properly did not instruct the jury that the act must be feloniously done. The statute does not use the word "felonious." Revisal, sec. 338; *S. v. Battle,* 126 N. C., 1036.

The judgment is

Affirmed.

Cited: S. v. Clark, 173 N. C., 745.

STATE v. WALTER M. DRAUGHON.

(Filed 27 October, 1909.)

1. Deeds and Conveyances—Forgery—Publication—Intent to Defraud—Declarations—Natural Evidence—Hearsay.

When defendant is tried for forging a deed from his father, since deceased, to himself, and uttering and publishing it with an intent to defraud the other children and heirs at law, defendant may show by a State's witness that deceased had acknowledged to this witness the execution of the deed, with deceased's declaration at the time that defendant had done more for him than any other of his children had done, etc.; (1) it tended to show the disposition of the father towards the son at the time the deed was alleged to have been executed by the father; (2) it was natural evidence and the only obtainable evidence of the intent of the grantor, and an exception to the rule of hearsay evidence.

2. Same.

While such declarations are not direct evidence that the father executed the deed, which the son is being tried for forging, it is a material circumstance tending to show it and excluding such evidence is reversible error. The questions raised in this case by defendant upon the plea of "former acquittal" are not passed upon on this appeal as they may not again arise.

(668) APPEAL by defendant from *W. R. Allen, J.*, at February Term, 1909, of SAMPSON.

The facts are stated in the opinion.

Attorney-General and G. E. Butler for the State.
Fowler & Crumpler, F. R. Cooper and J. D. Kerr for defendant.

WALKER, J. The defendant was indicted in the court below in two counts. In one of the counts he is charged with the forgery of a deed, purporting to have been made and executed by G. B. Draughon to the defendant, dated 2 November, 1902, and conveying to him in fee certain land, containing twenty acres and therein described, for the nominal sum of one dollar. In the other count he is charged with uttering and publishing the forged instrument. The bill was drawn under sec. 3424 and 3427 of the Revisal. In the first count it is alleged that the forgery was committed with intent to defraud G. B. Draughon, the alleged maker of the deed, and in the second count it is alleged that the defendant, by the forgery, intended to defraud John M. Mathis, Donnie Mathis and others, the said Donnie Mathis and others being the heirs of G. B. Draughon, who was dead when the bill of indictment was returned by the grand jury. It appears that an indictment had been found at a previous term of the court for the same forgery, simply, with intent to defraud J. M. Mathis and his wife, Donnie Mathis, the said Donnie Mathis being the child of G. B. Draughon, who was then living. The defendant was acquitted at the trial upon that indictment, under the charge of the court that there could be no such a thing in the law as an intent to defraud the heir of a living person who had but a bare possibility of inheritance from her father, applying the maxim, *Nemo est haeres viventis*. At the trial upon the second indictment, the
(669) defendant pleaded former acquittal, and relied, in support of his plea, on the verdict and judgment in the first trial. The court held, as matter of law, upon the admitted facts, that there had been no former acquittal of the defendant upon the charge contained in the second bill of indictment, and instructed the jury to disregard the plea and to consider the case and the evidence therein only upon the defendant's plea of not guilty. The jury returned a verdict of guilty, and judg-

ment that the defendant be confined in the State penitentiary for the term of three years was rendered thereon. The defendant, having duly excepted to divers rulings of the court, now assigned as errors, appealed to this Court. As to the plea of former acquittal, it is not absolutely necessary for us to pass upon it, as we think there was error in the exclusion of testimony offered by the defendant, but we will refer to it later on.

The State introduced as a witness Sherman Royall, who testified to facts very prejudicial to the defendant, and, among others, that G. B. Draughon had virtually denied, in a conversation with the defendant, which took place in the presence and hearing of the witness, that he had executed the deed, and that on one occasion, when the defendant was not present, as it impliedly appears, he requested the witness to see the defendant about a rumor to the effect that the latter had a deed from him, G. B. Draughon, and to ask the defendant for permission to see the deed, which request the defendant refused, but he did show the back of the deed, on which was written "G. B. Draughon to W. M. Draughon." The defendant proposed to prove by the same witness that G. B. Draughon admitted to him that he had executed the deed in question to the defendant for the twenty acres of land, and gave as his reason that he intended to do more for the defendant than for any other child, as the defendant had done more for him and had been better to him than any of his children. This evidence, on objection by the State, was excluded, and the defendant excepted. The Attorney-General, with his usual frankness and fairness, conceded in the argument before us that the court committed an error in rejecting the evidence. We take an extract from his very able and well-prepared brief: "It seems to me that the exclusion of this testimony was error. The State had proved by the witness certain declarations of G. B. Draughon prejudicial to the defendant. It would seem that, upon cross-examination, the defendant should have been allowed to show that G. B. Draughon had declared that he had given the defendant the land, and why. It tended to support the defendant's contention that the deed was genuine." Our opinion is that the testimony was competent and should have been admitted by the court and considered by the jury, for the reason (670) that it tended to show the disposition of the father towards his son at the time the deed was executed—in other words, his state of mind—and that he entertained a feeling of appreciation and gratitude toward his son, because of what he had done for him. The State attempted to show, by the examination of this very witness, that the deceased, G. B. Draughon, was unfriendly toward his son, the defendant, and, by every principle of fairness, justice and law relating to such evidence, the defendant should have been permitted to show by the

same witness that his father had expressed himself to the contrary and had really regarded the defendant as his favorite child. This kind of evidence is admitted, for the reason that it is what is called natural evidence, and the fact intended to be proved cannot easily be established in any other way. Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are what is termed by some of the text writers original evidence. Whether that is strictly accurate or not, we will not stop to consider. Greenleaf seems to have thought that it was an *exception* to the "hearsay rule." If they are the natural language of the feelings, whether of body or mind, they furnish satisfactory evidence, and often the only proof of their existence, and whether such expressions were real or feigned is for the jury to determine. In the words of *Lord Justice Mellish,* "Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were." *Sugden v. St. Leonards,* L. R., 1 P. D., 154; 1 Greenleaf on Ev. (16 Ed.), sec. 162a. Greenleaf, in that section, says: "But where a distinct assertion, in the form of words, predicating a mental state, is offered, as 'I have a pain in my side,' or 'I have the intention of going out of town,' or 'I do this for such-and-such a reason,' this language is no less an assertion of the existence of a fact than is an assertion of any sort of fact. In the neat phrase of *Lord Justice Bowen,* in *Edgington v. Fitzmaurice,* L. R., 29 Ch. Div., 459, 'The state of a man's mind is as much a fact as the state of his digestion.' And, therefore, such assertions, being taken on the credit of the declarant as testimonial evidence of the fact asserted, are met by the hearsay rule (on the principle explained, *ante,* section 99a). To admit them, then, is to make an exception to the hearsay rule." And, for the
(671) reason given, the evidence does not come within the rule, though in its nature partaking of hearsay.

We do not mean to decide that the declaration of the deceased father is direct evidence that he had not conveyed the land to his son, the defendant, but it is a circumstance, coming in a competent way and from a reliable source, which tends (as the Attorney-General so well said) to show that he had made the conveyance which is now alleged by the State to be a forgery.

We conclude that the evidence which was excluded should have been admitted, under the facts and circumstances of the case, as they now appear to us.

We do not decide or even consider the question whether the declaration of G. B. Draughon, while in actual possession of the land, in disparagement of his title, and therefore against his interest, he being now

deceased, is competent as evidence in this case, it being a criminal action; but we leave it open for future adjudication.

The decision of the remaining question, as to the plea of former acquittal, is pretermitted by us, for it may be that the facts as they appear at the next trial may be so different from those now stated in this record that the interesting and doubtful question of law as to the validity of the plea of former acquittal may not be presented. It would not be deferential to the learned judge who may preside at the next trial to anticipate any error in his decision upon questions which may then be raised. As the double pleas of former acquittal and not guilty are to be tried together, by consent of the parties, it may turn out that the defendant will be acquitted upon the latter plea—that is, the jury may find him not guilty of the crime charged in the two bills of indictment, treated as one bill with several counts, in which event the plea of former acquittal, and the evidence and arguments to sustain it, would be eliminated from the case. There are other grave and controlling reasons which induce us to withhold any expression of opinion upon the question thus raised by the defendant's first plea. The gravity of this question is shown by the fact that the Attorney-General was in some doubt, disclosed by his brief, as to whether or not the plea had been established, and the defendant's counsel was confident that it had been. At present we consider it as an open question of law and fact, to be hereafter determined according to the law and the evidence. Perhaps the solicitor may send a new bill, and we therefore cannot now determine what the allegations of the indictment or, as we have said, what the evidence may hereafter be; but let it be understood that we do not now decide, as it is not necessary to do so, that the plea of former acquittal was, in law, sustained, upon the bills and evidence as (672) they now stand, or that the learned judge was in error in so charging the jury; nor must it be understood that our opinion in this case in any degree prejudices the right of the defendant to rely at the next trial upon his plea of former acquittal. We merely award a new trial, for the reason already given, leaving undecided the other questions in the case, which are not now necessarily presented.

New trial.

Cited: Luckey v. Telegraph Co., ante, 553; *Weeks v. Telegraph Co.,* 169 N. C., 706.

STATE v. MARION BUTLER AND LESTER F. BUTLER.

(Filed 3 November, 1909.)

1. **Admissions—Subsequent Trial—Incompetency.**

Admissions made by defendants' counsel in their presence, for the purpose of preventing a continuance of the preliminary hearing of an indictment against them, are inadmissible under defendants' objection in the Superior Court, the object and reason for their admission having ceased.

2. **Libel—Judgments—Dicta—Evidence.**

In an action for libel, brought in the State court, for publishing that one A., while judge of a certain special United States court, was corruptly influenced in his judgment in allowing certain fees to attorneys in disproportion to the value of the services rendered, the opinion of a justice of the Supreme Court of the District of Columbia, delivered in an action to enjoin the payment of the fee, in which he stated as his opinion, that the fees were reasonable is incompetent as evidence, particularly in view of the decision of such justice that his court had no jurisdiction to pass upon the fee.

APPEAL by defendants from *Long, J.*, March Term, 1909, of GUILFORD.

This was an indictment for libel. The bill of indictment charged, in proper form, the defendants with a publication, on 23 April, 1908, in a newspaper, called the *Caucasian,* published in Raleigh, N. C., of a false, scandalous and libelous article, set forth in the bill, concerning and about Spencer B. Adams, charging the said Adams with being corruptly influenced in his judgments while Chief Judge of the Choctaw and Chickasaw Citizenship Court, created by act of the Congress of the United States, for the purpose of determining the status of certain Indians as members of the Choctaw and Chickasaw tribes of Indians.

Upon the plea of not guilty, entered by each of the defendants,
(673) they were tried, found guilty by the jury, judgment pronounced, and the defendants appealed to this Court.

Attorney-General, Stedman & Cooke, J. A. Long, R. C. Strudwick and G. S. Bradshaw for the State.

Aycock & Winston, W. S. O'B. Robinson and Justice & Broadhurst for defendants.

MANNING, J. Having reached the conclusion that, on the two questions herein considered, the learned trial judge committed error prejudicial to the defendants, entitling them to a new trial, we do not deem it necessary to pass upon the other questions presented upon the record and argued before us with ability and learning. These questions may not be presented upon another trial. At the trial the learned judge permitted the State, over defendants' objection, to offer certain admissions

of their attorneys at the preliminary hearing of the warrant issued by the justice of the peace. It appears, from all the witnesses examined about this matter, that on the day set for this preliminary hearing the prosecution asked for a continuance to enable it to secure from the office of the Secretary of State certain statements made, as required by section 1152, Revisal, by the Caucasian Publishing Company; that these statements were material, as "the State expected to prove by said documents the connection of the defendants with the *Caucasian* newspaper and the publication by them therein of the alleged libel." The attorneys of the defendants (they being present), in order to secure a hearing without delay and prevent a continuance, admitted that "the defendant L. F. Butler was managing the editorial department of the *Caucasian,* and the defendant Marion Butler was connected therewith at the time of the publication." At the trial in the Superior Court, upon indictment found, the State offered in evidence, prior to the offer of these admissions, the statements made by the Caucasian Publishing Company for the absence of which it had moved for a continuance at the preliminary hearing. It is manifest from this that the State was not misled by the admission before the justice of the peace, into an omission to have these statements at the trial in the Superior Court. We do not think these admissions made, under the circumstances and for the purpose stated, ought to have been received. In Weeks on Attorneys at Law, sec. 223, p. 393, the author says: "In criminal cases admissions are not admissible unless made at the trial by the defendant or his counsel." As sustaining this doctrine the learned author cites *Reg v. Thornhill,* Car & P., 575. That was an indictment for (674) perjury, tried before *Lord Abinger.* The report of the case states: "The case comes on to be tried as a traverse on the crown side of the assizes, and before trial it had been agreed between the attorneys on both sides that the formal proofs on the part of the prosecution should be dispensed with, and that that part of the case for the prosecution should be admitted. *Lord Abinger, C. B.* In a criminal case tried on the crown side of the assizes, I cannot allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel. C. Phillips, for the prisoner, declined making any admission, and, the formal proof not being complete, *Lord Abinger, C. B.,* directed an acquittal."

In *Weisbrook v. R. R.,* 20 Wis., 441, the Court, in speaking of admissions by an attorney at a former trial, said: "Such admissions are frequently made for the purpose of saving time, where counsel are confident of success upon some other points; and, when so made, they are always understood to have reference to the trial then pending, and not as stipulations which shall bind at any future trial. Such was the

character of the admissions proved, and the court erred in receiving it as evidence of the amount of damages to be recovered by the plaintiff upon a new trial." In speaking upon the same subject, the Supreme Court of Illinois, in *Hardin v. Forsythe,* 99 Ill., 312, said, at p. 324: "The admission was made only on and for the trial, at the time it was made, and could not be used on a subsequent trial without the consent of defendants." In *People v. Garcia,* 25 Cal., 531, the Court, in passing upon the ruling of the trial court receiving as evidence, without objection, admissions made at the commencement of the trial, said: "The admission was a solemn admission, of record, of a fact at the commencement of the trial, *and for the purpose of the trial,* by the prisoner's counsel, in open court, in his presence, and, we must presume, with his consent." *People v. Hobson,* 119 Cal., 424; *Wilkins v. Stidger,* 22 Cal., 232. In *Guy v. Manuel,* 89 N. C., 83, the admission under the consideration of the court was an admission in the answer filed in the action, and this Court quoted with approval the following language from Taylor on Ev., sec. 700 (772): "The admissions of *attorneys of record* bind their clients in all matters relating to the progress and trial of the cause. In some cases they are conclusive, and may even be given in evidence upon a new trial, though previously to such trial the party give notice that he intends to withdraw them, or, though the pleadings be altered, provided the alterations do not relate to the admis-
(675) sions. But to this end they must be distinct and formal, or such as are termed solemn admissions made for the express purpose of relaxing the stringency of some rule of practice, or of dispensing with the formal proof of some *fact at the trial."* In *Cutler v. Cutler,* 130 N. C., 1, this Court held that an admission of fact, made to prevent a continuance for the absence of a witness, cannot be used in a subsequent trial, the witness then being present. "As the reason ceased, the admission should have ceased." The error in admitting this evidence was not cured by the charge of the judge to the jury, leaving it to the jury to determine the extent and purpose of the admission. The learned judge should have excluded the admission of the defendants' attorneys, made under the circumstances as testified to by the witnesses.

The record of the trial, as presented to this Court, contains the following: "The State offered in evidence a duly certified copy of the opinion of *Judge Anderson,* Justice of the Supreme Court of the District of Columbia, in the case of *Richard McLish et al. v. Leslie M. Shaw, Secretary of the Treasury of the United States, et al.* The defendants had offered evidence tending to show that this suit had been brought to enjoin the payment of the fee allowed to Mansfield, McMurray & Cornish by the said Citizenship Court, and the said opinion offered was

the opinion of the court, disposing of said application for an injunction. The opinion is copied in full, and concludes as follows: "An order to that effect will be signed by the court." This opinion was not the formal judgment of the court; it contained the reasons moving the judge to render the judgment ordered to be prepared. It was not a part of the record proper. The libelous publication charged in the indictment contained the accusation against Judge Adams of receiving, with the other members of the Choctaw and Chickasaw Citizenship Court, part of the fee of $750,000 allowed by said court to said firm of attorneys, and to enjoin the payment of which by the Secretary of the Treasury of the United States the suit of *Richard McLish et al. v. Leslie M. Shaw, Secretary of the Treasury of the United States, et al.,* had been instituted and disposed of by the Supreme Court of the District of Columbia. In the opinion of *Judge Anderson* he disposes of the question of fraud, upon the ground that the averments of the facts were not sufficiently or properly stated in the bill, and further expressed the opinion that while the power to fix the attorney's fee had been by act of Congress vested in the Choctaw and Chickasaw Citizenship Court, and he was concluded by its finding and judgment in the matter, he gives it as his opinion that the fee allowed was very reasonable.

The opinion of the judge being incompetent as evidence, this ex- (676) tract from it shows that it was prejudicial to the defendants at the trial and should have been excluded from the consideration of the jury. The defendants were not parties to that suit, nor does it appear that they had anything to do with it. "The office of a judicial opinion, under the common-law system, is to set out the grounds upon which a legal controversy is decided in favor of one litigant and against the other, and incidentally to serve as a guide for determining similar controversies in the future." 6 A. & E., 1065. The opinions of the highest appellate court of a State are permitted to be used as evidence to ascertain, in the absence of legislative enactment, what the law of another State is, and the construction of its statutes and Constitution when these are pertinent, and in limited instances, under legislative sanction, when they are required as advisory of public officers in the discharge of their duties. *Hancock v. Tel. Co.,* 137 N. C., 497, and other cases. In these instances, and possibly in a few others, the opinions of a judge delivered in a judicial or *quasi* judicial proceeding may be used, but none of these sanction the use of them as evidence in a case like this. If the opinion offered had been written by the Court, of which Judge Adams was a member, or written by him, or concurred in by him, other principles of the law of evidence would have applied.

For the errors pointed out, the defendants are entitled to a New trial.

STATE v. HENRY E. SPIVEY.

(Filed 3 November, 1909.)

1. **Appeal and Error—Brief—Exceptions Abandoned—Criminal Cases.**

Exceptions appearing of record and not mentioned in the brief are deemed abandoned on appeal in criminal as well as civil actions.

2. **Evidence, Secondary—Bloodhounds.**

Evidence of the conduct of a bloodhound in tracking the accused after the offense was committed is competent to corroborate other evidence competent as tending to establish his guilt. *S. v. Freeman*, 146 N. C., 616, and other cases cited and approved.

3. **Evidence—Declarations—Res Gestae.**

The declarations of deceased made directly after he received the fatal shot, that defendant had shot him because he saw him, is competent against defendant on trial for the murder of deceased, when it appears that the declaration was made spontaneously, without design or premeditation.

4. **Appeal and Error—Murder—Witnesses—Tender of Wife—Instructions—Harmless Error.**

While it is improper for the solicitor to tender the wife of defendant on trial for his life, stating that he would not tender her if defendant did not wish to examine her, the error is cured by a clear instruction that this should not prejudice defendant or in any manner influence the jury in their verdict against him.

5. **Instructions Substantially Given.**

The judge is not required to give a charge to the jury in the language of a special instruction requested, and when the charge is as responsive to the request as the prisoner was entitled, there is no error therein.

6. **Instructions—Murder—Questions of Law—Directing Alternate Findings.**

When the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty.

(677) APPEAL from *W. J. Adams, J.*, at March Term, 1909, of BLADEN.

The defendant was indicted for the murder of Frank Shaw, his father-in-law, on the night of 10 December, 1908, in Bladen County, and, upon his plea of not guilty, was tried and convicted of murder in the first degree, and from the sentence of death pronounced by the court he appeals to this Court.

The immediate circumstances of the homicide are detailed in the testimony of Eugenia Shaw, the wife of the deceased, as follows: "Frank (the deceased) was hauling cotton to Mr. Nance's. He came that evening about dusk. There was a walking around the house and noise under the house, and the dog got after it. I don't know just what time it was—it was late bedtime. First thing I heard was a walking around the house, like somebody under the house, and the dog got to baying it. Frank got up and went out. The gun fired. Me and my daughter (the wife of the prisoner) went out about a minute or two after the gun fired. Just as soon as we heard the gun fire, we went out. Frank was down on his hands and knees, at the corner of the house, struggling in blood." Dr. Clark was called in that night, and said the load of shot took effect in the face, tongue and throat of the deceased; both eyes were shot out, and the gun was fired from a point in front of the deceased; that he found the tracks of the murderer at the corner of the house; and under the house a chamber, partly filled with kerosene oil and shucks, and indications of a lighted match that (678) went out; that it was a moonlight night. It was in evidence that the vessel belonged to the prisoner's wife and was last seen at her house; that prisoner's wife was a daughter of the deceased and had separated that day from him and returned to her father's; that prisoner called at the gate during the afternoon, and, calling his wife out, told her, with an oath, that if she did not leave her father's house he would kill her or her father that night; and, as he walked off, said: "I'll burn you up." A son of the deceased, awakened by the shot, saw the prisoner running away, with a gun in his hands. There was evidence of bad blood between the prisoner and the deceased, and of other threats made by the prisoner. Bloodhounds were put on the trail the next day and followed the track to prisoner's house and to his father's. The prisoner offered evidence that, at the time of the shooting and the entire night, he was at his father's, two and a half miles from the home of the deceased, and that when accused the next morning of the homicide he denied it. There was much evidence on the part of the State corroboratory of its theory, and from the prisoner, attacking the State's witnesses and sustaining his *alibi*. The dying declarations of the deceased were offered by the State, that the prisoner shot him, and the declarations of the deceased to his wife, that the prisoner shot him, were offered and admitted as part of the *res gestæ*. The deceased lingered a few days, and died from the effect of the gunshot wounds received the night of 10 December, 1908.

Attorney-General for the State.

McLean, McLean & Snow and McIntyre, Lawrence & Proctor for defendant.

MANNING, J. In the statement of the case there are twenty-one exceptions noted and embraced in the prisoner's assignment of errors, but in the well-considered brief of his able and learned counsel only the following numbered exceptions are mentioned, to wit, exceptions 4, 8, 9, 12, 13, 15, 16, 17, 18, 19, 20 and 21. Under Rule 34 (140 N. C., 666) and the decisions of this Court, those not mentioned are deemed abandoned. This rule applies equally to civil and criminal cases. *Britt v. R. R.*, 148 N. C., 37; *S. v. Freeman,* 146 N. C., 615; *S. v. Register,* 133 N. C., 746. We have, however, *in favorem vitæ,* carefully examined the exceptions omitted in the brief for the prisoner, and we do not think any one of them can be sustained. Exceptions 20 and 21 are formal—
(679) the one taken to the refusal of the court to grant a new trial for errors alleged in the trial, and the other to the judgment of the court pronouncing the sentence of death, as demanded by the law, upon the verdict. Exceptions 8 and 9 are taken to the rulings of his Honor permitting a witness for the State (Edmond) to narrate the conduct of a bloodhound used by him the day after the homicide in tracking the defendant. This evidence was admitted by his Honor after the State had, by testimony, brought it clearly within the rules laid down by this Court for its admissibility, in *S. v. Moore,* 129 N. C., 501; *S. v. Hunter,* 143 N. C., 607; *S. v. Freeman,* 146 N. C., 616. In his charge his Honor clearly stated to the jury how they should consider this evidence; that it was not substantive, but corroboratory; and before it could be considered as corroboratory they must be satisfied, beyond a reasonable doubt, of the existence of other relevant circumstances in connection therewith, as held in the above cases. No exception was taken to this part of his Honor's charge. It was full and clear. We therefore, find no error in exceptions 8 and 9.

The prisoner's fourth exception is taken to admission in evidence, over his objection, of the following declarations of the deceased (Frank Shaw) to his wife, on the night of the homicide and immediately thereafter: "Frank told me Henry Spivey shot him; said, 'Oh, Jenny, Henry Spivey shot me, because I saw him.'" The witness (wife of deceased) had given the following account of the events immediately preceding and at the time of this declaration: "First thing I heard was a walking around the house, like somebody under the house, and the dog got to baying it. Frank got up and went out. The gun fired. Me and my daughter went out about a minute or two after the gun fired. Just as soon as we heard the gun fire, we went out. Frank was down on his hands and knees, at the corner of the house, struggling in blood. I went to him and took him up, and said, 'What is the matter?' Me and my daughter were the first to get to him. I took him up, first one, about

two minutes after gun fired—just about a minute after gun fired. I shoved out; never waited for nothing. Frank said, 'Henry Spivey shot me, because I seed him.' " After then, being permitted to give this statement of the deceased, the witness added: "He said it two or three different times after he was set up on the piazza." Was this statement of Frank Shaw to his wife admissible as *pars rei gestæ?*

In McKelvey on Ev., p. 344, the author says: "The ground of reliability upon which such declarations are received is their spontaneity. They are the *ex tempore* utterances of the mind, under (680) circumstances and at times when there has been no sufficient opportunity to plan false or misleading statements; they exhibit the mind's impressions of immediate events, and are not narrative of past happenings; they are uttered while the mind is under the influence of the activity of the surroundings." In Underhill on Criminal Evidence, secs. 96 and 97, quoted with approval by *Connor, J.*, in the concurring opinion in *Seawell v. R. R.*, 133 N. C., 515, the author says: "On the whole, the *res gestæ* cannot be arbitrarily confined within any limit of time. The element of time is not always material. If they are declarative and descriptive in their form and character, if they are not the *impromptu* outpourings of the mind, they should be rejected, though uttered only a few minutes after the main transaction. The spontaneous, unpremeditated character of the declarations, and the fact that they seem to be the natural and necessary concomitants of some relevant transaction in which their author was a participant, constitutes the basis of their admission as evidence. If a sufficient period has intervened between the act and the statement for consideration, preparation or taking advice, the statement may be rejected. The mere likelihood that the statement was the result of advice or consideration may exclude it. Actual preparation need not be shown. Declarations made immediately after the principal transaction have been received in homicide cases, and the American cases, as a rule, do not sustain the strict English doctrine that the declarations, to be admissible, must be strictly contemporaneous with the main transaction, if the declarations are illustrative, verbal acts and not mere narratives of what has passed." In Wharton's Criminal Evidence, sec. 263, this learned writer says: "Under the rule before us, evidence in homicide trials has been received . . . of statements of the deceased, at the time or so soon before or afterwards as to preclude the hypothesis of concoction or premeditation, charging the defendant with the act." Following the rule clearly established by these authorities, a statement made as the "outpouring of the mind" of one of the actors in the tragedy is competent as *pars rei gestæ*. We conceive there is, and ought to be, a distinction made between the statements of one of the parties to the tragedy and a bystander or non-

participant. In the latter case, where the evidence proposed is the statement of a bystander or nonparticipant, whose mind is unmoved by the terrible emotions that overflow and express themselves in words uttered without design or thought or preparation, it must appear, to be admissible, that such statement was made while the thing was (681) being done, the transaction was occurring; they ought to be strictly contemporaneous. *S. v. McCourry,* 128 N. C., 598; *Seawell v. R. R.,* 133 N. C., 515; *Harrill v. R. R.,* 132 N. C., 655; *Bumgardner v. R. R.,* 132 N. C., 442; *Meares v. R. R.,* 124 N. C., 578; *S. v. Hinson,* 150 N. C., 827. In cases of joint action or conspiracy, where the evidence has disclosed a common unlawful purpose of two or more, or a concert of action, statements are admissible to prove the common, unlawful purpose that would not be admissible otherwise, as in *S. v. Anderson,* 92 N. C., 732; *S. v. Jarrell,* 141 N. C., 722. In our opinion, therefore, the statement of the deceased to his wife, as detailed by her, was admissible, and his Honor committed no error in receiving it.

The twelfth exception is taken to the following incident occurring at the trial: At the close of the testimony of the last witness examined by the State, and before the evidence was closed, the solicitor tendered to the prisoner several witnesses, among them the prisoner's wife, for examination. The prisoner objected to the tender of his wife; thereupon the solicitor withdrew the tender, stating that he found the name of defendant's wife among the witnesses for the State and thought it was his duty to tender her to defendant, stating also that he would not tender this witness to defendant if defendant did not wish to examine her. The defendant objected. The court then instructed the jury that this incident could not be construed by them, in making up their verdict, as prejudicial to the defendant or in any way influencing their verdict against him. His Honor, near the close of his charge, again said to the jury: "At the close of the evidence the solicitor called certain witnesses, whom he tendered to the prisoner for examination. Among these was the wife of the prisoner. The solicitor stated that as he found the name of the prisoner's wife upon the list of witnesses for the State, he deemed it his duty to tender her to the prisoner for examination. The court charges you that the wife of the prisoner is not a competent witness against the prisoner, and that her testimony could not be used against him on this trial. The court charges you, further, that it is your duty to disregard the circumstances of the tender of the prisoner's wife by the solicitor, and that such tender cannot be used as a circumstance against the prisoner. The circumstance of her having been tendered, therefore, must be entirely disregarded and ignored by the jury in arriving at their verdict." We have set out in full the matters pertaining to this incident to illustrate how careful his Honor was, not only in the

conduct of the trial, but in his charge, to see to it that the prisoner had a fair and impartial trial. There was a similar (682 incident in *S. v. Cox,* 150 N. C., 846, but his Honor, in the present case, observed the caution pointed out in that case, which the learned judge who tried *Cox's case* had unintentionally failed to observe. While it was improper for the solicitor to tender the prisoner's wife, with the remark made by him, yet his Honor corrected the error fully; and we, therefore, overrule this assignment of error.

The thirteenth assignment of error is the refusal of his Honor to give the following special instruction in its very language: "The defendant in this case is indicted for the murder of Frank Shaw, and before you can return a verdict of guilty against him you must find that he committed the murder, as charged in the bill of indictment. If there is any reasonable doubt about this in the minds of the jury, or if the jury shall be of opinion, from the evidence, that some person other than Henry Spivey either committed or might reasonably have committed the murder, Henry Spivey not being present, aiding and abetting, then the jury must return a verdict of not guilty." We have carefully examined the charge of the learned judge, and, in our opinion, the instructions given by him upon the matter contained in this prayer were as fully responsive to the request as the prisoner was entitled, and the jury fully and properly instructed by him. The judge was not obliged to instruct in the very words of the prayer. This is well settled. *S. v. Booker,* 123 N. C., 713, and cases cited.

Assignments of error 15, 16, 17, 18 and 19 are to the charge of the court that there was no evidence upon which the jury could convict the prisoner of manslaughter or of murder in the second degree; that the verdict should be "guilty of murder in the first degree" or "not guilty." His Honor instructed the jury that, "Before you can convict the prisoner, you must be satisfied beyond a reasonable doubt, upon all the evidence, that the deceased was shot, and that the wound so inflicted caused the death of the deceased, and that the prisoner is the man who did the shooting; and unless you are so satisfied of each one of these circumstances, beyond a reasonable doubt, you will return a verdict of 'not guilty.' If, however, you are satisfied beyond a reasonable doubt, upon all the evidence, that the prisoner, on the occasion referred to, went to the house of the deceased and lay in wait for the deceased, and that the deceased went into the yard, and that thereupon the prisoner shot the deceased, and that the wound so inflicted caused the death of the deceased, you will return a verdict of 'murder in the first degree.' If you find from the evidence, beyond a reasonable doubt, that, for the purpose of burning the dwelling house of the deceased, and while (683) in the attempt to perpetrate such arson, the prisoner shot deceased,

and the wound thus inflicted caused the death of the deceased, you will return a verdict of 'murder in the first degree.'" These assignments of error again present directly for our determination whether, upon the trial of a prisoner indicted for murder in the first degree, and the evidence discloses the homicide committed by lying in wait, or in an attempt to perpetrate a felony, or by poisoning, or starvation, or imprisonment, the court can charge the jury that there is no evidence of murder in the second degree or manslaughter, and their verdict will be either "guilty of murder in the first degree" or "not guilty." In the present case the murder was committed by lying in wait, or in the attempt to perpetrate the crime of arson. There was no evidence from which the jury could have found murder in the second degree or manslaughter. So sharply was this the contention between the State and the prisoner, that the record does not disclose any prayer from the learned counsel of the prisoner presenting the view of murder in the second degree. The only inference that could have been drawn from the evidence was that a murder in the first degree, by lying in wait or attempting to perpetrate arson, had been committed; and if the prisoner was the criminal, then his crime was murder in the first degree. In *S. v. Gilchrist,* 113 N. C., 673, the first case coming before this Court in which the act of 1893 (now sections 3631 and 3271, Revisal) was construed, the evidence tended to show that prisoner killed the deceased by waylaying the road on which the deceased was returning from his work at night; that the prisoner concealed himself behind some trees on the side of the road and killed deceased with an axe as he was passing. The trial judge instructed the jury that the prisoner was guilty of murder in the first degree or not guilty. This Court, *MacRae, J.,* writing the opinion for a unanimous Court, said: "There was no evidence on which to warrant a verdict of 'murder in the second degree' or of 'manslaughter.' The evidence, if believed, would warrant only a verdict of 'murder in the first degree.'"

In *S. v. Rose,* 129 N. C., 575, the deceased was shot and killed by the prisoner, from ambush, as the deceased and a friend were riding along a road in a buggy. The trial judge instructed the jury that they must return a verdict of "guilty of murder in the first degree" or "not guilty." This Court, without dissent, sustained the charge, and said: "All the evidence tends to show that the killing was done by some one 'lying in wait,' which comes expressly within the statutory definition of (684) murder in the first degree. There was no evidence of an altercation or a killing under any other circumstances. If the prisoner was the man who fired the fatal shot, he was guilty of murder in the first degree; and if this was not shown beyond a reasonable doubt, the jury should and the judge's charge would have acquitted the prisoner."

In *S. v. Dixon,* 131 N. C., 808, the deceased was shot by some one lying in ambush along the road. The trial judge instructed the jury that they should return a verdict of "murder in the first degree" or "not guilty." This Court, in a unanimous opinion, said: "The judge properly told the jury that they should return a verdict of 'murder in the first degree' or 'not guilty.' All the evidence tended to show a killing by shooting from ambush, and there was nothing to contradict this; and the sole question, if the evidence was believed, was simply whether the prisoner was, beyond all reasonable doubt, the slayer. *S. v. Rose,* 129 N. C., 575. We find no error in the judge's charge, in any of the matters excepted to." These three cases are the only cases presented to this Court since the act of 1893 where the evidence showed that the homicide was committed by lying in wait, and in each, on appeal, this Court sustained the charge of the trial judge, that the jury must find the prisoner guilty of murder in the first degree or not guilty. This same charge was given by the learned judge who tried the present case. In *S. v. Lochlear,* 118 N. C., 1154, the majority of this Court (*Clark* and *Montgomery, JJ.,* dissenting) held that there was some evidence from which the jury could have inferred that the homicide was committed by other means than lying in wait, and disapproved the charge by the trial judge, "that there was no evidence of murder in the second degree in the case now on trial," and granted a new trial for this error. In *S. v. Covington,* 117 N. C., 834, the evidence disclosed that the deceased was shot and killed in the night time, in his store, where he slept, by the prisoner while burglarizing the store, and the facts attending the killing were shown by the confessions of the prisoner. The trial judge charged the jury that, if they were satisfied beyond a reasonable doubt of the prisoner's guilt, their verdict would be "murder in the first degree"; that there was no evidence of murder in the second degree or manslaughter. The prisoner, being convicted of murder in the first degree, appealed, and this Court sustained the charge, saying: "The charge is correct, if there is no evidence of murder in the second degree or manslaughter." All these cases were instances of murder committed in one of the specific ways mentioned in the statute, and therein declared to be murder in the first degree. Whenever the evidence discloses (685) that the crime committed is murder—that is, the intentional and unlawful killing of a human being—and the evidence further discloses that the murder was done in one of the specific ways named in the statute, then it is murder in the first degree. *S. v. Banks,* 143 N. C., 652; *S. v. Stitt,* 146 N. C., 643; *S. v. Daniel,* 134 N. C., 671, and cases cited, *supra.* In this class of murder the law imputes malice and premeditation is necessarily presumed. In *S. v. Thomas,* 118 N. C., at p. 1121, this Court said: "The word which distinctly marks the two degrees

is 'premeditated.'" And, further, "Where the killing is not done by lying in wait, poisoning, or in any of the specific ways pointed out in the statute, and the test of its classification as murder in the first degree is the question whether there has been premeditation and deliberation, the prosecuting officer cannot rest the case for the State upon proof of the previous existence of actual malice." The only decision of this Court that is not in harmony with the cases cited, and the law upon this question, as we declare it to be, is *S. v. Gadberry,* 117 N. C., 811. The evidence in that case showed, in its only aspect, that a murder was done, and it was done in an attempt to abduct the deceased—a girl under the age of fourteen years—abduction being made a felony by our law (Revisal, sec. 3358). The trial judge, one of the present learned Associate Justices of this Court, charged the jury that, if they believed the evidence beyond a reasonable doubt, the crime of the prisoner was murder in the first degree. This Court, on appeal, decided by a divided Court that this charge was erroneous. We do not think that case, upon the evidence, well decided. There was no evidence upon which the judge below could have predicated a charge of murder in the second degree or manslaughter, nor was there any evidence from which the jury could have fairly deduced the crime of murder in the second degree or manslaughter.

After a careful review of the decisions of this Court, and a critical examination of the statute (Revisal, sections 3631 and 3271), we deduce the following doctrine: Where the evidence tends to prove that a murder was done, and that it was done by means of poison, lying in wait, imprisonment, starving, torture, or which has been committed in perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, and where there is no evidence and where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of "guilty of
(686) murder in the first degree," if they are satisfied beyond a reasonable doubt, or of "not guilty." If, however, there is any evidence or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial judge, under appropriate instructions, to submit that view to the jury. It becomes the duty of the trial judge to determine, in the first instance, if there is any evidence or if any inference can be fairly deduced therefrom, tending to prove one of the lower grades of murder. This does not mean any fanciful inference tending to prove one of the lower grades of murder; but, considering the evidence "in the best light" for the prisoner, can the *inference of murder in the second degree or man*slaughter be fairly deduced therefrom. When the evidence discloses

a murder in one of the specific methods which, by the statute, is made *per se* murder in the first degree, "the State is not required to prove premeditation, because the manner of doing the act necessarily involves premeditation, unless the prisoner is mentally incapable of deliberation or doing an intentional act. The jury must, of course, be instructed that they must be satisfied beyond a reasonable doubt that the evidence brings the murder within one of the specific methods mentioned in the statute, and that the prisoner perpetrated the murder, and that the prisoner was mentally capable of committing the crime." "Under the construction of the statute by this Court, in *S. v. Gilchrist,* 113 N. C., 673, and *S. v. Norwood,* 115 N. C., 789, the third section (now sec. 3271, Revisal) does not give jurors a discretion, when rendering their verdict, to determine of what degree of murder a prisoner is guilty. They must render a verdict according to the evidence; and believing a prisoner guilty, beyond a reasonable doubt, of murder in the first degree, it is their duty so to find, however much inclined to show mercy by rendering a verdict for a lesser offense. Their obligation in that respect has not been changed by the statute, and it is the same that it was upon the trial for homicide before its enactment, and the question was whether the prisoner was guilty of murder or manslaughter." *S. v. Covington,* 117 N. C., 834. A careful reading of the evidence in this case shows the murder to have been done in one of only two ways, to wit, by lying in wait or in the attempt to commit arson; and, done by either method, the statute makes the crime murder in the first degree. In our opinion, the trial judge properly so instructed the jury. Considering the momentous result, to the prisoner, of our conclusion, we have given his appeal the most careful thought, and declare that there was in his trial

No error.

Cited: Harrington v. Wadesboro, 153 N. C., 441; *S. v. De Vane,* 166 N. C., 283; *S. v. Walker,* 170 N. C., 718; *S. v. Wiggins,* 171 N. C., 816.

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(687)

STATE v. WILLIAM HILTON.

(Filed 11 November, 1909.)

1. Judgment Suspended—Reasonable Period—Power of Court.

The power of a court having jurisdiction of a cause to suspend judgment temporarily on conviction of a criminal for some special purpose or for some determinate and reasonable period of time was recognized at common law and ordinarily obtains at the present day in courts of general jurisdiction and holding terms at stated periods.

2. Same—Consent of Defendant Implied.

The power of the courts to suspend judgment in criminal cases should only be upheld when sanctioned by usage, and where the consent of the defendant was expressly given or would be implied from the fact that the order was made in defendant's presence without his objection, and that its evident purpose was to save defendant from a more grievous penalty permitted or required by law. Revisal, secs. 1293, 1294. The history and reason for the power of the court to suspend judgment, and its present application, discussed by HOKE, J.

3. Judgment Suspended—Terms—Compliance—Discharge—Subsequent Sentence—Power of Court.

When it appears that defendant had pleaded guilty to the offense charged in the indictment and the judgment was suspended upon his payment of costs and his giving bond to appear at court from term to term to show good behavior, sentence may not be imposed after an indefinite suspension of judgment, when every condition attached to the order has been complied with, the fine and costs paid, the defendant discharged by order of court and the cause removed from the docket.

4. Same—Discontinuance.

In this case it appeared that defendant was charged with unlawfully selling spirituous liquor without a license under three separate indictments and pleaded guilty as to each. He was sentenced under one to pay a fine and costs; in the second, judgment was suspended upon payment of costs; in the third, prayer for judgment was continued and he was required to appear from term to term to show good behavior. The defendant, having complied with the orders made in each case, was eventually discharged by the order of court, and the causes went off the docket: *Held*, this, in substance, if not technically, amounted to a discontinuance, without power of the court to subsequently impose the sentence appealed from; and a judgment imposing such sentence, being without warrant of law, is void, and will be arrested and the prisoner discharged.

APPEAL from a sentence imposed by *Long, J.*, at June Criminal Term, 1909, of GUILFORD, in a cause where there had been a plea of guilty entered by defendant, at December Term, 1907, said cause having gone off docket at _____ Term, 1908, and restored by order of his Honor at said June Term, 1909, for the purpose of imposing sentence.

(688) The court adjudged that defendant be imprisoned in the common jail of Guilford County for a period of six months and assigned to work on the roads of Guilford County during the time, and defendant excepted and appealed.

The pertinent facts are set forth in a case on appeal, tendered in apt time by defendant's counsel and agreed to by the solicitor, as follows:

This is a case which was heard at the December Term, 1907. The record, minute docket No. 15, page 227, in the clerk's office of Guilford County, is as follows, viz.:

STATE *v.* WILLIAM HILTON—December Term, 1907.

No. 128. Indictment, retailing. Defendant comes into court and pleads guilty of retailing, as charged in the bill of indictment. Upon motion of the solicitor, the prayer for judgment is continued, upon the payment of the costs of this action, defendant to give bond of $100 for appearance at court, from term to term, and show good behavior.

STATE *v.* WILLIAM HILTON—December Term, 1907.

No. 109. Indictment, retailing. Defendant comes into court and pleads guilty of retailing, as charged in the bill of indictment. Upon motion of the solicitor, the judgment of the court is suspended, upon the payment of the costs of this action.

STATE *v.* WILLIAM HILTON—December Term, 1907.

No. 129. Indictment, retailing. Defendant comes into court and pleads guilty of retailing, as charged in the bill of indictment. Motion of the solicitor for judgment. It is adjudged by the court that the defendant pay a fine of $25 and the costs of this action.

The defendant gave the bond of $100, as required in No. 128, above, and made his appearance at court, from term to term, and showed his good behavior, and was discharged by the court at ------ Term, 1908, and the case went off the docket. At the June Term, 1909, there were two indictments pending against defendant for retailing, the docket numbers being 24 and 123. The bill of indictment No. 24 was found at September Term, 1908, and the indictment No. 123 was found at June Term, 1909. The defendant was called for trial in No. 24 and answered. The case was heard. The jury returned a verdict of "not guilty." During the trial, and upon cross-examination of the defendant by the solicitor, it developed that the defendant had been charged with retailing at December Term, 1907. As soon as his Honor had charged the jury in No. 24, the case that was then being heard, and before they returned their verdict, he ordered the clerk to examine the records for the purpose of ascertaining whether or not the records showed that (689) there was any suspended judgments against this defendant. The clerk found the record of December Term, 1907, above set out, and so informed his Honor; whereupon, his Honor, without any motion by the solicitor, ordered the defendant into custody and ordered the clerk to place upon the docket at once the two cases of December Term, 1907, viz., 128 and 109, being 147 and 148 after being placed on the docket of June Term, 1909, by his Honor's order. After this was done, the jury, in No. 24, returned and announced their verdict of "not guilty." The solicitor called No. 123 and announced his readiness for trial. The defendant answered and announced his readiness for trial. His Honor,

of his own motion, sentenced the defendant to imprisonment for six months, to be assigned to work on the public roads of Guilford, in No. 147, which was case No. 128 of December Term, 1907, brought forward only a few minutes before by the clerk, upon order of his Honor.

The defendant, through his counsel, at the time his Honor pronounced this sentence, asked for the privilege of showing to his Honor under what circumstances the plea was entered at December Term, 1907. The attorneys for the defendant stated to his Honor that at that time it was impossible to hear the case of the defendant or bond, because of the number of jail cases; that the defendant was under bond; that the defendant had been present in court for several days, with a number of witnesses, and to return to another term of court, with his witnesses, would cause such loss of time and money that, as a matter of economy, he entered his plea of guilty, upon the agreement of the then solicitor, who was familiar with all the facts, and, with the approval of the trial judge, that upon entering the plea of guilty a fine should be imposed in one case and judgment suspended in the other two, upon payment of costs. The defendant asked the privilege of showing the character of the witnesses upon whose testimony the bills were found, and of showing all the facts and circumstances that caused the trial judge at December Term, 1907, to enter the judgments as found, and all the facts and circumstances that appealed to the judge hearing the cases at December Term, 1907, all of which his Honor refused to hear or consider. The defendant then insisted that he be tried in case No. 123, the case sent to the present term of the court by the municipal court, on appeal, and in which the solicitor had announced his readiness to try, the defendant contending and insisting before
(690) his Honor that he was innocent and that he confidently expected a verdict of acquittal in the case, if the jury would be permitted to hear the testimony. His Honor would not try the case, but continued the same, of his own motion, and ordered the clerk to place a *capias* in the hands of the sheriff for service as soon as the defendant had served his sentence in No. 147 (old number), at December Term, 1907, No. 128. The defendant gave notice of appeal from the judgment rendered; whereupon, his Honor sent for a stenographer and had the following entries made, viz.:

STATE OF NORTH CAROLINA—Guilford County.

In the Superior Court, June Term, 1909.

STATE *v.* WILLIAM HILTON.

No. 147. This is a case which was tried at the December Term, 1907, wherein the defendant pleaded guilty to the charge of retailing spirits without license. Prayer for judgment was continued in that case. The

case went off the docket. At this term of court an indictment was pending against the defendant in No. 24 for retailing, the indictment having been found at some previous term in No. 24. A jury trial was had, and the jury returned a verdict of "not guilty."

The defendant also stands indicted on the docket at this term in case No. 123, which appears to the court to be a case brought here by an appeal by the defendant from the recorder's court, where recently he was convicted for retailing before the recorder and sentenced to six months imprisonment and on the roads, and required to give bond in the sum of $250 for his appearance to this term, pending his appeal. Upon motion of the solicitor, this case, No. 123, at this term, is continued. In the meantime the court ordered the clerk to bring forward on the docket Nos. 147 and 148. No. 148 was a case wherein the defendant pleaded guilty to retailing at a former term of the court, and prayer for judgment was continued. When Nos. 147 and 148, from the old docket, were brought forward, upon consideration of all the facts which have appeared to the court, upon the records of this court and former courts, as to indictments for retailing, against the defendant, the court enters a judgment against the defendant in No. 147 as follows:

It is considered and adjudged by the court, upon the prayer for judgment, formerly entered in this case, that the defendant be imprisoned in the county jail of Guilford for a period of six months, and he is assigned to work on the public roads of Guilford. (691)

The defendant excepts and appeals to the Superior Court. Notice of appeal waived. Appeal bond in the sum of $25 adjudged sufficient. Appearance bond in this case in the sum of $200, pending the appeal, adjudged sufficient.

The defendant asked for time in which to make out his case on appeal, and his Honor refused to extend the time.

MOREHEAD & SAPP,
WM. P. BYNUM, JR.,
Attorneys for Defendant.

Service of the foregoing case on appeal is hereby accepted, and the case is agreed to.

This 23 June, 1909.

JONES FULLER,
Solicitor of the Ninth District.

Attorney-General for the State.
W. P. Bynum and Morehead & Sapp for defendant.

HOKE, J., after stating the case: The power of a court having jurisdiction of a cause to suspend judgment temporarily, on conviction of a criminal, for some special purpose or for some determinate and reason-

able period of time, was recognized at common law, and ordinarily obtains at the present day in courts of general jurisdiction and holding terms at stated periods. *S. v. Bennett,* 20 N. C., 43-51; *S. v. Crook,* 115 N. C., 760; *Commonwealth v. Maloney,* 145 Mass., 205; *S. v. Addy,* 43 N. J. Law, 113; 4 Blackstone, 394; Chitty Cr. Law, 75.

Wherever the power was exercised, however, in a former time, except for the purpose of allowing defendant to move for a new trial or take some other steps in the orderly procedure of the case, it seems only to have been done with a view to ameliorate the condition of the defendant, as by giving him time to show that he was entitled to the benefit of clergy, or that the rigors of the sentence had been modified by act of Parliament, or by affording him opportunity to apply for pardon. Thus, in the citation from Blackstone, *supra,* the author says: "A reprieve (1) (from *reprendre,* to take back) is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. This may be, first, *ex arbitrio judicis,* (2) either before or after judgment, as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy, or, sometimes, if it be a small felony, or any (692) favorable circumstance appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon."

And Chitty lays down the same doctrine, in language nearly identical, thus: "But the more usual course is for a discretionary reprieve to proceed from the judge himself, who, from his acquaintance with all the circumstances of the trial, is most capable of judging when it is proper. The power of granting this respite belongs, of common right, to every tribunal which is invested with authority to award execution (d). And this power exists even in case of high treason though the judge should be very prudent in its exercise (e). But it is commonly granted where the defendant pleads a pardon which, though defective in point of form, sufficiently manifests the intention of the crown to remit the sentence (f); where it seems doubtful whether the offense is not included in some general act of grace (g); or whether it amounts to so high a crime as that charged in the indictment (h). The judge sometimes also allows it before judgment or, at least, intimates his intention to do so, as when he is not satisfied with the verdict and entertains doubts as to the prisoner's guilt; or when a doubt arises, if the crime be not within clergy; or when, from some favorable circumstance, he intends to recommend the prisoner to mercy."

And in the more recent applications of the principle the better-considered decisions are to the effect that the power indicated should only

be upheld when sanctioned by usage, and where the consent of the defendant was expressly given or would be implied from the fact that its evident purpose was to save defendant from a more grievous penalty permitted or required by the law. *Commonwealth v. John Dondican's Bail,* 115 Mass., 136. In this State, as shown in *Crook's case, supra,* the power to suspend judgment and later impose sentence has been somewhat extended in its scope, so as to allow a suspension of judgment on payment of costs, or other reasonable condition, or continuing the prayer for judgment from term to term to afford defendant opportunity to pay the cost or to make some compensation to the party injured, to be considered in the final sentence, or requiring him to appear from term to term, and for a reasonable period of time, and offer testimony to show good faith in some promise of reformation or continued obedience to the law. These later instances of this method of procedure seem to be innovations upon the exercise of the power to suspend judgment as it existed at common law; and while they are well established with us by usage, the practice should not be readily or hastily enlarged and extended to occasions which might result in unusual punish- (693) ment or unusual methods of administering the criminal law.

That this is a correct interpretation of *S. v. Crook, supra,* is not only shown in the opinion itself, delivered by *Associate Justice Avery,* but in subsequent opinion (*S. v. Griffis,* 117 N. C., 709) the same learned justice thus speaks of that decision: "We have had occasion, in *S. v. Crook,* 115 N. C., 763, to comment upon the fact that the practice adopted in the courts of this State of suspending judgments upon the payment of costs is a peculiar one, for which we have searched in vain for precedents elsewhere. Indeed, it has proved difficult to find adjudications in other courts furnishing any analogies which would aid us in reaching a conclusion as to the force and effect of such orders. It appears, however, that a practice somewhat similar had prevailed for many years in the courts of Massachusetts before it received the legislative sanction by enactment into a statute. *Commonwealth v. Dondican,* 115 Mass., 136. But that court and those of Florida and Mississippi where the Massachusetts idea seems to have been transplanted, though they may differ as to the manner or details of the proceeding, concur in holding that the sentence of the court, whether upon a finding or a confession of guilt, can be suspended only with the consent of the defendant. But as the postponement of punishment, with the possibility that it may never be inflicted, is deemed a favor to him, it is presumed by the court that he assents to such an order, when made in his presence and without objection on his part. *S. v. Crook, supra,* at p. 766; *Gibson v. State, supra.* Where, under the practice prevailing in Massa-

chusetts, the order was made that the judgment lie on file, it was entered, with the consent of both the defendant and the commonwealth's attorney, and left either at liberty to have the case reinstated on the docket and to demand that the court proceed to judgment."

And the statutes of this State (Revisal, secs. 1293, 1294) seem to give legislative sanction to the position indicated. It will thus be seen that while the power to suspend judgment is allowed with us, there are well-recognized restrictions upon its exercise, and no well-considered decisions, here or elsewhere, will uphold the principle that sentence may be pronounced after an indefinite suspension of judgment, when every condition attached to it has been complied with, the fine and costs paid, the defendant discharged, by order of court, and the cause removed from the docket. To allow a defendant, under such circumstances, to be imprisoned by the court would afford opportunity for a capri-
(694) cious exercise or arbitrary power unknown to the common law and disapproved and condemned by many well-considered decisions of the present time. *People v. Barrett,* 202 Ill., 287; *Neal v. State,* 104 Ga., 509; *People v. Allen,* 155 Ill., 601; *United States v. Wilson,* 46 Fed., 748; *People v. Blackburn,* 6 Utah, 347.

In the case before us, while the evidence offered by defendant was not admitted, a perusal of the record gives clear indication of the essential facts attending the plea of guilty on the part of the defendant and the subsequent proceedings in the cause. At December Term, 1907, there were three indictments for retailing pending against defendant, and a plea of guilty was entered in each. In one case the defendant was sentenced to pay a fine of $25 and the costs. In the second case the judgment was suspended upon the payment of the costs; and in the third case the prayer for judgment was continued and the defendant required to give bond in the sum of $100 for appearance in court from term to term to show good behavior. The fine and all the costs were paid by the defendant, he appeared from court to court, and, having showed good behavior, was discharged, by order of court, at _____ Term, 1908, and the causes went off the docket. This, if not technically so, amounted, in substance, to a discontinuance of the cause (*Kistler v. State,* 64 Ind., 371; *S. v. Meager,* 57 Vt., 398; *Drinkard v. State,* 20 Ala., 1; Bishop's Cr. Procedure, sec. 1393; *S. v. Respass,* 85 N. C., 534), and the court was thereafter without power to further molest the defendant on this charge.

We are of opinion that, on the facts presented, the judgment was without warrant of law, and void, and that the same must be arrested and the prisoner discharged.

Reversed.

Cited: In re Hinson, 156 N. C., 252; *S. v. Everett,* 164 N. C., 404, 405; *S. v. Tripp,* 168 N. C., 152; *S. v. Burnett,* 173 N. C., 736, 738; *S. v. Greer, ibid.,* 760.

STATE v. BAXTER SHEMWELL.

(Filed 11 November, 1909.)

Upon examination of the entire evidence and the charge as a whole, no error is found.

APPEAL by defendant from *Long, J.,* February Term, 1909, of GUILFORD.

Indictment for assault with a deadly weapon. The defendant was convicted and sentenced to five months imprisonment, from (695) which judgment he appealed.

Attorney-General and G. L. Jones for the State.

Watson, Buxton & Watson, R. C. Strudwick and W. P. Bynum, Jr., for the defendant.

PER CURIAM: There is only one assignment of error set out in the brief of counsel for defendant, and that is directed to one clause in the charge of the court. Upon a careful examination of the entire evidence, and of the charge as a whole, we are convinced that the case was fairly presented to the jury, without any substantial error, and that they fully understood the questions submitted for their decision.

We find no reversible error—nothing which warrants us in ordering another trial.

No error.

WALKER, J., dissenting.

STATE v. DAVID RECORD, SR.

(Filed 11 November, 1909.)

1. Criminal Actions—Husband and Wife—Wife's Declarations—Evidence.

While the wife is not a competent witness against the husband in the trial of a criminal action, her declarations made in his presence under circumstances naturally calling for his reply if untrue, concerning which he remained silent, are competent when tending to show his guilt of the offense charged.

2. Criminal Actions—Larceny and Receiving—Evidence—Questions for Jury.

Evidence is sufficient to go to the jury upon the trial for larceny and receiving, which tends to show that the articles were found in the defendant's home two weeks after the theft; that tracks led from the place of the theft to defendant's home, he denied the theft, said that he knew that the articles afterwards identified were not there, appeared excited, and remained silent when his wife claimed them for his own and in his hearing. Evidence that the goods were found in defendant's home two weeks after the commission of the theft is of itself sufficient.

3. Appeal and Error—Instructions—Presumptions.

On appeal the presumption is that a charge given by the lower court to the jury was a correct one, in the absence of anything appearing to the contrary.

(696) APPEAL by defendant from *Long, J.*, at July Term, 1909, of RANDOLPH.

The facts are stated in the opinion.

Attorney-General for the State.
W. P. Bynum, Jr., and Morehead & Sapp for defendant.

CLARK, C. J. Indictment for larceny and receiving. There was a general verdict of guilty. The defendant's house was searched, and some of the stolen clothing were found hanging on the wall in the defendant's bedroom. His wife said they were her husband's clothes. The witness said that "the defendant was twenty feet outside door, in hearing distance." The defendant's exceptions cannot be sustained. Although the wife is not a competent witness against the husband in the trial of a criminal action, her declarations, made in his presence, are competent.

In *People v. McRae,* 32 Cal., 100, the Court says: "Admissions and confessions may be implied from the acquiescence of the party in the statements of others, made in his presence, when the circumstances are such as afford an opportunity to act or speak, and would naturally call for some action or reply from men similarly situated. And it makes no difference that the statements which call for reply are made by a party who is incompetent to testify." The Court cites *Rex v. Barlett,* 7 Car. and Pay., 832, and *Rex v. Smithers,* 6 Car. and Pay., 332, where the declarations of the wife, made in the presence of the husband, were held to be competent against him.

In *Richardson v. State,* 82 Wis., 172, it is said: "After the stabbing, from which deceased died, defendant's wife said to persons that defendant was guilty of the crime. Defendant was present, and had the same opportunity of hearing the statements as had the other persons, and did not deny them. *Held,* that such statements were admissions of guilt,

by acquiescence, and, as such, might be testified to by the persons present, though the wife was incompetent to testify in the case."

"It makes no difference that the statements which call for a reply are made by a party who is not competent to testify, because such statements are admitted, not as of themselves evidence of the truth of the facts stated, but simply to show what it is that calls for a reply, and the conduct of the defendant himself, under the circumstances, as indicating an acquiescence in or refutation of the truth of the statement." Abbott Criminal Trial Brief, sec. 284, p. 561.

In *S. v. Bowman,* 80 N. C., 432, it is held: "Where declarations were offered as evidence on a trial for murder, as having been made in prisoner's presence, and not contradicted by him, it was held (697) to be properly left to the jury to determine whether they were made in his hearing, whether he understood them, what was his conduct on the occasion, and to say what value should be attached to these circumstances as tending to prove the prisoner's guilt." See, also, *S. v. Burton,* 94 N. C., 947.

The other exception, for the refusal to charge that there was no evidence to go to the jury, is also without merit. The stolen goods were found in the defendant's possession two weeks after the theft. The possession of the stolen goods of itself is evidence. Hence the tracks lead to the defendant's house. He said he knew that the stolen goods were not there, but, on search, the defendant became greatly excited, and a part of the stolen goods were found in his bedroom, and his wife said, in his hearing, that the clothes were her husband's and he did not deny it.

1 Wigmore Ev., sec. 153, lays down the general doctrine: "Wherever goods have been taken as a part of the criminal act, the fact of the subsequent possession is some indication of the whole crime."

In *S. v. Rights,* 82 N. C., 675, this Court says: "The finding of stolen goods in the possession of the defendant a week or two after the theft raises a presumption of fact, not of law, against him, and is but a circumstance for the jury to consider, the rule being that the evidence is stronger or weaker, as the possession is more or less recent."

Again, this Court says: "A prisoner found in possession of stolen goods so soon after the theft that he could not reasonably have gotten the possession, unless he had stolen them himself, is presumed in law to be the thief." *S. v. Graves,* 72 N. C., 482.

"Possession of stolen goods immediately after the theft raises a violent presumption. But possession of stolen goods some time after the larceny raises a probable presumption of guilt, and the question must be submitted to the jury." *S. v. Jennett,* 88 N. C., 665; *S. v. McRae,* 120 N. C., 608; *S. v. Hullen,* 133 N. C., 656.

It is to be presumed that the court carefully instructed the jury as to the value of this sort of testimony. Indeed, the record says: "The court then instructed the jury, recapitulated the testimony and fully presented the contention of both sides as to the facts; and there were no other exceptions than the two above set out."

No error.

Cited: S. v. Anderson, 162 N. C., 575; *S. v. Randall,* 170 N. C., 762.

(698)

STATE v. SIMEON COX.

(Filed 17 November, 1909.)

Witness, Tender of—Cross-Examination—Evidence—Impeaching—Corroborative.

Upon the tender of a witness by the defendant to the State, without examination by him, it is error to admit in evidence, upon cross-examination, a letter prejudicial to defendant, which this witness testified he had written, either to impeach the witness, for he has not testified, or to corroborate the prosecuting witness, who, it appears, has not testified concerning the matters therein stated.

APPEAL from *Long, J.,* at July Term, 1909, of RANDOLPH.

Indictment for incest. This case was before this Court at Spring Term, 1909, and is reported 150 N. C., 846. On that appeal of defendant a new trial was granted. The defendant was again convicted, and appealed to this Court.

Attorney-General and G. L. Jones for the State.
Morehead & Sapp and C. L. Holton for defendant.

MANNING, J. The defendant has been twice tried and convicted of the crime of incest, perhaps the most detestable of all crimes. We feel again constrained to grant him a new trial. During the trial, and near the close of the evidence, the defendant tendered Pliny Cox to the State. The witness had been subpoenaed for and sworn on behalf of the defendant. The witness was a son of defendant and a brother of the prosecuting witness. The record shows: "Pliny Cox (tendered by defendant) is examined by the State. Letter of 23 June, 1909, marked Exhibit A, is handed to witness, and he says that he wrote said letter; that no change in facts communicated in letter to Alta (the prosecuting witness). Letter is offered in evidence by the State. The defendant ob-

jects, for that it has no reference to any fact testified to by any witness; that it neither corroborates nor contradicts any testimony in the case; that its tendency is merely to impeach witness. The State offers the letter to corroborate the witness, Alta Smith, to the extent it may do so. For this purpose, and this only, the letter is admitted and the jury so instructed."

In his brief, the Attorney-General, with his usual candor, admits that he can find nothing in the letter, after a careful study of it, which corroborates the testimony of Alta Smith. In this opinion of the Attorney-General we concur. The letter could not be used to impeach the witness, Pliny Cox, because he had given in no testimony. In *Bracegirdle v. Bailey,* 1 F. & F., 536, *Byles, J.,* said: "Inasmuch as he has proved nothing, you cannot cross-examine him to discredit him." (699) In *Toole v. Nichol,* 43 Ala., 406 (419), the Court said: "The purpose of cross-examination is to sift the testimony of a witness, and to try his integrity. When he has not been examined in chief, there can be no necessity for this." In *Ellmaker v. Buckley,* 16 S. & R., 72, the Court uses this strong language: "It would be palpably absurd when applied to a person who has given no evidence at all." The letter having been offered by the State and allowed, the defendant was necessarily compelled to attempt to break its force by an examination of the witness. In speaking of this letter, the Attorney-General says: "I would like to maintain that the introduction of this letter was, at any rate, harmless error, but I cannot say so. The letter was, in the main, an exigesis, bad as to law and worse as to scripture; but it is easy to see that it may have been deeply prejudicial to the defendant." The defendant had nothing to do with the writing or sending of this letter, and seems not to have known anything of it until it was presented at the trial. For the error pointed out, we think the defendant entitled to a New trial.

STATE v. L. G. HANCOCK.

(Filed 18 November, 1909.)

1. Verdict Set Aside—Discretion—Appeal and Error.

The refusal of the trial judge to set aside a verdict as being against the weight of the evidence is discretionary with him and not reviewable on appeal.

2. Insanity—Burden of Proof—Verdict—Recommendation for Mercy—Some Doubt—Proof Required.

Upon the trial of a criminal offense in which the plea of intermittent insanity at the time charged is set up as a defense, a verdict rendered that, "we return a verdict of guilty; we ask the mercy of the court for

the reason that some of the jurors have some doubt as to the sanity of the defendant," is sufficient for conviction, the first sentence being a complete verdict, and the balance surplusage, merely recommendatory, showing that some doubt existed in the minds of some of the jurors, but not sufficient to overcome the requirement that the burden was on defendant to prove insanity to their satisfaction.

APPEAL by defendant from *Moore, J.*, at February Term, 1908, of GUILFORD.

The facts are stated in the opinion.

(700) *Manly & Hendren and E. E. Gray, with Attorney-General, for the State.*

Watson, Buxton & Watson, for defendant.

CLARK, C. J. The defendant, a trusted employee, as manager at Winston of a branch business, whose main office was at Memphis, Tenn., embezzled something over $3,100. He fled with some $2,500 of this and $100 of jewelry which he had bought with his employer's money, and was arrested in San Francisco with $1,400 of the money on his person, unspent.

The record presents only two assignments of error.

1. Because the verdict was against the weight of the evidence. This is a matter in the discretion of the trial judge. *Bird v. Bradburn,* 131 N. C., 488; *S. v. Rose,* 129 N. C., 577; *Edwards v. Phifer,* 120 N. C., 406.

2. Because of the form of the verdict. The verdict of the jury as recorded is: "We return a verdict of guilty. We ask the mercy of the court, for the reason that some of the jurors have some doubt as to the sanity of the defendant."

The first sentence is the verdict in this case. It is complete: "We return a verdict of guilty." The next sentence is a request to the court and is no part of the verdict.

In *S. v. McKay,* 150 N. C., 813, the jurors had rendered a verdict of "guilty of murder in the first degree, with mercy." They were then directed by the court to find a verdict of "guilty" or "not guilty," whereupon they returned a verdict of "guilty." In writing the opinion of the Court, *Brown, J.*, said: "We do not think the added words 'with mercy,' vitiated the verdict, had it been so received. These words simply amounted to a recommendation for mercy, and did not leave in doubt the grade of the verdict rendered. They were surplusage and no part of the verdict."

"A statement of the grounds of the verdict or a recommendation to mercy may be disregarded as surplusage." Abbott Cr. Trial Brief, 727,

and cases cited. His Honor charged the jury that "if from the evidence they found that, just prior to the alleged acts of the embezzlement by the defendant, the defendant had a diseased mind, and such a disease was a permanent one, then the court charges you that the burden is upon the State to satisfy you beyond a reasonable doubt that at the time the defendant embezzled the money charged, if you find he did embezzle it, the defendant was sane—that is, he knew right from wrong and the nature and consequences of his acts; and if you are not so satisfied, you will acquit; but, if you should find from the evidence that the defendant, at the time of aforesaid, did have a diseased mind, but (701) that the character of the disease was such that the defendant had lucid intervals; that if you find he was sane at times, and at times insane, then the court charges you that the burden is upon the defendant to satisfy you, not beyond a reasonable doubt, but to satisfy you that at the time he took the money and committed the alleged acts of embezzlement, as charged in the bill of indictment; if you find he did take said money and was guilty of embezzlement, that he was at the time of said act of embezzlement insane—that is, that he did not have sufficient mental capacity to know right from wrong and the consequences of the acts and deeds he was committing—and if he has not so satisfied you, you should convict the defendant of this charge." The defendant excepted.

Taking the first part of the charge as correct, if the jury found the defendant permanently insane, they found him sane at the time of the commission of the act, beyond a reasonable doubt, but said that "some of the jury have *some* doubt of the sanity of the prisoner," clearly not amounting to "a reasonable doubt," as we must presume that the jury followed the charge of the court. Indeed, the defendant only sought to prove "intermittent insanity with lucid intervals," and the court correctly charged that the burden was on the defendant to show, not beyond a reasonable doubt, but to the satisfaction of the jury, that the embezzlement was accomplished while the defendant was insane, and the language of the jury evinces that it was not so satisfied.

But the first part of the charge was erroneous as regards the State. By the uniform rulings in this State, the burden of proving insanity in a criminal case is on the defendant who sets it up. *S. v. Norwood,* 115 N. C., 793; *S. v. Potts,* 100 N. C., 457; *S. v. Payne,* 86 N. C., 610; *S. v. Vann,* 82 N. C., 637; *S. v. Starling,* 51 N. C., 366, and there are many others in our Reports. This is sustained by the great weight of authority elsewhere, though there are some States which hold a different doctrine. In *S. v. Clark,* 101 Am. St., 1012, the jurisdictions maintaining the different doctrines are marshaled, as is also done more exhaustively as well as more interestingly by *Hawley, C. J.,* in *S. v. Lewis,* 20 Nev., 333.

Nowhere is the principle more clearly stated than in *Baccigalupo's*

case, 74 Va., 817, as follows: "In defense to a criminal prosecution upon the ground of insanity, it is not sufficient that the evidence should be of such a character only as to produce a doubt in the minds of the jury, but the *onus probandi* is always on the accused to prove such in-
(702) sanity to their satisfaction." This the defendant did not do. It was not suggested that he was not perfectly sane at the trial. The evidence showed him an active, capable business man; that 2 October he began using his employer's money; that on 19 October he drew out about $2,500, alleged that his employers would use it in building. To divert suspicion, he stated he was going to Danville, Va., and would return in two days. Thus getting a start of two days, he took an automobile to catch the northbound train at Greensboro for Washington, D. C.; at the latter place he bought a through ticket, under an assumed name, and by the quickest route, to Nagasaki, Japan; at Honolulu he doubled back (doubtless fearing extradition), and was arrested in San Francisco, still using the assumed name, which also was marked on his trunk, valise, handbag and on the band inside his hat. The day he left he wrote a letter to the main office, at Memphis, which the experts on both sides testified was written by a man who was at that time of a sound mind. There was evidence—never difficult to get—of some experts, selected and summoned by the defendant, throwing doubt upon the defendant's sanity at times, there being evidence of some wild statements at times made by the defendant; but, as there was evidence that he was a drinking man, the jury may have thought this sufficiently accounted for.

At any rate, the burden was on the defendant to show to the satisfaction of the jury that he was insane at the time of the commission of the offense. All that he did was to raise some doubt in the minds of some of the jury, who, nevertheless, found him guilty. The plea of insanity was not proven to their satisfaction. Else, under the charge of the court, they must have acquitted the defendant.

No error.

Cited: S. v. Johnson, 161 N. C., 266; *S. v. Hand,* 170 N. C., 706; *S. v. Terry,* 173 N. C., 766.

STATE v. KIMBRELL.

(Filed 24 November, 1909.)

Assault and Battery—Previous Threats—Res Gestae—Impeaching Evidence.

Previous threats are not competent as substantive evidence except in cases of homicide, and then only when self-defense is alleged or the evidence is circumstantial. Upon the trial for an assault with a deadly

weapon all that is pertinent is what took place at the time or so near thereto as to be a part of the *res gestae;* and in this case no error was committed by the trial judge, at least, to defendant's prejudice, in confining the evidence of a witness to the impeachment of the evidence of the prosecuting witness, that the latter had previously made threats against the defendant, which had been communicated to defendant.

WALKER, J., dissenting.

APPEAL from *Councill, J.,* August Term, 1909, of MECKLEN- (703) BURG.

The defendant was indicted and found guilty of an assault with a deadly weapon. The evidence of the State was to the effect that while Charles Thomas, prosecuting witness, was in the Driving Club, in Charlotte, defendant came into the club and, without warning, provocation or excuse, shot Thomas five times, inflicting upon him most serious bodily wounds. Two shots were fired after Thomas had fallen to the floor.

The evidence of the defendant was that there had been a quarrel at the fair grounds, the morning before the shooting, between the defendant's brother, Charles Thomas and Felix Thomas, in which Charles had offered defendant's brother, Sam Kimbrell, $10 to hit Felix, and had cursed defendant, who was not present. He further offered evidence that, before the shooting, sam Kimbrell had communicated these facts to him, and that, after having taken two drinks of beer with Charles Thomas, defendant started to leave the Driving Club, when Thomas grabbed him by the shoulder and said, "Now, God damn you, I will settle with you"; whereupon defendant shot Thomas four or five times. Defendant then offered to prove by one John Ward, Jr., that, a short time prior to the shooting, Charles Thomas had said to him (witness) that defendant owed his (Thomas') sister $200, and that he would either have to pay it back or he would "fix him" if he crossed his path, and that this threat was communicated to the defendant prior to the shooting.

Upon objection by the State, the court refused to allow the evidence to be received as substantive evidence, but only for the purpose of impeaching the witness Thomas. This was excepted to, and constitutes the only exception in the case.

Attorney-General and George L. Jones for the State.

T. L. Kirkpatrick, F. R. McNinch and Burwell & Cansler for defendant.

CLARK, C. J. The only question raised by this appeal is as to the competency of the evidence of previous communicated threats of violence, made by the prosecutor against the defendant. The point has been settled by repeated decisions of this Court that previous threats are not

competent as substantive evidence, except in cases of homicide.
(704) *S. v. Norton,* 82 N. C., 628, cited and approved in *S. v. Skidmore,* 87 N. C., 509; *S. v. Harrell,* 107 N. C., 946; *S. v. Goff,* 117 N. C., 762. There are many others to the same effect.

The principle and the reasons given are stated so clearly in the above and other cases, and are so well known and adhered to, that we need only refer to these cases. All that is pertinent to show in cases of assault and batteries and affrays is what took place at the time, or so near thereto as to be part of the *res gestae.* From that the jury can determine whether the parties fought willingly or in self-defense. To admit evidence of previous quarrels or threats in such case would consume the time of the courts for no good reason.

In homicide cases, evidence of previous threats is admissible, but only if the killing was in self-defense or the evidence is circumstantial. *S. v. Turpin,* 77 N. C., 473; *S. v. Hensley,* 94 N. C., 1021; *S. v. Byrd,* 121 N. C., 684.

But in assault and battery the evidence is usually direct—not circumstantial—and both parties can testify, and the jury can judge of what the parties did, without a narration of their wrangles and quarrels at other times and places. The defendant got all the benefit of the evidence which he was entitled to, when the judge admitted the testimony of previous threats by the prosecuting witness as impeaching testimony. Besides, a threat, if made, to "fix" the defendant, was too indefinite to authorize or justify the defendant to walk up and fire five shots into the prosecutor, without warning or provocation, according to the State's evidence, or, according to the defendant's own evidence, after taking two drinks with the prosecutor, to shoot him five times when he grabbed him by the shoulder. The jury were fully competent to decide, upon the evidence before them, whether the defendant was acting in self-defense or not, and they found he was not. It is singular that such a defense can be urged, when the evidence is uncontradicted that the defendant shot the prosecutor five times at close range and twice after he fell to the floor—when, too, there was no evidence that the prosecutor used or even had a weapon.

No error.

WALKER, J., dissenting: It has been greatly surprising to me—and I say so with all possible deference and respect for my brethren—that the Court has decided this case adversely to the defendant. I do not always agree with them in their opinion as to the law, but sometimes,
when I do differ with them, I do not enter my dissent, believing
(705) it better, in the interest of justice and also certainty of what the law is, to concur with them *sub silentio,* rather than have it appear that the Court is not a homogeneous body, and thereby weaken the

force and strength of the opinion of the Court by an attack upon its soundness in the statement and application of a legal principle. Such cases are rare, and I never withhold a formal dissent if the case establishes anything like an important precedent, but do so when the peculiar combination of facts in the particular case is not at all likely to be presented again and the decision is practically a mere declaration of the law of the special case. I would always prefer to agree with my associates than to dissent from their views, for many reasons, among others, because they are better qualified than I am to decide what the law is; but in this case I am so constrained by my sense of justice and right and my conviction as to what the general principle is, as it should be applied to the facts appearing in the record, that I would fail in the performance of my duty as a judge if I did not express my own views, which are so much at variance with those of the Court. I intend to adopt as the expression of my opinion, in part, what is ably and forcefully said by the Attorney-General, who, as I have said more than once before, is always fair and always just in the argument of cases before us in behalf of the State, and as able and learned as the best. He says: "The defendant was indicted and found guilty of an assault with a deadly weapon. The evidence of the State was to the effect that while Charles Thomas, the prosecuting witness, was in the Driving Club, in Charlotte, defendant came in the club and, without warning, provocation or excuse, shot Thomas five times, inflicting upon him most serious bodily wounds. Two shots were fired after Thomas had fallen to the floor."

The evidence of the defendant was that there had been a quarrel at the fair grounds, the morning before the shooting, between the defendant's brother, Charles Thomas and Felix Thomas, in which Charles had offered defendant's brother, Sam Kimbrell, $10 to hit Felix, and had cursed defendant, who was not present. He further offered evidence that, before the shooting, Sam Kimbrell had communicated these facts to him, and that, after having taken two drinks of beer with Charles Thomas, defendant started to leave the Driving Club, when Thomas grabbed him by the shoulder and said, "Now, G—d d— you, I will settle with you," whereupon defendant shot Thomas four or five times. Defendant offered to prove by one John Ward, Jr., that, a short time prior to the shooting, Charles Thomas had said to him (wit- (706) ness) that defendant owed his (Thomas') sister $200, and that he would either have to pay it back or he would "fix him" if he crossed his path, and that his threat was communicated to the defendant prior to the shooting.

Upon objection by the State, the court refused to allow the evidence to be received as substantive evidence, but only for the purpose of impeach-

ing the witness Thomas. This was excepted to, and constitutes the only exception in the case.

It is not disputed that, in homicide cases, evidence to show that the deceased had threatened the life of the prisoner is competent in this State:

1. When it appears that the killing was done in self-defense.

2. If the evidence of the killing is wholly circumstantial. *S. v. Turpin,* 77 N. C., 473; *S. v. Hensley,* 94 N. C., 1021; *S. v. Byrd,* 121 N. C., 684.

The same seems to be the law in many of the other States with reference to an assault and battery, as well as in cases of homicide. *Lewallen v. State,* 6 Tex. App., 475; *Harmon v. State,* 40 Tenn., 242; *Kepp v. Quallman,* 68 Wis., 451. See, also, 3 Cyc., p. 1056, and cases cited.

"When there is evidence of self-defense, previous threats are admitted as tending to show the reasonableness of defendant's apprehension that he was about to suffer death or great bodily harm. But in *S. v. Skidmore,* 87 N. C., 509, and *S. v. Norton,* 82 N. C., 628, evidence of previous threats was excluded, upon the ground that in a 'simple assault and battery the guilt or innocence of the defendant depended upon the facts and circumstances immediately connected with the transaction.' The ruling of his Honor in this case, in not allowing the jury to consider the threats as substantive evidence, was evidently based upon the opinions in the two cases just mentioned. Is the rule enunciated in these cases applicable to the case at bar? The ruling in *Skidmore's case* is based entirely on *Norton's case.* The principle is not discussed at all. And the facts in *Skidmore's case* bear very little resemblance to the facts of this case. There the defendant was not indicted for an ordinary assault and battery, nor for an assault with a deadly weapon, but for willfully maiming the prosecutor by biting off his ear. The deed was done, not in the beginning, but in the very heat of the fight, while the parties were rolling upon the ground, locked in a savage embrace. And it is impossible to see how something the prosecutor had said some time before could have in any way influenced, much less justified, the conduct of the de-
(707) fendant when he gave the deadly bite.

"*Norton's case* is distinguishable from ours in three particulars:

"1. There the threats proceeded from the defendant.

"2. It was a case of simple assault and battery, no deadly weapon being used.

"3. There was no evidence or suggestion of self-defense."

"Every opinion of the Court is predicated upon and is to be considered in the light of the facts then before the Court. And, in view of this principle, the *decision* of the Court in *Norton's case* is not applicable to

the case at bar. Here the defendant was indicted for an assault with a deadly weapon. The weapon was used in the very beginning of the fight. The contention of the defendant is that he brought his pistol into action because the conduct of the prosecutor when he grabbed him and said, 'Now, G— d— you, I will settle with you,' in connection with the threats which the prosecutor had previously made against him, and the fact that the prosecutor, when drinking, was a dangerous man, led him to reasonably believe that he was in danger of death or great bodily harm. Does the fact that no one of the bullets struck a vital spot deprive defendant of the benefit of this evidence? If so, it would seem that a twitch of a muscle (or a sudden shifting of the human body) can change a rule of law.

"It may be that it is in the interest of a sound public policy to limit the admission of threats to cases of homicide.

"It is with extreme reluctance and diffidence that we take this view, but the Voice said to John, 'What thou seest, write.' "

We see from this admirable presentation of the point involved in the case at bar that not only is the right of the defendant to have the benefit of the excluded evidence well sustained by reason, but also by the highest and best authorities. The cases cited by the Court to support its conclusion are distinguishable from this case in their facts, and besides, no sound or permissible reason is given for the principle as stated therein, which is gratuitously asserted, without the citation of any authority or any discussion of the matter. *S. v. Norton,* 82 N. C., 628, and *S. v. Skidmore,* 87 N. C., 509, are sufficiently discussed by the Attorney-General and their inapplicability to the present case clearly demonstrated. In *S. v. Harrell,* 107 N. C., 946, we quote the *syllabus* of the able and learned reporter, Mr. Davidson, who always stated the very point decided in a case with discrimination and accuracy: "Where one engages in a fight willingly, he is guilty of an affray, and it is immaterial (708) that he fought under a reasonable apprehension that his adversary had formed a purpose to make a violent assault upon him; nor is it any defense that during the encounter he fired a shot at his enemy, under the belief that he was in danger of great bodily harm." In the opinion of the Court *Chief Justice Merrimon* says: "The evidence rejected could not prove that they did or did not so fight, nor could it prove that they fought only in their own defense. The apprehensions of the witness, and the grounds of them, did not enter into and make up an element, or give quality thereto, of the offense, nor did these at all relieve him and his sons from guilt, if they fought as charged. Evidence of what was done, or attempted to be done or said, or what was not done or not said by the parties at the time of the fight, just before it began, during its progress and just at its close—such things as made a part of the *res gestae*—was

pertinent and relevant to prove the offense charged or the innocence of the parties. As to that offense, no matter what may have been their intent, or the provocation to them, or their fears or apprehensions, *if they fought otherwise than on the defensive,* such evidence might be pertinent and important in some classes of cases. This is not one of them. *S. v. Norton,* 82 N. C., 628; *S. v. Downing,* 74 N. C., 184. Nor could the belief of the witness, in the course of the conflict, that he and his sons were obout to be shot or suffer great bodily harm, prove that he and they fought only in their own defense. However fiercely and aggressively he might have joined in the fight, he might have had such belief, but this would not prove that he was on the defensive. The surrounding facts and circumstances—not his simple belief—constituted evidence to show that he fired his gun, not as an active, aggressive participant in the fight, but only on the defensive."

The facts as reported in that case plainly show that the threat proposed to be proven was not against Clingman Harrell, the father of his codefendants, but against his sons, or "boys," and were not communicated to them. The reporter states that "all the parties, it appeared from the evidence, fought willingly, the appellants successfully wounding both their opponents." So there was no semblance of self-defense, and the evidence was not circumstantial. This case, therefore, fails as a precedent or authority, when tested by the rule laid down in *Turpin's case, supra,* Even in *State v. Harrell, Justice Avery,* an able and painstaking jurist, as we all know, dissented from the opinion and conclusion of the Court. *In S. v. Goff,* 117 N. C., 762, the last case cited by the Court,
(709) the opinion was delivered by *Justice Avery,* who had dissented in *Harrell's case.* A bare perusal of *Goff's case* will show that the question herein presented was not raised.

In the very able and learned brief of the defendant's counsel my views are so clearly stated, with a full citation of authorities sustaining them, that I am sure it will not be "out of place" or prolong this opinion too much to quote therefrom what relates to the competency and relevancy of the rejected testimony. It is as follows: "However, the rule may be, in a case of *simple* assault, upon an indictment for an assault with a *deadly* weapon, used in such a way as is *calculated to produce death,* defendant ought to be permitted to prove every fact in justification of his act that he would be allowed to prove upon an indictment for *slaying* his antagonist; otherwise it would be safer to kill him outright than to wound him. As the law admonishes him who strikes in self-defense to be careful of his blows and give no more than are necessary to protect life and limb, surely it will not be guilty of the glaring inconsistency of denying to him who thus strikes, but not fatally, the benefit of every

principle of law and rule of evidence it would accord to him if his blows should prove deadly."

"The defendant's guilt or innocence depends solely upon whether he acted and was entitled to act from a motive of self-defense. 'It is sound sense and, we think, sound law, that, before a jury shall be required to say whether the defendant did anything more than a reasonable man should have done, under the circumstances, it should, as far as possible, be placed in the defendant's situation, surrounded with the same appearances of danger, with the same degree of knowledge of the deceased's probable purpose, which the defendant possessed.' *S. v. Turpin* 77 N. C., at p. 477."

"This could not be done unless the jury had been permitted to consider evidence of threats for the purpose of showing the grounds of the defendant's apprehension that he was about to be feloniously assaulted when he fired the several shots. In line with this reasoning are the cases of *Peoples v. Tillman,* 132 Mich., 23; *Galbraith v. Fleming,* 60 Mich., 403; *Fields v. Slate,* 46 Fla., 84; 1 Enc. Ev., 1013. The defendant offered evidence tending to show that, but a very short time after the threats were made and communicated to him, the prosecutor was guilty of an assault upon him, and it therefore became material to couple to this overt act the previous threats of violence made by the prosecutor against the defendant, for the purpose of sustaining his contention that he had well-grounded fear that the prosecutor was about to commit a *felonious* assault upon him. If there was *any* evidence (710) to go to the jury in support of this contention, then it was for the *jury,* and not for the *court,* to pass upon the question of his *motive* in firing the shots, as well as the *reasonableness* of the grounds of his apprehension. *S. v. Nash,* 88 N. C., 618; *S. v. Harris,* 119 N. C., 861; *S. v. Hough,* 138 N. C., 663; *S. v. Blevins,* 138 N. C., 668; *S. v. Castle,* 133 N. C., 769; *S. v. Clark,* 134 N. C., 699; *S. v. Barrett,* 132 N. C., 1005. So, also, is the question of excessive force for the *jury,* and not for the *court. S. v. Dixon,* 75 N. C., 275; *S. v. Bullock,* 91 N. C., 614; *S. v. Goode,* 130 N. C., 651; *S. v. Taylor,* 82 N. C., 554."

The Court is deciding in this case a most important principle, which excludes evidence of threats in the trial of an indictment for an assault with a deadly weapon, though such evidence is admitted to be competent in cases of homicide, and the decision is practically based upon the ground, when the reason for admitting it in homicide cases is clearly applicable, that the bullet or other deadly weapon used by the defendant did not inflict a mortal wound. It is so convincing to my mind that such is not the law, I would assert, but for the great respect I entertain for my brethren and my knowledge of their superior ability and learning, that

the conclusion drawn from their reasoning, which is really nothing more than a bare assertion, is lame and impotent.

In this case it appears that both the Attorney-General and the defendant's counsel, all able and learned criminal lawyers, agree, contrary to the decision of this Court, that an error was committed by the court below in excluding the testimony offered by the defendant. I concur in opinion with the counsel for the State and the counsel for the defendant, who, as I had said, agree that there should be a new trial because of the alleged error.

Cited: *S. v. Blackwell,* 162 N. C., 683; *S. v. Johnson,* 166 N. C., 395; *S. v. Pollard,* 168 N. C., 121.

STATE v. A. A. RAY.

(Filed 24 November, 1909.)

1. **Bigamy—Jurisdiction—Interpretation of Statutes—Extra-Territorial Effect.**

Revisal, sec. 3361, relating to the offense of bigamy cannot be given extra-territorial effect, and the words "or elsewhere" in the language of the statute, "whether the second marriage shall have taken place in the State of North Carolina *or elsewhere,*" are void.

2. **Same—Living Together—Instructions.**

One who has a wife living here, leaves the State and marries again to a different woman in another State, returns here and lives with such other woman as man and wife, is not indictable or punishable under our statute relating to bigamy, Revisal, 3361, there being no express language of the statute making it a specific criminal offense for them to cohabit together within the State after a bigamous marriage elsewhere. And when the evidence tends only to establish such facts, the defendant is entitled to an instruction of not guilty if the jury believed the evidence.

3. **Same—Venue.**

The provisions of Revisal, sec. 3361, relating to the offense of bigamy and its punishment, "that any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended," etc., refers only to the venue of the crime defined in the first clause—*i. e.,* "such offense" being "the second marriage, the former husband and wife still living."

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

(711) APPEAL from *E. B. Jones, J.,* at September Term, 1908, of ALAMANCE.

Indictment for bigamy. There was evidence on the part of the State to show that defendant intermarried with a former wife, E. T. Ray, in this State, in March, 1895, had two children born of the marriage, and

that said E. T. Ray is still living; that defendant, later, to wit, in August, 1902, having separated from his wife, E. T. Ray, married one Annie B. Lemonds, who is still living and a witness in the cause; that this second ceremony took place in Danville, Va., in August, 1902, and after it occurred the parties returned to this State and lived here together as man and wife nearly three years, when defendant left said Annie B. Lemonds.

There was evidence on the part of defendant tending to show that after the separation from the first wife, E. T. Ray, he had removed to Indiana, and there obtained a divorce, and that the second marriage took place after decree of divorce duly obtained and when defendant had a right to marry again.

The State, in reply, offered evidence tending to show that the proceedings of divorce, and the decree obtained in same, were null and void: (1) for want of jurisdiction in the court; (2) by reason of fraud.

There was a verdict of guilty, and from judgment on the verdict defendant excepted and appealed.

Attorney-General for the State. (712)
Parker & Parker, W. P. Bynum, Jr., and R. H. Hayes for defendant.

HOKE, J. We do not refer to many of the interesting questions presented in defendant's case on appeal, for the reason that the Court is of opinion that in no aspect of the State's testimony can the defendant be convicted of the offense charged in the bill of indictment. The State does not contend or claim that such conviction can be upheld, except under our statute against bigamy (Rev. 1905, sec. 3361). On matters relevant to this inquiry, this section of our law provides as follows:

"3361. Bigamy.—If any person, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in the State of North Carolina or elsewhere, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of felony and imprisoned in the State's Prison or county jail for any term not less than four months nor more than ten years; and any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended or be in custody, as if the offense had been actually committed in that county."

This has long been the law of this State controlling the matter, and appears in terms exactly similar in the Code of 1883, as section 988. Construing this section, in *S. v. Cutshall,* 110 N. C., 538, *Justice Avery,* for the Court, in a forcible and learned opinion, decides that this statute, in

so far as it undertakes to punish a defendant for a bigamous marriage, occuring beyond the borders of the State, is unconstitutional, and that, in the language of the statute defining the offense, "If any person, being married, shall marry another person, during the life of the former husband or wife, whether the second marriage shall have taken place in the State of North Carolina or elsewhere, etc., shall be guilty of a felony," the expression "or elsewhere" is void and of no effect. An examination of *Cutshall's case* will further disclose that it was there directly and necessarily held that the parties to a bigamous marriage, occurring without the State, could not be indicted and punished under the provisions of this statute, by reason of having thereafter returned to the State and lived together as husband and wife.

The case in question was determined on appeal by the State from an order quashing a bill of indictment for bigamy. The bill contained three counts: The first charged, in substance, a bigamous mar-
(713) riage, occurring in the State of South Carolina. A second charged that, after such bigamous marriage in South Carolina, the parties came back to North Carolina and lived together as husband and wife. There was a third count in the bill, on which a *nolle prosequi* was entered in the lower court, and the contents are therefore immaterial.

The Supreme Court, as stated, held that no offense was charged in the first count, because our State law could not be given extra-territorial effect; and that none was charged in the second count, because the statute contained no such provision. *Justice Avery,* speaking to this last question, said: "The additional count, in which it was charged that the defendant, after the bigamous marriage in South Carolina, came into North Carolina and cohabited with the person to whom he was married, cannot be sustained, because the offense is not covered by the statute." And a perusal of the law gives clear indication that the Court has correctly construed it in *Cutshall's case.* The only offense created and defined by this section of the statute is the "second marriage, while a former husband or wife is still living." This is declared to be felony, and it is the only act made criminal by the law, for it is perfectly plain that the subsequent words of the statute, "and any such offense shall be dealt with, tried, determined and punished in the county where the offender shall be apprehended or be in custody," refers only to the *venue* of the crime defined in the first clause, "such offense" being, as stated, "the second marriage, the former husband and wife still living." Coming back into the State after a bigamous marriage elsewhere, and a living together by the parties as husband and wife, might and ordinarily would constitute the crime of fornication and adultery. *S. v. Cutshall,* 109 N. C., 764. But there is nothing in this statute

which makes such conduct a felony, or which deals or attempts to deal with it one way or another; and the expression, "or elsewhere"—that is, a bigamous marriage beyond the borders of the State—having been declared of no effect by the courts, because contrary to the law of the land, there is nothing in the statute which applies to the conduct of the defendant, and he is entitled to go, quit of any further molestation by reason of any indictment predicated and necessarily dependent upon it.

There are decisions in many of the States, and by courts of recognized authority, sustaining convictions by reason of conduct similar to that imputable to defendant on this evidence, or upholding statutes condemning it. *Brewer v. State,* 59 Ala., 101; *Commonwealth v. Thompson,* 56 Mass., 551; *S. v. Fitzgerald,* 75 Mo., 571; *S. v. Palmer,* 18 Vt., 570. But in the cases cited, and all others of like import, so far as we have examined, the statutes, in express terms, made the "cohabiting (714) together within the State, after a bigamous marriage elsewhere," a specific criminal offense. Thus, in the Missouri statute (*S. v. Fitzgerald, supra*), the language is, "Every person having a husband or wife living, who shall marry another person without this State, in any case where such marriage would be punishable if contracted or solemnized in this State, and shall thereafter cohabit with such other person within this State, shall be adjudged guilty of bigamy," etc.

As now advised, and speaking for himself, the writer sees no reason why a State could not declare the coming into the State and cohabiting together here by the parties, after a bigamous marriage in another State, a felony, and punish it as such; but the question is not presented, for the Court is clearly of opinion that our statute contains no such provision, and the prosecution of the defendant, therefore, for the offense charged, on the evidence as it now appears, cannot be sustained.

The Court is not inadvertent to *S. v. Long,* 143 N. C., 670, which upholds the contrary view, but, after a careful consideration, we are of opinion that, on authority and for the reasons stated, the case referred to is not well decided; and, on the facts presented, the defendant was entitled to the instruction prayed for by him, that if the jury believed the evidence they would render a verdict of not guilty.

For the error indicated, there will be a

New trial.

CLARK, C. J., dissenting: The Supreme Court of the United States has held that no court should assume to declare a statute unconstitutional unless it was clearly so, "beyond all reasonable doubt." *Ogden v. Sanders,* 12 Wheaton, 213. This Court so held in *Sutton v. Phillips,* 116 N. C., 504; *S. v. Lytle,* 138 N. C., 741; *Daniels v. Homer,* 139 N. C.,

228, and in other cases. Cooley Cons. Lim. (7 Ed.), 254, states this as the accepted doctrine, and cites numerous authorities. Certainly we would not hold that a coördinate department had either ignorantly or intentionally violated the Constitution, which they had sworn to observe, unless it was clear to us beyond a reasonable doubt. Inasmuch as this Court, in a recent and unanimous opinion (*S. v. Long,* 143 N. C., 673), upheld this statute, we at least cannot think there is no reasonable doubt about it.

Nor should a court hold an act unconstitutional unless it can (715) point to the provision of the Constitution which the Legislature has violated. This cannot be done in this case.

Neither should a court put a meaning on the statute, which meaning the court may deem will make it unconstitutional, when there is a just and reasonable construction which renders it constitutional. This construction we put upon this statute in *S. v. Long, supra,* when we held that the Legislature had power to provide what should constitute bigamy (which was unknown at common law), and that in this section the Legislature had made the crime of bigamy consist, not in the second marriage, but in the living together in this State as a man and wife under color of such second ceremony. Without that ceremony, it would be fornication and adultery. With such fraudulent ceremony, wherever it took place, such living together here is bigamy.

In *S. v. Cutshall,* 110 N. C., 548, and 552, *Avery, J.,* speaking for the majority, conceded that if this construction was the meaning of the act, it was valid. *Merrimon, C. J.,* contended that this was the true construction. He said (p. 553): "This enactment is not very aptly, precisely or clearly expressed, and hence its validity is seriously questioned. But it must receive such reasonable interpretation as will render it intelligible, operative and effectual, if this can be done consistent with the Constitution. It does not necessarily imply or intend that the offender shall be indictable and convicted in this State for the offense of bigamy in another State; such is not its meaning. It intends that whoever shall be in this State, being married to two living wives or two living husbands, as the case may be (except in the cases excepted to in the proviso to the statute), shall be guilty of felony, and that without regard to whether the second marriage took place in this State or elsewhere." Further, he says (p. 554): "It makes the bigamist here answerable, because he is so living here, an offense to and an offender against this State and society here. The fact of bigamy—having two living wives or two living husbands—and the presence of the offender (living in second marriage) in this State constitute the offense. . . . The statute does not treat the second marriage as the offense, nor the *offense* as committed elsewhere than in the State."

Again, on p. 557 (110 N. C.), *Merrimon, C. J.*, says: "The statute does not make the second marriage the offense; it simply treats this as a fact to be taken in connection with others, all constituting the offense in this State. The offense is wholly statutory in its nature, and must be so treated." This view must be correct, else society in this State is powerless to protect itself, if the bigamist, living here, has taken the trouble to have the ceremony of the second marriage performed (716) in another State. We need not discuss the reference to indictment for fornication and adultery, except to say that if that is an adequate remedy, why have any statute against bigamy at all?

In *S. v. Long,* 143 N. C., 673, this Court took *Judge Merrimon's* construction of the statute, which is identical with that in Bouvier's Law Dictionary, as the one intended by the Legislature—as it doubtless was—and applied *Judge Avery's* concession, that if this were its meaning the statute was valid. This effectuated the intent of the Legislature, avoided holding their action violative of the Constitution, protected society and convicted a guilty man. Why disturb this result? For whose benefit? No innocent man can suffer by letting the law stand as we held it to be in *S. v. Long.*

Cited: Rev. 3361; *S. v. Herren,* 175 N. C.

STATE v. GEORGE MITCHELL.

(Filed 24 November, 1909.)

1. Warrant of Arrest Not Signed—Appearance Bond—Sufficiency.

It is immaterial to the validity of an appearance bond given by defendant before the court and in *custodia legis* that the warrant for his arrest, in due form, was, inadvertently, not signed by the recorder.

2. Appearance Bond—Deposit of Cash—Sufficiency.

The voluntary deposit of cash by the prisoner in lieu of an appearance bond is a compliance with the true spirit and meaning of the requirement therefor, and may not be returned to him upon the ground that the judge erred in accepting it, certainly not when the defendant is a fugitive from justice and makes the application by attorney.

APPEAL by defendant from *Webb, J.*, at August Term, 1909, of FORSYTH.

The facts are stated in the opinion of the Court.

Attorney-General and George L. Jones for the State.
J. S. Grogan for defendant.

BROWN, J. The defendant was arrested and brought before the recorder's court of Winston, charged with unlawfully selling intoxicating liquors. Being before the court, he was required to give bond for (717) his appearance for trial, on 16 March, in the sum of $250. The defendant voluntarily deposited $250 in cash with the recorder's court for his appearance. The defendant failed to appear, and the following proceedings were had:

"Defendant called and failed. Judgment *nisi, sci. fa.* and *capias. Capias* issued. *Capias* returned 17 March, not to be found in Forsyth County, by J. A. Thomas, chief of police. Judgment absolute for the penalty of the bond, $250. This 17 March, 1909.

"On 18 March, J. S. Grogan appeared in court and moved to have the above forfeiture stricken out; motion overruled. Notice of appeal given by Mr. Grogan to the May Term, 1909, Superior Court of Forsyth County. The Superior Court affirmed the judgment of the recorder."

1. It is immaterial that defendant was arrested under a warrant in due form, but inadvertently not signed by the recorder. The defendant was brought before the court and was *in custodia legis,* when he was required to give bail for his appearance at a future session of the court.

2. The fact that the defendant, of his own volition, chose to deposit the amount of the bond required in cash is not a violation of the statute, but a compliance with its true spirit and meaning.

The law contemplates that a defendant may give security for his appearance, and it would be singular indeed if he was denied the right to deposit the requisite cash as security for his appearance. The court could not compel the defendant to deposit cash or to give security of any kind. He had the privilege to go to prison if he preferred. Having tendered the cash, and it having been accepted by the court as security for his appearance, it would be extraordinary if the defendant, still a fugitive from justice, could have it returned to him, upon the theory that the court erred in accepting it. The judgment is

Affirmed.

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STATE v. J. DANENBERG.

(Filed 1 December, 1909.)

1. Taxation—Nonintoxicants—"Near Beer"—Recognized Business—Cities and Towns—Ultra Vires.

The taxing by a city in a prohibition State of one in the business of selling "near beer," mentioned among drinks containing only a small per cent of alcohol and nonintoxicants, is not *ultra vires,* its charter providing for the raising of revenue by taxation of real and personal property,

and making it a misdemeanor to carry on any business, etc., without paying a license tax when one has been levied thereon, the sale of "near beer" being a recognized business and a legitimate subject of taxation under the general laws of the State.

2. Same—Discrimination—Constitutional Law.

An ordinance of a city levying, under the provisions of its charter, a license tax upon "near beer" and all other like beverages containing as much as one-half of one per cent of alcohol, is uniform, bears equally upon all who come within its terms and are engaged in that character of business, and not discriminative within the meaning of Art. V, sec. 2, of the State Constitution.

3. Taxation Prohibitive—Nonintoxicants—"Near Beer."

By requiring the payment of an annual license tax to the State by those who deal in "near beer," the General Assembly has recognized and legalized its sale, and a prohibitive tax thereon levied by a municipality is void.

4. Same—License—Reasonableness—Courts' Jurisdiction.

The reasonableness or unreasonableness of a tax levied exclusively for revenue is a matter generally within the exclusive province of the legislative department, and not a matter for the courts; but when a license fee is taxed upon a legitimate business as a police regulation also, the courts will consider whether it is so unreasonable as to be prohibitive.

5. Same—Police Powers.

A municipality having the power by its charter to levy a license tax on dealers in "near beer" and kindred drinks may consider the question both from the standpoint of revenue and police regulations, and with regard to the extraordinary opportunities it affords for violating the prohibition law and the extra police surveillance it entails.

6. Same—Proof.

In determining whether a city ordinance imposing a license tax on dealers in "near beer" and kindred drinks is prohibitive, the courts cannot consider solely the probable effect it would have on the business of the complaining party in complying with the ordinance.

7. Cities and Towns—Nonintoxicants—"Near Beer"—Ordinances—Presumptions—License Prohibitive—Proof.

Giving the ordinance of the city of Charlotte, imposing a license tax of $1,000 on every dealer in "near beer" and kindred drinks the benefit of the presumption of reasonableness, the facts appearing of record in this case are not sufficient for the courts to say that the ordinance was unreasonable.

8. Taxation—License—Police Powers—Federal Constitution—Constitutional Law.

Imposing a license tax for the sale of "near beer" and other kindred drinks comes within the police power of a State and does not contravene the Fourteenth Amendment to the Federal Constitution.

(719) APPEAL from *Webb, J.*, at September Term, 1909, of MECKLENBURG.

The defendant was convicted in the recorder's court of the city of Charlotte of a misdemeanor for selling near beer without a license, and appealed to the Superior Court of Mecklenburg. He was convicted by the jury, and from the judgment of the court appealed to the Supreme Court.

The facts are stated in the opinion of the Court.

Attorney-General and George L. Jones for the State.
John J. Parker and Stern & Stern for defendant.

BROWN, J. Defendant was charged with engaging in the business of selling near beer without paying the license tax imposed thereon by the city of Charlotte. The ordinance in question taxes every person engaged in the sale of near beer $1,000. The defendant admitted that he was engaged in the business and had not paid the license tax, but contended that the ordinance is *ultra vires,* as well as discriminative and prohibitive, and that it violates the Fourteenth Amendment of the Constitution of the United States.

1. Is the city of Charlotte without authority to pass the ordinance?

The ordinance in question reads as follows:

"Beverages.—On every retail or wholesale dealer in cider (except sweet, unadulterated cider, made from apples), Beerine, Near Beer, Tidal Wave, Twenty-Three, Hop Beverage, Noxall, or any drink, under any name or description whatsoever, containing as much as one-half of one per cent of alcohol, per annum, $1,000."

We think the authority to levy a license tax upon the business of selling near beer, as upon any other business, is plainly conferred by sections 80 and 82 of the city charter. The first-named section provides for raising revenue for the city by taxation, not only upon real and personal property, and also in connection with section 81 gives express authority to levy license taxes.

Section 82 makes it a misdemeanor to carry on any business,
(720) profession, trade or avocation of any kind in said city, upon which a license tax has been levied, without first obtaining a license therefor.

Near beer is now a recognized article of commerce, and the sale of it appears to be an established business in those States which have adopted general prohibition laws. It has been judicially defined by the Supreme Court of Georgia to be "a term in general currency, used to designate any and all of that class of malt liquors which contain so little alcohol that they will not produce intoxication, even though drunk

to excess. It includes all malt liquors which are not within the purview of the general prohibition law." *Campbell v. Thomasville,* 6 Ga. App., 212.

It is a distinct business, which from its very nature admits of strict regulation, under the general police power of the State, by its municipalities, upon which that power may have been conferred. It stands legitimately in a different class from the business of selling soda, mineral waters, lemonade and the like. As was wittily said by the Attorney-General, upon the argument: "Near beer has made for itself a name and a place. It belongs in its own class, and it should not complain when the law shows respect for its position."

We are therefore of opinion that, being a recognized business, it is a legitimate subject of license taxation, and that the city of Charlotte, under its charter, has power to impose a license tax upon those who engage in it. *S. v. Irwin,* 126 N. C., 992; *Holland v. Isler,* 77 N. C., 1.

2. Is the ordinance discriminative? It is contended that the ordinance in question discriminates between persons of the same class, and makes an arbitrary classification without real ground of difference, and thus violates Article V, section 3, of the Constitution of this State. It has long been held in this State and elsewhere that a tax is uniform and does not discriminate when it is equal upon all persons belonging to the described class upon which it is imposed. *Gatlin v. Tarboro,* 78 N. C., 121; Burroughs on Taxation, sec. 77; *S. v. Worth,* 116 N. C., 1007; *Rosenbaum v. Powell,* 100 N. C., 525.

The ordinance in question levies the same tax upon all engaged in the business of selling near beer and other similar drinks as beverages containing as much as one-half of one per cent of alcohol, and it is admitted that near beer contains one and a half per cent of alcohol and comes within the terms of the ordinance. We think the law is therefore uniform, in that it bears equally upon all who come within its terms and are engaged in the character of business taxed by it. (721)

3. The next question presented by the appeal is whether or not the tax of $1,000 upon the business of selling near beer is unreasonable and prohibitory. The General Assembly of 1909 has recognized and legalized the sale of near beer by requiring from those who deal in it an annual license tax for the State of $20 and at least an equal sum for the counties. Section 63, chapter 438, p. 676, Laws 1909.

It therefore follows, as is said by the Supreme Court of Georgia, in a similar case, that, "Since the General Assembly, by the near beer tax act, has expressed the general policy of permitting its sale by those who pay the tax, the municipalities may not, in the absence of express charter authority, prohibit the sale entirely. They may, however, under the

usual general-welfare clause, enact reasonable regulations governing its sale." *Campbell v. Thomasville, supra.*

As municipal corporations have no inherent police powers, and can exercise only those conferred by the State, it of necessity follows that, in the absence of express charter authority, they cannot, directly, by taxation, prohibit or destroy a business legalized by the State. *S. v. Danenberg,* 150 N. C., 800, and authorities cited; 1 Dillon on Mun. Corp., sec. 89; Cooley on Taxation, 598; *Dobbins v. Los Angeles,* 195 U. S., 223. The contention here is that the tax destroys it.

It appears to be well settled that, unless the power to tax is transcended, the reasonableness or unreasonableness of a tax levied exclusively for revenue is a matter generally within the exclusive province of the legislative department of the State and is not a matter for the courts; but that when the license fee is demanded also as a police regulation, the courts will consider whether it is so unreasonable as to amount to a prohibition upon lawful vocations which cannot be prohibited. Tiedeman Police Powers, p. 277; *S. v. Hunt,* 129 N. C., 688; *Winston v. Beeson,* 135 N. C., 277.

The consensus of judicial decision is stated by Smith, in his work on Modern Mun. Corp., sec. 1455: "The authority to license and regulate particular privileges or occupations is usually regarded as a police power, but when license fees are imposed for the purpose of revenue they are taxes. Such license fees can only be considered as taxes when clearly authorized as such by the Legislature. When a revenue authority is conferred, the amount of the tax, unless limited by the grant, is left to the discretion of the municipality. But such a grant of authority (722) would not warrant taxes sufficiently to be prohibitory."

This is a fair statement of the law, with the added qualification that, in the absence of positive evidence to the contrary, such ordinances are presumed to be reasonable. 21 A. & E., 783, and cases cited in note 1.

In determining whether an ordinance is unreasonable, the courts cannot consider solely the probable effect of complying with the ordinance on the business of the party complaining. In Illinois it is held that such evidence is properly excluded. *Launder v. Chicago,* 11 Ill., 291. In Alabama it is held that "The reasonableness or unreasonableness of a license tax cannot be determined by the extent of the business of a single individual. There may be incompetence or negligence on his part, or other considerations affecting the extent of his business." *R. R. v. Attala,* 118 Ala., 362.

In fixing the proper license tax upon dealers in near beer and kindred drinks, we conclude, upon reason and precedent, that the municipal authorities may consider the question, both from the standpoint of reve-

nue and police regulation, and the cost thereof, provided they do not thereby prohibit and annihilate the business entirely.

Leavenworth v. Kansas, 15 Kan., 627, is an instructive case upon this point. The territory and population to be supplied is an important consideration in estimating the value of the right conferred. It is worth a great deal more to be permitted to conduct a business of this kind in a large city than in a small town, and a license tax that would be within the bounds of reason when imposed in Charlotte might be unreasonable and prohibitive if imposed in a small place. Other considerations that may properly enter into the matter are the cost of police surveillance and the propriety of reducing the number of saloons in order that such surveillance and supervision may be more effective and less costly.

It appears from the evidence in this record that, although near beer, properly made, is a nonintoxicating beverage, the sale of it furnishes extraordinary opportunities for the violation of the State prohibition law; that it is made by those who make beer, sold by those who sell beer, and drunk by those who drink beer, and that "it looks like beer, smells like beer and tastes like beer."

While these facts confer no power on municipalities to destroy or prohibit the business, they make it their undoubted duty to regulate and supervise it. The very possibilities which the business gives for palming off real beer and other intoxicating and prohibited drinks places it properly under the guardianship and control of (723) the police power.

Upon this idea it has been held that the State and, under its authority, the municipalities have the right to enact rules for the conduct of the most necessary and common occupations, when from their nature they afford peculiar opportunities for imposition and fraud. *Bazemore v. S.,* 121 Ga., 620; Cooley Const. Lim. (7 Ed.), 887; *Turner v. Maryland,* 107 U. S., 41; *Powell v. Pennsylvania,* 127 U. S., 684.

In this last case the Supreme Court held that the possibility that the manufacture of oleomargarine or imitation butter is or may be conducted in such a way as to baffle ordinary inspection is a ground for strict regulation, under the police power of the State, although the oleomargarine may be properly manufactured and no menace to health. See, also, *Dairy Co. v. Ohio,* 183 U. S., 245, and *Plumley v. Massachusetts,* 158 U. S., 461.

One of the recognized methods of regulation is by license taxation, which will reduce the area and extent of the business, without annihilating it, and thus bring it more easily within municipal control, as well as provide funds for the expense the municipality incurs.

Tiedeman, in his Police Powers, p. 275, says: "The evils growing out of some occupations may be such that their suppression can only be

attained to any appreciable degree by the imposing of a restraint upon the pursuit of such callings. For example, the keeping of saloons produces public evil in proportion to the number of low groggeries which are allowed to be opened; and in any event the evil is lessened by reducing the number of saloons of all grades of respectability. One of the most effective modes of restraining and limiting the number of saloons in any particular town or city is to require a heavy license of the keepers of them."

In *Ins. Co. v. Lewis,* 28 Montana, p. 490, the Court says: "No limitation is placed upon the purpose for which the license system may be employed, and it may be resorted to for the purpose of revenue, or for the purpose of regulation, or for both of such purposes, in the discretion and wisdom of the Legislature." See, also, *S. v. Camp,* Sing., 328; L. R. A., 635.

It appears from this record that, in the city of Charlotte, regulation of this traffic by such means, as well as others, had become imperative. At the time of the passage of the ordinance there were three exclusive near-beer saloons and seventy other places where the drink was extensively sold, and it appears that these places were general headquarters for the vagrant element; that a great majority of the people who frequent them were idle and immoral; that they require police
(724) supervision to keep order, and the chief of police of the city estimates that it will take two policemen for each saloon. And it further appears, from the testimony of the defendant himself, that some of those places were, in fact, engaged in selling real beer. Giving the ordinance the benefit of a presumption of reasonableness, we conclude that there are no facts contained in the record sufficient to overcome this presumption. We are confirmed in this conclusion by a statement made on the argument, and not denied, that there are now two near-beer saloons in Charlotte doing business in conformity to the ordinance.

4. As to the contention that the ordinance violates the Fourteenth Amendment of the Federal Constitution we need say but little. It has been long since settled that the Fourteenth Amendment, "broad and comprehensive as it is, was not designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations, to promote the health, peace and morals, education and good order of the people." *Barbier v. Connolly,* 113 U. S., 27; *In re Rahrer,* 140 U. S., 554.

Upon a review of the record, we are of opinion that there is

No error.

Cited: Parker v. Griffith, ante, 601; *Smith v. Wilkins,* 164 N. C., 141, 142.

STATE v. ED., GEORGE AND PINK STARNES.

(Filed 8 December, 1909.)

1. **Instructions Upon Findings—Criminal Cases—Formula—Appeal.**

While the Court has held that an instruction to the jury, where the testimony permits if "they believe the evidence," etc., will not constitute reversible error, it has been several times suggested as a better formula in such cases to charge, "If the jury find the facts to be as testified by the witness"; and in criminal cases it should further state if they are "satisfied beyond a reasonable doubt" that the facts are as testified to by the witnesses.

2. **Divine Worship—Interpretation of Statutes—Evidence.**

When it appears that the members of a certain family were accustomed to gather annually for a family reunion at their different homes, and that at some time during the day a religious service was usually had: *Held*, that testimony to the effect that defendant shot a pistol several times within one hundred yards of a residence when such service was going on, is not sufficient to sustain an indictment under Revisal, sec. 3706, which makes it a misdemeanor to disturb divine worship held at a place where people are accustomed to meet for divine worship, the evidence failing to show that defendant was in view of the meeting or that he was aware that religious services were being held.

3. **Same—Indictments—Picnics.**

A meeting of the kind described is fully protected from wrongful and willful interruption by sec. 3704 of the Revisal, but the charge is made under sec. 3406, and, on the facts presented, the defendant was entitled to the instruction, that if the jury should find the facts to be as testified, they would render a verdict of not guilty.

APPEAL from *Councill, J.*, at August Term, 1909, of CALD- (725) WELL.

Indictment for disturbing a religious congregation, under section 3706, Revisal 1905.

Defendant prayed the court to instruct the jury that, before the jury could convict the defendant, they must be satisfied beyond a reasonable doubt that the meeting was a religious meeting, and that the place was one where people were accustomed to assemble for divine services. This was refused, and defendant excepted. In this connection the court charged the jury that, if the evidence was believed, the place mentioned comes within the meaning of the statute. Defendant excepted to the refusal to give his prayer for instructions, and to the portion of the charge as given. Verdict of guilty, and judgment, and defendant appealed, assigning for error the charge as indicated.

Attorney-General for the State.

A. A. Whitener for defendant.

PER CURIAM: In several of our decisions it had been said that where the testimony permits, instead of charging the jury "if they believed the evidence," the better formula is to express the charge, "if the jury is satisfied that the facts are as testified," and for the reason chiefly that in criminal cases every essential feature of the crime should be established beyond a reasonable doubt; and, therefore, in such cases the formula should be, "if the jury are satisfied beyond a reasonable doubt that the facts are as testified," etc.; or if, by inadvertence, the trial judge uses the terms, "if the jury believe the evidence," in criminal cases, he should add, "if the jury believe the evidence beyond a reasonable doubt," etc.

We have not, however, in any case, held this to be a matter for reversible error. *S. v. R. R.*, 149 N. C., 508-512. But in the case before us we are of opinion that, on the testimony, there was error of a more serious nature indicated in the exceptions stated. Defendant was indicted, under section 3706, for disorderly conduct "at a place where people were accustomed to meet for divine worship, and while the people were there assembled for such worship," etc., and the evidence on the part of the State tended to show that this was a family reunion of the Yount family, which had been going on for ten or twelve (726) years, and quite a number of its members were in attendance. This reunion took the form of a general picnic, and it seems, from the testimony, to have been held at the houses of different members of the family—in this instance at the house of Mr. Elisha Keller, where Mrs. Carolina Yount resided; and at some time during the day a religious service was held, and was going on at the time when several pistol shots were heard about 100 yards from the place of meeting, and the evidence tended to show that defendant, George Starnes, did the shooting. There was no evidence to the effect that defendant was in view of the meeting, or that he knew that divine service was being conducted at the time; and we are of opinion that this was not a place that comes within the description or purview of section 3706, under which the bill was drawn. That section was intended to protect known and regularly established places of public worship, within the reasonable knowledge of the general public, and when it is fair to presume that they were put upon notice that divine service was likely to be going on whenever numbers of people were then assembled, and does not include an exceptional meeting of this kind, which assembles first at one house and then another of the members. Gatherings of the kind presented here, picnics, etc., come within the express provisions of section 3704 of the Code, but no charge is made against defendant under that section. As heretofore stated, the indictment is under section 3706, for disturbing unlawfully "religious worship at a place where people are accustomed to meet

for divine worship," and were then assembled for the purpose; and if he is convicted, it must be for the offense alleged against him in the bill of indictment.

On the testimony, defendant was entitled to the charge that, "on the testimony, if believed by the jury, they would acquit the defendant." There was error, and a new trial is awarded.

New trial.

STATE v. WILL SWINK.

(Filed 15 December, 1909.)

1. **Spirituous Liquors—Judgment—Motion to Arrest—General Law—Result of Election—Judicial Notice—Indictment.**

   A motion in arrest of judgment after conviction by defendant of violating the State prohibition laws, ch. 71, Public Laws 1908, extra session, for that the bill failed to charge that the election provided for had been held and resulted in favor of prohibition, will not be sustained. The courts take cognizance of an election of this general character, and also of the proclamation of the Governor which, under the provisions of the act, had the effect of determining the result of the election.

2. **Spirituous Liquors—Prohibition, State Law—Conviction—Punishment—Charter Provisions.**

   In this case the defendant was convicted of violating the State prohibition law, and the punishment is not confined to that prescribed by the charter of the city of Asheville.

3. **Power of Court—Witnesses—Contempt—Summary Punishment—Presence of Jury—Intimation of Opinion.**

   While the trial judge may summarily punish for contempt committed in the presence of the court, it is error to order the defendant's witness in the case into custody for perjury while on the witness-stand. This is an invasion of the rights of the party who had offered the witnesses and an intimation of opinion prohibited by statute.

APPEAL by defendant from *Ward, J.*, at April Term, 1909, of (727) BUNCOMBE.

Indictment for selling spirituous liquors. The defendant was convicted, and appealed.

The facts are stated in the opinion of the Court.

Attorney-General and George L. Jones for the State.
W. P. Brown and Jones & Williams for defendant.

BROWN, J. 1. The motion in arrest of judgment, because the bill fails to charge that the election provided for by chapter 71, Public Laws 1908, had been held and resulted in favor of prohibition, cannot be sustained.

In support of his position the learned counsel for the defendant relies on *S. v. Chambers,* 93 N. C., 600. We think, however, there is a distinction. In that case the statute provided for an election to be held in the town of Morganton. It was a local election, confined to a single town in the State. The election of 1908 was a general election, covering the entire State, and the entire State was to be governed by its result. No authority can be found which holds that an election of this general character need be alleged in the bill. In the text of Cyc., Vol. 16, p. 901, it is said: "Since judicial knowledge of official duties implies knowledge of the methods by which it is legally obtained, State courts judicially know the date of holding a general election or a special election provided for by a general law." And in Wigmore, sec. 2577, it is said: "All courts take notice, in one or another aspect, of facts concerning public elections." See, also, *Cokes v. State,* 55 Neb., 691. Moreover, the act of 1908 in express terms declares that "the proclamation by the
(728) Governor shall have the effect to determine the result of said election." All authorities hold that the courts take judicial notice of the proclamations of the executive. 16 Cyc., 904; Wigmore, sec. 2577.

2. The position that the punishment is limited to a fine of $50 or imprisonment for thirty days, as provided in the charter of the city of Asheville, is untenable. The city charter has reference only to a sale of liquor without license. The defendant is not indicted for such a sale, but simply for the sale of liquor contrary to the State prohibition law. To limit the punishment for a violation of the law to a fine of $50 or imprisonment for thirty days would be in direct conflict with the provisions of the prohibition act, and the act declares that all laws in conflict with it are expressly repealed.

3. It appears from the record that, during the progress of the trial, in the presence of the jury, and while Forest Phillips was on the stand as a witness for defendant, "the demeanor of the said Forest Phillips was bad and almost contemptuous, and it appearing to the court that some proceedings ought to be taken against him on account of his testimony, as well as his manner and obstinacy, the court, at the conclusion of the testimony, directed the sheriff to take charge of him, and also directed the solicitor to take such steps as were necessary." Defendant excepted.

In this we think the able and just judge who presided inadvertently committed an error, which fairly entitles the defendant to another trial.

The right of a *nisi prius* judge to order a witness or any one else into immediate custody for a contempt committed in the presence of the court in session is unquestioned. But the committing of a witness, in either a criminal or a civil action, into immediate custody for perjury in the presence of the jury is almost universally held to be an invasion of

the rights of the party offering the witness, and an intimation of opinion upon the part of the judge, prohibited by the statute. *S. v. Owenby,* 146 N. C., 677; *S. v. Dick,* 60 N. C., 440; 21 Enc. Pldg. & Prac., 998 *et seq.; Burke v. State,* 66 Ga., 157; *Taylor v. State,* 42 S. W., 384; *Golden v. State,* 75 Miss., 130; *Brandon v. State,* 75 Miss., 904; *Kitner v. State,* 45 Ind., 177; *Davidson v. Herring,* 48 N. Y. Sup., and 28 N. Y. Appel. Div., 402.

The right to punish summarily a contempt committed in the immediate presence of the court is necessary to maintain its dignity, but the necessity does not exist always for immediate commitment for perjury.

If, in the judge's opinion, there is such necessity, injury to the party offering the witness can be avoided by sending the jurors (729) out and keeping the action of the court from them.

New trial.

Cited: S. v. Johnson, 170 N. C., 692.

STATE v. GEORGE GREEN.

(Filed 23 December, 1909.)

Indictment—Definiteness—Failure to Work Road—Proof—Motion in Arrest.

In this case the motion in arrest of judgment should have been allowed, the warrant being fatally defective in failing to allege that defendant was assigned to work the road, for the failure of which he was tried and convicted, and the prosecution failing to negative the payment of one dollar allowed by law in lieu of service. *S. v. Lunsford,* 150 N. C., 862; *S. v. Neal,* 109 N. C., 858, cited and approved.

APPEAL from *Cooke, J.,* at January Term, 1909, of FRANKLIN.

Criminal prosecution for failure to work the public roads, heard on appeal from a justice's court.

The facts are stated in the opinion.

Attorney-General and George L. Jones for the State.
Defendant not represented in this Court.

HOKE, J. We have recently held, in *S. v. Lunsford,* 150 N. C., 862, that in every criminal prosecution, whether by indictment or warrant, or warrant taken in connection with the affidavit, the charge must be so stated as to show that a crime has been committed, and same must be described with sufficient certainty to inform the defendant of the nature

of the accusation against him, and to enable the court to proceed to judgment in case of conviction.

In the present case, and under several decisions of the Court, the warrant is fatally defective in failing to allege that defendant was assigned to work the road described and failing to negative the payment of the one dollar allowed by the law in lieu of service. *S. v. Neal,* 109 N. C., 859; *S. v. Baker,* 106 N. C., 758; *S. v. Pool,* 106 N. C., 698; *S. v. Smith,* 98 N. C., 747. The motion of defendant, therefore, must be allowed and judgment against him arrested.

Error.

Cited: S. v. Thomas, 169 N. C., 149.

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(730)

STATE v. RICHARD McCLOUD.

(Filed 23 December, 1909.)

False Pretense—Special Verdict—Intent—Verdict Defective—Appeal and Error—New Trial.

Defendant being indicted under Revisal, 3432, the jury found, by special verdict, that a certain mercantile company issued aluminum checks, redeemable in merchandise, to the laborers of a certain lumber company whose names were furnished it by the latter company, and that defendant obtained one of these checks upon his false statement that he was one B., a laborer whose name had thus been furnished, and that he obtained no goods on the check: *Held,* no judgment on the verdict can be rendered, and a new trial ordered; the court is confined to the facts found, and there was a failure of the jury to find defendant's intent to defraud, and also to find the facts of the agreement or arrangements existing between the mercantile and lumber companies respecting the issuance by the former of these checks.

APPEAL from *Peebles, J.,* at May Term, 1909, of BEAUFORT.

This was an indictment under section 3432, Revisal.

The jury returned the following special verdict: "The Clarke-Smith Company was a corporation, engaged in mercantile business at Belhaven. It issued aluminum checks to employees of the Roper Lumber Company, representing goods, and good for amount in goods named in check. Henry Boyd was a laborer for said Roper Lumber Company, and his name had been furnished by said Roper Lumber Company, as its laborer, to said Clarke-Smith Company. Defendant applied to said Clarke-Smith Company for a one-dollar check. The clerk asked the defendant his name. He told him it was Henry Boyd; thereupon the clerk furnished

him a check good for one dollar and representing one dollar in goods. The clerk said he thought defendant's conduct suspicious. The next day the defendant came back and asked for another dollar check. Clerk refused, in consequence of the fact that Boyd had been in in the meantime. No goods were furnished on the check. Defendant's name was not Henry Boyd, and Boyd had not authorized him to call for his check. If, upon this finding, the court is of the opinion that defendant is guilty, the jury find him guilty. If the court is of the opinion that he is not guilty, we find him not guilty." Whereupon the court adjudged the defendant not guilty, and the solicitor appealed.

Attorney-General and G. L. Jones for the State.
No counsel for defendant.

MANNING, J., after stating the case: The special verdict found in this case is defective, and the facts found by the jury are not sufficient to warrant any judgment thereon. In determining the guilt or (731) innocence of a defendant upon a special verdict, the court is confined to the facts found, and is not at liberty to infer anything not directly found. *S. v. Custer,* 65 N. C., 339; *S. v. Hanner,* 143 N. C., 632, and cases cited. The special verdict does not find the intent with which the defendant made the statements. "The *intent* to cheat and defraud the prosecutor is an essential ingredient in the crime of false pretense. The verdict should have found that fact distinctly, the one way or the other; either that the defendant made the false representation with intent to cheat, or that he made the statement under an honest conviction of its truth." *S. v. Blue,* 84 N. C., 807; *S. v. Oakley,* 103 N. C., 408. In the absence of such definite finding, the uniform practice is to grant a new trial. *S. v. Bray,* 89 N. C., 480; *S. v. Blue, supra; S. v. Oakley, supra; S. v. Hanner, supra.* Nor is there a finding showing under what agreement or arrangement the Clarke-Smith Company issued its aluminum checks to the laborers of the Roper Lumber Company. The aluminum check was the promise to pay of the Clarke-Smith Company, payable or redeemable in goods, as we interpret the verdict. We are, therefore, of the opinion that the judgment should be reversed, the special verdict set aside and a new trial had.

Error. New trial.

Cited: S. v. Colonial Club, 154 N. C., 185; *S. v. Fenner,* 166 N. C., 250; *S. v. Allen, ibid.,* 267.

STATE v. JOE FOWLER.

(Filed 23 December, 1909.)

1. **Murder—Manslaughter—Deadly Weapon—Unlawful Killing—Malice—Presumption.**

When the killing with a deadly weapon is established or admitted, and the plea is self-defense, two presumptions arise: (1) that the killing was unlawful; and (2) that it was done with malice.

2. **Murder—Manslaughter—Unlawful Killing—Malice.**

An unlawful killing is manslaughter, and when it is done with malice, it is at least murder in the second degree.

3. **Same—Self-defense—Presumption—Burden of Proof.**

When the killing with a deadly weapon is established or admitted, and the defendant's plea is self-defense, it is for him to rebut the presumption that it was unlawful or done with malice, and upon his rebutting only the presumption of malice, the presumption that it was unlawfully done yet stands, making him guilty of manslaughter.

4. **Same—Instructions—Without Prejudice—Harmless Error.**

When the killing with a deadly weapon is shown, and the plea is self-defense, it is not error to defendant's prejudice for the court to refuse to charge that there was no evidence to warrant a verdict of manslaughter, the jury having rejected defendant's evidence of self-defense and found him guilty of manslaughter, as otherwise it would have been their duty to convict of murder in the second degree.

5. **Murder—Manslaughter—Instructions—Construed as a Whole—Harmless Error.**

A charge to the jury is not solely to be interpreted by picking out therefrom certain expressions; and when, upon a trial for the unlawful killing of another, it is upon the defendant, under the plea of self-defense, to rebut the presumption that the killing was unlawful and with malice, and the charge is correct when construed as a whole, the expression, that if the jury were "left in doubt" as to whether defendant slew in self-defense they should return a verdict of manslaughter, is not of itself reversible error.

WALKER, J., concurs in result.

(732) APPEAL from *Justice, J.*, at October Term, 1909, of POLK.

Indictment for murder in second degree. The defendant was convicted of manslaughter, and from the judgment pronounced, appealed.

Attorney-General and George L. Jones for the State.
Shipman & Williams for defendant.

BROWN, J. This appeal presents two assignments of error.

1. Did the judge err in submitting to the jury the question of manslaughter? Under *S. v. Quick,* 150 N. C., 820, such an error is without prejudice to the defendant, and he cannot complain. When, as in this case, the plea is self-defense and the killing with a deadly weapon is established or admitted, two presumptions arise—(1) that the killing was unlawful; (2) that it was done with malice.

An unlawful killing is manslaughter, and when there is the added element of malice it is murder in the second degree. When the defendant takes up the laboring oar he must rebut both presumptions—the presumption that the killing was unlawful and the presumption that it was done with malice. If he stops when he has rebutted the presumption of malice, the presumption that the killing was unlawful still stands, and, unless rebutted, the defendant is guilty of manslaughter. This is a fair deduction from the cases in this State. *S. v. Hogan,* 131 N. C., 802; *S. v. Brittain,* 89 N. C., 501, 502.

At the request of defendant, the judge charged the jury very explicitly that if they should find from the evidence offered by the defendant that the killing occurred under circumstances claimed by him (733) and testified to by his witnesses, they should return a verdict of not guilty.

The jury discarded defendant's plea, and if, as now argued by him, there was nothing in the evidence to warrant a verdict of manslaughter, it was the duty of the jury to convict of murder in second degree.

It necessarily follows that, under such circumstances, the defendant cannot complain of a verdict for manslaughter, a lesser degree of homicide. An error on the side of mercy is not reversible. But we think there is in this case, as in *S. v. Quick,* evidence upon which a verdict of manslaughter may be supported.

2. His Honor stated to the jury in one part of his charge that if they were "left in doubt" as to whether the defendant slew in self-defense, they should return a verdict of manslaughter.

This was erroneous, and if the objectionable words stood alone, as in *S. v. Clark,* 134 N. C., 698, we would award a new trial.

In the case at bar, taking the charge as a whole, it is a very clear and luminous exposition of the law of homicide.

A charge is not to be interpreted by picking out an expression here and there. "It is to be considered as a whole, in the same connection in which it was given and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." 2 Thompson on Trials, sec. 2407; *S. v. Exum,*

138 N. C., 602; *Everett v. Spencer,* 122 N. C., 1010; *Westbrook v. Wilson,* 135 N. C., 402.

His Honor gave this prayer in the words in which it was expressed: "That the prisoner is not required to rebut the presumption of malice arising from the killing with a deadly weapon beyond a reasonable doubt, but to the satisfaction of the jury." The instruction that the plea of self-defense must be sustained only to the satisfaction of the jury was repeated so often and made so plain in the charge that we cannot think that the jurors were misled.

No error.

WALKER, J., concurs in result.

Cited: S. v. Thomson, 153 N. C., 621; *S. v. Cox, ibid.,* 642; *S. v. Rowe,* 155 N. C., 447, 448; *S. v. Lane,* 166 N. C., 339; *S. v. Cameron, ibid.,* 384.

MEMORANDUM CASES

These cases, left out of former volumes, are now printed by request.

FALL TERM, 1908.

S. (appellant) *v.* JOHN MARTIN, from Washington. *Per Curiam,* December 22. Reversed under *S. v. Burchfield,* 149 N. C., 537.

J. D. ODOM, TRUSTEE, AND ROCKY MOUNT SUPPLY CO. *v.* W. H. CLARK (appellant). *Per Curiam,* September 23. Affirmed. *Claude Kitchin* and *W. E. Daniel* for plaintiff; *Day, Bell & Dunn, Murray Allen* and *E. L. Travis* for defendant.

S. *v.* JOHN MORTON (appellant), from Craven. *Per Curiam,* September 23. Affirmed. *Attorney-General, Hayden Clement* and *D. L. Ward* for plaintiff; *Moore & Dunn* and *D. E. Henderson* for defendant.

THE CABLE CO. (appellant) *v.* W. T. HADDER, from Craven. *Per Curiam,* September 23. Affirmed. *R. A. Nunn* for plaintiff; *D. L. Ward* for defendant.

E. J. WHITE, JR., *v.* CITY OF NEW BERN (appellant), from Craven. *Per Curiam,* September 30. Affirmed. *D. L. Ward* for plaintiff; *W. D. McIver* for defendant.

J. P. MCCULLEN *v.* S. A. L. RAILWAY CO. (appellant), from Craven. *Per Curiam,* September 30. Affirmed. *W. D. McIver* for plaintiff; *Day, Bell & Allen* and *W. W. Clark* for defendant.

J. M. ARNOLD (appellant) *v.* MOYER HAHN, from Craven *Per Curiam,* September 23. Affirmed. *W. D. McIver* and *Moore & Dunn* for plaintiff; *M. DeW. Stevenson* and *Simmons, Ward & Allen* for defendant.

L. W. BRAME *v.* S. W. CLARK (appellant), from Craven. September 30. Affirmed. *A. C. Zollicoffer* and *Thomas M. Pittman* for plaintiff; *T. T. Hicks* for defendant.

W. S. BAILEY *v.* A. C. L. RAILWAY CO. (appellant), from Nash. *Per Curiam,* September 30. Affirmed. *F. S. Spruill* for defendant.

J. G. STATON *v.* J. I. GILLIS (appellant), from Martin. *Per Curiam,* October 14. Affirmed. *H. W. Stubbs* for plaintiff; *Wheeler Martin, W. W. Clark* and *H. A. Gilliam* for defendant.

W. H. MANN ET AL. (appellants) *v.* GEORGE S. BAKER ET AL., from Franklin. *Per Curiam,* September 29. Affirmed. *B. B. Massenburg* for plaintiff; *Bickett & White* for defendant.

CHARLES F. DUNN (appellant) *v.* JOHN L. WHITE AND NETA WHITE, from Lenoir. *Per Curiam,* October 7. Affirmed. *Charles F. Dunn* for plaintiff; *G. V. Cowper* and *Loftin, Varser & Dawson* for defendant.

W. D. POLLOCK *v.* CHARLES F. DUNN (appellant), from Lenoir. *Per Curiam,* October 7. Affirmed. *Y. T. Ormond, E. M. Land* and *G. V. Cowper* for plaintiff; *Charles F. Dunn* for defendant.

ALEX. TILGHMAN *v.* W. H. WATERS (appellant), from Lenoir. *Per Curiam,* October 6. Affirmed. *Wooten & Clark* for plaintiff; *Rouse & Land* and *H. E. Shaw* for defendant.

FLEISHMAN, MORRIS & Co. *v.* GEORGE E. ROBERTSON (appellant), from Wake. *Per Curiam.* Allowed. *Peele & Maynard* and *R. N. Simms* for plaintiff.

S. *v.* J. O. WILLIAMSON (appellant), from Columbus. *Per Curiam,* October 14. Affirmed. *Attorney-General, D. L. Lenoir, J. B. Schulken* and *N. A. Sinclair* for plaintiff; *Donald MacRackan & McLean* for defendant.

DONALD MACRACKAN ET AL. *v.* JERRY MCKINNON (appellant), from Columbus. *Per Curiam,* October 14. Affirmed. *D. J. Lewis* and *J. B. Schulken* for plaintiff; *Meares & Ruark* for defendant.

JOE BROWN *v.* SOUTHERN RAILWAY Co. (appellant), from Davidson. *Per Curiam,* November 18. Affirmed. *J. A. Barringer* for plaintiff; *Manly & Hendren* for defendant.

A. F. MESSICK GROCERY Co. *v.* C. H. JONES (appellant), from Forsyth. *Per Curiam,* November 25. Affirmed. *Louis M. Swink* for plaintiff; *Manly & Hendren* for defendant.

J. H. BROWN, ADMR. (appellant), *v.* NORFOLK AND WESTERN RAILROAD Co., from Forsyth. *Per Curiam,* November 19. Affirmed. *Lindsay Patterson* for plaintiff; *Watson, Buxton & Watson* for defendant.

HENRY A. HAINES ET AL. *v.* J. A. SMITH ET AL. (appellants), from Gaston. *Per Curiam,* December 2. No error. *O. F. Mason* and *Clarkson & Duls* for plaintiff; *A. G. Mangum* and *Tillett & Guthrie* for defendant.

S. *v.* J. E. RAMSEY AND ELIZA GILLESPIE (appellants), from Burke. *Per Curiam,* December 9. Affirmed. *Attorney-General and H. Clement* for the State; *John M. Mull* and *Riddle & Hufham* for defendant.

S. *v.* THOMAS MOSES (appellant), from Burke. *Per Curiam,* December 9. It appearing that defendant has broken jail and is still at large, the appeal is dismissed. *Attorney-General and H. Clement* for the State; *John M. Mull* and *Riddle & Hufham* for defendant.

ELIZA SHOFFNER ET AL. *v.* LIFE INSURANCE Co. OF VIRGINIA (appellant), from Buncombe. *Per Curiam,* December 16. Appeal dismissed. *M. W. Brown* and *Zeb F. Curtis* for plaintiff; *Frank Carter* and *H. C. Chedester* for defendant.

P. T. BRYSON ET AL. (appellants) *v.* SOUTHERN RAILWAY Co., from Haywood. *Per Curiam,* December 22. Affirmed. *W. J. Hannah* for plaintiff; *Moore & Rollins* for defendant.

MEMORANDUM CASES.

MRS. JENNIE R. MCFAYDEN ET AL. *v.* J. P. SWIFT (appellant), from Haywood. *Per Curiam,* December 22. Affirmed. *W. J. Hannah* for defendant.

SPRING TERM, 1909.

GEORGE H. WINSLOW *v.* THE NORFOLK HARDWOOD CO. (appellant), from Perquimans. *Per Curiam,* February 24. Affirmed. *C. E. Thompson* and *Charles Whedbee* for plaintiff; *Pruden & Pruden* and *Shepherd & Shepherd* for defendant.

NATIONAL FINANCE *v.* W. H. S. BURGWYN (appellant), from Halifax. *Per Curiam,* February 24. Affirmed. *W. H. S. Burgwyn, G. C. Green* and *E. L. Travis* for defendant.

GEORGE E. CARMAN (appellant) *v.* J. T. BENTHALL AND R. T. BARNES, from Hertford. *Per Curiam,* February 24. Affirmed. *Winborne & Lawrence* for plaintiff; *D. C. Barnes* and *Murray Allen* for defendant.

C. D. SMITH & Co. *v.* S. M. MEMBY (appellant), from Pitt. *Per Curiam,* February 24. Affirmed on authority of *Norton v. McLaurin,* 125 N. C., 185; *Pepper v. Clegg,* 132 N. C., 112. *Julius Brown* for defendant.

EDW. HAMMOND (appellant) *v.* A. C. L. RAILWAY CO., from Craven. *Per Curiam,* March. Affirmed. *R. Nunn* and *W. D. McIver* for plaintiff; *Moore & Dunn* for defendant.

J. A. MIZELL ET AL. *v.* W. C. MIZELL (appellant), from Martin. *Per Curiam,* March 17. Affirmed. *A. O. Gaylord* for plaintiff; *Winston & Everett* for defendant.

ELLIS *Koonce* (appellant) *v.* A. C. L. RAILWAY CO., from Wilson. *Per Curiam,* March 17. Affirmed. *C. C. Daniels* for plaintiff; *F. A. Woodard* and *Connor & Connor* for defendant.

EMMA E. LANIER *v.* FRANK P. RAYNOR AND WIFE (appellants), from Martin. *Per Curiam,* March 17. Affirmed. *Winston & Everett* and *S. A. Newell* for plaintiff; *Harry W. Stubbs* and *Martin & Critcher* for defendant.

R. J. SANDLIN *v.* DOVER AND SOUTHBOUND RAILROAD CO. ET AL. (appellants), from Duplin. *Per Curiam,* March 10. Affirmed. *Kerr & Gavin* for plaintiff; *Stevens, Beasley & Weeks* for defendant.

CHARLES F. DUNN (appellant) *v.* JOHN L. WHITE AND NETA WHITE, from Lenoir. *Per Curiam,* March 10. Affirmed. *Charles F. Dunn* for plaintiff; *G. V. Cowper* and *J. Frank Wooten* for defendant.

GARYSBURG MFG. CO. (appellant) *v.* J. A. ROWE, from Pender. *Per Curiam,* May 5. Affirmed. *E. K. Bryan* and *E. L. Larkins* for plaintiff; *Stevens, Beasley & Weeks* and *Murray Allen* for defendant.

OLIVE ARCHER, ADMX. (appellant), *v.* JOHN L. ROPER LUMBER CO., from Onslow. *Per Curiam,* March 11. Affirmed. *D. E. Henderson for* plaintiff.

EUGENE C. RAYNOR *v.* A. C. L. RAILWAY CO. AND SOUTHERN RAILWAY CO. (appellants), from Lenoir. *Per Curiam,* May 5. Affirmed. *E. R. Wooten* and *G. G. Moore* for plaintiff; *Rouse & Land* for defendant.

RHEINSTEIN DRY GOODS CO. (appellants) *v.* BETTIE McDOUGALL ET AL., from New Hanover. *Per Curiam,* May 25. Petition dismissed. *E. K. Bryan* for plaintiff; *Walter H. Neal, H. McClammy* and *M. L. John* for defendant.

S. *v.* LEWIS FREEMAN (appellant), from Cumberland. *Per Curiam,* March 24. Affirmed. *Attorney-General* for the State; *T. H. Sutton* and *C. W. Broadfoot* for defendant.

E. S. BOOTH (appellant) *v.* W. T. CARRINGTON LUMBER CO., from Durham. *Per Curiam,* April 14. Affirmed. *Manning & Foushee* for plaintiff; *Aycock & Winston* and *Bryant & Brogden* for defendant.

S. *v.* MAKE WATTS AND SALLIE RECTOR (appellants), from Iredell. *Per Curiam,* May 19. Affirmed. *L. C. Caldwell* for defendants.

SAMUEL DORSETT, BY NEXT FRIEND (appellant), *v.* C. W. BARBEE, from Forsyth. *Per Curiam,* April 21. Affirmed. *J. E. Alexander* and *Manly & Hendren* for plaintiff; *Watson, Buxton & Watson* and *D. H. Blair* for defendant.

ROBERT BALLARD *v.* GEORGE H. BELLINGER (appellant), from Mecklenburg. *Per curiam,* April 28. Affirmed. *Shannonhouse & Jones* for plaintiff; *Tillett & Guthrie* for defendants.

HARPER FURNITURE CO. (appellant) *v.* SOUTHERN EXPRESS CO., from Caldwell. *Per Curiam,* May 19. CONNOR, J., not sitting, and the other justices being evenly divided in opinion. Judgment affirmed. *Jones & Whisnant* for plaintiff; *W. C. Newland* and *J. A. Barringer* for defendant.

W. L. LAMBERT ET AL. (appellants), *v. H. T. Williams* ET AL., from Alexander. *Per Curiam,* April 28. Judge having found that only forty days was allowed, and case was not served within that time, petition for *certiorari* is denied. *J. B. Connelly* for plaintiff.

S. (appellant) *v.* W. S. DANIELS, from McDowell. *Per Curiam,* May 12. Affirmed. *Attorney-General* for the State.

S. *v.* JIM LOGAN (appellant), from Rutherford. *Per Curiam,* May 5. Petition for *certiorari* denied. *Attorney-General* for the State.

GLASPY NEWMAN *v.* ASHEVILLE BRICK AND TILE CO. (appellant), from Henderson. *Per Curiam,* May 19. Affirmed. *Charles E. Toms* and *Moore & Rollins* for plaintiff; *Smith & Schenck* and *Murray Allen* for defendant.

FALL TERM, 1909.

L. W. FOREHAND (appellant) *v.* NORFOLK AND SOUTHERN RAILWAY Co., from Camden. *Per Curiam,* September 15. Affirmed. *C. E. Thompson* and *Aydlett & Ehringhaus* for plaintiff; *Pruden & Pruden* and *Shepherd & Shepherd* for defendant.

EUREKA LUMBER Co. (appellant) *v.* JOHN R. HARRISON ET AL., from Beaufort. *Per Curiam,* September 22. Judgment of nonsuit affirmed. *W. C. Rodman* for plaintiff; *Small, MacLean & McMullen* for defendants.

S. *v.* JOHN GIBSON (appellant), from Craven. *Per Curiam,* September 29. Affirmed. *Attorney-General* for the State; *R. A. Nunn* for defendant.

L. C. CARROLL *v.* D. P. BIBLE ET AL. (appellants), from Carteret. *Per Curiam,* September 29. Affirmed. *Simmons, Ward & Allen* for plaintiff; *Abernathy & Davis* for defendants.

J. L. TAYLOR ET AL. (appellants) *v.* DANEY TAYLOR ET AL., from Martin. *Per Curiam,* September 29. Affirmed. *Martin & Critcher* for plaintiffs; *A. R. Dunning* for defendants.

ROBERT J. BRASWELL *v.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION (appellant). *Per Curiam,* September 29. Affirmed. *Gilliam & Clark* for plaintiff; *W. O. Howard* for defendant.

JOHN PARKER ET AL. *v.* CHARLES F. DUNN ET AL. (appellants), from Lenoir. *Per Curiam,* October 13. Affirmed. *W. D. Pollock* and *G. V. Cowper* for plaintiffs; *C. F. Dunn* for defendants.

L. F. SWAIN *v.* A. C. L. RAILWAY Co. (appellant), from Onslow. *Per Curiam,* October 1. Affirmed. *Duffy & Davis* and *Frank Thompson* for defendant.

H. WEIL BROS. (appellants) *v.* W. S. UZZELL AND WIFE, from Lenoir. *Per Curiam,* October 14. Affirmed. *G. V. Cowper* and *Loftin, Varser & Dawson* for plaintiffs; *H. E. Shaw, Aycock & Winston* and *Rouse & Land* for defendants.

S. *v.* W. H. MANNING (appellant), from Johnston. *Per Curiam,* October 13. Affirmed. *Attorney-General* and *G. L. Jones* for the State; *Wellons & Morgan* and *S. S. Holt* for defendant.

J. W. DARDEN *v.* A. C. L. RAILWAY Co. (appellant), from Johnston. *Per Curiam,* October 13. Affirmed. *Pou & Brooks* for plaintiff; *E. S. Abell* for defendant.

N. A. SPENCE *v.* TELEGRAPH Co. (appellant), from Wake. *Per Curiam,* October 13. Affirmed. *James H. Pou* and *J. C. L. Harris* for plaintiff; *P. H. Busbee* and *Womack & Pace* for defendant.

F. B. PERRY (appellant) *v.* WILLIAM PERRY, EXR., from Wake. *Per Curiam,* October 1. Affirmed on authority of *Calvert v. Peebles,* 82

N. C., 338. *B. C. Beckwith* for plaintiff; *Peele & Maynard* and *Aycock & Winston* for defendant.

J. ROWAN ROGERS *v.* GLENWOOD LAND Co., from Wake. *Per Curiam,* October 13. Affirmed. *Holden & Bunn* for plaintiff; *Douglass & Lyon* for defendant.

R. D. HONEYCUTT *v.* J. E. WATKINS ET AL. (appellants) from Wake. *Per Curiam,* October 13. Appeal dismissed. *B. C. Beckwith* for plaintiff; *W. J. Peele* for defendant.

S. *v.* ED. GREEN (appellant), from Moore. *Per Curiam,* November 3. Affirmed. *Attorney-General* for the State; *Douglass & Lyon* for defendant.

T. C. DUNLAP *v.* J. J. LITTLE (appellant), from Anson. *Per Curiam,* November 3. Affirmed. *Robinson & Caudle* for plaintiff; *McLendon & Thomas* for defendant.

E. S. ALLEN *v.* W. U. TELEGRAPH Co. (appellant), from Alamance. *Per Curiam,* November 3. Affirmed. *King & Kimball* and *T. S. Beall* for defendant.

BURLINGTON LUMBER Co. *v.* SOUTHERN RAILWAY Co. (appellant), from Alamance. *Per Curiam,* November 24. Affirmed. *W. H. Carroll* for plaintiff; *Parker & Parker* for defendant.

J. C. SIMMONS DRUG Co. *v.* SOUTHERN RAILWAY Co. (appellant), from Alamance. *Per Curiam,* November 11. Affirmed. *B. A. Hall* for plaintiff; *Parker & Parker* for defendant.

J. M. LAMB (J. T. Wilson & Co.) (appellant) *v.* SOUTHERN RAILWAY Co., from Rowan. *Per Curiam,* November 17. Affirmed. *J. J. Stewart* for plaintiff; *Linn & Linn* for defendant.

J. W. LEMONS AND A. M. VARNER *v.* L. & N. RAILROAD Co. (appellants), from Montgomery. *Per Curiam,* November 11. Affirmed. *R. T. Poole* for plaintiffs; *Gibson & Russell* for defendant.

WILLIAM M. COX *v.* ABERDEEN AND ASHEBORO RAILROAD Co. (appellant), from Randolph. *Per Curiam,* November 11. Affirmed. *Elijah Moffitt* and *Morehead & Sapp* for plaintiff; *J. T. Brittain, J. A. Spence, U. L. Spence* and *Adams, Jerome & Armfield* for defendant.

ARTHUR L. KIRBY, BY NEXT FRIEND (appellant) *v.* THE GRABBS MFG. Co., from Forsyth. *Per Curiam,* November 17. Affirmed. *Watson, Buxton & Watson* for plaintiff; *Lindsay Patterson* and *Manly & Hendren* for defendant.

GEORGIA MFG. Co. (appellant) *v.* O. W. KERNER ET AL., from Forsyth. *Per Curiam,* November 17. Affirmed. *L. M. Swink* for plaintiff; *Watson, Buxton & Watson* for defendant.

W. L. DOUGLAS SHOE CO. *v.* RUSSELL L. VAUGHAN ET AL. (appellants), from Forsyth. *Per Curiam,* November 17. Affirmed. *A. H. Eller* for plaintiff; *L. M. Swink* for defendants.

S. *v.* E. C. BLACKMAN (appellant), from Mecklenburg. *Per Curiam,* November 24. Affirmed. *Attorney-General* and *G. L. Jones* for the State; *Jake F. Newell* for defendant.

R. F. FOWLER *v.* SOUTHERN RAILWAY CO. (appellant), from Cabarrus. *Per Curiam,* December 8. - Affirmed. *Montgomery & Crowell* for plaintiff; *L. C. Caldwell* and *L. T. Hartsell* for defendant.

WILLIAM D. HOLLINGSWORTH (appellant) *v.* THE CHADWICK-HOSKINS CO., from Mecklenburg. *Per Curiam,* December 15. Affirmed. *J. D. McCall* and *B. Nixon* for plaintiff; *Tillett & Guthrie* for defendant.

S. *v.* CALVIN PITTS (appellant), from Catawba. *Per Curiam.* December 8. Affirmed on authority of *State v. Railway,* 142 N. C., 596. *Attorney-General* and *G. L. Jones* for the State; *W. A. Self, C. W. Bagley* and *A. A. Whitener* for defendant.

B. F. NOBLETT ET AL. (appellants) *v.* JAMES NOBLETT, from Rutherford. *Per Curiam,* December 15. Affirmed. *D. F. Morrow* for plaintiff.

J. C. HUDSON, ADMR. (appellant) *v.* SOUTHERN RAILWAY CO., from Burke. *Per Curiam,* December 15. Affirmed. *J. M. Mull, J. T. Perkins* and *Avery & Erwin* for plaintiff; *S. J. Ervin* for defendant.

L. B. CRAWFORD, ADMR., *v.* SOUTHERN RAILWAY CO. (appellant), from McDowell. *Per Curiam,* December 15. Affirmed. *Hudgins, Watson & Johnston* and *Pless & Winborne* for plaintiff; *S. J. Ervin* for defendant.

CLARISSA L. LOWERY *v.* THE SOUTH AND WESTERN RAILROAD CO. ET AL., from McDowell. *Per Curiam,* December 15. Affirmed on authority of *Kimberly v. Howard,* 143 N. C., 398. *Avery & Avery* and *W. T. Morgan* for plaintiff; *Hudgins, Watson & Johnston* for defendant.

CHARLES E. MERRILL *v.* SOUTHERN RAILWAY CO. ET AL. (appellants), from Buncombe. *Per Curiam,* December 23. Reversed. CLARK, C. J., did not sit. *Locke Craig, J. H. Merrimon* and *J. G. Merrimon* for plaintiff; *W. B. Rodman* and *Moore & Rollins* for defendants.

M. E. COZARD ET AL. *v.* HENRY M. MCADEN ET AL. (appellants), from Graham. *Per Curiam,* December 23. The Court being evenly divided in opinion (HOKE, J., not sitting; CLARK, C. J., and MANNING, J., voting to affirm; WALKER and BROWN, JJ., voting to reverse), the judgment below stands affirmed. *Zebulon Weaver, J. D. Murphy, F. L. Johnson* and *T. A. Morphew* for plaintiffs; *Dillard & Bell* and *Merrick & Barnard* for defendants.

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ABATEMENT. See Damages, Process.

1. *Possessory Action—Title—Death of Party.*—An action for the possession of land involving title does not abate by the death of a party except by order of the court. Revisal, sec. 415. *Moore v. Moore*, 555.
2. *Order of Court—Next Term — Criminal Term — Summons — Service—Reasonable Time.*—In an action for possession of lands involving title, it appeared that the plaintiff claimed under a deed from the defendant and his wife, and that, the death of the defendant being suggested, the court ordered that his heirs be made parties defendant. No process or notice being issued or given under this order, the court again ordered that notice issue or the action abate at the next term. A criminal term intervened, but before the next civil term, all the heirs, at least those resident within the State, had been served, and this within two years from the date of the death of their ancestor: *Held*, (1) the second order, by fair intendment, meant that the action should abate if process on the heirs was not served before the next civil term; (2) the defendants' motion for abatement should be denied, it appearing that the service upon the heirs was made within two years after the death of the ancestor, within the time fixed by the order, and that the mother of the heirs continued to be a party defendant. *Ibid.*

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ACTIONS.

1. *Suits—Causes—One Cause.*—Plaintiff alleging that defendants destroyed a certain paper-writing in which her deceased father appointed to her certain of his real and personal property under a parol trust in a deed he had theretofore made, sets out one cause of action. *Ricks v. Wilson*, 46.
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Subsequent Trial—Incompetency.—Admissions made by defendants' counsel in their presence, for the purpose of preventing a continuance of the preliminary hearing of an indictment against them, are inadmissible under defendants' objection in the Superior Court, the object and reason for their admission having ceased. *S. v. Butler*, 672.

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APPEAL AND ERROR. See Courts.

1. *Forma Pauperis—Trial Judge—Discretion.*—An appeal will not lie from the decision of the trial court in refusing a motion to disallow the continued prosecution of a suit in *forma pauperis*, it being within his discretion. *Modlin v. Insurance Co.*, 35.

2. *Parties—Order to Make Parties—Objections and Exceptions—Demurrer.* When no exception is taken in the court below to an order making a defendant a party in his additional capacity as administrator, a demurrer that he was not made a party as administrator will not be considered on appeal. *Ricks v. Wilson*, 46.

3. *Fragmentary Appeal—Appeal Dismissed.*—An appeal from a judgment on an agreement that if negligence on certain issues be found for plaintiff a referee shall be appointed to assess the damages, is premature and will be dismissed, when the issues are thus found but the amount of damages has not been ascertained or adjudged; and this rule is adhered to in this case, though both parties request a decision. *Richardson v. Express Co.*, 60.

4. *Reversed on Merits—Judgment Modified—Costs.*—On this appeal, the plaintiff (appellant) having succeeded upon the substantial merits of the case, and the judgment below being modified upon admission of plaintiff's counsel, the defendants, not appealing as to that matter, are taxed with the costs of appeal. *Williams v. Dunn*, 107.

5. *Executors and Administrators — Debts — Judicial Sales — Judgment, Motion to Set Aside—Findings.*—The facts found by the judge of the Superior Court, having evidence to support them, are conclusive on appeal from his denial of a motion to set aside a judgment directing that decedent's lands be sold by his personal representative to pay his debts. Clark's Code, sec. 417. *Yarborough v. Moore*, 116.

6. *Agreement of Time to Serve Case—How Computed—Sunday.*—In computing the time wherein a case on appeal may be served under an agreement, when, by excluding the first, the last day falls on Sunday, service on the next succeeding day is sufficient. Clark's Code, sec. 596. *Lumber Co. v. Rowe*, 130.

7. *Bill of Review—Superior Court—Judgment—Supreme Court.*—An action commenced in the Superior Court, in the nature of a bill of review in equity, will not lie to correct an alleged error apparent upon the face of a final judgment, where such judgment has been affirmed on appeal by the Supreme Court. *Hunter v. Nelson*, 184.

8. *Same—Procedure.*—In such case the remedy is by petition to rehear, prosecuted according to the rules of and addressed to the Supreme Court. *Ibid.*

9. *Reference—Findings—Issues—Exceptions—Judgments—Appeal Premature.*—An appeal is premature from an order of the judge to submit to the jury issues raised by exceptions to referee's report, when the order of reference appears to have been made without objection. The practice is to proceed with the inquiry, and appeal from the final judgment or a judgment in the nature of one. *Riley v. Sears*, 187.

10. *Expert Witness—Qualification — Record — Evidence Required.*—When evidence is offered and ruled out by the trial judge the burden is upon the appellant to show on appeal that prejudicial error was committed.

APPEAL AND ERROR—*Continued.*

And an exception to the exclusion of expert evidence is not tenable on appeal when it does not appear of record that his Honor failed, when requested by appellant, to find the preliminary question of the qualification of the witness as an expert, or that the evidence excluded was competent. *Ibid.*

11. *Order of Reference—Appeal Premature—Final Judgment.*—An appeal is premature from the judgment of the lower court modifying the report of a referee, declaring the indebtedness and priorities among defendant's creditors, and ordering a reference as to one of them, and it will be dismissed without prejudice; for when a reference has been entered upon, it must proceed to its proper conclusion, and an appeal will only lie from a final judgment, or one in its nature final. *Pritchard v. Spring Co.*, 249.

12. *Referee—Report Confirmed—Supreme Court—Findings.*—Upon appeal from the confirmation by the trial court of the report of a referee setting aside a deed as having been obtained by undue influence amounting to fraud, the Supreme Court has no power to make findings from the evidence, but can only determine as to whether there is sufficient legal evidence to support the findings which have been made. *Bellamy v. Andrews*, 256.

13. *Grouping Exceptions, Etc., Relied On—Rule of Court—Appeal Dismissed.*—Where there is a failure of the appellant to group, number and assign in an orderly manner the exceptions taken during the course of a trial, as required by the rule of the Supreme Court, the appeal will be dismissed. The Supreme Court in this case, as required by the statute, examined the record and found no error therein. *Smith v. Manufacturing Co.*, 260.

14. *Evidence—Restrictive—Exceptions.*—When evidence is competent for some purpose, its general admission is not reversible error unless the appellant asks at the time of the admission that it be restricted. *Tise v. Thomasville*, 281.

15. *Instructions—Presumption.*—When nothing to the contrary appears of record on appeal, the presumption is that the lower court gave correct instructions to the jury. *Ibid.*

16. *Verdict Non Obstante—Discretionary Power—Judgment.*—When the trial judge has erroneously held that the defendant is entitled to judgment *non obstante veredicto*, he has exercised no discretionary power, and judgment upon the verdict in plaintiff's favor will be rendered in the Supreme Court. *Shives v. Cotton Mills*, 290.

17. *Issues, Material—Issues Set Aside—Judgment—Discretion.*—The setting aside of material issues found by the jury in favor of the plaintiff, which, in connection with the other issues, would entitle him to recover, and giving judgment on the verdict as it then stood for defendant, does not involve matters resting within the sound discretion of the trial judge, but those of "law or legal inference," from which an appeal lies; and error in setting aside the issues being found by the Supreme Court a judgment for plaintiff will be ordered. *Drewry v. Davis*, 295.

18. *Sureties — Contribution — Procedure — Final Judgment.*—Ordinarily, a court is not permitted to determine the rights to contribution between sureties on a bond until there has been payment made in excess of

APPEAL AND ERROR—*Continued.*

the rightful proportion; but as the matter presented in this appeal was the lower court directing execution on a judgment theretofore obtained against the principal and sureties on his bond, the order of the lower court sufficiently partakes of the nature of a final judgment for the Supreme Court to express its opinion. *Commissioners v. Dorsett*, 307.

19. *Procedure—Recordari—Appellant's Laches.*—It is no sufficient excuse for the failure of the appellant to have his appeal docketed and ready for argument upon the calling of his district under Supreme Court Rules 5, 17, 30 and 24, that the judge had the original papers and had not settled the case on appeal, when it appears that he was in default in not requesting the judge to fix a time and place therefor until forty days after appellee has returned his case with objections. *Com. v. Chapman*, 328.

20. *Same—Case on Appeal—Appeal Dismissed.*—The Revisal, 591, makes appellee's case the case on appeal after fifteen days delay by appellant to transmit papers to the judge. Appellant's motion for a *recordari* under such circumstances will be denied and appellee's motion to dismiss granted. *Ibid.*

21. *Injunction—Completed Acts—Appeal Dismissed.*—An appeal from the refusal of the lower court to continue an injunction to the hearing will be dismissed when it appears that the acts apprehended as a threatened injury and invasion of plaintiff's rights have become accomplished and completed and that the injury may now be measured by actual results and effects. *Little v. Lenoir*, 415.

22. *Evidence—Findings by Court — Irreconcilable Findings — Judgments—Procedure.*—When the judge, in the trial court, who by an agreement of the parties was to have found the facts, sets out certain evidence which is conflicting and irreconciliable, finds it all to be true and renders judgment thereon, it is reversible error, and the judgment will be set aside. *Guy v. Casualty Co.*, 465.

23. *Agreement of Counsel—Rehearing—Procedure.*—In a former appeal in this case counsel agreed that the matter decided was the only question involved; if otherwise, or in case of inadvertence of the court, as to other questions presented, a rehearing should have been petitioned for. Hence the opinion found reported in 150 N. C., 680, may not thus be reviewed. The Court, however, decided against the plaintiff on the merits of the case. *Hardware Co. v. Schools*, 507.

24. *Amendments—Domicile — Evidence.*—Exceptions allowing amendments in this case and declarations on the question of a change of domicile are without merit.—*Wright v. Railroad*, 529.

25. *Injunction—Substantial Right—Procedure.*—An order continuing an injunction to restrain the holder from negotiating promissory note affects a substantial right, and an appeal therefrom presently lies. *Warlick v. Reynolds*, 606.

26. *Injunction, Temporary—Order Dismissed—Acts Accomplished—Abstract Propositions.*—An appeal from the dissolution of a restraining order will not be considered, when it appears that acts sought to be restrained have been committed, the appeal thus presenting merely an abstract proposition. *Wallace v. Wilkesboro*, 614.

APPEAL AND ERROR—*Continued.*

27. *Interlocutory Orders—Appeal Dismissed—Procedure.*—The dismissal of an appeal from an interlocutory order dissolving an injunction does not necessarily dismiss the action, but leaves it pending in the Superior Court. *Ibid.*

28. *Forma Pauperis—Defective Affidavit—Jurisdictional—Dismissal of Appeal.*—The affidavit for an appeal *in forma pauperis* is defective which does not aver "that the appellant is advised by counsel learned in the law that there is error in matter of law," etc., Revisal, sec. 597; and the compliance with the provisions of this section being jurisdictional, the appellee can have the appeal dismissed as a matter of right upon the failure of appellant to comply therewith. *Honeycutt v. Watkins*, 652.

29. *Forma Pauperis—Criminal Cases—Order Signed by Clerk.*—When the order allowing an appeal *in forma pauperis* in criminal cases is not signed by the judge as required by Revisal, sec. 3279, but by the clerk, the defect is jurisdictional, without power of the appellate court to allow amendment, and the appeal will be dismissed. *S. v. Parish*, 659.

30. *Same—Good Cause Shown—Deposit.*—But in this case the appellant asked to be allowed to make deposit in lieu of bond, and "good cause being shown," Revisal, 593, the case was set for argument at a later date so that the necessary printing may be done. *Ibid.*

31. *Brief—Exceptions Abandoned—Criminal Cases.*—Exceptions appearing of record and not mentioned in the brief are deemed abandoned on appeal in criminal as well as in civil actions. *S. v. Spivey*, 676.

32. *Instructions—Presumptions.*—On appeal the presumption is that a charge given by the lower court to the jury was a correct one, in the absence of anything appearing to the contrary. *S. v. Record*, 695.

ARBITRATION AND AWARD.

Correct Form—Reasons and Evidence.—Arbitrators are not required to set out in their award any reasons for it, or any of the evidence upon which it is based. *Mangum v. Mangum*, 270.

ARREST AND BAIL.

Contract, Breach of—Note—Maturity—Suit, When Brought—Procedure.—The ancillary process of arrest and bail on affidavit charging fraud and deceit, on the part of defendant, in a contract by which plaintiff's property was obtained, does not change the nature of the plaintiff's action brought for damages for breach of the contract, and such course is allowed under Revisal, 727, sub-sec. 4; but on recovery had there can be no imprisonment under final process unless the issue of fraud has been expressly submitted to and determined by the jury against the defendant. *Copeland v. Fowler*, 353.

ASSAULT AND BATTERY.

Previous Threats—Res Gestae—Impeaching Evidence.—Previous threats are not competent as substantive evidence except in cases of homicide, and then only when self-defense is alleged or the evidence is circumstantial. Upon the trial for an assault with a deadly weapon all that is pertinent is what took place at the time or so near thereto as to be a part of the *res gestae;* and in this case no error was committed

ASSAULT AND BATTERY—*Continued.*

by the trial judge, at least, to defendant's prejudice, in confining the evidence of a witness to the impeachment of the evidence of the prosecuting witness, that the lattter had previously made threats against the defendant, which had been communicated to defendant. *S. v. Kimbrell*, 702.

ASSUMPTION OF RISK. See Contributory Negligence; Negligence.

ASYLUMS.

1. *Insane Persons—Hospitals—Directors and Superintendent—Discharge—Negligence—Interpretation of Statutes.*—The directors and superintendent of a hospital for the insane acting under the provisions of Revisal, 4596, in discharging or releasing a patient therefrom, cannot be held responsible in damages by the subsequent killing by such patient of another under a charge of negligence. Revisal, 4560. *Bollinger v. Rader*, 383.

2. *Same—Proximate Cause.*—The act of an insane person in killing another about six months after his discharge or release by three directors and the superintendent of a hospital for the insane under authority conferred by Revisal, 4596, was a mere condition arising from the discharge or release, which the directors and superintendent by the exercise or ordinary care and caution, could not have anticipated, foreseen or expected, and for which they could not be held responsible in damages as arising from negligence on their part. *Ibid.*

ATTACHMENT.

1. *Illegal Trust—Actionable Wrong—Procedure.*—On motion to discharge an attachment where it appeared in the affidavits filed that by flattering and deceptive statements on the part of the principal defendants, the plaintiff had been induced to subscribe and partly pay for certain shares of corporate stock in a company formed to develop a certain water power; that before said subscription was obtained, and without the knowledge of plaintiff, said defendants had formed a voting trust forbidden by the law with the intent to dominate and control the management and business affairs of the company, and having thereby succeeded in obtaining such management and control, the said principal defendants wrongfully formed a combination and conspiracy by means of said illegal trust to exploit the enterprise for their own personal advantage and profit and to plaintiff's injury; that pursuant to such unlawful scheme, and with a view of acquiring the company's assets, said defendants in the management of said company designedly and systematically entered on a course of conduct by means of which said company was rendered insolvent and the value of plaintiff's stock and holdings therein was destroyed: *Held*, that an actionable wrong was stated against defendants and of a kind to uphold the validity of the order of attachment. *Worth v. Trust Co.*, 192.

2. *Same.*—In attachment proceedings it is not now necessary that the damages sought should only be for a wrongful conversion of personal property or liquidated damages arising under a contract or limited or defined by some standard or data contained in the contract itself, but by the amendments of the Code of 1883, and subsequent statutes, as shown in Revisal, sec. 758, the remedy is also provided in actions

ATTACHMENT—*Continued.*

for; subdiv. 3: "Any injury to real or personal property in consequence of negligence, fraud or other wrongful act"; subdiv. 4: "Any injury to the person by negligence or wrongful act." *Ibid.*

3. *Same—Interpretation of Statutes.*—Revisal, chap. 68, sec. 2831, and subsec. 6, provides: That in the construction of all statutes, unless a contrary intent is manifest, the term "personal property" shall include moneys, goods, chattels, choses in action and evidence of debt, including all things capable of ownership not descendible to the heirs at law, and applying such construction, sec. 758, subdiv. 3, Revisal, above stated, authorizes the process of attachment in an action for an unlawful combination and conspiracy to injure plaintiff, and by means of which plaintiff's subscription and holdings in the corporation above indicated were rendered valueless. *Ibid.*

4. *Procedure—Vacated—Bankruptcy.*—In this case, after the adjudication of the debtor as a bankrupt in the State of New York, the plaintiff instituted his action here to recover judgment for the amount of a note he held against the debtor, and when the summons was issued he levied an attachment upon real estate of the debtor situated within the county and caused the summons and warrant of attachment to be served by publication. After the levy of the warrant of attachment the petitioners filed their petition showing that they were the duly appointed and qualified trustees in bankruptcy of the estate of the creditor: *Held*, the procedure of the trustees was appropriate, and that the attachment should be vacated. *Ward v. Hargett*, 365.

ATTORNEY AND CLIENT.

1. *Summons—Acceptance of Service—Attorneys at Law.*—An attorney at law, without having special authority, cannot make a valid acceptance of service of original process. *Warlick v. Reynolds*, 606.

2. *Courts—Jurisdiction—Attorneys at Law—Special Appearance—Continuance of Motion—Waiver.*—By entering a special appearance, expressly restricted to the special purpose of moving to dismiss for want of jurisdiction, with request for a temporary continuance of such motion, an attorney does not enter a general appearance, actual or constructive, or waive any rights of his client to dismiss accordingly. *Ibid.*

BANKRUPTCY.

1. *Trustee—Title Upon Adjudication—Location of Property.*—On an adjudication of bankruptcy, followed by subsequent appointment of trustees, the property of a bankrupt available for distribution among his creditors and situate anywhere within the United States or any one of them, passes to such trustees as of the date of the adjudication. *Ward v. Hargett*, 365.

2. *Same—Liens—Preferences Avoided.*—After an adjudication of bankruptcy any and all attempts by an existing creditor to obtain within the United States an advantage or to secure a lien which would result in a preference, is of no avail; and where such attempt is made by means of court process, State or Federal, the same will be avoided on timely and properly application on the part of the trustees. *Ibid.*

3. *Laws—Amendment—Adjudication — Registration — Title.*—The amendmend to the Bankruptcy Act of 5 February, 1903, directing the trustee to file a certified copy of the decree of adjudication in the office

BANKRUPTCY—*Continued.*

where conveyances of real estate are recorded, in every county where the bankrupt holds real estate not exempted from execution, etc., is directory only and does not affect the principle that the bankrupt's title passes by operation of law to the trustees in bankruptcy as upon the date of his adjudication. *Ibid.*

BENEFICIAL OWNER. See Insurance; Evidence.

BIGAMY.

1. *Jurisdiction—Interpretation of Statutes—Extra-Territorial Effect.*—Revisal, sec. 3361, relating to the offense of bigamy cannot be given extra-territorial effect, and the words "or elsewhere" in the language of the statute, "whether the second marriage shall have taken place in the State of North Carolina *or elsewhere,*" are void. *S. v. Ray,* 710.
2. *Same—Living Together—Instructions.*—One who has a wife living here, leaves the State and marries again to a different woman in another State, returns here and lives with such other woman as man and wife, is not indictable or punishable under our statute relating to bigamy, Revisal, 3361. *Ibid.*

BOND ISSUES. See Cities and Towns; County.

1. *Suit against the State—State Agency.*—A suit brought by a bidder on State's bonds against the State Treasurer to recover a cash deposit made with defendant Lacy as security, that the plaintiff would take and pay for certain issues thereof in case they were adjudged to be valid by the courts, is not a suit against the State, and may be maintained against the Treasurer as an agent appointed by the State to make the sale. *Bank v. Lacy,* 3.
2. *Legislative Acts—Aye and No Vote—Separate Days—Constitutional Law.*—Bonds issued by the State in aid of its institutions are not unconstitutional because an amendment directing that some of the fund be applied to the settlement of a deficit in the account of one of the institutions has not passed its readings upon aye and no vote, upon different days, as required by the State Constitution, when otherwise the constitutional requirements have been met. *Ibid.*
3. *Legislature—Aye and No Vote—Constitutional Law—Clerk's Erroneous Endorsement—Title of Bill.*—An act to allow a city to issue bonds passed upon its various readings with the aye and no vote in accordance with the Constitution, is not rendered invalid after its passage in one branch of the Legislature by the erroneous endorsement of the clerk of the other branch thereof, when it appears there was no substantial difference therein, the numbers of the bill corresponded in every respect, the title on the face of the bill was unchanged, no other bill of like import was introduced at that session, and that the one first introduced became the act as finally ratified. *Tyson v. Salisbury,* 468.
4. *Legislature—Various Issues—Different Purposes—Elections—Interpretation of Laws.*—An act authorizing a city to issue bonds in the amount of $300,000, the issue in the first year not to exceed $100,000, and in any subsequent year not to exceed $50,000: *Held,* (1) a grant of legislative power for the issuance by the city of $300,000 in bonds if so much were required for the purposes set forth in the act, and if

BOND ISSUES—*Continued.*

it were found by the city that so much would not be required, then for the amount ascertained by the city and designated by the act and in accordance with its terms is constitutional and valid; (2) the intent of the Legislature was that one election be held for the various issues of bonds, and the fact that the issues were for various specified purposes does not affect the question, or change this ruling. *Ibid.*

5. *Elections—Notice—Legislative Acts—Substantial Compliance.*—Objection made in this case to the regularity or validity of an issue of bonds by a city, that the ordinance calling an election and the notice of the election are not specified, is untenable, it appearing that the time of the election was clearly stated in two newspapers publishing it, and that a sufficient opportunity to register and vote was given to all the qualified voters of the city, and that the requirements of the act were substantially, if not fully, complied with by the city authorities. *Ibid.*

6. *Same—Maturity of Bonds.*—It is not necessary for the aldermen of a city to state the maturity of certain bonds to be voted upon in the call or notice of the election, when the act giving authority therefor refers that matter to their determination. In this case it appears that these matters were specifically stated in the call for and notice of election, and that the voters fully understood the proposition. *Ibid.*

BRIDGES.

Counties—Dividing Streams—Cost Apportioned.—Under the provisions of Revisal, 1318, subsec. 29, each county shall defray the charge of building bridges across a stream dividing them "in proportion to the number of taxable polls in each," and a statute providing that the divisional line shall run up the "middle of the stream" (river) in question and that said line shall be "surveyed and marked," does not vary the rule of apportioning the expenses of such bridges between the counties from that prescribed by said section. Under the facts of this case Revisal, 2696, is inapplicable. *Bridge Co. v. Commissioners*, 215.

BRIEFS. See Appeal and Error.

CARRIERS OF FREIGHT.

1. *Consignor and Consignee—Title—Evidence—Nonsuit.*—The title to goods shipped under an open bill of lading *prima facie* vests in the consignee; and when the consignor, in his action for damages to the goods against the carrier, fails to offer evidence upon his allegations that he had retained the title which is denied, defendant's motion to nonsuit should be granted. *Gaskins v. R. R.*, 18.

2. *Unreasonable Delay—Damages—Evidence—Nonsuit.*—An unreasonable delay in transporting and delivering a shipment of goods renders the carrier liable to at least nominal damages, and when there is evidence thereof a motion to nonsuit should not be granted. *Lumber Co. v. R. R.*, 23.

3. *Railroads—Shipper—Cotton—Licensee.*—One who is preparing bales of cotton for shipment in a customary manner on the platform provided by a railroad company for the purpose is not a bare licensee. *Finch v. R. R.*, 105.

CARRIERS OF FREIGHT—*Continued.*

4. *Railroads—Live Stock—Bills of Lading—Notice Condition Precedent—Reasonable Stipulations.*—A stipulation in a bill of lading given by the carrier for a shipment of live stock, requiring that written notice of claim for damages be given the delivering carrier before the live stock is removed or intermingled with other live stock, as a condition precedent to recovery, being merely a provision to protect the carrier against a false or unjust claim by affording it an opportunity for examination, is reasonable and will be upheld. *Austin v. R. R.*, 137.
5. *Same—Consideration.*—A reduced rate of carriage of live stock is a sufficient consideration to support a stipulation in a bill of lading therefor, that notice in writing must be given the delivering carrier of any claim for damages as a condition precedent to recovery, before the removal from the depot of the live stock or commingling them with others. *Ibid.*
6. *Bill of Lading—Consideration—Live Stock—Valuation—Contract.*—An agreement in a bill of lading for shipment of live stock limiting the value thereof not to exceed $100 a head, upon the consideration of a less freight rate, is valid, and in such cases recovery against the carrier cannot exceed the amount named. *Winslow v. R. R.*, 250.

CARRIERS OF PASSENGERS.

1. *Rights of Way—Invitation Implied—Trespass.*—A railroad company by customarily allowing passengers to get off and on a train stopping at a coal-chute, collecting fares therefrom, etc., impliedly invites them to do so, and one acting accordingly is not a trespasser on the lands of the defendant there. *Credle v. R. R.*, 50.
2. *Protection—Assault—Avoidance—Evidence, Corroborative.*—In an action to recover damages of defendant railroad company for injuries received in an assault by another passenger, arising from defendant's alleged negligence in failing or refusing to afford plaintiff proper protection, it appeared that there was evidence that plaintiff went into a "reserved seat" car to avoid the difficulty, and the conductor was informed of the fact and refused the protection therein requested: *Held*, it was competent for plaintiff to testify his reason for going into this car in corroboration of the witnesses who testified that he notified the conductor of the fact. *Bedsole v. R. R.*, 152.
3. *Baggage—Larceny—Liability—Insurer.*—When there is no partnership arrangement between connecting lines of railroads, and a passenger buys a through ticket from a carrier to his destination on a connecting line, checks his trunk through to his destination and voluntarily returns to the starting point without going upon the road of the connecting line, the latter carrier is not liable as insurer of the contents of the trunk from larceny by reason of taking the trunk to its destination, storing it there in its baggage room until its return was requested and then forwarding it to the junctional point, without compensation. *Kindley v. R. R.*, 207.
4. *Same—Interpretation of Statutes.*—Carriers are made liable under the statute (Revisal, sec. 2624) for baggage of passengers "from whom they have received fare," etc., and they are also required under the statute (Revisal, sec. 2627) to redeem the unused part of the ticket in the manner therein prescribed; and a connecting line which receives the trunk of a passenger checked through under a ticket

CARRIERS OF PASSENGERS—*Continued.*

bought from the initial carrier, with which it has no partnership agreement, and carries it to its destination, places it in its baggage room, not knowing that the passenger voluntarily did not take its train, and returns it upon request of the passenger, is merely a gratuitous bailee, having performed the service without consideration. *Ibid.*

5. *Ticket Stipulations—Shortest Route—Negligence—Parol Evidence.*—A passenger traveling upon a round-trip ticket limiting his route to his destination and return to the shortest one, may show, in his suit for damages for being put off the train, that he was erroneously informed by defendant's station agent that the route he had taken was the shortest, not as a variation of the stipulation printed upon the ticket, but that it was through the negligence of the defendant's station agent that he had taken the longer route. *Mace v. R. R.*, 405.

6. *Same—Conductor.*—The fact that a conductor acted within his duty, and without insult, violence or rudeness, in putting a passenger off his train who was traveling on a ticket to his destination stipulating for another route thereto, does not exculpate the defendant railroad company for liability for the negligence of its station agent in causing the passenger, without his fault, to take this route as the one called for in his ticket. *Ibid.*

CASE ON APPEAL. See Appeal and Error.

CERTIFIED CHECKS. See Compromise and Settlement.

CITIES AND TOWNS. See Bond Issues.

1. *Water Supply—Powers, Implied—Expressed Powers.*—The expense of supplying water by a city or town is a necessary one, and implied in its general grant of powers unless expressly forbidden; and when the charter prescribes the particular mode in which this power may be exercised, it must be followed exclusively. *Water Co. v. Trustees*, 171.

2. *Water Supply—Franchise—Contract—Executed—Free Supply—Public Schools.*—A water company operating under a franchise-contract from a city or town, and receiving the benefits and advantage arising thereunder, may not repudiate the duty of supplying water free to public schools, etc., which it had expressly contracted to do in accepting the franchise containing such provision, and collect for water it had furnished them upon a *quantum meruit* or otherwise. The effect of the Revisal, sec. 2916, upon the question of the life of the contract, does not arise in the determination of this case. *Ibid.*

3. *Franchise—Contract—Contemplation of Parties.*—A water company in accepting a franchise-contract of forty years duration from a city, providing for the extension of the plant, under which the company was to furnish water free for the public schools, etc., has in its contemplation at the time it accepted the contract, the increase in the supply of free water to be furnished in accordance with the growth of the town as well as the increase of value of the franchise. *Ibid.*

4. *Negligence—Subsequent Repairs—Evidence Contradictory.*—In an action for damages alleged to have been caused by plaintiff's horse stepping into a hole in the street negligently left there by defendant town, it is competent for plaintiff to show that the hole had been filled after the accident to contradict the defendant's evidence tending to show it had been filled before the accident; though incompetent to show

CITIES AND TOWNS—*Continued.*

negligence by the mere fact of subsequent repairs. *Tise v. Thomasville*, 281.

5. *Condemnation Proceedings—Streets—Easements—Abutting Owners—Title—Issues—Damages.*—When a city under and in accordance with the provisions of its charter has widened certain of its streets and appealed to the Superior Court from the award of commissioners upon claims made for damages on that account by abutting owners, all the proof showing that claimants were occupying the property and claiming it as such owners, which position had been recognized by both sides, the issue of title is not raised. *New Bern v. Wadsworth*, 309.

6. *Streets—Easements, How Acquired.*—For a city to establish that it has an easement in lands for a street it must show by proper testimony that it had acquired the easement in some recognized manner by condemnation, or by dedication and acceptance, or by estoppel or adverse possession for twenty years. *Ibid.*

7. *Bond Issues—Necessaries—Charter Powers—Popular Vote—Constitutional Law.*—Under the charter of 1909, sec. 12, of the city of High Point, an issue of bonds by that city to complete payment under its contract for the erection of a waterworks plant and sewer system, about completed, is for a public necessity, not requiring a popular vote for its validity. Constitution, Art. VIII, sec. 4. *Bradshaw v. High Point*, 517.

8. *Bond Issues—Charter Powers—Repealing Acts—Interpretation of Statutes.*—Section 31 (10) of the charter of the city of High Point, repealing all former laws affecting the government of the city, etc., except acts relating to the issue of bonds and granting of franchises, etc., was to prevent the invalidation of bonds already issued and franchises already granted, and not to continue restrictions which are inconsistent with the provisions of the charter of 1909. *Ibid.*

9. *Health Ordinances—Selling Fish—Municipal Powers.*—An ordinance prohibiting the sale of fish within the corporate limits of a town outside of a certain market house therein, excepting fresh fish caught in the streams of the county at such places as may not be prohibited, is valid, being for the preservation of the public health. *S. v. Perry*, 661.

10. *Same—Market House—Contract—Constitutional Law.*—It is within the power of the city or town to provide, by contract with its citizens, a market house and exclude with certain reasonable exceptions, the sale of fish at other places, it appearing that, under the contract, the market house was to remain under full control of the municipal authorities, and that reasonable accommodation had been provided for the vendors, with reasonable charges for the stalls. A contract of this character does not contravene Art. 1, sec. 7, of the Constitution, relating to perpetuities and monopolies. *Ibid.*

11. *Taxation—Non-Intoxicants—"Near Beer"—Recognized Business—Ultra Vires.*—The taxing by a city in a prohibition State of one in the business of selling "near beer," mentioned among drinks containing only a small per cent of alcohol and non-intoxicants, is not *ultra vires*, its charter providing for the raising of revenue by taxation of real and personal property, and making it a misdemeanor to carry on any business, etc., without paying a license tax when one has been levied

CITIES AND TOWNS—*Continued.*

thereon, the sale of "near beer" being a recognized business and a legitimate subject of taxation under the general laws of the State. *S. v. Danenberg*, 718.

CLASS LEGISLATION. See Constitutional Law.

CLERKS OF COURT. See *Quo Warranto.*

Election — Board of County Canvassers — Decisions — Collateral Attack.— The decisions or judgments of the county board of canvassers are not of such conclusiveness or finality as to exclude collateral attack, and the use of the word "judicially" in Revisal, sec. 4350, does not enlarge the meaning of sec. 2694, Code, in respect thereto. *S. v. Midgett*, 1.

CODE.

SECTION.

417. Sale of defendant's land to pay his debts. *Yarborough v. Moore*, 116.

596. Method of computing time in which case on appeal is to be served. *Lumber Co. v. Rowe*, 130.

1280. Reservation in deed conveying lands is a reservation of the fee, unless a contrary intent appears. *Ruffin v. R. R.*, 330.

COMPROMISE AND SETTLEMENT.

Offer—Certified Check—Previous Agreement — Acceptance — Partial Payment.—When a debtor has sent his creditor a check to be accepted upon condition that it should be in full of an undisputed debt, and the creditor has it certified at the bank on which it was drawn, it is competent for the creditor to show in evidence, as a waiver or withdrawal of the condition, that the parties had agreed before the check was certified that it would be only a partial payment on the claim. *Drewry v. Davis*, 295.

CONDITIONS PRECEDENT. See Mortgagor and Mortgagee.

CONFLICT OF LAW. See Telegraphs; Contracts.

CONSIDERATION. See Contracts; Equity; Carriers of Freight; Carriers of Passengers; Corporations.

CONSIGNOR AND CONSIGNEE. See Carriers of Freight.

CONSTITUTION, STATE.

ARTICLE

I, sec. 7. A contract for the erection of a market house giving the city authorities full control, excluding sale of fish at other places, is constitutional. *S. v. Perry*, 661.

IV, secs. 2, 12, 14. An act creating a recorder's court, giving jurisdiction of a justice of the peace and of petty misdemeanors, declaring all offenses below a felony to be such, and providing an appeal to the Superior Court, is constitutional. *S. v. Collins*, 648.

V, sec. 2. A city ordinance levying a tax on "near beer" and other like beverages, etc., is constitutional and not discriminative. *S. v. Danenberg*, 718.

X, secs. 2, 3, 4. The word "children," with reference to the widow's homestead, means the children of deceased owner. *Simmons v. Respass*, 5.

CONSTITUTION, FEDERAL.

ARTICLE

IV, secs. 1 and 2. Concerning the "full faith and credit" clause of judgments of sister States, wherein transactions expressly forbidden by our

CONSTITUTION, FEDERAL—*Continued.*

sister States, wherein transactions expressly forbidden by our statutes were not passed upon. *Mottu v. Davis*, 237.

CONSTITUTIONAL LAW. See Bond Issues, Homestead, Taxation, Removal of Causes.

1. *Summons — Publication — "Due Process" — Proceedings in Rem.*—Our courts have general power, in following the provisions of Revisal, sec. 2490, relating to the service of process by publication to acquire jurisdiction and make decrees affecting the condition and ownership of real property situate within the State—*i. e.*, in proceedings *quasi in rem;* and this section is not subversive of the "due process" clause of the Constitution. *Lawrence v. Hardy*, 123.

2. *Gaming Contracts—Legislation—Judgments of Other States—Conflict of Laws—Res Judicata—"Full Faith and Credit."*—Where, in an action pending in the courts of this State to recover on a judgment in a sister State, the Legislature amended our statute on gaming by adding thereto: "Nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract," there can be no valid objection to such legislation on the ground that same impairs the obligation of contracts, and it would seem that no such objection can be made under Art. IV, secs. 1 and 2 of the Federal Constitution, "the full faith and credit clause," etc., if it is admitted or clearly appears that the judgment sued on was rendered on a transaction expressly forbidden by our statutes on gaming, and that the question was not raised, investigated or determined in the courts of the State in which the judgment was originally rendered. *Mottu v. Davis*, 237.

3. *Recorder's Court—Jurisdiction.*—Laws 1909, chap. 633, sec. 4, creating a Recorder's Court in Nash, giving it the jurisdiction of courts of a justice of the peace and additional jurisdiction of offenses below a felony, declaring such to be petty misdemeanors, and providing for an appeal to the Superior Court, does not contravene the State Constitution. Constitution, Art. IV, secs. 2, 12 and 14. The Court follows former precedents. *S. v. Collins*, 648.

CONTEMPT. See Power of Court; Courts.

CONTINGENT REMAINDERS. See Estates.

CONTINUING NEGLIGENCE. See Negligence.

CONTRACTS. See Vendor and Vendee, Landlord and Tenant, Deeds, Wills, Constitutional Law, Insurance, County, Carriers of Freight.

1. *Written—Language, Plain—Interpretation.*—The courts may not disregard the plainly expressed meaning of a lawful contract, and by construction or otherwise substitute a new contract for the one made by the parties. *Engine Co. v. Paschal*, 27.

2. *Private Corporations — Restricting Liability — Valid Stipulations.* — A clause in a written contract of purchase between two private corporations, not affected with a public use, clearly expressing that the vendor assumed no liability for damages on account of delay in delivery will be upheld in the absence of allegations of fraud and bad faith, and the vendee cannot recover damages caused by a delay of sixty-three days beyond the time fixed for delivery. *Ibid.*

CONTRACTS—*Continued.*

3. *Written—Contemporaneous Agreement—Breach—Issues.*—In an action for breach of a written contract of sales rights for certain machines, wherein plaintiff claimed damages arising from the alleged fraudulent negotiation of certain notes he had given therefor in violation of the terms of a contemporaneous oral agreement that they were not to be binding until defendant's fulfillment of certain conditions, issues were submitted, without objection, determinative only of the question of the violation of the oral agreement, and not of the fraudulent negotiation of the notes: *Held*, that upon the issues as submitted and in the absence of evidence of substantial damage, the plaintiff was entitled to nominal damage only. *Waters v. Susman*, 90.

4. *Debt of Another—Consideration—Independent Agreement.*—A promise to the landlord made by one advancing supplies to the tenant, under a mortgage, that if the landlord would wait until the tenant finished selling the crop the promisor would give him his note for the tenant's rent payable the next fall, is an independent contract between the landlord and one furnishing the supplies, and not barred by the statute of frauds. The question whether the landlord in this case has lost his lien by not following the remedy provided under the Virginia statute, does not arise. *Morrow v. White*, 96.

5. *To Convey—Consideration of Services—Deceased Persons—Evidence Sufficient—Nonsuit.*—Evidence is sufficient to take the case to the jury upon an issue as to whether plaintiff's deceased father had agreed, in consideration of services to be rendered, to give him, at his death, the farm he resided on, which tends to show, by several witnesses, that intestate had told them that he had agreed to give or leave by will, etc., the farm upon such conditions; and upon motion as of nonsuit upon the evidence such testimony must be construed in the view most favorable to plaintiff's contentions, and each ingredient making for plaintiff's claim taken as established. *Freeman v. Brown*, 111.

6. *Benevolent Societies—Rejection of Member—Certificate.*—A complaint alleging that defendant society elected him a member and then rescinded its action before issuing him a certificate of membership, fails to set out a contract for the breach of which damages may be recovered. *Dunn v. Aid Society*, 133.

7. *Standing Timber—Option—Consideration—Nudum Pactum.*—An option or offer to sell standing timber on lands, for which no consideration has been paid, may at any time be withdrawn before its acceptance, for the agreement is *nudum pactum*. *Timber Co. v. Wilson*, 154.

8. *Standing Timber—To Convey—Lis Pendens—Purchasers—Notice.*—A suit for the specific performance of a contract to convey standing timber, against the owners of the land, setting forth with particularity the nature and extent of the contract, describing the land, etc., and reciting the registered option under which the performance is sought, is full notice, as *lis pendens*, to subsequent purchasers. *Ibid.*

9. *Standing Timber—To Convey—Realty—Lands—Equity.*—Standing timber is regarded as a part of realty, and specific performance of a contract to convey it will be governed by the same equitable principles that are applicable to lands. *Ibid.*

10. *Lands—To Convey—Insufficient Deed—Tender of Sufficient Deed—When in Time.*—In actions where the remedy by specific performance is indi-

CONTRACTS—*Continued.*

cated, if the vendor of lands can make a good and sufficient title at any time before final decree, it is sufficient; and when the vendee, having made a partial payment on the purchase price, finds that the vendor's wife is not of age, and refuses to accept deed on that account, and brings suit to recover the partial payment he had made, a tender by defendant and his wife, the latter then being of age, of a good and sufficient deed during the course of the proceedings will be held a sufficient compliance with the contract. *Lewis v. Gay*, 168.

11. *Lands—To Convey—Agreement to Rescind—Purchase Price—Agreement Implied.*—When parties to a contract to convey lands mutually agree to rescind the same, in the absence of any stipulation to the contrary, the law implies a promise to repay such amounts as may have been paid by the vendee on the purchase money. *Ibid.*

12. *Voidable—Insanity—Notice—Advantage.*—When a party to a contract has not been judicially found to have been of unsound mind, but makes it a defense in an action involving the validity of his agreement, the contract is not void, but voidable, and will not be set aside where the other party had no notice of the infirmity and has derived no inequitable advantage. *West v. R. R.*, 231.

13. *Same—Subsequent Sanity—Repudiation—Consideration—Restoration.*—When plaintiff has executed a release to defendant for damages claimed in his action, and seeks to avoid it upon the ground of insanity, he is barred by his failure, within a reasonable time after being restored to his right mind, to repudiate the contract and restore the consideration he has received. *Ibid.*

14. *Written—Correspondence—Shares of Stock—Dividends Reserved—Questions of Law.*—When the transactions leading to and consummating a sale of certain shares of stock are embraced in the correspondence between the parties and put in evidence, it is a written contract of sale, and its construction is a question of law. *Trust Co. v. Mason*, 264.

15. *Same—Extra Dividends.*—A purchaser of certificates of stock under an agreement reserving to the seller the dividends to be declared in January, and without the knowledge of either party, the corporation had declared an extra cash and stock dividend then to be paid, is liable to the seller for the extra cash dividend and the value of the stock dividend which he thereafter has received and collected from the corporation. *Ibid.*

16. *Consignment—Indefinite Duration—Termination at Will.*—A contract for consignment of goods without fixing a date for its duration is terminable at the will of either party. *Wagon Co. v. Riggan*, 303.

17. *Same—Notification.*—When, under the terms of a contract for consignment of goods, it is provided that if the defendants keep the goods for eight months they were to purchase at a stipulated price, there is a failure of mutual agreement of sale upon the notification by the consignee within the eight months' period that he would not keep the goods. *Ibid.*

18. *Same—Plaintiff's Liability—Measure of Damages.*—When plaintiff has consigned goods to defendants under an agreement terminable at will, and therefore fails in his suit to recover the price of the goods in his action for goods sold and delivered, he is liable to defendant for

CONTRACTS—*Continued.*

storage of the goods after being notified of the termination, for freight paid by him, and for necessary repairs made. *Ibid.*

19. *Breach—Note—Maturity—Suit, When Brought—Procedure.*—Upon evidence tending to show that defendant agreed to give plaintiff a certain amount to boot in a horse trade, in the form of a note, payable at a time subsequent to the action, and to secure it with a chattel mortgage on the horse thus obtained, which he put off from time to time and failed to do, finally selling the horse to another, it is error to sustain defendant's motion to nonsuit upon the evidence, on the ground that suit was brought before the maturity of the note. Upon the breach of the agreement to give the note and security the action presently lies. *Copeland v. Fowler*, 353.

20. *Fraud—Parol Evidence.*—It is competent by parol evidence to show fraud in the procurement of a contract for the sale and delivery of goods, whether the contract itself is oral or written. *Food Co. v. Elliott*, 393.

21. *Interpretation — Intent — Reasonable Support—Blanks Supplied—Certainty.*—A bond in a certain sum given in consideration of certain lands, conditioned upon the obligor's supporting in a certain manner an imbecile son of the obligee for and during his natural life, if the son think it proper to live with him, and that if he "shall be minded to live with another person" the obligor shall pay the son yearly for and on account of his maintenance "at such other place the sum of _____ dollars per year," evidences the intent that the father desired to provide for the support and maintenance of the son; and the blank left therein does not avoid the undertaking if the son live with another person, but manifests a purpose not to limit the amount thought necessary for the son's support except as it is imposed by the condition of life in which he lived. *Rhyne v. Rhyne*, 400.

22. *Liens—Future Payments—Receiver—Completing.*—When, by unconditionally accepting an order given on him by a subcontractor in favor of one furnishing the latter material for the building, the contractor has made a valid assignment of funds coming into his hands under his contract with the owner for the payment of the debt, and thereafter the subcontractor, a corporation, goes into the hands of a receiver who, by agreement, satisfactorily completes the work, the assignment is valid as to such sum or sums of money as may have become due under the accepted order as against material men, creditors of the subcontractor, of whose claims the contractor had not been notified, and who had not acquired a lien under the statutory provisions. *Hall v. Jones*, 419.

23. *Liens—Contractor—Interpretation—Payments Reserved—Material Men—Trusts and Trustees.*—A provision in a contract between the owner and the contractor to erect a building, that the architect shall make a monthly estimate of the labor and material put into the building during each preceding month, and the owner pay the contractor therefor after reserving a certain per cent, is for the benefit of the contractor and the protection of the owner, and does not create a trust in the reserved payments in favor of laborers and material men of a subcontractor. For the material men to acquire a lien they must proceed under the statutes. *Ibid.*

CONTRACTS—*Continued.*

24. *Independent Contractors—Joint Torts—Partition—Master and Servant.*—A railroad company cannot be held liable as a joint tort feasor with its independent contractor for an injury to an employee of the latter, when there is no evidence or suggestion that the former assumed an active part, by encouragement, direction or control of the work wherein the injury complained of was received. *Smith v. R. R.*, 479.

25. *Statutory Liens—Subcontractor—Material Men—Debtor and Creditor—Privity.*—Between the subcontractor or material man and the owner there is no privity of contract, and the former cannot make the latter their debtor except with his consent, or by following the provisions of the statute giving them a lien, and then only according to the status of the contract between the owner and the contractor with reference to the amount owed the contractor thereunder at the time of notice and the relation thereto of other like claimants. Revisal, secs. 2019, 2020, 2021. *Hardware Co. v. Schools*, 507.

26. *Breach—Rescission—Intimation of Court—Fragmentary Appeal—Conversion—Measure of Damages.*—In an action to recover the purchase price for certain lumber under a contract, it appeared from plaintiff's evidence that he had shipped a carload thereof, and after conversation had between himself and defendant it was ascertained that only a small portion of it came up to the sizes specified, and therefore unfit for defendant's purposes; and on that account it was agreed between the parties that the lumber should be left in the car to be otherwise disposed of, but that defendant thereafter, without plaintiff's knowledge, took from the car certain of the lumber which he found he could use. The lower court intimated that plaintiff could not recover for the contract price of the carload, but only the value of so much as defendant had taken therefrom, with the consequent damages to plaintiff. Plaintiff took a nonsuit and appealed: *Held*, the nonsuit and appeal were premature, and that plaintiff should have excepted and appealed from final judgment; (2) the plaintiff could not recover on the contract: (a) he had not performed it, (b) it had been rescinded by mutual agreement, (*c*) the action would be for conversion, and the damages the actual value of the lumber taken, with such damage to the carload lot as plaintiff had sustained by defendant's taking a portion thereof and leaving a remnant; (3) that if the contract had not been rescinded, defendant, by taking a part of the lumber, was not bound under the contract to take the remainder which did not come up to it. *Teeter v. Manufacturing Co.*, 602.

27. *Restraint of Trade, Reasonable—Consideration, Assignment of.*—For and in consideration of the purchase of certain certificates of stock at a certain price, the vendor agreed not to enter or become employed in the same town in a certain business in which he was skilled, and which was carried on by the corporation: *Held*, the agreement is supported by a sufficient consideration, is a reasonable restraint of trade, and valid; and is assignable, especially when the corporation is the assignee, and the contract in restraint was also made for its benefit. *Anders v. Gardner*, 604.

28. *Restraint of Trade, Reasonable—Injunction—Damages.*—When it appears by affidavits, or otherwise, that one who has entered into a valid contract in restraint of his trade or business, is acting in violation of it, upon proper application of the other party in interest a restraining

CONTRACTS—*Continued.*

order should be continued to the hearing, especially when it appears that resulting damages would be difficult to measure. *Ibid.*

CONTRIBUTION. See Principal and Surety.

CONTRIBUTORY NEGLIGENCE. See Issues; Negligence; Railroads.

1. *Master and Servant—Officious Acts—Evidence.*—The plaintiff in this case was not guilty of contributory negligence in thrusting his hand into the machine to adjust it while it was not running, and he was not guilty of an officious act because he was directed to do so by the master's representative. *Morrisett v. Cotton Mills*, 31.

2. *Nonsuit.*—In an action to recover damages from a railroad company for the alleged negligent killing of plaintiff's intestate by running a train, without lights or signals, over him at a public crossing at night, the contributory negligence of intestate will bar recovery when it appears that he both saw and heard the engine coming and attempted to run across the track in front of it, and thus received the fatal injury. *Champion v. R. R.*, 197.

3. *Railroads—Moving Trains—Brakemen.*—If a brakeman jumps on or off a moving train, when it is obviously dangerous for him to do so, he is guilty of such contributory negligence as will bar recovery. As there was conflict of evidence in this case as to the speed of the train the question was properly submitted to the jury. *Reeves v. R. R.*, 318.

4. *Assumption of Risk.*—An electric lighting company is not liable for damages for the death of its employee caused by a current of electricity from a defect in its system of wires which the employee, competent and properly instructed, and in the course of his employment, had undertaken to remedy, there being no suggestion or evidence that defendant had failed or refused to furnish proper implements or appliances with which to do the work and no negligence supervening on part of defendant, and if, upon competent evidence, the jury find the facts so to be, his recovery would be barred, for in undertaking to do the work the plaintiff assumed the risk; and if he did not avail himself of the appliances furnished, he would be guilty of contributory negligence. *White v. Power Co.*, 356.

5. *Pleading—Proof—Burden of the Issue.*—Contributory negligence will not be presumed in law, it must be alleged and proved by the defendant, the burden of the issue resting upon him and the burden of duty on the plaintiff. *Farris v. R. R.*, 483.

CORPORATION COMMISSION. See Taxation; Removal of Causes.

1. *Appeal—Procedure—Notice.*—When notice of appeal to the Superior Court is given to the Corporation Commission by a railroad company, and the other requirements of Revisal, sec. 1074, relating thereto, have been met by the company, it is sufficient without giving notice of the appeal to the complaining party in the proceedings had before the commission, as upon this appeal the statute makes the commission the party plaintiff. *Corp. Com. v. R. R.*, 447.

2. *Legislative Agency—Quasi Judicial.*—The Corporation Commission is not a judicial court but a mere administrative agency of the State possessing certain *quasi* judicial and legislative powers. *Ibid.*

CORPORATIONS. See Taxation; Receivers.

1. *Private—Contracts—Restricting Liability—Valid Stipulations.*—A clause in a written contract of purchase between two private corporations, not affected with a public use, clearly expressing that the vendor assumed no liability for damages on account of delay in delivery will be upheld in the absence of allegations of fraud and bad faith, and the vendee cannot recover damages caused by a delay of sixty-three days beyond the time fixed for delivery. *Engine Co. v. Paschal*, 27.
2. *Officers—Laborers and Workmen—Statutory Liens—Interpretation of Statutes.*—Officers and owners of a corporation are not entitled, under Revisal, sec. 1206, to priorities of payment for work and labor done by them over the other creditors, as such officers do not come under the meaning of the words "laborers" and "workmen" used in the statute, and were not so intended. *Alexander v. Farrow*, 320.

COSTS. See Appeal and Error, Witnesses, Ejectment, Bridges, County.

COUNTY. See Bridges.

1. *Necessaries—Courthouse.*—The building and repairing of a courthouse by the county is a part of its necessary expense. *Burgin v. Smith*, 561.
2. *Quasi Corporations—State Agencies—Legislative Powers—Courthouse—Necessaries—Limitation of Expenditure.*—A county is a *quasi* corporation distinguishable from municipal corporations on the one hand and private corporations aggregate on the other hand. The Legislature has the power to control and govern them as its creatures and political agencies, and a limitation imposed by a special act upon the cost of repairing a courthouse is final, and may not be exceeded by the county authorities. *Ibid.*
3. *Courthouse — Legislative Powers — Necessaries — Limitations — Bond Issues — "County Script."*—The notes or evidence of indebtedness issued by a county is within the meaning of an act authorizing a county to issue "coupon bonds" or "county script" for the purposes of improving the courthouse; and when the act authorizes the issue not to exceed $5,000, a limit to the cost of the improvements is placed in that sum and not merely a limit to the amount of issue of bonds. *Ibid.*
4. *Same—Excessive Issue—Void Notes.*—When a special act of the Legislature places a limit upon the amount to be expended by a county in improving its courthouse, authorizing an issue of "coupon bonds" and "county script" not to exceed a certain sum, notes in excess of that amount given by the county for the improvements under an entire contract calling for a larger amount than authorized, are void. *Ibid.*
5. *Same—Special Act—General Powers—Interpretation of Statutes.*—When a special act of the Legislature has imposed a limit upon the expense of a county to be incurred in improving its courthouse, the commissioners cannot avoid the will of the Legislature as therein declared by setting up a general power of contracting debts for necessary expenses, limited only by the constitutional limitation of taxation, and thus under an entire contract made beforehand expend a larger amount for the purpose than that prescribed by the special act. *Ibid.*
6. *Courthouse—Acceptance—Necessaries—Legislative Powers—Limitations—Excess—Bond Issues—Payment of Interest—Ratification.*—When a county has issued bonds for the improvement of its courthouse in

COUNTY—*Continued.*

excess of the amount limited therefor by the Legislature in a special act, the payment of interest by the county on all the bonds does not have the effect of ratifying the bonds issued beyond the lawful limit, for a ratification can have no greater force than, or exceed, a previous authority. *Ibid.*

7. *Courthouse—Acceptance—Latent Defects—Contracts, Breach of—Damages—Mala Fides.*—After the owner has accepted a building from his contractor, he must show *mala fides* upon the part of the contractor in inducing his acceptance, in order to recover damages for latent defects alleged not to have been discoverable at the time. *Ibid.*

"COUNTY SCRIPT." See County.

COURTS. See Jurisdiction; Statutes; Jurors.

1. *Bill of Review—Superior Court—Judgment—Supreme Court.*—An action commenced in the Superior Court, in the nature of a bill of review in equity, will not lie to correct an alleged error apparent upon the face of a final judgment, where such judgment has been affirmed on appeal by the Supreme Court. *Hunter v. Nelson*, 184.

2. *Justice's Court—Judgments—Appeal—Docketing—Laches of Justice—Principal and Agent.*—A motion in the Superior Court for a *recordari* or an attachment under Revisal, 1493, is the remedy given an appellant for the failure of the justice to send up an appeal, and it is no legal excuse for the appellant to show that he had paid to the justice his fees and those of the clerk, and that the justice had failed to docket it as required by the statutes. The appellant would thus make the justice his agent and for his neglect he would be responsible. *McKenzie v. Development Co.*, 276.

3. *Justice's Court—Appeal—Docketing—Judgment—Laches—Void Appeal.* An appeal from a judgment of a justice of the peace must be docketed at the next ensuing term of the Superior Court commencing ten days after the notice of appeal, and an attempted docketing at a later term is a nullity. Revisal, 307-8. *Ibid.*

4. *Discretion of Trial Court—Verdict—Weight of Evidence—Testimony of Witnesses.*—Motion for new trial upon affidavit in respect to the testimony of a witness, and for that the verdict is contrary to the weight of the evidence, are matters strictly within the discretion of the lower court. *Bouldin v. Daniel*, 283.

5. *Verdict—Non Obstante—Discretionary Power—Appeal and Error—Judgment.*—When the trial judge has erroneously held that the defendant is entitled to judgment *non obstante veredicto*, he has exercised no discretionary power, and judgment upon the verdict in plaintiff's favor will be rendered in the Supreme Court. *Shives v. Cotton Mills*, 290.

6. *Issues, Material—Issues Set Aside—Judgment—Discretion—Appeal and Error.*—The setting aside of material issues found by the jury in favor of a plaintiff, which, in connection with the other issues, would entitle him to recover, and giving judgment on the verdict as it then stood for defendant, does not involve matters resting within the sound discretion of the trial judge, but those of "law or legal inference," from which an appeal lies; and error in setting aside the issues being found by the Supreme Court a judgment for plaintiff will be ordered. *Drewry v. Davis*, 295.

COURTS—*Continued.*

7. *Justice of the Peace—Pleadings—Record—Jurisdiction.*—A substantial statement of the cause of action brought before a justice of the peace should appear in the summons, pleadings, or otherwise in his record, so as to show jurisdiction; and the method of pleading generally adopted of issuing a summons for defendant to appear and answer a complaint upon a cause of action not stated, is disapproved. In this case, for a recovery of $194.78, the court inferred an action upon contract from the use of the word "indebted," though otherwise the magistrate's jurisdiction would not have appeared. *Love v. Huffines*, 378.

8. *Justice of the Peace—Appeal—Time of Docketing—Criminal Term.*—Revisal, sec. 607, requiring the justice to make a return to the Superior Court and to file the return of the appeal within ten days after serving of notice, etc., applies to criminal as well as civil terms, and upon failure of the appellant to docket his appeal as required by law, whether the next term be criminal or civil, the appellee may have the case placed upon the docket and move to dismiss according to the provisions of Revisal, sec. 1493. *Ibid.*

9. *Same.*—An appellee may by his own laches or conduct waive his right to dismiss an appeal from a justice's court to the Superior Court for failure of appellant to perfect his appeal under Revisal, secs. 607 and 1493, as such matters relate only to irregularities in the procedure and not to the inherent jurisdiction of either court; and the appellee's motion under the latter section is too late when made upon the trial of the cause in the Superior Court after evidence has been introduced. *Ibid.*

10. *Contempt.*—In these proceedings for contempt no error is found on appeal after an examination of the evidence and findings of the lower court. *In re R. R.*, 467.

11. *Appeal and Error—Weight of Evidence—Discretion.*—It is within the sound discretion of the lower court to determine whether the verdict of the jury should stand as being against the weight of the evidence, and its decision is not reviewable. *Cates v. Telegraph Co.*, 497.

12. *Recorder's Court—Jurisdiction—Constitutional Law.*—The Act of 1909, ch. 633, sec. 4, creating a Recorder's Court of Nash County, giving it the jurisdiction of courts of a justice of the peace and additional jurisdiction of offenses below a felony, declaring such to be petty misdemeanors, and providing for an appeal to the Superior Court, does not contravene the State Constitution. Constitution, Art. IV, secs. 2, 12, and 14. The Court follows former precedents. *S. v. Collins*, 648.

COURTS, FEDERAL. See Removal of Causes; Corporation Commissioners.

CRIMINAL TERM. See Courts.

CROSSINGS. See Railroads.

CUSTODIA LEGIS. See Habeas Corpus.

DAMAGES. See Measure of Damages; Carriers.

1. *Carriers of Freight—Unreasonable Delay—Special—Notice.*—A verdict of special damages awarded against a common carrier, arising from its unreasonable delay in transporting and delivering goods to the consignee, will be sustained upon the question of knowledge, when

DAMAGES—*Continued.*

from the evidence it appears that the shipment was a sawmill edger, weighing about one thousand pounds, shipped "open," to a consignee whose business was known to the carrier to be that of running sawmills, the character and manner of the shipment being such that the jury could fairly presume that the carrier knew it was for a special purpose or present use. *Lumber Co. v. R. R.*, 23.

2. *Witnesses—False Testimony.*—A witness is not liable for damages for alleged willful and false testimony given by him in a former case, upon the ground that by reason thereof the plaintiff had lost his suit in the former action. Such action would not lie at common law, and there is no statute authorizing it. *Godette v. Gaskins*, 52.
3. *Surface Waters—Diverting Natural Flow.*—One is liable for damages caused to the lands of another by his diverting the natural flow of surface water thereto. *Roberts v. Baldwin*, 407.
4. *Private Nuisance—Light and Air—"Spite Fence"—Motive.*—Ordinarily the owner of lands may erect such improvements thereon as he sees fit, and any resultant injury to the adjoining owner is *damnum absque injuria;* but he may not, without liability as for a private nuisance, erect an unsightly "spite fence" on his own land for the sole malicious purpose and effect and without benefit to himself, of shutting out the light and air from his neighbor's windows. *Barger v. Barringer*, 433.
5. *Same—Prescriptive Rights.*—Plaintiff and defendant had erected a wire divisional fence between their adjoining lands whereon they resided, and thereafter the plaintiff, as chief of police of the town, reported, in accordance with his official duty, the filthy condition of defendant's stable. From vengeance and malice, and without benefit to himself, the defendant then erected a very rude and unsightly board fence eight feet, six inches high on his own side of the division fence, within four feet of plaintiff's window, so as to shut out his view, light and air therefrom: *Held*, that though a prescriptive right in light and air cannot be acquired, the defendant's motive in constructing the fence in the manner indicated can be considered, and he will be liable for damages as for maintaining a private nuisance. *Ibid.*

DAMAGES, REMOTE. See Measure of Damages.

DANGEROUS INSTRUMENTALITIES. See Negligence.

DEADLY WEAPON. See Murder; Manslaughter.

DEATH BY WRONGFUL ACT. See Railroads.

DEATH OF PARTY. See Abatement.

DEBT OF ANOTHER. See Contracts.

DECLARATIONS OF WIFE. See Evidence.

DEEDS AND CONVEYANCES. See Contracts; Vendor and Vendee; Mortgagor and Mortgagee; Railroads; Husband and Wife.

1. *Reformation—Evidence Sufficient—Questions for Jury.*—The evidence to reform a written deed must be clear, strong and convincing, but when the testimony is sufficient to carry the case to the jury, as on an ordinary issue, the judge can only lay this down as a proper rule to guide the jury in their deliberations, and it is for them to determine whether in a given case the testimony meets the requirements of this rule as to the degree of proof. *Gray v. Jenkins*, 80.

DEEDS AND CONVEYANCES—*Continued.*

2. *Same—Positive Fraud.*—A grantor who can read and write, by merely signing a deed, is not necessarily concluded from showing that, as between the original parties, it was induced by a positive act of fraud on the part of the grantee, and that he was deceived and thrown off his guard by the grantee's false statements and assurances designedly made at the time, and reasonably relied on by him. *Ibid.*

3. *Lands—Contract to Convey—Insufficient Deed—Tender of Sufficient Deed, When in Time.*—In actions where the remedy by specific performance is indicated, if the vendor of lands can make a good and sufficient title at any time before final decree, it is sufficient; and when the vendee, having made a partial payment on the purchase price, finds that the vendor's wife is not of age, and refuses to accept deeds on that account, and brings suit to recover the partial payment he had made, a tender by defendant and his wife, the latter then being of age, of a good and sufficient deed during the course of the proceedings will be held a sufficient compliance with the contract. *Lewis v. Gay*, 168.

4. *Same—Agreement to Rescind—Evidence—Questions for Jury.*—In an action to recover partial payment made on an executory contract for the sale of lands, the deed being refused by the vendee on discovering that vendor's wife, signing the deed, was not of age, and thereafter pending the proceedings, vendee refused to accept a good and sufficient deed from the vendor and his wife, the latter then being of age, it is competent to show that by parol or by matter *in pais*, the parties had agreed to rescind the contract, and under conflicting evidence the question thus raised should have been submitted to the jury. *Ibid.*

5. *Lands—Contract to Convey—Agreement to Rescind—Purchase Price—Agreement Implied.*—When parties to a contract to convey lands mutually agree to rescind the same, in the absence of any stipulation to the contrary, the law implies a promise to repay such amounts as may have been paid by the vendee on the purchase money. *Ibid.*

6. *Consideration—Fraud—Money Advanced—Equity.*—A conveyance obtained by one whose position gave him the power and influence over the grantor, without proof of actual fraud, shall not stand at all, if without consideration; and where there has been a partial or inadequate consideration it shall stand only as a security for the sum paid or advanced. *Bellamy v. Andrews*, 256.

7. *Railroads—Easement, Reservation of—Fee.*—A provision in a deed of lands to a railroad company for depot purposes, that the grantor should have the right to erect a warehouse partly on the lands described and conveyed, provided a width of 115 feet be left to the railroad company, reserves to the grantor a descendible, assignable and transferable easement therein for the stipulated purpose and to the extent specified in the deed. *Ruffin v. R. R.*, 330.

8. *Same—Words of Inheritance.*—An easement in fee in lands reserved by the owner in his deed thereto, does not require the use of the words of inheritance, for the thing excepted is not granted and the grantor retains it by virtue of his original title. *Ibid.*

9. *Same—Statute.*—Under the Code of 1883, sec. 1280, a reservation by the grantor in his deed of an easement in the lands conveyed will be construed to be an easement in the fee unless the contrary intent appears from the conveyance. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

10. *Same—Determinable Fee—Rights Appurtenant—Permissive User.*—A stipulation in a deed of land to a railroad company for depot purposes was that the grantor shall have the right to erect warehouses along certain sides of the lands, provided they do not encroach upon any portion of the depot ground of the width of 115 feet, and in accordance with such right the grantor erected a warehouse partly on his own land and extending upon the lands conveyed a distance of twenty-three feet, which was occupied continuously as such since its erection by the grantor, his heirs and assigns: *Held*, (1) whether by way of reservation or exception, the grantor retained for warehouse purposes, a determinable fee in the land conveyed to the extent of the twenty-three feet; (2) that this right was appurtenant to the land covered by the other part of the warehouse; (3) that the question of whether a permissive user of a railroad right of way would ripen title to the easement reserved did not arise. *Ibid.*

11. *Unregistered—Parties—Enforceable.*—An unrecorded bond for title is good and enforceable as between the original parties. *Jordan v. Ins. Co.*, 341.

12. *Title—Boundaries—Agreement of Parties—Evidence Immaterial.*—When it is agreed between the parties in a suit to establish title to land that the controversy depended upon the beginning corner of E. grant, and if so found the controverted territory would not be covered by plaintiff's grant, evidence of declarations for the purpose of establishing certain pine and maple corners of a grant to G. is irrelevant. *Land Co. v. Lumber Co.*, 390.

13. *Contracts to Convey Lands—Guarantee of Number of Acres—Parol Evidence.*—In an action to reform a written contract to convey land in conformity with an alleged guarantee of the vendor that the tract contained a certain number of acres, which, in fact, it did not contain, it is not necessary that the guarantee be in writing. The requirement imposed in this case, by the trial judge, that plaintiff show that defendant had omitted the guarantee from the written instrument, was not to defendant's prejudice and therefore not reversible error. *Stern v. Benbow*, 460.

14. *Mutual Mistake—Color.*—When defendants, the heirs at law of plaintiff's grantor, have failed to set aside his deed to plaintiff for mistake, which admittedly covered the *locus in quo*, the deeds incident to the title become the property of the plaintiff, the grantee, as muniments of his title, and thereafter the occupation of the grantor, or his heirs, even if adverse, would be without "color." *Moore v. Moore*, 555.

15. *Mutual Mistake—Parties—Beneficial Owner—Declarations—Evidence—Res Gestæ.*—A. conveyed by deed to C. certain of his lands, and C. conveyed the same to W., the plaintiff, who brings his action against A. for possession, the action involving title, and the death of A. being suggested, his heirs are made parties defendant: *Held*, (1) if properly pleaded, the equitable defense is available that, by mutual mistake, the land in controversy was embraced in the description of the deed from A. to C.; (2) C. was not a necessary party as he had conveyed all his interests in the land to plaintiff, and especially when he was practically the beneficial owner of the land from the beginning; (3) the declarations of the plaintiff that there was a mistake in the deed from A. to C. as contended for by the defendants, are competent evidence, being by the principal party in interest, made in the treaty

DEEDS AND CONVEYANCES—*Continued.*

or purchase and directly relevant to the issue. So far as it appears in this case, it was a pertinent fact in the *res gestæ*. *Ibid.*

16. *Description Indefinite.*—When the descriptive part of a deed is indefinite, so it does not define the lands to be conveyed, the established rules to ascertain the intent of the parties are not capable of application. *Cathey v. Lumber Co.*, 592.

17. *Same—Indefinite Part of Definite Whole.*—A conveyance of a part of a tract of land must itself furnish the means by which the part can be located—*i. e.*, a subject-matter either certain within itself, or capable of being made certain by recurrence to something extrinsic to which the deed refers. *Ibid.*

18. *Same—Evidence Dehors.*—When, in a conveyance, the boundaries of an entire tract of land containing 724 acres are described with exactness, of which 327 acres were intended to be conveyed, but without any words indicative of their location in the larger tract, or by which they can be identified or set apart, the deed is void for indefiniteness of description and may not be aided by parol and extrinsic evidence as to the location of the land intended to be conveyed. *Ibid.*

19. *Description—Interpretation of Deeds—Habendum.*—From the descriptive words of this deed it appeared that the grantor intended to convey an undefined 327 acres from a definitely described tract of 724 acres, as will also appear by the *habendum;* "to have and to hold the aforesaid 327 acres, being a part of the aforesaid tract of land." *Ibid.*

20. *Husband and Wife—Existing Debts—Fraudulent Conveyances—Principal and Agent.*—A deed made by defendant to his wife without a valuable consideration and for the purpose of avoiding the obligations incurred to the Government under the distiller's bond, which plaintiff has signed as surety prior to the execution of the deed, the property conveyed being practically the entire estate of the defendant, the principal of the bond, is fraudulent and void as against the surety having been compelled to pay the bond. *Graeber v. Sides*, 596.

21. *Registration—Notice.*—The registration of a deed made by the principal on a distiller's bond, to his wife, for the purpose of escaping liability on the bond, and avoid liability as to his surety who was forced to pay for his default thereunder, is not notice to the surety that it was made to defraud him, when he did not then know of his principal's default, or that he would be called upon to pay anything as surety. *Ibid.*

22. *Probate — Certificates — Adjudication—Substantial Compliance—Sufficiency—Supreme Court—Appeal and Error.*—A substantial requirement with Revisal, secs. 999 and 1001, is all that is necessary to be observed by the clerk of the Superior Court of the county wherein the land lay, in passing upon the certificates to a deed thereto made and executed in another State; and when objection to the validity of registration is made on that ground and it appears of record on appeal that the certificates made in such other State are in fact sufficient, the validity of the registration will be declared and upheld by the Supreme Court. *Kleybolte v. Timber Co.*, 635.

23. *Probate—Certificates—Adjudication—Substantial Compliance.*—When a deed in trust made and executed beyond the borders of this State conveying lands herein has been there acknowledged and probated before a notary public, and (unnecessarily) the clerk of the Supreme

DEEDS AND CONVEYANCES—*Continued.*

Court, in compliance with a statute there, has certified the official character of the notary and his authority as such, it is a sufficient compliance with Revisal, secs. 999 and 1001, for the clerk of the Superior Court of the county wherein the land lay, to certify that "the foregoing and annexed certificate of (naming the clerk) a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form, and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc. *Ibid.*

DEFECTS. See Negligence.

DEFENSE. See Process; Constitutional Law; Arbitration and Award.

DELIVERY. See Notes; Telegraphs.

DEMURRER. See Parties.

1. *Actions, Misjoinder of—Negligence—Personal Injury—Loss of Son's Services—Parties.*—The joinder of a cause of action brought by a son, an employee, to recover of defendant cotton mill, his employer, damages for a personal injury alleged to have been caused by the latter's negligence, with that of the father to recover for the loss of the son's services alleged to have been caused by the same negligent act, is demurrable on the ground of misjoinder of parties and causes of action. Revisal, sec. 469. *Thigpen v. Cotton Mills*, 97.
2. *Pleadings—Distinct Defenses—As to One—Procedure.*—Under Revisal, sec. 4853, when a pleading contains averments of separate and distinct offenses, an adverse litigant may demur to one of such defenses and reply to another. *Mottu v. Davis*, 237.
3. *Pleadings—Admissions.*—Every demurrer directed to the incapacity of the plaintiff to sue, to the misjoinder of parties or causes of action, or to jurisdiction, admits the facts alleged for the purpose of the demurrer. *Quarry Co. v. Construction Co.*, 345.
4. *Pleadings—Misjoinder—Parties—Causes of Action.*—When the complaint alleges that the defendant is indebted to each of the two parties plaintiff in different amounts for goods sold and delivered, in this case crushed rock for street purposes, under a contract with one of them, the other performing a part of the contract of the coplaintiff with the consent of the defendant, a demurrer for misjoinder of parties and causes of action is bad: (*a*) if the defendant were solely liable to one of the plaintiffs under his contract for both amounts, the joinder of the other plaintiff would be superfluous and harmless; (*b*) and, if he were responsible to both plaintiffs upon a joint contract, it would be bad, for both of them would be interested in both causes of action. The precedents upon this principle reviewed, discussed and applied by WALKER, J. *Ibid.*
5. *Courts—Jurisdiction—Procedure.*—A party defendant may enter a special appearance for the purpose of demurring to the jurisdiction of the court, and have the court determine and inform him of the validity of proceedings affecting a substantial right, and he is not required to test the validity by disobedience, and thereby risk the process of contempt. *Warlick v. Reynolds*, 607.

DISCHARGE. See Asylums; Judgments.

DISCRIMINATION. See Constitutional Law.

DIVIDING STREAM. See County.

DIVINE WORSHIP. See Evidence.

DIVORCE. See Marriage and Divorce.

DOCKETING. See Courts.

DOMESTIC INDUSTRIAL CORPORATIONS. See Corporations.

DOWER.

Executors and Administrators—Debts—Sales—Assets.—When the widow's claim of homestead is rightfully denied in proceedings by the administrator on partition to sell lands to make assets to pay her deceased husband's debts, an order directing that her dower be assigned, and, subject thereto, the land be sold for assets, is the proper one. *Simmons v. Respass*, 5.

DUE COURSE. See Notes.

DUE PROCESS. See Constitutional Law.

EASEMENTS. See Cities and Towns; Deeds and Conveyances; Water and Watercourses.

EJECTMENT.

1. *Lands—Title—Common Source—Estoppel—Burden of Proof.*—An action of ejectment, under our present procedure, is an action to recover land, placing the burden upon the plaintiff to establish title in himself good against the world, or good against the defendant by estoppel, or to show a common source of title with the defendant so as to bring himself within the rule of convenience, sometimes called an estoppel. *Bryan v. Hodges*, 413.

2. *Title—Defendant's Denial—Verdict—Costs.*—In an action of ejectment the jury found the issue as to title in plaintiff's favor, except as to a small tract of land, and, also, that they were not entitled to recover damages: *Held*, that as defendants denied plaintiff's title and right of possession to the entire tract it was error for the trial court to refuse plaintiff's motion to tax them with the costs, their disclaimer not being broad enough. *Ibid.*

EJECTMENT OF PASSENGERS. See Carriers of Passengers.

ELECTION. See Equity; Damages; Taxation; Bond Issues.

ELECTIONS. See Quo Warranto.

Clerks of Court—Board of County Canvassers—Decisions—Collateral Attack.—The decisions or judgments of the county board of canvassers are not of such conclusiveness or finality as to exclude collateral attack, and the use of the word, "judicially" in Revisal, sec. 4350, does not enlarge the meaning of sec. 2694, Code, in respect thereto. *S. v. Midgett*, 1.

ELECTRICITY. See Contributory Negligence.

Defects, Employee to Repair—Negligence, Rule of.—An electric company does not owe the same duty to a competent workman employed to remedy a dangerous defect in its system as it does to the public, its patrons or its ordinary employees, in respect thereto; and when such

ELECTRICITY—*Continued.*

employee is killed while thus engaged, it is error for the trial judge, in an action by his administrator for damages for the negligent killing, to try the case upon the theory that the same principles as to negligence apply. *White v. Power Co.*, 356.

ENDORSEMENTS. See Notes.

ENTRY. See State's Lands.

EQUITABLE OWNER. See Trusts and Trustees.

EQUITY.

1. *Superior Courts—Jurisdiction—Parol Trusts.*—When it is alleged that plaintiff's deceased father had created a parol trust under a deed in her favor in certain of his real and personal property, and that he had subsequently executed a paper-writing declaring the trusts, which defendants had destroyed, the action is properly cognizable in the Superior Court, to enforce the trusts declared, whether the writing be a deed or a will, and it can give relief in its equity jurisdiction; and leave given the plaintiff to probate the paper as a deed, or will, under penalty of dismissal, is erroneous. *Ricks v. Wilson*, 46.

2. *Same—Trustee Ex Maleficio.*—And if it should be established that the executor acquired the property by the deeds and under the will by fraud, the court, in administering the equities and doing substantial justice between the parties, will decree the executor a trustee *ex maleficio* for plaintiff's benefit and prohibit him and those claiming under him from setting up title; may require the executor to give bond *pendente lite;* may make such further interlocutory orders as may be expedient and right to preserve the rights of the parties. *Sumner v. Staton*, 198.

3. *Same—Remedy at Law.*—When it appears that a suit has been properly brought against one of the defendants in the Superior Court to set aside a will, for the reason of certain equities arising in setting aside a deed upon the ground of fraud, and necessary to be administered in order to give adequate and complete relief, it should be dismissed as to another defendant when relief can be had as to her in proceedings to caveat the will before the clerk (probate court) and concerning whose rights it is not necessary for the courts of equity to interfere. *Ibid.*

4. *Same—Infirmities—Interpretation of Statutes.*—An endorsee will not be affected with notice of an infirmity in a negotiable instrument taken from the payee without recourse and arising from a breach of warranty in an executory contract between the original parties, when it does not appear that he was aware of its terms, or there was nothing in the contract restricting the negotiability of the note or indicating fraud or imposition or an existent breach; and this is true though the note or instrument may contain on its face an express statement of the transaction which gives rise to the instrument. Revisal, 1905, sec. 2153. Case of *Howard v. Kimball*, 65 N. C., 175, cited and commented on. *Ibid.*

5. *Pleadings.*—In order to obtain equitable relief the party seeking it must allege such facts as will entitle him to it. *McFarland v. Cornwell*, 428.

ESTATES. See Wills.

Contingent Remainders, Sale of—Statutes—Constitutional Law.—Revisal, sec. 1590, providing for the sale of contingent remainders, is constitutional and valid. *Smith v. Miller*, 620.

ESTOPPEL. See Insurance; Evidence; Judgments.

Appeal and Error—Res Judicata—Evidence.—When the contents of records in a former suit, upon which a plea in estoppel or *res judicata* is based, do not appear on appeal, the Supreme Court will not pass upon the question as there is no evidence to support the plea. *Baker v. Brown*, 12.

EVIDENCE. See Questions for Jury; Nonsuit; Verdict; Issues; Pleadings; Demurrer; Arbitration and Award; Notes; Witness.

1. *Competent in Part—Objections and Exceptions.*—When a part of the testimony of a witness is competent and relevant, an objection to his entire testimony will not be sustained. *Savings Bank v. Chase*, 108.
2. *Depositions—Motion to Suppress, When Made.*—An objection and motion made in the trial of the cause to suppress a deposition taken therein for that the deposition was taken before the filing of the answer or issue joined, is made too late. The motion, at least, should have been made before the trial was entered upon. *Freeman v. Brown*, 111.
3. *Depositions, When Used—Answer.*—A plaintiff is not required to delay taking the deposition of a witness in a cause until after answer is filed. Revisal, sec. 1647. *Ibid.*
4. *Slaves—Marriage—Instructions—Legitimate Children.*—Upon the question of inheritance by the children of slaves, dependent upon what constituted the married relationship of slaves before their emancipation, it was not error of the trial judge to charge that the jury were to ascertain from the evidence whether the claimants were the children of A. and E., and not whether they were the legitimate children, especially when more definite instructions were not requested. *Walker v. Walker*, 164.
5. *Agreement to Rescind—Questions for Jury.*—In an action to recover a partial payment made on an executory contract for the sale of lands, the deed being refused by the vendee on discovering that vendor's wife, signing the deed, was not of age, and thereafter pending the proceedings, vendee refused to accept a good and sufficient deed from the vendor and his wife, the latter then being of age, it is competent to show that by parol or by matter *in pais*, the parties had agreed to rescind the contract, and under conflicting evidence the question thus raised should have been submitted to the jury. *Lewis v. Gay*, 168.
6. *Appeal and Error—Expert Witness—Qualification—Record.*—When evidence is offered and ruled out by the trial judge the burden is upon the appellant to show on appeal that prejudicial error was committed. And an exception to the exclusion of expert evidence is not tenable on appeal when it does not appear of record that his Honor failed, when requested by appellant, to find the preliminary question of the qualification of the witness as an expert, or that the evidence excluded was competent. *Lumber Co. v. R. R.*, 217.
7. *"Opinion Evidence"—Qualification—Competency.*—For "opinion evidence," as distinguished from expert evidence to be competent, there must be evidence tending to prove that the witness, by whom it is

EVIDENCE—*Continued.*

offered, has had personal observation and knowledge of the facts and conditions of the subject-matter upon which it is offered, as well as that, from his practical training and experience, he can aid the jury in reaching a correct conclusion. *Ibid.*

8. *Same.*—In this case defendant offered the "opinion" of its experienced engineer as to whether the burning of plaintiff's lumber near defendant railroad company's right of way was caused by a spark alleged to have come from a defective smokestack on defendant's engine, or from plaintiff's own mill. It did not appear that the witness had personal observation of all the pertinent and material facts and circumstances, and it is *held* that his opinion relative to the cause of the fire was incompetent. *Ibid.*

9. *Restrictive—Exceptions—Appeal and Error.*—When evidence is competent for some purpose, its general admission is not reversible error unless the appellant asks at the time of the admission that it be restricted. *Tise v. Thomasville*, 279.

10. *Discretion of Trial Court—Verdict—Weight—Testimony of Witnesses.* Motion for new trial upon affidavit in respect to the testimony of a witness, and for that the verdict is contrary to the weight of the evidence, are matters strictly within the discretion of the lower court. *Bouldin v. Daniel*, 283.

11. *Boundaries—Declarations.*—Declarations of deceased persons and common reputation, under certain circumstances are received here as evidence on questions of private boundary, the limitations as to declarations being that they should have been made *ante litem motam;* that the declarant is dead when they are offered and was disinterested when they were made; and as to both species of evidence it is required that the testimony should attach itself to some monument of boundary or natural object or be fortified by some evidence of occupation and acquiescence tending to give the land some fixed and definite location. *Lumber Co. v. Triplett*, 409.

12. *Same—Presence of Declarant.*—In the case of declarations it is not required that the declarant should be physically present at the point indicated if he describes the same so that it can be located with a reasonable degree of certainty. *Ibid.*

13. *Appeal and Error—Weight—Discretion of Court.*—It is within the sound discretion of the lower court to determine whether the verdict of the jury should stand as being against the weight of the evidence, and its decision is not reviewable. *Cates v. Telegraph Co.*, 497.

14. *Questions for Jury.*—In this case the lower court erred in not submitting the case to the jury, there being sufficient legal evidence in plaintiff's behalf. As it may prejudice the party against whom the ruling is made, the Supreme Court did not discuss the evidence, but called attention to the rulings in sundry cases. *Busbee v. Land Co.*, 513.

15. *Exceptions Confined.*—Objection to the answer of a witness to a question asked him will not be sustained when it appears that a portion of the answer was competent. The objection should be made to that part which is claimed to be irrelevant. *Shaw v. Telegraph Co.*, 638.

16. *Notes of Committing Justice.*—The notes of evidence made by a committing magistrate upon the hearing are not conclusive as to the testimony of witnesses examined. *S. v. Hooper*, 646.

EVIDENCE—*Continued.*

17. *Same—Parol—Independent Recollection.*—On the trial in the Superior Court it is competent for purposes of contradiction, to offer parol evidence as to what a witness testified to upon such preliminary examination. *Ibid.*

18. *Indictment—Proof—Variance.*—There is no fatal variance between the allegation of a bill of indictment and the proof, the former charging the burning of "a certain shop and storehouse," giving its ownership and its occupancy as "used in the trade of woodworking by H.," and the latter tending to show that defendant was seen to set fire to the "H. workshop." *S. v. Arthur*, 653.

19. *Criminal Cases—Supreme Court—Newly Discovered—Power of Court.* A new trial in criminal cases will not be granted by the Supreme Court upon the grounds of newly discovered evidence. *Ibid.*

20. *Burning Barn—Motive—Error.*—It is competent for the State in showing motive upon the part of defendant in burning a barn for which he was being tried, and which was being used by the witness as a tenant at the time, to ask witness, on direct examination, whether he opposed defendant's application for membership in a certain lodge; but it was error in the trial judge to admit in evidence at an early stage of the trial, and before defendant had put his character at issue, the answer of witness that his reason for doing so was that defendant "had been convicted of stealing and sent to the chain-gang." *S. v. Barrett*, 665.

21. *Same—Harmless Error.*—Error committed in admitting as evidence the reason of witness in opposing defendant's application for membership in a certain lodge, to show motive for the burning of a barn, used by witness as a tenant, for which defendant was being tried, to wit: defendant "had been convicted of stealing and sent to the chain-gang," is cured by the subsequent admission thereof by the defendant when under examination as a witness in his own behalf. *Ibid.*

22. *Libel—Judgments—Dicta.*—In an action for libel, brought in the State court, for publishing that one A., while judge of a certain special United States court, was corruptly influenced in his judgment in allowing certain fees to attorneys in disproportion to the value of the services rendered, the opinion of a justice of the Supreme Court of the District of Columbia, delivered in an action to enjoin the payment of the fee, in which he stated as his opinion, that the fees were reasonable is incompetent as evidence, particularly in view of the decision of such justice that his court had no jurisdiction to pass upon the fee. *S. v. Butler*, 672.

23. *Secondary—Bloodhounds.*—Evidence of the conduct of a bloodhound in tracking the accused after the offense was committed is competent to corroborate other evidence competent as tending to establish his guilt. *S. v. Spivey*, 676.

24. *Declarations—Res Gestæ.*—The declarations of deceased made directly after he received the fatal shot, that defendant had shot him because he saw him, is competent against defendant on trial for the murder of deceased, when it appears that the declaration was made spontaneously, without design or premeditation. *Ibid.*

25. *Criminal Actions—Husband and Wife—Wife's Declarations.*—While the wife is not a competent witness against the husband in the trial of a criminal action, her declarations made in his presence under circum-

EVIDENCE—*Continued.*

stances naturally calling for his reply if untrue, concerning which he remained silent, are competent when tending to show his guilt of the offense charged. *S. v. Record*, 695.

26. *Criminal Actions—Larceny and Receiving—Questions for Jury.*—Evidence is sufficient to go to the jury upon the trial for larceny and receiving, which tends to show that the articles were found in the defendant's home two weeks after the theft; that tracks led from the place of the theft to defendant's home; he denied the theft, said that he knew that the articles afterwards identified were not there, appeared excited, and remained silent when his wife claimed them for his own and in his hearing. Evidence that the goods were found in defendant's home two weeks after the commission of the theft is of itself sufficient. *Ibid.*

27. *Divine Worship—Interpretation of Statutes.*—When it appears that the members of a certain family were accustomed to gather annually for a family reunion at their different homes, and that at some time during the day a religious service was usually had: *Held*, that testimony to the effect that defendant shot a pistol several times within one hundred yards of a residence when such service was going on, is not sufficient to sustain an indictment under Revisal, sec. 3706, which makes it a misdemeanor to disturb divine worship held at a place where people are accustomed to meet for divine worship, the evidence failing to show that defendant was in view of the meeting or that he was aware that religious services were being held. *S. v. Starnes*, 724.

EXCEPTIONS. See Objections and Exceptions; Reference.

EXECUTIONS. See Judgments.

EXECUTORS AND ADMINISTRATORS.

1. *Debts—Sales—Assets—Dower.*—When the widow's claim of homestead is rightfully denied in proceedings by the administrator on partition to sell lands to make assets to pay her deceased husband's debts, an order directing that her dower be assigned, and, subject thereto, the land be sold for assets, is the proper one. *Simmons v. Respass*, 5.

2. *Fiduciary Capacity—Sale to Make Assets—Suit of Creditors—Jurisdiction.*—It is a fiduciary duty of the personal representative of deceased to sell land to make assets to pay his debts, when the personal property is insufficient, and upon his failure to do so an action will lie in the Superior Court by a single creditor to subject the land to the payment of his claim, though the action may be converted afterwards into a creditors' suit. *Yarborough v. Moore*, 116.

3. *Debts—Sale of Lands—Innocent Purchaser—Infants—Parties—Representation—Process.*—An innocent purchaser for value without notice of land sold under judgment of the Superior Court by the personal representative of deceased to make assets to pay his debts, takes free from the claim of children, not *in esse*, at the time of sale, to whom the lands descend subject to the life estate of their father, when the father, as life tenant, had been served with process and was bound by the order of sale. *Ibid.*

FALSE PRETENSE.

Special Verdict — Intent — Verdict Defective — Appeal and Error — New Trial.—Defendant being indicted under Revisal, 3432, the jury found, by special verdict, that a certain mercantile company issued aluminum checks, redeemable in merchandise, to the laborers of a certain lumber company whose names were furnished it by the latter company, and that defendant obtained one of these checks upon his false statement that he was one B., a laborer whose name had thus been furnished, and that he obtained no goods on the check: *Held*, no judgment on the verdict can be rendered, and a new trial ordered; the court is confined to the facts found, and there was a failure of the jury to find defendant's intent to defraud, and also to find the facts of the agreement or arrangements existing between the mercantile and lumber companies respecting the issuance by the former of these checks. *S. v. McCloud*, 730.

FALSE TESTIMONY. See Damages.

FEE DETERMINABLE. See Deeds and Conveyances.

FEE, RESERVATION OF. See Deeds and Conveyances.

FLOATING RIGHTS. See Railroads.

FORGERY.

1. *Deeds and Conveyances—Publication—Intent to Defraud—Declarations —Natural Evidence—Hearsay.*—When defendant is tried for forging a deed from his father, since deceased, to himself, and uttering and publishing it with an intent to defraud the other children and heirs at law, defendant may show by a State's witness that deceased had acknowledged to this witness the execution of the deed, with deceased's declaration at the time that defendant had done more for him than any other of his children had done, etc.; (1) it tended to show the disposition of the father towards the son at the time the deed was alleged to have been executed by the father; (2) it was natural evidence and the only obtainable evidence of the intent of the grantor, and an exception to the rule of hearsay evidence. *S. v. Draughon*, 667.

2. *Same.*—While such declarations are not direct evidence that the father executed the deed, which the son is being tried for forging, it is a material circumstance tending to show it and excluding such evidence is reversible error. The questions raised in this case by defendant upon the plea of "former acquittal" are not passed upon on this appeal as they may not again arise. *Ibid.*

FRANCHISE. See Cities and Towns.

FRAUD. See Evidence; Judgment; Insurance; Contracts; Deeds; Issues; Notes; Wills; Taxation; Trusts.

FRAUD AND DECEIT. See Contracts.

FUNDS, MISAPPLICATION OF. See Issues.

GAMING CONTRACTS. See Contracts.

GRATUITOUS BAILEE. See Carriers of Passengers.

HABEAS CORPUS.

1. *Custody of Child—Rights of Parents—Third Persons.*—In the exercise of a sound legal discretion subject to review on appeal, the court in *habeas corpus* proceedings may, in proper instances, order the child into the custody of some third and fit person against the claims of the father and mother therefor. *In re Turner*, 474.
2. *Same—Industrial School—Custodia Legis—Visiting, Etc.*—It appearing from the findings of the lower court in *habeas corpus* proceedings for the custody of a child that both parents claimed it; that the father was improvident and traveled from place to place without a fixed place of abode; that the mother was scarcely a fit person, and resided beyond the borders of the State; the court ordered the child into the custody of the Home Industrial School at Asheville and that the father pay $80 for its care and maintenance there, with leave to the parents to visit and have access to it under the order and supervision of the court, the child to spend one-half the time during vacation with each of her parents, each to give a bond for $300 for the return of the child to the jurisdiction of the court, retaining the cause for further orders: *Held*, no error, with the modification that the mother should not have the custody of the child in such a manner as to enable her to remove the child beyond the court's jurisdiction. *Ibid.*

HARMLESS ERROR. See Appeal and Error; Notes.

HAZARDOUS OCCUPATION. See Master and Servant.

HEALTH. See Cities and Towns.

HOMESTEAD.

1. *Rights of Widow—Children—Constitution—Interpretation.*—The widow by a second marriage of one who died seized and possessed of land leaving no children by her, is not entitled to the benefit of a homestead therein, when he has left children by his first marriage, though they are adult. The meaning of the language of the Constitution is too plain for construction, that in speaking of children the instrument refers to children of the deceased owner. Constitution, Art. X, secs. 2, 3, 5. *Simmons v. Respass*, 5.
2. *Executors and Administrators—Debts—Sales—Assets—Dower.*—When the widow's claim of homestead is rightfully denied in proceedings by the administrator on partition to sell lands to make assets to pay her deceased husband's debts, an order directing that her dower be assigned, and subject thereto, the land be sold for assets, is the proper one. *Ibid.*
3. *Judgments—Executions—Lands—Purchase Price—Exemption.*—A judgment debtor cannot claim his homestead exemption in lands upon which execution has been issued under a valid judgment on his note given for their purchase price and so certified in the transcript docketed in the Superior Court. *Billings v. Joines*, 363.

HOURS OF SERVICE. See Railroads.

HUSBAND AND WIFE. See Witnesses; Deeds.

1. *Deeds and Conveyances—Married Women—Principal and Agent—Fraud—Reformation of Deed.*—In an action to reform a deed of a married

HUSBAND AND WIFE—*Continued.*

woman, evidence is sufficient which tends to show that defendant, acting through her husband as her agent, bargained to sell the whole of her certain lot, which was not measured at the time but afterwards ascertained to have a frontage of sixty-five feet, and that her husband, thereafter, induced, by fraudulent acts and representations, the plaintiff to accept a deed conveying only a frontage of fifty feet, leaving out a large portion of a house which was to have been included in the conveyance, and that she received the purchase price for the sixty-five foot lot; and an instruction is correct, that the jury should find for plaintiff if defendant knew the whole lot was not conveyed and that plaintiff was deceived thereby and induced to accept the deed thinking it conveyed the whole lot bargained for. *Bell v. McJones*, 85.

2. *Same—Equitable Relief.*—When a *feme covert* admits a contract for the sale of a certain lot of her land by her agent, and has received the purchase money, she cannot profit by his fraud in inducing her grantor to accept a deed for a smaller lot, and thus profit by his fraud; but she will be held as trustee of the unconveyed property to the end that the agreement may be executed; and equity will decree correction of the deed, and if such is not done, the registration of the decree as a conveyance. Revisal, 567. *Ibid.*

3. *Tort—Husband's Liability.*—The husband living with his wife is jointly liable with her for damages resulting from an injury received by a customer through the negligence of a clerk in her store, if she is liable therefor. Revisal, 2105. *Brittingham v. Stadiem*, 299.

INDICTMENT.

1. *Bill — Offense Charged — Evidential Matters—Surplusage—Motion to Quash.*—The use of superfluous words in a bill of indictment should be disregarded, and it is error to dismiss a bill on motion to quash which sufficiently charges "an unlawful sale of liquor by the small measure," because of other matters therein found by the grand jury which are only evidential. Revisal, sec. 3254. *S. v. Wynne*, 644.

2. *Bill of—Offense Charged—Special Verdict.*—The grand jury cannot find a special verdict by adding evidential matters to a bill of indictment which otherwise sufficiently charges the offense. *Ibid.*

3. *Same—Questions for Jury.*—Evidential matters contained in a bill of indictment can furnish no ground for the trial judge to consider quashing the bill, when otherwise it is sufficient, as such would be an invasion of the province of the petty jury. *Ibid.*

4. *Superior Court—Quashing Bill.*—An indictment for an assault with a deadly weapon is a misdemeanor and cognizable by the Recorder's Court of Nash (Laws 1909, ch. 633), and the Superior Court of that county properly quashed the bill for want of original jurisdiction, the indictment having been found after the law creating the recorder's court had been enacted. *S. v. Collins*, 648.

5. *Proof—Evidence—Variance.*—There is no fatal variance between the allegation of a bill of indictment and the proof, the former charging the burning of "a certain shop and storehouse," giving its ownership and its occupancy as "used in the trade of woodworking by H.," and the latter tending to show that defendant was seen to set fire to the "H. workshop." *S. v. Arthur*, 653.

INDICTMENT—*Continued.*

6. *Presentment—Limitation of Actions.*—An indictment or presentment marks the beginning of the prosecution and arrests the running of the statute of limitations. Revisal, sec. 3147. *S. v. Williams*, 660.
7. *Divine Worship—Evidence—Picnics.*—A meeting of the kind described is fully protected from wrongful and willful interruption by sec. 3704 of the Revisal, but the charge is made under sec. 3406, and, on the facts presented, the defendant was entitled to the instruction, that if the jury should find the facts to be as testified, they would render a verdict of not guilty. *S. v. Starnes*, 724.
8. *Definiteness—Failure to Work Road—Proof—Motion in Arrest.*—In this case the motion in arrest of judgment should have been allowed, the warrant being fatally defective in failing to allege that defendant was assigned to work the road, for the failure of which he was tried and convicted, and the prosecution failing to negative the payment of one dollar allowed by law in lieu of service. *S. v. Green*, 729.

INFANTS. See Sales; Parties.

INFERIOR COURT. See Statutes.

INHERITANCE, WORDS OF. See Deeds and Conveyances.

INJUNCTION. See Appeal and Error.

1. *Courts—Jurisdiction—In Personam.*—An injunction can only operate *in personam*, and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity, and on motion properly made it should be dismissed. *Warlick v. Reynolds*, 606.
2. *Judgments—Lands—Levy—Quieting Title.*—The plaintiff showing title to lands by deed expressing a valuable consideration, made and recorded prior to an attachment levied thereon by a judgment debtor of his grantor, may maintain his action to quiet title under the provisions of chapter 763, Public Laws of 1903, amending chapter 6, section 1, Public Laws 1893, now Revisal (Pell's), sec. 1589; and when defendant has answered alleging fraud of plaintiff in the procurement of his deed, an injunction will lie restraining the sale under the levy until the issue of title can be determined. *Crockett v. Bray*, 615.
3. *Injunctions Dissolved—Appeal and Error—Continued—Bond—Procedure.*—The Supreme Court in this case having overruled the judgment of the lower court in dissolving the plaintiff's injunction, requires the plaintiff to give a bond in a certain named sum, payable to defendant, with sureties approved by the Superior Court clerk, with order that defendants be notified of its tender that they may object to its sufficiency; the bond to be filed within fifteen days from the filing with said clerk of a certified copy of this opinion, and conditioned to pay costs of the action and the principal and interest of the debt, if defendant's right of attachment and execution on the lands in question be finally upheld. *Ibid.*

INJURY TO REALTY. See Venue.

INNOCENT PURCHASER. See Sales; Notes; Partnerships.

IN PARI DELICTO. See Insurance; Statutes.

INSANE PERSONS.

1. *Hospitals—Directors and Superintendent—Discharge—Negligence—Interpretation of Statutes.*—The directors and superintendent of a hospital for the insane acting under the provisions of Revisal, sec. 4596, in discharging or releasing a patient therefrom, cannot be held responsible in damages by the subsequent killing by such patient of another under a charge of negligence. Revisal, sec. 4560. *Bollinger v. Rader*, 383.
2. *Same—Proximate Cause.*—The act of an insane person in killing another about six months after his discharge or release by three directors and the superintendent of a hospital for the insane under authority conferred by Revisal, sec. 4596, was a mere condition arising from the discharge or release, which the directors and superintendent by the exercise of ordinary care and caution, could not have anticipated, foreseen or expected, and for which they could not be held responsible in damages as arising from negligence on their part. *Ibid.*
3. *Burden of Proof—Verdict—Recommendation for Mercy—Some Doubt—Proof Required.*—Upon the trial of a criminal offense in which the plea of intermittent insanity at the time charged is set up as a defense, a verdict rendered that "we return a verdict of guilty; we ask the mercy of the court for the reason that some of the jurors have some doubt as to the sanity of the defendant," is sufficient for conviction, the first sentence being a complete verdict, and the balance surplusage, merely recommendatory, showing that some doubt existed in the minds of some of the jurors, but not sufficient to overcome the requirement that the burden was on defendant to prove insanity to their satisfaction. *S. v. Hancock*, 699.

INSANITY. See Contracts.

INSTRUCTIONS. See Issues.

1. *Evidence—Questions for Jury.*—An instruction, "If you find by the greater weight of the testimony that the plaintiff's evidence on the fourth issue is not positive and supported, then you will answer that issue 'Yes,'" is properly refused as invading the province of the jury to pass upon the weight and sufficiency of the evidence. *Baker v. Brown*, 12.
2. *Entire—Verdict Directing—Evidence Conflicting.*—A requested instruction directing the jury to answer each of several issues in a certain manner, if they believed the evidence, is not correct when there is conflicting evidence as to one or more of them. The instruction being asked in its entirety every substantial and integral part must be correct in law. *Savings Bank v. Chase*, 108.
3. *Evidence—Demurrer—Ruling Reserved—Sustained—Harmless Error.*—It is not improper for the trial judge to reserve his ruling on the evidence upon matters set out in a certain section of the complaint and to sustain the demurrer when the evidence is all in if it appears that he should have done so. His instructions to the jury to exclude such evidence from their consideration would cure the error, if any committed therein. *Bedsole v. Lumber Co.*, 152.
4. *Slaves—Marriage—Legitimate Children.*—Upon the question of inheritance by the children of slaves, dependent upon what constituted the married relationship of slaves before their emancipation, it was not error of the trial judge to charge that the jury were to ascertain

INSTRUCTIONS—*Continued.*

from the evidence whether the claimants were the children of A. and E., and not whether they were the legitimate children, especially when more definite instructions were not requested. *Walker v. Walker*, 164.

5. *Contentions.*—It is the duty of the trial judge to call the contentions of the parties to the attention of the jury when supported by the evidence, and his properly doing so can afford no just ground of exception. *Ibid.*

6. *Admonitions.*—Impartial admonitions of the trial judge to the jury as to the importance of the case to the parties, is not just ground for exceptions. *Ibid.*

7. *Contracts, Interpretation of—Reasonable Support—Measure of Damages—Value of Service—Harmless Error.*—In a suit upon a bond and undertaking given to another for the support of an imbecile son, if he think it proper to live with the obligor, and if not, by construction, a reasonable allowance to the son in keeping with his condition in life, it was shown that the son was an average field hand and worth about $65 a year. The son lived with another person than the obligor: *Held*, (1) it was error in the trial judge to instruct the jury that recovery could be had of the amount necessary to support the son in his condition of life for the period he had not lived with the obligor, as it allowed no deduction for the value of the son's services during that time; (2) it appeared from the verdict that the jury had made this deduction, and the error was harmless. *Rhyne v. Rhyne*, 400.

8. *Ejectment—Lands—Title—Questions for Jury.*—An instruction which erroneously assumes that plaintiff has established his title in an action of ejectment, when the issue in the case is one of mixed law and fact to be found by the jury, under instructions of the court, is properly refused. *Bryan v. Hodges*, 413.

9. *Findings—Criminal Cases—Formula—Appeal.*—While the Court has held that an instruction to the jury, where the testimony permits if "they believe the evidence," etc., will not constitute reversible error, it has been several times suggested as a better formula in such cases to charge, "If the jury find the facts to be as testified by the witnesses"; and in criminal cases it should further state if they are "satisfied beyond a reasonable doubt" that the facts are as testified to by the witnesses. *S. v. Starnes*, 724.

10. *Divine Worship—Interpretation of Statutes—Evidence.*—When it appears that the members of a certain family were accustomed to gather annually for a family reunion at their different homes, and that at some time during the day a religious service was usually had: *Held*, that testimony to the effect that defendant shot a pistol several times within one hundred yards of a residence when such service was going on, is not sufficient to sustain an indictment under Revisal, sec. 3706, which makes it a misdemeanor to disturb divine worship at a place where people are accustomed to meet for divine worship, the evidence failing to show that defendant was in view of the meeting or that he was aware that religious services were being held. *Ibid.*

11. *Different Issues—Error Not Cured as to One.*—An erroneous instruction upon one issue cannot be cured by an instruction upon a different

INSTRUCTIONS—*Continued.*

issue, when it does not purport to do so, and when it does not appear which instruction influenced the verdict of the jury on the first issue. *Jones v. Ins. Co.*, 54.

INSURANCE. See Pleadings.

1. *Title—Equity—Proof.*—As between the insured and an insurance company, in an action to recover upon a fire insurance policy, it is not necessary for the former to show by clear, strong and convincing proof, that he was the sole equitable owner of the property covered by the policy, this rule of proof not applying in such case. *Modlin v. Ins. Co.*, 35.
2. *Title—Essential Matters—Time of Inquiry.*—If it is essential for an underwriter to know by what title the insurer holds the property, the inquiry should be made at the time of issuing the policy and not deferred until after the loss has occurred. *Ibid.*
3. *Mortgages—Title—Policy—Benefits Avoided—Waiver—Estoppel.*—Execution of a mortgage on the insured property so affects title as will avoid an insurance policy then existing thereon and forfeit its benefit, if made without the knowledge or consent of the insurance company, and not attested as prescribed by the policy contract, unless the company thereafter, by its acts, conduct and statements has waived the effect of the mortgage and is estopped to assert its forfeiture. *Ibid.*
4. *Policies—Conditions—Waiver.*—It is not necessary that the consent of an insurance company to a waiver of the conditions of a policy contract be in writing and attached to the policy, as therein required, when such consent was given by the company itself. *Ibid.*
5. *Same—Arbitration—Nonwaiver—Agreement—Estoppel.*—A "nonwaiver agreement" looking to the ascertainment of loss by fire under a fire insurance contract, affords no defense to the insurance company for its own acts, conduct and statements, constituting a waiver or estoppel done and made afterwards with full knowledge of all its rights and defenses and a knowledge of the causes of avoidance. *Ibid.*
6. *Standard Policies—Limitations of Actions—Interpretation of Statutes.* The provision of a standard fire insurance policy, Revisal, sec. 4760, stating that no suit thereon shall be sustained, etc., "unless commenced within twelve months next after the fire," etc., must be construed in connection with Revisal, sec. 2809, to wit: that the policy shall not "limit the time within which such suit or action shall be commenced to less than one year after the cause of action accrued," and it is not barred if brought accordingly. *Ibid.*
7. *Fraud and Deceit—Instructions—Unresponsive—Questions for Jury.*—In an action of fraud and deceit against a life insurance company, in which it was alleged that defendant obtained the policy from plaintiff by falsely and fraudulently representing that he would receive back his premiums paid, and interest thereon, at the expiration of ten years, there was evidence that plaintiff was told by one P., after he had received and paid premiums on his policy, that the policy was worthless in that respect; that this was repeated to defendant's agent who then said that the policy was "as good as gold": *Held*, error for the judge to instruct the jury to find the issue on the question of fraud and deceit in the affirmative if they found that the agent had

INSURANCE—*Continued.*

said that the policy was "as good as gold," as such was not responsive to the issue: It likewise prevented the jury from finding the truth or falsity of the statement of P. *Jones v. Ins. Co.*, 54.

8. *Life—Collateral Agreement—Policyholders—Preferred Class—Revisal, 4775.*—When a policyholder surrendered his policy of life insurance for cancellation and received the surrender value, he cannot maintain an action against the insurance company upon an agreement made collaterally to the policy contract, and which is in direct contravention to the Revisal, sec. 4775, prohibiting discrimination among insurants of the same class and equal expectation of life, etc. *Smathers v. Ins. Co.*, 98.

9. *Same.*—An agreement collateral to a policy contract of life insurance which selects a body of its policyholders not exceeding three hundred, and confers upon them such a property right in the funds of the company as to make the policies in this class self-sustaining in five or six years, is a distinction or discrimination between insurants of the same class and equal expectation of life, and prohibited by the statute. Revisal, sec. 4775. *Ibid.*

10. *Life — Collateral Agreement — Policyholders — Special Inductments — Statutory Requirements.*—When a collateral agreement delivered to insured with his policy of life insurance provided for the reduction of his premiums to be paid thereon, and is claimed to be the sole inducement moving him to take the policy, it is necessary for these inducements so claimed to be specified in the policy contract. Otherwise the collateral agreement is prohibited by the statute and not enforceable. Revisal, sec. 4775. *Ibid.*

11. *Same—In Pari Delicto.*—A policyholder cannot enforce against the insurance company a severable collateral agreement to his policy contract of life insurance which is prohibited by statute, Revisal, sec. 4775, upon the principle that the law was not passed for the benefit of the company resisting recovery, but for the protection of the policyholders when it appears that the agreement is executory in character and gives him a preference over the general body of policyholders for whose benefit the statute was passed. In such cases the parties are *in pari delicto. Ibid.*

12. *Pleadings—Benevolent Societies—Rejection of Member—Cause of Action.*—The complaint alleging that plaintiff had been elected a member of defendant society by ballot, but that, subsequently, misled by false statements to his prejudice, made by one of its directors, it rescinded its action to his humiliation and damage, states no cause of action, it appearing that the director acted in the line of his duty. *Dunn v. Aid Society*, 133.

13. *Benevolent Societies—Rejection of Member—Certificate—Contracts.*—A complaint alleging that defendant society elected him a member and then rescinded its action before issuing him a certificate of membership, fails to set out a contract for the breach of which damages may be recovered. *Ibid.*

14. *Contracts, Written—Parol Evidence—Contradictory.*—In defense to an action upon a due bill specifying that $92.92 was due on a policy of life insurance, to be paid on the delivery of the policy by the agent of the company issuing it, it is incompetent to set up by parol that the contract was the surrender of a $1,000 policy for one for $2,000,

INSURANCE—*Continued.*

the latter of which was to be for life, and the annual payment of a premium of $9; and that the due bill was signed under an impression that it was an order to deliver the old policy under this contract. This would be a contradiction by parol of the terms of a written instrument and not admissible in the absence of fraud or mistake. *Woodson v. Beck*, 144.

15. *Fire—Loss—Denial of Liability—Proof—Waiver.*—A distinct denial by a fire insurance company of liability under a policy after loss, and within the time prescribed for the proofs, upon the ground that there is no valid contract of insurance, is a waiver of proofs of loss. *Jordan v. Ins. Co.*, 341.

16. *Fire—Title—Policy Provisions—Ownership.*—A vendee of land under an executory contract of purchase, who has paid a portion of the purchase price and entered into possession is an "unconditional and sole owner" in fee simple in respect to the usual clause in a policy of fire insurance relating to the title; and such does not avoid the policy on the house under a provision therein that the policy shall be void if the interest of the insured is other than unconditional and sole ownership of the fee simple title, in the absence of allegation of misrepresentation as to title and encumbrances. *Ibid.*

17. *Same—Equity.*—In relation to the usual clause relating to the title of the insured in a fire insurance policy, equity treats that as done which ought to have been done, or the doing of which the vendor and vendee contemplated in the final execution and consummation of the contract as specifically executed; and in the absence of allegation of misrepresentation of title and encumbrances, a policy is not void on the ground that the insured, in possession, held under an executory contract of purchase. *Ibid.*

18. *Health—Notice of Sickness—Interpretation of Contracts.*—A policy of health insurance requiring "written notice to be given in ten days by the insured or his attending physician to the company" of the disease by reason of which the indemnity is claimed, by reasonable intendment and construction is to afford the company opportunity to investigate conditions for the purpose of preventing imposition, and means that the notice must be given "within ten days of the beginning of that part of the illness for which the insured claims payment." *Guy v. Casualty Co.*, 465.

19. *Same—Reasonable Notice—When Notice Not Required.*—The notice to an insurance company of indemnity claimed under a health policy requiring that written notice be given to the company by the insured or his attending physician, is sufficient if given by any relative or friend, etc., acting on behalf of the insured, though their failure to do so when the insured is unable to request it is no bar on the insurance. *Ibid.*

20. *Same—Health Policy—Notice of Sickness.*—When the defense to an action to recover an indemnity for sickness under a health insurance policy is that notice was not given as required by the policy, and the judge, under an agreement of the parties, in finding the facts sets out evidence tending to show that plaintiff was incapacitated by the sickness to notify the defendant, or cause it to be notified, and evidence *per contra*, the court on appeal will set aside his judgment in favor of defendant on the evidence, and order a new trial. *Ibid.*

INSURANCE—*Continued.*

21. *Life—Fraternal Orders—Good Standing—Past Dues—Waiver.*—In an action to recover upon a death certificate of the National Council U. A. M., it appeared that the insured was in arrears for weekly dues to the local lodge for eight months preceding his death. The condition of the insurance, as stated in the certificate, was that the insured must be a member in good standing in the subordinate lodge affiliating with the National Council, and in good standing of the Funeral Benefit Department; and by the Constitution and By-laws of the Order, that he would forfeit all his rights and privileges, except that of being admitted to the council chamber during its session, if he should become more than thirteen weeks in arrears for weekly dues: *Held,* (1) that under the express stipulations of the certificate on which the cause of action was based, no recovery could be had; (2) a payment made by the local lodge to the National Council of a portion of certain fees due the latter by the former, necessary to preserve its connection and standing, could not be considered as a waiver. *Wilkie v. National Council,* 527.

INTENT. See Mortgagor and Mortgagee; Wills; Contracts; Forgery; False Pretense.

INTEREST, CONTINGENT. See Trusts and Trustees.

INTERLOCUTORY ORDERS. See Appeal and Error.

INTERSTATE COMMERCE. See Statutes.

INTIMATION OF OPINION. See Power of Court.

INTOXICATING LIQUORS.

1. *Nonintoxicants—"Near Beer"—License—Lawful Commodity—Prohibition Law.*—"Near beer" and kindred non-intoxicating beverages mentioned in chapter 438, Public Laws of 1909, are now recognized articles of commerce, and may lawfully be dealt in within this State, notwithstanding the general prohibition laws. *Parker v. Griffith,* 600.

2. *Nonintoxicants — "Near Beer" — License—Issuance—Mandamus.*—The commissioners of Union County, in conformity with chapter 438, Public Laws 1909, having levied a tax on "near beer" and kindred nonintoxicating drinks therein enumerated, the writ of mandamus will lie to compel the sheriff of the county to issue a license for its sale, upon his refusal to do so, as he is without discretion to grant or refuse the license. *Ibid.*

3. *Same—Police Powers.*—A municipality having the power by its charter to levy a license tax on dealers in "near beer" and kindred drinks may consider the question both from the standpoint of revenue and police regulations, and with regard to the extraordinary opportunities it affords for violating the prohibition law and the extra police surveillance it entails. *S. v. Danenberg,* 718.

4. *Cities and Towns—Nonintoxicants—"Near Beer"—Ordinances—Presumptions—License Prohibitive—Proof.*—Giving the ordinance of the city of Charlotte, imposing a license tax of $1,000 on every dealer in "near beer" and kindred drinks the benefit of the presumption of reasonableness, the facts appearing of record in this case are not sufficient for the courts to say that the ordinance was unreasonable. *Ibid.*

INTOXICATING LIQUORS—*Continued.*

5. *Spirituous Liquors—Judgment—Motion to Arrest—General Law—Result of Election—Judicial Notice—Indictment.*—A motion in arrest of judgment after conviction by defendant of violating the State prohibition laws, chapter 71, Public Laws 1908, extra session, for that the bill failed to charge that the election provided for had been held and resulted in favor of prohibition, will not be sustained. The courts take cognizance of an election of this general character, and also of the proclamations of the Governor which, under the provisions of the act, had the effect of determining the result of the election. *S. v. Swink*, 726.

6. *Spirituous Liquors—Prohibition, State Law—Conviction—Punishment—Charter Provisions.*—In this case the defendant was convicted of violating the State prohibition law, and the punishment is not confined to that prescribed by the charter of the city of Asheville. *Ibid.*

7. *Power of Court—Witnesses—Contempt—Summary Punishment—Presence of Jury—Intimation of Opinion.*—While the trial judge may summarily punish for contempt committed in the presence of the court, it is error to order the defendant's witness in the case into custody for perjury while on the witness stand. This is an invasion of the rights of the party who had offered the witnesses and an intimation of opinion prohibited by statute. *Ibid.*

ISSUES. See Contracts.

1. *Sufficient—Contributory Negligence.*—When the negligence of a fellow-servant is set up in bar of recovery and the judge below clearly gives the defendant the benefit of it by proper instructions under the issue of negligence, the refusal of the trial judge to submit a separate issue thereon is not error. *Morrisett v. Cotton Mills*, 31.

2. *Evidence.*—The refusal of the trial judge to submit an issue upon which no evidence whatever is offered is not erroneous. *Ibid.*

3. *Instruction—Error Not Cured as to One.*—An erroneous instruction upon one issue cannot be cured by an instruction upon a different issue, when it does not purport to do so, and when it does not appear which instruction influenced the verdict of the jury on the first issue. *Jones v. Ins. Co.*, 54.

4. *Sufficient.*—An issue is not open to objection which clearly arises from the pleadings, and under which any phase of the evidence and of the controversy may be presented. *Bell v. McJones*, 85.

5. *Evidence Immaterial—Harmless Error.*—The admission or exclusion of evidence not pertinent to the inquiry or material to the issue does not constitute reversible error. *Freeman v. Brown*, 111.

6. *Misapplication of Funds—Consent—Instructions.*—Upon an issue as to whether the defendant fraudulently applied the plaintiff's money to his own use, the defense being that the money was used with the plaintiff's consent, the question presented was whether the defendant had reasonable grounds to believe from his intercourse with plaintiff that it had been so agreed; and it was not error for the trial judge to omit to charge as to whether the plaintiff assented to this use of the money by defendant, either expressly or impliedly, as such would tend to confuse the true meaning of the issue. *Lumber Co. v. Rowe*, 130.

ISSUES—*Continued.*

7. *Determination of Controversy—Other Issues—Harmless Error.*—An issue submitted that does not prejudice the rights of the complaining party, though unnecessary, the whole controversy being correctly determined upon another issue, is harmless error. *Walker v. Walker*, 164.

8. *Unnecessary—Negligence—One Damage.*—When there is allegation and evidence that defendant negligently injured plaintiff by the derailment of its passenger train and the immediate running into it of another passenger train, the plaintiff can only recover one damage caused by the negligence of the defendant, and two issues as to damage are necessary. *West v. R. R.*, 231.

9. *Gaming Contracts — Pleadings — Judgments—Fraud—Jurisdiction.*—In the present case, being an action to recover on a judgment rendered in favor of plaintiff and against defendant in the State of Virginia, it appearing that personal service of process on defendant was had in the State of Virginia, and that said defendant appeared and by proper pleas raised the question whether the claim declared on arose on a gaming transaction and on inquiry duly had the question resolved against defendant, the parties are thereby concluded as to such question; and it appearing, further, that the plea of fraud is not sufficiently averred, the only remaining issue arising on the pleadings is on the jurisdiction of the court, and the cause is sent back for the proper decision of such issue. *Mottu v. Davis*, 237.

10. *Technical Error—Verdict—Harmless Error.*—This case was properly submitted to the jury upon conflicting evidence and under proper instructions; and while there was technical error committed as to one issue, it was cured in the manner in which the jury answered it. *Young v. Mfg. Co.*, 272.

11. *Material—Set Aside—Judgment—Discretion—Appeal and Error.*—The setting aside of material issues found by the jury in favor of a plaintiff, in connection with the other issues, would entitle him to recover, and giving judgment on the verdict as it then stood for defendant, does not involve matters resting within the sound discretion of the trial judge, but those of "law or legal inference," from which an appeal lies; and error in setting aside the issues being found by the Supreme Court a judgment for plaintiff will be ordered. *Drewry v. Davis*, 295.

12. *Inconsistent—Verdict—Judgment.*—The exception by appellant to a judgment rendered on the verdict in favor of appellee, on the ground of inconsistent issues, cannot be sustained when it appears that appellee was entitled to his verdict on the answer of the jury as to each. *Stern v. Benbow*, 460.

JOINDER. See Parties.

JUDGMENTS. See Evidence.

1. *Executors and Administrators—Debts—Judicial Sales—Motion to Set Aside—Findings—Appeal and Error.*—The facts found by the judge of the Superior Court, having evidence to support them, are conclusive on appeal from his denial of a motion to set aside a judgment directing that decedent's lands be sold by his personal representative to pay his debts. Clark's Code, sec. 417. *Yarborough v. Moore*, 116.

JUDGMENTS—*Continued.*

2. *Summons — Publication — Persons Unknown — Defense After—Title—Purchaser.*—Revisal, sec. 449, allowing persons served with summons by publication to defend after judgment, etc., by its express terms does not affect the title to land acquired by a *bona fide* purchaser of land at a sale therein decreed. *Lawrence v. Hardy*, 123.

3. *Other States—Estoppel.*—By virtue of the Constitution of the United States and Acts of Congress in pursuance thereof, the judgments of the courts of other States are put upon the same footing as domestic judgments. Therefore, a judgment of such other courts, standing unreversed, in the absence of fraud or lack of jurisdiction, bars a recovery of the same cause of action subsequently brought in the courts of this State. *Marsh v. R. R.*, 160.

4. *Other States—Pleadings—Demurrer—Merits—Estoppel.*—A general demurrer to the merits of the cause of action alleged in the complaint is an admission of all matters of fact well pleaded, and a judgment of a court of competent jurisdiction of another State sustaining such a demurrer, in the absence of fraud, will bar recovery for the same cause of action brought in the courts of this State. *Ibid.*

5. *Same—Additional Allegations.*—When a former judgment of a court, standing unimpeached, sustaining a demurrer to a complaint, is pleaded in bar of recovery, and it appears that every phase and essential feature of the controversy has been set out, that the cause and the parties are the same, a position that certain material facts stated in the pending action were not set out in the former one, cannot be sustained. *Ibid.*

6. *Other States—Jurisdiction—Parties—Subject-matter.*—In an action on a judgment recovered in a sister State, it is open to defendant to allege and show a want of jurisdiction in the court rendering the judgment, either of the subject-matter or the parties litigant, and this is allowable, though the judgment sued on may recite jurisdictional facts. *Mottu v. Davis*, 237.

7. *Another State—Nonresidence—Summons—Service—Proof.*—A lack of jurisdiction of the person is not established by showing, without more, that process was personally served on a nonresident defendant while he was temporarily and of his own volition within the jurisdiction of the court rendering the judgment. *Ibid.*

8. *Other States—Fraud—Proof.*—In an action in the courts of this State on a judgment rendered in a sister State it is open to defendant to allege and prove fraud in the procurement of the judgment, and the term fraud in this connection includes all such circumstances of fraud or imposition in procuring the judgment as would induce and authorize the courts of the original forum to interfere to prevent the enforcement of an unconscionable recovery. *Ibid.*

9. *Same—Pleadings.*—This defense of fraud involves an issue of fact, and in order to be available it is not sufficient to aver in general terms that a judgment was procured by fraud, but the alleged facts must be set forth with sufficient fullness and accuracy to indicate the fraud charged and to apprise the offending party of what he will be called on to answer. *Ibid.*

10. *Contracts, Impairment of—Legislation—Constitutional Law.*—While judgments are sometimes spoken of as contracts of record, they are not in reality contracts, and are never so considered in reference to

JUDGMENTS—*Continued.*

the clause in the Federal Constitution which forbids that contracts should be impaired by State legislation. *Ibid.*

11. *Same.*—On the facts indicated, if it appeared that the court of the sister State rendering the judgment had jurisdiction of the cause and the parties, and that the question whether the transaction sued on was a gaming transaction had been expressly raised and determined adversely in that court, in such case, under Art. IV, sec. 1, the judgment of the sister State would conclude the parties, the terms and very purpose of the article being to prevent all question in the courts of one State of the Union as to the validity of a cause of action which had been presented and decided in the courts of another. *Ibid.*

12. *Justice's Court—Appeal—Docketing—Laches—Void Appeal.*—An appeal from a judgment of a justice of the peace must be docketed at the next ensuing term of the Superior Court commencing ten days after the notice of appeal, and an attempted docketing at a later term is a nullity. Revisal, 307-8. *MacKenzie v. Development Co.*, 276.

13. *Judgment Non Obstante—Pleadings.*—While the common-law rule has been relaxed so that a judgment *non obstante veredicto* may sometimes be granted the defendant, it is only when the pleadings entitle him to it irrespective of the verdict. *Shives v. Cotton Mills*, 290.

14. *Appeal and Error — Sureties—Contribution—Procedure—Final.*—Ordinarily, a court is not permitted to determine the rights to contribution between the sureties on a bond until there has been payment made in excess of the rightful proportion; but as the matter presented in this appeal was the lower court directing execution on a judgment theretofore obtained against the principal and sureties on his bond, the order of the lower court sufficiently partakes of the nature of a final judgment for the Supreme Court to express its opinion. *Comrs. v. Dorsett*, 307.

15. *Executions—Lands—Purchase Price—Homestead Exemption.*—A judgment debtor cannot claim his homestead exemption in lands upon which execution has been issued under a valid judgment on his note given for their purchase price and so certified in the transcript docketed in the Superior Court. *Billings v. Joines*, 363.

16. *Set Aside—Fraud—Allegations Necessary.*—To invalidate a judgment for fraud it is necessary to allege the facts constituting the fraud with sufficient certainty and fullness to apprise the opposing party of what he is called upon to answer; and in an action to restrain an execution issued thereunder, the mere allegations that the judgment is fraudulent, illegal and void, and that the transcript, execution and levy and all other proceedings are illegal, are insufficient. *Ibid.*

17. *Public Schools.*—A public schoolhouse cannot be sold under execution, except with legislative authority, and a judgment in favor of a subcontractor, or those furnishing materials for its construction, would be in vain, and the courts will therefore not render such a judgment. *Hardware Co. v. Schools*, 507.

18. *Lands—Levy—Quieting Title—Injunction.*—The plaintiff showing title to lands by deed expressing a valuable consideration, made and recorded prior to an attachment levied thereon by a judgment debtor of his grantor, may maintain his action to quiet title under the provisions of chapter 763, Public Laws of 1903, amending chapter 6, sec-

JUDGMENTS—*Continued.*

tion 1, Public Laws 1893, now Revisal (Pell's), sec. 1589; and when defendant has answered alleging fraud of plaintiff in the procurement of his deed, an injunction will lie restraining the sale under the levy until the issue of title can be determined. *Crockett v. Bray*, 615.

19. *Suspended—Reasonable Period—Power of Court.*—The power of a court having jurisdiction of a cause to suspend judgment temporarily on conviction of a criminal for some special purpose or for some determinate and reasonable period of time was recognized at common law and ordinarily obtains at the present day in courts of general jurisdiction and holding terms at stated periods. *S. v. Hilton*, 687.

20. *Suspended — Terms — Compliance—Discharge—Subsequent Sentence—Power of Court.*—When it appears that defendant had pleaded guilty to the offense charged in the indictment and the judgment was suspended upon his payment of costs and his giving bond to appear at court from term to term to show good behavior, sentence may not be imposed after an indefinite suspension of judgment, when every condition attached to the order has been complied with, the fine and costs paid, the defendant discharged by order of court and the cause removed from the docket. *Ibid.*

JUDICIAL NOTICE. See Statutes.

JUDICIAL POWERS. See Corporation Commission.

JURISDICTION. See Sales; Equity; Judgments; Corporation Commission; Removal of Causes.

1. *Superior Courts—Parol Trusts—Equity.*—When it is alleged that plaintiff's deceased father had created a parol trust under a deed in her favor in certain of his real and personal property, and that he had subsequently executed a paper-writing declaring the trusts, which defendants had destroyed, the action is properly cognizable in the Superior Court, to enforce the trusts declared, whether the writing be a deed or a will, and it can give relief in its equity jurisdiction; and leave given the plaintiff to probate the paper as a deed, or will, under penalty of dismissal, is erroneous. *Ricks v. Wilson*, 46.

2. *Superior Court—Procedure—Appellee's Laches—Waiver.*—By docketing an appeal from a justice's court in the Superior Court, the latter court acquires, derivatively, the jurisdiction of the justice, and nothing more; and while the appellant may lose his appeal to the Superior Court unless perfected in the manner prescribed by the statute, the appellee must not sleep upon his rights, but make the motion to dismiss in apt time. *Love v. Huffines*, 378.

3. *Same.*—An appellee may by his own laches or conduct waive his right to dismiss an appeal from a justice's court to the Superior Court for failure of appellant to perfect his appeal under Revisal, secs. 607 and 1493, as such matters relate only to irregularities in the procedure and not to the inherent jurisdiction of either court; and the appellee's motion under the latter section is too late when made upon the trial of the cause in the Superior Court after evidence has been introduced. *Ibid.*

4. *Courts—Special Appearance—Continuance of Motion—Waiver.*—Jurisdiction in case of actions *in personam* can only be acquired by personal service of process within the territorial jurisdiction of the court, or

JURISDICTION—*Continued.*

by acceptance of service, or by general appearance, actual or constructive, this last usually arising by reason of some motion in the cause which can only be made in behalf of one who submits his case generally to the court's jurisdiction. *Warlick v. Reynolds*, 606.

5. *Courts—Attorneys at Law—Special Appearance—Continuance of Motion—Waiver.*—By entering a special appearance, expressly restricted to the special purpose of moving to dismiss for want of jurisdiction, with a request for a temporary continuance of such motion, an attorney does not enter a general appearance, actual or constructive, or waive any rights of his client to dismiss accordingly. *Ibid.*

6. *Courts—Demurrer—Procedure.*—A party defendant may enter a special appearance for the purpose of demurring to the jurisdiction of the court, and have the court determine and inform him of the validity of proceedings affecting a substantial right, and he is not required to test the validity by disobedience, and thereby risk the process of contempt. *Ibid.*

7. *Courts — Nonresidents — Damages — Attachment — Situs of Credits.* — While an order may not be granted restraining the negotiation of a promissory note in the hands of a holder who is a nonresident of the State and beyond its borders, the action may not be dismissed when there are allegations of damages sustained by reason of fraud in the procurement of the instrument and an attachment issued in the cause has been levied on indebtedness of resident debtors to the holder, within the jurisdiction of the court. *Ibid.*

JURORS.

1. *Improper Conduct—Court's Discretion.*—While it is not proper conduct for a party litigant to talk to a juror sitting in his cause, it is within the discretion of the trial judge to set the verdict aside, and his decision is not reviewable, when he had not said anything relating to the cause then being tried, and when it was found by the judge and appears to be harmless in its effect. *Baker v. Brown*, 12.

2. *Motions—Set Aside Verdict—Additional Evidence—Court's Discretion.*— When the trial judge has heard the evidence adduced upon a motion to set aside a verdict because of the improper conduct of a party in talking to a juror in his cause, it is within his discretion to refuse additional evidence, and his decision is not reviewable. *Ibid.*

JUSTICE'S COURT. See Courts; Judgments.

LANDLORD AND TENANT.

Lessor and Lessee—Monthly Payments—Lease—Tenant by the Year—Contract, Interpretation of.—A lessee paying rent by the month, but under a lease providing that it would be renewed from year to year for a period of four years, without change in its terms, upon his request in writing, and holding over from the first year without making such request, is a tenant by the year. And when he vacates the premises before the expiration of the year he is liable to the lessor for the stipulated rent for the unexpired term, provided the latter, with reasonable diligence, could not have rented to another within that time. *Holton v. Andrews*, 340.

LARCENY. See Carriers of Passengers.

Criminal Actions—Larceny and Receiving—Evidence—Questions for Jury. Evidence is sufficient to go to the jury upon the trial for larceny and receiving, which tends to show that the articles were found in the defendant's home two weeks after the theft; that tracks led from the place of the theft to defendant's home; he denied the theft; said that he knew that the articles afterwards identified were not there, appeared excited, and remained silent when his wife claimed them for his own and in his hearing. Evidence that the goods were found in defendant's home two weeks after the commission of the theft is of itself sufficient. *S. v. Record*, 695.

LEGISLATIVE POWERS. See Constitutional Law; Statutes; Corporation Commission; Venue.

LEGITIMATE CHILDREN. See Evidence.

LESSOR AND LESSEE.

Monthly Payments—Lease—Tenant by the Year—Contract, Interpretation of.—A lessee paying rent by the month, but under a lease providing that it would be renewed from year to year for a period of four years, without change in its terms, upon his request in writing, and holding over from the first year without making such request, is a tenant by the year. And when he vacates the premises before the expiration of the year he is liable to the lessor for the stipulated rent for the unexpired term, provided the latter, with reasonable diligence, could not have rented to another within that time. *Holton v. Andrews*, 340.

LIBEL.

Judgments—Dicta—Evidence.—In an action for libel, brought in the State court, for publishing that one A., while judge of a certain special United States court, was corruptly influenced in his judgment in allowing certain fees to attorneys in disproportion to the value of the services rendered, the opinion of a justice of the Supreme Court of the District of Columbia, delivered in an action to enjoin the payment of the fee, in which he stated as his opinion, that the fees were reasonable is incompetent as evidence, particularly in view of the decision of such justice that his Court had no jurisdiction to pass upon the fee. *S. v. Butler*, 672.

LICENSE. See Carriers of Freight; Intoxicating Liquors; Negligence.

LIENS.

1. *Deeds and Conveyances—Assignment—Priorities—Taxes—Levy.*—The sheriff and tax collector of a county are not entitled to priority of payment of taxes by the trustee of a corporation under a deed of assignment over creditors who reduced their claims to judgment and had execution issued before the assignment was executed and recorded, the property being personal and they having failed to levy for the taxes due them, respectively. Revisal, 2863. *Alexander v. Farrow*, 320.

2. *Corporations—Officers—Laborers and Workmen—Statutory—Interpretation of Statutes.*—Officers and owners of a corporation are not entitled, under Revisal, sec. 1206, to priorities of payment for work and labor done by them over the other creditors, as such officers do not come under the meaning of the words "laborers" and "workmen" used in the statute, and were not so intended. *Ibid.*

LIENS—*Continued.*

3. *Sub-contractor—Material Men—Statutory Provisions.*—Those who have furnished a sub-contractor materials for the erection of a building and who have not acquired their liens on the property of the owner in accordance with the provisions of the statute, Revisal, secs. 2020, 2021, stand only in the relation of creditors of the sub-contractor. *Hall v. Jones*, 419.

4. *Same—Contractor—Order—Acceptance.*—When an order on the contractor given by a sub-contractor in favor of one furnishing the latter materials for the building has been unconditionally accepted by the former, to be paid from moneys coming into his hands under his contract with the owner, it is a valid assignment of such moneys *pro tanto*, and good against the claims or demands of other material men who have likewise furnished the sub-contractor and who have not notified the contractor or acquired liens on the building in accordance with the statutory provisions. *Ibid.*

5. *Same—Future Payments—Receiver—Completing Contract.*—When, by unconditionally accepting an order given on him by a sub-contractor in favor of one furnishing the latter material for the building, the contractor has made a valid assignment of funds coming into his hands under his contract with the owner for the payment of the debt, and thereafter the sub-contractor, a corporation, goes into the hands of a receiver who, by agreement, satisfactorily completes the work, the assignment is valid as to such sum or sums of money as may have become due under the accepted order as against material men, creditors of the sub-contractor, of whose claims the contractor had not been notified, and who had not acquired a lien under the statutory provisions. *Ibid.*

6. *Contractor—Contracts, Interpretation of—Payments Reserved—Material Men—Trusts and Trustees.*—A provision in a contract between the owner and a contractor to erect a building, that the architect shall make a monthly estimate of the labor and material put into the building during each preceding month, and the owner pay the contractor therefor after reserving a certain per cent, is for the benefit of the contractor and the protection of the owner, and does not create a trust in the reserved payments in favor of laborers and material men of a sub-contractor. For the material men to acquire a lien they must proceed under the statutes. *Ibid.*

7. *Public Schools—Sub-contractor—Material Men—Statutory.*—A building used for graded-school purposes is a public building upon which no lien can be acquired, except with legislative sanction. *Hardware Co. v. Schools*, 507.

8. *Statutory—Sub-contractor—Material Men—Debtor and Creditor—Privity of Contract.*—Between the sub-contractor or material man and the owner there is no privity of contract, and the former cannot make the latter their debtor except with his consent, or by following the provisions of the statute giving them a lien, and then only according to the status of the contract between the owner and the contractor with reference to the amount owed the contractor thereunder at the time of notice and the relation thereto of other like claimants. Revisal, secs. 2019, 2020, 2021. *Ibid.*

9. *Same—Interpretation of Statutes.*—Revisal, secs. 2019, 2020, 2021, does not create the relationship of debtor and creditor between the owner

LIENS—*Continued.*

of a building and the sub-contractor or material man, except as to the extent of liens acquired in accordance with its provisions, and in the manner indicated. *Ibid.*

10. *Public Schools—Sub-contractor—Material Men—Statutory.*—Neither by the enforcement of a lien, nor by anything in the nature of an equitable proceeding, nor directly by sale under execution, was it the intent of Revisal, secs. 2019, 2020, 2021, etc., to subject one of its public corporations, organized as necessary to the administration of its governmental affairs, to the privation or loss of its buildings for public school purposes. *Ibid.*

11. *Estates—Contingent Remainders, Sale of—Interests Safeguarded—Void Decrees—Reinvestments—Funds in Hand—Incompleted—Investment, Sale of—Notice—Procedure—Appeal and Error.*—In an action brought under the provisions of Revisal, sec. 1590, to sell certain lands devised to E. for life and a contingent remainder to her children, it appeared that to further a scheme to erect a hotel on one of the city lots, the court had decreed the sale of certain other of the lands and had appointed a commissioner to act in furtherance of its object. The lands were sold and the proceeds applied to the building of the hotel, but only having funds sufficient to erect the skeleton work of the hotel, other of the lands were decreed by the court to be sold, and their proceeds to be likewise applied; these would not be sufficient for the purpose, and when erected the hotel would not be a desirable investment, especially in the unfurnished condition in which it then would be left: *Held*, (1) the decree for the further sale and reinvestment was void, not meeting the statutory requirement that the interests involved should be properly safeguarded; (2) that the court was without authority to order an investment or reinvestment of funds not then available, but depending upon the outcome of future sales of the land, and of this, notice was implied to third persons; (3) that the purchasers at the sale of the land derived a clear title thereto; (4) that the commissioner came under no personal liability to the contractor or material men of the hotel building; (5) that endorsers of a note made to procure money for building the hotel had no claim on the hotel lot; (6) that the commissioner sell the hotel lot and report to the court and that the proceeds be held for the benefit of the devisees to the extent of the value of the lots and the costs of improvements thereon free from the claims of material men, etc.; (7) that the claim of priorities of material men among themselves may not arise, in this case, as the hotel property may not bring sufficient to pay the amount to be paid to the devisees, and this question will not now be passed upon. *Smith v. Miller*, 620.

LIGHT AND AIR. See Nuisance.

LIGHTS AND SIGNALS. See Negligence.

LIMITATION OF ACTIONS.

1. *Contracts to Convey—Consideration of Services—Deceased Persons—Failure to Perform.*—To an action to enforce an express contract made by deceased to convey or leave by will certain lands to plaintiff at his death, in consideration of continued services rendered thereon by plaintiff to him, the statute of limitations only begins to run from the death of the deceased or from the time he was to have performed

LIMITATION OF ACTIONS—*Continued.*

his part of the contract, or from the time it has been ascertained that he has failed therein. *Freeman v. Brown*, 111.

2. *Cities and Towns—Easements—Streets.*—The statute of limitations of actions does not run against an easement in lands acquired by a city for a street for the use of the public. *New Bern v. Wadsworth*, 309.

3. *Surface Waters—Permanent Damages—Easement.*—The damage caused to the lands of another by the unlawful diverting of surface water thereon by means of a ditch is not barred by the three-year statute of limitations from the time the ditch was dug. The trespass is not continuing, but the irregular downpouring of the water upon the land, in varying quantities, to the injury of the land, and the recovery of damages is limited to those accruing within three years prior to the commencement of the suit, both as to annual or permanent damages, unless by acquiescence for twenty years the presumption of a grant or easement arises. *Roberts v. Baldwin*, 407.

4. *Mortgagor and Mortgagee—Seal—Procedure—Invalid Mortgage—Equities.*—In a possessory action to recover lands and not to assert equitable rights to redeem the land, the ten-year statute, Revisal, sec. 391, subsec. 4, has no application. *McFarland v. Cornwell*, 428.

5. *State's Lands—Entry—Fraud—Purchaser—Trusts and Trustees.*—The plaintiffs, as heirs at law of an original enterer upon the State's vacant and unappropriated lands, brought suit to declare defendants trustees for them, alleging, and establishing by the verdict of the jury, that the one under whom defendants derived title had fraudulently procured an assignment of the entry of their ancestor, which was duly recorded. It appeared that defendants were purchasers for value and without notice in a line of grantors, also purchasers for value without notice, under conveyances duly recorded, for a period of more than seventeen years. The facts being uncontradicted, *held*, as a matter of law, plaintiffs' action to have defendant declared a trustee was barred after a lapse of ten years from the date of the grant to the time of the commencement of the action. Revisal, 399. *Phillips v. Lumber Co.*, 519.

6. *Deeds and Conveyances—Fraud.*—The statute of limitations does not begin to run against one who has executed a distiller's bond to the Government as surety, and was subsequently forced to pay by judgment the Government for his principal's default thereon, until the date of such payment, in his action to set aside his principal's deed made to his wife since he executed the bond for the fraudulent purpose of avoiding paying the bond. *Graeber v. Sides*, 596.

7. *Registration—Notice.*—The registration of a deed made by the principal on a distiller's bond, to his wife, for the purpose of escaping liability on the bond, and void as to his surety who was forced to pay for his default thereunder, is not notice to the surety that it was made to defraud him, when he did not then know of his principal's default, or that he would be called upon to pay anything as surety. *Ibid.*

8. *Indictment—Presentment.*—An indictment or presentment marks the beginning of the prosecution and arrests the running of the statute of limitations. Revisal, sec. 3147. *S. v. Williams*, 660.

9. *Nol. Pros. "With Leave."* After the entry of a *nol. pros.* "with leave," the prosecution remains as it was under the original finding of the grand jury upon the bill, and the statute does not begin to run there-

LIMITATIONS OF ACTIONS—*Continued.*

from so as to bar the further prosecution of the indictment under a *capias* and arrest eventually ordered and made, in this case more than two years after the entry of the *nol. pros.* with leave. *Ibid.*

LIMITATIONS OVER. See Estates.

LIS PENDENS. See Carriers of Freight.

LIVING ISSUE. See Estates.

MANDAMUS.

Nonintoxicants—"Near Beer"—License—Issuance.—The commissioners of Union County, in conformity with chapter 438, Public Laws of 1909, having levied a tax on "near beer" and kindred nonintoxicating drinks therein enumerated, the writ of *mandamus* will lie to compel the sheriff of the county to issue a license for its sale, upon his refusal to do so, as he is without discretion to grant or refuse the license. *Parker v. Griffith*, 600.

MANSLAUGHTER. See Murder.

MARKET HOUSE. See Cities and Towns.

MARRIAGE. See Evidence.

MARRIAGE AND DIVORCE.

1. *A Mensa—Wife's Separate Property—Improvements by Husband—Equity.*—A husband, from whom a decree of divorce *a mensa et thoro* has been obtained by his wife, because of his misconduct, cannot assert any equitable right or claim for improvements made by him and with his money, on lands conveyed by her to a trustee in trust for her separate use and enjoyment, in contemplation of the marriage, without request or inducement on her part. The decree is the result of his own acts, the improvements were made without suggestion of fraud or inducement on the part of the wife, and forms no basis for any equitable relief in his favor. *Joyner v. Joyner*, 181.

2. *A Mensa—Wife's Separate Property—Trusts and Trustees—Contingent Interests.*—It appearing that a wife, in contemplation of marriage, executed a deed in trust for her use and benefit providing a certain contingent estate, between herself and husband, which may be defeated by the happening of an event upon which it was made to depend; and that a decree for divorce *a mensa et thoro* was obtained by her on the ground of the misconduct of the husband, the courts will not pass upon the contingent interests as the question may never arise. The possibility of condonation and resumption of the marriage relation is recognized by statute. Revisal, sec. 2111. *Ibid.*

MARRIED WOMEN—SEPARATE PROPERTY. See Marriage and Divorce.

MASTER AND SERVANT. See Negligence; Deeds and Conveyances, Railroads.

1. *Fellow-servant.*—One who is "second boss" in a cotton mill, under whose direction the plaintiff was employed, and was working at the time of receiving the injury complained of, is not his fellow-servant. *Morrisett v. Cotton Mills*, 31.

MASTER AND SERVANT—*Continued.*

2. *Contributory Negligence—Officious Acts—Evidence.*—The plaintiff was not guilty of contributory negligence in thrusting his hand into the machine to adjust it while it was not running, and he was not guilty of an officious act because he was directed to so do by the master representative. *Ibid.*

3. *Parent and Child—Tort of Child—Servant—Agent—Parent's Liability.* The mere relationship of parent and child does not make the former liable in damages for the tort or negligent act of the latter. It must be shown that he approved such acts, or that the child was his servant or agent. *Brittingham v. Stadiem*, 299.

4. *Parties—Joinder—Foreman—Medical Treatment.*—In an action for damages for personal injury received by the plaintiff while at work within the scope of his employment for defendant corporation under the codefendant, F., its foreman, the complaint alleged that defendants failed to provide sufficient helpers for the work required of him; that he was required by defendants to do this work in a dark, dangerous, unsafe and unlighted place; that the injury was caused by certain specified negligent acts of both defendants; that the injury was made permanent by the careless medical treatment given by defendant F., who was not a physician, with medicine furnished by the corporation, his codefendant, to be administered or applied by him to employees with like injuries: *Held*, that while the responsibility of defendant F., for the first occurrences is not alleged with the precision and fullness desirable, by fair intendment, both as to the original occurrence and the subsequent treatment, a joint wrong on the part of both defendants is sufficiently alleged under our statute, Revisal, sec. 469. *Howell v. Fuller*, 315.

5. *Independent Contractors—Joint Torts—Partition.*—A railroad company cannot be held liable as a joint tort feasor with its independent contractor for an injury to an employee of the latter, when there is no evidence or suggestion that the former assumed an active part, by encouragement, direction or control of the work wherein the injury complained of was received. *Smith v. R. R.*, 479.

6. *Same—Release of Liability—Effect.*—The plaintiff received the injury complained of while engaged in the employment of an independent contractor of a railroad company in building the latter's roadbed, and brought suit against the railroad and the contractor, alleging that they were joint tort feasors. He introduced the contract between the defendants wherein it appeared that the contractor had agreed to indemnify the railroad from liability of the character demanded by plaintiff: *Held*, a release in full given by the plaintiff to the independent contractor in consideration of a compromise likewise released the liability of the railroad, in the absence of evidence tending to show that the latter actively participated in the alleged wrong. The principles of law applicable to the master's liability for the wrongful acts of the servants discussed by MANNING, J. *Ibid.*

7. *Railroad Crossing—Custom—Employer and Employee—Trespass.*—Employees who are accustomed in large numbers to cross defendant's railroad yards and a large number of its tracks in going to and from their dinner at the noon hour, with the knowledge and acquiescence of the defendant, cannot be regarded as trespassers in so doing. *Farris v. R. R.*, 484.

MATERIAL MEN. See Liens.

MATURITY. See Notes; Bond Issues.

MEASURE OF DAMAGES. See Telegraph; Negligence; Railroads.

1. *Carriers of Passengers—Instructions Distinctive.*—A charge to the jury, upon the measure of damages, that the plaintiff is entitled to recover on account of injuries received in an assault made on him by another passenger, alleged to have arisen from defendant's failure or refusal to afford him proper protection, on its passenger train, that the jury could include such physical pain and mental suffering as was the proximate, immediate and necessary consequence of the assault is not prejudicial on the question of mental suffering claimed on account of plaintiff's having been compelled to kill his assailant, when evidence on that point had been excluded and the jury instructed not to consider that phase of the case. *Bedsole v. R. R.*, 152.

2. *Consignment—Plaintiff's Liability.*—When plaintiff has consigned goods to defendants under an agreement terminable at will, and therefore fails in his suit to recover the price of the goods in his action for goods sold and delivered, he is liable to defendant for storage of the goods after being notified of the termination, for freight paid by him, and for necessary repairs made. *Wagon Co. v Riggan*, 303.

3. *Cities and Towns—Streets—Easements.*—When the proceedings by a city for condemnation of lands to widen its street under the provisions of its charter do not raise an issue of title, but only the question of the measure of damages to the abutting owners, it is permissible for the city to show in diminution of damages, by proper evidence, that it had theretofore acquired the easement to the width required, and, upon its doing so, damages for the additional burden only should be allowed. *New Bern v. Wadsworth*, 309.

4. *Contracts, Breach of—Notes—Maturity.*—For the breach of an agreement to give a note, secured by a chattel mortgage for the balance due plaintiff on a trade, the measure of damages, in an action thereon brought prior to the time the note was to have matured, will ordinarily be the amount indicated by the contract—if the note was to bear interest, the amount and interest; if not, the present value of the note with interest thereon from the time of suit. *Copeland v. Fowler*, 353.

5. *Contracts—Fraud and Deceit—Special Damages.*—In setting aside a contract for the sale and delivery of goods for fraud, while the defendant cannot recover on a counterclaim measured by the contract, he can recover special damages to his reputation or business arising from the sale of an inferior or spurious article directly and proximately caused by plaintiff's tort, if shown by proper evidence. *Food Company v. Elliott*, 393.

6. *Same—Evidence—Questions for Jury.*—To recover damages upon a counterclaim set up in defense to an action for the sale and delivery of goods alleged to have arisen from plaintiff's fraud and deceit in its procurement, it is necessary for the defendant to show the particulars of his injury so as to enable the court to see if they come within the recognized principles of the law and are allowable; and an estimate by defendant that he has been damaged in a certain sum, at least, is too vague, indefinite and uncertain, and invades the ex-

MEASURE OF DAMAGES—*Continued.*

clusive province of the jury by permitting him to assess his own damages. *Ibid.*

7. *Contracts—Fraud and Deceit—Special Damages—Pleadings—Evidence Restricted.*—Evidence that defendant has been damaged in a certain sum by reason of plaintiff's fraud and deceit in inducing a contract for the sale and delivery of goods, must be taken in connection with the allegations relating to the character of the damages alleged in his counterclaim; and when defendant alleges his damages to have arisen from a loss of profits, his evidence that he has been damaged in a certain sum must be taken to mean by the loss of profits. *Ibid.*

8. *Contracts — Fraud and Deceit — Samples — Loss of Profit—Proximate Cause.*—Profits that would have been made had the goods sold and delivered come up to the samples shown and representations made at the time of sale by the salesman, may not be recovered when they are too speculative or remote, the rule being that they must proximately and naturally flow from the tortious act, and are reasonably definite and certain. *Ibid.*

9. *Deeds and Conveyances—Contracts to Convey Lands—Guarantee of Number of Acres—Option of Grantee—Remedy.*—When plaintiff has alleged and proven that the defendant had guaranteed that a certain tract of land, the subject of a written contract to convey between them, contained a hundred acres, and in fact, that it contained something less than eighty acres, it is optional with him to cancel the contract or to take a deed for the land with a *pro rata* abatement in the price. In the latter case he may recover such damages arising from the loss of rents and profits he may have sustained as the proximate and direct result of having been wrongfully kept from the possession, less the interest on the unpaid balance of the purchase price. *Stern v. Benbow*, 460.

10. *Same—Actual Damages—Rents and Profits.*—Plaintiff having established by the verdict of the jury, under competent evidence and correct instructions of law, that a contract to convey lands made with him by defendant should be reformed so as to include a guarantee that it contained one hundred acres, and that in fact it contained less than eighty acres, and also, certain loss of rents and profits by reason of his having been wrongfully kept from possession, he is entitled to a judgment that defendant hold the lands as a security for the balance of the purchase price due, with interest thereon, ascertained by deducting from the purchase price the amount thereof theretofore paid, and such damages as directly and proximately resulted to plaintiff by the wrongful withholding of the possession by the defendant. *Ibid.*

11. *Deeds and Conveyances—Contracts to Convey Lands—Breach—Damages Remote.*—The plaintiff cannot recover of the defendant, as damages for unlawfully withholding possession of certain lands he had contracted to convey, the expense of moving his son and family from an adjoining State and boarding them during the time the possession had thus been withheld, such damages being too remote. *Ibid.*

12. *Evidence.*—In this case no error is found on the part of the lower court upon the issue of damages, as upon the evidence the damages awarded were proper upon defendant's own theory. *Curtis v. R. R.*, 523.

MEASURE OF DAMAGES—*Continued.*

13. *Telegraphs.*—Upon the *quantum* of damages recoverable by a son in his suit against a telegraph company for the negligent failure to deliver a message announcing the death of his mother, asking him to come, and stating the hour of the funeral, it is competent to show the feeling between the mother and son as a fact directly relevant to and embraced in this issue, and also the conduct of the parties towards each other and conversations between them tending to show such feelings at the last time they had met, when the son was leaving her on her sick bed, about a week before her death, the circumstances being such as to exclude any reasonable suspicion of their sincerity. *Luckey v. Telegraph Co.*, 551.

14. *Telegraphs — Damages—Evidence—Mental Anguish—Instructions.*—In an action to recover damages arising from the nondelivery of a telegram sent by a brother of the sendee, reading, "Come at once; Ida and I are sick with malarial fever," it is competent for the plaintiff, the sender of the message, to testify, in answer to a question as to the effect his sister's failure to come had upon him, "It just killed me. I couldn't hardly tell what effect it had on me; it affected me pretty badly; caused me mental distress, because I didn't know what was the matter with her"; and from the face of the message and the extraneous facts and circumstances in this case, the defendant had implied notice of the character of the resultant damages as testified to, arising from its negligent failure to deliver the message. *Shaw v. Telegraph Co.*, 638.

MEDICAL TREATMENT. See Master and Servant.

MISJOINDER. See Actions; Demurrer.

MISNOMER OF DEFENDANT. See Process.

MISTAKE OF FACT. See Notes.

MORTGAGOR AND MORTGAGEE. See Insurance.

1. *Sale, Defect in—Resale—Breach of Trust—Damages.*—Ordinarily a junior mortgagee with power of sale can only sell and convey the property subject to prior existing liens, and a plaintiff mortgagor, claiming a homestead, and certain judgment creditors with junior liens on the land, cannot recover damages of the trustee and *cestui que trust* holding a lien by their deed subsequent to that of a prior mortgage, for an alleged breach of trust in failing to collect, or making any endeavor to collect, bids obtained at a sale thereunder, and afterwards reselling at a less price, when at the first sale the trustee, in effect, offered an unencumbered title and there was a prior registered mortgage on the property, the holder of which had not been notified or given his consent to such a sale. *Brett v. Davenport*, 56.

2. *Same.*—When the trustee, at a sale under a deed of trust, announced that all prior liens on the mortgaged premises would be paid out of the proceeds of the sale of the land, such liens consisting of those of a prior mortgage and judgments, and subsequently resells at a lower price without attempting to collect the bids made at the first sale, the mortgagor, by claiming a homestead, and the judgment creditors, by asserting a demand for the entire proceeds of sale, make it impos-

MORTGAGOR AND MORTGAGEE—*Continued.*

sible for the trustee to comply with his proposition thereat and render the obligation of the bidder unenforceable. *Ibid.*

3. *Advertisement—Notice—Validity.*—Unless the stipulation in a mortgage in regard to advertising or notice of sale thereunder are complied with by the mortgagee, it renders the sale invalid; and a deed made in pursuance thereof passes the legal title subject to certain equitable rights in the purchaser as of subrogation, etc., when the purchase money is paid in good faith. *Ibid.*

4. *Sale Defective—Resale—Duty of Mortgagee.*—When the mortgagee discovers a defect in a sale under the mortgage before the purchase price has been paid, it is his right and, ordinarily, his duty, unless the defect is waived or cured by the parties whose interests are affected, to readvertise and foreclose the property in accordance with law and the stipulations of the instrument under which he is acting. *Ibid.*

5. *Realty, Chattels Annexed—Priorities.*—The mortgagee of the realty has no superior lien on chattels subsequently annexed thereto, subject, at the time, to a mortgage lien for the purchase price of the chattels, as the senior mortgagee could acquire no title superior to that of the mortgagor, whether claimed by him under the terms of the mortgage or by reason of its annexation to the realty. *Cox v. Lighting Co.*, 62.

6. *Same—Notice.*—The question of notice to a mortgagee of the realty of the subsequent annexation thereto of chattels under an existing mortgage or conditional sale, is not determinative of his superior right, or important in fixing the rights of the respective mortgagees. *Ibid.*

7. *Realty, Chattels Annexed — Liens — Priorities—Intent—Evidence.*—By adding to or substituting new or additional machinery in a manufacturing plant, mortgaged at the time to secure the purchase price, and annexing it to the realty, the intent of the purchaser is evidenced thereby that such machinery is to retain its character as personalty, regardless of the manner in which it may have been annexed to the freehold. *Ibid.*

8. *Same.*—A mortgagor of the realty cannot annex thereto personal property, so as to become a part thereof, and thereafter change its character as such, by his convention with a stranger, so as to conclude the rights of a prior mortgagee. *Ibid.*

9. *Realty, Chattels Annexed—Liens—Priorities—Equity—Relief.*—When it appears that the rights of a mortgagee of the realty will be impaired by the preservation of the rights of the mortgagee of personal property subsequently affixed and made a part of the freehold, the chattel mortgage being for the balance of the purchase price, the impairment being by reason of substitution of additional machinery in a manufacturing plant, the old machinery having been dissipated or being in such condition that its restoration would cause the expenditure of a material sum of money, the rights of the respective mortgagees should be adjusted upon sound and just equitable principles. *Ibid.*

10. *Same—Evidence Required.*—In the adjustment of the rights and equities between a mortgagee of a manufacturing plant and a subsequent mortgagee of chattels having his lien at the time of annexation, the

MORTGAGOR AND MORTGAGEE—*Continued.*

machinery annexed to the freehold replacing that embraced in the prior mortgage, the finding of the referee as to the value of the plant and of the substituted machinery are not sufficient upon which to render judgment, as it was necessary to find the value of the plant at the time of the annexation and whether or not it was increased or diminished by the changes made. *Ibid.*

11. *Subsequent Mortgage—Delay in Registration—Rights Unaffected.*—The delay in registering a mortgage of machinery annexed to the freehold, upon which there was a senior mortgage, does not affect the priority of the liens as between the mortgagees, when it does not appear that the rights of the senior mortgagees were in any way prejudiced. *Ibid.*

12. *Deeds and Conveyances—Consideration—Pleadings—Cancellation—Evidence.*—In an action for the cancellation of a bond and mortgage on plaintiff's land, plaintiff alleged that they were given defendants, upon consideration that the latter would pay a certain prior mortgage indebtedness of plaintiff, which, owing to the defendant's delay, plaintiff had to pay when he was in imminent danger of losing the land under foreclosure. The answer raised no material issue: *Held*, upon the pleadings, it appeared there was a failure of consideration and the bond and mortgage should be canceled. *Williams v. Dunn*, 107.

13. *Appeal and Error—Admissions of Counsel—Deeds and Conveyances—Cancellation—Conditions Precedent.*—When it is adjudged from the pleadings that plaintiff is entitled to the relief demanded, that his certain bond and mortgage held by the defendants be canceled, and it appears from facts admitted by counsel on appeal that defendants should first be repaid a certain sum of money they had paid to plaintiff in consideration of the transaction relieved against, the cancellation of the bond and mortgage will be decreed upon the condition of defendants being repaid. *Ibid.*

14. *Purchaser—Adverse Possession—Void Mortgage—"Color"—Limitations of Action.*—A possessory action brought by the heirs at law of a mortgagor alleging that the mortgage is void, and seeking to recover the land independent of the mortgage, and claiming nothing by virtue of it, but claiming the land against it, may be barred by lapse of time; and it appearing that defendant had entered under a deed good as color of title and showed adverse possession by himself and those under whom he claimed for seven years: *Held*, that plaintiffs are not entitled to recover. *McFarland v. Cornwell*, 428.

15. *Same—"Color"—Parties—Tenant—Adverse Possession.*—In an action of ejectment the owner is not a necessary party, and the length of his absence from the State should not be considered where there is a tenant in possession against whom suit may be brought. *Ibid.*

16. *Invalid Mortgage—Right of Possession—Adverse Possession.*—A void mortgage of lands confers no right of possession to the purchaser at a sale under its terms, and when he takes a deed and enters into possession, the mortgagor has the legal right of possession and can recover it at any time notwithstanding the instrument, until barred by lapse of time. *Ibid.*

MOTIONS. See Indictment.

Set Aside Verdict—Additional Evidence—Court's Discretion.—When the trial judge has heard the evidence adduced upon a motion to set aside a verdict because of the improper conduct of a party in talking to a juror in his cause, it is within his discretion to refuse additional evidence, and his decision is not reviewable. *Baker v. Brown*, 12.

MURDER.

1. *Appeal and Error—Witnesses—Tender of Wife—Instructions—Harmless Error.*—While it is improper for the solicitor to tender the wife of defendant on trial for his life, stating that he would not tender her if defendant did not wish to examine her, the error is cured by a clear instruction that this should not prejudice defendant or in any manner influence the jury in their verdict against him. *S. v. Spivey*, 676.
2. *Instructions—Questions of Law—Directing Alternate Findings.*—When the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty. *Ibid.*
3. *Manslaughter—Deadly Weapon—Unlawful Killing—Malice—Presumption.*—When the killing with a deadly weapon is established or admitted, and the plea is self-defense, two presumptions arise: (1) that the killing was unlawful; and (2) that it was done with malice. *S. v. Fowler*, 731.
4. *Manslaughter—Unlawful Killing—Malice.*—An unlawful killing is manslaughter, and when it is done with malice it is at least murder in the second degree. *Ibid.*
5. *Same—Self-defense—Presumption—Burden of Proof.*—When the killing with a deadly weapon is established or admitted, and the defendant's plea is self-defense, it is for him to rebut the presumption that it was unlawful or done with malice, and upon his rebutting only the presumption of malice, the presumption that is was unlawfully done yet stands, making him guilty of manslaughter. *Ibid.*
6. *Same—Instructions—Without Prejudice—Harmless Error.*—When the killing with a deadly weapon is shown, and the plea is self-defense, it is not error to defendant's prejudice for the court to refuse to charge that there was no evidence to warrant a verdict of manslaughter, the jury having rejected defendant's evidence of self-defense and found him guilty of manslaughter, as otherwise it would have been their duty to convict of murder in the second degree. *Ibid.*
7. *Manslaughter—Instructions—Construed as a Whole—Harmless Error.*—A charge to the jury is not solely to be interpreted by picking out therefrom certain expressions; and when, upon a trial for the unlawful killing of another, it is upon the defendant, under the plea of self-defense, to rebut the presumption that the killing was unlawful and with malice, and the charge is correct when construed as a whole, the expression, that if the jury were "left in doubt" as to whether defendant slew in self-defense they should return a verdict of manslaughter, is not of itself reversible error. *Ibid.*

MUTUAL MISTAKE. See Deeds and Conveyances.

NECESSARIES. See Bond Issues; County.

NEGLIGENCE. See Carriers; Nonsuit; Railroads.

1. *Questions for Jury.*—Evidence on the question of actionable negligence is sufficient upon which to submit the case to the jury, tending to show that defendant railroad company knowingly permitted passengers to get off and on its trains stopping at a coal-chute in a town, some distance from the station, collected fare there, etc., and that plaintiff, a passsenger, got off the defendant's train at that place on a dark night, and fell into defendant's unlighted coal-chute nearby, sustaining the injury complained of, which could have been prevented by a guard-rail. *Credle v. R. R.*, 50.
2. *Master and Servant—Instruction of Foreman—Proximate Cause.*—The defendant is liable to the plaintiff, its employees, for an injury received while removing a shiver from a sawmill in the course of his employment, when it appears that it was necessary for him to remove it, and that he was required by his foreman to do so when the saw was running, the only safe method being to stop the saw before doing so; and such negligent act of the foreman was the proximate cause of the injury. *Noble v. Lumber Co.*, 76.
3. *Safe Appliances—Evidence.*—There is no evidence of the failure of the employer to furnish the employee with proper appliance to remove shivers at a sawmill, when it does not appear that there is any special appliance in general use for the purpose. *Ibid.*
4. *Instructions of Foreman—Rule of the Prudent Man.*—Under the evidence in this case the removal of a shiver by the plaintiff from the planing machine while it was running was not obviously so dangerous as to make it plaintiff's duty to refuse to obey the instructions of the foreman to do so. *Ibid.*
5. *Actions, Misjoinder of—Personal Injury—Loss of Son's Services—Parties—Demurrer.*—The joinder of a cause of action brought by a son, an employee, to recover of defendant cotton mill, his employer, damages for a personal injury alleged to have been caused by the latter's negligence, with that of the father to recover for the loss of the son's services alleged to have been caused by the same negligent act, is demurrable on the ground of misjoinder of parties and causes of action. Revisal, sec. 469. *Thigpen v. Cotton Mills*, 97.
6. *Cities and Towns—Subsequent Repairs—Evidence Corroborative.*—When plaintiff seeks to recover damages of a town for its alleged negligently leaving a hole in the streets which caused the injury complained of, and the defendant has introduced evidence tending to show that it had theretofore filled the hole, it is competent for plaintiff to show that the hole was afterwards filled as corroborative of her evidence of the existence of the hole at the time and place. *Tise v. Thomasville*, 281.
7. *Permanent Damages.*—In this case the court properly permitted the jury to assess permanent damages to plaintiff, under the evidence, for injury received by reason of her horse stepping into a hole left by defendant upon its street. *Ibid.*
8. *Same—Res Ipsa Loquitur.*—The doctrine of *res ipsa loquitur* only applies to cases where, on proof of the occurrence and the injury, the existence of negligent default is the more reasonable probability; and is

NEGLIGENCE—*Continued.*

inapplicable to this case wherein the injury complained of was caused by the explosion of a bottle of "Coca-Cola," which is ordinarily charged with a gas pressure of 60 pounds to the square inch, shipped in this instance, in crates or cases quite a distance and handled by various parties, and the mere explosion of one bottle thereof causing the injury is not evidence sufficient to carry the case to the jury upon the question of negligence, in an action by the vendee against the vendor. *Dail v. Taylor*, 284.

9. *Same.*—In an action by the vendee against the vendor for an injury received from the unexpected explosion of a bottle of "Coca-Cola," while the fact of the explosion of one bottle thereof and injury resulting are not in themselves sufficient upon the question of negligence, a nonsuit upon the evidence should not be granted when there is additional evidence tending to show a want of proper care on the part of the defendant, that the bottles of defendant had thus exploded in several instances, and, by one witness, that this had frequently occurred for the last two years. *Ibid.*

10. *Safe Place to Work—Defect—Implied Knowledge.*—An aperture negligently left in the floor of a cotton mill, dangerous to employees going to and from their work at night, with the knowledge of the foreman directly in charge, fixes the principal with such knowledge. *Shives v. Cotton Mills*, 290.

11. *Same—Damages.*—It is the duty of the employer to provide on his premises a safe way for his employees to go to and from their work; and when a dangerous aperture in the floor of a cotton mill has been left over night by one in charge of making repairs, who would not have left it had he known that the employees would return that night to their work, the negligence of the foreman directly in charge in not informing the one doing the repairs of the fact is attributable to the principal, and the latter is liable for an injury to an employee directly and proximately caused by the negligent act. *Ibid.*

12. *Master and Servant—Negligence of Minor Employee—Dangerous Instrumentalities—Pistols—Care Required—Questions for Jury.*—Those who deal in dangerous articles are held to a degree of care commensurate with their dangerous character; and when the evidence tends to show that defendants employed their twelve-year-old boy as a clerk in their pawnshop, where, among other things, second-hand pistols were dealt in, and that while carelessly handling a pistol on which a loan was desired, the boy unexpectedly shot and injured another customer in the store, and that the defendants had not taken the precaution to see that the pistol was unloaded or harmless, it is sufficient to take the case to the jury upon the question of defendant's actionable negligence, though the one negotiating the loan on the pistol informed the boy, at the time, that it was unloaded. *Brittingham v. Stadiem*, 299.

13. *Master and Servant—Employee, Inexperienced—Latent Danger.*—The plaintiff is liable in damages for the act of the boss of his lapper room in directing an inexperienced minor, an employee over whom he had charge, to do certain work dangerous to him without further instructing him as to his duty, or as to dangers incident to it which would not be observable by an inexperienced, untrained workman. *Craven v. Manufacturing Co.*, 352.

NEGLIGENCE—*Continued.*

14. *Electricity—Defects, Employee to Repair—Rule.*—An electric company does not owe the same duty to a competent workman employed to remedy a dangerous defect in its system as it does to the public, its patrons or its ordinary employees, in respect thereto; and when such employee is killed while thus engaged, it is error for the trial judge, in an action by his administrator for damages for the negligent killing, to try the case upon the theory that the same principles as to negligence apply. *White v. Power Co.*, 356.

15. *Master and Servant—Duty of Employer—Safe Appliances—General Use —Evidence.*—It being the duty of the employer to furnish the employees proper implements and appliances which are reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use, and to keep them in repair by the exercise of reasonable care and supervision, where an employee sues to recover damages for an injury alleged to have been caused by his negligent failure to furnish them, etc., it is competent to show by proper testimony what implements were in general use at the time in the same mill or in other well-equipped and well-conducted mills of the kind in which the employee received the injury or in which power was applied in the same or similar manner. *Helms v. Waste Co.*, 370.

16. *Same.*—The plaintiff employed in defendant's mill received the injury complained of while using a detached stick furnished by the latter, to shift a belt from a loose to a fast pulley on a machine run by steam power: *Held*, competent to show that in this and other mills where power was applied by a belt in the same manner, it was usual and customary to have a safer device for the purpose called a shifter; and it was not material whether the machines were of different kinds or used for different purposes, if the method of applying the power and dangers incident to it were substantially the same; and while an isolated and single instance is not sufficient to establish a custom, it is competent to begin with one instance if followed up by others sufficient to show that such use was general and customary. *Ibid.*

17. *Vacant Lot—Permissive User—Licensee—Liability of Owner.*—One who, with others, is accustomed to use, with the knowledge of the owner, a pathway across a vacant lot for his own convenience, without any enticement, allurement or inducement being held out to him by the owner, goes there at his own risk and enjoys the license subject to its concomitant perils; and while the owner may not place new and dangerous pitfalls and obstructions along the path without warning to those likely to use it, and escape liability for an injury thereby directly caused to one of them without fault on his own part, he owes no such duty when the pitfall or obstruction has remained there continuously for some time, in this case for a period of two years. *Monroe v. R. R.*, 374.

18. *Master and Servant—Hazardous Occupation—Precautions—Duty of Employer.*—If by the exercise of a proper precaution a dangerous occupation can be engaged in without harmful results, it is the duty of those engaged in the business to use such precaution with reference to their employees, and if the employees are left in ignorance of the dangers incurred, the employers are chargeable for their injuries. *Wood v. McCabe*, 457.

NEGOTIABLE INSTRUMENTS. See Notes.

NEW TRIALS.

Criminal Cases—Supreme Court—Newly Discovered Evidence—Power of Court.—A new trial in criminal cases will not be granted by the Supreme Court upon the grounds of newly discovered evidence. *S. v. Arthur*, 653.

NOL. PROS. WITH LEAVE. See Indictment.

"NON OBSTANTE." See Verdict.

NONRESIDENTS. See Process; Taxation; Jurisdiction.

NONSUIT. See Evidence; Negligence; Carriers; Railroads.

1. *Evidence—Limitations of Action.*—Without deciding whether a motion to nonsuit upon the evidence is the proper method of raising the question of the bar of the statute of limitations, the motion will be denied when there is conflicting evidence upon the issue. *Baker v. Brown*, 12.
2. *Negligence—Master and Servant—Res Ipsa Loquitur—Evidence.*—When the evidence tended to show that plaintiff, an employee, was injured while at work, in the course of his employment, on a certain machine while not running, and that it suddenly started, without explanation, inflicting the injury complained of, the motive power being under the management of other agents or employees of defendant, a motion to nonsuit upon the evidence was properly refused. *Morrisett v. Cotton Mills*, 31.
3. *Defendant's Evidence.*—A motion to nonsuit predicated largely on defendant's own evidence will be denied. *Craven v. Manufacturing Co.*, 352.
4. *Evidence—Defendant's Evidence.*—When evidence in defense is necessary to be considered in passing upon defendant's motion to nonsuit upon the evidence, the motion will not be sustained. *White v. Power Co.*, 356.
5. *Evidence.*—In this case testimony of certain witnesses being properly excluded and there being no evidence to sustain the contention of fraud and conspiracy there was no error in allowing the motion to nonsuit. *Michael v. McIntyre*, 392.
6. *Counties—Courthouse—Latent Defects — Damages—Evidence.*—In this case the county commissioners contracted with defendant to put additions and improvements upon the courthouse, and by the method prescribed in the contract, accepted the work as entirely satisfactory, without *mala fides* on the contractor's part. In an action against defendant for latent defects, the evidence tended only to show that a certain brick wall was not as high as specified, that there were certain leaks, and that certain concrete work was imperfect. As to the concrete work, it was shown that with the best workmanship and materials it would frequently show later defects complained of; and that the contractor had offered, without avail, to make the work good: *Held*, that defendant's motion to nonsuit upon the evidence should have been granted. *Burgin v. Smith*, 561.

NOTES. See Evidence; Taxation.

1. *Original Parties—Restrictive Endorsements—Delivery—Presumptions.*—The time of the operative effect of Revisal, sec. 2345, relating to negotiable instruments, was 8 March, 1899; and prior thereto, as between

NOTES—*Continued.*

the original parties, one who wrote his name across the back of the instrument, could show the exact nature of the obligation assumed, whether as joint promissor, guarantor or first or second endorser, the presumption of the law, in the absence of such qualifying testimony, being that he signed as co-maker, or at least as surety. *Barden v. Hornthal*, 8.

2. *Same—Instructions—Questions for Jury.*—In an action on a promissory note made in February, 1899, when it appears from the instrument itself and admissions in the pleadings, in evidence, that the defendant wrote his name across the back of the note, before delivery to payee, to enable the maker to obtain a loan from the payee, without further evidence tending to restrict or qualify the nature of his obligation, and the amount claimed to be due is not disputed, the defense that the defendant was discharged by the laches of the payee in the collection of the note from the maker and by failure to give notice of default, is invalid, and a charge is correct that if the jury believe the evidence they should render a verdict for the plaintiff. *Ibid.*

3. *Liability of Endorsers—Original Parties—Restrictive Endorsements—Undated Endorsements—Burden of Proof.*—The question as to whether an undated endorsement on a note is presumed to bear the same date of the instrument only in favor of third persons, and has no application between the original parties, is not involved, when it appears from the admissions that defendant, in a suit upon a note, wrote his name across its back before delivery to enable the maker to obtain money from the plaintiff, and there is no evidence restrictive of the defendant's obligation, which it is upon him to show. *Ibid.*

4. *Endorser—Liability.*—Whether section 50, Code, 1883, by which all endorsers are declared to be *prima facie* sureties, applies to a transaction of this character or is confined to endorsements in the strict sense of mercantile law by which the title to a note is passed and same is put in circulation as a negotiable instrument. *Quaere. Ibid.*

5. *Overpayment—Mistake of Fact—Recovery.*—When the plaintiff has overpaid his note owing to his having forgotten a previous payment, it is a mistake of fact, and not of law, against which he may be relieved; and the mere fact that he had means of knowing does not necessarily preclude him from recovering in his action therefor. *Simms v. Vick*, 78.

6. *Negotiable Instruments—Fraud—Purchaser With Notice—Agent's Declaration—Evidence.*—On the defense of an action brought upon an acceptance given by defendant and assigned by the drawer to the plaintiff, when it is alleged in the answer that they were given for certain jewelry bought by defendant of the drawer upon the false and fraudulent representations of the agent of the latter and assigned to plaintiff with notice of the fraud, it is not reversible error to show the alleged fraudulent statements of the agent at the time of the negotiations. The evidence would be harmless if it is found that the plaintiff was a purchaser without notice, and, if otherwise, the agent's statements would bind the plaintiff. *Savings Bank v. Chase*, 108.

7. *Same—Principal and Agent—President.*—Upon the question of whether a bank purchased an accepted draft with notice of fraud on the part of the drawer in obtaining it, it is competent to show by the bank

NOTES—*Continued.*

president, who was active in the transaction, that the bank purchased with notice of the fraud, leaving the question an open one for the jury, when the evidence is conflicting, under proper instructions from the court. *Ibid.*

8. *Contract, Breach of—Maturity — Suit, When Brought — Procedure.*— Under evidence tending to show that defendant agreed to give plaintiff a certain amount to boot in a horse trade, in the form of a note, payable at a time subsequent to the action, and to secure it with a chattel mortgage on the horse thus obtained, which he put off from time to time and failed to do, finally selling the horse to another, it is error to sustain defendant's motion to nonsuit upon the evidence, on the ground that suit was brought before the maturity of the note. Upon the breach of the agreement to give the note and security the action presently lies. *Copeland v. Fowler*, 353.

9. *Negotiable Instruments—Endorsee—"Without Recourse"—"Due Course."* An endorsee of a negotiable instrument is not deprived of the position as holder in due course by the fact, and that alone, that said endorsement is in form "without recourse." *Bank v. Hatcher*, 359.

10. *Same—Vendor and Vendee—Equities—Notice.*—An endorsee for value and "holder in due course" of a negotiable instrument given for the purchase price of goods under an executory contract is not subject to equities and defenses existent between the vendor and vendee of which he had no knowledge or notice, and when he was not interested in the goods or the transaction concerning them, otherwise than as such endorsee. *Ibid.*

11. *Same—Infirmities—Interpretation of Statutes.*—An endorsee will not be affected with notice of an infirmity in a negotiable instrument taken from the payee without recourse and arising from a breach of warranty in an executory contract between the original parties, when it does not appear that he was aware of its terms, or there was nothing in the contract restricting the negotiability of the note or indicating fraud or imposition or an existent breach; and this is true though the note or instrument may contain on its face an express statement of the transaction which gives rise to the instrument. Revisal, 1905, sec. 2153. *Ibid.*

12. *Same—Promissory—Nonresidents—Situs—Proceedings Quasi in Rem.*— Proceedings to restrain the negotiation of a note in the hands of a holder, a non-resident and beyond the borders of the State, should be dismissed, and not retained by the courts of our State as a proceeding *quasi in rem.* The situs of the note, in matters of injunction, is governed by the general rule, that it is at the home of the creditor, differing from the exception to this rule made in the proceedings in attachment. *Warlick v. Reynolds*, 606.

NOTICE. See Sales; State's Lands; Mortgagor and Mortgagee; Partnerships; Taxation; Notes; Contracts; Carriers of Freight; Telegraphs; Master and Servant; Insurance; Vendor and Vendee; Deeds and Conveyances.

NUISANCE.

1. *Private—Light and Air—"Spite Fence"—Motive—Damages.*—Ordinarily the owner of lands may erect such improvements thereon as he sees fit, and any resultant injury to the adjoining owner is *damnum*

NUISANCE—*Continued.*

absque injuria; but he may not, without liability as for a private nuisance, erect an unsightly "spite fence" on his own land for the sole malicious purpose and effect and without benefit to himself, of shutting out the light and air from his neighbor's windows. *Barger v. Barringer*, 433.

2. *Same—Prescriptive Rights.*—Plaintiff and defendant had erected a wire divisional fence between their adjoining lands whereon they resided, and thereafter the plaintiff, as chief of police of the town, reported, in accordance with his official duty, the filthy condition of defendant's stable. From vengeance and malice, and without benefit to himself, the defendant then erected a very rude and unsightly board fence eight feet, six inches high on his own side of the division fence, within four feet of plaintiff's window, so as to shut out his view, light and air therefrom: *Held*, that though a prescriptive right in light and air cannot be acquired, the defendant's motive in constructing the fence in the manner indicated can be considered, and he will be liable in damages as for maintaining a private nuisance. *Ibid.*

OBJECTION AND EXCEPTIONS.

1. *Evidence—Competent in Part.*—When a part of the testimony of a witness is competent and relevant, an objection to his entire testimony will not be sustained. *Savings Bank v. Chase*, 108.
2. *Evidence—Restrictive—Appeal and Error.*—When evidence is competent for some purpose, its general admission is not reversible error unless the appellant asks at the time of the admission that it be restricted. *Tise v. Thomasville*, 281.
3. *Evidence—Confined.*—Objection to the answer of a witness to a question asked him will not be sustained when it appears that a portion of the answer was competent. The objection should be made to that part which is claimed to be irrelevant. *Shaw v. Telegraph Co.*, 638.

OFFICE HOURS. See Telegraphs.

OFFICERS. See Liens; Corporations.

OFFICIOUS ACTS. See Contributory Negligence.

"OPEN" SHIPMENT. See Damages.

OVERPAYMENT. See Notes.

PARENT AND CHILD. See Habeas Corpus.

Tort of Child—Servant—Agent—Parent's Liability.—The mere relationship of parent and child does not make the former liable in damages for the tort or negligent act of the latter. It must be shown that he approved such acts, or that the child was his servant or agent. *Brittingham v. Stadiem*, 299.

PAROL TRUSTS. See Trusts and Trustees.

PARTIAL PAYMENTS. See Compromise and Settlement.

PARTIES. See Deeds and Conveyances; Notes.

1. *Joinder of Husband—Demurrer.*—A demurrer will not be sustained for nonjoinder of the husband in an action brought by the wife to declare

PARTIES—*Continued.*

certain trusts in her favor in a deed made by her deceased father. *Ricks v. Wilson*, 46.

2. *Order to Make Parties—Objections and Exceptions—Demurrer—Appeal and Error.*—When no exception is taken in the court below to an order making a defendant a party in his additional capacity as administrator, a demurrer that he was not made a party as administrator will not be considered on appeal. *Ibid.*

3. *Severable Actions—Action Divided—Procedure.*—When several causes of action are improperly joined, on a demurrer therefor, the judge should order the pending action divided accordingly, and not grant leave to plaintiff to bring separate actions under penalty of dismissal. *Ibid.*

4. *Actions, Misjoinder of—Negligence—Personal Injury—Loss of Son's Services—Demurrer.*—The joinder of a cause of action brought by a son, an employee, to recover of defendant cotton mill, his employer, damages for a personal injury alleged to have been caused by the latter's negligence, with that of the father to recover for the loss of the son's services alleged to have been caused by the same negligent act, is demurrable on the ground of misjoinder of parties and causes of action. Revisal, sec. 469. *Thigpen v. Cotton Mills*, 97.

5. *Partition—Summons—Publication—Representation—Discretionary Powers—Appeal and Error.*—It is discretionary, by the express terms of the statute, with the trial judge as to whether he will appoint some disinterested person to represent the interests of unknown persons, etc., served with summons by publication, in proceedings to sell land for partition, Revisal, sec. 2490, and this discretion is not reviewable. *Lawrence v. Hardy*, 123.

6. *Defendant—Joinder—Same Cause of Action.*—Causes of action for "injuries with or without force to persons and property, or to either," may be joined (Revisal, sec. 469), and different causes of action for such injuries may be joined against one or more defendants, provided that each of such causes affects all the parties defendant. *Howell v. Fuller*, 315.

7. *Pleadings—Demurrer—Misjoinder—Causes of Action.*—When the complaint alleges that the defendant is indebted to each of the two parties plaintiff in different amounts for goods sold and delivered, in this case crushed rock for street purposes, under a contract with one of them, the other performing a part of the contract of the coplaintiff with the consent of the defendant, a demurrer for misjoinder of parties and causes of action is bad: (*a*) if the defendant were solely liable to one of the plaintiffs under his contract for both amounts, the joinder of the other plaintiff would be superfluous and harmless; (*b*) and, if he were responsible to both plaintiffs upon a joint contract, it would be bad, for both of them would be interested in both causes of action. The precedents upon the principle reviewed, discussed and applied by WALKER, J. *Quarry Co. v. Construction Co.*, 345.

8. *"Color"—Tenant—Adverse Possession.*—In an action of ejectment, the owner is not a necessary party, and the length of his absence from the State should not be considered where there is a tenant in possession against whom a suit may be brought. *McFarland v. Cornwell*, 428.

PARTITION.

1. *Summons—Publication—Proceedings in Rem—Sale—Title—Purchaser for Value.*—When the service of summons, as provided by Revisal, sec. 2490, has been made by publication on parties unknown, etc., in proceedings in partition for the sale of lands for division by the heirs at law, the proceedings being regular upon their face, and the court having jurisdiction of the subject-matter, a purchaser for full value without notice acquires title, free from claim or demand of such heirs upon whom the summons has been thus served. *Lawrence v. Hardy*, 123.

2. *Heirs at Law—Marriage—Declarations—Evidence—Harmless Error.*—When, in proceedings for partition of lands brought by petitioners alleging title in common with defendants, as heirs at law of A., children by his marriage with E., an issue is submitted as to whether the petitioners were the children of A. and E., testimony of a witness as to the declarations of E., the mother, that she was never married to A. is competent evidence upon the question of the married relationship, and tenancy in common; and in this case the admitted declarations of E. expressing a legal opinion of her rights and the rights of her children, were harmless error. *Walker v. Walker*, 164.

PARTNERSHIPS.

1. *Trusts and Trustees.*—Partners stand in a fiduciary relationship to each other, and ordinarily the rules and tests applicable to trustees are applicable to their conduct towards each other. *Baker v. Brown*, 12.

2. *Limitations of Actions.*—When one partner receives the assets of the firm for the purpose of paying its debts and settling its affairs, he acts as a trustee or agent for his copartner, and when such relationship is shown to exist without evidence that it had been terminated, it is not error to refuse a motion to nonsuit under the plea of the statute of limitations. *Ibid.*

3. *Evidence—Transactions.*—In an action to dissolve a partnership, it was not error in the trial court to refuse to dismiss the action as to a certain line of business, when there was evidence that it was embraced in the partnership dealings and which was germane to the issue. *Ibid.*

4. *Contracts—Scope of Authority—Warranty.*—During the continuance of a partnership for building purposes, a warranty of material and construction given by one partner for the purpose of obtaining a payment from the owner after the completion of a house contracted for by the partnership, is within the scope of the power of the partnership relations; and in the absence of bad faith by the partner giving it, or notice thereof by the owner, it is binding upon the other partner. *Powell v. Flowers*, 140.

5. *Same—Innocent Third Persons.*—A misnamed "guaranty contract" given by one partner in the scope of his partnership authority, without the knowledge of the other, being in effect but a continuance of a warranty of material and construction after the completion of a house contracted to be built by the partnership, is binding upon such other partner as against the rights of the owner, though it may have been improvidently made and entailed a loss on the partnership. *Ibid.*

6. *Duplicated Agreement — Annulment — Fraud—Innocent Persons.*—One who has entered into partnership with another, expressed the agree-

PARTNERSHIPS—*Continued.*

ment in duplicated and signed writings, and then agreed to annul the partnership, leaving the duplicate agreement in the hands of the other party, is liable to a stranger who is thereafter fraudulently induced by the other partner to lend money, in good faith, upon exhibition of the duplicate partnership agreement, within the period of its stated duration, and for purposes within its expressed scope. He has put it within the power of the other partner to commit the fraud, and should suffer loss rather than an innocent stranger who has advanced the money in good faith. *Campbell v. Huffines*, 262.

7. *Dissolution—Notice—Principal and Agent.*—In the absence of evidence tending to show that an agent would be unlikely to communicate to his principal facts affecting the latter's dealing with third persons so as to bring it within the exceptions to the general rule, notice to a traveling salesman of the retirement of a partner from a firm to whom he sold goods, is sufficient to bind the principal with such knowledge, it appearing that it was a part of his duty to report changes in partnerships among his customers, and that at times he collected money on account of goods sold for his principal, though not directly so authorized to do. *Jenkins v. Renfrow*, 323.

8. *Same—Conditional Sale—Acceptance.*—An order for goods given by a partnership to the traveling salesman of the creditor subject to the latter's confirmation, is not a completed sale until so confirmed; and when its acceptance is only evidenced by the shipment of the goods, the sale and delivery are of that date. *Ibid.*

9. *Same—Time—Retiring Partner—Liability.*—A partnership having given an order for goods to the plaintiff's traveling salesman subject to the plaintiff's acceptance, one of its members retired and gave due notice before its acceptance to the salesman, who was the plaintiff's accredited agent for the purpose: *Held*, (1) such notice was a rescission of the order; (2) its sufficiency in point of time was not limited to the date of the order; (3) that as the goods were not sold and delivered until shipment made after such notice was duly given, the retiring partner is not responsible therefor. *Ibid.*

10. *Limited Authority—Notice—Liability.*—When one deals with a partner with notice that his acts exceed the limitation imposed upon his authority by the partnership, the partnership is not bound, and the remedy is restricted to the partner with whom he deals. *Sladen v. Lance*, 492.

11. *Same—Evidence.*—One who has entered into a partnership with another in a business conducted in a different town from that of his residence, under a parol contract by which it was agreed that the other partner should conduct the entire business and only buy such goods as he was able to pay for promptly, is not liable to a creditor of the firm to whom he had given notice of the agreement, and who acted in disregard of the notice and in such a manner as to keep him in ignorance of the true status of the account. *Ibid.*

PERMISSIVE USER. See Negligence.

PLEADINGS. See Fraud.

1. *Insurance—Evidence—Admissions.*—When, in an action against a fire insurance company, the complaint alleged a total loss and that the full amount of insurance became due, a part of the corresponding

PLEADINGS—*Continued.*

allegation in the answer is admissible in evidence, when put in by plaintiff, admitting the loss, without introducing a part thereof denying liability therefor. *Modlin v. Insurance Co.*, 35.

2. *Insurance—Waiver—Estoppel—Allegations Sufficient.*—In an action to recover upon a fire insurance policy, the plaintiff alleged sole beneficial ownership of property insured, the issuance of policy and subsequent loss by fire when policy was in force; the adjustment of loss which defendant promised to pay and issued check therefor, but recalled it. The parties appeared to be satisfied to present their contentions arising under the pleadings under an issue of indebtedness, and another as to the bar of the statute of limitations: *Held*, matters constituting waiver and estoppel were sufficiently pleaded in this case. *Modlin v. Insurance Co.*, 35.

3. *Deeds and Conveyances—Mortgages—Cancellation—Evidence.*—In an action for the cancellation of a bond and mortgage on plaintiff's land, plaintiff alleged that they were given to defendants, upon consideration that the latter would pay a certain prior mortgage indebtedness of plaintiff, which, owing to the defendant's delay, plaintiff had to pay when he was in imminent danger of losing the land under foreclosure. The answer raised no material issue: *Held*, upon the pleadings, it appeared there was a failure of consideration and the bond and mortgage should be canceled. *Williams v. Dunn*, 107.

4. *Variance—Amendments.*—There is no error in the trial judge allowing amendments to the pleadings so as to make them conform to the proof. Revisal, 507. *Bedsole v. R. R.*, 152.

5. *Equity.*—In order to obtain equitable relief the party seeking it must allege such facts as will entitle him to it. *McFarland v. Cornwell*, 428.

POLICE POWERS. See Courts.

POWER OF COURT.

1. *Injunction—Sewerage—Damages Doubtful—Court's Noninterference.*—In this case an injunction is sought against the action of the city in emptying its sewer into a stream by certain of the landowners along its course where the sewer empties. The court affirming the doctrine of the city's liability for damages as laid down in *Metz v. Asheville*, 150 N. C., 748, and other cases cited, will not interfere by injunction, it being doubtful, from the record, as to the character and extent of the damage. *Cherry v. Williams*, 14 N. C., 452; *Vickers v. Durham*, 132 N. C., 880, cited and approved. *Little v. Lenoir*, 415.

2. *Criminal Cases—Supreme Court—Newly Discovered Evidence.*—A new trial in criminal cases will not be granted by the Supreme Court upon the grounds of newly discovered evidence. *S. v. Arthur*, 653.

POWERS, IMPLIED. See Cities and Towns.

PREFERENCES. See Bankruptcy.

PRESCRIPTIVE RIGHTS. See Nuisance.

PRESENTMENT. See Indictment.

PRESUMPTIONS. See Evidence; Statutes; Instructions; Cities and Towns; Appeal and Error; Murder; Manslaughter.

PRINCIPAL AND AGENT. See Trusts and Trustees.

1. *Evidence of Agency—Harmless Error.*—In an action to recover purchase price of goods sold and delivered, exclusion of defendant's evidence that plaintiff's agent was told by the agent of defendant that the goods were bought by him for his principal, is harmless, when plaintiff has brought his action and recovered against the principal in recognition of this act. *Engine Co. v. Paschal*, 27.

2. *Agent's Counterclaim.*—An agent cannot successfully interpose as a set-off, in an action brought by another against his principal, expenses incurred by him individually and for which his principal cannot be held responsible. *Ibid.*

3. *Account Stated—Admissions—Receipt—Agent's Unauthorized Acts.*—Plaintiff, being indebted to a bank, delivered, at an agreed price and under a contract of purchase with defendant railroad, a certain number of crossties at said road and told defendant to send statement and certificate of the amount to the bank. Thereafter defendant accepted the ties, but at a reduced price, and sent statement accordingly to the bank and had the bank to receipt the statement "in full of above account." The plaintiff notified both the bank and the railroad company that he would accept the payment only in part: *Held*, (1) the account rendered by defendant to the bank was no more than an admission that it owed the plaintiff the sum stated therein; (2) the receipt of the bank was not in full of plaintiff's demand, but only in full for the amount stated; (3) there was no evidence to warrant the bank to receipt for plaintiff in full of his demand, and such receipt would not be binding upon him. *Colvard v. R. R.*, 522.

PRINCIPAL AND SURETY.

1. *Sureties — Justification—Different Amounts—Contribution.*—Contribution between sureties upon a sheriff's bond, as it relates to their rights between themselves alone, rests upon the principle that "equality is equity," and though they may have justified in different amounts, upon the same bond for the same penalty, the burden must be borne by them in equal proportions, in the absence of evidence tending to show that they had otherwise agreed among themselves. *Comrs. v. Dorsett*, 307.

2. *Same—Interpretation of Statutes.*—In an action wherein judgment had been rendered in a certain sum against an ex-sheriff and the sureties on his bond, and continued to determine the liability of the sureties among themselves, who had justified at the foot of the bond in different amounts: *Held*, the intendment of Revisal, sec. 310, was to provide a statement under oath to show the solvency of the sureties and afford information to the county commissioners under like sanction that the aggregate amount of the bond equaled the penalty required, and does not affect the doctrine of contribution as it relates to the rights of the sureties to contribution between themselves. *Ibid.*

3. *Payment by Surety—Implied Covenant—Cause of Action.*—One who has executed a distiller's bond to the Government as surety, incurs an outstanding existing obligation which he has thereby assumed for his principal, with an implied covenant on the part of the principal that he will indemnify him, as surety, against loss; and no cause of action accrues to the surety upon the implied covenant of indemnity until he has paid the bond according to its terms. *Graeber v. Sides*, 596.

PRIORITIES. See Liens; Mortgagor and Mortgagee.

PRIVATE CORPORATIONS. See Corporations.

PRIVITY. See Contracts.

PROBATE. See Deeds and Conveyances.

PROCEDURE. See Taxation; Demurrer.

1. *Process—Service—Misnomer of Defendant—Plea in Abatement.*—A mere misnomer of the defendant in failing to serve summons on it as the "Supreme Lodge," etc., when, in fact, the summons was served on the proper officer, is not a ground for dismissal; the proper procedure is a plea in abatement wherein the correct name could be supplied and the pleadings amended to conform. *Dunn v. Aid Society*, 133.

2. *Process—Service—Misnomer of Defendant—Misjoinder of Causes.*—In this case there was no misjoinder of causes of action; but, if otherwise, the remedy was by motion to divide the action, Revisal, 476, the defendant being already in court and having received notice by the summons and complaint. *Ibid.*

3. *Attachment.*—In attachment proceedings it is not now necessary that the damages sought should only be for a wrongful conversion of personal property or liquidated damages arising under a contract or limited or defined by some standard or data contained in the contract itself, but by the amendments of the Code of 1883, and subsequent statutes, as shown in Revisal, sec. 758, the remedy is also provided in actions for; subdiv. 3: "Any injury to real or personal property in consequence of negligence, fraud or other wrongful act"; subdiv. 4: "Any injury to the person by negligence or wrongful act." *Worth v. Trust Co.*, 191.

4. *Same—Interpretation of Statutes.*—Revisal, ch. 68, sec. 2831, and subsec. 6, provides: That in the construction of all statutes, unless a contrary intent is manifest, the term "personal property" shall include moneys, goods, chattels, choses in action and evidence of debt, including all things capable of ownership not descendible to the heirs at law, and applying such construction. Sec. 758, subdiv. 3, Revisal, above stated, authorizes the process of attachment in an action for an unlawful combination and conspiracy to injure plaintiff, and by means of which plaintiff's subscription and holdings in the corporation above indicated were rendered valueless. *Ibid.*

5. *Justice's Court—Judgments—Appeal—Docketing—Laches of Justice—Principal and Agent.*—A motion in the Superior Court for a *recordari* or an attachment under Revisal, sec. 1493, is the remedy given an appellant for the failure of the justice to send up an appeal, and it is no legal excuse for the appellant to show that he had paid to the justice his fees and those of the clerk, and that the justice had failed to docket it as required by the statutes. The appellant would thus make the justice his agent and for his neglect he would be responsible. *MacKenzie v. Development Co.*, 276.

6. *Justice's Court—Appeal—Docketing—Judgment—Laches—Void Appeal.* An appeal from a judgment of a justice of the peace must be docketed at the next ensuing term of the Superior Court commencing ten days after the notice of appeal, and an attempted docketing at a later term is a nullity. Revisal, secs. 307-8. *Ibid.*

PROCEDURE—*Continued.*

7. *Judgments, Irregular—Irregular Process—Justice of the Peace.*—To set aside a judgment of a justice of the peace by default for irregularity upon the ground of irregular service of summons, the complaining party must proceed in due time to move before the justice to that end. *Billings v. Joines*, 363.

8. *Evidence—Findings by Court—Irreconcilable Findings—Judgments—Appeal and Error.*—When the judge in the trial court who by agreement of the parties was to have found the facts sets out certain evidence which is conflicting and irreconcilable, finds it all to be true and renders judgment thereon, it is reversible error, and the judgment will be set aside. *Guy v. Casualty Co.*, 465.

PROCEEDINGS IN REM. See Process; Jurisdiction.

PROCESS.

1. *Executors and Administrators—Debts—Sale of Lands—Innocent Purchaser—Infants—Parties—Representation.*—An innocent purchaser for value without notice of land sold under judgment of the Superior Court by the personal representative of deceased, to make assets to pay his debts, takes free from the claim of children not *in esse* at the time of sale, to whom the lands descend subject to the life estate of their father when the father, as life tenant, had been served with process and was bound by the order of sale, affirming *Carraway v. Lassiter*, 139 N. C., 145. *Yarborough v. Moore*, 116.

2. *Judicial Sales—Motion to Set Aside—Innocent Purchaser—Infants—Parties—Service—Proof—Record Evidence.*—A purchaser at a judicial sale is only required to see that the court has jurisdiction of the parties and the cause of action. And when it appears that certain parties defendant were minors and interested in the lands sold, that guardians *ad litem* had been appointed for them and that the sheriff had served the summons on them by reading it, and it nowhere appears in the record that they were under the age of fourteen, so as to require service by copy, etc., as provided by the statute, the service on them is apparently sufficient, and the rights of an innocent purchaser at the sale will not be disturbed. *Ibid.*

3. *Judgments of Another State—Nonresidence—Summons—Service—Proof.* A lack of jurisdiction of the person is not established by showing, without more, that process was personally served on a nonresident defendant while he was temporarily and of his own volition within the jurisdiction of the court rendering the judgment. *Mottu v. Davis*, 237.

4. *Order of Court—Next Term—Criminal Term—Summons—Service—Reasonable Time.*—In an action for possession of lands involving title it appeared that the plaintiff claimed under a deed from the defendant and his wife, and that the death of the defendant being suggested the court ordered that his heirs be made parties defendant. No process or notice being issued or given under this order, the court again ordered that notice issue or the action abate at the next term. A criminal term intervened, but before the next civil term all the heirs, at least those resident within the State, had been served, and this within two years from the date of the death of their ancestor: *Held*, (1) the second order, by fair intendment, meant that the action should abate if process on the heirs was not served before the next

PROCESS—*Continued.*

civil term; (2) the defendants' motion for abatement should be denied, it appearing that the service upon the heirs was made within two years after the death of the ancestor, within the time fixed by the order, and that the mother of the heirs continued to be a party defendant. *Rogerson v. Leggett*, 145 N. C., 7, cited, approved and distinguished. *Moore v. Moore*, 555.

5. *Summons—Acceptance of Service—Attorneys at Law.*—An attorney at law, without having special authority, cannot make a valid acceptance of service of original process. *Warlick v. Reynolds*, 606.

5. *Warrant of Arrest Not Signed—Appearance Bond—Sufficiency.*—It is immaterial to the validity of an appearance bond given by defendant before the court and in *custodia legis* that the warrant for his arrest, in due form, was inadvertently not signed by the recorder. *S. v. Mitchell*, 716.

PUBLICATION. See Forgery; Process.

PUBLIC SCHOOLS. See Cities and Towns; Liens; Taxation.

PUBLIC WATER SUPPLY. See Cities and Towns.

PURCHASER, RIGHTS OF. See Equity; Mortgagor and Mortgagee.

PURCHASER WITH NOTICE. See Notes; Sales; Actions.

QUIETING TITLE. See Judgments.

QUO WARRANTO.

Rights and Remedies.—The correctness of the result of the election of a clerk of the Superior Court, determined and declared by the county board of canvassers, can be investigated, passed upon and determined in a civil action in the nature of a *quo warranto*, and such is the proper remedy. *S. v. Midgett*, 1.

RAILROAD CROSSINGS. See Contributory Negligence.

RAILROADS. See Negligence; Contributory Negligence; Master and Servant.

1. *Shipper—Cotton—Licensee.*—One who is preparing bales of cotton for shipment in a customary manner on the platform provided by a railroad company for the purpose is not a bare licensee. *Finch v. R. R.*, 105.

2. *Cotton Platform—Repairs—Duty to Shipper—Negligence—Questions for Jury.*—A railroad company owes a duty to its patrons shipping bales of cotton over its lines to keep in repair its platform used and furnished by it for that purpose, and when there is evidence tending to show that one thus shipping cotton, while complying with the instructions of defendant's agent in heading up the bales so that their marking could readily be seen, was injured by his foot catching in a hole in the platform left by a rotting plank, which was concealed by the bale he was then handling, it is sufficient to take the case to the jury upon the issue of defendant's negligence. In this case the question of contributory negligence was not presented. *Ibid.*

3. *Lights and Signals—Negligence.*—When it is alleged and proven to the jury under conflicting evidence that plaintiff's intestate was run over and killed by defendant's work train, without lights or signals, when

RAILROADS—*Continued.*

he was endeavoring to go over the railroad at a public crossing, the defendant is liable in damages for its negligent act, in the absence of evidence of contributory negligence of plaintiff. *Champion v. R. R.*, 197.

4. *Same—Contributory Negligence—Nonsuit.*—In an action to recover damages from a railroad company for the alleged negligent killing of plaintiff's intestate by running a train, without lights or signals, over him at a public crossing at night, the contributory negligence of intestate will bar recovery when it appears that he both saw and heard the engine coming and attempted to run across the track in front of it, and thus received the fatal injury. *Ibid.*

5. *Master and Servant—Negligence—Defective Tools—Ordinary Use—Accident.*—When in the ordinary and everyday use of a tool, simple in structure, an injury is caused an employee by a defect in it, which was not observed by him after working with it for several hours, the employer is not liable in damages by reason of the defect alone; and when an injury was thus caused to the plaintiff by the unexpected flying off of a striking hammer used by another in striking a riveting hammer held by him while riveting bands together in the course of his employment, the employer is not responsible in damages for plaintiff's resultant injury. *Dunn v. R. R.*, 313.

6. *Negligence—Moving Trains—Brakemen—Scope of Employment.*—When it appears that the plaintiff, a brakeman, has received the injury complained of from a defective hand-hold by following a custom of brakemen in jumping off and on another train ahead of his own train in order to reach a switch to change it, and such custom was known to and approved by the superior officers of defendant, a motion to nonsuit upon the evidence on the ground that he acted therein outside the line of his duties will not be sustained. *Reeves v. R. R.*, 318.

7. *Same—Evidence—Nonsuit.*—The rule that persons cannot recover damages of a railroad company for an injury received while getting on and off a moving train, does not apply in its full strictness to brakemen acting in the line of their duty. *Ibid.*

8. *Negligence—Moving Trains—Brakemen.*—The test of whether a brakeman, while engaged in his employment with defendant railroad company, was guilty of contributory negligence and barred of recovery in his action for damages for an injury sustained by him while jumping on or off his moving train, is whether a person of ordinary prudence in his position would have acted likewise. *Ibid.*

9. *Moving Trains—Brakemen—Contributory Negligence.*—If a brakeman jumps on or off a moving train, when it is obviously dangerous for him to do so, he is guilty of such contributory negligence as will bar recovery. As there was conflict of evidence in this case as to the speed of the train, the question was properly submitted to the jury. *Ibid.*

10. *Negligence — Vacant Lot — Permissive User — Licensee — Liability of Owner.*—One who with others is accustomed to use, with the knowledge of the owner, a pathway across a vacant lot for his own convenience, without any enticement, allurement or inducement being held out to him by the owner, goes there at his own risk and enjoys the license subject to its concomitant perils; and while the owner may not place new and dangerous pitfalls and obstructions along the

RAILROADS—*Continued.*

path without warning to those likely to use it, and escape liability for an injury thereby directly caused to one of them without fault on his own part, he owes no such duty when the pitfall or obstruction has remained there continuously for some time, in this case for a period of two years. *Monroe v. R. R.*, 374.

11. *Rights of Way—"Floating"—Rights Barred—Question of Law—Limitation of Actions.*—The grant to a railroad company of an undefined or "floating" right of way over the owner's lands is of an executory nature, and where no consideration has been paid by the company, the right may be lost by lapse of ten years upon failure of entry and of location by the company; and in this case there was a delay of twenty-one years barring the right as a matter of law. Even if there had been a deed, with metes and bounds, the adverse possession of twenty years would bar the company under the statute of limitations. Revisal, sec. 384. *May v. R. R.*, 388.

12. *Independent Contractors—Joint Torts—Partition—Master and Servant.* A railroad company cannot be held liable as a joint tort feasor with its independent contractor for an injury to an employee of the latter, when there is no evidence or suggestion that the former assumed an active part by encouragement, direction or control of the work wherein the injury complained of was received. *Smith v. R. R.*, 479.

13. *Same—Release of Liability—Effect.*—The plaintiff received the injury complained of while engaged in the employment of an independent contractor of a railroad company in building the latter's roadbed, and brought suit against the railroad and the contractor, alleging that they were joint tort feasors. He introduced the contract between the defendants, wherein it appeared that the contractor had agreed to indemnify the railroad from liability of the character demanded by plaintiff: *Held,* a release in full given by the plaintiff to the independent contractor in consideration of a compromise likewise released the liability of the railroad, in the absence of evidence tending to show that the latter actively participated in the alleged wrong. The principles of law applicable to the master's liability for the wrongful acts of the servants discussed by MANNING, J. *Ibid.*

14. *Negligence—Evidence—Sufficient—Nonsuit.*—In an action against a railroad company for damages for the negligent killing of plaintiff's intestate, a motion of nonsuit upon the evidence should be allowed if the evidence does not prove or tend to prove a breach of duty resulting proximately in the injury complained of. *Farris v. R. R.*, 483.

15. *Crossings—Custom—Notice Implied.*—A custom of six months' duration of a large number of employees of defendant railroad company to cross the yards and a large number of tracks of defendant in going at dinner time the shortest way to and from their homes, fixes the company with notice of of the fact, and that it was the custom of its own employees. *Ibid.*

16. *Flying Switch—"Kicking Cars"—Negligence Per Se.*—It is negligence *per se* for a railroad company to make a flying switch or "kick" or "shunt" cars on its yard, wherein there are a large number of tracks, at a place where and a time when it was the known custom of the company's employees to cross, without brakemen or other like employees of the company on the cars being thus placed to give notice or warning of their approach. *Ibid.*

RAILROADS—*Continued.*

17. *Same—Evidence Sufficient.*—Evidence is sufficient to sustain a verdict on the issue of defendant's negligence which tends to show that plaintiff's intestate, an employee of defendant railroad company, was run over and killed by defendant in making a flying switch while he was crossing the yard at a place where and a time when the intestate, with a large number of other employees, were accustomed to cross with the acquiescence of the defendant; that while he was crossing the tracks, they being close together, an engine running without warning or signals from thirty-five to forty miles an hour, passing in two feet of him, caused his hat to blow off on the track he had just crossed, and the injury was caused when he was stooping to pick it up by cars which had been "shunted" coming upon him noiselessly at the rate of eight or ten miles an hour with no watchman on them to give warning. *Ibid.*

18. *Same—Continuing Negligence—Proximate Cause.*—In this case the negligent act of the defendant, a railroad company and its conductor and engineer, in running an engine on its yards without signal or warning at the rate of thirty-five or forty miles an hour, at a place where and time when they knew or should have known that employees of the company would cross going to and from their homes for dinner, and which caused the death of plaintiff's intestate, one of such employees, continues up to the collision with the intestate, and without fault on his part is the proximate cause. *Ibid.*

19. *Contributory Negligence—"Look and Listen," Exceptions to Rule—Evidence—Nonsuit.*—The plaintiff's intestate, in an action against a railroad company for damages for negligent killing, in drawing back from an engine negligently running in two feet of him at the rate of thirty-five or forty miles an hour, without signal or warning, and killed by cars "shunted" onto the track he had just crossed running at the rate of eight or ten miles an hour, without watchmen on them, while stooping to pick up his hat which the moving engine had caused to blow there from his head, the tracks being near together, is not held to that degree of care ordinarily required of one crossing a railroad track to stop, look and listen, and a motion of defendants to nonsuit upon this evidence on the question of contributory negligence was properly disallowed. *Ibid.*

20. *Contributory Negligence—Pleading—Proof—Burden of the Issue.*—Contributory negligence will not be presumed in law; it must be alleged and proved by the defendant, the burden of the issue resting upon him and the burden of duty on the plaintiff. *Ibid.*

21. *Negligence—Burden of Proof—Pedestrians, Unexpected Acts of—Evidence—Nonsuit.*—According to plaintiff's evidence, in an action against a railroad company for damages for an injury alleged to have negligently been inflicted on him by defendant, he was a brakeman who had been left by one section of a freight train and endeavored to catch the second section. He crossed the track upon which he saw this second section was switching and walked along the track in a path used by employees. When the train was backed down the track going in the same direction, at a speed of four miles an hour, he became dizzy from faintness and, being a distance of eighteen inches from the track, fell on it and was injured. There was no one on the end of the last car. There was testimony as to the distance

of the train from him at the exact moment of his falling, though it appeared that the train must have been less than fifteen feet. There was no evidence that a train of this character could have been stopped in time to avoid the injury under the circumstances: *Held,* there was no sufficient evidence that the injury would have been averted had there been a brakeman on the last car, and as the burden was on plaintiff to show the proximate cause of the injury, which he failed to do, a motion for a judgment of nonsuit should be sustained. *Merrill v. R. R.*, 524.

22. *Tramways—Regulations and Liabilities—Fellow-Servant Act.*—A corporation organized under a charter conferring the power of eminent domain, and the privilege of constructing tramways, railways, etc., for the transportation of passengers and freight, including logs, lumber, timber, etc., is considered and held as a railroad, and subject to the regulations and liabilities affecting such companies, including the statute known as the Fellow-Servant Act, though its chief purpose was to exploit certain timber lands and market the timber growing thereon. *Wright v. R. R.*, 529.

23. *Damages—Illegal Conduct—Master and Servant—Orders of Master.*—An action will not lie when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the State, nor is this principle impaired by reason of the fact that plaintiff was acting under the orders of the defendant, his principal, for an agent cannot justify such conduct by showing he was so acting. *Lloyd v. R. R.*, 536.

24. *Master and Servant—Employees' Hours of Service—Public Benefit—Interpretation of Statutes—Violation of Statute—Liability of Master—In Pari Delicto.*—Chapter 456, Public Laws of 1907, prescribing the hours of service of employees of railroad companies, to wit: not more than sixteen consecutive hours, and declaring that working beyond such hours shall constitute a misdemeanor on the part of the employees and the company requiring it, while doubtlessly passed for the well-being of railroad employees, was also intended for the benefit of the public, and hence, when it is alleged that plaintiff, a fireman on defendant's road, having been compelled and directed by defendant company to work continuously for twenty-three hours without food, was for that reason so incapacitated that the injury was caused him while attempting to board a slowly moving train to reach a shanty-car where he was directed to go to get food, the plaintiff and the defendant company are *in pari delicto*, and plaintiff, having alleged an act in violation of said chapter 456 in order to maintain his action, cannot recover. *Ibid.*

25. *Death by Wrongful Act—Nonsuit.*—While the requirements of Revisal, sec. 59, giving a right of action for death caused by the wrongful act, etc., of another, provided it be "brought within one year after such death" is not in strictness a statute of limitation, but a condition affecting the cause of action itself, yet when such suit has been brought within the time specified by this section, it comes within the provisions of Revisal, sec. 370 (Code, sec. 166), to the effect that if an action shall be commenced within the time prescribed therefor and the plaintiff be nonsuited, etc., he may commence a new action within one year after such nonsuit, etc. *Trull v. R. R.*, 545.

RAILROADS—*Continued.*

26. *Same—Bill of Peace—Procedure.*—When an action for death caused by a wrongful act of another, etc., has been brought within the time prescribed by Revisal, sec. 59, the provisions of Revisal, sec. 370, allowing another action thereon to be brought within one year, etc., applies as often as a nonsuit is taken; this on the idea that the time the first action was pending is not counted against plaintiff, the remedy to prevent vexatious litigation being some procedure in the nature of a bill of peace. *Ibid.*

27. *Crossings—Signals—Duty of Pedestrian—Look and Listen—Contributory Negligence—Evidence—Nonsuit.*—When it appears from the evidence that plaintiff's intestate was standing near a railroad crossing waiting for a train to be moved on a track in front of him, and unexpectedly and without explanation stepped from a place of apparent safety directly and immediately in front of a moving shifting-engine in plain view, and was thereby killed, though the engine did not give the customary crossing signals or warnings, the plaintiff has failed to exercise that degree of care for his own safety which it was his duty to observe, and a motion of nonsuit upon the evidence should be sustained upon the issue of contributory negligence. *Ibid.*

RATES, WATER. See Water Rates.

RATIFICATION. See County.

REALTY, INJURY TO. See Venue.

REASONABLE STIPULATIONS. See Carriers of Freight.

RECEIVERS.

Liens—Future Payments—Completing Contract.—When, by unconditionally accepting an order given on him by a sub-contractor in favor of one furnishing the latter material for the building, the contractor has made a valid assignment of funds coming into his hands under his contract with the owner for the payment of the debt, and thereafter the sub-contractor, a corporation, goes into the hands of a receiver who, by agreement, satisfactorily completes the work, the assignment is valid as to such sum or sums of money as may have become due under the accepted order as against material men creditors of the sub-contractor of whose claims the contractor had not been notified, and who had not acquired a lien under the statutory provisions. *Hall v. Jones*, 419.

RECORDARI. See Appeal and Error.

RECORDER'S COURT. See Courts.

REFERENCE.

1. *Receivers.*—An order issued in this case, being a creditors' bill, requiring the receiver of a corporation to pass upon the different claims of the plaintiffs, and upon certain priorities claimed by some of them, is in effect an order of reference. *Riley v. Sears*, 187.

2. *Findings—Issues—Exceptions—Judgments—Appeal Premature.*—An appeal is premature from an order of the judge to submit to the jury issues raised by exceptions to referee's report, when the order of reference appears to have been made without objection. The practice

REFERENCE—*Continued.*

is to proceed with the inquiry, and appeal from the final judgment or a judgment in the nature of one. *Ibid.*

3. *Appeal and Error—Order—Appeal Premature—Final Judgment.*—An appeal is premature from the judgment of the lower court modifying the report of a referee, declaring the indebtedness and priorities among defendant's creditors and ordering a reference as to one of them, and it will be dismissed without prejudice; for when a reference has been entered upon, it must proceed to its proper conclusion, and an appeal will only lie from a final judgment, or one in its nature final. *Pritchard v. Spring Co.*, 249.

4. *Appeal and Error—Referee—Report Confirmed—Supreme Court—Findings.*—Upon appeal from the confirmation by the trial court of the report of a referee setting aside a deed as having been obtained by undue influence amounting to fraud, the Supreme Court has no power to make findings from the evidence, but can only determine as to whether there is sufficient legal evidence to support the findings which have been made. *Bellamy v. Andrews*, 256.

REFORMATION. See Deeds and Conveyances.

REGISTRATION. See Deeds and Conveyances; Bankruptcy; State's Lands; Taxation.

REHEAR, PETITION TO. See Appeal and Error.

REMOVAL OF CAUSES. See Corporation Commission.

1. *Federal Court—Petition—Jurisdictional Facts—Matter of Right.*—In proceedings for the removal of a cause from the State to the Federal courts upon the question of diversity of citizenship under the Federal statute, applicable, the State court is not bound to surrender its jurisdiction until a case has been made which, on the face of the petition, shows the petitioner has a right to the transfer of the cause to the Federal courts. *Corporation Commission v. R. R.*, 447.

2. *Corporation Commission — Legislative Functions — Police Powers — "Suits."*—In a matter before the Corporation Commission wherein certain citizens of a town were seeking an enforcement of certain changes of location and conditions of a railroad company's depot therein, the commission held, "In view of the facts, it is the opinion of the commission that the removal of the depot to the north side of the railroad and enlarging the warehouse space will promote the convenience, security and accommodation of the public." From this order the railroad company appealed under the provisions of the State statute to the State Superior Court, and there, in apt time and due form, filed a petition to remove the cause to the Federal Court on the ground of diverse citizenship, alleging the jurisdictional amount: *Held*, the action of the commission was the regulation by the State through its lawfully constituted agency of a legislative function falling within its police power, and was not a "suit," within the purview of the Federal statute, removable to an inferior Federal tribunal. *Ibid.*

3. *Corporation Commission—State Regulations—Federal Courts—Constitutional Law.*—The Federal courts have no jurisdiction over regulations of a legislative character made by a State through its lawfully authorized agency in this case, the Corporation Commission, unless

REMOVAL OF CAUSES—*Continued.*

the regulations are of such an unreasonable or arbitrary character as to be in effect not a mere regulation, but an infringement of ownership, or in some other way repugnant to the protective clauses of the Fourteenth Amendment of the Federal Constitution. *Ibid.*

4. *Same—Procedure.*—The only remedy that the common carrier has in the Federal Court for relief from a regulation of a State, legislative in its character, alleged to be in contravention of the Fourteenth Amendment to the Federal Constitution, is upon writ of error from the United States Supreme Court after the carrier has exhausted the right of review and appeal open to it under the laws of the State. *Ibid.*

5. *Federal Courts—Allegations of Petition—Jurisdictional Facts.*—The allegation in a petition of a carrier filed for the removal of a cause to the Federal Court upon the ground of diversity of citizenship under the Federal statute, that certain changes in its depot ordered by the Corporation Commission will cost it over two thousand dollars, does not *per se* make the regulation an infraction of the Fourteenth Amendment of the Federal Constitution or give inferior Federal tribunals jurisdiction to pass on the propriety of such an order. *Ibid.*

6. *Federal Courts — Jurisdiction — Corporation Commission — Legislative Acts—Federal Constitution—Constitutional Law.*—Assuming that the mere fact that an order of the Corporation Commission made to compel the carrier to change the location and conditions of its depot to promote the convenience, security and accommodation of the public would be an invasion of interstate commerce, it does not transform the proceedings in which the order is made into "a suit at law or in equity," and, as such, removable from the Superior Court of the State to an inferior Federal tribunal upon the ground of diverse citizenship. *Ibid.*

7. *Corporation Commission—Legislative and Judicial Powers—State Constitution.*—The Corporation Commission in ordering a carrier to make certain changes in its depot for the security, etc., of the public under the legislative authority conferred, is not exercising strictly judicial functions, but those which are more legislative in their character; and whether the union of legislative and judicial functions of the Corporation Commission in a single hand is permissible under the State Constitution cannot be determined on an appeal by the carrier from the refusal of the Superior Court to grant its petition to remove the proceedings to the Federal Court. *Ibid.*

8. *Municipal Corporation—Municipal Agencies.*—Under chapter 71, Private Laws of 1905, the defendant board was created a department or agency of the municipal corporation of Concord, and, among other things, expressly created for the purpose of operating and maintaining a system of waterworks and lights for the city; and a cause of action for damages for breach of contract made by the board within the scope of its public duties brought in a different county should be removed to the county wherein the town is situate, irrespective of the question as to whether the damages arose for a negligent discharge of an administrative duty or a technically governmental one. Revisal, sec. 420 (2). *Light Co. v. Comrs.*, 558.

RES IPSA LOQUITUR. See Nonsuit; Negligence.

RES JUDICATA. See Estoppel; Judgments.

RESTRICTING LIABILITIES. See Corporations.

RESTRICTIVE ENDORSEMENTS. See Notes.

RESTORATION. See Contracts.

RESTRAINT OF TRADE. See Contracts.

RETIRING PARTNER. See Partnership.

REVIEW, BILL OF. See Appeal and Error.

REVISAL.

SECTION.

50. The right of action given for a death caused by a wrongful act is not strictly a statute of limitation, and section 370, as to bringing actions within the year upon a judgment of nonsuit, fully applies. *Trull v. R. R.*, 545.

370. The right to commence another action within a year after judgment of nonsuit under this section fully applies to an action for wrongful death under section 50. *Ibid.*

384. An unaccepted and indefinite floating right of way granted a railroad company is barred in twenty years. *May v. R. R.*, 388.

399. Under the facts of this case the ten-year statute bars plaintiff's action to have defendant, enterer of State's lands, declared a trustee for his benefit. *Phillips v. Lumber Co.*, 519.

415. Action for possession of land involving title does not abate by death of party, except by order of court. *Moore v. Moore*, 555.

420 (2). An action against a county governmental agency is removable to the courts of that county. *Light Co. v. Comrs.*, 558.

469. A sufficient allegation of a joint tort of the master and servant. *Howell v. Fuller*, 315.

469. An action for personal injury brought by the son with that of the father for loss of the son's services is a misjoinder. *Thigpen v. Cotton Mills*, 97.

476. When causes of action are misjoined, motion to divide is the remedy. *Dunn v. Aid Society*, 133.

567. Equity will decree correction of a deed, and the registration of the decree as a conveyance. *Bell v. McJones*, 85.

593. An offer of appellant to deposit in lieu of appeal bond in criminal matters is sufficient. *S. v. Parish*, 659.

597. An affidavit for appeal in *forma pauperis* failing to contain the clause that appellant is advised by counsel learned in the law that there was error therein is defective. *Honeycutt v. Watkins*, 652.

727. Arrest and bail may be had without changing the nature of an action for damages formerly brought. *Copeland v. Fowler*, 353.

758. Wrongful conversion in attachment proceedings, the damages need not be liquidated. *Worth v. Trust Co.*, 191.

999. A substantial requirement is all that is necessary for the clerk of the court of the county wherein the land lay in passing upon certificates to a deed. *Kleybolte v. Timber Co.*, 635.

1001. A substantial requirement is all that is necessary for the clerk of the court of the county wherein the land lay in passing upon certificates to a deed. *Ibid.*

REVISAL—*Continued.*

SECTION.

1074. Notice of appeal given to Corporation Commission is sufficient. *Corporation Commission v. R. R.*, 447.

1293. The court may suspend judgment in criminal cases when done without objection in the presence of the defendant. *S. v. Hilton*, 687.

1294. The Court may suspend judgment in criminal cases when done without objection in the presence of the defendant. *Ibid.*

1318. Counties are taxed to pay for bridges over divisional streams "in proportion to the number of poles," and this applies when dividing lines run up the "middle of the stream." *Bridge Co. v. Comrs.*, 215.

1493. A motion for a *recordari* is the procedure when the justice fails to send up an appeal. *McKenzie v. Development Co.*, 276.

1589. An attachment upon lands is a cloud upon title which courts of equity may inquire into in proper instances. *Crockett v. Bray*, 615.

2019. There is no privity of contract between the owner and material man not acquiring lien. *Hardware Co. v. Schools*, 507.

2020. There is no priviity of contract between the owner and material man not acquiring lien. *Ibid.*

2020. Material men not acquiring lien are only creditors of sub-contractor. *Hall v. Jones*, 419.

2021. Material men not acquiring lien are only creditors of sub-contractor. *Ibid.*

2021. There is no privity of contract between the owner and material man not acquiring lien. *Hardware Co. v. Schools*, 507.

2105. Liability of the husband for the negligent acts of his wife's clerk. *Brittingham v. Stadiem*, 299.

2111. The possibility of condonation and resumption of marriage is recognized by statute. *Joyner v. Joyner*, 181.

2153. An endorser of a negotiable instrument without recourse, is not affected by a fraudulent transaction between the original parties to a contract of which he had no notice. *Bank v. Hatcher*, 359.

2345. Prior to 8 March, 1899, one who wrote his name across the back of a negotiable instrument was presumed to have signed as comaker, or as surety at least. *Barden v. Hornthal*, 8.

2490. When summons is served by publication, and lands sold, it is discretionary with the trial court to appoint disinterested persons to represent interests of unknown persons. *Lawrence v. Hardy*, 123.

2490. Validity of sale of land by judgment when summons is served by publication. *Ibid.*

2516. Purchasers for value without notice of lands sold under judgment on service of summons by publication, is not affected by the failure of the court to retain funds sufficient to protect interests of unknown claimants. *Ibid.*

2624. Carriers are liable for baggage of passengers from whom they have received fare. *Kindley v. R. R.*, 207.

2627. Passengers who have not used ticket, but had trunk checked over connecting line, may have the ticket redeemed, and the carrier is not necessarily liable for larceny from trunk carried forward by mistake without the passenger. *Ibid.*

2694. Collateral attack on decisions of county board of canvassers. *S. v. Midgett*, 1.

2696. This action inapplicable to this case, concerning the cost of bridge over divisional stream where the dividing line is in "middle of stream." *Bridge Co. v. Comrs.*, 215.

REVISAL—*Continued.*

SECTION.

2809. A policy of fire insurance may not limit time of bringing action to less than one year. *Modlin v. Ins. Co.*, 35.

2863. The sheriff loses his lien for taxes by failure to levy on personal property before execution under judgment. *Alexander v. Farrow*, 320.

2916. This section does not affect the determination of this case upon the question of the life of a franchise of a water company receiving benefits thereunder. *Water Co. v. Trustees*, 171.

3113. An unsigned draft of a will cannot be construed as a will. *Kennedy v. Douglas*, 336.

3127 (3). Testator's declarations that certain memoranda dictated by him for a will, unread, is insufficient, as witnesses have no data to reduce the same into writing from memory within ten days. *Ibid.*

3147. An indictment or presentment is the beginning of the prosecution, and arrests the running of the statute of limitations. *S. v. Williams*, 660.

3254. Superfluous words in a bill of indictment should be disregarded. *S. v. Wynne*, 644.

3279. The defect in the failure of the judge to sign an order allowing appeal in criminal cases is jurisdictional, and the appeal will be dismissed. *S. v. Parish*, 659.

3338. In this trial for burning a barn the charge of the court was not error for failure to explain more fully the meaning of "willfully and wantonly." *S. v. Barrett*, 665.

3361. This section cannot be given extra-territorial effect in regard to jurisdiction as to try the act of bigamy here, committed in another State. *S. v. Ray*, 710.

3432. No judgment on the verdict can be rendered under this section because of failure to find intent. *S. v. McCloud*, 730.

3704. When defendant has been tried for disturbing divine worship (sec. 3706) he cannot be convicted under this section. *S. v. Starnes*, 724.

3706. Shooting pistols near a residence where families at irregular times hold services is not sufficient to sustain indictment for disturbing divine worship in the absence of knowledge at the time of defendant. *Ibid.*

4115. In the absence of fraud or misconduct on the part of County Board of Education, and when the provisions of this section are complied with, the courts will not inquire into their determination in fixing the lines of a special school-tax district. *Howell v. Howell*, 575.

4115. When there has been no mistake as to where the voting place for a special school tax was to be, and a majority of the qualified voters were for tax, and it appears that no one was prevented from voting, the election will not be disturbed because the voting place was not published, etc. *Yountz v. Comrs.*, 582.

4350. Collateral attack on decisions of county boards of canvassers. *S. v. Midgett*, 1.

4560. Directors and superintendent of hospital for insane are not liable in damages for a discharged patient's subsequently killing another, upon the charge of negligence. *Bollinger v. Rader*, 383.

REVISAL—*Continued.*

SECTION.

4596. Directors and superintendent of hospital for insane are not liable in damages for a discharged patient's subsequently killing another, upon the charge of negligence. *Ibid.*

4760. A policy of fire insurance may not limit time of bringing action to less than one year. *Modlin v. Ins. Co.*, 35.

4775. As to discrimination among insurants of the same class. *Smathers v. Ins. Co.*, 98.

4853. When averments are of separate and distinct offenses, a demurrer to one and reply to another is good. *Mottu v. Davis*, 237.

RIGHTS OF WAY. See Railroads; Carriers of Passengers.

RULING RESERVED. See Demurrer.

SALES. See Partnerships; Dower; Partition.

Judicial—Deferred Payments—Title—Defenses—Arbitration.—Purchasers of land at a judicial sale resisting payment of their notes given for deferred payments, upon the ground that the lands overlapped an adjoining owner, and that therefore the commissioner could not make title, having agreed to submit this question to arbitration, are bound by the award made in conformity with their agreement, in the absence of fraud, misconduct, corruption, partiality or bad faith on the part of the arbitrators. *Mangum v. Mangum*, 270.

SCOPE OF AUTHORITY. See Partnerships; Principal and Agent.

SENTENCE. See Judgments.

SERVICE. See Process.

SERVICE OF CASE. See Appeal and Error.

SEVERABLE ACTION. See Actions.

SEWERAGE.

Injunction—Damages Doubtful—Court's Noninterference.—In this case an injunction is sought against the action of the city in emptying its sewer into a stream by certain of the landowners along its course where the sewer empties. The court affirming the doctrine of the city's liability for damages as laid down in *Metz v. Asheville*, 150 N. C., 748, and other cases cited, will not interfere by injunction, it being doubtful, from the record, as to the character and extent of the damage. *Little v. Lenoir*, 415.

SIGNALS. See Railroads.

SITUS. See Jurisdiction.

SPECIAL APPEARANCE. See Jurisdiction.

SPECIAL DAMAGES. See Damages.

STATE'S LANDS. See Limitations.

Assignment of Entry — Fraud — Registration — Purchasers for Value — Notice.—An assignment, though procured by fraud of an entry upon the State's vacant and unappropriated land does not *per se* raise a

STATE'S LANDS—*Continued.*

presumption of fraud, and the recorded certificate thereof and of the entry cannot affect subsequent purchasers for value without notice or knowledge of the fraud. *Phillips v. Lumber Co.*, 519.

STATUTES. See Taxation.

1. *Interpretation — Railroads — Gratuitous Bailee—Negligence.*—Carriers are made liable under the statute (Revisal, sec. 2624) for baggage of passengers "from whom they have received fare," etc., and they are also required under the statute (Revisal, sec. 2627) to redeem the unused part of the ticket in the manner therein prescribed; and a connecting line which receives the trunk of a passenger checked through under a ticket bought from the initial carrier, with which it has no partnership agreement, and carries it to its destination, places it in its baggage room, not knowing that the passenger voluntarily did not take its train, and returns it upon request of the passenger, is merely a gratuitous bailee, having performed the service without consideration. *Kindley v. R. R.*, 209.
2. *Compromise.*—While under the statute, Revisal, secs. 2337 and 2338, the certification of a check by the bank on which it is drawn is equivalent to the acceptance, and the bank then becomes the debtor of the holder, against whom he may maintain his action, it does not affect the enforcement of an agreement between the original parties, made before certification of the check, that the debtor had agreed to waive or withdraw a condition annexed to the acceptance of his check that it was to be received by the payee, his creditor, in full compromise of his debt, in a larger amount. *Drewry v. Davis*, 295.
3. *Interpretation—Principal and Surety—Justification—Contribution.*—In an action wherein judgment had been rendered in a certain sum against an ex-sheriff and the sureties on his bond, and continued to determine the liability of the sureties among themselves, who had justified at the foot of the bond in different amounts: *Held*, the intendment of Revisal, sec. 310, was to provide a statement under oath to show the solvency of the sureties and afford information to the county commissioners under like sanction that the aggregate amount of the bond equaled the penalty required, and does not affect the doctrine of contribution as it relates to the rights of the sureties to contribution between themselves. *Comrs. v. Dorsett*, 307.
4. *Corporations—Officers—Laborers and Workmen—Statutory Liens—Interpretation.*—Officers and owners of a corporation are not entitled, under Revisal, sec. 1206, to priorities of payment for work and labor done by them over the other creditors, as such officers do not come under the meaning of the words "laborers" and "workmen" used in the statute, and were not so intended. *Alexander v. Farrow*, 320.
5. *Elections—Special School Tax—Duty of Registrar—Time for Registration—Interpretation.*—The requirements of Revisal, sec. 4323, "that it shall be the registrar's duty, between the hours of 9 a. m. and sunset on each day (Sunday excepted), for twenty days preceding the day for closing the registration books, to keep open said books for the registration of any electors residing within said township, etc., and entitled to registration," does not require the registrar to be at his home or place of registration every moment of the twenty days between the hours indicated, and a reasonable requirement is all that is necessary. And when it has been found as a fact by the lower

STATUTES—*Continued.*

court that every qualified voter has had a fair and ample opportunity to register, an election declaring for a special school tax will not be declared invalid by reason of the fact that the registrar left the district for a part of two days out of the twenty days required for registration. *Younts v. Comrs.*, 582.

6. *Elections—Special School Tax—Benefits—Place of Election—Publication—Majority Vote—Ample Opportunity—Interpretation.*—While the statute provides that places where elections are to be held should be fixed and published by the boards of commissioners authorized by statute to call them, an election declaring for a special school tax will not be held invalid for the failure to have done so, it appearing from the facts found by the lower court that a majority of the qualified voters of the district had voted in favor of the tax; that the election was held at the place in the district that all elections were held; that all the voters knew of the place and a fair and full opportunity had been given them to vote upon the question. Revisal, sec. 4115. In this case the fact that a remote section of the district struggling to maintain its schools at its own expense received a benefit from the tax is no ground of complaint. Those invested with the power to call special elections are admonished to adhere to and observe with strictness all statutory requirements. *Ibid.*

7. *Legislative Acts—Creating Inferior Courts—Prospective Effect.*—An act of the Legislature creating a court of inferior jurisdiction to the Superior Court operates prospectively unless a contrary intention appears in the act itself, and when the latter court has previously acquired jurisdiction of an offense included in the jurisdiction of the former by the finding of a bill before the passage of the act, its jurisdiction in that instance is not divested by the new law, and the motion to quash the bill in this case was therefore properly disallowed. *S. v. Pridgen*, 651.

STATUTORY LIENS. See Liens.

STATUTORY REQUIREMENTS. See Insurance.

STIPULATIONS, REASONABLE. See Carriers of Freight.

SUBCONTRACTOR. See Liens.

SUIT AGAINST STATE. See States.

SUMMONS. See Process.

SUNDAY. See Appeal and Error.

SUPREME COURT. See Courts; New Trials.

SURFACE WATERS. See Water and Watercourses.

SURPLUSAGE. See Indictment.

TAXATION.

1. *Notice—Hearing—Procedure.*—The plaintiff having been afforded an opportunity to be heard before the assessment of its property for taxation should become fixed, as directed in a former appeal (*S. c.*, 146 N. C., 199), the question of proper notice is not material on this appeal. *Land Co. v. Smith*, 70.

TAXATION—*Continued.*

2. *Domestic Industrial Corporations—Corporation Commission—Notes—Solvent Credits.*—When a domestic industrial corporation has paid its taxes on its capital stock for the year 1902-03, assessed in accordance with the report of the treasurer and auditor of the State transmitted to the board of commissioners of the county, pursuant to law as it then existed, the said commissioners cannot lawfully assess for taxation a note held by the corporation upon the ground that it was a solvent credit, as such was included and considered by the treasurer and auditor in the values determining the full value of the capital stock; and subject to a stated right of exception and appeal to the courts, their estimate forms the only basis of assessment for taxation, and any other or further imposition of taxes on this portion of their assets is forbidden. The Revisal substantially confers the former powers and duties of the State Auditor and Treasurer on the Corporation Commission. (The Revisal upon this subject and Revenue Act of 1909 discussed and interpreted by HOKE, J.) *Ibid.*

3. *Legislative Powers—Acts Directory—Positive Requirements.*—Subject to well recognized constitutional restrictions the Legislature has plenary power in matters of public taxation to designate the property, fix the rate and establish the methods of collection; and while many of the regulations affecting these methods are regarded as directory, this does not permit or sanction a procedure in direct contravention of a positive and essential legislative requirement respecting them. *Ibid.*

4. *Legislative Powers—Domestic Industrial Corporations—Solvent Credits—Corporation Commission—Class Legislation—Constitutional Law.*—The provisions of the Revisal and Revenue Act of 1909, for the assessment of the capital stock of domestic industrial corporations by the Corporation Commission, formerly incumbent on the State Auditor and Treasurer, are not in violation of the Constitution, as the commission is directed to include in its estimate of the value placed upon the capital stock every asset, solvent credit or investment, embracing the surplus, undivided profits, etc., and such method is not therefore prohibited as class legislation. *Ibid.*

5. *Deeds and Conveyances — Assignment—Liens—Priorities—Levy.*—The sheriff and tax collector of a county are not entitled to priority of payment of taxes by the trustee of a corporation under a deed of assignment over creditors who reduced their claims to judgment and had execution issued before the assignment was executed and recorded, the property being personal and they having failed to levy for the taxes due them respectively. Revisal, sec. 2863. *Alexander v. Farrow*, 320.

6. *Special Tax — Recanvass—Elections—Fraud—Evidence, Immaterial.*—Upon an issue as to whether the majority of the qualified voters in a certain school district voted in favor of a special school tax, the registrar and judges of election declared one result, and subsequently the registrar and one of the judges of election again canvassed the votes and certified to the county commissioners another result: *Held*, that evidence to show alleged misconduct in the recanvass is incompetent. *Bowman v. Poovy*, 386.

7. *Special School Tax—Elections—Nonresidents—Questions for Jury.*—In an action to determine the true result of an election held for the

TAXATION—*Continued.*

purpose of voting a special school tax it appeared that the result was really to be determined by whether a certain voter living nearest to the dividing line of the district was a qualified voter or not; and the verdict of the jury upon legal evidence and under a proper charge having found the location of the lines in question in favor of defendant's contention, and thereby established the fact that the voter was a nonresident, it is conclusive of the question. *Ibid.*

8. *Special School Districts—Objection, When and How Made—Procedure.* The objection to a special school tax district as determined upon by the county board of education, should be made at a meeting of the board, the times of which are fixed by statute, when the petition is presented to it for endorsement; and the equitable jurisdiction of the court will afford no relief by injunction or otherwise after the provisions of Revisal, sec. 4115, have been fully complied with and the will of the qualified voters has been lawfully expressed favorably to its establishment in the absence of fraud or misconduct on the part of the county board of education or any one officially connected with the election. *Howell v. Howell*, 575.

9. *Special School Districts—Board of Education—Discretionary Powers—Equity.*—Should section 4129 be conceded as applying to all districts, whether ordinary or special, and the Court is of opinion that the requirements to establish a special school district by the county board of education are fully contained in Revisal, sec. 4115, it is left to the discretion of that board whether the district is as compact in form as practicable and the convenience and necessities of the patrons were consulted in forming it, with which discretion the courts cannot interfere. The responsibilities and duty of the boards of education commented on, especially in this case, where no map of the proposed district was presented to it. *Ibid.*

10. *Special School Districts—Elections—Approval of Voters.*—When the provisions of section 4115 have been fully complied with in establishing a special school tax district, the votes cast are for the district as laid out as well as for the tax, and when the matter is carried it declares the will of the qualified voters, and the courts will not interfere. *Ibid.*

11. *Elections—Special School Tax—Duty of Registrar—Time for Registration—Interpretation of Statutes.*—The requirements of Revisal, sec. 4323, "that it shall be the registrar's duty, between the hours of 9 a. m. and sunset on each day (Sunday excepted), for twenty days preceding the day for closing the registration books, to keep open said books for the registration of any electors residing within said township, etc., and entitled to registration," does not require the registrar to be at his home or place of registration every moment of the twenty days between the hours indicated, and a reasonable requirement is all that is necessary. And when it has been found as a fact by the lower court that every qualified voter has had a fair and ample opportunity to register, an election declaring for a special school tax will not be declared invalid by reason of the fact that the registrar left the district for a part of two days out of the twenty days required for registration. *Younts v. Comrs.*, 582.

12. *Elections—Special School Tax—Benefits—Place of Election—Publication—Majority Vote—Ample Opportunity—Interpretation of Statutes.*

TAXATION—*Continued.*

While the statute provides that places where elections are to be held should be fixed and published by the board of commissioners authorized by statute to call them, an election declaring for a special school tax will not be held invalid for the failure to have done so, it appearing from the facts found by the lower court that a majority of the qualified voters of the district had voted in favor of the tax, that the election was held at the place in the district that all elections were held, that all the voters knew of the place, and a fair and full opportunity had been given them to vote upon the question. Revisal, sec. 4115. In this case the fact that a remote section of the district struggling to maintain its schools at its own expense received a benefit from the tax is no ground of complaint. Those invested with the power to call special elections are admonished to adhere to and observe with strictness all statutory requirements. *Ibid.*

TELEGRAPHS.

1. *Message—Cipher—Notice of Importance—Damages.*—A telegram reading "Sold Tootle Mottar ninety cases twenty-eight inch six and three-quarters," is not a cipher message, and the use of the initial capital letters to the word Tootle Mottar indicates the name of a firm to whom goods are sold, and the rest of the message the quantity, kind and price thereof; and from the nature of the business a telegraph company receiving the message for transmission has implied knowledge of the importance of accuracy in transmission and promptness in delivery. *Williamson v. Telegraph Co.*, 223.
2. *Same—Measure of Damages—Proximate Cause.*—A telegram indicating upon its face that a commodity had been sold gives notice to defendant telegraph company that damages would probably result from an error in transmitting it; and when a message addressed to a manufacturer of cloth, a user of defendant's telegraph service, by his commission man, was negligently transmitted so as to show a difference of eighty-one cases in the quantity of goods sold to a certain firm, which caused the manufacturer not to buy the cotton for the eighty-one cases until several days later when the price of cotton was higher, he may recover of defendant his loss in having to protect himself by purchasing cotton for the eighty-one cases later at the advanced price, as such damages will be reasonably presumed to have been in the contemplation of the parties at the time the message was received by defendant for transmission, and the direct and proximate cause of its negligence. *Ibid.*
3. *Additional Notice.*—And when, after the manufacturer informed the defendant's agent that the message was important and involved a financial loss or profit and requested an investigation, the agent tells him later in the same day that the message as delivered correctly stated the number of cases sold, relying upon which he does not protect himself, the company has received additional notice of the importance of the message, and also through its second error caused the injury. *Ibid.*
4. *Telegraph Companies—Messages—Contracts—Conflict of Laws—Public Policy—Comity.*—A stipulation printed on a message form which limits the liability of a telegraph company for negligence in transmitting an unrepeated message is void in North Carolina, it being contrary to public policy; and if it is upheld by the laws of another State wherein the message had been received by the company and the

TELEGRAPHS—*Continued.*

contract for transmission had been made, the laws of such other State will not be recognized here through comity. *Ibid.*

5. *Office Hours—Notification of Employees.*—A telegraph company may observe reasonable office hours for the transaction of its business in the transmission and delivery of telegrams, and it is under no obligation to keep its employees in each of its offices informed of the time when every other office is closed for the night. *Cates v. Telegraph Co.*, 497.

6. *Office Hours—Message Subject to Delay.*—A message received at 8:25 p. m. by an agent of the defendant telegraph company "subject to delay," the agent informing the sender of the message at the time that it could be delivered during the night provided that the defendant had a joint office with the railroad at the place of destination, but not if the office was a separate one, imposes no duty upon the defendant to deliver the message that night if the office at the destination was in fact not a joint office. *Ibid.*

7. *Same—Instructions.*—When there is evidence tending to show that the defendant telegraph company received a death message for transmission at 8:25 p. m., and that at the time its agent informed the sender that the message would only be delivered if the defendant had a joint office with the railroad at the place of destination, and not if it had a separate office there; that in fact the office was a separate one, at which the hours were from 8 a. m. to 8 p. m., and that the injury complained of arose from the plaintiff's not being able to catch a train leaving at 8 a. m., owing to the delivery of the message to the plaintiff at 9:40 a. m. at his place of business after the messenger had carried it to his residence, a mile and a quarter from defendant's office, the defendant is entitled to an instruction that it was under no obligation to deliver the message except between the hours of 8 a. m. and 8 p. m., and if the jury find the office hours at the place of destination to be from 8 a. m. to 8 p. m., and it delivered the message a reasonable time after 8 a. m. of the following day, to answer the issue as to negligence for the defendant. *Ibid.*

8. *Office Hours—Destination—Receiving Message for Tranmission—Agreement Implied—Negligence.*—In order to hold a telegraph company liable for damages for not delivering a message at its place of destination when the office there had been closed for the night in the observance of reasonable office hours, it must be shown that defendant's agent who received the message for transmission and delivery, by an agreement with the sender, expressed or implied, undertook that the message would be delivered that night, and the mere fact that the message was received after the office at the destination had been thus closed for the night is not evidence of negligence *per se* on the defendant's part. *Ibid.*

9. *Negligence—Death Message, Failure to Deliver—Measure of Damages—Evidence—Conduct and Conversation.*—Upon the *quantum* of damages recoverable for the negligent failure of defendant telegraph company to deliver to plaintiff a message announcing the death of his mother, requesting him to come, and giving date of the funeral, after showing that plaintiff had given his mother money to visit him at his residence in a different town and for other purposes, that plaintiff visited her, and the affectionate and kindly feelings existing between them, it is

TELEGRAPHS—*Continued.*

competent for plaintiff to testify to a conversation between them had at her home the last time he had seen her alive, about a week before her death, to the effect that he had promised at her solicitation and request that if possible he would visit her should she become worse and have him notified. *Luckey v. Telegraph Co.*, 551.

10. *Messages Announcing Sickness—"Morning Train"—Negligence—Evidence—Quickest Way—"Walked."*—When it is admitted that the first train a father could have taken to reach the bedside of his sick child would have been too late for him to have seen his child alive, had the message sued on, reading, "Your baby very sick; come on morning train," been promptly transmitted and delivered, yet it is competent for him to show that had the message been promptly delivered, and not negligently delayed in the delivery from 9 p. m. to the next day at 11 a. m., he could and would have walked the distance of thirty-five miles and have seen his child alive, thus avoiding the injury from which the damages demanded in his action arose. *Battle v. Telegraph Co.*, 629.

11. *Same—Notice to Company.*—In an action for damages arising from the negligence of defendant telegraph company in the delivery of a message to a father reading, "Your baby very sick; come on morning train," the importance of the message is shown by that part of the message relating to the sickness, and the latter part, "come on morning train," gives indication of the intent for him to come quickly; the company is put upon notice that the father may use the quickest way to get to the bedside of the child, and evidence that he could and would have accomplished this result in time by walking, as in this case, is competent, though it be admitted that it would have been too late if he had taken the train indicated in the message. *Ibid.*

12. *Negligence—Delivery—Evidence of Affection—Measure of Damages.*—In an action for damages alleged to have been caused a father by the negligent delay in the delivery of a message announcing the sickness of his child, with a request to come at once, by which he was prevented from seeing his child alive, evidence was competent, upon the measure of damages, that the child was a boy seventeen months old, could walk and talk, and could have recognized plaintiff, as he called him "papa." *Ibid.*

13. *Nondelivery — Address — Negligence—Evidence—Questions for Jury.*—Evidence is sufficient of the negligence of a telegraph company in failing to deliver a message addressed to "No. 419 South Street," in a city, to take the case to the jury, which tends to show that there were two houses with this number about a block apart, one of them occupied by the sendee, who had been living and receiving mail there for two years preceding the time in question; that the messenger boy unsuccessfully attempted a delivery at the wrong number; a service for better address was sent; a postal card notice was mailed and received by the occupant of the wrong number (419); that information given on inquiry at the postoffice coincided with the address on the message; that in response to the service message the sender reiterated the address given on the message and that this was not communicated to the office of the destination, and no further service message was sent by him. *Shaw v. Telegraph Co.*, 638.

TENANT. See Adverse Possession.

TENDER. See Vendor and Vendee; Deeds and Conveyances; Witnesses.

TICKET STIPULATIONS. See Carriers of Passengers.

TIME COMPUTED. See Appeal and Error.

TITLE. See Carriers of Freight; Deeds and Conveyances; Partition; Bankruptcy; Ejectment; Trespass; Estates; Equity; Insurance; Sales; Issues.

TORTS. See Husband and Wife; Parent and Child.

1. *Deeds and Conveyances — Breach of Contract — Action—Pleadings—Proof.*—An action cannot in general be maintained for inducing a third person to break his contract with the plaintiff, the consequence being only a broken contract, for which the party to the contract may have his remedy by suing upon it. To this rule there are two generally recognized exceptions discussed by BROWN, J. *Swain v. Johnson*, 93.
2. *Independent Contractors—Joint—Partition—Master and Servant.*—A railroad company cannot be held liable as a joint tort feasor with its independent contractor for an injury to an employee of the latter when there is no evidence or suggestion that the former assumed an active part by encouragement, direction or control of the work wherein the injury complained of was received. *Smith v. R. R.*, 479.
3. *Same—Release of Liability—Effect.*—The plaintiff received the injury complained of while engaged in the employment of an independent contractor of a railroad company in building the latter's roadbed, and brought suit against the railroad and the contractor, alleging that they were joint tort feasors. He introduced the contract between the defendants wherein it appeared that the contractor had agreed to indemnify the railroad from liability of the character demanded by plaintiff: *Held*, a release in full given by the plaintiff to the independent contractor in consideration of a compromise likewise released the liability of the railroad, in the absence of evidence tending to show that the latter actively participated in the alleged wrong. The principles of law applicable to the master's liability for the wrongful acts of the servants discussed by MANNING, J. *Ibid.*

TRAMWAYS. See Railroads.

TRESPASS. See Evidence.

1. *Carriers of Goods—Rights of Way—Invitation Implied.*—A railroad company by customarily allowing passengers to get off and on a train stopping at a coal chute, collecting their fares therefrom, etc., impliedly invites them to do so, and one acting accordingly is not a trespasser on the lands of the defendant there. *Credle v. R. R.*, 50.
2. *Boundaries—Reputation—Declarations—Definiteness.*—In an action of trespass on land it was admitted that the answer to an issue as to the beginning corner of a grant at a blackgum tree would control in the locating the land in dispute. Evidence was offered by a witness of the declarations of one L. which did not speak of the beginning corner in express words as a "gum," but that it was "right at the intersection of" certain definite trails and a ridge, and the marked gum was subsequently found where he had stated. The witness had the calls of the tract of land read to declarant, and in the calls was "the

TRESPASS—*Continued.*

character of the tree": *Held,* evidence of declarations sufficiently definite to designate the tree as the beginning corner of the grant. *Lumber Co. v. Triplett,* 409.

TRIAL JUDGE. See Courts.

TRUSTEE EX MALEFICIO. See Trusts and Trustees.

TRUSTEES. See Bankruptcy.

TRUSTS AND TRUSTEES.

1. *Active Trusts—Negligence—Liability.*—A trustee acting in the cutting of timber and the operation of a railroad for marketing it, under the power conferred in a deed of trust, with the sanction and for the benefit of the *cestui que trust,* and to a large extent under their control, renders the trust estate liable for his negligent acts committed within the scope of his powers and in the furtherance of their interests. *Wright v. R. R.,* 529.
2. *Same—Railroads—Personal Injury.*—When, under an instrument of agreement made and executed between an insolvent corporation and its creditors, a trustee is appointed to cut and sell a large tract of timber at a price to be submitted to and approved by the creditors, and acting largely under their control, and for the purpose of hauling or marketing the timber has sublet a railroad from one of the largest creditors, he is liable as such trustee, certainly to the extent of the trust estate conveyed, for the negligent killing of plaintiff's intestate while employed in the operation of the railroad. *Ibid.*

ULTRA VIRES. See Cities and Towns.

UNREASONABLE DELAY. See Carriers of Freight.

USER, PERMISSIVE. See Deeds and Conveyances.

VARIANCE. See Indictment.

VENDOR AND VENDEE.

1. *Option of Purchase—Acceptance—Purchase Price—Deed—Tender.*—It was the duty of the vendor, in an option given for the purchase of land, to prepare and tender a deed upon being notified by the vendee, within the time specified, that he elected to take the land in accordance with the terms of the option and was ready to pay the sum agreed; and a tender of payment by the vendee was not required until the deed was so tendered, if, in fact, he was ready to make the payment; nor was it incumbent on him to do a vain thing by offering the money after the vendor had refused to make the deed. *Phelps v. Davenport,* 22.
2. *Negligence—Liability.*—This being an action for negligent injury brought by the vendee, or one of them, against the vendor, the principles of law applicable as to the responsibility of a vendor to third persons for the negligent default in the sale of goods does not in strictness apply. *Dail v. Taylor,* 284.
3. *Same—Goods Sold—Defects—Questions for Jury.*—In the absence of evidence tending to show a breach of warranty, in an action by the vendee to recover of the vendor damages for the alleged negligent

VENDOR AND VENDEE—*Continued.*

default in the sale of goods, in this case for an injury caused by the explosion of a bottle charged with gas in bottling "Coca-Cola," the question presented is whether there is sufficient evidence of actionable negligence to carry the case to the jury—*i. e.*, a breach of some legal duty on the part of defendant incident to the contract relationship between them, and not contained within the terms and stipulations of the agreement. *Ibid.*

4. *Same—Latent Defects—Knowledge.*—When a vendor sells goods having a latent defect of a kind likely to cause some physical injury to the vendee, of which the vendor was aware or which he could have ascertained by proper care and attention, he is liable in damages to the vendee for an injury received as the proximate cause of this breach of duty. *Ibid.*

5. *Goods Sold—Latent Defects—Negligence—Questions for Jury.*—A vendee who seeks to recover damages of the vendor for an injury he has received from a latent defect in the goods sold which was likely to cause the injury complained of, is not required to establish his case by direct or positive proof, but the issue must be submitted to the jury whenever facts are shown forth in evidence from which a fair and reasonable inference of negligence may be drawn. *Ibid.*

VENUE.

1. *Legislative Regulation.*—The venue for civil actions is a matter for legislative regulation and is not governed by the rules of the common law. *Cooperage Co. v. Lumber Co.*, 455.

2. *Injury to Realty—Contiguous Tracts—Separate Counties.*—There is a distinction drawn by the Revisal, sec. 419, as to the venue of an action "for injury to real property" and that of an ejectment brought to recover possession of land; and when it appears that, in an action of trespass for damages claimed by reason of defendant's cutting timber on certain contiguous tracts of land claimed by plaintiff and situated in two counties, the trespass complained of was entirely situate in an adjoining county to the one in which the action was brought, and the defendant having disclaimed title to all land in the county where action commenced, upon motion made in apt time the cause should be removed to the adjoining county in which the alleged injury was caused. *Ibid.*

VERDICT.

1. *Motions—Set Aside—Additional Evidence—Court's Discretion.*—When the trial judge has heard the evidence adduced upon a motion to set aside a verdict because of the improper conduct of a party in talking to a juror in his cause, it is within his discretion to refuse additional evidence, and his decision is not reviewable. *Baker v. Brown*, 12.

2. *Instruction Entire—Directing—Evidence Conflicting.*—A requested instruction directing the jury to answer each of several issues in a certain manner, if they believed the evidence, is not correct when there is conflicting evidence as to one or more of them. The instruction being asked in its entirety every substantial and integral part must be correct in law. *Savings Bank v. Chase*, 108.

3. *Non Obstante—Discretionary Power—Appeal and Error—Judgment.*—When the trial judge has erroneously held that the defendant is entitled to judgment *non obstante veredicto*, he has exercised no

VERDICT—*Continued.*

discretionary power, and judgment upon the verdict in plaintiff's favor will be rendered in the Supreme Court. *Shives v. Cotton Mills*, 290.

4. *Cities and Towns—Condemnation Proceedings—Easements—Streets—Abutting Owners — Issues — Damages — Evidence—Title.*—When the only question presented in the action is the measure of damages to abutting owners for the widening of a street by a city for public use under proceedings in condemnation in accordance with its charter provisions, it is error to admit evidence for the purpose of affecting adversely defendants' title as abutting owners, and for the court to so regard it as shown in his charge to the jury, though it was otherwise competent on the question of the measure of damages; and this is not cured by the verdict awarding defendants damages only for the moving of houses from the easement, it appearing that in thus finding they must necessarily have considered the question of title. *New Bern v. Wadsworth*, 309.

5. *Indictment, Bill of—Offense Charged—Special.*—The grand jury cannot find a special verdict by adding evidential matters in a bill of indictment which otherwise sufficiently charges the offense. *S. v. Wynne*, 644.

6. *Set Aside—Discretion—Appeal and Error.*—The refusal of the trial judge to set aside a verdict as being against the weight of the evidence is discretionary with him and not reviewable on appeal. *S. v. Hancock*, 699.

VOTERS. See Taxation.

WAIVER. See Insurance; Evidence; Procedure; Jurisdiction.

WAREHOUSEMEN. See Carriers of Passengers.

WARRANT. See Process.

WARRANTY. See Partnerships.

WATER AND WATERCOURSES. See Limitations.

Surface Waters—Diverting Natural Flow—Damages.—One is liable for damages caused to the lands of another by his diverting the natural flow of surface water thereto. *Roberts v. Baldwin*, 407.

WATER RATES.

Minimum Charge — Charge for Each House — Tenement Houses — One Supply-Pipe.—Under a minimum charge of sixty cents a month for water for each house furnished therewith by the city of Goldsboro, the owner of three tenement houses on the same property is chargeable with the minimum amount for each house at least; and the abrogation of an ordinance requiring a separate water pipe and meter to each house in this and similar instances, so as to permit of only one pipe and one meter for the supply of water to the three houses, is for the convenience and advantage of the owner, and does not affect the clear import of the regulations as to the minimum amount chargeable for each house. *Thompson v. Goldsboro*, 189.

WIDOWS. See Homestead.

WIFE'S SEPARATE PROPERTY. See Marriage and Divorce.

WILLFULLY AND WANTONLY. See Instructions.

WILLS.

1. *Probate Court—Deeds—Fraud—Jurisdiction—Equity—Relief.*—A court of equity has jurisdiction of an action brought by the next of kin and heirs at law to set aside a will for undue influence, when it appears that to afford the relief demanded it is necessary to cancel previous deeds for alleged fraud appearing to convey the same property to the executor and devisee under the will; and the Superior Court, in which the suit was brought, may proceed to hear and determine the case and administer all the rights and equities between the parties, as no adequate or complete remedy at law is given in proceedings before the clerk or probate court. *Sumner v. Staton*, 198.

2. *Same—Trustee Ex Maleficio.*—And if it should be established that the executor acquired the property by the deeds and under the will by fraud, the Court, in administering the equities and doing substantial justice between the parties, will decree the executor a trustee *ex maleficio* for plaintiff's benefit and prohibit him and those claiming under him from setting up title; may require the executor to give bond *pendente lite*, and make such further interlocutory orders as may be expedient and right to preserve the rights of the parties. *Ibid.*

3. *Same—Remedy at Law.*—When it appears that a suit has been properly brought against one of the defendants in the Superior Court to set aside a will, for the reason of certain equities arising in setting aside a deed upon the ground of fraud, and necessary to be administered in order to give adequate and complete relief, it should be dismissed as to another defendant when relief can be had as to her in proceedings to caveat the will before the clerk (probate court) and concerning whose rights it is not necessary for the courts of equity to interfere. *Ibid.*

4. *Requisites.*—A paper-writing drafted by the attorney from stenographer's notes taken from dictation of deceased as to the disposition of her property after death, unsigned and unwitnessed, is not admissible as a last will and testament. Revisal, sec. 3113. *Kennedy v. Douglas*, 336.

5. *Nuncupative—Witnesses—Requisites.*—It is necessary to the validity of a nuncupative will that the testator state her wishes in the presence of two witnesses and "specially require them to bear witness thereto." *Ibid.*

6. *Same—Two Present—One Witness.*—The declaration of a testator made in the presence of two witnesses that a paper-writing contained the disposition he desired made of his property and that he desired its provisions carried out, without reading or having the paper read at the time, but relying upon the assertion of a person then present that it contained his wishes as dictated by him several months before, is invalid as a nuncupative will: (1) the dictation was made to one witness alone; (2) there was no sufficient declaration then and there of the testator's wishes in the presence of two witnesses from which they could reduce their recollection to writing within ten days. Revisal, sec. 3127 (3). *Ibid.*

WILLS—*Continued.*

7. *Nuncupative — Writing — Intent — "Last Sickness."* — A paper-writing which the deceased had theretofore dictated, but postponed executing from time to time, and which he finally declared to be his will without reading it, at a time he was in his last sickness not expecting to recover and physically unable to execute it, is invalid as a nuncupative will: (1) his intent that it should be a written will is evidenced by his conduct; (2) the dictation was not in law "during his last sickness." *Ibid.*

8. *Nuncupative—Validity—Interpretation of Laws.*—The position cannot be maintained that nuncupative wills are not now legal in North Carolina because of the exception in regard to them in Revisal, sec. 3113. The whole Revisal should be construed together, and sec. 3127 (3) expressly provides for their probate. *Ibid.*

9. *Estates for Life—Remainder—Living Issue—Limitations Over—Title—Contract to Convey—Specific Performance.*—An estate was devised to S. for life, and after her death and the death of the devisor, to M., and should M. die without issue, to F., said M. being now alive with no living issue, but the mother of a child long since dead. The plaintiff having acquired and holding the estate and interest of M., and having bargained the same to defendant at a certain contract price, brings his action to enforce the payment thereof, defendant resisting upon the ground that the plaintiff's title was not a good one: *Held*, on the death of M. without issue then living, the estate would pass under the will to F., or his heirs and assigns, and the title thus being imperfect, under plaintiff's allegations set forth in the complaint, it was no error to sustain defendant's demurrer thereto. *Dawson v. Ennett*, 543.

10. *Devisees—Contract for Division—Independent Property—Consideration—Chattels—Reservation of Life Estate—Covenants—Interpretation of Contracts—Intention.*—In dividing the estate of the testator between his widow and two sons, A. and S., the widow having the life estate and the sons the remainder in certain portions, the widow and sons entered into and effectuated a written agreement among themselves, agreeing, among other things, that S. was to convey to A. certain property, and that the widow would hold until her death the proceeds of a certain note, which was her own property, and after her death the balance of the proceeds of the notes to go to S., or his heirs: *Held*, (1) the contract to be a personal one between the parties; (2) that it should be construed to effectuate the intention of the parties; (3) the agreement will be construed as a distinct covenant that the widow shall have the use of the proceeds of the note during her life, and not as a conveyance of chattels, reserving a life estate to the grantor, and that the division of the estate under the contract was a sufficient consideration. *Kirkman v. Hodgin*, 588.

WITNESSES. See Wills.

1. *False Testimony—Damages.*—A witness is not liable for damages for alleged willful and false testimony given by him in a former case, upon the ground that by reason thereof the plaintiff had lost his suit in the former action. Such action would not lie at common law, and there is no statute authorizing it. *Godette v. Gaskill*, 52.

WITNESSES—*Continued.*

2. *Fees—Costs.*—Witness fees may not be taxed in the cost against an unsuccessful litigant, though the witnesses were subpœnaed, when they were not examined or tendered, or, if the witnesses did not attend the trial, having a legally sufficient excuse, it is not shown that their evidence was material. Nor can fees be taxed when it only appears that the failure of the witness to attend was inexcusable. *Hobbs v. R. R.*, 134.

3. *Appeal and Error—Expert—Qualification—Record—Evidence Required.* When evidence is offered and ruled out by the trial judge the burden is upon the appellant to show on appeal that prejudicial error was committed. And an exception to the exclusion of expert evidence is not tenable on appeal when it does not appear of record that his Honor failed, when requested by appellant, to find the preliminary question of the qualification of the witness as an expert, or that the evidence excluded was competent. *Lumber Co. v. R. R.*, 217.

4. *"Opinion Evidence"—Qualifications—Competency.*—For "opinion evidence," as distinguished from expert evidence to be competent, there must be evidence tending to prove that the witness by whom it is offered has had personal observation and knowledge of the facts and conditions of the subject upon which it is offered as well as that, from his practical training and experience, he can aid the jury in reaching a correct conclusion. *Ibid.*

5. *Same.*—In this case defendant offered the "opinion" of its experienced engineer as to whether the burning of plaintiff's lumber near defendant railroad company's right of way was caused by a spark alleged to have come from a defective smokestack on defendant's engine, or from plaintiff's own mill. It did not appear that the witness had personal observation of all the pertinent and material facts and circumstances, and it is *held* that his opinion relative to the cause of the fire was incompetent. *Ibid.*

6. *Appeal and Error—Murder—Tender of Wife—Instructions—Harmless Error.*—While it is improper for the solicitor to tender the wife of defendant on trial for his life, stating that he would not tender her if defendant did not wish to examine her, the error is cured by a clear instruction that this should not prejudice defendant or in any manner influence the jury in their verdict against him. *S. v. Spivey*, 676.

7. *Criminal Actions—Husband and Wife—Wife's Declarations—Evidence.* While the wife is not a competent witness against the husband in the trial of a criminal action, her declarations made in his presence under circumstances naturally calling for his reply if untrue, concerning which he remained silent, are competent when tending to show his guilt of the offense charged. *Ibid.*

8. *Tender — Cross-examination—Evidence—Impeaching—Corroborative.*—Upon the tender of a witness by the defendant to the State, without examination by him, it is error to admit in evidence, upon cross-examination, a letter prejudicial to defendant, which this witness testified he had written, either to impeach the witness, for he has not testified, or to corroborate the prosecuting witness who, it appears, has not testified concerning the matters therein stated. *S. v. Cox*, 698.

WITNESSES—*Continued.*

9. *Power of Court—Contempt—Summary—Punishment—Presence of Jury —Intimation of Opinion.*—While the trial judge may summarily punish for contempt committed in the presence of the court, it is error to order the defendant's witness in the case into custody for perjury while on the witness stand. This is an invasion of the rights of the party who had offered the witnesses and an intimation of opinion prohibited by statute. *S. v. Swink*, 727.

WORKING ROADS. See Indictment.